UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
TIFA, LIMITED	)	I.F.& R. Docket No. II-547-C
	)	
Respondent	)	

ORDER DENYING RESPONDENT'S MOTION TO COMPEL DEPOSITIONS

AND GRANTING MOTION TO AMEND ANSWER AND CHANGE HEARING DATE

By Motion dated March 24, 1998, Respondent moved to:

(1) depose four of Complainant's witnesses; (2) amend its Answer to assert a defense of estoppel; and (3) change the hearing date. On April 10, 1998, Complainant opposed the Motion. For the reasons that follow, Respondent's request to take depositions will be denied on grounds that Respondent has failed to provide a sufficient basis therefor under the Consolidated Rules of Practice, 40 C.F.R. Part 22. Respondent will be granted leave to amend its Answer and a new hearing date is established.

I. Depositions

Respondent seeks an order allowing it to depose four of the witnesses that Complainant intends to call at the hearing. Respondent generally asserts that these depositions are critical to properly prepare for cross-examination, and that otherwise Respondent would have to essentially depose these witnesses in front of the Court, which would be "ineffective and a waste of the Court's time." Motion at 3. Specifically, Respondent seeks to discover how many of Complainant's documents support or are relevant to claims in the Complaint, whether certain witnesses received a letter that is a central issue in this matter, and if not what steps were taken to locate the letter and standard office procedures for opening and processing mail.

In contrast to the extensive and time-consuming discovery that takes place in practice before the Federal courts, the discovery procedure in administrative proceedings under the Consolidated Rules of Practice, 40 C.F.R. Part 22, is

intentionally abbreviated and accomplished principally through the prehearing exchange. *See,* 40 C.F.R. § 22.19(b). Depositions may be ordered only "upon a showing of good cause and upon a finding that:

> (i) The information sought cannot be obtained by alternative methods; or
>
> (ii) There is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing."

40 C.F.R. § 22.19(f)(2).

As to alternative methods for acquiring the information it seeks through the depositions, Respondent asserts that interrogatories and other forms of discovery do not allow Respondent to ask follow-up questions. However, the information Respondent allegedly seeks to obtain in depositions, is such that it could well be obtained through a set of thoughtfully drafted interrogatories. Certainly, through interrogatories Respondent could have the Complainant identify which documents purportedly support which issue in dispute, whether certain witnesses received the letter at issue, what steps were taken to locate the letter and what are the general office procedures regarding mail. Thus, there is an alternative method to obtaining the information sought by Respondent.

As to the second factor above, Respondent has not proffered any reason for believing that the evidence it seeks may not be preserved for hearing without the depositions. To the contrary, Complainant has indicated that the witnesses from whom Respondent seeks the evidence will be present to testify at the hearing. Therefore, the alternative basis for granting leave to take depositions is also not met.

Thus, Respondent has not shown that depositions are warranted under the Consolidated Rules of Practice. Respondent may, however, move for other discovery under 40 C.F.R. § 22.19(f) in the form of interrogatories or requests for production as appropriate, to obtain the information it seeks.

II. Amendment of Answer

The Consolidated Rules of Practice provide, at 40 C.F.R. § 22.15(e), that an answer may be amended upon motion granted by the Presiding Judge. No standard is provided for determining such motions. Where no standard is provided in the Consolidated Rules of Practice, the Administrative Law Judges and the Environmental Appeals Board (EAB) have consulted the Federal Rules of Civil Procedure and decisions in Federal courts interpreting the Federal Rules. *See, Asbestos Specialists, Inc.,* 4 E.A.D. 819, 827 (EAB 1993). Rule 15(a), Fed. Rules. Civ. Pro. states that "leave [to amend] shall be freely given when justice so requires." Federal court precedent has established the policy that "[i]n the absence of . . . undue delay, bad faith or dilatory motive on the part of the movant . . . undue prejudice to the opposing party . . . [or] futility of amendment," leave to amend pleadings should be allowed. *Forman v. Davis,* 371 U.S. 178, 181-82 (1962). The policy of liberal amendment of pleadings has been applied to administrative adjudications. *Lazarus, Inc.,* TSCA Appeal No. 95-2, slip op. at 22 (EAB, Sept. 30, 1997); *Asbestos Specialists,* 4 E.A.D. at 830.

Respondent requests amendment of its Answer to assert a defense of equitable estoppel. Respondent asserts that, as relevant to six counts in the Complaint, the U.S. Fish and Wildlife Service purchased the product at issue from Respondent knowing that the product was suspended. Respondent believes that this purchase was affirmative misconduct by the Federal Government, which is an element of the defense of equitable estoppel as asserted against the Government. *United States v. Ven-Fuel, Inc.,* 758 F.2d 741, 761 (1st. Cir. 1985).

In response, Complainant asserts that Respondent did not allege factual evidence

sufficient to establish the defense, and that allowing an amendment without proof would unnecessarily delay the proceeding.

