

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III**

IN THE MATTER OF)

Eagle Petroleum - Plantation Road, LLC)
711 Pocahontas Avenue)
Roanoke, VA 24012)

Docket No. RCRA-03-2009-0206

VRH, LLC)
4101-B Plantation Road)
Roanoke, VA 24012)

Shree Ganesh, LLC)
4101 Plantation Road)
Roanoke, VA)

RESPONDENTS)

Turbo Food Mart)
4101 Plantation Road)
Roanoke, VA 24012)

FACILITY)

_____)

**COMPLAINANT'S MOTION FOR LEAVE TO FILE
AN AMENDED COMPLAINT**


Complainant, the Director of the Land and Chemicals Management Division of the U.S. Environmental Protection Agency Region III ("Complainant"), respectfully moves, pursuant to 40 C.F.R. §§ 22.14(c) and .16 of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/ Termination or Suspension of Permits* ("Consolidated Rules"), for an Order allowing the Complainant to file an Amended Complaint. Complainant has included a copy of the proposed Amended Complaint and a red-

line/strikeout version showing the proposed Amended Complaint's changes from the original Complaint for the Court's information. The accompanying Memorandum in Support of Complainant's Motion for Leave to File an Amended Complaint describes the changes that the proposed Amended Complaint would make to the original Complaint and provides the arguments in support of this Motion. Complainant has also included a proposed Order for the Presiding Officer's consideration should she agree to grant this Motion.

Complainant has spoken with Respondents Eagle Petroleum-Plantation Road, LLC and VRH, LLC about this Motion and can represent that they neither support nor oppose this Motion. Proposed Respondent Shree Ganesh, Incorporated was incorrectly listed as Shree Ganesh, LLC in the original Complaint and was not consulted about the proposed Motion to Amend because it is not yet a party to this action due to the incorrect name in the original Complaint.

Respectfully submitted,

Date: 4/30/10


James Heenehan
Sr. Assistant Regional Counsel
EPA, Region III

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FACILITY)

**MEMORANDUM IN SUPPORT OF COMPLAINANT'S MOTION FOR LEAVE
TO FILE AN AMENDED COMPLAINT**

In accordance with 40 C.F.R. §§ 22.16 of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/ Termination or Suspension of Permits* ("Consolidated Rules"), Complainant, Director of the Land and Chemicals Division of the U.S. Environmental Protection Agency Region III ("EPA" or "Complainant"), submits this Memorandum in Support of Complainant's Motion for Leave to File an Amended Complaint. Complainant has included both a copy of the proposed Amended Complaint and a red-line/strikeout version showing the proposed Amended Complaint's changes from the original Complaint in this case as Attachments A and B. The proposed Amended Complaint would be

issued pursuant to Section 9006 of the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (collectively “RCRA”), 42 U.S.C. § 6991e.

A. Introduction

On June 24, 2009, Complainant issued an Administrative Complaint, Compliance Order and Notice of Right to Request a Hearing (“Complaint”) against Eagle Petroleum – Plantation Road, LLC (“EP-PR, LLC”); VRH, LLC; and Shree Ganesh, LLC, for various violations of RCRA’s underground storage tank (“UST”) requirements at the Turbo Food Mart facility located at 4101 Plantation Road, Roanoke, Virginia (the “Facility”). The Complaint alleged that these parties were owners and/or operators of the five USTs at the Facility. Proof of Service of the Complaint for the first two parties occurred on June 26, 2009,¹ and one of the two, VRH, Inc., submitted an Answer to the Complaint with a Certificate of Service dated July 24, 2009. EP-PR, LLC filed for bankruptcy and declined to file an Answer.

Proof of Service for Shree Ganesh, LLC, also apparently occurred on June 26, 2009, with a copy of the Complaint delivered to a Shree Ganesh employee at the Facility.²

Subsequent to the departure of the original EPA case attorney, Brianna Tindall, this case was reassigned in October 2009 to the current EPA staff attorney, James Heenehan.³ During a review of the case file, Mr. Heenehan discovered that the Complaint incorrectly named Shree Ganesh, LLC as a respondent when, in fact, the entity operating the Facility, and against which

¹ Proof of Service for the Complaint was filed with the Regional Hearing Clerk on March 5, 2010.

