

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
)
BURNHAM ASSOCIATES, INC.,) Docket No. MPRSA-01-2010-0078
)
Respondent)

ORDER GRANTING MOTION TO FILE AMENDED COMPLAINT
ORDER GRANTING CROSS-MOTION TO AMEND PREHEARING EXCHANGE
DEADLINES

By Motion dated February 10, 2011, U.S. Environmental Protection Agency, Region 1, Office of Environmental Stewardship (“Complainant”) moved to file an Amended Complaint.¹ The stated purpose of the Motion is to add 22 more days on which Complainant alleges that the Respondent, Burnham Associates, Inc., transported dredged material for the purpose of dumping it into ocean waters and dumped such dredged material at locations within the ocean disposal site beyond those disposal point coordinates authorized by a permit issued pursuant to the Marine Protection Research Sanctuary Act (“MPRSA”). The Motion states that the additional days of violation the Complainant seeks to add are based on information it obtained from the U.S. Army Corp of Engineer’s “Dredging Quality Management” program (an automated dredging monitoring system) that Complainant received after it filed the original Complaint. Complainant also seeks to add additional disposal events for dates that were cited in the original Complaint. The Motion states that the dates cited in the original complaint were based on Greenwich Mean Time not Eastern Standard Time but when converted to EST, only two dates are affected and they need to be changed to account for the time difference. Finally, Complainant proposes to make a change to the nomenclature used to identify a monitoring system referenced in the complaint.

Complainant’s Motion to Amend Complaint contained a request to delay the deadline for filing its prehearing exchange, pending a decision on Complainant’s Motion to Amend Complaint. In response, on February 16, 2011, the undersigned issued an Order Staying Prehearing Deadlines.

On February 22, 2011, the Respondent submitted a Reply of Respondent Burnham Associates, Inc. to Complainant’s Motion to Amend Complaint and Burnham’s Assented-to Cross-Motion to Adjust Prehearing Exchange Deadlines (“Reply” and “Cross-Motion”). In its

¹ Attached to the Motion was an Amended Administrative Complaint and Notice of Opportunity to Request a Hearing (“Amended Complaint”).

Reply, Respondent states that it does not oppose Complainant's Motion. In its Cross-Motion, Respondent moved to adjust the prehearing exchange deadlines as follows:

- i. Complainant's Initial Prehearing Exchange due 58 days following allowance of the Complainant's Motion to Amend;
- ii. Respondent's Prehearing Exchange and any dismissal motion for failure to state a claim due 14 days thereafter; and
- iii. Complainant's Rebuttal Prehearing Exchange due 14 days thereafter.

Respondent asserts that the requested extensions are not unreasonable given the history of this case and would not prejudice either party. Respondent's Reply and Cross-Motion states that the Complainant consents to the proposed deadlines.


Section 22.14(c) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (40 C.F.R. § 22.14(c)) provides that once an answer has been filed, the Complainant may amend the Complaint only upon motion granted by the Presiding Officer. However, because the Rules provide no standard for determining when leave to amend should be granted, the FRCP and interpretations thereof may be used as guidance. *Carroll Oil Co.*, 10 E.A.D. 635, 649 (EAB 2002); *Asbestos Specialists*, 4 E.A.D. 819, 827 n.20 (EAB 1993). Rule 15(a) of the Federal Rules of Civil Procedure concerning amended pleadings provides that "[t]he court should freely give leave [to amend] when justice so requires." In applying this Rule, the United States Supreme Court stated that "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Forman v. Davis*, 371 U.S. 178, 181-82 (1962) (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)). 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. *Id.* at 182.

In the absence of any apparent undue delay, bad faith, or dilatory motive on Complainant's part, and in light of Respondent's lack of opposition, Complainant's Motion to Amend Complaint is hereby **GRANTED**. Complainant's Amended Complaint, which was attached to its Motion, is deemed filed and served as of the date of this Order. Consistent with 40 C.F.R. § 22.14(c), Respondent shall have 20 additional days from the date of this Order to file its Answer to the Amended Complaint.

Respondents' un-opposed Cross-Motion to Adjust Prehearing Exchange Deadlines is hereby **GRANTED**. The parties are Ordered to comply with the undersigned's January 10, 2011 Prehearing Order in accordance with the following revised deadlines:

- April 1, 2011** The parties are directed to engage in a settlement conference on or before this date.
- April 8, 2011** The Complainant shall file a status report regarding settlement on or before this date.
- May 13, 2011** Complainant's Initial Prehearing Exchange or Consent Agreement and Final Order.
- May 27, 2011** Respondents' Prehearing Exchange, including any direct and/or rebuttal evidence and any dismissal motion for failure to state a claim.
- June 10, 2011** Complainant's Rebuttal Prehearing Exchange.

SO ORDERED.



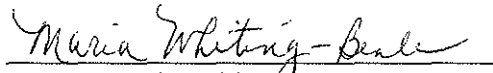
Susan L. Biro
Chief Administrative Law Judge

Date: March 23, 2011
Washington, D.C.

In the Matter of Burnham Associates, Inc., Respondent
Docket No.MPRSA-01-2010-0078

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Granting Motion to File Amended Complaint, Order Granting Cross-Motion To Amend Prehearing Exchange Deadlines**, dated March 23, 2011, was sent this day in the following manner to the addressees listed below.



Maria Whiting-Beale
Staff Assistant

Dated: March 23, 2011

Original And One Copy By Pouch Mail To:

Wanda I. Santiago
Regional Hearing Clerk
U.S. EPA
5 Post Office Square, Suite 100
Boston, MA 02109-3912

Copy By Pouch Mail And Facsimile To:

Tonia Bandrowicz, Esquire
Enforcement Counsel
Office of Environmental Stewardship
U.S. EPA
Mail Code OES04-3
5 Post Office Square, Suite 100
Boston, MA 02109-3219

Copy By Regular Mail And Facsimile To:

John D. Fitzpatrick, Esquire
Pingitore & Fitzpatrick, LLC
929 Massachusetts Avenue, Suite 2800
Cambridge, MA 02139