



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:)
)
New York State) Docket No. CWA-02-2016-3403
Department of Transportation,)
)
Respondent.)

ORDER ON MOTIONS TO SUPPLEMENT THE PREHEARING EXCHANGE

By Order dated November 22, 2017, I scheduled the hearing in this matter to commence on February 13, 2018, and set a number of prehearing deadlines. With regard to any supplements to the parties’ prehearing exchanges, the Order advised:

An addition of a proposed witness or exhibit to the prehearing exchange may be filed without an accompanying motion until 60 days before the hearing is scheduled to commence. Thereafter a motion shall be required. Notwithstanding the deadline set forth in 40 C.F.R. § 22.22(a)(1),¹ if a party fails to supplement their prehearing exchange by December 29, 2017, the document, exhibit, or testimony shall not be admitted into evidence unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so. Motions to supplement the prehearing exchange filed after January 12, 2018, will not be considered absent extraordinary circumstances. A document or exhibit that has not been included in prehearing information exchange shall not be admitted into evidence, and any witness whose name and testimony summary has not been included in prehearing information exchange shall not be allowed to testify.

Order on Respondent’s Motions for Extension of Time (Nov. 22, 2017), at 2.

By Order dated February 1, 2018, the hearing in this matter was postponed until April 3, 2018, at Respondent’s request. Shortly thereafter, each party filed a Motion to Supplement the Prehearing Exchange. In its motion, Complainant seeks leave to supplement its prehearing exchange with the CV of its proposed expert witness, Christy Arvizu, explaining that it submitted Ms. Arvizu’s CV at the time it submitted its prehearing exchange but mistakenly failed to mark the

¹ This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“Rules of Practice”), set forth at 40 C.F.R. Part 22. The Rules of Practice provide that if a party fails to provide any document, exhibit, witness name, or summary of expected testimony required to be exchanged under 40 C.F.R. §§ 22.19(a) or (f) to all parties at least 15 days prior to the hearing, “the Presiding Officer shall not admit the document, exhibit or testimony into evidence,” unless the party had good cause for its failure to do so. 40 C.F.R. § 22.22(a)(1).

CV as a proposed exhibit; that a staff attorney for this Tribunal notified Complainant of the need to mark the CV as a proposed exhibit in order to move it into evidence to support the designation of Ms. Arvizu as an expert²; and that Respondent does not object to this request. Respondent's motion similarly seeks to supplement its prehearing exchange with the CV of its proposed expert witness, Ellen Kubek, with the explanation behind its request mirroring that of Complainant.

The Rules of Practice establish the requirement that parties file prehearing exchanges of information in accordance with an order issued by the Presiding Officer. 40 C.F.R. § 22.19(a)(1). With respect to the contents of a party's prehearing exchange, the Rules of Practice provide, in pertinent part:

Each party's prehearing information exchange shall contain: (i) The names of any expert or other witnesses it intends to call at the hearing, together with a brief narrative summary of their expected testimony . . . ; and (ii) Copies of all documents and exhibits which it intends to introduce into evidence at the hearing.

40 C.F.R. § 22.19(a)(2). The Rules of Practice also describe the circumstances under which a party is required to supplement its prehearing exchange, as follows:

A party who has made an information exchange under paragraph (a) 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.

40 C.F.R. § 22.19(f).

If a party fails to provide information within its control as required in its prehearing exchange or in a supplement to its prehearing exchange promptly upon learning that the contents of the prehearing exchange are incomplete, outdated, or inaccurate, the Rules of Practice authorize the Presiding Officer, in her discretion, to infer that the information would be adverse to the party failing to provide it, exclude the information from evidence, or issue a default order. 40 C.F.R. § 22.19(g). Thus, a motion for leave to supplement a party's prehearing exchange may be denied where the motion is not prompt or where the existing prehearing exchange is not incomplete, inaccurate, or outdated. Evidence of bad faith, delay tactics, or undue prejudice may also warrant the denial of a supplement to a prehearing exchange.

No such evidence exists with respect to the motions at hand. Further, the record reflects that the parties sought to supplement their respective prehearing exchanges promptly upon being informed by a staff attorney for this Tribunal that they were incomplete and well in advance of the hearing as rescheduled. Finally, neither party objects to the opposing party's request. For the foregoing reasons, the parties' Motions to Supplement the Prehearing Exchange are hereby **GRANTED**.

² The record of this proceeding reflects that the staff attorney conveyed this information during a prehearing teleconference that the staff attorney conducted on January 24, 2018, in preparation for the hearing.

SO ORDERED.

A handwritten signature in black ink, appearing to read 'S. Biro', written over a horizontal line.

Susan L. Biro
Chief Administrative Law Judge

Dated: February 16, 2018
Washington, D.C.

In the Matter of *New York State Department of Transportation*, Respondent.
Docket No. CWA-02-2016-3403

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing **Order on Motions to Supplement the Prehearing Exchange**, issued by Chief Administrative Law Judge Susan L. Biro, were sent this day to the following parties in the manner indicated below.

Jennifer Almase
Attorney Advisor

Original and One Copy by Hand Delivery 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:

Christopher Saporita, Esq.
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, NY 10007
Email: saporita.chris@epa.gov
For Complainant

Jason P. Garelick, Esq.
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, NY 10007
Email: garelick.jason@epa.gov
For Complainant

Alicia McNally, Esq.
Assistant Counsel
Division of Legal Affairs
New York State Department of Transportation
50 Wolf Road, 6th Floor
Albany, NY 12232
Email: Alicia.McNally@dot.ny.gov
For Respondent

Dated: February 16, 2018
Washington, D.C.