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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 9
75 HAWTHORNE STREET
SAN FRANCISCO, CALIFORNIA 94105

IN RE:	)	
	)	DOCKET NO. CAA-9-2011-0004
	)	
KILAUEA CRUSHERS, INC.,	)	MOTION FOR LEAVE TO
	)	FILE FIRST AMENDED
	)	COMPLAINT
RESPONDENT	)	
	)	

Pursuant to the authority set forth at 40 C.F.R. § 22.16(a), Complainant, United States Environmental Protection Agency, Region IX ("EPA"), moves the Presiding Administrative Law Judge for leave to file First Amended Complaint and Notice Of Opportunity For Hearing ("First Amended Complaint") in this matter, as provided in 40 C.F.R. § 22.14(c). Complainant's reasons for seeking leave to file the First Amended Complaint are set forth below.

The Complaint in this action was issued on September 27, 2011. The Complaint alleged

violations of Regulation III, Rule 316 of Maricopa County Air Quality Department ("MCAQD" or the "Department") as incorporated into the State Implementation Plan for Arizona pursuant to Section 110 of the Clean Air Act, 42 U.S.C. § 7410. On February 27, 2012, Respondent filed its Answer to the Complaint.

Having reviewed the Answer, Complainant wishes to amend the Complaint in two respects. First, Complainant wishes to delete Count II of the Complaint that alleged a violation of MCAQD Rule 316, Section 307.6(b)(4), arising from Respondent's alleged failure to install, maintain, and use a gravel pad. Second, Complainant wishes to amend Count III of the Complaint to better conform to the regulatory language of MCAQD Rule 316, Section 301.2(b), by alleging Respondent's failure to permanently mount watering systems (e.g., spray bars or an equivalent control) at the inlet and outlet of the crusher and the outlets of two shaker screens at Respondent's facility at 16402 S. Tuthill Road, Buckeye, Arizona.

Consequently, Complainant has prepared the First Amended Complaint, which reflects the amendments discussed above. A copy of the First Amended Complaint is attached hereto.

While the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice") at 40 C.F.R. Part 22 provide at § 22.14(c) that the Presiding Administrative Law Judge may grant the Complainant leave to file an amended Complaint, the Rules of Practice provide no standard for when leave to amend should be granted. In the absence of an express standard in the Rules, the Environmental Appeals Board ("EAB") has often relied on the guidance developed by the federal courts in construing Rule 15(a) of the Federal Rules of Civil Procedure ("FRCP"). In the Matter of Asbestos Specialists, Inc., 4 E.A.D. 819, 827 n.20 (October 6, 1993). Although the

FRCP are not binding on administrative agencies, guidance pertaining them has often been found to be instructive in applying the Rules of Practice. See Wego Chemical & Mineral Corp., 4 E.A.D. 513, 524 n.10 (February 24, 1993).

The FRCP take a liberal approach to the amendment of pleadings. Specifically, Rule 15(a) provides that "leave to amend shall be freely given when justice so requires." The United States Supreme Court has interpreted Rule 15(a) to mean that there should be "a strong liberality...in allowing amendments" to pleadings, 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 v. Davis, 371 U.S. 178, 181-82 (1962). Moreover, the Court held that, under Rule 15(a), in the absence of factors such as undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by previous amendment, futility of amendment, or prejudice to the opposing party, leave to amend shall be freely given. Id at 182. Accordingly, the EAB has found that a complainant should freely be given leave to amend a complaint because it promotes accurate decisions on the merits of the case. In the Matter of Asbestos Specialists, Inc., 4 E.A.D. at 830; In the Matter of Port of Oakland and Great Lakes Dredge and Dock Company, 4 E.A.D. 170, 205 (August 5, 1992).

