



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY BEFORE THE ADMINISTRATOR

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REGIONAL HEARING CLERK U.S. ENVIRONMENTAL PROTECTION AGENCY

In The Matter of:)
Hanson's Window and Construction, Inc.,)
Respondent.)

Docket No. TSCA-05-2010-0013

ORDER DENYING RESPONDENT'S MOTION TO DISMISS AND GRANTING COMPLAINANT'S MOTION TO FILE AMENDED COMPLAINT

I. Background

On June 10, 2010, the United States Environmental Protection Agency ("EPA"), Region 5 ("Complainant"), filed a Complaint pursuant to Section 16(1) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a), requesting civil penalties be imposed against Hanson's Window and Construction, Inc., d/b/a "numerous assumed names," located in Madison Heights, Michigan ("Respondent").¹ Complainant seeks civil penalties in the amount of \$784,380 for 542 counts of alleged TSCA violations related to window replacements made by Respondent at 271 units of target housing. After Respondent filed a Motion for Extension of Time to Answer or Otherwise Respond to EPA's Administrative Complaint, the Regional Judicial Officer extended the response deadline to July 30, 2010.

On August 3, 2010, Respondent's Answer to Administrative Complaint ("Answer") and Respondent's Motion to Dismiss EPA's Administrative Complaint ("Motion to Dismiss") were filed. In its Answer, Respondent identifies its various trade and assumed names, requests a hearing, denies civil liability under "any such rules that became effective at a time beyond the dates of the actionable conduct alleged by Complainant," and denies the ability to pay the proposed penalty. Further, Respondent asserts as an affirmative defense that Complainant is barred by the applicable statute of limitations from seeking a penalty for any violations occurring before June 9, 2005. In its Motion to Dismiss, Respondent argues that the allegations against it in the Complaint are based on the "Pre-Renovation Rule" at 40 C.F.R. § 745.84, amended by EPA in 2010, when "each and every count listed in the Complaint relates to a job performed by

¹ Complainant lists the names as "including, but not limited to, 800-Hansons, 1-800-Hansons, Hanson's Window and Siding World, Window & Siding World, Hanson's Windows & Siding, Inc., Hanson's Window & Siding, and Hanson's Window Company."

Hanson's *in 2005*." (Motion to Dismiss, ¶ 4, emphasis added.) Respondent argues that because the Complaint seeks to "retroactively enforce EPA rules," which would be "severely prejudic[ial]," it should be dismissed. *Id.*, ¶ 8.

Complainant responded to the Motion to Dismiss on August 12, 2010 ("Complainant's Response" or "C's Resp."), by arguing that it does not attempt to enforce the "Pre-Renovation Rule" as amended in 2008,² but intends to enforce "the portion of the regulations that were promulgated and in effect since 1998." (C's Resp. at 2.) The substantive requirements, Complainant asserts, "were not significantly changed" in the newer version of the regulations, which were cited in the Complaint. *Id.* Plus, Complainant argues, Respondent had sufficient notice of which requirements Complainant charged it with violating. *Id.* at 3.

Simultaneously, on August 12, 2010, Complainant filed a Motion to File the Amended Complaint and a memorandum in support ("Motion to Amend"), and two copies of an Amended Complaint, one a final, unmarked version ("Amended Complaint"), and one version with the edited portions highlighted. In its Motion to Amend, Complainant seeks to amend the Complaint to (1) clarify Respondent's assumed and trade names as set forth in Respondent's Answer, (2) cite to the provisions within Part 745 effective in 2005, (3) include reference to an additional section of TSCA, and (4) clarify when the window replacement contracts at issue were made.

On August 27, 2010, Respondent replied to Complainant's Response ("Respondent's Reply" or "R's Reply") by arguing that Complainant has not established a prima facie case or on other grounds shown a right to relief in its Complaint. Complainant "fail[ed] miserably" to follow the pleading requirements of the Rules of Practice, Respondent asserts, and therefore, did not provide Respondent with fair notice of the allegations alleged against it. (R's Reply at 3.) Respondent adds that it is not requesting that the undersigned dismiss the Complaint with prejudice, but explains that instead, "Complainant will have every right to file a new complaint." *Id.*

On August 30, 2010, Respondent filed a response to Complainant's Motion to Amend ("Response to Motion to Amend"), wherein Respondent argued that it "will unequivocally be prejudiced" by the granting of the Motion and the filing of the Amended Complaint. The five-year statute of limitations in 28 U.S.C. § 2462, Respondent asserts, would bar any new claims filed against it for work done in 2005, so if the Motion to Amend is granted, Respondent would not be able to challenge a new complaint based on a limitations defense. Further, Complainant delayed filing a complaint for "more than two years," realized the limitations period was approaching, and then quickly "filed an error-filled complaint that failed to follow the express requirements of 24 C.F.R. § 22.14(a)(2) and, consequently, did not give the Respondent fair notice of the charges against it."