² Proof of Service for the Complaint was filed with the Regional Hearing Clerk on March 5, 2010. While a Shree Ganesh employee signed for the Complaint, the employee worked for Shree Ganesh, Incorporated, not Shree Ganesh, LLC.

³ Mr. Heenehan was assigned a bankruptcy matter associated with the case in mid-September, 2009.

EPA had intended to file this action, was and is Shree Ganesh, Incorporated. The two Shree Ganesh entities are unrelated. Because certain correspondence such as an information request letter issued pursuant to Section 9005 of RCRA, 42 U.S.C. § 6991d, had been issued to Shree Ganesh LLC rather than Shree Ganesh, Incorporated, EPA reissued new Section 9005 information request letters on November 13, 2009 to Shree Ganesh, Incorporated as well as to the other two respondents while simultaneously completing an updated file review. EPA thought it would be more efficient to file a single Motion to Amend rather than separate motions to change the name of Shree Ganesh, LLC to Shree Ganesh, Incorporated and then to modify the substantive allegations in the Amended Complaint based on responses to the November 13, 2009 Section 9005 information request letters and other information obtained during its review process.

Shree Ganesh, Incorporated responded to EPA's Section 9005 letter in December, 2009. The attorney representing EP-PR, LLC and VRH, LLC also responded to EPA's Section 9005 letter in December although it has also engaged in procuring information from the Virginia Department of Environmental Quality ("VADEQ") that might be responsive to EPA's questions. As of March, 2010, these parties were still in the process of gathering such information for EPA. Also from November, 2009 through March 3, 2010, EPA received updated information from VADEQ that is relevant to the allegations in the Complaint, including significant post-complaint developments that caused EPA to propose certain changes in Complainant's proposed Amended Complaint.⁴

In addition, there are a handful of typo corrections in Complainant's proposed Amended

⁴ This information was in response to questions posed to VADEQ by Mr. Heenehan after his review of the file information in this case. Two health emergencies suffered by a member of Mr. Heenehan's family on January 2 and February 18, 2010, slowed the referenced review process and subsequent filing of the enclosed motion.

Complaint.

B. Proposed Changes in the Amended Complaint.

The Amended Complaint would make the following changes to the Complaint:

1. Caption:
 - a. VRH, LLC address changed to “711 Pocahontas Avenue, Roanoke, Virginia” (the address listed with the Virginia State Corporation Commission, although VRH LLC does accept mail at the 4101-B Plantation Road, Roanoke, Virginia address listed in the original Complaint);
 - b. Respondent “Shree Ganesh, LLC” is changed to Respondent “Shree Ganesh, Incorporated”; and
 - c. “Administrative Complaint, Compliance Order and Notice of Right to Request Hearing” is changed to “First Amended Administrative Complaint and Notice of Right to Request Hearing”. Compliance Order deleted as it only pertained to Count VII which is deleted in the Amended Complaint.
2. Introduction:
 - a. Paragraph one/Sentence one: “Administrative Complaint, Compliance Order and Notice of Opportunity for Hearing (“Complaint”)” is changed to “First Amended Administrative Complaint and Notice of Right to Request Hearing (“Amended Complaint”).” “Complaint” is changed to “Amended Complaint” throughout the document. Compliance Order deleted as it only pertained to Count VII which is deleted in the Amended Complaint;
 - b. Paragraph two/Sentence one: The word “Chemicals” is inserted into the title of the “Director of the Land and Chemicals Division of U.S. EPA Region III. This word had been inadvertently omitted in the original Complaint; and
 - c. Paragraph two/Sentence one: “Shree Ganesh, LLC” is changed to “Shree Ganesh, Incorporated” here and throughout the document.
3. Paragraph 2:
 - a. Change “Section 9001(5) of RCA, 42 U.S.C. § 6991(6)” to “Section 9001(5) of RCA, 42 U.S.C. § 6991(5)” [typo].
4. Paragraph 3:
 - a. Change “Section 9001(5) of RCA, 42 U.S.C. § 6991(6)” to “Section 9001(5) of RCA, 42 U.S.C. § 6991(5)” [typo].
5. Paragraph 4:
 - a. Change “Section 9001(5) of RCA, 42 U.S.C. § 6991(6)” to “Section 9001(5) of RCA, 42 U.S.C. § 6991(5)” [typo].
6. Paragraph 7.a:

