



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
CYCLE CHEM, INC.,) DOCKET NO. TSCA-03-2009-0209
)
RESPONDENT)

ORDER ON COMPLAINANT'S MOTION TO FURTHER SUPPLEMENT COMPLAINANT'S
PREHEARING EXCHANGE

ORDER ON RESPONDENT'S MOTION FOR LEAVE TO MAKE ADDITIONAL
SUPPLEMENTAL EXCHANGE OF EXHIBITS LESS THAN 15 DAYS BEFORE
HEARING

On September 28, 2010, Complainant filed a Motion to Further Supplement Complainant's Prehearing Exchange ("Motion"),^{1/} in which it seeks leave to supplement its prehearing exchange with new exhibits (57, 57A-D, 58, and 58A-D) and to make a typographical correction to Complainant's Exhibit 21. On October 5, 2010, Respondent submitted a Declaration in Partial Opposition to Complainant's Motion to Supplement Its Prehearing Exchange ("Response"), in which it objects to the inclusion of Complainant's Exhibits 58 and 58A-D ("CX 58" and "CX 58A-D"). On October 7, 2010, Complainant submitted its Response to Respondent's Motion in Partial Opposition to Complainant's Motion to Further Supplement Complainant's Prehearing Exchange ("Reply").

Also on October 7, 2010, Complainant sent a Notice of Disclosure ("Notice") to which it attached three documents related to correspondence between Respondent and EPA Region 2 dated from 2000-2001. In its Notice, Complainant states that it would not object should Respondent seek to have these documents admitted together despite the close proximity of the hearing. On the same day, Respondent submitted a Motion ("Respondent's Motion") seeking leave to make an additional supplemental

^{1/} Other motions to supplement the prehearing exchanges, filed before the instant Motion, were unopposed and were previously granted without written order. This Order does not affect those earlier motions.

exchange of exhibits, which exhibits include the same three letters attached in Complainant's Notice.^{2/}

I. Complainant's Motion

In support of its Motion, with respect to CX 58 - 58D, Complainant states that the proposed exhibits are taken from a learned treatise (CX 58A) and product material safety data sheets (CX 58B-D) or derived therefrom (CX 58), and "are intended to help explain, provide context to, and assist in the understanding of the facts and information, as well as the assumptions, used by Mr. [Craig] Yussen in performing the calculations set forth in [CX 57 and 21]." Motion at 4.

In its Response, Respondent argues that Complainant should not be allowed to supplement its prehearing exchange with CX 58 - 58D because information from a learned treatise, under the Federal Rules of Evidence, must have an expert witness to establish the authority of the treatise and Complainant has proposed no expert witness in its Prehearing Exchange. Response at 2. Respondent therefore asserts that the evidentiary foundation for the admission of the proposed exhibits has not been exchanged. In addition, Respondent argues that the proposed supplementation was not timely, because Complainant alleged knew of these exhibits prior to the initial Prehearing Exchange, and Complainant offers no excuse for the alleged delay. *Id.* at 3.

In its Reply, Complainant argues that the Federal Rules of Evidence are not binding on this Tribunal and proceeds to recite the standard for admitting evidence at hearing. Reply at 4 (citing 40 C.F.R. § 22.22 and *In re Pyramid Chem. Co.*, 11 E.A.D. 657 (EAB 2004)). Complainant goes on to argue that expert testimony is not needed to explain the information contained in CX 58-58D. Reply at 5. Further, Complainant argues that Mr. Yussen will explain the relevance and utility of this information during his "anticipated fact testimony at hearing." *Id.* With respect to the allegation of delay, Complainant asserts that CX 58-58D and the information therein "was not compiled and organized into a form amenable to the purpose for which they are being offered until immediately prior to their submission." *Id.*

^{2/} Attachments A, B, and C from Complainant's Notice correspond to Respondent's Exhibits G2, G3, and G4, respectively. RX G2 was already included in an earlier supplement of Respondent's Prehearing Exchange.

