UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2

In the Matter of: Advanced Recovery, Inc., Respondent. Proceeding Under Section 9006 of the Solid Waste Disposal Act, as amended.	**Hon. Christine D. Coughlin, Presiding Officer** Docket No. RCRA-02-2013-7106

MEMORANDUM IN SUPPORT OF MOTION TO PRECLUDE RESPONDENT FROM QUALIFYING EXPERT WITNESS AND PRODUCING EXPERT REPORT

Complainant in this proceeding, the Director of the Division of Enforcement and Compliance Assistance, EPA, Region 2 (EPA or Agency), through counsel, submits this memorandum to move this Court, pursuant to 40 C.F.R. §§ 22.4(c)(2), 22.4(c)(6), 22.16(a) and 22.19(g), and also pursuant to the order of this Court, dated August 19, 2014, as modified by the order of September 3, 2014,[1] for an order: **a)** precluding Respondent from qualifying Joanne Vicaretti (or other person) as an expert witness at the hearing in the above-referenced proceeding scheduled to commence on September 23, 2014; and **b)** precluding Respondent from introducing and entering into the record of the hearing any expert report prepared by Ms. Vicaretti (or other person). As demonstrated below, Complainant submits that good cause exists for granting this motion, *i.e.* the circumstances surrounding this motion justify and support the issuance of the preclusion order Complainant seeks against Respondent.

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[1] The order of August 19, 2014, denominated, "ORDER ON MOTION TO SUPPLEMENT PREHEARING EXCHANGE AND ORDER ON MOTION TO COMPEL PRODUCTION" (the "August 19th order"); the order of September 3, 2014, denominated, "ORDER ON RESPONDENT'S REQUEST FOR EXTENSION OF TIME" (the "September 3rd order").

II. History and Background

For purposes of this preclusion motion, a substantive history of this litigation from the time of its commencement need not be documented in great detail.[2] The discussion below represents a summary of essential background facts and also of facts relevant to the operative facts relative to the relief Complainant seeks.

Respondent is a for-profit corporation, Advanced Recovery, Inc., that owns and operates a recycling facility in Port Jervis, New York. Respondent's business involves recycling various types of wastes, including electronic wastes such as spent fluorescent light bulbs and spent cathode ray tubes (the latter referred to as "CRTs").[3] As part of its recycling operations, Respondent processes such wastes, *e.g.*, these operations include the crushing of spent fluorescent light bulbs and CRTs. In carrying out these operations, Respondent processes and handles hazardous waste.[4]

On or about July 25, 2012, EPA conducted an inspection of Respondent's Port Jervis facility to determine Respondent's compliance with the applicable hazardous waste requirements. To follow-up on its inspection and obtain additional and/or clarifying information, EPA in February 2013 sent Respondent, pursuant to 42 U.S.C. § 6927, a "Notice of Violation" ("NOV") and an information request letter ("IRL"). Respondent provided its response to the NOV and IRL in March 2013.

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[2] The pertinent facts have also been provided to the Court in recent motions, such as Complainant's August 15, 2014, "Motion To Compel Production/To Conditionally Preclude."

[3] CRTs are the video display components of various electronic devices, most commonly older computer monitors or older television monitors.

[4] The parties stipulated to these and other background facts, and these stipulations were filed and served on August 22, 2014.

Based on the information obtained through EPA's inspection and the NOV/IRL response, Complainant in October 2013 issued a "Complaint, Compliance Order, and Notice of Opportunity for Hearing" against Respondent. The Complaint, which seeks a penalty of approximately $67,000, alleges two overall violations: **1)** in Respondent's activities and its handling of the resulting wastes, it has failed "to maintain and operate its facility to minimize the possibility of fire, explosion, or any unplanned sudden release of hazardous waste or hazardous waste constituents into the air, soil, or surface water which could threaten human health or the environment..." and **2)** that Respondent unlawfully (*i.e.* without having obtained the requisite permit or without having "interim status") stored hazardous waste.[5] The Complaint alleged violations of the Solid Waste Disposal Act, as amended by various laws including the Resource Conservation Recovery Act and the Hazardous and Solid Waste Amendments of 1984 (collectively referred to as "RCRA"), 42 U.S.C. § 6901 *et seq.*, and applicable implementing regulations. Respondent filed its Answer on or about January 14, 2014. While admitting a few predicate allegations, it mostly denied the allegations and disputed liability.