- a. Clarifies that the contents of USTs Nos. 1, 2, and 3 are “premium gas”, “regular gas” and “plus gas”, respectively.
7. COUNT II, Paragraph 19:
 - a. Change “...pressurized piping that conveys regulated substances under pressure” to “piping that routinely contains regulated substances and conveys regulated substances under pressure.” This is a more precise statement of this element of 9 VAC § 25-580.140.2.
8. COUNT II, Paragraph 20:
 - a. Includes additional line tightness tests for all five USTs based on updated information. Depending upon the UST in question, such additional tests are dated August 22, 2000, October 2, 2000, March 26, 2001, July 11, 2007, November 26, 2007 and/or March 27, 2008.
9. COUNT II, Paragraph 22:
 - a. Changes the period of violation for UST No. 4 from “from June 30, 2004 to July 15, 2008” to “from June 30, 2004 to July 10, 2007”; and
 - b. Changes the period of violation for UST No. 5 from “from June 30, 2004 to February 21, 2007” to “from June 30, 2004 to February 16, 2005 and from February 17, 2006 to February 21, 2007”.
10. COUNT III, Paragraph 28:
 - a. Changes the period of violation for USTs Nos. 1 - 5 from “from at least June 30, 2004 until July 15, 2008” to “from at least June 30, 2004 until November 25, 2007”.
11. COUNT VI, Paragraph 44:
 - a. Changes the period of violation from “from at least June 30, 2004 until July 15, 2008” to “from at least June 30, 2004 until February 7, 2008”.
12. COUNT VII:
 - a. Count deleted since the VADEQ has since confirmed that this task has been completed and there is no penalty associated with Count VII.
13. Compliance Order:
 - a. Compliance Order deleted as it only pertained to Count VII.
14. Section III. Proposed Penalty:
 - a. Section Roman Numeral changed from IV to III to correct a typo in the original Complaint.
15. Section IV. Notice of Right to Request a Hearing:
 - a. Section Roman Numeral changed from V to IV to correct a typo in the original Complaint;
 - b. Revises the period of time for the parties to file an Answer to the Amended

Complaint depending upon whether a Respondent is Shree Ganesh, Incorporated (30 days since this is the initial service of the complaint issued to this party) or EP-PR, LLC and VRH, LLC (20 days since they had previously been issued the initial Complaint), as set forth in 40 C.F.R. §§ 22.15(a) and .14(c) respectively; and

- c. The EPA case attorney's name is changed to James Heenehan from Brianna Tindell.

16. Section V. Settlement Conference:

- a. Section Roman Numeral changed from VI to V to correct a typo in the original Complaint;
- b. The EPA case attorney's name is changed to James Heenehan from Brianna Tindell;
- c. Clarifies that Respondent Shree Ganesh, Incorporated has thirty days to request a settlement conference and file an Answer while Respondents Eagle Petroleum – Plantation Road, LLC and VRH, LLC have twenty days to request a settlement conference and file an Answer; and
- d. Clarifies that the Quick Resolution settlement procedures set forth in 40 C.F.R. § 22.18 do not apply to this proceeding because a specific penalty has not been proposed in the Amended Complaint (even though the Amended Complaint no longer contains a Compliance Order).

17. Section VII. Separation of Powers and *Ex Parte* Communications:

- a. Section Roman Numeral changed from VII to VI to correct a typo in the original Complaint.

Respondents EP-PR, LLC and VRH, LLC have authorized Complainant to represent to the Presiding Officer that they neither support nor oppose this Motion. Because Shree Ganesh, Incorporated was mistakenly cited as Shree Ganesh, LLC in EPA's initial Complaint, it was technically never served with the original Complaint and, therefore, consultation about Complainant's proposed Motion to Amend is inapplicable since it was not a listed party listed in the original Complaint.

C. Motions to Amend Complaints are Freely Granted and the Court in this Instance is Requested to Grant this Motion.

Complainant requests that the Presiding Officer grant this Motion because the proposed Amended Complaint more accurately represents the alleged violations than the original Complaint and correctly names one of the three parties allegedly responsible for the violations

set forth in the Complaint.

The Rules provide at 40 C.F.R § 22.14 (c) that after the answer is filed, the complainant may amend the complaint only upon motion granted by the presiding officer. However, 40 C.F.R. Part 22 does not set out the circumstances as to when amendment of the complaint is or is not appropriate.