In the present case, Complainant seeks to amend the Complaint to: (1) delete Count II (i.e., failure to install, maintain, and use a gravel pad); and (2) revise Count III (i.e., failure to permanently mount watering systems) to better conform to the regulatory language of MCAQD Rule 316, Section 301.2(b). These amendments are being sought before the issuance of any prehearing order. Moreover, amending the Complaint at this time allows Respondent to amend

their Answer and address any issues that Complainant's amendments raise well in advance of their Prehearing Exchange as well as the hearing, which has not yet been set.

Consequently, granting leave to file the attached First Amended Complaint will serve the public interest in the efficient and complete prosecution of Respondent for its alleged violations and the ends of justice. Additionally, Respondent will not be prejudiced if Complainant is permitted to amend the First Amended Complaint at this time; after all, one of the alleged violations (i.e., failure to install a gravel pad) is being deleted from the Complaint.

For the reasons set forth herein, Complainant requests that the Presiding Administrative Law Judge sign and enter an Order that the attached First Amended Complaint be deemed filed and served pursuant to 40 C.F.R. § 22.14(c) as of the date of the Order granting leave to file the First Amended Complaint.

Respectfully submitted,

DATED: 8/1/12

David H. Kim

Assistant Regional Counsel

CERTIFICATE OF SERVICE

I certify that the original and a copy of the foregoing Motion for Leave to File First Amended Complaint was sent by pouch mail to:

Sybil Anderson
Headquarters Hearing Clerk
Office of Administrative Law Judges (Mail Code 1900L)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-2001

and that a true and correct copy of the Motion for Leave to File First Amended Complaint was placed in the United States Mail or pouch mail addressed to the following:

The Honorable M. Lisa Buschmann
Administrative Law Judge
Office of Administrative Law Judges (Mail Code 1900L)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-2001

Patrick J. Paul, Esq.
Snell & Wilmer, L.L.P.
One Arizona Center
400 East Van Buren Street, Suite 1900
Phoenix, AZ 85004-2202

Dated: 8-1-2012

By: Beatrice Stack
Office of Regional Counsel
USEPA, Region 9

ATTACHMENT

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United States Environmental Protection Agency, Region 9

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IN RE:	)	
	)	DOCKET NO. CAA-9-2011-0004
	)	
KILAUEA CRUSHERS, INC.,	)	FIRST AMENDED COMPLAINT
	)	AND NOTICE OF OPPORTUNITY
	)	FOR HEARING
RESPONDENT	)	
	)	

PRELIMINARY STATEMENT

Complainant, the Director of the Air Division, United States Environmental Protection Agency ("EPA"), Region 9, is issuing this First Amended Complaint and Notice of Opportunity for Hearing ("First Amended Complaint") pursuant to Section 113(d) of the Clean Air Act (the "Act"), as amended, 42 U.S.C. § 7413(d). The Administrator of EPA ("Administrator") delegated the authority to issue complaints such as this one in the state of Arizona to the Regional Administrator

of Region 9 and the Regional Administrator, in turn, re-delegated that authority to Complainant. Respondent is Kilauea Crushers, Inc. ("Kilauea" or "Respondent").

Complainant will show that Respondent violated Regulation III, Rule 316 of Maricopa County Air Quality Department ("MCAQD" or the "Department") as incorporated into the State Implementation Plan for Arizona pursuant to Section 110 of the Act, 42 U.S.C. § 7410.

STATUTORY AND REGULATORY BACKGROUND

1. The primary purpose of the Act is to protect and enhance the quality of the nation's air resources so as to promote the public health and welfare and the productive capacity of its population. See 42 U.S.C. § 7401(b)(1).

2. The Administrator of EPA, pursuant to authority under section 109 of the Act, 42 U.S.C. § 7409, promulgated the National Ambient Air Quality Standards ("NAAQS") for certain criteria air pollutants. 40 C.F.R. §§ 50.9, 50.10.

3. Pursuant to Section 107(d) of the Act, 42 U.S.C. § 7407(d), the Administrator promulgated lists of attainment status designations for each air quality control region ("AQCR") in every state. These lists identify the attainment status of each AQCR for each of the criteria pollutants. The attainment status designations for the Arizona AQCRs are listed at 40 C.F.R. § 81.303.

