BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)	
	)	Docket No. TSCA-10-2021-0006
GREENBUILD DESIGN & CONSTRUCTION, LLC	)	**REPLY IN SUPPORT OF COMPLAINANT'S MOTION TO ACCEPT AN AFFIDAVIT IN LIEU OF TESTIMONY**
Anchorage, Alaska	)	
Respondent.	)	

COMPLAINANT'S REPLY

COMES NOW, the U.S. Environmental Protection Agency, Region 10 ("Complainant"), by and through its undersigned counsel and pursuant to 40 C.F.R. § 22.16(b), to respectfully offer the following reply in support of its motion to accept an affidavit in lieu of testimony. On April 8, 2022, Complainant filed a motion with this Court asking it to accept CX 05, the affidavit of Mr. Rob Hamlet, in lieu of his testimony at the forthcoming penalty-only hearing in this matter. GreenBuild Design & Construction, LLC ("Respondent") filed a reply on April 15, 2022, opposing Complainant's motion. Complainant offers the following reply in support of its motion.

I. This Court should grant Complainant's motion

40 C.F.R. § 22.22(d) provides that this Court "may admit into evidence affidavits of witnesses who are unavailable." A declarant is considered to be unavailable as a witness, for the purpose of 40 C.F.R. § 22.22(d), if the declarant "cannot be present or testify at the trial or hearing because of death or then-existing infirmity, physical illness, or mental illness." Fed. R. of Evidence (FRE) 804(a)(4).

Unfortunately, and regardless of the outcome of this motion, Mr. Hamlet will be unavailable to testify at the forthcoming hearing due to an existing infirmity. Mr. Hamlet has had to undergo multiple surgeries over the past few months, including an emergency surgery just a few weeks ago, which has taken a substantial toll on his physical wellbeing.

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Therefore, pursuant to 40 C.F.R. § 22.22(d), this Court should accept CX 05 in lieu of Mr. Hamlet's testimony. Mr. Hamlet is unavailable to testify according to FRE 804(a)(4), has already provided this Court with an affidavit sworn under penalty of perjury, CX 05, and while important, was not expected to be a foundational witness in Complainant's case in chief. *See* Section II(A)(1), below.

II. Respondent has offered no legal support for its contentions otherwise

Respondent provides two reasons why it believes the Court should deny Complainant's motion. First, Respondent asserts that granting the motion would provide Complainant with "an unfair advantage as it prevents Respondent from thoroughly cross-examining Complainant's witness," Response at 1, which Respondent asserts is a right and privilege afforded to it. Second, Respondent asserts that Complainant had ample time to offer this motion earlier in these proceedings but chose to hold off until a few weeks before the date of the trial. Response at 2. Respondent's arguments are unsupported and meritless, and this Court should disregard them both.

A. Granting Complainant's motion will not afford Complainant an unfair advantage

Respondent asserts that granting Complainant's motion would be an unfair advantage to Complainant because it would prevent Respondent from thoroughly cross-examining Complainant's witness. This argument is meritless for three reasons.

1. Respondent does not have the right to cross-examine Mr. Hamlet

First, Respondent offers no support for the notion that it has a *right* to cross-examine Mr. Hamlet such that this motion should be denied. To the contrary, Respondent's argument is inconsistent with the plain text of 40 C.F.R. § 22.22 and interprets 40 C.F.R. § 22.22(d) in such a way that would leave it meaningless.

40 C.F.R. § 22.22(b) provides that "witnesses shall be examined orally, under oath or affirmation, except as otherwise provided in paragraphs (c) and (d) of this section or by the Presiding Officer. Parties shall have the right to cross-examine a witness who appears at the hearing provided such

cross-examination is not unduly repetitious." Paragraphs (c) and (d), in turn, provide the Court the with the ability to admit written testimony and affidavits into the record in lieu of oral testimony. 40 C.F.R. § 22.22(c), (d).

According to the plain text of 40 C.F.R. § 22.22(b), Respondent only has the right to cross-examine witnesses *who appear at the hearing*. 40 C.F.R. § 22.22(b) (emphasis added). Respondent offers this Court no support for the notion that it has the right to cross-examine anyone other than those individuals.

