



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY BEFORE THE ADMINISTRATOR

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In the Matter of:)
Advanced Recovery, Inc.,)
Respondent)

Docket No. RCRA-02-2013-7106

ORDER ON MOTION TO SUPPLEMENT PREHEARING EXCHANGE AND ORDER ON MOTION TO COMPEL PRODUCTION

On August 15, 2014, Complainant filed a Motion to Supplement Complainant’s Prehearing Exchange (“Motion to Supplement” and “Supp. Mot.”), and a Motion to Compel Production / To Conditionally Preclude (“Motion to Compel” and “Compel Mot.”). In both, Complainant states that Respondent’s counsel does not object to the motions. Supp. Mot. 10; Compel Mot. 2. On August 18, 2014, staff for this Tribunal confirmed with Respondent’s counsel that Respondent does not object to either motion.

I. Motion to Supplement Complainant’s Prehearing Exchange

In its Motion to Supplement, Complainant seeks to supplement its prehearing exchange with four additional documents. Complainant argues that there is good cause to add these documents, the addition will not surprise, disadvantage or unfairly prejudice Respondent, nor will it delay the proceeding, and the Motion to Supplement is timely. Supp. Mot. 10-11.

Complainant’s proposed Exhibit 11 is the curriculum vitae for Complainant’s proposed expert witness in financial analysis, Anne Czerwonka of Industrial Economics, who “will address financial matters relevant to this proceeding . . . such as Respondent ARI’s ability to pay the penalty being sought by Complainant.” Id. 5.

Complainant’s proposed Exhibit 12 is a consent letter from Respondent’s counsel “giving EPA permission to share with [Industrial Economics] any financial information Respondent submitted to Complainant in order that the financial analysis could be performed.” Id. 6.

Complainant’s proposed Exhibit 12a would be Industrial Economics’ financial analysis of Advanced Recovery, Inc., “should there be any such report” completed. Id. 7. As it has not been created yet, Complainant did not attach a copy of the report to the Motion to Supplement.

Complainant’s proposed Exhibit 13 is a printout from EPA’s RCRA Database that

“indicates Respondent did not have a permit to store hazardous wastes at its facility.” *Id.* Complainant states that one of its witnesses will be able to testify to the veracity of this proposed exhibit, and that it is a public document. *Id.* 7-8.

Complainant seeks an order granting her leave to supplement EPA’s prehearing exchange with these four documents, declaring them “incorporated by reference into EPA’s prehearing exchange with full force and effect,” deeming each one an exhibit to Complainant’s prehearing exchange, and granting other relief deemed lawful and proper. *Id.* 11-12.

The procedural rules governing this proceeding, set forth at 40 C.F.R. Part 22 (“Rules”), require the parties to file and exchange certain information before the hearing, including the names of witnesses, a brief narrative summary of their testimony, or a statement that no witnesses will be called, and copies of all documents that party intends to introduce into evidence at the hearing. 40 C.F.R. § 22.19(a). The Rules also provide that parties “shall promptly supplement or correct the [prehearing] 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.” 40 C.F.R. § 22.19(f). The Prehearing Order (“PHO”) issued in this matter on March 10, 2014, requires the same, and in addition, requires 1) that a party file and serve a curriculum vitae (CV) or resume for any proposed expert witness, and 2) that if a party intends to add a proposed witness or exhibit to its prehearing exchange, it must file and serve an accompanying motion to supplement the prehearing exchange.

Therefore, Complainant’s filing of a Motion to Supplement is appropriate. However, as to Complainant’s proposed Exhibit 12a, relief cannot be granted. A copy of this “anticipated” document has not been filed with the Motion to Supplement or served on Respondent. Supp. Mot. 2. The Rules and Prehearing Order require that actual “copies” of proposed exhibits be filed and served as part of a prehearing exchange. 40 C.F.R. § 22.19(a)(2)(ii); PHO 2. Permitting less would contravene one of the purposes of the exchange, which is to ensure that each party fairly discloses to the other all evidence that may later be presented at the hearing.