Prehearing exchanges have been submitted. Complainant filed her initial prehearing exchange on April 30, 2014. Respondent submitted its prehearing exchange on May 14, 2014, and Complainant then filed her rebuttal prehearing exchange on June 4, 2014. The order of June 11, 2014,[6] set a number of deadlines and informed the parties that the hearing in this matter would commence on September 23, 2014.

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5 Paragraphs 40 and 41, paragraphs 53 and 54 of the complaint, respectively.

6 Denominated "NOTICE OF HEARING AND SCHEDULING ORDER."

III. Respondent's Raising of the Expert Witness Issue

In its May 14, 2014 prehearing exchange, Respondent raised the possibility of producing an expert witness to testify at the hearing and of introducing an expert report produced by such witness. Respondent did not name the witness in its prehearing exchange nor did it provide a copy of any such expert report, as required by the 40 C.F.R. Part 22 governing rules of procedure.[7] Instead Respondent referenced an un-named witness and referred to a "Proposed Expert Report. In paragraph 4 of Section 2 of Respondent's prehearing exchange it states that Respondent anticipated calling at hearing:

> An environmental engineer or similar expert (not yet retained). The expert is expected to testify as to the extent that Advanced Recovery deviated from regulations, and the potential for harm arising out of any such deviation. Due to Advanced Recovery's limited funds, they have currently [sic] unable to retain an expert. However, as soon as an expert is retained, we will forward a copy of his Curriculum Vitae, and a more detailed account of his proposed testimony immediately upon receipt.

In the ensuing section (Section 3) the May 14th prehearing exchange, Respondent wrote as part of its list of documentary evidence and exhibits it anticipated offering into evidence at the upcoming hearing (paragraph "F") (last page of the prehearing exchange):

> Proposed Expert Report and Curriculum Vitae. (Will be provided once expert is retained).

To date, over four months since Respondent has submitted its prehearing exchange and with less than two weeks left until the scheduled commencement of the September 23rd hearing,

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[7] In 40 C.F.R. § 22.19(a)(2), it states that the prehearing exchange of each party must contain "(i) [t]he names of any expert or other witnesses it intends to call at the hearing...and (ii) [c]opies of all documents and exhibits which it intends to introduce into evidence at the hearing." Further, the prehearing order of this Court, dated March 10, 2014, enjoined each party to serve "a list of names of the expert and other witnesses intended to be called at the hearing...and a curriculum vitae or resume for each identified expert witness...." Section1.(A) of the March 10th order, page 2.

Respondent has yet to provide a curriculum vitae (C.V.) [or a resume] for its putative expert witness, nor has Respondent provided to EPA any expert report written by such witness.[8]

IV. The Court's Orders Compelling Production

By motion dated and filed (and served) August 15, 2014, Complainant moved to compel Respondent to identify its alleged expert witness and to produce the expert report Respondent asserted in its May 14th prehearing exchange that such witness was supposed to have written. Complainant sought, *inter alia*, an order from this Court that would have compelled Respondent "either to produce by no later than September 2, 2014, documentation and information related to Respondents's putative expert witness...or, in the alternative, to inform Complainant and this Court that Respondent will not seek to introduce into the record of the upcoming hearing the testimony of any such expert witness and any expert report prepared by him/her." Page 1 of the August 15th motion. More specifically, Complainant sought (pages 2 and 3 of the August 15th motion):