Initially, I note that while Complainant has waited until the last minute to compile and organize the disputed information into CX 58-58D, this does not render the proposed supplement so untimely as to preclude its proffer. The applicable rules state that a party "shall promptly supplement or correct the exchange when the party learns that the information exchange . . . is incomplete, inaccurate, or outdated. . . ." and that any document or exhibit not exchanged "at least 15 days before the hearing" shall not be admitted into evidence "unless the non-exchanging party had good cause for failing to exchange the required information" and did so "as soon as it had control of the information." 40 C.F.R. §§ 22.19(f), 22.22(a)(1). I accept Complainant's statement that these proposed exhibits were provided to Respondent as soon as they were "compiled and organized into a form amenable to the purpose for which they are being offered." Reply at 5. Also, the proposed exhibits were submitted more than 15 days before hearing, if barely, which has allowed for a full briefing and decision by this Tribunal.

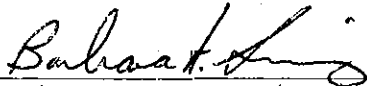
The acceptance of a supplement to the prehearing exchange should not be conflated with the standard for admitting evidence at hearing. See 40 C.F.R. § 22.22. Complainant correctly notes that the Federal Rules of Evidence, particularly the rules on Hearsay, do not strictly apply in administrative proceedings unless incorporated into the Rules of Practice. See, e.g., 40 C.F.R. § 22.19(a) (incorporating Rule 408 - disclosure of settlement information). Decisions on the relevance, reliability, or materiality of any evidence are more appropriately reserved for hearing. Thus, without ruling on the admissibility of the proposed exhibits, Complainant's Motion is **GRANTED**. The parties are free to renew their arguments as to admissibility of any evidence at the hearing.

II. Respondent's Motion

Upon review of Complainant's Notice and Respondent's Motion, the exhibits proposed by Respondent (RX G3-4) are identical to Attachments (B & C) in the Notice. Complainant states that it has no objection to Respondent's inclusion of these documents in its Prehearing Exchange provided the documents are included together. In Respondent's Motion, Respondent argues that extraordinary circumstances exist justifying the late inclusion of these exhibits. Respondent's Motion at 2-3 (establishing compelling facts). For good cause shown, Respondent's Motion is **GRANTED**.

ORDER

Complainant is granted leave to supplement its Prehearing Exchange with the proposed exhibits marked CX 57, 57A-D, 58, and 58A-D. Respondent is granted leave to supplement its Prehearing Exchange with the proposed exhibits marked RX G3-4.



Barbara A. Gunning
Administrative Law Judge

Dated: October 14, 2010
Washington, DC

In the ADR matter of *Cycle Chem, Inc.*, Respondent.
Docket No. TSCA-03-2009-0209

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on Complainant's Motion to Further Supplement Complainant's Prehearing Exchange; Order on Respondent's Motion for Leave to Make Additional Supplemental Exchange of Exhibits Less Than 15 Days Before Hearing**, dated October 14, 2010, was sent this 14th day of October 2010, in the following manner to the addressees listed below.



Mary Angeles
Legal Staff Assistant

One Copy by Facsimile and Pouch Mail:

Lydia Guy
Regional Hearing Clerk
U.S. EPA / Region III
1650 Arch Street
Philadelphia, PA 19103-2029
Fx: 215.814.2603

One Copy by Facsimile and Pouch Mail to:

A. J. D'Angelo, Esq.
Sr. Assistant Regional Counsel
Benjamin Fields, Esq.
U.S. EPA / Region III
1650 Arch Street
Philadelphia, PA 19103-2029
Fx: 215.814.2603

One Copy by Facsimile and Regular Mail to:

James M. Hazen, Esq.
Attorney at Law
One River Centre
331 Newman Springs Road
Building 1, 4th Floor, Ste. 143
Red Bank, NJ 07701
Fx: 732.865.7720

Dated: October 14, 2010
Washington, D.C.