



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of: Edward and Theresa Washines, Da Stor at Lillie's Corner, Respondents. Docket No. RCRA-10-2014-0100

ORDER GRANTING COMPLAINANT'S UNOPPOSED MOTION FOR LEAVE TO AMEND THE COMPLAINT

On April 30, 2014, the United States Environmental Protection Agency ("Agency"), Region 10 ("Complainant"), initiated this proceeding by filing a Complaint, Compliance Order, and Notice of Opportunity for Hearing ("Complaint") against Edward and Theresa Washines and Da Stor at Lillie's Corner ("Respondents").

On December 2, 2014, Complainant filed an unopposed Motion for Leave to Amend the Complaint ("Motion"), with an attached, signed Proposed Amended Complaint, Compliance Order, and Notice of Opportunity for Hearing ("Proposed Amended Complaint").

- (1) include additional dates of violation for Violation 1 and Violation 3 for periods of violation that occurred after the Complaint was filed[;] (2) . . . revise Complainant's proposed Compliance Order to require Respondents to demonstrate continuous and current compliance with the financial responsibility requirements for their USTs[;] and (3) conform Complainant's proposed penalty amounts within the Amended Complaint with the November 1990 U.S. EPA Penalty Guidance for Violations of UST Requirements ("UST Penalty Guidance").

Motion at 1.

More specifically, Complainant seeks leave to amend those portions of the Complaint that list the alleged periods of noncompliance for Violations 1 and 3 to reflect evidence obtained by Complainant in October of 2014 allegedly showing that Respondents continued to violate the regulations at issue after the filing of the Complaint. Complainant next seeks leave to amend the proposed Compliance Order to require Respondents “to demonstrate continuous and current compliance with the financial responsibility requirements for their USTs.” With respect to the proposed penalty, Complainant seeks leave to amend the penalty proposed for Violation 3 because a “calculation error” resulted in that penalty being “\$6,205 lower than the value supported by a correct application of the Penalty Guidance.” Motion at 2-3. Complainant also seeks leave to amend the penalty proposed for Violation 2 in order to “adjust how the \$3,931 economic benefit for delayed costs are allocated between Counts 5 and 6, to more accurately conform to the UST Penalty Guidance.” Motion at 3.¹

Complainant avers that Respondents’ counsel was contacted in advance of filing the Motion and that he does not oppose the relief sought, but he “reserves the right to dispute the additional alleged period of failure to demonstrate compliance with the financial responsibility requirements if he finds evidence to the contrary, and reserves the right to dispute the proposed penalties.” Motion at 4.

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 (“Rules”) set forth at 40 C.F.R. part 22. The Rules provide, in pertinent part, that once an answer has been filed, “the complainant may amend the complaint only upon motion granted by the Presiding Officer.” 40 C.F.R. § 22.14(c). The Rules do not provide a standard for adjudicating such a motion, however. In the absence of administrative rules on a subject, this Tribunal may consult the Federal Rules of Civil Procedure (“FRCP”) for guidance in analogous situations. *See, e.g., Carroll Oil Co.*, 10 E.A.D. 635, 649 (EAB 2002); *Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827 n. 20 (EAB 1993).

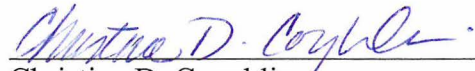
¹ The proposed changes related to the alleged periods of noncompliance for Violations 1 and 3 are found in Paragraphs 3.16 – 3.18, 3.38, 3.39, and 4.4 of the Proposed Amended Complaint, and the proposed change related to compliance with financial responsibility requirements appears to be found in Paragraph 4.1.2 of the Proposed Amended Complaint, which discusses the submission of copies of financial assurance. The proposed changes related to the proposed penalty, on the other hand, are not accurately reflected in the Proposed Amended Complaint. The proposed penalty for Violation 3 found in the Proposed Amended Complaint is \$7,731 greater than that found in the original Complaint, which is inconsistent with Complainant’s request to increase that figure by \$6,205. Additionally, the proposed penalties for Counts 5 and 6 appear to be the same in both the Complaint and Proposed Amended Complaint. Upon further review of the Proposed Amended Complaint, I also found that the language of Paragraph 4.1.1 had been altered from the original Complaint without any request to do so. The parties are advised that any motion for leave to amend a pleading shall identify every proposed change to the pleading and that a proposed amended pleading shall accurately reflect such changes.

FRCP Rule 15 provides that “a party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.” Fed. R. Civ. P. 15(a)(2). The United States Supreme Court has interpreted this provision liberally, stating that “[i]n the absence of any apparent or declared reason . . . the leave sought should, as the [FRCP] require[s], be freely given.” *Forman v. Davis*, 371 U.S. 178, 182 (1962) (internal quotation marks omitted). Reasons for denying such leave include “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment,” or similar deficiencies. *Id.*

Nothing in the record of this proceeding suggests that Complainant seeks leave to amend the Complaint for any of the above-described reasons. Moreover, Respondents do not object to the relief sought. Accordingly, Complainant’s Motion is hereby **GRANTED**.

Complainant shall file and serve a copy of the Amended Complaint, Compliance Order, and Notice of Opportunity for Hearing in accordance with the applicable provisions of 40 C.F.R. § 22.5 as soon as practicable. Pursuant to the Rules, Respondents shall have 20 days from the date of service of the Amended Complaint, Compliance Order, and Notice of Opportunity for Hearing to file an answer. 40 C.F.R. § 22.14(c).

SO ORDERED.



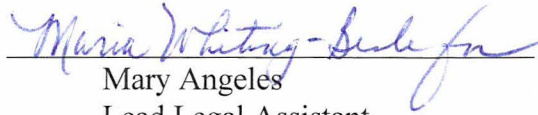
Christine D. Coughlin
Administrative Law Judge

Dated: December 19, 2014
Washington, D.C.

**In the Matter of Edward and Theresa Washines, Da Stor at Lillie's Corner, Respondents.
Docket No. RCRA-10-2014-0100**

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order Granting Complainant's Unopposed Motion For Leave to Amend The Complaint**, dated December 19, 2014, was sent this day in the following manner to the addressees listed below.


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Lead Legal Assistant

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**Dated: December 19, 2014
Washington, D.C.**