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- Rules of Practice & Procedure
- Environmental Appeals Board
- Employment Opportunities

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

<p>In re:))) Tebay Dairy Company) III - 236)) Respondent,)</p>	<p>Docket No. EPCRA-</p>
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Order on Motion to Amend Complaint

EPA has filed a Second Motion To Amend Administrative Complaint ("Second Motion") in this proceeding filed under the Emergency Planning and Community Right to Know Act of 1986, ("EPCRA"), 42 U.S.C. Section 11045. The initial Complaint was filed on September 30, 1998. [\(1\)](#)

The Amended Complaint seeks to clarify the time period involved in Count I, drop allegations relating to the Local Emergency Planning Committee (LEPC) for Counts II, III, and drop entirely Count IV from the charges. The proposed penalty EPA seeks has been significantly adjusted downward.

In its Reply to EPA's Second Motion, Tebay first reviews the context of the EPA inspection and then summarizes the original Complaint. An important aspect of Tebay's response was its assertion that, for Counts Two and Three, "the condition of the records at both the SERC and LEPC are such that [it can not be proven whether] the forms were filed or not." Reply at 2. Consistent with Tebay's position concerning SERC and LEPC records, it denied the allegation of Count IV of the Original Complaint, as inaccurate reporting of Tebay's actions regarding submission of required forms. [\(2\)](#)

Tebay next refers to the Alternative Dispute Resolution process which preceded the assignment of this case to the undersigned and complains that the informal discovery employed in that process caused EPA to seek to amend the Complaint. In fact, EPA's Second Motion to Amend Administrative Complaint does add a date to Count I, removes the LEPC component from its allegations, and drops entirely Count IV. The effect of these amendments was significant in another respect as well: EPA now seeks a \$10,500.00 civil penalty, instead of the \$31,875.00 originally sought. Tebay continues to argue that the SERC records are flawed, and is concerned that EPA's Motion to Amend the Complaint was driven by a desire to make evidence of poor LEPC filing practices irrelevant to the proceeding.

Referring to the Consolidated Rules of Practice, Tebay argues that the proposed Amended Complaint prejudices it, since it has expended significant resources defending flawed charges after EPA's ballyhooed internet claims about the matter. Tebay submits that no Amended Complaint should be permitted which would result in foreclosing evidence of unreliable recordkeeping by LEPC or SERC and concludes that Counts I and IV should also be dismissed with prejudice.

The Court's Ruling on the Motion

Having considered the Parties' positions on this matter, EPA's Motion is GRANTED. No citations are necessary for the proposition that amendments to a Complaint are usually granted. In this instance Tebay neglects to emphasize that EPA's Motion brings significant benefits to the Respondent by reducing the proposed penalty by more than \$21,000.00, a noteworthy drop. In apparent reaction to the exchange of information at the ADR phase of this action, EPA dropped the LEPC allegations, and Count IV entirely. While Tebay complains about EPA's motives, it strikes the Court that the actions sought by EPA in filing the Motion to Amend the Complaint are precisely the kind of laudable reaction that parties should follow when new evidence is presented, particularly where, as here, EPA also took notice that its original penalty amount was now no longer appropriate. Further, there is no Motion before the Court to exclude evidence presented as part of the Prehearing Exchange. Should such a Motion be presented it will be addressed at that juncture and the usual guideposts of relevance and materiality will be the basis for any ruling. [\(3\)](#)

This case will now be set for hearing. Any Motion filed seeking the exclusion of evidence will be resolved orally at that time.

So Ordered

William B. Moran
United States Administrative Law Judge

Dated: August 3, 1999

1. After the initial Complaint was filed, EPA filed a Motion to Amend the Administrative Complaint on April 22, 1999. Tebay replied to the Motion on May 7, 1999. This was followed, on May 26, 1999 by Complainant's Withdrawal of the April 22nd Motion, and, ultimately, by the filing of the current (Second) Motion to Amend the Complaint.
2. Tebay also asserts that its substantive and procedural due process rights have been violated; that EPA has, by rulemaking, removed the cited requirements; that the intent of the law was not violated in any event; and that the fine sought is excessive. The Court only notes the presence of these claims. At this point they are mere assertions. However, it is noted that Constitutional challenges are rarely entertained in administrative proceedings. The asserted rulemaking change, if proven, would appear relevant to the determination of an appropriate penalty, not the fact of violation. Finally, it would also appear that the claim that the law's intent was not violated, if it can be demonstrated, would be part of the contention that the fine is excessive.
3. For example, with the LEPC aspect of the Complaint dropped, the materiality of such recordkeeping practices may be questioned. Commenting without the benefit of arguments, it would seem at first blush that such evidence could be excluded unless some nexus could be established tending to show that the asserted unreliability of LEPC records is probative of the claimed unreliability of SERC records.

In the Matter of Tebay Dairy Company, Respondent
Docket No. EPCRA-III-236

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order On Motion To Amend The Complaint**, dated August 3, 1999, was sent this day in the following manner to the addressees listed below:

Original by Regular Mail to:

Lydia A. Guy
Regional Hearing Clerk
U. S. EPA
1650 Arch Street
Philadelphia, PA 19103-2029

Copy by Regular Mail and facsimile to:

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Maria Whiting-Beale
Legal Staff Assistant

Dated: August 3, 1999

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