



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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BEFORE THE ADMINISTRATOR

In the Matter of:
Johnson Matthey Inc.
Respondent
Docket No. CAA-02-2012-1222
Dated: April 5, 2013

ORDER ON MOTION FOR LEAVE TO AMEND COMPLAINT THROUGH A CONSENT AGREEMENT

The Complaint in this matter was issued on September 21, 2012 under Section 113(d) of the Clean Air Act ("CAA"), charging Respondent with two counts of violating pharmaceutical Maximum Achievable Control Technology regulations and corresponding provisions in Respondent's CAA Title V Operating Permits and the CAA Title V Annual Compliance Certification requirement. After Respondent answered the Complaint and requested a hearing, the undersigned was designated to preside in this matter on November 28, 2012 and a Prehearing Order was issued, setting due dates for the parties to file prehearing exchange information. Thereafter, Complainant, Director of the Division of Enforcement and Compliance Assistance, United States Environmental Protection Agency Region 2, sought and was granted two unopposed extensions of time for the parties to file their prehearing exchanges, on grounds that the parties agreed to settle this matter, and considering that Complainant needed to evaluate technical information to be submitted by Respondent. On March 1, 2013, Complainant submitted a third unopposed motion for extension of the due dates on grounds that Complainant may need to amend the Complaint to include new information provided by Respondent, recognizing that time was needed to file a motion to amend the Complaint and to finalize the Consent Agreement and Final Order ("CAFO"). After the motion was granted, Complainant submitted on March 27 a fourth motion for extension of time, stating that the parties agreed to a Consent Agreement, but that complex procedures were required for the settlement, and indicating that it will file a motion for leave to amend the Complaint. The motion was granted, and the due date for the filing of either a CAFO or Complainant's prehearing exchange was extended to April 12, 2013.

On April 3, 2013, Complainant submitted a Motion For Leave to Amend Complaint Through a Consent Agreement ("Motion"). In the Motion, Complainant "moves the Court for leave to amend the Complaint, by filing a Consent Agreement and proposed Final Order amending the complaint and resolving this litigation." Motion at 3. Complainant explains that

“[t]he amendment will be made in a Consent Agreement resolving the litigation” and that if leave is granted to amend the Complaint, the Consent Agreement and Final Order will be submitted to the Regional Judicial Officer for final execution. *Id.* at 1. Complainant states that the parties have agreed upon and prepared a Consent Agreement that “amends the complaint to add a claim related to additional information provided by Respondent . . . during the settlement discussions.” *Id.* at 2. The Motion states that Respondent concurs in the request therein.

Complainant is seeking to amend the Complaint without filing an amended complaint, presumably in the interest of efficiency in concluding the settlement of this matter. The fact that Respondent agrees to such a procedure and agrees with the terms of settlement including the additional claim does not end the inquiry for the presiding officer in determining whether to grant the Motion. The applicable procedural rules, 40 C.F.R. Part 22 (“Rules”) neither refer to any procedure for amending a complaint through a consent agreement, nor suggest that any such procedure may be authorized. The Rules simply provide that once an answer is filed, “the complainant may amend the complaint only upon motion granted by the Presiding Officer” and that “Respondent shall have 20 additional days from the date of service of the amended complaint to file its answer.” 40 C.F.R. § 22.14(c). Looking to provisions in the Rules regarding settlement, Section 22.18(c) provides that “Full payment of the penalty proposed in a . . . settlement . . . shall only resolve respondent’s liability for Federal civil penalties for the violations and facts alleged in the complaint.” 40 C.F.R. § 22.18(c). The relief Complainant seeks is not consistent with this provision, as the Complaint would not include all of the facts and violations alleged in the settlement agreement, and no amended complaint would exist.

Section 22.18(c) reflects that it is critical that the allegations which the parties are resolving by settlement are clearly and specifically set out, to avoid future litigation over the scope of the allegations in the event that another enforcement action is brought against the respondent on similar allegations. Complainant has not submitted to me any proposed amended complaint, any statement of the claim it seeks to add to the settlement, or even a description of such claim. Therefore, I have no basis upon which to determine whether the claim is clearly and adequately stated. Furthermore, it would be inappropriate to order that a complaint be deemed amended with additional language when the language has not been presented to me and therefore cannot be stated or referenced in the order.

I note that in the motion for extension of time dated March 1, Complainant acknowledged the need to first file a motion to amend the Complaint prior to finalizing the CAFO, but later, with the approaching due date for filing the CAFO, Complainant may have had good intentions to initiate a more efficient method in order to comply with the due date. The approach requested in the Motion, however, cannot be taken for the reasons stated. Instead, the appropriate remedy is to grant an additional extension of time, given that the parties have reached a settlement of this matter but need time to file a motion to amend the complaint along with the proposed amended complaint, and after the motion is ruled upon, to file an amended complaint prior to or concurrently with the CAFO.

Accordingly, the Motion for Leave to Amend Complaint Through a Consent Agreement is hereby **DENIED**.

The parties are hereby granted an extension of time. The parties shall file a fully executed Consent Agreement and Final Order settling this matter **on or before April 26, 2013.**

SO ORDERED.



M. Lisa Buschmann
Administrative Law Judge

In the Matter of Johnson Matthey Inc., Respondent
Docket No. CAA-02-2012-1222

CERTIFICATE OF SERVICE

I certify that the foregoing Order on Motion for leave to Amend Complaint through a Consent Agreement dated April 5, 2013, was sent in the following manner to the addressees listed below.



Knolyn R. Jones
Legal Staff Assistant

Dated: April 5, 2013

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