

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY



BEFORE THE ADMINISTRATOR

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IN THE MATTER OF)
)
MERCURY VAPOR PROCESSING) DOCKET NO. RCRA-05-2010-0015
TECHNOLOGIES, INC., a/k/a)
RIVER SHANNON RECYCLING, AND)
LAURENCE C. KELLY,)
)
RESPONDENTS)

ORDERS ON PARTIES' MOTIONS TO SUPPLEMENT PREHEARING EXCHANGES,
COMPLAINANT'S CROSS MOTION FOR RULING REGARDING
ADMISSIBILITY OF TESTIMONY AND EXHIBITS, AND
COMPLAINANT'S MOTION TO AMEND PROPOSED PENALTY

I. INTRODUCTION

On April 23, 2010, the United States Environmental Protection Agency ("EPA" or "Agency"), Region 5 ("Complainant"), initiated this proceeding by filing a Complaint and Compliance Order ("Complaint") against Mercury Vapor Processing Technologies, Inc., a/k/a River Shannon Recycling ("Respondent MVPT"), pursuant to its authority under Section 3008 of the Solid Waste Disposal Act, as amended, also known as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (collectively referred to as "RCRA"), 42 U.S.C. § 6928. Pursuant to the Prehearing Order issued by the undersigned on June 15, 2010, the initial prehearing exchange in this proceeding was completed on November 10, 2010, when Complainant filed a rebuttal to the Initial Prehearing Exchange filed by Respondent MVPT through its representative, Laurence Kelly. Upon leave granted by the undersigned, Complainant subsequently filed an Amended Complaint and Compliance Order adding Mr. Kelly ("Respondent Kelly") as a party to this proceeding. Thereafter, Respondents filed a Motion to Supplement Respondents' Pre-Hearing Exchange on March 28, 2011, which the undersigned granted by Order dated May 5, 2011.

On June 8, 2011, Complainant filed a Motion for Leave to File First Supplemental Prehearing Exchange Instanter ("Complainant's First Motion to Supplement" or "C's First Motion") and a copy of its First Supplemental Prehearing

Exchange.^{1/} On July 5, 2011, the undersigned received Respondents' Objections to Complainant's First Supplemental Prehearing Exchange ("Respondents' Objections" or "Rs' Objections"), to which Respondents attached seven photographs identified as Respondent Pictures #1-7. On July 7, 2011, Complainant filed a Reply to Respondents' Objections to Complainant's First Supplemental Prehearing Exchange And, Alternatively, Cross Motion for Ruling Regarding Admissibility of Testimony and Exhibits ("Complainant's Reply" or "C's Reply").

Complainant subsequently filed motions for leave to file second and third supplemental prehearing exchanges on June 24, 2011 ("Complainant's Second Motion to Supplement"), and July 8, 2011 ("Complainant's Third Motion to Supplement"), respectively, and copies of its second and third supplemental prehearing exchanges. Complainant also filed a Motion to Amend Proposed Penalty on July 8, 2011. To date, Respondents have not filed responses to these motions.

On July 8, 2011, Respondents moved for leave to file a supplement to their prehearing exchange ("Respondents' Second Motion to Supplement") and filed copies of the proposed exhibits identified in their Motion. On July 12, 2011, Complainant filed a Response and Objection to Respondents' Motion to Supplement their Prehearing Exchange ("Complainant's Response" or "C's Response"). To date, Respondents have not filed a reply.

I will first address the parties' motions to supplement their prehearing exchanges and then address Complainant's Motion to Amend Proposed Penalty.

II. PARTIES' MOTIONS TO SUPPLEMENT PREHEARING EXCHANGES

A. Applicable Rules

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), 40 C.F.R. §§ 22.1-22.32. Section 22.19 of the Rules of Practice, 40 C.F.R. § 22.19, sets forth the requirement that parties file prehearing exchanges of information. Pursuant to this provision, each party is obligated to submit, in accordance with a prehearing order issued by the presiding Administrative Law Judge, "[t]he names of . . . any witnesses it intends to call at the hearing, together with a

^{1/} Complainant subsequently filed an Errata to Complainant's First Supplemental Prehearing Exchange, in which Complainant modified the descriptions of three proposed exhibits identified as Items 13, 15, and 16 in its First Supplemental Prehearing Exchange.

brief narrative summary of their expected testimony," and "[c]opies of all documents and exhibits which it intends to introduce into evidence at the hearing." 40 C.F.R. § 22.19(a).

