UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
UNIVERSITY OF KANSAS MEDICAL CENTER,	)	**Docket No. RCRA-07-2006-0261**
	)	
Respondent.	)	

ORDER GRANTING MOTIONS TO AMEND COMPLAINT AND ANSWER

A. Background

On September 28, 2006, this action was initiated by Complainant, the U.S. Environmental Protection Agency, Region VII (EPA), by the filing of an Administrative Complaint against Respondent, University of Kansas Medical Center. The Complaint charged Respondent in two Counts with violations of the Resource Conservation and Recovery Act of 1976 as amended by the Hazardous and Solid Waste Amendments of 1984 (RCRA), 42 U.S.C. §§ 6901 to 6992k, the Kansas Solid Waste Management Act, K.S.A. § 65-3431 *et seq.*, and/or Kansas Administrative Regulations on solid waste, KAR §§ 28-31-1, *et seq.* Count 1 of the Complaint alleged that Respondent, a hazardous waste generator, failed to conduct a hazardous waste determination with regard to 721 containers of solid waste located in various locations at its facility in violation of KAR § 28-31-4(b). Complainant proposed a penalty of $158,871 for such failure. Count 2 is set out in three alphabetically-designated sections. The first section alleged that Respondent stored hazardous waste at its facility for over 90 days without a permit or interim status in violation of RCRA Section 3005 (42 U.S.C. § 6925) and K.S.A. § 65-3437 (Count 2A). The second section alleged that Respondent failed to label 66 containers at its facility as "hazardous waste" in violation of KAR § 28-31-4(g)[3] and failed to mark 54 containers of its hazardous waste with the accumulation start date in violation of KAR § 28-31-4(g)(2), and as a result, failed to come within the exemption provided by KAR § 28-31-4(g) to the permit or interim status requirement for a hazardous waste treatment, storage or disposal facility and so violated RCRA Section 3005, 42 U.S.C. § 6925 and K.S.A. § 65-3437 (Count 2B). The third section alleged that Respondent failed to label as "hazardous waste" 24 satellite accumulation containers in violation of KAR § 28-31-4(j)(1)(B) and as a result, failed to come within the exemption provided by KAR § 28-31-4(g) to the permit or interim status requirement for a hazardous waste treatment, storage or disposal facility and so violated RCRA Section 3005, 42 U.S.C. § 6925 and K.S.A. § 65-3437 (Count 2C). Complainant proposed a penalty of

$147,523 for all the violations set forth in Count 2. In addition, the Complaint requested the issuance of a Compliance Order.

Respondent filed an Answer to the Complaint on November 9, 2006 wherein it admitted, denied, explained, or stated it lacked information as to the allegations contained in the Complaint, and requested a hearing.

The parties were then offered, and accepted, an opportunity to participate in this Tribunal's Alternative Dispute Resolution process which took place from November 29, 2006 until terminated by Order of the Neutral Judge on March 8, 2007. The case was then redesignated to Judge Carl Charneski for hearing, and on April 9, 2007 upon his resignation from his position with the Agency, to the undersigned.

A Prehearing Scheduling Order was issued in this case on March 19, 2007, setting the filing date for the parties' mandatory "opening" prehearing exchange as April 16, 2007 and optional reply exchange on May 7, 2007.

By Motion dated March 16, 2007, Respondent moved for leave to amend its Answer to add the affirmative defense of "fair notice" and to request fees and costs under the Equal Access to Justice Act, 28 U.S.C. § 2412. Attached to the Motion was Respondent's proposed Amended Answer.

On April 12, 2007, Complainant filed a Motion for Leave to File an Amended Complaint wherein it indicated that while preparing its Prehearing Exchange it "recognized minor inaccuracies" in the original Complaint and sought to amend Paragraph 11 (of Count 1) thereof to reflect the locations and numbers of containers as to which it alleges Respondent failed to conduct a hazardous waste determination. Complainant attached its proposed Amended Complaint to the Motion. The following day, April 13, 2007, Respondent filed an "Objection" to the Complainant's Motion to Amend alleging that Complainant lacks a legitimate reason therefor, that the amendments were due to Complainant's "own negligence or motivations, are not based on new facts, unforeseen circumstances, or a change in the law," and "substantially changes the allegations in the original complaint," causing undue delay and undue prejudice to it. On April 19, 2007, Complainant filed a Reply to Respondent's Objections denying a dilatory motive, alleging that Respondent has long been aware of the assertions made by the proposed amendment, and asserting no undue prejudice will result from the amendment made at this point in the litigation.

