

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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HEARING CLERK

James K. Laducer and Debra Werner)
)
United C-Store)
BIA 7 South)
Belcourt, ND 58316)
EPA ID Number 3050006)
)
Respondents.)
_____)

Docket No. RCRA-08-2008-0005

ORDER ON MOTION TO AMEND COMPLAINT

On June 25, 2008, Complainant filed a Motion to Amend Complaint pursuant to 40 C.F.R. §§ 22.14(c) and 22.16(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (“Rules of Practice”). In its Motion, Complainant requests to amend the Complaint by dismissing Respondent, James K. Laducer and adding Respondent Mike Werner. Mr. Laducer has not, to date, filed an Answer in response to the Complaint filed on April 1, 2008. Respondent Debra Werner and her spouse, Mike Werner, filed an Answer to the initial Complaint on May 12, 2008. Pursuant to 40 C.F.R. § 22.16(c) “the Regional Judicial Officer shall rule on all motions filed or made before an answer to the complaint is filed.” For efficiency purposes and to avoid undue delay, if there are multiple respondents, a matter is not transferred to the Office of Administrative Law Judges until all respondents have filed an answer. (See, September 20, 2007, Memorandum from Chief Judge Susan Biro, Referring New Cases Involving Multiple Respondents). Therefore, this Presiding Officer shall address the Motion to Amend Complaint presently before the court. Complainant,

in its Motion, further requests clarification from this Presiding Officer on whether Debra and Mike Werner are required to file an answer to the Amended Complaint.

40 C.F.R. § 22.14(c) states “[t]he complainant may amend the complaint once as a matter of right at any time before the answer is filed. Otherwise the complainant may amend the complaint only upon motion granted by the Presiding Officer.” Under the circumstances of this case, Complainant can avail itself of either option. Complainant, in its Memorandum in Support of Motion to Amend Complaint (“Memo in Support”), states that in order “to avoid any prejudice or inequity to Ms. Werner who filed an answer already in this matter, Complainant is erring on the side of caution by seeking to amend the complaint by motion.” (See, p. 4 of Memo in Support).¹ Respondent Debra Werner filed a response to the Motion on July 15, 2008. In her response, Ms. Werner states she opposes adding Mike Werner to the Complaint. Ms. Werner also states she does not oppose the dismissal of Mr. Laducer from the Complaint.

On July 24, 2008, Complainant filed a Motion for Extension of Time requesting until August 14, 2008 to file a reply to Respondent’s response of July 15, 2008. Complainant’s motion was granted. On August 14, 2008, Complainant filed its Motion in Opposition to Respondent’s Response to Complainant’s Motion to Amend Complaint. In its Motion, Complainant states that Mr. Werner is involved in the day-to-day operations of United-C Store and therefore is an operator as that term is defined in 42 U.S.C. § 6991. Complainant also requests, for the first time, that United Oil and Gas, Inc. be added as a Respondent to the

¹ Under the Federal Rules of Civil Procedure, adding and dropping parties amending a complaint is governed by Rule 21 as well as Rule 15. 40 C.F.R. § 22.14(c) is most like Rule 15 and functions in the same manner in the administrative context. The Rules of Practice do not have an analogous section to Rule 21. Furthermore, courts are in disagreement regarding the effect that Rule 21 has on the courts’ discretion to grant a Rule 15(a) motion to amend. Therefore, an analysis of Rule 21 is not instructive in this instance.

Complaint. Respondent has not had the opportunity to respond to amending the Complaint to add United Oil and Gas, Inc. as a Respondent.

Mr. Laducer has not filed a response to the Motion to Amend Complaint. The Rules of Practice provide that a "party's response to any written motion must be filed within 15 days after service of such motion." 40 C.F.R. § 22.16(b). The Regional Hearing Clerk has not received a response from Mr. Laducer. The Rules of Practice provide that "A party who fails to respond within the designated period waives any objection to the granting of the motion." 40 C.F.R. § 22.16(b). Therefore, this court can now rule on the dismissal of Mr. Laducer and the addition of Mr. Werner and United Oil and Gas, Inc.

Discussion

Complainant, in its Memo in Support, cites to administrative and judicial case law that favors amending pleadings, in particular a complaint, in the absence of undue prejudice, delay, bad faith or dilatory motive. See, *In the Matter of City of St. Charles, Illinois*, 2008 ALJ LEXIS 15 (April 8, 2008), citing, *Foman v. Davis*, 371 U.S. 178, 182 (1962). In *Foman*, a case interpreting Rule 15(a) of the Federal Rules of Civil Procedure, the Supreme Court emphasized the provision in the Rule that leave to amend shall be freely given, and held that:

“[i]n the absence of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.-the leave sought should, as the rules require, be ‘freely given.’”