> 1) The name, business address and business/professional affiliation of the 'environmental engineer or similar expert' referred to in Paragraph 2.4. of Respondent's May 14, 2014, Prehearing Exchange (fifth page therein);
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> 2) The Curriculum Vitae of the 'environmental engineer or similar expert' referred to in Paragraph 2.4.) of Respondent's May 14, 2014, Prehearing Exchange (fifth page therein) and also in Paragraph 3.F. of Respondent's May 14, 2014, Prehearing Exchange (sixth page therein);
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> 3) The 'more detailed account of [the] proposed testimony' of the 'environmental engineer or similar expert' referred to in Paragraph 2.4. of Respondent's May 14, 2014, Prehearing Exchange (fifth page therein); and
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> 4) The 'Proposed Expert Report' referred to in Paragraph 3.F. of Respondent's May 14,

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[8] As discussed in the section discussing the September 4, 2014, telephone conference, Respondent has provided a name for this alleged expert witness, Joanne Vicaretti.

2014, Prehearing Exchange (sixth page therein) [brackets in paragraph 3, above, in original].

The Court on August 19, 2014, issued its "ORDER ON MOTION TO SUPPLEMENT PREHEARING EXCHANGE AND ORDER ON MOTION TO COMPEL PRODUCTION." In granting Complainant's August 15th motion to compel production, the Court directed that Respondent must, by September 2, 2014 (third and fourth pages of the August 19th order):

a. file and serve the information and documentation described on pages 2 and 3 of Complainant's Motion to Compel, as enumerated 1 through 4 [the indented four paragraphs quoted above on page 5]; or

b. inform this Tribunal and Complainant that it does not intend to introduce that evidence at the hearing.

By September 2nd, Respondent had not provided the information and documentation Complainant had requested nor had it apprised this Court and Complainant that it did not intend to produce an expert witness and an expert report. Rather, Respondent requested an extension of time through September 5, 2014, to comply with the Court's August 19th order. In that correspondence to the Court, Respondent stated it had retained an expert but also admitted that she had not by then prepared an expert report. No curriculum vitae or resume was attached to or included with the September. In granting Respondent's request to extend the deadline to September 5th, the Court, in its September 3rd "ORDER ON RESPONDENT'S REQUEST FOR EXTENSION OF TIME," noted the operative and relevant circumstances:

> On August 19, 2014, the undersigned issued an order requiring Respondent, by September 2, 2014, to either: file and serve certain information and documentation related to its proposed expert testimony, or inform this Tribunal and Complainant that it does not intend to introduce that evidence at the hearing.
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> On September 2, 2014, Respondent filed a letter stating therein that it has retained an expert, however, 'she had not yet prepared a report.' Respondent

requests an extension of time to file its expert discovery information until 'the end of business on September 5, 2014.' ***

On September 4, 2014, at the direction of the Court's staff attorney, Adrienne Fortin, the parties, together with Ms. Fortin, held a telephone conference. During that conference, Respondent's counsel provided a name for an expert witness, Joanne Vicaretti. No more information was provided on or about Ms. Vicaretti.[9]

V. Respondent's Violation of the Court's August 19th and September 3rd Orders

As of this writing,[10] Respondent stands in violation of the August 19th order, as modified by the September 3rd order, and also in violation of the Court's March 10th prehearing order. Respondent has not provided to EPA a curriculum vitae (or resume) for Ms. Vicaretti (or anyone else), nor has it provided any expert report authored by Ms. Vicaretti (or anyone else). At this stage of the proceeding, exactly two weeks prior to the commencement of the hearing, Complaint remains unaware and uninformed of many things about this purported expert, including: (1) her professional qualifications are (including whether she has a Ph.D. or P.E. and her area(s) of specialty and expertise is(are)); (2) her familiarity, knowledge and experience concerning RCRA regulatory requirements pertaining to the handling and storing of spent fluorescent bulbs and CRTs (and in general hazardous waste); (3) her familiarity, knowledge and experience in analyzing and evaluating "the extent that Advanced Recovery deviated from the regulations, and the potential of harm arising out of any such deviation"[11] and (4) what any purported expert report Ms. Vicaretti might have prepared does find and conclude. Nor has Respondent timely

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9 Respondent's counsel was unable to confirm whether Ms. Vicaretti held a Ph.D. degree.