On or about April 16, 2007, the parties submitted their opening Prehearing Exchanges in compliance with the Prehearing Scheduling Order.[1]

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[1] In addition, by Notice dated April 9, 2007, counsel for the Respondent withdrew its appearance and new counsel entered an appearance.

B. The Applicable Standard

Section 22.14(c) of the Rules of Practice (40 C.F.R. § 22.14(c)) provides that once an answer has been filed, the complainant may amend the complaint only upon motion granted by the Presiding Officer. Similarly, Section 22.14(e) of the Rules of Practice (40 C.F.R. § 22.14(e)) provides that the respondent may amend its answer upon motion granted by the Presiding Officer. The Rules of Practice, however, provide no standard for use by the Presiding Officer in determining when leave to amend should be granted. Rule 15(a) of the Federal Rules of Civil Procedure concerning amended pleadings provides that "leave [to amend] shall be freely given when justice so requires." The United States Supreme Court has interpreted Rule 15(a) to mean that leave to amend pleadings should be given freely in the absence of any apparent or declared reason, such as undue delay, bad faith, or dilatory motive on the movant's part, repeated failure to cure deficiencies by previous amendment, undue prejudice, or futility of amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

C. Respondent's Motion

As indicated above, Respondent requests to amend its Answer to add the affirmative defense of "fair notice" and to request fees and costs under the Equal Access to Justice Act, 28 U.S.C. § 2412. *See*, Respondent's Motion for Leave to Amend Answer (R's Mot) at 1 and attached proposed Amended Answer (Amended Ans.) at 8-9.

a. Fair Notice

As noted by the Environmental Appeals Board -

> [T]he fair notice doctrine may in some circumstances provide a defense where a regulation "fails to give fair warning of the conduct it prohibits or requires." [] . . . [T]he fair notice concept has been recognized in the civil administrative context . . . .
>
> [The agency] has the responsibility to state with ascertainable certainty what is meant by the standards [the Agency] has promulgated . . . . The phrase "ascertainable certainty" is often quoted as expressing the underlying standard of what degree of notice must be given to be fair. . . .
>
> We must ask ourselves whether the regulated party received, or should have received, notice of the Agency's interpretation in the most obvious way of all: by reading the regulations. If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with "ascertainable certainty," the standards with which the

> agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation. . . . .
>
> Courts often consider a number of factors when evaluating whether a regulation provides fair notice. In some cases, the plain language of the regulation may suffice to show fair notice. . . . The agency's other public statements also bear on the fair notice inquiry. . . . Likewise, an "agency's pre-enforcement efforts to bring about compliance * * * [may also] provide adequate notice." . . . . Significant difference of opinion within the agency as to the proper interpretation of the agency's regulation may also be considered in evaluating whether the regulatory text provides fair notice. . . .
>
> In addition, courts often consider whether or not an allegedly confused defendant inquires about the meaning of the regulation at issue. . . . [Respondents] bear the burden of establishing a lack of notice, as the issue is raised as an affirmative defense to liability.

Morton L. Friedman and Schmitt Construction Company, 11 E.A.D. 302, 318-320, 2004 EPA App. LEXIS 3, 42-47 (EAB 2004) (citations omitted).

