UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8
Docket No.: RCRA-08-2009-0002

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HEARING CLERK

In The Matter Of:	)	
	)	**EPA'S REPLY TO FRONTIER'S RESPONSE**
Frontier Refining, Inc.	)	**IN OPPOSITION TO EPA'S MOTION TO**
	)	**AMEND COMPLAINT AND SUPPORTING**
2700 East 5th Street	)	**MEMORANDUM**
Cheyenne, Wyoming	)	
82007	)	
	)	
Respondent.	)	

Complainant, the United States Environmental Protection Agency Region 8 (EPA) files this Reply to the Frontier Response in Opposition to EPA's Motion to Amend Complaint and Memorandum in Support.

I. INTRODUCTION

A. Summary of Argument

Frontier's Response in Opposition to EPA's Motion to Amend Complaint and Brief in Support lists the following reasons as support for this Tribunal to deny EPA's Motion to Amend the Complaint: (1) the consolidation of legally flawed claims is misleading and made in bad faith; (2) the re-characterization of all alleged violations as "continuing" is made in bad faith; (3) the Amended Complaint is legally insufficient under 40 C.F.R. § 22.14(a)(4)(ii); (4) the First Amended Complaint does not cure the legal deficiencies; and (5) the Motion to Amend is futile[1].

Consolidation of Counts 1-50 and 54 into Count 51 (renumbered Count 1) create no advantage for EPA nor undue prejudice for Frontier. In consolidating those counts, EPA is offering an Amended Complaint that may likely be better for Frontier because when compared to

[1] See, Sections II. A. and Section VI of Frontier's Response In Opposition to EPA's Motion to Amend Complaint.

the assessed penalty in the Original Complaint, it reduces the number of violations for Frontier to dispute and the withdrawal of the calculated penalty will allow EPA to file a new calculated penalty that will be significantly less than the previous penalty. Respondent retains its right to file a new or amended answer and/or an accelerated decision. Respondent is in fact better off if the Motion to Amend the Complaint is granted.

As set forth below, EPA denies any bad faith act or dilatory motive in EPA's decision to consolidate Counts 1-50 and Count 54 with Count 51 (renumbered as Count 1) and re-characterize the remaining alleged violations as "continuous" rather than single events. All arguments in the Motion to Amend the Complaint and Brief in Support are herein incorporated by reference into this Reply Motion.

For the reasons set forth, EPA's Motion to Amend should be granted.

B. <u>The Applicable Standard</u>

EPA agrees that the seminal case that provides the standard of review for an amendment to the Original Complaint filed subsequent to the filing of Respondent's Answer is the Supreme Court's decision *Foman v. Davis,* 371 U.S. 178, 182 (1962). Under *Foman,* leave to amend would be given freely to EPA absent 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. As the Environmental Appeals Board has recognized, the most significant of the *Foman* factors is whether the amendment would unduly prejudice the opposing party. *In re Carroll Oil Company*, 10 E.A.D. 635, 650, 2002 EPA App. LEXIS 14 (EAB 2002). "Injustice resulting to the opposing party which weighs against granting a motion to amend may result from need for additional discovery, delayed litigation, or presentation of new legal theories shortly

before trial, with attendant legal costs and burdens to the opposing party." *Carroll Oil,* 2002 EPA App. LEXIS 14 * 42; *Block v. First Blood Associates*, 988 F.2d 344, 350 (2nd Cir. 1992). The EAB has held that a complainant should be given leave to amend the Complaint consistent with the liberal policy of Rule 15(a) of the Federal Rules of Civil Procedure so as to promote accurate decisions on the merits. See, *Matter of Asbestos Specialists*, 4 E.A.D. at 830; *Matter of Port of Oakland and Great Lakes Dredge and Dock Company*, 4 E.A.D. at 205.