10 September 8th, at 10 PM.

11 Quoted from the fifth page, Section 2.4., of Respondent's May 14th prehearing exchange.

moved for an extension of the September 5th deadline established in the September 3rd order (*i.e.* moved prior to the expiration of the deadline therein set). Respondent also failed to provide to this Court an explanation or purported justification for its failure to have timely submitted the requisite curriculum vitae (or resume) and expert report. All Respondent has done is orally inform Complainant and this Court that Joanne Vicaretti is expected to be Respondent's expert witness at the upcoming hearing. Under these circumstances Complainant deems that preclusion is warranted and justified under governing principles of law.[12]

VI. Legal Support And Justifications For The Requested Sanctions

The legal arguments in support of preclusion for Respondent's failure to comply with the requirements of this Court's August 19th and September 3rd orders, and also with the Court's March 10th prehearing order, have been set forth in Complainant's August 15th motion, pages 8 through 20. The arguments set forth in the August 15th motion for preclusion are incorporated herein by reference, and these will not be repeated here; the Court is respectfully referred to that motion. Complainant here will supplement those argument with the overarching principles and salient points that legally support and justify this Court entering an order implementing the sanctions sought in the August 15th motion.

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[12] Around 11 AM on September 8th, the undersigned phoned Respondent's counsel. The latter indicated that he hoped to have a curriculum vitae and expert report by, at the latest, noon on September 9th. As indicated above, as of this writing, neither a C.V. nor an expert report has been provided. Nor is it clear that this Court would permit Respondent to belatedly provide such documentation insofar as providing them at that time would violate the Court's September 3rd order. Thus, Complainant believes the mere possibility of Respondent producing such documentation does not provide a proper basis to deny preclusion.

If, however, Respondent moves for an extension of time to provide the documentation discussed above, and this Court then grants an extension, but Respondent fails to meet the extended deadline, then Complainant requests that this Court deem that this motion apply to such extended deadline and that preclusion based upon a failure to meet the extended deadline be granted.

As noted in Section V of the August 15th motion, pages 8-10, the 40 C.F.R. Part 22 rules of procedure specifically authorize the granting of preclusion motions where a party fails to provide information or documentation under its control. The case law construing the Part 22 rules of procedure have affirmed the availability and applicability of such authority. These principles are similar to the rules governing pre-trial and trial procedures in the federal courts.[13]

It should be self-evident that Respondent's failure to provide information concerning its expert witness and any expert report she might have prepared works to the prejudice of EPA in its preparation for the hearing: Complainant does not know about her expected testimony or what any such expert report might say, nor does Complainant know what specific evidence EPA must put forth to rebut or refute what Respondent will claim and attempt to prove through Ms. Vicaretti and any expert report she might have prepared. Complainant is essentially left in the dark on key aspects of trial preparation (preparing for proper cross-examination of an expert witness and adducing evidence to refute what she might testify to or as to what her expert report might say). Complainant has been denied the customary roadmap provided by pre-trial documents that ordinarily would guide trial preparation and the development of trial strategy.

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[13] The Environmental Appeals Board has directed Article I EPA administrative tribunals to look to the decisions of the Article III federal courts construing and applying the comparable or analogous provisions of the Federal Rules of Civil Procedure in adjudicating questions arising under Part 22. *See, e.g., In re Pyramid Chemical Company*, RCRA (3008) Appeal No. 03-03, 11 E.A.D. 657, 683 n.34 ("Although the Board is not bound by the Federal Rules of Civil Procedure, the Board may, in its discretion, refer to the Federal Rules of Civil Procedure for guidance when interpreting EPA's procedural rules"); *In re Consumers Scrap Recycling, Inc.*, CAA Appeal No. 02-06/CWA Appeal No. 02-06/RCRA (3008) Appeal No. 02-03/MM Appeal No. 02-01, 11 E.A.D. 269, 285 (EAB 2004) ("As we have said in previous decisions, although the Federal Rules of Civil Procedure do not apply to the proceedings before us, we look to the Federal Rules, including the summary judgment standard in Rule 56, for guidance"); In *re Chempace Corporation*, FIFRA Appeals Nos. 99-2 and 99-3, 9 E.A.D. 119, 135 n.22 (2000)("The Board is not bound by the Federal Rules of Civil Procedure and related practice; however, those rules and related practice can nonetheless by used to inform our analysis of relevant issues"). Copies of Environmental Appeals Board decisions are available at www.epa.gov/eab.