Section 22.19 also requires a party to promptly supplement its prehearing exchange when the party learns that the information therein is incomplete, inaccurate, or outdated. 40 C.F.R. § 22.19(f). The Rules of Practice further provide at Section 22.22 that:

The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value If, however, a party fails to provide any document, exhibit, 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 document, exhibit, or 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).^{2/}

B. Complainant's First Motion to Supplement

Complainant filed its First Motion to Supplement on June 8, 2011, seeking leave to file a supplemental prehearing exchange containing both additional proposed witnesses^{3/} and additional

^{2/} Pursuant to this provision, the Order Scheduling Hearing issued by the undersigned on November 19, 2010, advises that the parties retain the right to supplement their prehearing exchanges no later than 15 days prior to the hearing date. The undersigned also directed the parties during a conference call held on May 19, 2011, to file any motions to supplement their prehearing exchanges no later than July 8, 2011.

^{3/} In its First Motion to Supplement, Complainant identifies three proposed witnesses it seeks to add to its prehearing exchange: Mr. Mark D. Ewen, Principal and Chief Operations Officer at Industrial Economics, Inc.; Mr. William K. Graham, P.E.; and Mr. Leonard Worth, President of Fluorecycle, Inc. In the copy of its First Supplemental Prehearing Exchange, however, Complainant names a fourth additional proposed witness, James K. Morris of the Illinois Environmental Protection Agency ("IEPA"), and provides a summary of Mr. Morris's expected testimony.

proposed exhibits.^{4/} C's First Motion at 2-4. In support, Complainant asserts that it filed the Motion prior to the filing deadlines imposed by the Rules of Practice and the undersigned. *Id.* at 4. Complainant also contends that its Motion complies with the requirement set forth at Section 22.20(f) of the Rules of Practice, 40 C.F.R. § 22.20(f), that a party supplement its prehearing exchange upon learning that the information therein is incomplete, inaccurate, or outdated. *Id.* Complainant claims that "EPA has continued to investigate the facts of this matter" since Complainant filed the Complaint on April 23, 2010, and that "EPA has acquired new information during the course of its investigation that bears on the allegations in the [Complaint] and Respondents' liability." *Id.* at 4-5. Complainant further contends that its prehearing exchange is incomplete without the additional witnesses and exhibits proposed in its First Supplemental Prehearing Exchange. *Id.* at 6.

Finally, Complainant argues that it filed the First Motion to Supplement nearly two months prior to the hearing in this matter, providing ample time for Respondents to review the information. C's First Motion at 5. Complainant further argues that "Respondent(s) are, or should be, already specifically aware of" each of the exhibits proposed in its First Supplemental Prehearing Exchange. *Id.* Thus, Complainant claims, Respondents will suffer no prejudice from the addition of the proposed exhibits provided in its First Supplemental Prehearing Exchange. *Id.*

Pursuant to Sections 22.16(a)^{5/} and 22.22(a) of the Rules Practice, 40 C.F.R. §§ 22.16(a) and 22.22(a), Respondents subsequently submitted Objections to Complainant's First Supplemental Prehearing Exchange, wherein Respondents object to two of the proposed witnesses and eight of the proposed exhibits identified by Complainant in its First Motion to Supplement on the grounds that Respondents find this proposed evidence to be irrelevant, unreliable, unduly repetitious, or of no probative value. Rs' Objections at 1. Among other objections, Respondents maintain that the proposed testimony of Mr. Graham and a number of the proposed exhibits relate to Spent Lamp Recycling Technologies, which is not a named party in this proceeding. *Id.* at 1-2, 4. Accordingly, Respondents contend, such proposed evidence is irrelevant in this matter. *Id.*

^{4/} Both Complainant's First Motion to Supplement and the copy of Complainant's First Supplemental Prehearing Exchange identify 20 proposed exhibits to be added.

^{5/} Section 22.16(a) of the Rules of Practice, 40 C.F.R. § 22.16(a), governs motions and responsive filings in this proceeding.

Respondents also object to the proposed exhibit identified as Item 16 in Complainant's First Motion to Supplement and described as the "U.S. EPA Inspection report on the current conditions of the Riverdale Warehouse located at 13605 S. Halsted Street, Riverdale, Illinois, dated May 26, 2011, and accompanying photograph log." Rs' Objections at 2. Respondents contend that this proposed exhibit is irrelevant and lacks probative value on the grounds that River Shannon Recycling "relinquished this property back to the owner in December 2008," more than three years prior to the inspection conducted by EPA on May 26, 2011. *Id.* at 2-3. Thus, Respondents contend, the condition of the property as observed by EPA during its inspection is not representative of the condition of the property at the time River Shannon Recycling vacated in December 2008. *Id.* In order to "depict the true and accurate condition [of] the building" in December 2008, Respondents attached Respondent Pictures #1-7 to their Objections. *Id.* at 3.