II. DISCUSSION

A. EPA Meets the *Foman* Standard and Leave to Amend should be Granted

1. Consolidation of Counts Amounts to Judicial Efficiency Not Bad Faith

Respondent argues that EPA's Motion to Amend should be denied because the consolidation of Counts 1-50 and Count 54 into Count 51 (renumbered Count 1 in the proposed Amended Complaint) by EPA was made in bad faith to avoid litigation, hide flawed claims, and gain an unfair advantage over Respondent. The bad faith imputed to EPA is based upon Frontier's presumption of motives on the part of EPA in filing its Motion to Amend. Nowhere in its Response in Opposition to EPA's Motion to Amend the Complaint did Frontier proffer any evidence to contradict EPA's stated basis for moving to amend the complaint. Frontier continues to misstate EPA's theories,[2] impute motives that simply are unfounded[3], and assert that EPA's claims are legally flawed prior to this Tribunal's determination on the motions currently before it.

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[2]See Section III.A. at p. 6 of Frontier's Response in Opposition to EPA's Motion to Amend.

[3]Frontier has described EPA's motives for moving to amend the complaint as an "attempt to cloak and camouflage," a "shell game," "desperate," a "game of deception," and "misleading."

EPA had no dilatory motive or bad faith when it filed its Motion to Amend the Complaint[4] If the case were to proceed to litigation over issues that are addressed and resolved in the First Amended Complaint substantial inefficiencies would result. As discussed above, the amendments result, in part, with a reduced set of alleged violations, thus reducing the scope and universe of the issues to be litigated.

2. Frontier Will Not Be Subject to Undue Disadvantage by the Amended Complaint.

In fact, if this Tribunal were to grant EPA's Motion to Amend the Complaint, Frontier would likely be better off than if the Original Complaint were to stand because the Motion to Amend reduces the number of violations for Frontier to dispute and it reduces the number of counts combined with the withdrawal of the calculated penalty to allow EPA to file a new calculated penalty that will be significantly less than the previous penalty. None of the factors listed in *Carroll Oil*[5], such as the need for additional discovery, delayed litigation, or presentation of new legal theories shortly before trial, with attendant legal costs are present for Frontier.

Frontier has alleged that it will suffer undue prejudice if EPA's Motion to Amend is granted. However, Frontier has not argued that it will have to defend and litigate new legal

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[4]EPA clearly stated this in Section III. A. of the Motion to Amend the Complaint.

[5]*Carroll Oil Company*, 10 E.A.D. 635, 650, 2002 EPA App. LEXIS 14 (EAB 2002). "Injustice resulting to the opposing party which weighs against granting a motion to amend may result from need for additional discovery, delayed litigation, or presentation of new legal theories shortly before trial, with attendant legal costs and burdens to the opposing party." *Carroll Oil*, 2002 EPA App. LEXIS 14 * 42; *Block v. First Blood Associates*, 988 F.2d 344, 350 (2nd Cir. 1992).

theories resulting from the Amended Complaint, but that once the consolidation takes place, Frontier will lose its opportunity to argue its legal theory concerning the "receipt" of the F037 waste. While EPA agrees that Counts 1-50 and 54 should be consolidated into Count 51 and will not be treated as separate counts in the Amended Complaint, key aspects of Counts 1-50 and Count 54 are germaine to the remaining counts. Hazardous waste was generated as a result of frequent and recurring dry weather discharges to Pond 2 and therefore the operative facts supporting Counts 1-50 support Count 51. Frontier's argument that it will lose its opportunity to argue its legal theory is unsupported. EPA is unable to fathom any prejudice to Frontier based upon EPA's Motion to Amend. The parties are at the very early stages of litigation. Frontier retains its right to file a new or amended answer and/or a new motion for accelerated decision. Frontier has fewer violations to address and the assessed penalty will be reduced significantly as a result of the consolidation.

3. EPA's Re-characterization of the Alleged Violations as "Continuous" does not amount to Bad Faith

Frontier argues that re-characterization of the alleged violations from single to continuous, gives EPA an unfair advantage by allowing EPA to recalculate a clearly erroneous penalty determination without regard to EPA's own penalty policy[6]. Frontier goes on to argue that unless this Tribunal denies the Motion to Amend, EPA will be allowed the extremely unfair advantage of assessing a penalty in excess of the statutory maximum by engaging in a game of deception relative to the methodology for arriving at such penalty in bad faith[7].

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[6]Respondent's Response in Opposition to EPA's Motion to Amend at p.8.