4. Section 110 of the Act, 42 U.S.C. § 7410, requires each state to adopt and submit to EPA a plan which provides for the implementation, maintenance, and enforcement of primary and secondary NAAQS in the State. Upon approval by EPA, the plan becomes part of the applicable SIP for the State. Pursuant to Section 113(a)(1) of the Act, 42 U.S.C. § 7413(a)(1), EPA may enforce violations of the SIP.

5. Kilauea is based in Peoria, Arizona, and engages in sand and gravel production and

processing at its facility (the "Facility") located at 16402 S. Tuthill Road, Buckeye, Arizona. The Facility is subject to the jurisdiction of the Department. EPA has designated Maricopa County as a nonattainment area for the NAAQS for particulate matter. See 40 C.F.R. § 81.303.

6. MCAQD Regulation I, Rule 2 was approved into and made a part of the federally enforceable SIP pursuant to 42 U.S.C. § 7410 on August 17, 1982.[1]

7. MCAQD Regulation III, Rule 316 was approved into and made a part of the federally enforceable SIP pursuant to 42 U.S.C. § 7410 on January 8, 2010.[2]

8. Section 81 of MCAQD Rule 2 defines "source" as "any facility, equipment, machine, incinerator, structure, building, device or other article (or combination thereof) which is located on one or more contiguous properties and which is owned or operated by the same person (or by persons under common control) and which emits or may emit an air pollutant."

9. Section 71 of MCAQD Rule 2 defines "pollutant" as "an air contaminant the emission or ambient concentration of which is regulated pursuant to these rules and regulations."

10. Section 7 of MCAQD Rule 2 defines "air contaminants" to include "smoke, vapors, chemical, paper, dust, soot, grime, carbon, fumes, gases, sulfuric acid mist, aerosols, aerosol droplets, odors, particulate matter, windborne matter, radioactive materials, noxious chemicals, or any other material in the outdoor atmosphere."

11. Section 69 of MCAQD Rule 2 defines "person" as "any public or private corporation, company, partnership, firm, association or society of persons, the Federal Government and any of its departments or agencies, the State and any of its agencies, departments or political

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[1]47 Fed. Reg. 26382 (June 18, 1982).

[2]74 Fed. Reg. 58553 (November 13, 2009).

subdivisions, as well as a natural person."

12. MCAQD Rule 316 is intended to "limit the emission of particulate matter into the ambient air from any nonmetallic mineral processing plant and/or rock product processing plant." See Section 101, MCAQD Rule 316.

13. Section 102 of MCAQD Rule 316 provides that MCAQD Rule 316 "shall apply to any commercial and/or industrial nonmetallic mineral processing plant and/or rock product processing plant."

14. Section 235 of MCAQD Rule 316 defines "nonmetallic mineral processing plant" as "[a]ny facility utilizing any combination of equipment or machinery that is used to mine, excavate, separate, combine, crush, or grind any nonmetallic mineral including, but not limited to, lime plants, coal fired power plants, steel mills, asphalt plants, concrete plants, Portland cement plants, raw material storage and distribution, and sand and gravel plants."

15. Section 234 of MCAQD Rule 316 defines "nonmetallic mineral" to include crushed and broken stone, including limestone, dolomite, granite, rhyolite, traprock, sandstone, quartz, quartzite, marl, marble, slate, shale, oil shale, and shell; sand and gravel; clay; rock salt, and gypsum.

16. Section 214 of MCAQD Rule 316 defines "crusher" as "[a] machine used to crush any nonmetallic minerals including, but not limited to, the following types: jaw, gyratory, cone, roll, rod mill, hammermill, and impactor."

17. Section 249 of MCAQD Rule 316 defines "screening operation" as "[a] device that separates material according to its size by passing undersize material through one or more mesh surfaces (screens) in series and retaining oversize material on the mesh surfaces (screens)."