In its Motion, Respondent does not set forth the factual basis for adding a "fair notice" defense. However, its proposed Amended Answer suggests that the basis for it is Respondent's assertion that it "did not receive fair notice of EPA Region VII's interpretation of 40 CFR Part 261 and KAR 28-31-4," prior to commencing enforcement efforts. *See*, Amended Ans. at 8. Additionally, Respondent alleges that the Notice of Violation and Inspection Report "does not qualify as the type of pre-enforcement warning that meets due process requirements" and that "Region VII's analysis of the regulations differs from that of other EPA offices, thereby confusing [Respondent]." *Id.*

Such assertions, while non-specific, conclusionary and unsupported, at least provide arguably a colorable good faith basis for raising a "fair notice" defense and meet the standard of the applicable rule which merely requires that an answer state the "circumstances or arguments which are alleged to constitute the grounds of any defense." 22 C.F.R. § 22.15(b). There is no evidence of record suggesting undue delay, bad faith, or dilatory motive on the Respondent's part in regard to raising this defense at this point in the litigation and it is noted that Complainant, by not filing an opposition to Respondent's Motion, has waived any objection to the granting thereof. *See*, Rule 22.16(b), 40 C.F.R. § 22.16(b)("Any party who fails to respond [to a motion] within the designated period waives any objection to the granting of the motion." Therefore, Respondent's request to amend its answer to add a "fair notice" defense will be permitted.

b. EAJA Fees and Costs

Respondent's Motion states that it is "specifically requesting fees and costs under the

Equal Access to Justice Act . . . since EPA's position in this action is not substantially justified, nor do any special circumstances exist to make an award to [Respondent] unjust." R's Mot. at 1. Its proposed Amended Answer indicates that "immediately upon final disposition in this action" Respondent "requests an award of its fees and other expenses under 28 U.S.C. § 2412" and suggests it is an eligible party under that section for such an award. *See*, Amended Ans. at 9.

The Equal Access to Justice Act (EAJA), provides in relevant part that:

> (a) (1) . . . a judgment for costs, . . . but not including the fees and expenses of attorneys, may be awarded to the *prevailing party* in any civil action brought by or against the United States or any agency or any official of the United States
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> * * *
>
> (b) . . . a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the *prevailing party* . . .
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> * * *
>
> (d)(1) (A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action . . . *unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.*
>
> (B) A party seeking an award of fees and other expenses ***shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses*** which shows that the party is a *prevailing party* and is eligible to receive an award under this subsection, and the amount sought, *including an itemized statement* from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

28 U.S.C. § 2412 (emphasis added).

Thus, no award may be considered under EAJA unless and until there is a "final judgment" in the case wherein there is a determinable "prevailing party" and then it falls to such party to thereafter timely submit the requisite application for fees and expenses and supporting itemized documentation in accordance with Section 2412(B). No final judgment has been entered in this case and, as such, neither party can claim to be prevailing. As a result, Respondent's request to amend its answer to add an EAJA claim is not appropriate in that such

claim is both premature and not properly documented and therefore futile. *See, Sohappy v Hodel*, 911 F.2d 1312 (9th Cir. 1990) (Where there has been no final judgment in action, request for attorney's fees on appeal under EAJA is premature); *Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139, 168 (2nd Cir. 2003)(A proposed amendment is futile if it could not withstand a motion to dismiss.). Therefore, Respondent's request to amend its Answer to add an EAJA claim will not be permitted.

D. Complainant's Motion

Complainant's Motion for Leave to File an Amended Complaint (C's Mot.) alleges that in "preparing for the Prehearing Exchange, [it] recognized minor inaccuracies in its original Complaint" and seeks to amend Paragraph 11 thereof to "accurately reflect the locations and numbers of containers where EPA alleges Respondent failed to conduct a hazardous waste determination" and "more accurately reflects the facts Complainant intends to present in support of its case at hearing." C's Mot. at 1. Complainant alleges that its motion is submitted in good faith and will not prejudice Respondent. *Id.* Upon review, the proposed Amended Complaint (Amended Comp.) appears to alter Paragraph 11 by changing from "721" to "over 900" the number of containers of solid waste Respondent was allegedly storing on or about March 15-17, 2006, as to which allegedly a hazardous waste determination was not made at the time of generation, and adding to the itemized list thereof the following new locations of containers: "Lied G010: 3 containers;" "Hospital Maintenance and Storage Room: Contact and adhesive cleaners and rags;" and "Briedenthal 2030: 4 containers;" and, as to the containers in "Wahl East 4022," increasing from "6" to "250" the number of containers.[2] *See*, Amended Comp. ¶ 11 b, g, k, n. The Amended Complaint does not propose an increased penalty corresponding with these additional allegations.

