

**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 MOTION IN LIMINE TO EXCLUDE TESTIMONY FROM  
RESPONDENT KENT HOGGAN’S UNNAMED WITNESSES**

**I. INTRODUCTION**

Respondent Hoggan’s proposed testimony by unnamed witnesses violates the Rules of Practice and the Presiding Officer’s Orders and, therefore, should be excluded.

The Presiding Officer previously warned the Respondent of failing to follow the rules. After Respondent Kent Hoggan disregarded the first prehearing exchange deadline and the other Respondents failed to file any prehearing exchange, the Presiding Officer admonished “Respondents and their counsel are hereby warned to strictly follow the Rules of Practice and instructions set forth in orders issued in this proceeding from this day forward, as such leniency may not be shown again in this proceeding.” OALJ Index Document 33 at 4.

Despite this warning, Respondent Kent Hoggan continues to ignore the rules. This time, Respondent failed to list the “names of the expert and other witnesses” he intends to call at hearing. *See* OALJ Index Document 18 at 2. Rather, Mr. Hoggan listed two *unnamed* witnesses—“Representative of PCG” and “Representative of Cambia”—in his initial prehearing exchange. *See* OALJ Index Document 28 at 1-2. Furthermore, contrary to the Presiding Officer’s clear directive, Mr. Hoggan still has not provided these witnesses’ names to Complainant or the Presiding Officer.

Because Respondent failed to follow the prehearing exchange requirements and, more generally, disregarded the Presiding Officer's Order, Complainant respectfully requests the Presiding Officer enforce the Rules of Practice and Orders in this case and exclude the testimony of Mr. Hoggan's unnamed witnesses from this proceeding.

Complainant's counsel was unable to confirm whether Respondents' counsel opposes this motion, so assumes it is opposed.

## **II. ARGUMENT**

Complainant does not make this motion lightly, as a motion in limine "should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose." *VSS International, Inc.*, 2019 WL 1760743 at \*2 (ALJ 2019) (quoting *Noble v. Sheahan*, 116 F. Supp. 2d 966, 969 (N.D. Ill. 2000)). In this instance, the Presiding Officer's Order stated that: "any witness whose name and testimony summary has not been included in prehearing information exchange shall not be allowed to testify." OALJ Index Document 38 at 1. Because Respondent Hoggan has yet to provide his witnesses' names to Complainant, or shown that extraordinary circumstances have prevented him from doing so to date (the last date this court will accept prehearing motions), testimony by Respondent Hoggan's two unnamed witnesses is inadmissible for any purpose.

The Rules of Practice govern all aspects of this proceeding, including the admissibility of witness testimony at hearing. 40 C.F.R. part 22. While Section 22.22(a) explains "[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value[.]" the Rules also require parties to exchange "[t]he names of any expert or other witnesses it intends to call at the hearing, together with a brief narrative summary of their expected testimony[.]" 40 C.F.R. §§ 22.22(a), 22.19(a))

Further, 40 C.F.R. § 22.22(a)(1) sets forth the consequences for disregarding these specific prehearing exchange requirements:

[i]f, however, a party fails to provide any . . . witness name or summary of expected testimony required to be exchanged under § 22.19 (a), (e) or (f) to all parties at least 15 days before the hearing date, the Presiding Officer shall not admit the . . . testimony 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.

40 C.F.R. § 22.22(a)(1).

Finally, presiding officers have the authority 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[.]” because “[a]ccepting supplements to prehearing exchanges without reasons for filing information after the prehearing exchange would in effect make the prehearing exchange deadlines meaningless.” *99 Cents Only Stores*, 2009 WL 1900069 at \*4–5, \*7 n2 (ALJ 2009).

The Presiding Officer has exercised her authority as described above to ensure a fair and efficient proceeding. The Presiding Officer’s December 28, 2018 Order set February 15, 2019, as the deadline for each party to supplement its prehearing exchange without needing to show good cause. This Order also explained that between February 15, 2019, and April 15, 2019, parties could supplement their prehearing exchange upon motion showing good cause, and that “motions to supplement the prehearing exchange filed after April 15, 2019, will not be considered absent extraordinary circumstances.” *Id.* at 1. The Order reiterated Section 22.22(a)(1)’s consequences for failing to exchange required information: “any witness whose name and testimony summary has not been included in prehearing information exchange shall not be allowed to testify.” *Id.*

Despite a specific requirement imposed by the Presiding Officer, Mr. Hoggan failed to timely provide Complainant and the Presiding Officer the “names of the expert and other witnesses” Respondent intends to call at hearing. OALJ Index Document 18 at 2; *see also* 40 C.F.R. § 22.19(a). Instead, Respondent Hoggan lists two unnamed witnesses as “Representative of PCG” and “Representative of Cambia,” effectively preventing Complainant from being able to adequately prepare for hearing. OALJ Index Document 28 at 1-2.