Court have recognized that such situations expose a litigant to prejudice and potential litigation harm. *Compare, e.g.*, the situation in *Ware v. Rodale Press, Inc.*, 322 F.3d 218 (3rd Cir. 2003), a case involving a suit by appellant "WCI" against appellee "Rodale" for, *inter alia*, breach of contract. The circuit court explained the prejudice resulting from appellant's failure timely to provide specific information on the issue of damages (322 F.3d at 222-23):

> The District Court noted that while 'prejudice' for purposes of [the leading circuit court case's] analysis does not mean 'irremediable harm,' the burden imposed by impeding a party's ability to prepare effectively a full and complete trial strategy is sufficiently prejudicial. This is a correct statement of law. *** The District Court noted that WCI's failure to provide timely and specific information as to damages caused prejudice to Rodale in the following forms: Rodale had to file two motions (the motion to compel evidence and the motion to preclude evidence at trial); and when WCI finally made some effort to file its damages calculation, it did so only one week before trial and without supporting documentation, impeding Rodale's ability to prepare a full and complete defense.

That a court possesses the requisite authority to exclude evidence not produced in compliance with a pre-trial order cannot be gainsaid. For example, as the Court of Appeals for the Eighth Circuit observed the following in *Burlington Northern Railroad Company v. Nebraska*, 802 F.2d 994, 1005 n.10 (8th Cir. 1986):

> Burlington Northern also challenges the district court's refusal to admit certified copies of arbitration awards permitting railroads to run trains without cabooses. The court excluded this evidence because the exhibits were not listed as intended evidence pursuant to the pretrial order. Burlington Northern argues that it did not include these exhibits in the pretrial report because the need to admit them did not arise until midtrial. It attempted to submit these exhibits only after the district court excluded Burlington Northern's witnesses' testimony as to the arbitration results.
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> The district court may, in its discretion, exclude exhibits not disclosed in compliance with pretrial orders and such a ruling will be reversed on appeal only for abuse of discretion [citations omitted].

A trial judge's order to control events related to trial is wide-ranging and accorded deference on appellate review. A trial court's "order concerning the exclusion of witnesses will be upheld unless there has been a clear abuse of discretion." *United States v. Koziy*, 728 F.2d 1314, 1320 (11th Cir.), *cert. denied*, 469 U.S. 835 (1984).[14] Moreover, the importance of this authority to be exercised — for a court to order and enforce sanctions against a party failing to comply with a pre-trial order — goes to the function of a pre-trial order in ensuring that an adjudication proceed in an orderly, efficient manner upon which the litigants may rely.[15] *See*, *e.g.*, *Hale v. Firestone Tire & Rubber Company*, 756 F.2d 1322, 1335 (8th Cir. 1985), where the court explained:

> The pretrial order measures the dimension of a lawsuit. Accordingly, a party may not offer evidence or advance theories during trial which violate the terms of a pretrial order [internal quotation marks, citations omitted].

