

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of

D.A. Stuart Company,

Respondent

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Docket No. RCRA-05-2006-0022

Order Granting Complainant's Motion For Leave to Amend Complaint

I. Introduction

This proceeding under the authority of Section 3008(a) of the Resource Conservation and Recovery Act ("RCRA" or "the Act"), 42 U.S.C. § 6928(a), was commenced on September 28, 2006, by a complaint issued by the Chief, Enforcement and Compliance Assurance Branch, Waste, Pesticides and Toxics Division, U.S. Environmental Protection Agency, Region 5 ("Complainant"), charging D.A. Stuart Company ("Stuart" or "Respondent") with violations of the Act and regulations issued by the State of Illinois found at 35 IAC Part 703 et seq. The complaint alleged violations in four counts and proposed to assess Stuart a civil penalty totaling \$582,644.

Respondent, through counsel, filed an answer on October 30, 2006, denying the alleged violations and requesting a hearing. On March 13, 2007, the Administrative Law Judge ("ALJ") issued a prehearing order directing the parties to exchange prehearing information on or before April 20, 2007. Both parties filed their prehearing exchanges by April 20th.

On April 20, 2007, Complainant filed a Motion for Leave to File Amended Complaint ("Motion to Amend") along with the Memorandum of Law in Support thereof ("Memorandum") and the proposed amended complaint. Complainant proposes to eliminate Counts 2 through 4 of the original complaint; add a new Count 2 alleging a violation of 35 IAC 703.121 and RCRA Section 3005-basically operating a TSD w/o a permit- based upon the same factual allegations as former Counts 2 through 4; conform assertions in the complaint with facts and information allegedly obtained since the filing of the original complaint; make organizational changes to the order of the paragraphs; and reduce the proposed penalty to \$336,350.

Respondent filed a Response Opposing Complainant's Motion for Leave to File Amended Complaint ("Response"), dated May 7, 2007. Respondent contends that Complainant's action of filing an amended complaint constitutes a bad faith attempt to preserve the penalty demand proposed for Counts 2 and 3 of the original complaint. Further, Respondent objects to the Compliance Order which also appeared in the original complaint. Because Complainant admits Respondent is in compliance with most or all regulatory obligations cited in

the amended complaint, Respondent argues that the “Compliance Order provides no fair notice of what actions are being demanded and should be stricken.”(Response at 1).

Complainant filed a Memorandum of Law in Reply to Respondent’s Response Opposing Motion for Leave to File Amended Complaint (“Reply”), dated May 11, 2007 and asserts that Respondent supported its claim of bad faith with mere speculations but no evidence. Further, Complainant notes that case law sets precedent that the Motion For Leave to Amend should be granted. In conclusion, Complainant contends that Respondent cannot argue against the Compliance Order because it is the same Compliance Order filed with the original complaint so there is no amendment to contest.

II. Arguments of the Parties

A. Complainant’s Motion For Leave to Amend Complaint

Pursuant to Consolidated Rules 22.14(c) and 22.16(a)(4), Complainant filed its Motion For Leave to Amend the Complaint allegedly to more accurately and correctly describe the violations alleged and assess a revised proposed penalty reflecting the facts and circumstances now known to Complainant (Memorandum at 1). Count 1 (improper manifests) remains unchanged from the original complaint except for a recalculation of the penalty (id. at 3). Count 2 replaces Counts 2 through 4¹ of the original complaint and alleges that Respondent violated RCRA by failing to have a permit for storage of hazardous waste, or an exemption permitting the storage of hazardous waste without a permit. Pursuant to 35 IAC 722.134 [40 C.F.R. § 262.34], generators of hazardous waste are allowed an exemption from the requirement of obtaining a hazardous storage waste permit provided they fulfill the conditions listed in 35 IAC 722.134(a)(1)-(4) (id.). These conditions include complying with Subpart J of 35 IAC 725 (if hazardous waste is placed in tanks); Subpart D of 35 IAC 725 (contingency plans and emergency procedures); and with 35 IAC 725.116 (personnel training) (id. at 3-4). Complainant only sought penalties for the violation of the Illinois hazardous waste storage facility permitting requirement under 35 IAC 703.121 and Section 3005 of RCRA and not penalties for the lack of a contingency plan, training requirements, or for violations of the Illinois tank rule (id. at 4). This penalty assessment, according to Complainant, avoids a disproportionately high penalty. Count 2 does contain allegations concerning tank system requirements, contingency plans, and hazardous waste training requirements relating to the same conduct alleged in Counts 2 through 4 of the original complaint but has been modified to reflect the information Complainant allegedly obtained since the filing of the original complaint. All other counts in the original complaint, such as various treatment, storage and disposal provisions of RCRA have been removed (id. at 4).