Respondent could have remedied this error at any time. Respondent could have unilaterally updated his prehearing exchange by February 15, 2019, with the names of these representatives without providing any justification for the delay. He did not, even though Respondent knew the names of his witnesses’ employers by September 24, 2018, more than four months before this deadline. Further, between February 15, 2019, and April 15, 2019, Respondent could have moved to update his exchange with this information based on a showing of good cause. Again, he did not. As of April 15, 2019, Respondent may only update his prehearing exchange with this information under “extraordinary circumstances.” As of the filing of this Motion, he has not.

Pursuant to Section 22.22(a)(1) of the Rules of Practice, as modified by the Presiding Officer’s Order, Respondent’s failure to list the names of the intended witnesses means “the Presiding Officer shall not admit the . . . testimony into evidence” unless Mr. Hoggan can explain his reasons “for failing to exchange the required information” and show that he “provided the required information to all other parties as soon as [he] had control of the information,” or sufficiently explain why he did not do so. *See* OALJ Index Document 38 at 1. With the hearing a month away, Mr. Hoggan must demonstrate “extraordinary circumstances” to have newly-named witnesses testify at hearing. *Id.*

Respondent has not and cannot demonstrate that “extraordinary circumstances” exist for his failure to disclose the names of his intended witnesses to Complainant and the Presiding Officer. It has always been within Respondent’s control to determine which “representatives” he intends to call. Yet in continuing disregard for the Presiding Officer’s Orders and admonitions, he has either intentionally delayed doing so or delayed in providing this information to Complainant. The Presiding Officer provided ample time for Mr. Hoggan to name his witnesses, but he has chosen not to do so. No extraordinary circumstances prevented Mr. Hoggan from providing Complainant the names of his unnamed witnesses. Therefore, their testimony cannot be admitted under Section 22.22(a) and the Presiding Officers’ Orders, and such testimony “is clearly inadmissible for any purpose” in this proceeding. *VSS International, Inc.*, 2019 WL 1760743 at \*2.

Moreover, Respondent’s continued failure to provide Complainant the names of these representatives materially prejudices Complainant’s ability to prepare to examine the unnamed witnesses at hearing. If Complainant doesn’t have the witnesses’ names, Complainant cannot meaningfully review over 1500 pages of Respondents’ financial information to determine which financial transactions these unnamed witnesses were involved in. Without this information, Complainant is unable to prepare cross examinations of Respondent’s witnesses at hearing. Allowing Respondents to call these witnesses at hearing, after “strategically waiting” to provide Complainant the witnesses’ names, would unfairly prejudice the Complainant and “would in effect make the prehearing exchange deadlines meaningless.” *99 Cents Only Stores*, 2009 WL 1900069 at \*7 n2.

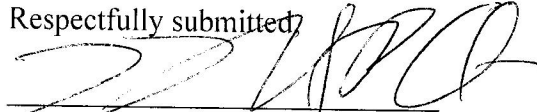
### **III. CONCLUSION**

Absent Respondent demonstrating “extraordinary circumstances,” the Rules of Practice and the Presiding Officer’s Orders prohibit testimony from Respondent Kent Hoggan’s unnamed

witnesses, and Complainant respectfully requests the Presiding Officer exclude the testimony from this proceeding.

May 3, 2019  
Date

Respectfully submitted,



Matthew Castelli, Attorney

(303) 312-6491, castelli.matthew@epa.gov

Charles Figur, Senior Attorney

(303) 312-6915, figur.charles@epa.gov

U.S. Environmental Protection Agency, Region 8

1595 Wynkoop Street (8ENF-L)

Denver, CO 80202

Counsel for Complainant

**CERTIFICATE OF SERVICE**

I certify that the foregoing COMPLAINANT'S MOTION IN LIMINE TO EXCLUDE TESTIMONY FROM RESPONDENT KENT HOGGAN'S UNNAMED WITNESSES, in In the Matter of Kent Hoggan and Frostwood 6 LLC, Respondents, Docket No. CWA-08-2017-0026, dated May 3, 2019, was sent this day in the following manner to the addressees listed below:

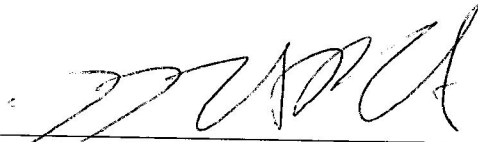
Copy by OALJ E-Filing System to:

Headquarters Hearing Clerk    Mary Angeles  
U.S. Environmental Protection Agency  
Office of Administrative Law Judges  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

Presiding Officer                The Honorable Susan L. Biro  
U.S. Environmental Protection Agency  
Office of Administrative Law Judges  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

Copy by email to:

Attorney for Respondents    David W. Steffensen, Esq.  
Law Office of David W. Steffensen, P.C.  
4873 South State Street  
Salt Lake City, UT 84107  
Email: dave.dwslaw@me.com



Matthew Castelli, Attorney  
U.S. Environmental Protection Agency, Region 8  
Legal Enforcement Program  
1595 Wynkoop Street  
Denver, CO 80202  
Tel.: 303-312-6491  
Email: castelli.matthew@epa.gov

Dated: May 3, 2019