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[14] The situation in *Koziy* involved the district court having prohibited two witnesses from testifying on the ground defendant failed to comply with a pre-trial order establishing a deadline for the listing of witnesses; the instant proceeding involves Respondent having failed to comply with the provisions of an order for presenting expert witnesses. If preclusion as this motion seeks were granted, Respondent would be barred from qualifying Ms. Vicaretti (or other person) from testifying as an expert (as well as precluding the introduction of any expert report). This difference with the circumstances in *Koziy* is, however, of no consequence. There is no indication in the record of this proceeding that Ms. Vicaretti has any personal knowledge concerning the nature, extent, duration or other aspects of the violations alleged in the complaint. Not only has Respondent not asserted that she has any such personal knowledge, its prehearing exchange, dated May 14, 2014, admits Ms. Vicaretti had "not yet [been] retained" by that date, thus acknowledging her lack of personal knowledge concerning the violations (the complaint was issued in December 2013, some five months *prior* to Respondent's prehearing exchange). Without such knowledge, she could not testify as a fact witness. Thus, if she were precluded from testifying as an expert, such an order would effectively preclude her from testifying at all. Because of this, the principle concerning the exclusion of witnesses from trial articulated by the 11th Circuit in *Koziy* is applicable.

[15] The 40 C.F.R. Part 22 rules emphasize the importance of ensuring that adjudicatory proceedings are conducted in an efficient and orderly manner. *See* 40 C.F.R. § 22.4(c)(10), providing Presiding Officers with authority to "[d]o all other acts and take all measures necessary for the **maintenance of order and for the efficient,** fair and impartial adjudication of issues arising in proceedings governed by" Part 22 (emphasis added).

The rationale underlying judicial insistence upon a litigant's compliance with a court's pre-trial orders, and the concomitant importance of enforcing sanctions against a party in violation of such orders, was succinctly summarized by the court in *United States v. First National Bank of Circle*, 652 F.2d 882, 886 (9th Cir. 1981):

> Pretrial orders play a crucial role in implementing the purposes of the Federal Rules of Civil Procedure 'to secure the just, speedy, and inexpensive determination of every action.' Unless pretrial orders are honored and enforced, the objectives of the pretrial conference to simplify issues and avoid unnecessary proof by obtaining admissions of fact will be jeopardized if not entirely nullified. Accordingly, a party need offer no proof at trial as to matters agreed to in the order, nor may a party offer evidence or advance theories at the trial which are not included in the order or which contradict its terms. Disregard of these principles would bring back the days of trial by ambush and discourage timely preparation by the parties for trial.

These principles are full applicable here: Respondent's violation of the August 19th order, as modified by the September 3rd order, and its independent violation of the March 10th pre-trial order of this Court, must entail consequences, and without such consequences, these orders are essentially rendered a nullity. Respondents' failure to comply with the Court's order most likely would, in the words of the Ninth Circuit, result in a "trial by ambush" and would certainly impede and make more difficult EPA's "timely preparation...for trial."

Recent Part 22 case law has applied such principles. In an recent underground storage tank (RCRA) case, respondent failed to submit documents that met the requirements of a pre-trial order (a May 11, 2012 order) of the Presiding Officer. In holding that "any information or evidence presented by Respondents in support of any claim of inability to pay a penalty or financial hardship shall not be admitted into evidence in the proceeding," the court explained:

> Respondents have not presented any persuasive argument that exclusion that

> exclusion of all financial information is inappropriate or unwarranted. *** Therefore, it is appropriate to exclude all financial information and evidence that may be presented in support of any claim of financial hardship or inability to pay a penalty.[16]

Similarly, in this proceeding, Respondent Advanced Recovery has not presented "any persuasive argument that" precluding it from qualifying Ms. Vicaretti (or other person) as an expert witness or precluding it from admitting into evidence at the hearing any expert report Ms. Vicaretti (or other person) might have prepared "is inappropriate or unwarranted."

Sanctions in the present matter are appropriate not only because of Respondent's failure to comply with the aforementioned orders of this Court, but, *a fortiori*, for Respondent's failure timely to explain or seek to justify such failure. *See, e.g., In re William E. Comley, Inc. & Bleach Tek, Inc.*, FIFRA Appeal No. 03-01, 11 EAD 247, 257 (EAB 2004), where the Environmental Appeals Board, upholding sanctions ordered by the Presiding Officer for respondents having failed to comply with a pre-trial order, observed:

> We also endorse the Region's view that the ALJ's sanction is justified in light of the Respondents' failure to provide any legitimate justification for refusing to provide the information required in the ALJ's discovery orders. In light of the Respondents being the parties most likely to possess detailed information touching on the issue of corporate succession, their failure to produce this information warrants an adverse ruling against them [citations omitted].

