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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY REGIONAL HEARING CLERK
BEFORE THE ADMINISTRATOR EPA REGION VI

IN THE MATTER OF)
)
LAFOURCHE PARISH,) Docket No. CWA-06-2007-2725
)
)
Respondent)

ORDER GRANTING COMPLAINANT'S MOTION TO FILE AN AMENDED COMPLAINT

The Complaint in this matter was filed on August 20, 2007. Respondent's Answer was filed on September 24, 2007. Respondent's Answer did not contain a request for a hearing pursuant to 40 C.F.R. § 22.15(b). The undersigned issued an Order Seeking Clarification and Directing Settlement Conference that directed Respondent to clarify its position as to whether a hearing before an Administrative Law Judge is requested. On December 20, 2007, Respondent sent a Motion for Hearing to the Office of the Regional Hearing Clerk, U.S. EPA, Region VI. In Complainant's Response to Respondent's Motion for Hearing, filed January 3, 2008, Complainant requests that Respondent's Motion for Hearing be held in abeyance. On January 29, 2008, the undersigned issued an Order finding Respondent's Motion for Hearing premature, and the ruling thereon was held in abeyance. Without filing a motion for leave to file an amended answer, pursuant to 40 C.F.R. § 22.15(e), Respondent filed another Answer in this matter on January 7, 2008. On March 20, 2008, a Prehearing Order was issued directing the parties to submit their prehearing exchange in *seriatim* manner.

On June 30, 2008, Complainant filed a Motion to Amend Complaint and a copy of the proposed Amended Administrative Complaint. Complainant states that it is seeking to consolidate violations and to promote judicial economy. The Amended Complaint proposes a class II civil penalty of \$70,000. Respondent has not

filed a response to Complainant's Motion to Amend Complaint.

As previously noted in the Prehearing Order entered by the undersigned on March 20, 2008, 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 (the "Rules of Practice"), 40 C.F.R. §§ 22.1-22.32. The procedural rule governing the amendment of a complaint is found at Section 22.14(c) of the Rules of Practice, 40 C.F.R. § 22.14(c). Section 22.14(c) provides:

Amendment of the complaint. The complainant may amend the complaint once as a matter of right at any time before the answer is filed. Otherwise the complainant may amend the complaint only upon motion granted by the Presiding Officer. Respondent shall have 20 additional days from the date of service of the amended complaint to file its answer.

The Rules of Practice do not, however, illuminate the circumstances when amendment of the complaint is or is not appropriate. Nevertheless, some parameters have been developed through various administrative decisions. Specifically, the Environmental Appeals Board ("EAB") has offered guidance on the subject, informed by the Federal Rules of Civil Procedure ("FRCP")¹ and judicial interpretation of the FRCP. See *In the Matter of Asbestos Specialists, Inc.*, 4 E.A.D. 819 (EAB 1993); see also *In the Matter of Port of Oakland and Great Lakes Dredge and Dock Company*, 4 E.A.D. 170 (EAB 1992). Rule 15(a) of the FRCP addresses the amendment of pleadings.²

¹ The FRCP are not binding on administrative agencies but many times these rules provide useful and instructive guidance in applying the Rules of Practice. See *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*, 4 E.A.D. 513, 524 n. 10 (EAB 1993).

² FRCP 15(a) states:

A party may amend its pleading once as a matter of course: (A) before being served with a responsive pleading; or (B) within 20 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar. . . . In all other cases, a party may amend its pleading only with the opposing party's written

The United States Supreme Court has interpreted FRCP 15(a) to mean that there should be a strong liberality in allowing amendments to pleadings. *Foman v. Davis*, 371 U.S. 178, 181-82 (1962). Leave to amend pleadings under Rule 15(a) should 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. See *Id.*

In similar fashion to Rule 15(a), Section 22.14(c) of the Rules of Practice provides that a complainant, after the answer is filed, may amend the complaint only upon motion granted by the Presiding Officer.³ The EAB has held that a complainant should be given leave to freely amend a complaint in EPA proceedings, in accord with the liberal policy of FRCP 15(a), inasmuch as it promotes accurate decisions on the merits of each case. See *Matter of Asbestos Specialists, supra*, at 830; see also *Matter of Port of Oakland, supra*, at 205.

In the instant case, there is no apparent reason to deny Complainant's Motion to Amend Complaint. Respondent has failed to respond to the Motion to Amend Complaint. Pursuant to Section 22.16(b) of the Rules of Practice, if no response to a written motion is filed within the designated period, a party may be deemed to have waived any objection to the granting of the motion. Inasmuch as Respondent is deemed to have waived any objection to the granting of the Motion to Amend Complaint and there is no apparent reason to deny the Motion, Complainant's Motion is **GRANTED**.

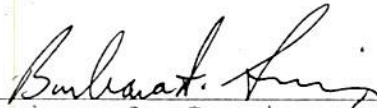
Upon the filing of the Amended Complaint, the Amended Complaint will become the Complaint in this matter. Pursuant to 40 C.F.R. § 22.14(c), Respondent shall have twenty (20) additional days from the

consent or the court's leave. The court should freely give leave when justice so requires. . . . Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 10 days after service of the amended pleading, whichever is later.

FED. R. CIV. P. 15(a).

³ The term "Presiding Officer" refers to the Administrative Law Judge designated by the Chief Administrative Law Judge to serve as the Presiding Officer. 40 C.F.R. § 22.3(a).

date of service of the amended complaint to file its amended answer, should it choose to do so. Should Respondent desire a hearing in this matter, it should properly request a hearing in its Amended Answer pursuant to 40 C.F.R. § 22.15(b). Respondent may also file an amended prehearing exchange within thirty (30) days of the date the Amended Complaint is filed.



Barbara A. Gunning
United States Administrative Law Judge

Dated: July 24, 2008
Washington, DC

**In the Matter of *Lafourche Parish*, Respondent.
Docket No. CWA-06-2007-2725**

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Granting Complainant's Motion to File an Amended Complaint**, dated July 24, 2008, was sent this day in the following manner to the addressees listed below.



Mary Angeles
Legal Staff Assistant

Original and One Copy by Pouch Mail to:

Lorena Vaughn
Regional Hearing Clerk
U.S. EPA, Region VI
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733

Copy by Pouch Mail to:

David Gillespie, Esq.
Assistant Regional Counsel
U.S. EPA, Region VI
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733

Copy by Regular Mail:

Christopher H. Riviere, Esq.
Riviere Law Firm
McCulla House
103 West Third Street
Thibodaux, LA 70302-0670

**Dated: July 24, 2008
Washington, D.C.**