UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Energy Gases, Inc.,	)	Docket No. EPCRA-02-2000-4002
	)	
Respondent	)	

ORDER GRANTING COMPLAINANT'S MOTION
TO SUPPLEMENT PREHEARING EXCHANGE

The United States Environmental Protection Agency ("EPA") moves to supplement its prehearing exchange to include an expert witness, Gail Coad, as well as Exhibits 13 through 22. Energy Gases, Inc. ("Energy Gases"), objects only to the inclusion of Exhibit 22, identified by EPA as, "Report Prepared by Gail Coad pertaining to Energy Gases, Inc.'s, Ability to Pay a Penalty." As explained below, EPA's motion to supplement its prehearing exchange is *granted.*

Respondent argues that Exhibit 22 "is duplicative of Ms. Coad's testimony, ... and is merely an attempt to buttress the actual testimony of the Complainant's witness." Resp. Opp. at 1. Energy Gases' objections to Coad's ability-to-pay report on these grounds are premature. It is simply too early in these proceedings to reach such a conclusion.

In addition, respondent argues that Exhibit 22 is inadmissible under the Federal Rules of Evidence. *Id.* Citing *Paddack v. Christensen,* 745 F.2d 1254, 1262 (9th Cir. 1984), Energy Gases submits that Rule 703, Fed.R.Evid., does not allow the submission of an expert report to establish the truth of what the report asserts. Even assuming that Exhibit 22 contains hearsay, such evidence, if reliable, is admissible in this administrative proceeding. *See In Re Great Lakes Division of National Steel Corp.,* Appeal No. 93-3, 1994 EPA App. Lexis 51 (June 29, 1994). Moreover, even the *Paddack v. Christensen* case cited by respondent explains that "[a]n expert is permitted to disclose hearsay for the limited purpose of explaining the basis for his expert opinion." *Id*.

Finally, Energy Gases' argument that it would be unfairly prejudiced by the inclusion of Exhibit 22 in EPA's prehearing exchange list is rejected. Respondent has made no such showing. Also, respondent's argument that the exhibit cannot be considered because it is not a document that EPA relied upon in proposing the penalty in this case likewise must fail. Given the fact that in opposing EPA's earlier filed motion for accelerated decision the respondent asserted that it is "a small company of limited means," the issue as to its ability to pay a penalty appears to be an issue that needs to be addressed.

Accordingly, EPA's motion to supplement its prehearing exchange is *granted.*

Carl C. Charneski
Administrative Law Judge

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