Complainant cites the familiar standard for granting leave to amend a complaint, i.e., leave to amend is liberally granted where the interests of justice are thereby served and no

¹ Count 2 alleged a failure to perform a tank assessment by failing to provide evidence of proper design and installation of the tank system; Count 3 alleged a failure to update and maintain a contingency plan; and Count 4 alleged a failure to comply with hazardous waste training requirements.

prejudice to the opposing party results (Memorandum at 5; citing *In the Matter of City of Orlando, FL*, Docket No. CWA-04-501-99, 1999 EPA ALJ LEXIS 63, *7 (ALJ August 24, 1999); see also *Port of Oakland and Great Lakes Dredge and Dock Company*, 4 E.A.D. 170, 209 (EAB 1992) (Where the Environmental Appeals Board ruled that principles of administrative pleadings are liberally construed and easily amended). Complainant also emphasizes that if “any apparent or declared reason, such as undue delay, bad faith or dilatory motive on the movant’s part, repeated failure to cure deficiencies by previous amendment, undue prejudice, or futility of amendment” are found, the motion will be denied (id.; citing *City of West Chicago*, Docket No. CWA-5-99-013, 2000 EPA ALJ LEXIS 17, *4 (ALJ Feb. 25, 2000)).

Complainant contends that its Motion to Amend should be granted because no hearing has been scheduled and there will be no undue delay. Complainant emphasizes that Respondent was notified of the proposed amendment by letter, dated January 23, 2007, and alleges that it “moved to amend promptly after the Order of Designation of Judge Nissen.” (Memorandum at 6). Complainant notes that case law permits amendment of a complaint after the prehearing exchange has been filed but prior to the scheduling of a hearing (id., citing *In the Matter of Neoplan USA Corp.*, Docket No. EPCRA-VIII-94-04, 1996 EPA ALJ LEXIS 93, *8). Complainant says new information was discovered by Respondent’s disclosure after the filing of the original complaint, resulting in the penalty being lowered and the number of counts being reduced. Although the disclosure referred to is not explained, the result, according to Complainant, is that Respondent will not be burdened with additional investigations or witnesses as the “factual terrain” has not changed (id. at 6-7). Further, Complainant asserts that the motion is appropriate because it was filed before a hearing date was scheduled, permitting Respondent to raise a defense (id. at 7, citing *In the Matter of Cavco Industries, LLC*, Docket No. EPCRA-9-2000-0018, 2001 EPA ALJ LEXIS 37, *4 (ALJ July 2, 2001). Complainant claims that Respondent will not be unduly burdened because the amendments are minor changes in the facts alleged to support the violations. Further, since Complainant already alleged Respondent’s noncompliance with the tank, contingency plan, and personnel training standards in the original complaint, Respondent suffers no lack of notice, bad faith or dilatory motive by Complainant.