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[16] *In re Andrew B. Chase et al.*, Docket Number RCRA-02-2011-7503 (Judge Buschmann, June 28, 2012) ("ORDER ON COMPLAINANT'S MOTION TO PRECLUDE DOCUMENTATION AND DRAW ADVERSE INFERENCES"). After an initial decision in the matter in which EPA obtained a judgment of liability and a penalty against respondents was assessed, the Environmental Appeals Board modified the penalty assessed against respondents by increasing the amount by nearly $4,000. The Board's decision specifically upheld the Presiding Officer's interlocutory order of preclusion: "Under the circumstances presented in this case, the Board finds no error or abuse of discretion in the ALJ's decision to exclude from the record the untimely and incomplete financial information that Respondent[s] proffered in their opposition to the Region's June 25, 2012 Motion to Preclude." *In re Andrew B. Chase et al.*, RCRA (9006) Appeal No. 13-04 (August 1, 2014), slip opinion at 31-32.

For the reasons set forth above, Complainant submits that the sanctions Complainant seeks herein — an order of preclusion — is warranted, justified and supported in law, both the law governing this proceeding and the law governing the proceedings in the federal courts.

IV. Conclusion

For all the reasons set forth above, Complainant respectfully requests this Court issue an order that: (1) precludes Respondent from qualifying at the upcoming hearing set to commence September 23, 2014, Joanne Vicaretti (or any other person) as an expert witness under 40 C.F.R. § 22.19(a); (2) precludes Respondent from introducing and entering into the record of said hearing any expert report prepared by Ms. Vicaretti (or any other person) addressing, pertaining to or otherwise related to "the extent that [Respondent] deviated from the regulations, and the potential of harm arising out of any such deviation"; and (3) grants Complainant such other and further relief that this Court deems just, lawful and proper.[17]

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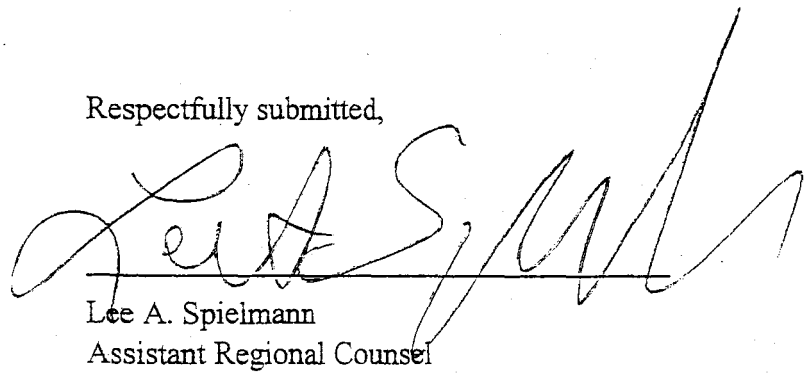
[17] The Court's June 11th order states that "[a]ll non-dispositive hearing motion, such as motions...to supplement a prehearing exchange..., must be filed on or before August 15, 2014" (emphasis omitted). Insofar as this motion is seeking to enforce orders issued subsequent to the June 11th order, and thus the June 11th order was never intended to cover such specific circumstances unforeseen at the time of its issuance, Complainant deems that this preclusion motion does not constitute a non-dispositive motion within the meaning of the June 11th order. To the extent this Court holds otherwise, then Complainant moves, pursuant to 40 C.F.R. §§ 22.1(c), 22.4(c)(2), 22.4(c)(6), 22.4(c)(10), 22.16(a) and 22.19(g), for an order: a) vacating so much of the June 11th order that required all non-dispositive motions to be filed by August 15, 2014; b) extending the time for the filing of such non-dispositive motions through to the date of the filing of this motion (but no later than September 10, 2014).

Dated: September 8, 2014
New York, New York

Respectfully submitted,



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