To the contrary, Respondent's assertion is inconsistent with 40 C.F.R. § 22.22. 40 C.F.R. § 22.22(b) and (c) expressly provide for cross-examination. *See* 40 C.F.R. § 22.22(b) ("Parties shall have the right to cross-examine a witness who appears at the hearing"); *Id*. at § 22.22(c) ("The witness presenting the testimony . . . shall be subject to appropriate oral cross-examination"). 40 C.F.R. § 22.22(d), however, does not. 40 C.F.R § 22.22(d) (providing no such right of cross examination).

Therefore, this Court should read the absence of any mention of cross-examination in 40 C.F.R. § 22.22(d) as deliberate. *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002) (discussing the *expresio unius* cannon of statutory construction, which notes that the expression of one thing implies the exclusion of others). *See also*, *e.g.*, *Ebert v. Poston*, 266 U.S. 548, 554 (1925) (discussing the *casus omissus* cannon, which notes that a matter not covered by a statute should be treated as intentionally omitted). The Consolidated Rules provide that witnesses shall be examined orally, under oath, and parties to the proceeding have the right to cross-examine witnesses who appear at the proceeding. 40 C.F.R. § 22.22(b). But this Court has the authority to admit written affidavits into evidence regardless of whether the declarant has been subjected to cross-examination or not.

Further, Respondent's argument would leave 40 C.F.R. § 22.22(d) meaningless. If Respondent had a right to cross-examine every one of Complainant's witnesses, such that it could override the

flexibilities afforded in 40 C.F.R. § 22.22(d) and defeat this motion, then paragraph (d) would be left meaningless. In such an instance, a party would be unable to admit affidavits of unavailable witnesses anytime a Respondent desired to cross-examine the declarant. Because Courts should "give effect, if possible, to every clause and word of a statute," *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal citation omitted), so that "no clause is rendered superfluous, void, or insignificant," *Young v. UPS*, 135 S. Ct. 1338, 1352 (2015) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)) (internal quotation mark omitted), this Court should reject Respondent's argument. Respondent does not have an unfettered right to cross-examine an unavailable witness, such that it can override 40 C.F.R. § 22.22(d) and prevent this Court from admitting CX 05.

2. Respondent has already had the opportunity to argue against the reliability of Mr. Hamlet's affidavit

Second, Respondent has already had plenty of opportunities to argue against the reliability of Mr. Hamlet's affidavit, which it has chosen not to do. Complainant placed Mr. Hamlet's affidavit—CX 05—into the record with its initial prehearing exchange filed a year ago. *See* Complainant's Initial Prehearing Exchange (filed April 19, 2021). In the last year, Complainant has cited to CX 05 in substantive filings to this Court at least 18 times. *See* Complainant's Memorandum in Support of its Motion for Accelerated Decision at 10, 12, 17, 22, 24, 39, and 41. *See also*, Complainant's Reply in Support of its Motion for Accelerated Decision at 9, 12. This Court cited to Mr. Hamlet's affidavit 30 times. *See* Order on Complainant's Motion for Accelerated Decision at 6–9, 11–13, 18–20. Respondent has never cited to Mr. Hamlet's affidavit or otherwise offered this Court any argument against its reliability.

If Respondent had concerns about the reliability of Mr. Hamlet's affidavit, it could have asked this Court to strike the exhibit from the record. *See, e.g.*, *Titan Wheel Corp. of Iowa v. U.S. EPA*, 291 F. Supp.2d 899 (S.D. Iowa, 2003), *aff'd*, 113 Fed. Appx. 734 (8th Cir. 2004) (upholding EPA ALJ's decision to strike documents submitted during the prehearing exchange). Respondent did not.

If Respondent had concerns about the veracity of Mr. Hamlet's affidavit, it could have argued why this Court should not rely upon it when responding to Complainant's motion for accelerated decision. Respondent did not. *See* Respondent's Response to Complainant's Motion for Accelerated Decision.

If Respondent had any legitimate argument against the admissibility of Mr. Hamlet's affidavit, it could have availed itself of the rights afforded to it by The Consolidated Rules of Practice, 40 C.F.R. Part 22, the Federal Rules of Evidence, and this Court's jurisprudence interpreting those rights. Respondent did not. Therefore, Respondent has had plenty of opportunities to show why Mr. Hamlet's affidavit is unreliable. Its failure to take advantage of those opportunities is not grounds for denying Complainant's motion.

