

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:)
)
Kent Hoggan and Frostwood 6 LLC,) **Docket No. CWA-08-2017-0026**
)
Respondents.)

**COMPLAINANT’S RESPONSE IN OPPOSITION TO RESPONDENT KENT
HOGGAN’S MOTION TO SUPPLEMENT PRETRIAL EXCHANGE**

I. INTRODUCTION

Complainant’s allegation that storm water from the Site reaches waters of the U.S. is central to its discharge claims, and Respondents have been on notice of this allegation since the beginning of the case. Yet Respondent Kent Hoggan, only now, on the last day of a lengthy prehearing discovery period, seeks the Court’s leave to supplement the prehearing exchange with an unnamed expert’s yet-to-be-finished report concerning whether storm water from the Site reaches a water of the U.S. Moreover, Mr. Hoggan proposes to exchange the report at some indeterminate time in the next couple of weeks, well after this Court’s April 15, 2019 final deadline. Mr. Hoggan provides no reason, let alone extraordinary circumstances or even good cause, for failing to submit a report on this question during the prehearing exchange process. Further, Complainant would be prejudiced by the admission of such a report only a few weeks before the hearing. Accordingly, Complainant respectfully requests the Presiding Officer deny Respondent Kent Hoggan’s Motion to Supplement Pretrial [sic] Exchange.

II. BACKGROUND

Complainant filed the Complaint in this matter on September 27, 2017. The Complaint clearly states the allegation that storm water from the Site reaches waters of the U.S. via the

Summit County MS4. OALJ Index Document 1 at 5, ¶¶ 43-44. Respondents directly responded to these allegations in the Answer. OALJ Index Document 6 at 5, ¶¶ 43-44.

The Presiding Officer first set the prehearing exchange schedule in the Court's July 5, 2018 Prehearing Order. OALJ Index Document 18. As required, Complainant submitted its Initial Prehearing Exchange by August 17, 2018. OALJ Index Document 24 at 2-3. To support the allegation that storm water from the Site flows into waters of the U.S. via the Summit County MS4, Complainant submitted multiple exhibits and described expected testimony from Akash Johnson and Kyle Monez. *See, e.g.*, CX 5; CX 8-9; CX 17-18; CX 66.

The July 5, 2018 Prehearing Order required Respondents to submit their Prehearing Exchange by September 7, 2018, with a list of all witnesses and exhibits they intended to rely on at hearing, including copies of any documents supporting denials made in the Answer. OALJ Index Document 18 at 2-4. Respondent Kent Hoggan submitted an untimely Prehearing Exchange on September 24, 2018. OALJ Index Document 28. While the untimely Prehearing Exchange "challenge[d] ... any factual basis for contending that water discharge from the site entered into any US waterway[.]" Mr. Hoggan submitted no supporting exhibits and described no expected fact or expert witness testimony in support of this "challenge." *Id.* at 2-4.¹

Per a November 14, 2018 Order, Complainant submitted its Rebuttal Prehearing Exchange by December 15, 2018. In further support of its allegation that storm water from the Site flows into waters of the U.S., Complainant provided a description of the testimony expected from Complainant's expert, Julia McCarthy. OALJ Index Document 34 at 3-4.

¹ Respondent's exhibits, however, do document that storm water from the Site entered the MS4. *See, e.g.*, RX 3 at 23 (RESP 68) ("Dirty water running off from first lot on right onto roadway and into storm drain"); RX 4 at 1, 4 (RESP 69, 72) ("[w]ater running off into grated inlets").

The Presiding Officer's December 28, 2018 Order set the requirements for supplements to the prehearing exchange. This Order allowed the parties to file additional proposed witnesses and exhibits without an accompanying motion on or before February 15, 2019. OALJ Index Document 38 at 1. Complainant submitted a Supplemental Prehearing Exchange by February 15, 2019. OALJ Index Document 39. Respondents did not.

The December 28, 2018 Order further explained that evidence submitted after February 15, 2019, "shall not be admitted into evidence unless the non-exchanging party had good cause" for the late submittal and that "[m]otions to supplement the prehearing exchange filed after April 15, 2019, will not be considered absent extraordinary circumstances." OALJ Index Document 38 at 1.

On April 15, 2019, Respondent Kent Hoggan submitted a motion to supplement the prehearing exchange at some point "in the next couple of weeks" with an unnamed expert's unfinished report concerning whether storm water runoff from the Site "comes anywhere near any US Waterway." OALJ Index Document 50 at 1.