The Complaint in this matter was filed over six months ago, on September 30, 1997, and the hearing is scheduled for June 23, 1998, in two months. However, mere delay, when unaccompanied by actual prejudice, bad faith or futility, does not justify denial of leave to amend an answer. *Defender Industries v. Northwestern Mut. Life Ins. Co.,* 938 F.2d 502, 508 (4th Cir. 1991), *cert. denied,* 509 U.S. 923 (1993). *See also, United States v. Continental Illinois National Bank and Trust Co.,* 889 F.2d 1248, 1254 (2nd. Cir. 1989). Undue prejudice to the non-moving party is the touchstone for denying leave to amend an answer. *Bechtel v. Robinson,* 886 F.2d 644, 652 (3d Cir. 1989). Although Complainant challenges the Respondent's factual basis, or lack thereof, for the estoppel defense, Complainant does not allege any prejudice other than simple delay. Moreover, in Respondent's Prehearing Exchange (at p. 6), dated January 30, 1998, Respondent provided notice that it intended to move to amend its answer to assert the defense of estoppel on the basis that the Federal Government is estopped from pursuing penalties resulting from sales made to the Federal Government itself.

As to futility of an amendment, the Court of Appeals for the Second Circuit has stated, "As a matter of law, justice requires leave to amend when the moving party has demonstrated 'at least colorable grounds' for the proposed amendment." *S.S. Silberblatt, Inc. v. East Harlem Pilot Block Building 1 Hous. Dev. Fund Co.,* 608 F.2d 28, 42 (2d Cir. 1979). In determining whether there are colorable grounds, an inquiry must be made comparable to that of a motion to dismiss under Rule 12(b)(6), Fed. Rules Civ. Pro. where "it must appear beyond doubt that the [movant] can prove no set of facts supporting his claim that entitles him to relief." *Ragin v. Harry Macklowe Real Estate Co.,* 126 F.R.D. 475, 478 (S.D.N.Y. 1989). Complainant's position is well taken, that Respondent has not provided sufficient facts to support its proposed amendment. However, it cannot be concluded that the defense would fail under any set of facts which could be introduced. Therefore, and without ruling on the merits of the defense, Respondent's motion to amend the complaint will be granted.

III. Changing the Date of Hearing

Rule 22.21(c), of the Consolidated Rules of Procedure (40 C.F.R. § 22.21(c)) provides that "[n]o request for postponement of a hearing shall be granted except upon motion and for good cause shown." Respondent requests that the hearing date of June 23, 1998 be either postponed until the week of July 27, 1998, or that it be moved back to the week of June 15, 1998. Complainant objects to moving the hearing date back to that week due to work-related commitments, but has no objection to moving it to the July date or later.

As grounds for changing the hearing date, Respondent asserts that its counsel has vacation planned for the week following the Fourth of July, and the hearing in this matter may take up to two weeks, thus ending on July 3, 1998. Counsel asserts that "it would be an impossibility to try a case for two straight weeks, and then leave for vacation . . . [t]he rest of my cases would essentially go untouched for the two weeks of the trial, and it would not be possible to do this for a third straight week."

The Administrative Procedure Act provides, at 5 U.S.C. §554, that "[i]n fixing the time and place of hearings, due regard shall be had for the convenience and necessity of the parties or their representatives," and at Section 555, "[w]ith due regard for the convenience and necessity of the parties or their representatives *and within reasonable time*, each agency shall proceed to conclude a matter presented to it." Thus, although the convenience of counsel is to be given due regard, the conclusion of an administrative proceeding within reasonable time is also to be considered.

The Office of Administrative Law Judges currently has a policy of disposing of cases in 12-18 months. This case was initiated on September 30, 1997 and therefore, should be going to trial as scheduled or as close to the previously established date as possible. However, the undersigned's calendar currently has another case

set for trial the week of July 27, 1998, so moving the case to that week is not possible. The parties have indicated that this case will take two weeks to try. The next uninterrupted two week period that is with certainty available is beginning October 27 and going through November 6, 1998. With great hesitation and regret, the undersigned will reset this for hearing for these dates and the prehearing deadlines amended to conform to the extended hearing date. However, should the parties determine that this case can be tried to completion in less then two weeks, they should promptly notify the undersigned. Furthermore, should the undersigned's trial calendar open and an early two week period become available, the parties will be notified of a revised hearing date and other revised filing dates.

Accordingly, **IT IS ORDERED THAT:**

1. Respondents' motion requesting depositions is **DENIED**;

2. **Respondents' motion requesting amendment of the answer is GRANTED**;.

3. Respondent's motion requesting that the hearing date be changed is **GRANTED**

. THE HEARING IN THIS CASE WILL BE HELD BEGINNING OCTOBER 27, 1998, CONTINUING DAY AFTER WEEK DAY, THROUGH NOVEMBER 6, 1998. THE FOLLOWING ADDITIONAL DEADLINES ARE HEREBY REVISED:

- Any and all motions for discovery shall be filed by May 22, 1998;

- A Joint Set of Stipulated Facts, Exhibits and Testimony shall be filed on or before June 30, 1998;

- Any and all remaining pre-trial motions shall be filed by July 24, 1998;

- Prehearing briefs shall be filed on or before August 31, 1998.

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Susan L. Biro
Chief Administrative Law Judge

Dated: April 20, 1998
Washington D.C.