² EPA's 2010 amendments to the "Pre-Renovation Rule" did not change the 2008 version of 40 C.F.R. § 745.84(a)(1), the subsection that the proposed Amended Complaint alleges Respondent violated.

Complainant's Reply to Respondent's Response to Complainant's Motion to Amend ("Complainant's Reply" or "C's Reply"), filed September 2, 2010, Complainant rebuts Respondent's claim that it is prejudiced by the filing of the Amended Complaint, arguing that "Respondent has not identified any prejudice that outweighs having the alleged violations decided on the merits." (C's Reply at 3.) Complainant asserts Respondent is not deprived of the opportunity to present facts or evidence, and cannot claim that it did not have notice of the Complainant's allegations. Second, Complainant argues that Respondent improperly relies on a document containing settlement communication in order to demonstrate Complainant's alleged delay in filing the Complaint. *Id.* at 5-7. This document, Complainant states, should not be considered by the undersigned. *Id.*

II. Respondent's Motion to Dismiss EPA's Administrative Complaint

The Rules of Practice at 40 C.F.R. Part 22 ("Rules"), which govern this proceeding, state that "Each complaint shall include . . . [s]pecific reference to each provision of the Act, implementing regulations, permit or order which respondent is alleged to have violated." 40 C.F.R. § 22.14(a)(2). The Rules further provide as follows:

The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

40 C.F.R. § 22.20(a). Analogous to a motion to dismiss for failure to state a claim upon which relief may be granted under the Federal Rules of Civil Procedure ("FRCP") (Rule 12(b)(6)), Respondent's Motion may be considered against the same standard.³

As stated by the Supreme Court:

[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement of relief.

Ashcroft v. Iqbal, 129 S.Ct. 1937, 1950 (2009); *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)(dismissal for failure to state a claim upon which relief may be granted does not require

³ The Environmental Appeals Board has affirmed that ALJs and the Board may, "in [their] discretion, refer to the FRCP for guidance when the Consolidated Rules of Practice do not clearly resolve a procedural issue." *In re B&L Plating, Inc.*, 11 E.A.D. 183, 188 n.10 (EAB 2003); *see also In re Zaclon, Inc.*, 7 E.A.D. 482, 490 n.7 (EAB 1998)(Remand Order).

appearance, beyond a doubt, that plaintiff can prove no set of facts in support of claims that would entitle it to relief), abrogating *Conley v. Gibson*, 355 U.S. 41 (1957). See also *Minor Ridge, L.P.*, Docket No. TSCA 07-2003-0019, 2003 EPA ALJ LEXIS 21, at *4 (EPA ALJ Mar. 26, 2003)(Order on Respondent's Motion to Dismiss); *Julie's Limousine & Coachworks, Inc.*, Docket No. CAA-04-2002-1508, 2002 EPA LEXIS 74, at *3-4 (EPA ALJ Nov. 26, 2002)(Order Denying Respondent's Motion to Dismiss and Order Denying Respondent's Motion for Bill of Particulars).

Respondent originally argued in its Motion to Dismiss that the Complaint attempts to retroactively apply 2010 rules to 2005 conduct. However, since Complainant admitted its citation errors and moved to amend, Respondent's Reply no longer asserts the retroactivity argument and there is no need to discuss it further here.