18. Section 257 of MCAQD Rule 316 defines "transfer point" as "[a] point in a conveying

operation where nonmetallic mineral is transferred from or to a belt conveyor except for transfer to a stockpile."

19. Section 256 of MCAQD Rule 316 defines "trackout" as "[a]ny and all bulk materials that adhere to and agglomerate on the surfaces of motor vehicles, haul trucks, and/or equipment (including tires) and that have fallen or been deposited onto a paved area accessible to the public."

20. Section 257 of MCAQD Rule 316 defines "trackout control device" as "[a] gravel pad, grizzly, wheel washer, rumble grate, paved area, truck washer, or other equivalent trackout control device located at the point of intersection of an unpaved area and a paved area accessible to the public that controls and prevents trackout and/or removes particulate matter from tires and the exterior surfaces of aggregate trucks, haul trucks, and/or motor vehicles that traverse a facility."

21. Section 248 of MCAQD Rule 316 defines "rumble grate" as "[a] system where the vehicle is vibrated while traveling over grates with the purpose of removing dust and other debris."

22. Section 301.2(b) of MCAQD Rule 316 provides that the owner and/or operator of a crushing and/or screening operation must permanently mount watering systems (e.g., spray bars or an equivalent control) at the inlet and outlet of all crushers; outlet of all shaker screens; and outlet of all material transfer points, excluding wet plants.

23. Section 301.2(c) of MCAQD Rule 316 provides that the owner and/or operator of a crushing and/or screening operation must operate watering systems (e.g., spray bars or an equivalent control) on the points listed in Section 301.2(b) of MCAQD Rule 316 for crushers, shaker screens, and material transfer points, excluding wet plants, to continuously maintain a 4% minimum moisture content.

24. Section 307.6 of MCAQD Rule 316 provides that the owner and/or operator of a commercial and/or industrial nonmetallic mining processing plant and/or rock product processing plant with less than 60 aggregate trucks, mixer trucks, and/or batch trucks exiting a facility on any onto paved public roadways/paved areas accessible to the public shall install, maintain, and use a rumble grate, wheel washer, or truck washer.

25. Section 307.6(a)(1)(c) and (b)(1)(b) of MCAQD Rule 316 provides that any rumble grate used as a trackout control device to comply with Section 307.6 shall consist of raised dividers (rails, pipes, or grates) a minimum of three inches tall, six inches apart, and 20 feet long, to allow a vibration to be produced such that dust is shaken off the wheels of a vehicle as the entire circumference of each wheel of the vehicle passes over the rumble grate. This requirement applies to all rumble grates that are constructed, moved or modified after June 12, 2008. See Section 401.6 of MCAQD Rule 316.

26. Section 309 of MCAQD Rule 316 provides that the owner and/or operator of a commercial and/or industrial nonmetallic mineral processing plant and/or rock product processing plant with a rated or permitted capacity of 25 tons or more of material per hour or with five acres or more of disturbed surface area subject to a permit, whichever is greater, shall have in place a Fugitive Dust Control Technician who must meet various qualifications, including certification to determine opacity as visible emissions in accordance with the provisions of the EPA Method 9 as specified in 40 C.F.R. Part 60, Appendix A.

GENERAL ALLEGATIONS

27. Kilauea engages in sand and gravel mining and processing operations in Maricopa County, Arizona.

28. At all times relevant to this action, Kilauea performed sand and gravel mining and processing

operations at the Facility.

29. At all times relevant to this action, the Facility contained five acres or more of disturbed surface area subject to a permit.

30. The Facility is a "commercial and/or industrial nonmetallic mineral processing plant and/or rock product processing plant" as defined by MCAQD Rule 316.

31. Kilauea is a "person" as that term is defined in section 69 of MCAQD Rule 2.

32. Kilauea is an "owner and/or operator" within the meaning of MCAQD Rule 316.

33. On or about March 16, 2010, inspectors from EPA and MCAQD inspected the Facility.

34. EPA issued an information request to Kilauea pursuant to Section 114 of the Clean Air Act, 42 U.S.C. § 7414, on June 10, 2010.