The Environmental Appeals Board has held that a complainant should be given leave to freely amend a complaint in EPA proceedings, in accord with the liberal policy of Federal Rule of Civil Procedure 15(a) (“F.R.C.P.”), since it promotes accurate decisions on the merits of each case. *In the matter of Asbestos Specialists, Inc.*, TSCA Appeal No. 92-3, 4 E.A.D. 819, 827 n. 20, 830 (October 6, 1993), *In the Matter of Port of Oakland and Great Lakes Dredge and Dock Company*, MPRSA Appeal No. 91-1, 4 E.A.D. 170. 205 (EAB, August 5, 1992).

In considering a motion to amend under Rule 15(a) of the F.R.C.P., the Supreme Court has held that leave to amend shall be given freely in the absence of 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. *Forman v. Davis*, 371 U.S. 178, 182 (1962).

Respondents EP-PR, LLC and VRH, LLC will suffer no prejudice from the filing of the Amended Complaint. Complainant’s motion is being filed at an early stage in the proceedings without undue delay. The proposed Amended Complaint eliminates Count VII and reduces the period of alleged violations set forth in Counts II, III and VI. The Amended Complaint also deletes the Compliance Order that was included in the original Complaint. Respondents EP-PR, LLC and VRH, LLC will have an opportunity to file a response to these revised allegations if they wish (Respondent EP-PR, LLC did not file an Answer to the initial Complaint although it

could do so now while Respondent VRH, LLC, could either file a new Answer or rely on its prior Answer depending upon how the Presiding Officer so rules). These respondents have stated they neither support nor oppose this Motion.

Respondent Shree Ganesh, Incorporated, also does not suffer any prejudice since it was not properly named in the initial Complaint and hence has no standing to challenge Complainant's Motion to Amend.

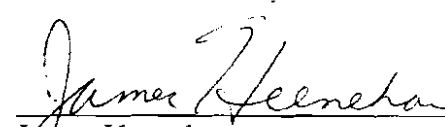
None of the other factors listed by the Supreme Court in *Forman v. Davis* is applicable to this case.

D. Conclusion

For the foregoing reasons, Complainant requests the Presiding Officer to grant it leave to file the attached First Amended Complaint.

Respectfully submitted,

Date: 4/30/10


James Heenehan
Sr. Assistant Regional Counsel
EPA, Region III

**BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III**

In the Matter of:)	
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Eagle Petroleum - Plantation Road, LLC)	
711 Pocahontas Avenue)	U.S. EPA Docket Number
Roanoke, VA 24012)	RCRA-03-2009-0206
)	
VRH, LLC)	
4101-B Plantation Road)	
Roanoke, VA 24012)	Proceeding Under Section 9006 of the
)	Resource Conservation and Recovery
Shree Ganesh, LLC)	Act, as amended, 42 U.S.C. Section
4101 Plantation Road)	6991e
Roanoke, VA 24012)	
)	
RESPONDENTS,)	
)	
Turbo Food Mart)	
4101 Plantation Road)	
Roanoke, VA 24012)	
)	
)	
FACILITY.)	

CERTIFICATE OF SERVICE

I certify that on the date noted below, I hand-delivered the original and one true and correct copy of Complainant's Motion for Leave to File an Amended Complaint, a Memorandum in Support of the Motion, a copy of the proposed Amended Complaint, a red-line/strikeout version showing the proposed Amended Complaint's changes from the original Complaint, and a proposed Order for the above-referenced matter to the Regional Hearing Clerk (3RC00), U.S. EPA Region III, 1650 Arch St., Philadelphia, PA, 19103, and that I sent or delivered a true and correct copy of same to the below parties as indicated below:

*For Respondent Eagle Petroleum - Plantation Road, LLC, and
Respondent VRH, LLC:*


Certified Mail:	Charles Williams, Esq. Gentry Locke Rakes & Moore LLP SunTrust Plaza, 10 Franklin Road, S.E., Suite 800 Roanoke, Virginia 24022-0013
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For the Presiding Officer:

Hand delivered:

Renee Sarajian
Regional Judicial Officer (3RC00)
EPA Region III
1650 Arch Street
Philadelphia, PA 19003

Dated: 4/30/10



James Heenehan
Sr. Assistant Regional Counsel (3RC30)
U.S. EPA - Region III
1650 Arch Street
Philadelphia, PA 19103-2029