Respondent's main argument now, in briefs on both pending motions, is that the Complaint "does not include specific reference to each provision of the Act, implementing regulations, permit or order which respondent is alleged to have violated. Rather . . . the citations to the regulations and statute are replete with errors." (R's Reply at 3, R's Resp. at 7-8.) Respondent's pleadings place much emphasis on arguing that the decision of the Environmental Appeals Board ("EAB") in *In the Matter of Asbestos Specialists, Inc.*, 4 E.A.D. 819 (EAB 1993) should serve as a "road map" for deciding the present motions. (R's Reply at 3, R's Response at 7.) In *Asbestos Specialties*, the EAB found that EPA's complaint "failed miserably" to meet the pleading standards in the Rules. 4 E.A.D. at 820. In that complaint, citations to regulations and the statute were "replete with errors," specifically:

the complaint cites to a requirement contained in 40 C.F.R. § 763.90(i)(5)(i), but § 763.90(i) does not have a subsection (5)(i); the complaint alleges that Respondent is in violation of TSCA section 15(3)(d), but TSCA section 15(3) does not have a subsection (d); the complaint alleges that Respondent failed to comply with TSCA section 203(b), but that section does not impose any duties on anyone except the Agency; and the complaint also charges Respondent with a failure to collect asbestos containing materials, yet the only sample collecting requirement by the Region in the regulation cited in the complaint or in the penalty calculation worksheet refers to the collection and analysis of *air samples*

Id. at 820-821. The complaint in *Asbestos Specialties* even failed to identify the school building where the violations allegedly took place, and the EPA inspector who observed them. *Id.* at 821. The EAB held that dismissal of the complaint was warranted under 40 C.F.R. 22.20(a) "on the basis of . . . grounds which show no right to relief" and the "complaint is defective in that it does not give the Respondent fair notice of the charges against it . . ." *Id.* at 826.

However, this Tribunal is not persuaded that the Complaint in the instant case suffers the same fatal flaws as the complaint in *Asbestos Specialists*. True, the original Complaint in the instant case did mistakenly cite the current codified section number (40 C.F.R. § 745.85(a)(1)) for the provisions describing the legal requirements alleged to have been violated by Respondent

Hanson's Window and Construction, Inc., rather than the correct section number (40 C.F.R. § 745.84(a)(1)) that applied in 2005 at the time of the conduct in issue. Although imperfect, the provisions cited in the Complaint do serve to adequately identify the legal deficiencies with which Respondent is charged, particularly when combined with the Complaint's narrative descriptions of the alleged non-compliant conduct (See, e.g., Complaint, §§ 8, 47 and 321). In other words, the magnitude of the inaccuracies, confusion and lack of clarity in defining the alleged violations in *Asbestos Specialists* is simply not present here.

The differences between the 1998 and 2008 versions of EPA's Pre-Renovation Rule are relatively minor. The *prima facie* case remains the same. EPA's preamble discussion of the amended version states: "With respect to renovations in individual housing units, whether single family or multi-family, firms performing renovations for compensation in target housing must continue to distribute a lead hazard information pamphlet to the owners and tenants of the housing no more than 60 days before beginning renovations. This requirement, along with the associated requirements to obtain acknowledgments or document delivery, has not changed." 73 Fed. Reg. 21692, at 21716. In both the original and proposed amended Complaint, "[a]t its essence, Complainant alleges that for each identified contract, Respondent failed to perform the following: provide required information about lead hazards to its customers and obtain documentation necessary to demonstrate that it provided the required lead hazard information; and retain records to demonstrate that it provided such required lead hazard information." (C's Reply at 4.) "Complainant does not seek to revise the language in Counts 1 through 542. Complainant does not seek to add new transactions or violations, or to assess additional penalties." (Motion to Amend, at 5.)

"Fair notice is achieved through pleadings that inform the respondent of the applicable legal requirement at issue, even if there are minor defects in citation." *In re Lazarus, Inc.*, 7 E.A.D. 318, 382 (EAB 1997); *In the Matter of Bethenergy (Bethlehem Steel Corp.)*, 3 E.A.D. 209, 220 (CJO 1990)(respondent received fair notice from notice of noncompliance that erroneously cited an unapproved version of a state implementation plan but otherwise correctly described the standards at issue, which were in effect pursuant to an earlier approved plan); *Bujtas v. Henningsen Foods Inc.*, 63 F.R.D. 660, 662 (S.D.N.Y. 1974)(granting leave to amend to add plaintiffs to comply with local law, when the theory of plaintiff's cause of action and proofs remain the same; "The only change will be one of form . . .").