3. Respondent will have the opportunity to cross-examine Complainant's witnesses

And third, Respondent will have the opportunity to cross-examine Complainant's primary witness—Ms. Socky Tartaglia—who calculated the penalty in this case. When calculating the penalty, Ms. Tartaglia relied upon the Notices of Inspection,[1] telephone call logs,[2] inspection report,[3] and other materials prepared by Mr. Hamlet. *See* CX 95 at 7–8 (citing CX 80–85). The core of Mr. Hamlet's testimony was going to be his work on this matter before the July 25, 2018 inspection, when he tried to get Respondent to come into compliance with the law but Respondent ignored or disregarded those efforts. *See* Complainant's Initial Prehearing Exchange at 2–3. As Ms. Tartaglia used this information to justify increasing the gravity-based penalty due to Respondent's culpability, CX 95 at 7–8, Respondent will have the opportunity to test the viability of that tactic at the forthcoming hearing. Therefore,

[1] CX 80–81, 83
[2] CX 82
[3] CX 84

Respondent will have ample opportunity to cross-examine Ms. Tartaglia on the primary aspect of Mr. Hamlet's expected testimony.

B. The timing of Complainant's motion has not negatively impacted Respondent

Respondent also asserts that Complainant had ample time to file the underlying motion but chose to hold off on doing so until a few weeks before the hearing. Respondent offers no argument for why the timing of this motion indicates that the motion should be denied. Nevertheless, the timing of Complainant's motion was unavoidable and has not negatively impacted Respondent.

During the past few months, Complainant was generally aware of Mr. Hamlet's medical issues but was under the impression that Mr. Hamlet would still be available to testify. Mr. Hamlet was under the same impression. Unfortunately, Mr. Hamlet had to undergo emergency surgery the last week of March. Complainant did not learn about the full ramifications of this emergency surgery and its impacts on Mr. Hamlet's availability until April 4th, 2022. Complainant filed the underlying motion just four days later, on April 8th, 2022. Complainant does not know why Respondent is under the impression that Complainant had ample time to file this motion but chose to hold off. That is not the case.

Nevertheless, the timing of this motion has not negatively impacted Respondent. Regardless of the outcome of this motion, Complainant will not be calling Mr. Hamlet to testify, and Complainant will be moving forward with its case. Respondent has offered no argument for why this motion's timing has negatively impacted it and Complainant cannot see how that would be the case. CX 05, and any other evidence that Mr. Hamlet's testimony would have relied upon, has been in the record for the past year—seemingly more than enough time for Respondent to fully prepare for the upcoming hearing. Complainant has not offered any additional evidence or placed anything new in the record related to this motion. Therefore, the timing of this motion has not negatively impacted Respondent.

III. Respondent has not properly moved to delay these proceedings

Respondent has suggested that because Mr. Hamlet is unable to testify, perhaps it would be better to delay this hearing. Response at 1. Complainant strongly disagrees with this suggestion and with the underlying assumption that the unavailability of a minor witness in Complainant's case in chief somehow suggest that a delay is warranted. As Respondent's one-sentence paragraph is not a properly supported motion to delay, *see* 40 C.F.R. § 22.16(a), Complainant does not believe that a full response is necessary. Complainant respectfully reserves the right to further respond to this assertion, should this Court read this as a proper motion to delay. Complainant further respectfully requests that this Court call for such a response, if it believes that Respondent's paragraph is a sufficient motion.

Respectfully submitted,

Futerman, Andrew

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In the Matter of *GreenBuild Design & Construction, LLC,* Respondent.
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Complainant's Reply in Support of its Motion to Accept an Affidavit in lieu of Testimony**, dated April 20, 2022, was served on the following parties in manner indicated below:

Original by OALJ E-Filing System to:
Mary Angeles, Headquarters Hearing Clerk
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Ronald Reagan Building, Room M1200
1200 Pennsylvania Avenue, NW
Washington DC 20004

Copy by Electronic Mail to:
Mr. and Mrs. Rodrigo and Kari von Marees
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For Respondent

Dated: April 20, 2022
Chicago, Illinois

Respectfully submitted,

Futerman, Andrew
Digitally signed by Futerman, Andrew
Date: 2022.04.20 16:04:58 -05'00'

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Andrew Futerman
Counsel for Complainant
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