35. On or about July 16, 2010, Kilauea submitted its response (the "Kilauea Response") to the EPA's June 10, 2010 information request.

36. During the March 16, 2010 inspection, the EPA inspectors observed that the Facility engaged in excavation, crushing, screening, processing, storage and/or export of sand, soil, gravel, and other bulk materials.

37. During the March 16, 2010 inspection, the EPA inspectors observed that the Facility used a rumble grate as a trackout control device.

38. During the March 16, 2010 inspection, the EPA inspectors measured the length of the rumble grate at the exit of the Facility to be approximately fifteen and a half (15½) feet.

39. The Kilauea Response indicates that the rumble grate at the exit of the Facility was moved and/or modified after June 12, 2008.

40. During the March 16, 2010 inspection, the EPA inspectors observed that the Facility had failed to install spray bars or an equivalent control at the inlet and outlet of the crusher and

the outlets of two shaker screens to control fugitive dust from those operations.

41. The Kilauea Response indicates that the Fugitive Dust Control Technician at the Facility was not certified to determine opacity as visible emissions in accordance with the provisions of the EPA Method 9 as specified in 40 C.F.R. Part 60, Appendix A, from April 2010 to July 2010.

COUNT I: FAILURE TO INSTALL A PROPER RUMBLE GRATE; MCAQD RULE 316, SECTION 307.6(b)(1)(b).

42. Paragraphs 1 through 41 are realleged and incorporated herein by reference.

43. Section 307.6(b)(1)(b) of MCAQD Rule 316 requires any rumble grate used as a trackout control device to comply with Section 307.6 to consist of raised dividers (rails, pipes, or grates) a minimum of three inches tall, six inches apart, and 20 feet long, to allow a vibration to be produced such that dust is shaken off the wheels of a vehicle as the entire circumference of each wheel of the vehicle passes over the rumble grate. This requirement applies to all rumble grates that are constructed, moved or modified after June 12, 2008. See Section 401.6 of MCAQD Rule 316.

44. On or about March 16, 2010, Kilauea violated Section 307.6(b)(1)(b) of MCAQD Rule 316 by failing to install a rumble grate consisting of raised dividers a minimum of three inches tall, six inches apart, and 20 feet long at the exit of the Facility.

COUNT II: FAILURE TO PERMANENTLY MOUNT WATERING SYSTEMS (E.G., SPRAY BARS OR AN EQUIVALENT CONTROL); MCAQD RULE 316, SECTION 301.2(b).

45. Paragraphs 1 through 41 are realleged and incorporated herein by reference.

46. Section 301.2(b) of MCAQD Rule 316 provides that the owner and/or operator of a crushing and/or screening operation must permanently mount watering systems (e.g., spray bars or an equivalent control) at the inlet and outlet of all crushers; outlet of all shaker screens; and outlet of all material transfer points, excluding wet plants.

47. On or about March 16, 2010, Kilauea violated Section 301.2(b) of MCAQD Rule 316 by failing to permanently mount watering systems (e.g., spray bars or an equivalent control) at the inlet and outlet of the crusher and the outlets of two shaker screens at the Facility to control fugitive dust from those operations.

COUNT III: FAILURE TO EMPLOY A FUGITIVE DUST CONTROL TECHNICIAN CERTIFIED TO DETERMINE OPACITY IN ACCORDANCE WITH THE EPA METHOD 9; MCAQD RULE 316, SECTION 309.

48. Paragraphs 1 through 41 are realleged and incorporated herein by reference.

49. Section 309 of MCAQD Rule 316 provides that the owner and/or operator of a commercial and/or industrial nonmetallic mineral processing plant and/or rock product processing plant with a rated or permitted capacity of 25 tons or more of material per hour or with five acres or more of disturbed surface area subject to a permit, whichever is greater, shall have in place a Fugitive Dust Control Technician who must be certified to determine opacity as visible emissions in accordance with the provisions of the EPA Method 9 as specified in 40 C.F.R. Part 60, Appendix A.