In judging the Complaint in this case, the standard enunciated in *Iqbal, supra*, requires those factual allegations in the Complaint that are more than mere conclusions be assumed true. This includes the factual allegations that: (1) Respondent replaced windows at the addresses listed in the Complaint. (This assumption is easily defended because Respondent admits to supplying Complainant with a list of all jobs it performed in 2005 in Michigan, from which Complainant drew its allegations; see Answer ¶¶ 26-27, 31, 37); (2) Respondent failed to provide the owners of 271 specifically identified residential dwelling units of target housing with lead hazard information pamphlets and failed to obtain acknowledgment of receipt from each owner at least seven days before conducting renovation at those units; and (3) Respondent failed to retain related records for three years following completion of the renovations. Assuming their

veracity, these factual allegations plausibly give rise to an entitlement of relief under the regulations at 40 C.F.R. Part 745 and the Act at 15 U.S.C. §§ 2689 and 2615.⁴ *Iqbal*, 129 S.Ct. at 1950. Likewise, under the Rules' standard at 40 C.F.R. § 22.20(a) that the Complaint must establish a *prima facie* case, the Complaint survives. Therefore, Respondent's Motion to Dismiss EPA's Administrative Complaint is denied.

III. Complainant's Motion to File the Amended Complaint

A. Standard by Which to Decide the Motion

Section 22.14(c) of the Rules provides that once an answer has been filed, the complaint may be amended only upon motion granted by the presiding officer. 40 C.F.R. § 22.14(c). Because the Rules provide no standard for determining when leave to amend should be granted, the FRCP and interpretations thereof may be used as guidance. *In re Carroll Oil Co.*, 10 E.A.D. 635 (EAB 2002); *Asbestos Specialists*, 4 E.A.D. at 827 n.20.

Rule 15(a)(2) of the FRCP, which concerns amended pleadings, provides that courts "should freely give leave [to amend] when justice so requires." In the leading case of *Foman v. Davis*, 371 U.S. 178 (1962), the United States Supreme Court stated "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." *Id.* at 182. The Supreme Court stated further that "[o]f course, the grant or denial of an opportunity to amend is within the discretion of the [court]" and listed the following possible grounds for denial:

In 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

⁴ Complainant's amended Complaint also cites 15 U.S.C. § 2686 as the basis for violations in Counts 1 to 271 and cites § 2687 as the basis for violations in Counts 272 to 542. However, citing statutory sections 2686 and 2687 is incorrect. Section 2686 only directs EPA to promulgate regulations that require renovators of target housing to provide lead hazard information pamphlets to owners and occupants. Section 2687 only requires EPA to include recordkeeping and reporting requirements in its lead regulations. It is those regulations that apply to Respondent, that can be violated by Respondent, and that are properly cited in the Complaint, without referencing the underlying statutory rulemaking authority. The statutory provisions in sections 2686 and 2687 themselves impose no requirements on Respondent and thus cannot be violated by Respondent. *Asbestos Specialists, Inc.*, 4 E.A.D. at 820-821 (EAB 1993) ("the complaint alleges that Respondent failed to comply with TSCA section 203(b), but that section does not impose any duties on anyone except the Agency," rather it directs EPA to promulgate regulations). Violation of the rule alone is a sufficient cause of action, as section 2689 provides "It shall be unlawful for any person to fail or refuse to comply with a provision of this subchapter or with **any rule** or order issued under this subchapter." 15 U.S.C. § 2689 (emphasis added).

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.”

Id. Federal appellate and district courts have held in “innumerable judicial pronouncements” that Rule 15(a) directs “strong liberality . . . in allowing amendments” to pleadings. 6 Charles Alan Wright & Arthur R. Miller, et al., FEDERAL PRACTICE & PROCEDURE § 1484 (3d ed. 2010); *Hall v. Nat’l Supply Co.*, 270 F.2d 379, 383 n.8 (5th Cir. 1959), quoting Moore’s *Federal Practice* at 828 (2d ed.)(citations omitted). Likewise, the standard enunciated in *Foman* has been applied in a multitude of administrative proceedings. *San Pedro Forklift*, Docket No. CWA-09-2009-0006, 2010 WL 3324918 (EPA ALJ Aug. 11, 2010)(Order on Respondent’s Motion for Leave to File a First Amended Answer to Administrative Complaint); *City of St. Charles*, Docket No. CWA-04-2008-5192, 2008 WL 1744634 (EPA ALJ Apr. 8, 2008)(Order Granting Motion to Amend Complaint); *City of West Chicago*, Docket No. CWA-5-99-013, 2000 WL 341012 (EPA ALJ Feb. 25, 2000)(Order on Complainant’s Motion to Amend Complaint). Of the factors set forth by the Supreme Court in *Foman*, prejudice to the parties is repeatedly cited as the most important in determining whether to allow amendment. *Carroll Oil Co.*, 10 E.A.D. 635, 650; *Green v. Wolf Corp.*, 50 F.R.D. 220, 223 (S.D.N.Y. 1970); *Middle Atl. Util. Co. v. S. M. W. Dev. Corp.*, 392 F.2d 380 (2d Cir. 1968).

