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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of)
)
Advanced Electronics, Inc.,) Docket No. CWA-5-98-021
)
Respondent)

ORDER

Advanced Electronics, Inc. ("Advanced"), seeks leave to file an amended answer to the amended complaint filed in this case by the U.S. Environmental Protection Agency ("EPA"). EPA opposes this motion. As explained below, respondent's motion to file an amended answer is *granted*.

EPA filed a complaint in this matter on September 30, 1998. Advanced timely filed an answer. Thereafter, on May 7, 1999, EPA was granted leave to file an amended complaint. Again, Advanced timely filed an answer. It is this answer which respondent seeks to amend. Specifically, Advanced wants to change its answer to allegation No. 21 from an admission to a denial.¹ Advanced also wishes to add several affirmative defenses. Not surprisingly, EPA vigorously opposes this amendment.

The chief argument offered by Advanced in support of its motion is that denying allegation No. 21, rather than admitting it, as well as adding the affirmative defenses, is consistent with an expert report prepared for respondent by James Huff.² Advanced submits that given this expert report, "it would not be proper to admit those allegations since Huff does not believe that Advanced's discharges exceeded the applicable daily limits for all 74 alleged violations." Mot. at 2.

EPA, however, claims that respondent's motion "stems from a dilatory motive, is futile, and causes undue delay and prejudice." EPA Opp. at 6. First, EPA submits that

¹ Allegation No. 21 of the amended complaint reads:


Respondent's discharges to the West Chicago POTW during the days listed and containing the substances specified in Exhibit A to the Complaint exceeded the applicable daily limits contained in Industrial Waste Discharge Permit #0218.

² Advanced has identified Mr. Huff as an expert witness.

Advanced's "new" answer is inconsistent with the proposed evidence already submitted by respondent in its prehearing exchange. It is this potential evidence which EPA claims is controlling, as opposed to what it characterizes as respondent's attempted reliance upon "statistical 'mumbo jumbo' in an attempt to create a material issue of fact where none exists." EPA Opp. at 3. Second, EPA argues that the motion to amend is untimely because it is in conflict with a scheduling order previously issued in this case. Third, the Agency opines that the granting of the motion could delay proceedings because it may necessitate some type of responsive filing by complainant. Fourth, EPA asserts that allowing Advanced to amend its answer will result in some sort of tactical advantage because respondent is filing a new answer after having seen complainant's earlier filed motion for partial accelerated decision. Finally, EPA states that respondent should have known the views of its own expert prior to filing its answer to the amended complaint.

The points raised by EPA are not unreasonable (although complainant's characterization of respondent's motive is not accepted). Still, in order to ensure the fairness of this proceeding, the better course is to allow Advanced to deny the subject allegation. To be sure, the granting of respondent's motion to amend its answer will have an immediate effect upon how this case is tried. This fact, however, does not equate to undue prejudice to EPA. For example, allowing respondent to amend its answer in no way suggests that the expert report of Huff, or the affirmative defenses based upon his opinion, are in any way controlling as to the issues to be decided in this case. It simply means that respondent may identify in its answer certain defenses which it intends to address at the hearing. The strength of those defenses will depend upon the evidence received at the hearing. EPA's ability to present evidence in this case, in carrying its burden of proof, is not hampered by allowing the answer to be amended. In that regard, EPA is free to show at the hearing that the report and opinions of respondent's expert are unsupported by the body of record evidence and, thus, are to be rejected.

Accordingly, Respondent's Motion For Leave to File Its Amended Answer and Affirmative Defenses to Amended Complaint, Instantly is *granted*, and its amended answer is accepted for filing.



Carl C. Charneski
Administrative Law Judge

Issued: July 29, 1999
Washington, D.C.

IN THE MATTER OF ADVANCED ELECTRONICS, Respondent
Docket No. CWA-5-98-021

Certificate of Service

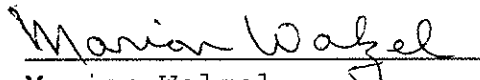
I certify that the foregoing Order, dated July 29, 1999, was sent this day in the following manner to the below addressees.

Original by Regular Mail to: Ms. Sonja R. Brooks
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Dated: July 29, 1999