

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII

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901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101
ENVIRONMENTAL PROTECTION AGENCY-REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF:

University of Kansas Medical Center
3901 Rainbow Blvd.
Kansas City, Kansas 66160

Docket No. RCRA-07-2006-0261

EPA ID No. KSD076274737

Respondent.

**COMPLAINANT’S REPLY TO RESPONDENT’S OBJECTION TO
COMPLAINANT’S MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT**

On April 16, 2007, the University of Kansas Medical Center (Respondent) filed an Objection to the Motion for Leave to File an Amended Complaint (Motion) filed by the United States Environmental Protection Agency Region 7 (EPA or Complainant). In accordance with Rule 22.16(b) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties (Rules), found at 40 C.F.R. § 22.16(b), EPA hereby submits this reply. For the reasons stated below, EPA asserts that Respondent’s objection is without merit and respectfully requests that this Court grant EPA’s Motion.

Rule 22.14(c) states that after the answer in a matter has been filed, the Complainant may amend the complaint only upon motion granted by the Presiding Officer. 40 C.F.R. § 22.14(c). Although there is no stated standard in the Rules for determining whether to grant an amendment, there are numerous administrative decisions that state that the general rule is that “administrative pleadings are liberally construed and easily amended.” *See, e.g., In the Matter of Port of Oakland and Great Lakes Dredge and Dock Co.*, 4 E.A.D. 170, 205 (EAB 1992), *cited in In the Matter of Service Oil Inc.*, 2006 EPA ALJ LEXIS 15, *11 (2006) *and in In the Matter of Joe W. Morgan, Inc.*, 2005 EPA ALJ LEXIS 32, *2-3 (2005).

Respondent cites to *Foman* for a list of circumstances in which it may be appropriate to deny leave to amend a complaint. In *Foman*, the Supreme Court stated that Federal Rule of Civil Procedure 15(a) (which governs Amended Pleadings) declares that leave to amend “shall be

freely given when justice so requires. ... If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*, 371 U.S. 178, 182 (1962). Therefore, "[i]n the absence of ... undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc., *the leave sought should, as the rules require, be freely given.*" *Id.* (emphasis added). None of the listed factors apply to this case.

Respondent claims that the proposed amendment to the Complaint "illustrates a dilatory motive on the part of EPA" because EPA should have known of the minor inaccuracies in the Complaint over the past seven months. Respondent also implies that EPA inappropriately delayed the disclosure of these inaccuracies. On the contrary, it was during the recent review of the evidence and preparation of its Prehearing Exchange that EPA discovered some minor discrepancies between the evidence and the Complaint. EPA took immediate steps to correct the problem by alerting Respondent's attorney to the discrepancies and by filing the motion to amend the Complaint. In contrast to Respondent's assertion, the changes in question do not affect the nature or number of counts in the original complaint, nor do they affect the total proposed penalty of this enforcement action. Instead, the changes are simply intended to clarify the location and number of solid waste containers that were observed during the inspection.

In addition, the changes in question to the original Complaint are based on information contained within the inspection report. Respondent has been in possession of a copy of this report since approximately May 4, 2006, as evidenced by the first page of Exhibit 18 of Respondent's Prehearing Exchange. Therefore, in contrast to Respondent's assertion, it is unlikely that Respondent will need to incur significant additional expenses as a result of the changes in question.

Respondent also alleges that these "significant substantive changes" will result in undue prejudice and undue delay in this proceeding if the Court grants EPA's motion. There is no delay caused by the amended Complaint. A hearing in this matter has not been scheduled. In addition, there is no undue prejudice caused by the amended Complaint. The Rules provide ample opportunity for Respondent to address the changes in question if Respondent feels it is necessary. If the court grants EPA's motion to file the amended complaint, Rule 22.15(e) allows Respondent to seek leave of the Court to amend its answer. The Prehearing Order issued by then-Presiding Judge Charneski on March 19, 2007 allows Respondent until May 7, 2007 to file a reply to EPA's prehearing exchange. Rule 22.19(f) also gives Respondent the opportunity to supplement its own prehearing exchange if it is somehow incomplete, inaccurate or outdated. As stated above, the changes in question do not substantively change the violations or the total calculated penalty and are based on information that has been in Respondent's possession since May 2006. Thus, the changes in question should not cause the hardships that Respondent claims.

Based on the foregoing, EPA respectfully requests that its Motion for Leave to File an Amended Complaint be GRANTED.

Respectfully Submitted,



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ATTORNEY FOR COMPLAINANT

CERTIFICATE OF SERVICE

I certify that on the date noted below I hand-delivered the original and one true copy of Complainant's Reply to Respondent's Objection to Complainant's Motion for Leave to File an Amended Complaint to the Regional Hearing Clerk, United States Environmental Protection Agency, 901 North 5th Street, Kansas City, Kansas 66101.

I further certify that on the date below I sent a true and correct copy of the same via certified mail, return receipt requested to:

The Honorable Susan L. Biro
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Mail Code 1900L / Ariel Rios Building
1200 Pennsylvania Ave. NW
Washington, D.C. 20460

and

Michael P. Comodeca
Spencer Fane Britt & Browne LLP
9401 Indian Creek Parkway, Suite 700
Overland Park, KS 66210-2005

Dated this 19th day of April, 2007.


Signature