B. Statute of Limitations

Respondent claims that it would be prejudiced by the granting of Complainant’s Motion to Amend because Respondent could not then benefit from asserting that the five year statute of limitations at 28 U.S.C. § 2462 bars any newly asserted claims. Of course, this defense is predicated on the dismissal or withdrawal of the original Complaint and the subsequent filing of a new one alleging the violations of 2005. Respondent’s argument is not persuasive.

In *Kimbrow v. U.S. Rubber Co.*, 22 F.R.D. 309, 311 (D. Conn. 1958), the defendant claimed that “it had a vested right in the use of the Statute of Limitations as a defense, and that allowance of [an] amendment deprives it of this right.” The court rightly answered: “But prejudice must consist of more in this context; otherwise the doctrine of relation back would never apply.” *Id.* The relation back doctrine, at FRCP Rule 15, provides that

An amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading

FRCP 15(c)(1)(B).⁵ Citing the Supreme Court in *Tiller v. Atl. Coast Line R.R. Co.*, 323 U.S.

⁵ For an amendment to change the name of a party, an additional requirement is that the newly-named party must have “received such notice of the action that it will not be prejudiced in defending on the merits; and . . . knew or should have known that the action would have been

574, 581 (1945), the court in *Kimbro* found that the statute of limitations should not bar the allegations in a complaint when the relation back doctrine applies, and when ““the respondent has had notice from the beginning”” of the facts and claims alleged against it. *Kimbro*, 22 F.R.D. at 311.

Following *Kimbro*, the court in *Bujtas v. Henningsen Foods Inc.*, *supra*, held that the potential applicability of a statute of limitations that would otherwise bar the claims by the plaintiffs who were proposed to be added to the complaint was not unduly prejudicial to merit denying the amendment. 63 F.R.D. at 662. The *Bujtas* court quoted from Moore’s Federal Practice: “If the original pleading gives fair notice of the general fact situation out of which the claim arises, the defendant will not be deprived of any protection which the statute of limitations was designed to afford him.” *Id.* (citation omitted). *Accord, Green v. Wolf Corp.*, 50 F.R.D. at 224 (rejected defendant’s argument of undue prejudice because claims sought to be added to complaint, four years later, although potentially barred by statute of limitations, involved the same conduct alleged in the original claim; thus the amendments related back to the original complaint). See also *Middle Atl. Util. Co.*, 392 F.2d at 385-386 (court found potential application of statute of limitations insufficient to deny motion to amend, where trial judge made no findings that amended complaint did not arise out of the same conduct, transaction or occurrence and thus relate back to initial filing).

The undersigned finds that Complainant’s proposed Amended Complaint clearly asserts a claim that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading, and thus is entitled to “relate back” to the date of the original Complaint. Complainant’s primary amendment would simply correct a regulatory citation – replacing citations to the section amended in 2008 that currently describes the alleged errant conduct but was not in effect at the time of Respondent’s conduct in 2005, by instead citations to the original 1998 section that was in effect in 2005. As noted in discussing the Motion to Dismiss, “At its essence, Complainant alleges [in both the original and proposed amended Complaint] that for each identified contract, Respondent failed to perform the following: “provide required information about lead hazards to its customers and obtain documentation necessary to demonstrate that it provided the required lead hazard information; and retain records to demonstrate that it provided such required lead hazard information.” (C’s Reply at 4.) “Complainant does not seek to revise the language in Counts 1 through 542. Complainant does not seek to add new transactions or violations, or to assess additional penalties.” (Motion to Amend, at 5.) Thus, there is ample case law precedent for holding in this case that denying Respondent the potential application of the statute of limitations to some of the counts does not constitute undue prejudice that would warrant denying Complainant’s Motion to Amend.

C. Fair Notice

In objecting to Complainant’s Motion to Amend, Respondent again asserts that because Complainant hurriedly filed the Complaint so as to prevent a statute of limitations bar, it was

brought against it, but for a mistake concerning the proper party’s identity.” FRCP 15(c)(1)(C).