On July 7, 2011, Complainant filed a Reply, in which Complainant maintains that its First Motion to Supplement should be granted on the grounds that it was timely filed; that it complied with the requirements of Sections 22.16, 22.19, and 22.22 of the Rules of Practice, 40 C.F.R. §§ 22.16, 22.19, and 22.22; that its First Supplemental Prehearing Exchange was filed as a matter of right; and that Respondents fail to identify any bases for denial of the Motion or, in fact, request the denial of the Motion. C's Reply at 1-6. Rather, Complainant maintains, Respondents object to the admissibility of the proposed evidence under Section 22.22(a) of the Rules of Practice, 40 C.F.R. § 22.22(a), which renders Respondents' Objections as a motion *in limine*. C's Reply at 6-7. Complainant argues that, if the undersigned treats Respondents' Objections as a motion *in limine*, it should be denied because the proposed testimony and exhibits contained in its First Supplemental Prehearing Exchange are admissible. C's Reply at 8. In the event that such motion is denied, Complainant moves for a "Permissive Order *in Limine*" affirmatively finding that the proposed testimony and exhibits are admissible. C's Reply at 16.

As Complainant correctly points out, Respondents' Objections may more appropriately be characterized as a motion *in limine*. A motion *in limine* is the proper vehicle for preventing proposed testimony or exhibits from being introduced at hearing on the basis that it does not satisfy the standard for admissibility set forth at Section 22.22(a)(1) of the Rules of Practice, 40 C.F.R. § 22.22(a)(1). As noted above, Section 22.22(a)(1) provides that the presiding Administrative Law Judge "shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value" 40 C.F.R. § 22.22(a)(1).

Regardless of the characterization of Respondents' Objections, I find that Respondents, appearing *pro se*, have failed to adequately demonstrate at this stage of the proceeding that the proposed testimony and exhibits contained in Complainant's First Supplemental Prehearing Exchange do not satisfy the standard for admissibility set forth at Section 22.22(a)(1) of the Rules of Practice. Nevertheless, I decline to render any evidentiary rulings until the proposed testimony and exhibits are proffered by Complainant at the hearing in this case. Thus, Complainant shall be afforded the opportunity at the hearing to demonstrate the admissibility of the proposed testimony and exhibits at issue. Respondents are free to renew their objections at that time. In accordance with the foregoing discussion, Complainant's Cross Motion for Ruling Regarding Admissibility of Testimony and Exhibits is deemed to be moot.

Upon consideration, I find that Complainant's First Motion to Supplement and its First Supplemental Prehearing Exchange comply with the requirements of the Rules of Practice and the Orders issued in this proceeding. Accordingly, Complainant's First Motion to Supplement is hereby **GRANTED**.

C. Complainant's Second and Third Motions to Supplement

On June 24, 2011, Complainant filed a Second Motion to Supplement and a copy of its Second Supplemental Prehearing Exchange, in which Complainant identifies seven additional proposed exhibits. Complainant subsequently filed a Third Motion to Supplement and a copy of its Third Supplemental Prehearing Exchange on July 8, 2011, in which Complainant identifies six additional proposed exhibits and four proposed demonstrative exhibits. To date, Respondents have not filed responses.

Upon consideration, I find that Complainant's Second and Third Motions to Supplement and its Second and Third Supplemental Prehearing Exchanges comply with the requirements of the Rules of Practice and the Orders issued in this proceeding. Accordingly, Complainant's Second and Third Motions to Supplement are hereby **GRANTED**.

D. Respondents' Second Motion to Supplement

Respondents filed a Second Motion to Supplement on July 8, 2011, seeking to supplement their prehearing exchange with two additional proposed witnesses, Ms. Mary Allen of the Solid Waste Agency of Northern Cook County and Mr. Gary Westefer of EPA, and three additional proposed exhibits. Respondents simultaneously filed copies of the additional proposed exhibits. On July 12, 2011, Complainant filed a Response, in which Complainant objects to Respondents' Second Motion to Supplement on the basis that Respondents failed to provide summaries of Ms. Allen and Mr.