Complainant points out that judicial and administrative precedent support the conclusion that compliance with all of the conditions of 40 C.F.R. § 262.34 [35 IAC 722.134] is necessary to avoid storage facility status and the performance standards of part 264 and 265 (Motion at 8 (citing *United States v. Baytank, Inc.*, 934 F.2d 599, 607 (5th Cir. 1991) (Where court held that a violation of the prohibition against storing hazardous waste without a permit could be found either by proving storage for greater than 90 days, or by proving storage for fewer than 90 days in noncompliance with any of the other safe storage conditions set forth in 40 C.F.R. 262.34(a)); see also *In re: Gordon Redd Lumber Company*, 5 E.A.D. 301 (EAB 1994) (Where EAB found that because respondent failed to comply with Subparts C and D and hazardous waste training conditions for an exemption, the exemption did not apply); *In the Matter of National-Standard Company*, 1984 EPA ALJ LEXIS 22 (ALJ May 8, 1984) (finding that noncompliance with any of the four provisos in Section 262.34(a) does not entitle respondent to the benefits of the provisos).

Complainant concludes by contending that the amended complaint correctly pleads the violations at issue and is therefore, not futile. Complainant cites to case law arguing that a

motion to amend is only futile when the complaint would not survive a motion to dismiss or if the claim is frivolous (Memorandum at 10; citing *In the Matter of Jerry L. Korn and Dairy Health*, Docket No. FIFRA-10-2000-0061 (ALJ July 13, 2001)). Further, Complainant argues that the court must satisfy itself that the claim is colorable and not frivolous. Accordingly, Complainant contends that its claim that Respondent violated RCRA by operating without a permit or interim status and without complying with each condition of the permitting requirements exemption is colorable.

B. Respondent's Response

Respondent recognizes, pursuant to Consolidated Rule 22.14(c) and by analogy to the Federal Rules of Civil Procedure, that amendments to pleadings are not permitted when there is undue delay, bad faith, dilatory motive on the part of the movant, or undue prejudice to the opposing party (Response at 2; citing *In the Matter of Strong Steel Products, LLC*, 2003 WL 22534560 (E. P.A., ALJ, October 27, 2002)). Respondent argues that Counts 2 and 3, of the original complaint, made up 97.5% of the penalty proposed and that the prehearing exchange submitted proved that Complainant was unlikely to prevail on these counts (*id.* at 3). In its answer, Respondent raised the affirmative defense of statute of limitations (28 U.S.C. § 2462) against Count 2, which Complainant addressed in its prehearing exchange only by noting that Count 2 is “not a violation of the substantive regulation governing tank system assessments, but is rather a violation of permitting requirements based on failure to meet requirements for a permit exemption.” (*id.*, 14). Respondent notes that Complainant failed to make an argument that Count 2 of the complaint as originally pled is not time barred (*id.*). Respondent contends that Complainant is trying to sidle around the statute of limitations defense by claiming that there was a violation of permitting requirements because of a failure to meet requirements for a permit exemption rather than its failure to obtain the tank assessment. Respondent notes that the ALJ directed Complainant to respond to the statute of limitations defense and that Complainant has in effect acknowledged that its tank assessment claim was time-barred by confining its arguments to the amended complaint.² In any event, Respondent says it intends to vigorously pursue the statute of limitations *vis-à-vis* the tank assessment allegations even if the ALJ allows Complainant to re-plead its case (Response at 3, note 1).

For Count 3, Complainant alleges that Respondent did not have a proper contingency plan in place as of November 5, 2004. In response, Respondent provided its contingency plan in place at that time. Complainant has acknowledged that this plan is in compliance (Prehearing Exchange at 11). Accordingly, Respondent claims that Complainant is trying to replead the same facts regarding Counts 2 and 3 in order to keep extant a majority of the proposed penalty. Respondent contends that this is bad faith on the part of Complainant and should not be sanctioned.

² Response at 3. Relying on the continuing violation theory, i.e., violation of a continuing requirement tolls the running of the statute of limitations, Complainant says that it does not concede that any of its original claims are time-barred (Reply at 3). As indicated (*supra* note 1), Count 2 alleges a failure to obtain and provide evidence of proper design and installation of tank system. Because this relates to tank installation, it is more analogous to a one time rather than a continuing violation.