Foman v. Davis, 378 U.S. 178, 182 (1962).

The Court in *Foman* stated that "if the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman* at 181. Furthermore, when an amendment to add a defendant is done at a very early stage in the litigation and it would not prejudice the newly joined defendant, who was notified of the action within the applicable time limit, the amendment should be granted. *U.S. v. Thomas Howell Kiewit Inc.*, 149 F.R.D. 125 (E.D. Va. 1993).

While Respondent Debra Werner does not oppose the dismissal of Mr. Laducer she does oppose adding Mike Werner as a Respondent. Her rationale for opposing the motion is that Mr. Werner is an employee and not an owner of the facility. Some courts have determined that amending the pleadings is not appropriate in certain instances. *See, Perry v. Hartford Insurance Company of Midwest*, 196 F.Supp.2d 447 (E.D. Tex. 2002); *Fair Housing Development Fund v. Burke*, 55 F.R.D. 414 (E.D.N.Y. 1972), In these cases the motion to add defendants was denied based on the following factors: 1) the amendment was sought primarily to defeat federal jurisdiction; 2) the plaintiff did not exercise diligence in attempting to add the defendant; 3) the plaintiff would not be prejudiced if the amendment was denied; 4) that there were no other equitable factors weighing in favor of the motion to amend. *Perry*, at 449. However, none of these factors overtly apply here.

With respect to dismissing Mr. Laducer, the parties agree to his dismissal. There is no apparent prejudice, and therefore, his dismissal is appropriate. Furthermore, the facts of this matter also do not warrant a denial of Complainant's Motion as to Mr. Werner. No undue prejudice is apparent in this case, as it is still in the very early stages of the litigation process.

The parties have not been directed to file their prehearing exchange, and no hearing date has yet been set. Mr. Werner signed the Answer to the initial Complaint, is identified as a point of contact on several documents related to the facility and therefore can be considered an operator of the United-C Store as that term is defined in 42 U.S.C. § 6991(1)(B)(3). The addition of Mr. Werner is appropriate.

With respect to adding United Oil and Gas, Inc. as a Respondent to the Complaint, there also is no undue prejudice. Debra Werner submitted on August 2, 2008, documentation showing she is the President of United Oil and Gas, Inc. Ms. Werner registered United Oil and Gas, Inc. with the North Dakota Secretary of State on July 7, 2008. United Oil and Gas, Inc. is in the business of bulk gas, propane and fuel activities, including United-C Store, and therefore fits the definitions of owner/operator as those terms are defined in 42 U.S.C. § 6991(1)(B)(3) and (4).

As to the issue of whether Debra and Mike Werner are required to file an Answer to the Amended Complaint, it seems that the Respondents may want to file an Amended Answer given their position that Mr. Werner should not be a party to this matter. If Mr. Werner believes the Answer he filed on May 12, 2008 does not accurately represent his admissions, denials and affirmative defenses, then he can file an Amended Answer pursuant to 40 C.F.R. § 22.15(e). The Rules of Practice also provide for Debra Werner to, personally and on behalf of United Oil and Gas, Inc., file an Amended Answer pursuant to 40 C.F.R. § 22.14(c).

ORDER

1. Complainant's Motion to Amend Complaint is hereby **GRANTED**. Complainant shall file the First Amended Administrative Complaint within seven (7) days from the date of this Order.
2. Respondent James K. Laducer is dismissed from the Complaint. Respondents Mike Werner and United Oil and Gas, Inc. may be added as Respondents to the Complaint.
2. Respondents may file an Answer to the First Amended Complaint within 20 days of the date of service of the First Amended Complaint.

Dated this 20th day of August, 2008.



Elyana R. Sutin
Regional Judicial Officer

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **ORDER ON MOTION TO AMEND COMPLAINT** in the matter of **JAMES K. LADUCER AND DEBRA WERNER AND UNITED C-STORE; DOCKET NO.: RCRA-08-2008-0005** was filed with the Regional Hearing Clerk on August 20, 2008.

Further, the undersigned certifies that a true and correct copy of the document was delivered to Dana J. Stotsky, Senior Enforcement Attorney, U.S. EPA - Region 8, 1595 Wynkoop Street, Denver, CO 80202-1129. True and correct copies of the aforementioned document were placed in the United States mail certified/return receipt on August 20, 2008 to:

Mr. Mike Werner and/or Ms. Debra Werner
United Oil and Gas of Bottineau
P.O. Box 386
Bottineau, ND 58318

and

James K. Laducer
Laducer & Associates, Inc.
201 Missouri Drive
Mandan, ND 58554

August 20, 2008



Tina Artemis
Paralegal/Regional Hearing Clerk