“error-filled” and did not provide Respondent with fair notice of the charges against it. R’s Resp. at 8. As explained above in discussing the Motion to Dismiss, this Tribunal finds that the original Complaint, despite imperfections in citing the regulations alleged to be violated, succeeded in giving Respondent fair notice of the charges against it.

Complainant summarizes it’s four main proposed amendments as follows:

Complainant seeks permission to amend the Complaint in the following four areas: (1) to clarify Respondent’s assumed and trade names as set forth in Respondent’s Answer; (2) to cite to the original regulations promulgated at 40 C.F.R. Part 745, Subpart E, prior to the regulatory amendment and recodification in 2008; (3) to add references to Section 407 of TSCA, 15 U.S.C. § 2687; and (4) to make clear that all the allegations in the original Complaint are only for contracts entered into during the period of approximately May 2005 through December 2005.

Memorandum in Support of Motion to Amend, at 2. As set forth below, these amendments will not cause Respondent undue prejudice nor lack of notice of the allegations against it, nor give rise to any of the other grounds for denial enumerated in *Foman*.

Amendment 1: Respondent’s Trade and Assumed Names

Complainant’s first amendment – the addition of names – does not deprive Respondent of sufficient notice of the allegations against it. Indeed, Respondent does not challenge this particular proposed amendment, and had provided Complainant with the clarification of names in the first place in its Answer (¶ 3). The amendment will conform the Complaint to Respondent’s own submitted information, resulting in no prejudice to Respondent. *See City of St. Charles, supra*, (granting EPA leave to amend the complaint when those amendments were based on information in respondent’s answer).

Amendment 2: Citation to Regulations

The dismissed complaint in *Asbestos Specialists, supra*, reflected a lack of thoughtfulness and preparation. When proposed amendments reflect, instead, an interest in careful pleading and prosecution, leave to amend should be “freely given.” In *Bug Bam Product, LLC*, Docket No. FIFRA-09-2009-0013, 2010 WL 149296 (EPA ALJ Jan. 7, 2010)(Order Granting Complainant’s Motion for Leave to File First Amended Complaint as Modified by the Supplement to the Amended Complaint), EPA moved to amend its complaint in four ways, including adding allegations related to a minimum risk pesticide exemption. The Presiding Officer found no prejudice and held that “[s]uch an amendment would allow the parties to narrow the scope of disputed, material facts by requiring a direct admission or denial by the Respondent.” *Id.* at 8. In the present case, where Respondent answered the Complaint with procedural argument (“Respondent denies the creation of or exposure to civil liability with respect to . . . rules that became effective at a time beyond the dates of the actionable conduct . . .”), an Amended

Complaint, with the applicable regulatory citations, is more likely to garner responses related to the merits of the allegations.

The main amendment to the Complaint, and the one most challenged by Respondent, is the revision to the regulatory and statutory citations. However, the difference between the regulations and law cited, and described in narrative prose, in the Complaint versus the Amended Complaint is not so great as to surprise Respondent with the allegations against him. In fact, the amendments to the regulatory citations simply conform those citations to match the original Complaint's narrative descriptions of the alleged violations. In contrast to the complaint in *Asbestos Specialists*, and similar to that in *Bug Bam*, the Complaint here provided ample notice of the violations, the rules and law at issue, and the proposed amendments merely help to clarify without prejudicing any party.

Specifically, in the original Complaint, Respondent is charged with 271 counts of violating 40 C.F.R. § 745.84(a)(1) by failing to provide owners of residential dwelling units of target housing with lead hazard information pamphlets and obtain their written acknowledgment of receipt or confirmation of delivery at least seven days prior to renovating. Because Respondent's renovations at issue took place in 2005, in the proposed Amended Complaint, Complainant proposes to insert citations to Section 745.85(a)(1), the provision in effect from 1998 to 2008, to replace references in the original Complaint to Section 745.84(a)(1), the current provision as recodified in 2008. As noted above, the substantive terms of these regulations are virtually identical; only the section number was recodified. EPA stated as much in Federal Register preamble discussion of the 2008 amendments:

With respect to renovations in individual housing units, whether single family or multi-family, firms performing renovations for compensation in target housing must continue to distribute a lead hazard information pamphlet to the owners and tenants of the housing no more than 60 days before beginning renovations. This requirement, along with the associated requirements to obtain acknowledgments or document delivery, has not changed.