As to Complainant’s proposed Exhibits 11, 12 and 13, because Respondent has no objection to the Motion to Supplement, and Complainant’s request is set forth in accordance with the Rules and the Prehearing Order, the Motion to Supplement may be **GRANTED IN PART**.

II. Motion to Compel Production / To Conditionally Preclude

In the Motion to Compel, Complainant seeks an order 1) compelling Respondent either to produce by September 2, 2014, documentation and information related to Respondent’s proposed expert witness, or, in the alternative, to inform Complainant and the Tribunal that Respondent will not seek to introduce expert testimony or the related evidence, and 2) notifying Respondent that failure to provide such documentation and information might result in an order precluding Respondent from introducing such testimony or related evidence at the hearing. Compel Mot. 1.

The specific information and documentation that Complainant seeks from Respondent is listed in the Motion to Compel at pages 2-3.

As stated above, the Rules require the parties to file and exchange certain information before the hearing, including the names of witnesses, a brief narrative summary of their testimony, or a statement that no witnesses will be called, and copies of all documents that party intends to introduce into evidence at the hearing. 40 C.F.R. § 22.19(a). The Rules also provide that parties “shall promptly supplement or correct the [prehearing] 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.” 40 C.F.R. § 22.19(f). The PHO also requires that a party file and serve a curriculum vitae (CV) or resume for any proposed expert witness. PHO 2.

In its prehearing exchange, Respondent has stated that it anticipates calling an expert witness to testify at the hearing, but has not yet identified that witness. Respondent’s Prehearing Exchange 5 (Respondent’s proposed witness described as “An environmental engineer or similar expert (not yet retained)” due to “limited funds”); 6 (Respondent’s proposed Exhibit F described as “Proposed Expert Report and Curriculum Vitae. (Will be provided once expert is retained).”) (May 14, 2014). Complainant argues that “at this point in time, slightly over five weeks prior to the start of the scheduled hearing, given that Respondent has introduced the issue of an expert witness . . . Respondent should be compelled to identify” that witness, “his/her professional qualifications and credential and to produce any” reports that the witness has prepared for this proceeding that are intended as evidence. Compel Mot. 7.

As explained above, the Rules and the Prehearing Order require that if Respondent intends to call an expert witness or introduce documentary evidence at the hearing, it must file and serve certain documentation and information about that evidence prior to the hearing. 40 C.F.R. § 22.19; PHO 2. And as the Prehearing Order warns, “any document not included in the prehearing exchange shall not be admitted into evidence, and any witness whose name and testimony summary are not included in the prehearing exchange shall not be allowed to testify.” PHO 3.

Therefore, in consideration of the Rules, the requirements of the Prehearing Order, and without objection, Complainant’s Motion to Compel is hereby **GRANTED**.

ORDER

1. Complainant’s proposed Exhibits 11, 12 and 13 are hereby incorporated into Complainant’s prehearing exchange.
2. On or before September 2, 2014, Respondent must either:

- a. file and serve the information and documentation described on pages 2 and 3 in Complainant's Motion to Compel, as enumerated 1 through 4; or
- b. inform this Tribunal and Complainant that it does not intend to introduce that evidence at the hearing.

SO ORDERED.



Christine D. Coughlin
Administrative Law Judge

Date: August 19, 2014
Washington, D.C.

In the Matter of *Advanced Recovery*, Respondent.
Docket No. RCRA-02-2013-7106

CERTIFICATE OF SERVICE

I hereby certify that true copies of this **Order on Motion to Supplement Prehearing Exchange and Order on Motion to Compel Production**, issued by Christine D. Coughlin, Administrative Law Judge, in Docket No. RCRA-02-2013-7106, were sent to the following parties on this 19th day of August 2014, in the manner indicated:



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Dated: August 19, 2014
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