III. ARGUMENT

The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (Rules of Practice), 40 C.F.R. part 22, govern this proceeding. Section 22.19(a)(1) of the Rules of Practice provides:

In accordance with an order issued by the Presiding Officer, each party shall file a prehearing information exchange. Except as provided in § 22.22(a), 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.

The Court reiterated this rule in its December 28, 2018 Order.

Section 22.19(f) mandates a party “promptly” supplement the prehearing exchange “when the party learns that the information exchanged . . . is incomplete . . . , and the additional . . . information has not otherwise been disclosed to the other party pursuant to this section.” “Thus, where the supplement is not prompt or where the existing information is not incomplete, inaccurate or outdated, and particularly where there is evidence of bad faith, delay tactics, or undue prejudice, supplements to prehearing exchanges may be denied.” *99 Cents Only Stores*, 2009 WL 1900069, at *4–5 (ALJ 2009).

Section 22.22(a)(1) bars a presiding officer from admitting evidence a party failed to exchange at least 15 days before hearing unless the party shows good cause for the failure. In addition, presiding officers are empowered to take “all measures necessary . . . for the efficient fair and impartial adjudication of issues” 40 C.F.R. § 22.4(c)(10). This authority includes the discretion “to prevent parties from strategically waiting until 15 days prior to the hearing to submit proposed exhibits and witnesses, . . . in order to enforce Rule 22.19(f).” *See 99 Cents Only Stores*, 2009 WL 1900069 at *4–5.²

In this matter the Presiding Officer set reasonable prehearing exchange deadlines, including clear deadlines and rules governing supplemental prehearing exchanges. The Presiding Officer’s December 28, 2018 Order moved the applicable deadline to supplement the prehearing exchange without justification to February 15, 2019. The Court also explained that between February 15, 2019, and April 15, 2019, a prehearing exchange could be supplemented upon

² As the presiding officer explained in *99 Cents Only Stores*: “[p]arties may attempt to unfairly disadvantage their opponent by holding back significant information until a couple of weeks prior to the hearing, when opposing counsel may not have sufficient opportunity to review it, respond, and prepare rebuttal testimony and exhibits. Accepting supplements to prehearing exchanges without reasons for filing information after the prehearing exchange would in effect make the prehearing exchange deadlines meaningless.” *Id.* at *7 n2.

motion showing good cause, and that “motions to supplement the prehearing exchange filed after April 15, 2019, will not be considered absent extraordinary circumstances.” OALJ Index Document 38 at 1.

Presiding officers have denied motions to supplement prehearing exchanges when movants did not explain why they failed to submit the evidence earlier or failed to demonstrate good cause for doing so. For example, this Presiding Officer denied a motion to supplement a prehearing exchange—made after the date when good cause was required—when the evidence “could have been provided as part of Respondents’ first supplemental prehearing exchange” and the respondents “ha[d] not made any attempt to show good cause why they did not disclose” the evidence earlier. *Carbon Injection Systems*, 2012 WL 3068487, at *2–3 (ALJ 2012). Similarly, the Environmental Appeals Board held that a respondent’s submission of exhibits—after the date when good cause was required—was untimely and lacked good cause because the complaint put the respondent on notice of the relevant issue and the respondent could have submitted the exhibits with the rest of its prehearing exchange. *Titan Wheel Corp.*, 2002 WL 1315600, at *9–11 (EAB 2002) *aff’d*, 291 F. Supp. 2d 899 (S.D. Iowa 2003), *aff’d per curiam*, 113 Fed. Appx. 734 (8th Cir. 2004).

While Respondent Kent Hoggan’s Motion is dated April 15, 2019, he seeks to supplement the prehearing exchange with the report weeks *after* April 15, 2019. Therefore, the Presiding Officer’s December 28, 2018 Order requires that his Motion demonstrate extraordinary circumstances for his failure to exchange the exhibit earlier. Mr. Hoggan provides no reason for not submitting the supplemental exhibit earlier. Further, Mr. Hoggan cannot demonstrate extraordinary circumstances, or even good cause, in support of this failure.

Mr. Hoggan “ha[s] not made any attempt to show good cause [or extraordinary circumstances] why [he] did not” submit this report earlier. *See Carbon Injection Systems*, 2012 WL 3068487, at *2–3. “Accepting supplements to prehearing exchanges without reasons for [their delay] would in effect make the prehearing exchange deadlines meaningless.” *99 Cents Only Stores*, 2009 WL 1900069 at *7 n2. Thus, the Court should deny Mr. Hoggan’s Motion.