Westefer's expected testimony, as required by Section 22.19(a)(2)(i) of the Rules of Practice, 40 C.F.R. § 22.19(a)(2)(i). C's Response at 2. Complainant contends that, without such summaries, Complainant is unable to prepare its case as to those witnesses' testimony. *Id.* at 3. Accordingly, Complainant requests that Respondents' Second Motion to Supplement be denied with respect to the additional proposed witnesses and that Respondents be barred from calling Ms. Allen and Mr. Westefer to testify at the hearing. *Id.*

As discussed above, Section 22.19(a) of the Rules of Practice requires each party to submit, in accordance with a prehearing order issued by the presiding Administrative Law Judge, "[t]he names of . . . any witnesses it intends to call at the hearing, together with a brief narrative summary of their expected testimony," and "[c]opies of all documents and exhibits which it intends to introduce into evidence at the hearing." 40 C.F.R. § 22.19(a). Pursuant to Section 22.19(a)(1), "any witness whose name and testimony summary has not been included in prehearing information exchange shall not be allowed to testify." 40 C.F.R. § 22.19(a)(1).

Here, Complainant correctly points out that Respondents failed to provide summaries of Ms. Allen and Mr. Westefer's expected testimony with their Second Motion to Supplement. I note, however, that Respondents also filed a Request for Execution of Subpoenas concurrently with their Second Motion to Supplement, as well as an Amended Request for Execution of Subpoenas shortly thereafter, and that Respondents described the expected testimony of Ms. Allen and Mr. Westefer in connection with those requests. I find that these explanations sufficiently notify Complainant of the expected testimony of Ms. Allen and Mr. Westefer, such that Complainant has ample opportunity to prepare to address their testimony if presented at the hearing.

Thus, I find that Respondents' Second Motion to Supplement sufficiently complies with the requirements of the Rules of Practice and the Orders issued in this proceeding. In view of the foregoing discussion, Respondents' Second Motion to Supplement is hereby **GRANTED**.

III. COMPLAINANT'S MOTION TO AMEND PROPOSED PENALTY

The Amended Complaint proposes the assessment of a civil administrative penalty in the amount of \$743,293 against Respondents for the violations alleged therein. On July 8, 2011, Complainant filed a Motion to Amend Proposed Penalty ("Complainant's Motion to Amend Penalty" or "C's Motion to Amend Penalty"), in which Complainant seeks to revise the amount of the proposed penalty from \$743,293 to \$120,000 based upon Complainant's review of financial information provided by

Respondents in connection with their ability to pay a civil penalty in this proceeding. C's Motion to Amend Penalty at 1. Complainant also "reserves the right to conform its final proposed penalty after hearing to the evidence in the administrative record after the record is closed." *Id.* To date, Respondents have not filed a response to Complainant's Motion to Amend Penalty.

Upon consideration, Complainant's Motion to Amend Penalty is hereby **GRANTED**. As requested by Complainant, the Amended Complaint shall remain in force and the original proposed penalty amount of \$743,293 will hereafter be substituted with the revised proposed amount of \$120,000.

IV. CONCLUSION

To summarize, I rule as follows:

Complainant's First Motion to Supplement is granted.

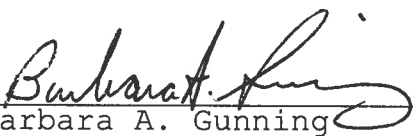
Complainant's Cross Motion for Ruling Regarding Admissibility of Testimony and Exhibits is deemed to be moot.

Complainant's Second Motion to Supplement is granted.

Complainant's Third Motion to Supplement is granted.

Respondents' Second Motion to Supplement is granted.

Complainant's Motion to Amend Penalty is granted.


Barbara A. Gunning
Administrative Law Judge

Dated: July 15, 2011
Washington, DC

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**In the Matter of Mercury Vapor Processing Technologies, Inc., a/k/a River Shannon Recycling,
and Laurence C. Kelly, Respondent.
Docket No. RCRA-05-2010-0015**

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Orders on Parties' Motions to Supplement Prehearing Exchanges, Complainant's Cross Motion for Ruling Regarding Admissibility of Testimony and Exhibits, and Complainant's Motion to Amend Proposed Penalty**, dated July 15, 2011, issued by Barbara A. Gunning, Administrative Law Judge, was sent on this 15th day of July 2011, in the following manner to the addressees listed below.



Mary Angeles
Legal Staff Assistant

Original and One Copy by Facsimile and Pouch Mail to:

LaDawn Whitehead
Regional Hearing Clerk
U.S. EPA, Region V, MC-E-19J
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Copy by Facsimile and Regular Mail to:

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Dated: July 15, 2011
Washington, DC