



**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:)
)
McNamara Realty,) **Docket No. TSCA-09-2018-0007**
)
Respondent.)

**ORDER ON COMPLAINANT’S MOTION
SEEKING LEAVE TO FILE AMENDED COMPLAINT**

The Agency filed the Complaint initiating this proceeding on September 24, 2018. Respondent submitted its Answer on October 23, 2018, and on November 1, 2018, this Tribunal issued a Prehearing Order setting forth dates for the parties to submit their prehearing exchanges.

The Agency has now moved to amend its Complaint. *See* Complainant’s Motion Seeking Leave to File Amended Complaint (Nov. 27, 2018) (“Motion”). According to the Agency’s Motion, “[i]n part due to the facts raised in Respondent’s Answer, Complainant seeks to amend the Complaint to reduce the number of violations it is alleging,” specifically

(1) the sales contract-related violations associated with 377 Fairview Avenue in Morro Bay, California and 1190 Green Oaks Drive in San Luis Obispo, California (Counts 1-15); (2) the lease-related violations associated with all 23 subject leases identified in Paragraph 16 of the Complaint (Counts 27-49); and [3] the lease-related violations associated with 1354 Peach Street in San Luis Obispo, California (both the July 9, 2015 and July 6, 2016 leases) and 2102 Loomis Street in San Luis Obispo, California (three of Counts 74-96).

Mot. at 1-2. In total, the Agency states, the proposed Amended Complaint eliminates 41 of the 142 violations originally alleged. Mot. at 2. The proposed Amended Complaint is attached to the Agency’s Motion. Counsel for Respondent has indicated to a staff attorney for this Tribunal that Respondent does not oppose the Agency’s Motion.

The Rules of Practice governing this proceeding provide, in relevant part, that:

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.

40 C.F.R. § 22.14(c). The Rules of Practice do not discuss the circumstances in which it is or is not appropriate to amend a complaint. However, the Environmental Appeals Board (“EAB”) has “expressly adopted” the liberal policy regarding pleadings and amendments found in Federal Rule of Civil Procedure 15 and described in *Foman v. Davis*, 371 U.S. 178 (1962). *Chem-Solv, Inc.*, EPA Docket No. RCRA-03-2011-0068, 2014 EPA ALJ LEXIS 14, at *16-17 (ALJ, June 5, 2014) (citing, *inter alia*, *Lazarus, Inc.*, 7 E.A.D. 318, 333 (EAB 1997), *Carroll Oil Co.*, RCRA (9006) Appeal No. 01-02, 2002 EPA App. LEXIS 14 at *35 (EAB, July 31, 2002), *In the Matter of Asbestos Specialists, Inc.*, TSCA Appeal No. 92-3, 4 E.A.D. 819, 827 n. 20 (October 6, 1993)).

Under the Federal Rules of Civil Procedure, leave to amend “shall be freely given when justice so requires.” Fed. R. Civ. P. 15(a). The Supreme Court has also endorsed this liberality in interpreting Rule 15(a), finding that “the 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.” *Foman*, 371 U.S. at 181-82 (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)). Further, amendment is acceptable in the absence of any apparent or declared negative 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; accord *Carroll Oil*, 2002 EPA App. LEXIS 14 at *37; *see also Yaffe Iron and Metal Co. v. U.S. EPA*, 774 F.2d 1008, 1012 (10th Cir. 1985) (administrative pleadings should be “liberally construed” and “easily amended”). Similarly, the EAB has found that a complainant may freely amend its complaint in accordance with the liberal policy of Rule 15(a) because it promotes accurate decisions on the merits of each case. *Asbestos Specialists, Inc.*, 4 E.A.D. at 830; *In the Matter of Port of Oakland and Great Lakes Dredge and Dock Company*, MPRSA Appeal No. 91-1, 4 E.A.D. 170, 205 (EAB, August 5, 1992).

Here, the proposed Amended Complaint will not result in undue delay, is not the product of bad faith or dilatory motive on the Agency’s part, nor is it the result of repeated failure to cure deficiencies by previous amendment, undue prejudice, or futility of amendment. Indeed, it more accurately describes the charges alleged against Respondent in response to Respondent’s Answer, and it does not prejudice Respondent because it eliminates more than 40 violations of which Respondent is accused.

Consequently, the Agency’s Motion Seeking Leave to File Amended Complaint is **GRANTED**. The Agency shall promptly file the Amended Complaint reflected in the attachment to its Motion and serve the Amended Complaint on Respondent. Respondent shall file an Amended Answer within **20 days** of being served with the Amended Complaint.

SO ORDERED.

Christine Donelian Coughlin

Christine Donelian Coughlin
Administrative Law Judge

Dated: November 29, 2018
Washington, D.C.

In the Matter of *McNamara Realty*, Respondent.
Docket No. TSCA-09-2018-0007

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on Complainant's Motion Seeking Leave to File Amended Complaint**, dated November 29, 2018, and issued by Administrative Law Judge Christine Donelian Coughlin, was sent this day to the following parties in the manner indicated below.



Matt Barnwell
Attorney-Advisor

Original by Personal Delivery to:

Mary Angeles, Headquarters Hearing Clerk
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Dated: November 29, 2018
Washington, D.C.