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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:)
)
Liphatech, Inc.) Docket No. FIFRA-05-2010-0016
Milwaukee, Wisconsin)
) Hon. Barbara A. Gunning
Respondent.)
)
)
)

**COMPLAINANT'S MOTION FOR LEAVE TO AMEND
COMPLAINT TO REDUCE PROPOSED PENALTY AND
MEMORANDUM IN SUPPORT OF COMPLAINANT'S MOTION**

Complainant, the United States Environmental Protection Agency, Region 5 (Complainant or the Region), pursuant to 40 C.F.R. §§ 22.16 and 22.14(c) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* (Consolidated Rules or Rules), hereby moves for leave to amend its Complaint to reduce the proposed penalty from \$2,941,456 to \$2,891,200 by eliminating the economic benefit component of the proposed penalty. In support of this Motion, Complainant states as follows:

1. This is a civil administrative action brought under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y. This action alleges that Liphatech, Inc. (Respondent) violated FIFRA (a) by advertising "Rozol Pocket Gopher Bait Burrow Builder Formula," EPA Reg. No. 7173-244 to control prairie dogs, without identifying its "Restricted Use" classification and (b) by unlawfully distributing or selling "Rozol Pocket Gopher Bait Burrow Builder Formula," EPA Reg. No. 7173-244 and "Rozol Prairie Dog Bait," EPA Reg. No. 7173-286.

2. On May 14, 2010, Complainant initiated this action by filing a Complaint against Respondent. In its Complaint, Complainant alleged 2231 separate counts of Sections 12(a)(2)(E) and 12(a)(1)(B) (and/or alternatively 12(a)(1)(E)) of FIFRA, 7 U.S.C. §§ 136j(a)(2)(E) and 136(a)(1)(B) (and /or alternatively 136(a)(1)(E)). Complainant proposed a civil penalty of \$2,941,456 under Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), for Respondent’s alleged violations.

3. As alleged in the Complaint, Complainant’s proposed civil penalty was calculated as follows:

Counts 1-2140 – Radio and Print Advertisement of Rozol:	\$2,268,500
Counts 2141-2183 – Distribution or Sale of Rozol:	\$279,500
Counts 2184-2231 – Distribution or Sale of Rozol:	\$343,200
Economic Benefit	<u>\$50,226</u>
Total Proposed Civil Penalty:	\$2,941,456

4. In determining the penalty amount, Complainant considered the size of Respondent’s business, the effect on Respondent’s ability to continue in business, and the gravity of the violations. Complainant also considered EPA’s *Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act*, dated December 2009 (ERP), which provides, *inter alia*, that “enforcement professionals should always evaluate the economic benefit of noncompliance in calculating penalties.” ERP at 20.

5. Based on new guidance that is currently being developed by the United States Environmental Protection Agency on how to calculate the economic benefit in FIFRA cases, Complainant seeks to reduce the proposed penalty by the amount of the economic benefit calculated in this matter.

6. Through this Motion, Complaint seeks leave to amend its Complaint to reduce the proposed penalty from \$2,941,456 to \$2,891,200, by eliminating the economic benefit component of the proposed penalty.

7. The Consolidated Rules provide that a Complaint may be amended after the Answer has been filed upon motion granted by the Presiding Officer. 40 C.F.R. §22.14(c). “While no standard is provided in the Rules for determining whether to grant an amendment, the general rule is that administrative pleadings are ‘liberally construed and easily amended.’” *In re Scranton Prods., Inc., et al.*, Docket No. CAA-03-2008-0004, 2008 EPA ALJ LEXIS 16, at *2 (Chief ALJ, April 3, 2006) (quoting *In re Port of Oakland and Great Lakes Dredge and Dock Co.*, 4 E.A.D. 170, 205 (EAB 1992)) (Exhibit 1). Absent a showing that the proposed amendment is brought in bad faith or for dilatory purposes, results in undue delay or prejudice to the opposing party, or would be futile, leave to amend should be granted. *Id.* at *2-3 (citing *Foman v. Davis*, 371 U.S. 178, 181-82 (1962)).

8. Because Complainant seeks to reduce the proposed penalty in this action, there is no prejudice to Respondent. *See id.* at *3. Furthermore, Complainant’s request for leave to amend the Complaint to reduce the proposed penalty is not the product of undue delay, bad faith, or dilatory motive.

9. In accordance with *In re Scranton Prods., Inc., et al.*, 2008 EPA ALJ LEXIS 16, at *3 (holding that the filing of an amended complaint with the reduced penalty was not required), should the Presiding Officer grant this Motion, Complainant will submit an amended complaint with the reduced penalty amount upon the Presiding Officer’s request.

10. For all of the foregoing reasons, Complainant respectfully requests that the Presiding Officer grant it leave to amend its Complaint to reduce the proposed penalty to \$2,891,200 or, in the alternative, order that Complainant's proposed penalty is reduced to \$2,891,200 without the need for the filing of an amended Complaint.

