UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
CITY OF URBANA WASTEWATER TREATMENT PLANT	)	Docket No. 5-CWA-97-035
	)	
Respondent	)	

Order Granting Motion to File an Amended Complaint

On January 26, 1998 the Complainant, Environmental Protection Agency ("EPA"), filed a Motion for Leave to File an Amended Complaint. For the reasons which follow, the Motion is GRANTED.

EPA's Motion states that the Amended Complaint adds 305 alleged violations for failure to meet vector attraction reduction requirements. According to EPA, the Amended Complaint was prompted by new information developed from informal conferences and correspondences with the Respondent and which became known to the Complainant after the Complaint was filed. The proposed penalty of $125,000. remains unchanged from the original complaint. EPA further asserts that the Respondent will not be prejudiced by the Amended Complaint, that Respondent had knowledge of the violations prior to the filing of this Motion and that no rejoinder is required.

Respondent, City of Urbana, ("Urbana"), filed a Memorandum in Opposition to EPA's Motion, in which it challenged EPA's assertion that the information became known to it after the filing of the original complaint. Urbana adds that the Amended Complaint, if granted, will require an Answer, further discovery and other trial preparation. Urbana adds that "...Complainant's cryptic reference in paragraphs 20-22 to 'other information available to this agency' requires demystification. Complainant has also failed to provide the dates of the alleged vector attraction violations." Memorandum In Opposition at 2. Urbana concedes however, that EPA "may have the law on its side," but asserts that "the interest of justice would demand that the federal government cease its attempt to exact the maximum amount of flesh from a small municipality that came into compliance before these enforcement proceedings began." *Id.*

It is noted that the Amended Administrative Complaint pertains to the same publicly

owned domestic sewage treatment works in Urbana, Ohio. The original complaint alleged that 74 times in 1994 and 33 times in 1995 Respondent applied land sewage sludge that exceeded the ceiling concentration limit for molybdenum. The Amended Complaint now describes this as Count 1. Count II, which is new, asserts that the Respondent applied sewage sludge that did not meet one of the vector attraction reduction requirements set forth at 40 C.F.R. § 503.33(b)(1)-(b)(10) and that this occurred 74 times in 1994 and 49 times in 1995. Count II also addresses additional years, 1996 and 1997, alleging that the vector attraction reduction requirements were not met 182 times in those years. The effect of this is to add 305 additional violations to the Complaint, all related to the alleged failures involving vector requirements.

EPA counsel thereafter submitted, without any accompanying analysis, four decisions for my consideration in ruling on the Motion. Respondent's counsel was advised of the submission, but provided no comment. I will briefly address these cases.

Unlike the present case, In re: Borough of Ridgway, Pennsylvania, ("Ridgway") CWA Appeal No. 95-2, Docket No. CWA-III-141, Remand Order; 1996 CWA LEXIS 2, May 30, 1996, involved the filing of two separate "Class I" actions under the Clean Water Act and the issue was the propriety of filing two actions when the effect of doing so keeps the actions in the Class I category and thereby avoids the necessity of proceeding under the "Class II" APA-derived adjudication procedures. The thrust of this decision involved matters unrelated to the present Motion, but as dicta it points out that a second action will be precluded where it is based on *new consequences* of the same conduct that occurred before the first action was initiated. Thus, EPA could be precluded in a subsequent action from asserting other sludge violations occurring during the same time period which arose out of the same conduct. At a minimum however, this would not appear to affect the aspects of Count II that address different years. Indirectly, the case can be read for the proposition that all consequences of discrete violative conduct must be asserted in the original action.

As with Ridgway, In the Matter of: Asbestos Specialists, Inc., ("Asbestos Specialists") 4 E.A.D. 819; 1993 TSCA LEXIS 421, October 6, 1993, also dealt primarily with matters distinct from the issues in the present Motion. However, the Environmental Appeals Board ("the Board") notes that while there are instances when leave to amend a complaint may be denied, such as where undue delay, bad faith, or undue prejudice are demonstrated, the general rule is that ordinarily administrative pleadings are intended to be easily amended. *Id*. at 4 E.A.D. 828.

In the Matter of: Port of Oakland and Great Lakes Dredge and Dock Company, 4 E.A.D. 170, 1992 MPRSA LEXIS 1, August 5, 1992, dealt with EPA's attempt to amend its complaint to conform to the evidence when it expressed an intention to do so both shortly before and during the hearing. As with Asbestos Specialists, the Board notes that leave to amend a complaint is freely given, absent some nefarious basis or undue surprise. Finally, In re: Commercial Cartage Company, Inc., 5 E.A.D. 112; 1994 CAA LEXIS 15, February 22, 1994, a case dealing with a dismissal with prejudice of a complaint, reaffirms the points cited above in Asbestos Specialists generally favoring the liberal amendment of complaints.

As Respondent has conceded, the law favors allowance of amendments of complaints where the ends of justice will be served. Although an amendment will necessarily strengthen the movant's position and consequently harm the opponent, such harm does not amount to prejudice warranting the denial of the motion to amended. See In the Matter of Chem-Met Services, Inc. 1993 RCRA LEXIS 253, April 15, 1993. In this case the Respondent has not demonstrated any sufficient grounds to deny the Amended Complaint. To the contrary, Respondent benefits because EPA seeks no additional penalty despite the additional alleged violations and the inclusion of additional years within the ambit of the complaint. As to Respondent's concerns that the Amended Complaint contains "cryptic references" and fails to provide specific dates for the alleged vector attraction violations, these issues, if not resolved by information within Respondent's control, or through the prehearing exchange, can be addressed through the "Other Discovery" provision under the Consolidated Rules, 40 C.F.R. § 22.19(f).

Last, in response to the comment that the government seeking the "maximum amount of flesh from a small municipality that came into compliance before these enforcement proceedings began," Respondent is reminded that, after a hearing, it is the judge who determines the amount of any penalty and that a penalty must "take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, *and such other matters as justice may require.*" 33 U.S.C. § 1319 (g)(3) (emphasis added).

So Ordered.

William B. Moran
Administrative Law Judge

Dated March 19, 1998
Washington, D.C.

In the Matter of City of Urbana Wastewater Treatment Plant, Respondent

Docket No. 5-CWA-97-035

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Order Granting Motion to File an Amended Complaint, dated March 19, 1998, was sent in the following manner to the addressees listed below:

Original by Pouch Mail to:

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Copy by Regular Mail to:

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_____

Elaine Malcolm
Legal Assistant

Dated: March 19, 1998
Washington, D.C.

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Last updated on March 24, 2014