Moreover, Respondent contends that the Compliance Order, which is the same one found in the original complaint, provides no fair notice of the alleged ongoing violations and therefore, is in contravention of 42 U.S.C. § 6928(a)(3) and due process. According to Respondent, the Compliance Order is generic and provides no notice of the alleged violations or the specific actions being demanded (Response at 4). Respondent point out that Complainant has admitted that Respondent's contingency plans are in compliance with the applicable regulations (Complainant's prehearing exchange at 11) and in compliance with the tank inspection requirements (Complainant's prehearing exchange at 12) and argues that the Compliance Order should be stricken regardless of the missing hazardous waste training record provided for by Chris Hamaker, who left D.A. Stuart's employment on January 20, 2004.³

C. Complainant's Reply

Complainant maintains that Respondent has failed to demonstrate bad faith on the part of Complainant. Complainant notes that administrative complaints are easily amended and that an objection based upon a claim of bad faith must show that the purpose of the amendment is to punish, harass, or gain unfair advantage (Reply at 2). While Complainant says that Respondent supports its claim of bad faith with only speculation that Complainant is "trying to sidle around the statute of limitations bar to prop up its unwarranted penalty demand," Complainant emphasizes that not only has the penalty been reduced, but that such assertions should be raised in the post-hearing briefs, not in Respondent's objection to a motion to amend (*id.*). Moreover, Respondent did not provide any facts proving that it is being punished, harassed or taken advantage of and that a reduction of the penalty and in the number of counts are proof to the contrary. Complainant provides case law which supports its argument that the motion to amend be allowed (*see Nassau County of Public Works, et al.*, Docket No. MPRSA-II-92-02, 1993 EPA ALJ LEXIS 386 (ALJ Sept. 11, 1992) (ALJ granted motion notwithstanding claim of bad faith based upon 100% proposed penalty increase filed after respondent rejected settlement for the amount sought in the original complaint); *In the Matter of Chem-Met Services, Inc.*, Docket No. RCRA-V-W-011-92, 1993 EPA ALJ LEXIS 278 (ALJ April 15, 1993) (Where ALJ found that the harm found did not rise to the level of prejudice and therefore, the motion to amend was granted).

Complainant rejects Respondent's argument that the original allegations are time- barred and argues that the defense is irrelevant in determining whether to grant leave to amend the complaint. Complainant asserts that a motion to amend is denied when a proposed amended complaint can not withstand a motion to dismiss (*id.* at 3 (citing *In the Matter of Asbestos Specialists, Inc.*, 4 E.A.D. 819, 830 (EAB 1993)). Complainant contends that Respondent is or was in continuing violation of RCRA and that a continuing violation tolls the statute of limitations (*id.* at 3-4).

³ This assertion is supported by the affidavit of Kristin Pelizza, dated May 3, 2007, who states that she has been employed as the Global Health Safety and Environmental Manager of D.A. Stuart Company, Inc since February of 2000, and that Mr. {"Chris"} Hamaker left his employment with D.A. Stuart on January 20, 2004.

In conclusion, Complainant argues that because it has not changed the proposed Compliance Order, it cannot be characterized as too general and/or unnecessary by Respondent simply because there is no amendment to contest. Further, the arguments made by Respondent, including the Declaration of Kristin Pelizza, are irrelevant in determining whether an amendment should be allowed. According to Complainant, Respondent should provide such information in its prehearing exchange.