Respectfully submitted,

DATED: Sept. 15, 2010



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CERTIFICATE OF SERVICE

I hereby certify that on the 15 day of September, 2010, I filed the original and one copy of Complainant's Motion for Leave to Amend Complaint to Reduce Proposed Penalty and Memorandum in Support Complainant's Motion with La Dawn Whitehead, Regional Hearing Clerk, U.S. EPA, Region 5, 77 West Jackson Blvd., Chicago, Illinois 60604, and placed for pickup to be mailed a copy of Complainant's Motion for Leave to Amend Complaint to Reduce Proposed Penalty and Memorandum in Support of Complainant's Motion by Pouch Mail to:

Honorable Barbara A. Gunning
Administrative Law Judge
Office of the Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-2001

and placed for pickup to be delivered by UPS a copy of Complainant's Motion for Leave to Amend Complaint to Reduce Proposed Penalty and Memorandum in Support of Complainant's Motion to:

Michael H. Simpson, Esq.
Reinhart Boerner Van Deuren S.C.
1000 North Water Street
Milwaukee, Wisconsin 53202



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EXHIBIT 1



6 of 103 DOCUMENTS

In the Matter of: Scranton Products, Inc., Hoffman and Kozlansky Realty Co., LLC and
Wyoming S & P, Inc., Respondents

Docket No. CAA-03-2008-0004

United States Environmental Protection Agency
Office of Administrative Law Judges

2008 EPA ALJ LEXIS 16

April 3, 2008

PANEL:

[*1] Susan L. Biro, Chief Administrative Law Judge

OPINION:

ORDER GRANTING MOTION TO AMEND THE PROPOSED PENALTY

Complainant, the Division Director of the Waste and Chemicals Management Division of the United States Environmental Protection Agency, Region III, filed a Complaint and Notice of Opportunity for Hearing ("Complaint") on October 22, 2007 against Scranton Products, Inc. ("Scranton Products"), Hoffman and Kozlansky Realty Co., LLC ("H&K"), and Wyoming S & P, Inc., for violations of the National Emission Standard for Asbestos, 40 C.F.R. Part 61, Subpart M, which was promulgated under Sections 112 and 114 of the Clean Air Act.

After Respondents each filed Answers to the Complaint, Complainant entered a settlement with Scranton Products and H&K to resolve their liability for the violations alleged in the Complaint, and subsequently a Consent Agreement and Final Order ("CAFO") among Complainant, Scranton Products, and H&K was executed and filed on March 13, 2008. In the CAFO, Scranton Products and H&K agreed to pay a civil penalty for their liability in the amount of twenty thousand dollars (\$ 20,000). The CAFO did not resolve the liability of the remaining Respondent, Wyoming S & P, [*2] Inc.

Complainant filed a Motion to Amend the Proposed Penalty on March 20, 2008 to reduce the penalty proposed in the Complaint by the amount which the other two Respondents agreed to pay, so that the proposed penalty would be reduced from \$ 59,317 to \$ 39,317. Complainant asserts that it informed Wyoming S & P, Inc. of its intent to file the Motion, but did not receive a response. To date, no response to the Motion has been filed.

The Rules of Practice provide at 40 C.F.R. § 22.13(c) that a complainant may amend the complaint upon motion granted by the presiding judge. While no standard is provided in the Rules for determining whether to grant an amendment, the general rule is that administrative pleadings are "liberally construed and easily amended." *Port of Oakland and Great Lakes Dredge and Dock Company*, 4 E.A.D. 170, 205 (EAB 1992)(quoting *Yaffe Iron & Metal Co., Inc. v. U.S. EPA*, 774 F.2d 1008, 1012 (10th Cir. 1985)). The following standard in Federal court for amendment of pleadings, set forth in *Foman v. Davis*, 371 U.S. 178, 181-182 (1962), is applied to administrative pleadings: "[i]n [*3]

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.

In this case, where Complainant seeks merely to reduce the total penalty proposed against three Respondents by the amount of penalty agreed to be paid by two of the Respondents, there appears to be no undue prejudice to the remaining Respondent. There is nothing in the case file which would support a finding of any undue delay, bad faith or dilatory motive on the part of Complainant.

Complainant has not submitted a proposed amended complaint, and, where the only amendment is a penalty reduction, and the amendment has not been opposed, there is no need for filing an amended complaint or for an answer to be filed thereto.

Accordingly, the Complainant's Motion to Amend the Proposed Penalty is hereby **GRANTED**.

Susan L. Biro

Chief Administrative Law Judge

Dated: April 3, 2008
Washington, D.C.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental Law Air Quality Emission Standards Stationary Sources Hazardous Pollutants Real Property
Law Environmental Regulation Indoor Air & Water Quality