

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 2

U.S. ENVIRONMENTAL  
PROTECTION AGENCY-REG.II  
2009 AUG 25 - PM 12:04  
REGIONAL HEARING  
CLERK

In the Matter of:

Eastman Kodak Company,  
Rochester, NY

Respondent

In a proceeding under the Clean Air Act,  
42 U.S.C. § 7401, et seq., 42 U.S.C.  
§ 7413(d), Section 113(d)

CAA-02-2009-1212

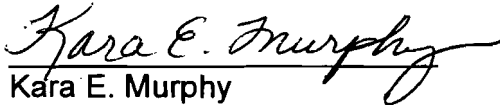
Hon. Barbara A. Gunning,  
Administrative Law Judge

**MOTION FOR LEAVE TO AMEND THE COMPLAINT**

Please take notice that upon the joint stipulations to amend the complaint and the accompanying memorandum of law Complainant in this proceeding, the Director of the Division of Enforcement and Compliance Assistance, EPA, Region 2 (EPA), through her attorney, hereby moves the Court for an order issued pursuant to 40 C.F.R. § 22.14(c) for leave to serve an amended complaint in the above-captioned administrative proceeding. Eastman Kodak Company, through its attorney, has indicated to EPA counsel that it does not oppose this motion.

Dated: August 24, 2009  
New York, New York

Respectfully submitted,



Kara E. Murphy  
Office of Regional Counsel  
U.S. Environmental Protection Agency,  
Region 2  
290 Broadway, 16<sup>th</sup> floor  
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212-637-3211/FAX: 212-637-3199

TO: Honorable Barbara A. Gunning  
Administrative Law Judge  
U.S. Environmental Protection Agency  
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Rochester, NY 14604

**In the Matter of Eastman Kodak Company, Docket No. CAA-02-2009-1212**

**CERTIFICATE OF SERVICE**

I, Kara E. Murphy, certify that the foregoing Motion for Leave to Amend the Complaint was sent this day in the following manner to the addressees listed below:

Original and One Copy

By Hand:

Office of Regional Hearing Clerk  
U.S. Environmental Protection Agency,  
Region 2  
290 Broadway, 16<sup>th</sup> Floor  
New York, NY 10007-1866

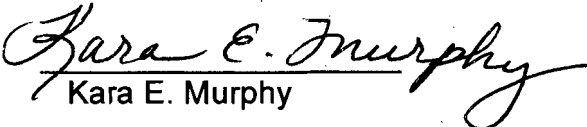
Copy by  
Pouch Mail:

The Honorable Barbara A. Gunning  
Administrative Law Judge  
U.S. Environmental Protection Agency  
Office of Administrative Law Judges  
Mail Code 1900L  
1200 Pennsylvania Avenue, N.W.  
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Dated: Aug. 24, 2009  
New York, New York

  
Kara E. Murphy

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CAA-02-2009-1212

Hon. Barbara A. Gunning,  
Administrative Law Judge

**MEMORANDUM OF LAW IN SUPPORT OF**  
**MOTION FOR LEAVE TO AMEND COMPLAINT**  
**August 24, 2009**

Kara E. Murphy  
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U.S. Environmental Protection Agency, Region 2  
290 Broadway, 16<sup>th</sup> Floor  
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## Preliminary Statement

This memorandum of law is submitted on behalf of Complainant in this proceeding, the Director of the Division of Enforcement and Compliance Assistance, EPA, Region 2 (EPA), in support of the motion for leave to serve an amended complaint in the administrative proceeding, CAA-02-2009-1212, commenced against Eastman Kodak Company (Respondent or Kodak) for alleged violations of the requirements or prohibitions of Section 608, 42 U.S.C. § 7671(g) of the Clean Air Act (CAA or the Act), the emission standards for the servicing and disposal of air conditioning or refrigeration equipment containing ozone depleting refrigerants, 40 C.F.R. Part 82, Subpart F, 40 C.F.R. § 82.150 *et seq.* (CFC Regulations) promulgated pursuant to §§ 114 and 608 of the Act, and the Facility's Title V Operating Permit, which includes the CFC Regulations as applicable requirements. As will be demonstrated in this memorandum, in conjunction with the accompanying joint stipulations, both of which are included as part of Complainant's motion, under the EPA administrative rules of practice (40 C.F.R. Part 22) and applicable case law, an order granting Complainant leave to serve an amended complaint under the circumstances of this case is both appropriate and warranted. An unsigned copy of the amended complaint is attached to this memorandum as exhibit #1, which will be signed pending approval of the motion.