50. From or about April 2010 to July 2010, Kilauea violated Section 309 of MCAQD Rule 316 by failing to employ a Fugitive Dust Control Technician at the Facility who was certified to determine opacity as visible emissions in accordance with the provisions of the EPA Method

9 as specified in 40 C.F.R. Part 60, Appendix A.

PROPOSED CIVIL PENALTY

Section 113(d) of the Act, 42 U.S.C. § 7413(d), authorizes a civil administrative penalty of up to Thirty-Seven Thousand Five Hundred Dollars ($37,500) per day for each violation of the Act, provided that the total amount of penalty assessed does not exceed Two Hundred Ninety-Five Thousand Dollars ($295,000). For purposes of determining the amount of the civil penalty to be assessed, Section 113(e) of the Act, 42 U.S.C. § 7413(e), requires EPA to consider the size of the business, the economic impact of the penalty on the business, the violator's compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence, payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation. Accordingly, Complainant requests that after consideration of these statutory assessment factors, the Administrator assess against Respondent a civil administrative penalty of up to $37,500 for each violation of the Act set forth above.

OPPORTUNITY TO REQUEST A HEARING

The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules of Practice"), 40 C.F.R. Part 22, govern these proceedings.

Under these rules, you have the right to request a hearing. Any request for a hearing must be in writing and must be filed with the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region 9, 75 Hawthorne Street, San Francisco, California within thirty (30) days of receipt of the Complaint. In the event that you intend to request a hearing to contest any material facts set forth in the First Amended Complaint, to dispute the amount of the penalty proposed in the First

Amended Complaint, or to assert a claim for judgment as a matter of law, you must file a written Answer to this First Amended Complaint with the Regional Hearing Clerk at the above address within twenty (20) days of receipt of this First Amended Complaint. A copy of your Answer should also be sent to:

David H. Kim
Assistant Regional Counsel (ORC-3)
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, CA 94105

Your Answer should clearly and directly admit, deny, or explain each factual allegation contained in this First Amended Complaint with regard to which you have any knowledge. The Answer should state: (1) the circumstances or arguments which are alleged to constitute the grounds of defense; (2) a concise statement of the facts which you intend to place at issue in the hearing; and (3) whether a hearing is requested. Hearings held in the assessment of the civil penalties will be conducted in accordance with the provisions of the Administrative Procedures Act, 5 U.S.C. §§ 551 et seq., and the Consolidated Rules of Practice. See 40 C.F.R. Part 22.

If you fail to file an Answer to this First Amended Complaint with the Regional Hearing Clerk within twenty (20) days of receipt, such failure shall constitute an admission of all facts alleged in the First Amended Complaint and a waiver of your right to a hearing under Section 113(d)(2).

SETTLEMENT CONFERENCE

EPA encourages all parties against whom civil penalties are proposed to pursue the possibilities of settlement through informal conferences. Therefore, whether or not you request a hearing, you may confer informally with the Agency concerning the alleged violation or the amount of the proposed penalty. You may wish to appear at the conference yourself or be represented by counsel. If a settlement is reached, it shall be finalized by the issuance of a written Consent

Agreement and Final Order by the Regional Judicial Officer, EPA, Region 9. The issuance of such Consent Agreement and Final Order shall constitute a waiver of your right to request a hearing of any matter stipulated to therein.

To explore the possibility of settlement in this matter, address your correspondence to:

David H. Kim
Assistant Regional Counsel (ORC-3)
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, CA 94105

His telephone number is (415) 972-3882.

After this First Amended Complaint is issued, the Consolidated Rules of Practice prohibit ex parte (unilateral) discussion of the merits of any action with the EPA Regional Administrator, Chief Judicial Officer, Administrative Law Judge, or any person likely to advise these officials in the decision of this case.

Dated at San Francisco, California on this 31st day of July 2012.

Deborah Jordan
Director, Air Division
USEPA, Region 9