73 Fed. Reg. 21692, at 21716. 40 C.F.R. § 745.84 (Apr. 22, 2008). Thus, Respondent's assertion of lack of fair notice is without merit. Respondent would not be prejudiced by this minor amendment that simply corrects the citation to the regulations alleged to have been violated.

Amendment 3: Citation to Statute

As explained above in footnote 4, Complainant's citation to the underlying statutory provisions, 15 U.S.C. §§ 2686 and 2687, that require EPA to promulgate the rules alleged to be violated in this case is unnecessary and incorrect.

Amendment 4: Time Period Clarification

Complainant's fourth amendment simply clarifies that all the contracts for window

replacement at issue in the Complaint were entered into during the period “from May through December 2005,” rather than the original statement “around May 2005. Clearly, this amendment does not prejudice Respondent. In fact, in its Motion to Dismiss, Respondent states that “each and every count listed in the Complaint relates to a job preformed by Hanson’s in 2005.” Motion to Dismiss, ¶ 4.

In sum, these four proposed amendments do not cause undue delay in the proceeding, as the parties may still opt to engage in Alternative Dispute Resolution before a neutral administrative law judge, no formal discovery has taken place, no prehearing orders have been issued, nor has a hearing date or any other deadlines been set. A resolution of this matter is better determined on the merits at a hearing or at least further along in the proceeding after discovery has taken place. There is no evidence of bad faith from Complainant, no repeated failure to cure deficiencies by previous amendment, no futility of amendment, and finally, no undue prejudice to Respondent or harm to its entitlement to fair notice of the allegations. Therefore, Complainant’s request to amend is granted, in part, consistent with the discussion above.

IV. Complainant’s Request to Strike Exhibit A of Response to Amend Motion

Finally, Complainant requests that the September 2009 letter attached as Exhibit A to Respondent’s Response to Complainant’s Motion to Amend either be stricken, or in the alternative, that the “Court give no weight to one settlement communication taken out of the context of extensive pre-filing communications.” C’s Reply at 6-7. Allowing such communication “could open the door to having the parties in this matter seek to introduce prior settlement discussions” and “may have a chilling effect on settlement discussions . . . in future administrative proceedings.” *Id.* at 6. Complainant also submits that the letter is neither probative or relevant regarding whether the Motion to Amend may be granted. *Id.* Under 40 C.F.R. § 22.22(a) of the Rules, evidence relating to settlement negotiations, which would be excluded in a federal court under Rule 408 of the Federal Rules of Evidence (FRE), is not admissible. Because there are no terms, monetary or otherwise, of settlement offered, accepted or discussed within the September letter, it cannot meet the definition of what FRE 408 would exclude and the parties are not prejudiced by the letter’s inclusion. Complainant’s request to strike Exhibit A to Respondent’s Response to the Motion to Amend is denied.

ORDER

1. Respondent's Motion to Dismiss EPA's Administrative Complaint is hereby **DENIED**.
2. With the exception of the statutory citations to 15 U.S.C. §§ 2686 and 2687 (as discussed in footnote 4), Complainant's Motion to File the Amended Complaint is hereby **GRANTED**. Within seven (7) days of the date of this Order, Complainant shall file with this Tribunal and serve on Respondent a version of the Amended Complaint, revised to be consistent with this Order.
3. Respondent shall have twenty (20) days from the date the Amended Complaint is served to file an Answer, in accordance with 40 C.F.R. § 22.14(c).
4. Complainant's request to strike Exhibit A of Respondent's Response to Complainant's Motion to File First Amended Complaint is **DENIED**.



Susan L. Biro
Chief Administrative Law Judge

Date: December 1, 2010
Washington, D.C.

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PROTECTION AGENCY**

In the Matter of Hanson's Window and Construction, Inc., Respondent
Docket No. TSCA-05-2010-0013

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Denying Respondent's Motion To Dismiss And Granting Complainant's Motion To File Amended Complaint**, dated December 1, 2010, was sent this day in the following manner to the addressees listed below.



Maria Whiting-Beale
Staff Assistant

Dated: December 1, 2010

Original And One Copy By Pouch Mail To:

La Dawn Whitehead
Regional Hearing Clerk
U.S. EPA
77 West Jackson Boulevard, E-19J
Chicago, IL 60604-3590

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Copy By Pouch Mail To:

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