Complainant seeks to make the following substantive amendments to the complaint: 1) Withdraw the following counts – counts 1, 2, 3, 5, 6, 7, and 9; and 2) Add one count in which it alleges a violation of 40 C.F.R. § 82.156(i)(2).

Complainant asserts that the proposed amendments to the Complaint sought will not prejudice Respondent because the basis for the amendments sought (withdrawal of specific counts and an addition of a count) is information that Respondent generated and is aware of. Further, the amendments will not cause undue hardship to either party as the parties have not filed their prehearing exchanges nor has a trial date been set. In addition, Respondent has indicated it does not oppose the motion to amend the Complaint.

#### Facts of the Case

Pursuant to Section 113(d) of the Act, on April 9, 2009, Complainant issued the Complaint, CAA-02-2009-1212, to Respondent for violations of the CAA. In the Complaint, EPA alleged that Respondent's Kodak Park facility located in Rochester, New York (Facility), with a mailing address of 343 State Street, Rochester, New York 14650, violated requirements or prohibitions of Section 608, 42 U.S.C. § 7671(g) of the Act, the CFC Regulations promulgated pursuant to §§ 114 and 608 of the Act, and the Facility's Title V Operating Permit, which includes the CFC Regulations as applicable requirements.

In response to receiving the Complaint, Respondent contacted Complainant to conduct settlement negotiations. On May 4, 2009, the parties met for an initial settlement conference. After Respondent filed an answer and request for hearing (Answer), dated May 12, 2009, the parties continued negotiations throughout the early part of June. On June 8, 2009, the parties agreed to a settlement in principle.

## Argument

Pursuant to 40 C.F.R. § 22.14(c), Complainant may amend the Complaint once as a matter of right at any time before the Answer is filed or, otherwise, only upon motion granted by the Presiding Officer. In the case, *In re Port of Oakland and Great Lakes Dredge and Dock Company*, 4 E.A.D. 170 (EAB 1992), the Environmental Appeals Board (EAB) provided a general rule governing EPA administrative practice that administrative pleadings are "liberally construed and easily amended." *In re Port of Oakland and Great Lakes Dredge and Dock Company*, 4 E.A.D. 170, 205, (EAB 1992), *citing Yaffe Iron & Metal Co., Inc. v. EPA*, 774 F.2d 1008, 1012 (10th Cir. 1985). However, since the Rules of Practice do not provide circumstances as to when the administrative Court should grant such motions, the EAB permits guidance by consulting the Federal Rules of Civil Procedure (FRCP) in analogous situations. *In re Carroll Oil Co.*, 10 E.A.D. 635, 649 (EAB 2002); *see also In the Matter of Asbestos Specialists, Inc.*, TSCA Appeal No. 92-3, 4 E.A.D. 819, 827 n. 20 (EAB 1993). The FRCP indicate that the courts apply a liberal interpretation when allowing for amending pleadings. The EAB has interpreted this to mean that leave to amend "*shall be freely given when justice so requires.*" *Carroll Oil Co.*, 10 E.A.D. at 649 (quoting Fed. R. Civ. P. 15(a)). In *Foman v. Davis*, 371 U.S. 178 (1962), the Supreme Court provided a set of factors for courts to consider whether to grant or deny a motion to amend. Those factors include:

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 by amendments previously allowed, undue prejudice to the opposing party by

virtue of allowance of the amendment, futility of amendments, etc.  
-- the leave sought should, as the rules require, be "freely given."

*Foman*, 371 U.S. at 182.

The proposed amendments will not cause undue delay. Complainant has already filed a joint motion for extension of time to file prehearing exchange in order to file this motion and prepare the consent agreement and final order (CAFO). There has been no bad faith or dilatory motive on EPA's or the Respondent's part throughout this entire proceeding. In fact, both parties worked cooperatively to settle the case as expeditiously as possible.

Most importantly, the proposed amendments will not prejudice Respondent. It is self-evident that no prejudice will occur to Respondent when EPA proposes to withdraw seven (7) counts. EPA proposes the additional claim as a result of evidence provided by Respondent. Lastly, both parties have entered into a joint stipulation to amend the Complaint, attached to this memorandum as exhibit #2, which indicates that both parties agree to the amendments proposed.

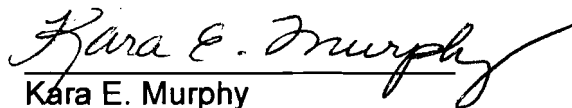
#### Conclusion

For all the reasons set forth herein, Complainant submits that granting EPA leave to amend the Complaint would be appropriate and warranted, and therefore Complainant respectfully requests that the Court grant EPA's motion in all respects.

Dated: August 24, 2009  
New York, New York



Respectfully submitted,



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