[7]*Id.*

Complainant's amendment withdraws the proposed specific penalty assessments in favor of the general form of pleading. The Amended Complaint does not include an actual calculated penalty. The Rules of Practice at 40 C.F.R.22.19(a)(4) specify that if the proceeding is for the assessment of a penalty and Complainant has not specified a proposed penalty, each party shall include in its prehearing exchange all factual information it considers relevant and within 15 days after Respondent files its prehearing exchange, Complainant shall document the proposed penalty and how it was calculated. Respondent's argument that the assessment of a proposed penalty does not conform with the penalty policy does not make sense when, as allowed by the Rules in 40 C.F.R. § 22.19(a)(4), the revised penalty has yet to be developed. The Amended Complaint does not propose a specific penalty.

4. EPA's Proposed Amended Complaint is Legally Sufficient

In citing to 40 C.F.R. § 22.14(a)(4)(ii), Respondent argues that EPA's Amended Complaint is insufficient as a matter of law because Complainant failed to provide the number of days of violation and the severity of the violations. Complainant disagrees with Respondent's characterization. Both the Original Complaint and the First Amended Complaint allege that Respondent's storage of F037 hazardous waste in surface impoundment 2 from, at least, **December 26, 2006 through the present**, constitutes a continuing violation of RCRA sections 3005(a) and (j), 42 U.S.C. §§ 6925(a) and (j)(*Emphasis added.*). Additionally, both the Original Complaint[8] and the Amended Complaint lay out the duration of the violations and the severity of the violations in the "Proposed Civil Penalty" section of the respective documents. If EPA is

[8] EPA's penalty narratives were provided to Frontier for the Original Complaint and state with specificity the severity of each of the violations alleged in the Complaint.

allowed to Amend its Complaint, changing the penalty assessment from specific to general pleading, the assessed proposed penalty will be provided to Frontier in accordance with 40 C.F.R. §§ 22.14 and 22.19. Contrary to Frontier's assertion, the proposed Amended Complaint is legally sufficient on its face.

5. No Undue Prejudice Will Inure to the Respondent

The Motion to Amend the Complaint should be granted because it will not result in any undue prejudice to Respondent. This matter is in the very early stages of litigation as the Complaint was served on Respondent on October 19, 2009, and the Respondent's Answer was filed on November 17, 2009. There has been no schedule established for prehearing exchange, nor has a hearing date been set. Furthermore, the First Amended Complaint is not the result of undue delay, bad faith, or dilatory motive which would subject the motion to a denial ruling by this Tribunal. As previously stated, Frontier will gain numerous advantages if the Amended Complaint rather than the Original Complaint is granted. In sum, the First Amended Complaint, rather than resulting in undue prejudice, actually provides a reduced number of violations to address, a significantly reduced penalty based upon the reduced number of violations, and a clearer and more succinct pleading for the next steps in this litigation.

6. EPA's Amendment is not Futile

Respondent argues that in order for EPA to be granted leave to amend the Original Complaint, new facts must be shown to justify such amendment. Thus, under Frontier's test, an error or an unwitting mistake cannot be cured by moving to amend the Complaint. Frontier moves on to state that EPA makes no effort to cure the legal deficiencies in the "live" Complaint[9]

[9] *Id.* at pp.15-16.

and thus, the proposed amendment would be futile. It is clear from the arguments set forth above, that EPA's First Amended Complaint is legally sufficient, that Frontier will not suffer undue prejudice, and that the amendment is not futile.

IV. Conclusion

For the foregoing reasons, Complainant respectfully requests that this Tribunal grant EPA's Motion to Amend the Complaint and Brief in Support.

RESPECTFULLY SUBMITTED this 25th day of January, 2010.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one true copy of EPA's Reply to Frontier's Response in Opposition to EPA's Amended Complaint was hand-carried to the Regional Hearing Clerk, EPA Region 8, 1595 Wynkoop St., Denver, Colorado, and that a true copy of the same was sent via USEPA Pouch mail to:

The Honorable Barbara A. Gunning
Administrative Law Judge
Office of Administrative Law Judges
U. S. EPA. Mail Code 1900L
Arial Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

and sent, via first class U.S. mail to:

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Date: January 25, 20109 **By:** Brenda Morris for
Judith M. McTernan