

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

In the Matter of:)
Heritage-WTI, Inc.,) Docket No. CAA-05-2011-0012
Respondent.)

**ORDER GRANTING COMPLAINANT'S MOTION FOR LEAVE TO FILE
AMENDED COMPLAINT AND JOINT MOTION
FOR EXTENSION OF TIME TO FILE EXECUTED CAFO**

By Order dated June 3, 2011, the undersigned directed the parties to file a fully-executed Consent Agreement and Final Order ("CAFO") in this matter no later than June 30, 2011, based upon the parties' representations in their Second Joint Motion to Extend Alternative Dispute Process that they would be able to negotiate the terms of their settlement agreement and file a CAFO memorializing that agreement by that date.

Complainant subsequently filed a Motion for Leave to File Amended Complaint ("Motion to Amend") on June 20, 2011. The original Complaint, filed on December 22, 2010, alleges in two counts that Respondent violated Section 112(f)(4) of the Clean Air Act, 42 U.S.C. § 7412(f)(4), and the implementing regulations by discharging combustion gases containing dioxin/furan and mercury in excess of standards set forth in those regulations from May 11, 2010, through September 15, 2010. Complaint ¶¶ 35, 42. In the Motion to Amend, Complainant seeks leave to file an amended Complaint in order to modify the alleged period of violation on the basis that Respondent produced credible evidence during the parties' settlement negotiations demonstrating that it had complied with the emissions standards for dioxin/furan and mercury as of June 14, 2010, rather than September 15, 2010, as alleged in the Complaint. Complainant also seeks leave to file an amended Complaint in order to make "minor and clerical changes." Motion to Amend at 3. Complainant highlights the proposed modifications in a "draft redline/strikeout Amended Complaint" ("Draft Amended Complaint") attached to its Motion to Amend as Appendix A.¹ Motion to Amend at 1. One of the undersigned's staff attorneys confirmed on June 23, 2011, that Respondent does not object to the Motion to Amend.

Thereafter, on June 27, 2011, the parties filed a Joint Motion for Extension of Time to File Executed CAFO ("Joint Motion"). The parties represent in their Joint Motion that, "because of the unanticipated need to file an Amended Complaint" in this proceeding, the parties are unable to file a fully-executed CAFO by June 30, 2011. The parties further represent that, should the undersigned grant Complainant's Motion to Amend, the parties require additional time to obtain the appropriate signatures on the CAFO. Accordingly, the parties request an extension of

¹ I note that Paragraph 43 of the Draft Amended Complaint alleges that the period of violation for Count 1 ended on June 14, 2010, but that Paragraph 48 of the Draft Amended Complaint alleges that the period of violation for Count 2 ended on September 15, 2010, as alleged in the corresponding paragraph of the original Complaint. If Complainant intended to modify the alleged period of violation for Count 2 in the Draft Amended Complaint but inadvertently failed to do so, Complainant is advised to correct this error in the amended Complaint it files with the Regional Hearing Clerk.

time to file a fully-executed CAFO until July 18, 2011.

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 22.14(c) of the Rules of Practice authorizes the complainant to amend the complaint after the filing of the answer "only upon motion granted by the Presiding Officer." 40 C.F.R. § 22.14(c). The Rules of Practice do not, however, provide a standard for adjudicating such a motion. Accordingly, I may rely on the Federal Rules of Civil Procedure and federal court practice as guidance. *See, e.g., Euclid of Virginia, Inc.*, 13 E.A.D. 616, 657 (EAB 2008) ("[I]t is appropriate for Administrative Law Judges and the [Environmental Appeals Board] to consult the Federal Rules of Civil Procedure and Federal Rules of Evidence for guidance"); *Carroll Oil Company*, 10 E.A.D. 635, 649 (EAB 2002) ("In the absence of administrative rules on [a] subject, it is helpful to consult the Federal Rules of Civil Procedure as they apply in analogous situations.").

The FRCP adopt a liberal stance toward the amendment of pleadings, stating that "[t]he court should freely give leave [to amend a complaint] when justice so requires." Fed. R. Civ. P. 15(a)(2). In construing Rule 15(a), the Supreme Court has held that, "in the absence of . . . undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice to the opposing party . . . [or] futility of amendment," a motion for leave to amend pleadings should be granted. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

In the present proceeding, nothing in the record suggests that Complainant seeks leave to amend the Complaint for any of the above-described reasons. Moreover, Respondent does not object to the Motion to Amend. Accordingly, Complainant's Motion to Amend is hereby **GRANTED**.

Section 22.7(b) of the Rules of Practice authorizes the undersigned to grant an extension of time for filing a document "upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties." 40 C.F.R. § 22.7(b). Upon consideration, the parties' Joint Motion is hereby **GRANTED** for good cause shown. Accordingly, the parties shall file a fully-executed CAFO no later than **July 18, 2011**, with a **copy contemporaneously sent to the undersigned by facsimile or mail**.

FAILURE TO FILE THE CAFO IN A TIMELY MANNER MAY RESULT IN ENTRY OF AN ORDER OF DISMISSAL OR DEFAULT, AS APPROPRIATE, WITHOUT FURTHER NOTICE.



Susan L. Biro
Chief Administrative Law Judge

Dated: June 28, 2011
Washington, DC

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In the Matter of Heritage-WTI, Inc., Respondent
Docket No. CAA-05-2011-0012

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Granting Complainant's Motion For Leave To File Amended Complaint And Joint Motion For Extension Of Time To File Executed CAFO**, dated June 28, 2011, was sent this day in the following manner to the addressees listed below.

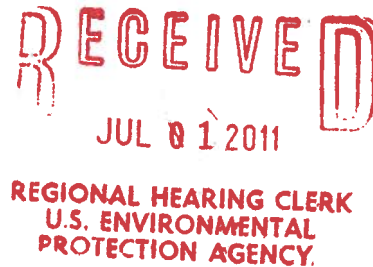


Maria Whiting-Beale
Staff Assistant

Dated: June 28, 2011

Original And One Copy By Pouch Mail To:

LaDawn Whitehead
Regional Hearing Clerk
U.S. EPA
77 West Jackson Boulevard, E-19J
Chicago, IL 60604-3590



Copy By Pouch Mail And Facsimile To:

John Matson, Esquire
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