Moreover, Mr. Hoggan cannot demonstrate extraordinary circumstances, or even good cause, for his failure to submit the expert report earlier. The Complaint put Respondents on notice that Complainant is alleging storm water from the Site reached waters of the U.S. via the Summit County MS4. OALJ Index Document 1 at 5, ¶¶ 43-44. Mr. Hoggan had almost a full year between the September 27, 2017 Complaint and his September 24, 2018 Prehearing Exchange to support his position that storm water from the Site does not reach waters of the U.S. Though he did not take advantage of that time, Mr. Hoggan certainly could have supported his position upon review of Complainant’s August 2018 Initial Prehearing Exchange. He did not.

Further, Complainant listed Ms. McCarthy as a witness in its December 14, 2018 Rebuttal Prehearing Exchange, after which Respondent had ample time to supplement his exchange prior to the February 15, 2019 deadline for submitting supplemental evidence without good cause. He did not. Nor did he attempt to supplement his exchange upon receiving Ms. McCarthy’s report during the period when he could have done so for good cause. Mr. Hoggan did not even move to supplement his prehearing exchange for good cause in response to Complainant’s Motion for Accelerated Decision on Liability. Only now, when this Court has stated that it will not entertain such motions except in extraordinary circumstances, does Mr. Hoggan move this Court to allow him to supplement his prehearing exchange with an unnamed expert’s unfinished report at some point in the next couple of weeks.

As in *Titan Wheel Corp.*, Mr. Hoggan's actions and statement that Complainant only recently filed the expert report of Julia McCarthy are "unconvincing" and do not show good cause (let alone extraordinary circumstances), as the allegation that storm water from the Site reaches waters of the U.S. is a central element of the Complaint. *See* 2002 WL 1315600, at *9–11, *aff'd*, 291 F. Supp. 2d 899, *aff'd per curiam*, 113 Fed. Appx. 734. There is no requirement or reason Mr. Hoggan would need to wait for Complainant to introduce a related expert, their expected testimony, or their report before doing so himself.

Respondent's failure to explain why he did not submit the expert report can only mean that Mr. Hoggan either intended this delay or did not take the Presiding Officer's instructions seriously. Either way, Respondent's last-minute attempt to introduce a potential expert report demonstrates bad faith. And his failure to even mention the report earlier in the proceeding provides further support for denying his Motion. *See Titan Wheel Corp.*, 2002 WL 1315600, at *9–11 (a respondent's failure to ever mention an issue earlier in the proceeding supported the EAB's refusal to admit related evidence via an untimely submission), *aff'd*, 291 F. Supp. 2d 899, *aff'd per curiam*, 113 Fed. Appx. 734.

Finally, Complainant will be prejudiced if Mr. Hoggan is allowed at this late stage of the proceeding to add an expert report. According to Mr. Hoggan, the report will allegedly be completed "in the next couple of weeks" by an unidentified expert. As the Court's April 15, 2019 deadline acknowledges, this will leave Complainant little time to review the report and prepare to address it at hearing. Also, Respondent does not seek to add the unnamed "experts" behind the report as witnesses or to add their curricula vitae. So Complainant is unable to assess their credibility and expertise or to cross examine them at hearing. Because Respondent's Motion is a delay tactic and the untimely introduction of a new "expert" report would severely prejudice

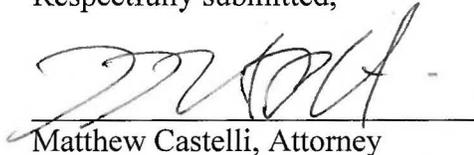
Complainant, the Presiding Officer should deny Respondent's Motion. *See 99 Cents Only Stores*, 2009 WL 1900069, at *4-5 (ALJ 2009).

IV. CONCLUSION

Because Respondent Kent Hoggan failed to demonstrate any reason, let alone extraordinary circumstances or even good cause, for his failure to submit this report earlier, Complainant respectfully requests the Presiding Officer deny Respondent Kent Hoggan's Motion to Supplement Pretrial [sic] Exchange.

4/19/2019
Date

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that the foregoing COMPLAINANT'S RESPONSE IN OPPOSITION TO RESPONDENT KENT HOGGAN'S MOTION TO SUPPLEMENT PRETRIAL EXCHANGE, in In the Matter of Kent Hoggan and Frostwood 6 LLC, Respondents, Docket No. CWA-08-2017-0026, dated April 19, 2019, was sent this day in the following manner to the addressees listed below:

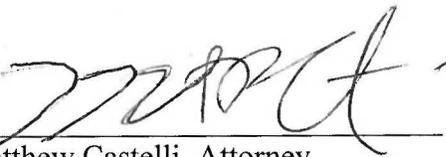
Copy by OALJ E-Filing System to:

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Dated: April 19, 2019