III. Discussion

Pursuant to Consolidated Rule 22.14(c), after an answer has been filed, the complaint may only be amended by motion granted by the ALJ. Because there is no standard provided by the Consolidated Rules for granting a motion to amend, the Federal Rules of Civil Procedure, although not binding on administrative agencies, are looked to for guidance (*see In the Matter of Rogers Corp.*, Docket No. TSCA-I-94-1079, 1997 EPA ALJ LEXIS 20, *2, n.2 (citing *Oak Tree Farm Dairy, Inc. v. Block*, 544 F. Supp. 1351, 1356 n. 3 (E.D.N.Y. 1982); *In re Wego Chemical & Mineral Corporation*, TSCA Appeal No. 92-4, at 13 n. 10 (EAB 1993)). Specifically, Rule 15(a) of the Fed. R. Civ. P. provides that “leave [to amend] shall be freely given when justice so requires.” The Supreme Court interpreted the Rule to permit amendments in the absence of any apparent or declared reason, such as “undue delay, bad faith, or dilatory motive on the part of the movant . . . undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of the amendment . . .” *Foman v. Davis*, 371 U.S. 178, 182 (1962). The EAB stated that “the Board adheres to the generally accepted principle that ‘administrative pleadings are liberally construed and easily amended,’ and that permission to amend a complaint will ordinarily be freely granted.” (*In the Matter of Port of Oakland and Great Lakes Dredge and Dock Company*, 4 E.A.D. 170, 205 (EAB 1992) (citing *Yaffe Iron & Metal Co., Inc. v. U.S. Environmental Protection Agency*, 774 F.2d 1008, 1012 (10th Cir. 1985), affirming *In the Matter of Yaffe Iron & Metal Co., Inc.*, TSCA Appeal No. 81-2 (August 9, 1982).

The movant has the burden to show any reason for delay (*In the Matter of San Antonio Shoe, Inc.*, EPCRA Docket No. VI-501-S, 1992 EPA ALJ LEXIS 525, *6 (ALJ April 2, 1992) (citing *Vargas v. McNamera*, 608 F.2d 15, 19 (1st Cir. 1979)). According to Complainant, the information was not available to it before the filing of the original complaint (Memorandum at 6) While Complainant argues that there is no undue delay on its part [in moving to amend]⁴ and the information Complainant contends was not available prior to filing the original complaint is not clear, Respondent has not shown “prejudice” within the meaning of the rule warranting denial of the motion to amend. Firstly, Respondent’s claims of bad faith are not supported by any factual evidence. Secondly, in the words of *San Antonio Shoe*, supra, which in turn quotes *Cuffy v. Getty Refining & Marketing Co.*, 648 F. Supp. 802, 806 (D. Del. 1986): “It is obvious that an amendment designed to strengthen the movant’s legal position will in some way harm the opponent, but such harm does not arise to the level of prejudice such as to warrant denying the

⁴ Although Complainant’s assertion that it moved promptly to amend after the Order of Designation of Judge Nissen (ante at 3) may be questioned in view of the fact that the Order of Designation is dated January 29, 2007, and the Motion to Amend is dated April 20, 2007, as Complainant points out, it informed Respondent of its intention to amend the complaint by letter, dated January 23, 2007.

motion to amend.” Accordingly, the apparent fact that the proposed amended complaint is designed to strengthen Complainant’s contention that none of its claims are time-barred, it is not a reason for denying the Motion. Rather, prejudice within the meaning of the rule means unfairly disadvantaged or deprived in some way of an opportunity to prepare or present its defense. Here, Respondent has indicated that it intends to vigorously pursue its statute of limitations defense vis-à-vis the tank assessment allegations even if Complainant is permitted to re-plead its case, no hearing has been scheduled and Respondent will have ample opportunity to prepare and present its case. It follows that Complainant’s Motion for Leave to File Amended Complaint will be granted.⁵

ORDER

Good cause having been shown, Complainant’s Motion for Leave to File Amended Complaint is granted. Complainant will file the proposed Amended Complaint and Compliance Order within ten days from the date of this Order. Respondent will file any answer to the Amended Complaint within 20 days from the date of its service.

Dated this _____ day of May, 2007.

Spencer T. Nissen
Administrative Law Judge

⁵ The proposed Compliance Order, which is identical to that enclosed with the initial complain, will not be stricken, notwithstanding Respondent’s arguments that it fails to provide fair notice of what is required and deprives Respondent of due process.