In its Objection (R's Obj.), Respondent argues that Complainant had ample time to, and should have, added the newly raised allegations before this point in the litigation. It suggests, without reference or citation to supporting documentation, that Complainant had in its possession all the facts forming the basis for its Motion to Amend over a year ago and when the original Complaint was filed over seven months ago. Therefore, Respondent claims that Complainant should have been aware of the "minor inaccuracies" sooner and its failure to do so, and then timely amend, constitutes "negligence" and is evidence of a dilatory motive. R's Obj. at 1-3.

Further, Respondent claims that the proposed changes are substantive and will result in undue delay in the proceeding and undue prejudice to it, because if the Complaint is amended Respondent will then have to amend its answer and prehearing exchange, conduct additional document reviews, site visits, and witness interviews to adequately defend itself against these

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[2] It is noted that the proposed Amended Complaint does not describe as to "containers of solid waste" how the "contact and adhesive cleaners and rags" in the Hospital Maintenance Storage Room are "containerized" solid waste.

new allegations, incurring "significant additional expenses that would have been avoided absent this action by EPA." R's Obj. at 2.

Finally, Respondent states the timing of Complainant's Motion is "suspect" noting it was filed just two days before the prehearing exchanges were due. R's Obj. at 3. It suggests this timing may evidence an inappropriate motive on EPA's part to delay disclosure. *Id.*

In its Reply to Respondent's Objections (C's Reply), Complainant denies a dilatory motive stating again that it only discovered the minor errors recently in preparation of its Prehearing Exchange and alleges that Respondent will suffer no prejudice from the amendments in that they do not affect the nature or number of counts nor the penalty proposed. Complainant states that Respondent has been aware of them for almost a year, since they were contained in the Inspection Report of which Respondent has had a copy since May 4, 2006, so it is unlikely Respondent will need to incur significant additional expenses at this point. C's Reply at 2. Further, Complainant asserts that the amendment will cause no undue delay because a hearing has not yet been scheduled and Respondent can respond to the new allegations in its Reply Prehearing Exchange which is not due until May 7, 2007, and otherwise can move under the Rules of Practice to amend its Answer or Supplement its Prehearing Exchange as it deems necessary. *Id.*

As indicated above, the standard for amendment of pleadings generally applied by this Tribunal is set forth in *Foman v. Davis*, 371 U.S. 178, 181-82 (1962) which provides that "in 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. *Foman* further states 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." *Id.* at 181.

Of all the factors to be considered in deciding upon amendment, the most significant is prejudice to the opposing party. *Carroll Oil Company*, 10 E.A.D. 635, 650, 2002 EPA App. LEXIS 14 * 37, 40- 42 (EAB, July 31, 2002).[3] However, almost every amendment of a complaint results in *some* prejudice to a defendant, thus the test in each case is whether *undue* prejudice would result. Applying such test requires a court to balance the general policy that controversies should be decided on merits against the prejudice that would result from permitting a particular amendment. *Alberto-Culver Co. v Gillette Co.*, 408 F. Supp. 1160 (N.D. Ill. 1976). "Undue prejudice" is that which is more than is appropriate or justified. *Doe v. Columbia Univ.*, 165 F.R.D. 394 (S.D. N.Y. 1996). In determining whether prejudice is "undue" courts consider

[3] It is noted that Federal courts have held that mere delay is seldom a sufficient reason to deny a motion to amend. *Howey v. United States*, 481 F.2d 1187, 1190-91 (9th Cir. 1973); *United States v Pend Orielle Public Utility District No. 1*, 926 F.2d 1502, 1511 (9th Cir. 1991)(the crucial factor is not the length of the delay but whether prejudice would result).

whether amending complaint would (1) require opponent to expend significant additional resources to conduct discovery and prepare for trial, (2) significantly delay resolution of dispute, or (3) prevent plaintiff from bringing timely action in another jurisdiction. *Stephenson v. Dow Chem. Co.*, 220 F.R.D. 22 (E.D. N.Y. 2004).

While Respondent claims "undue" prejudice will result from the proposed amendment, I do not find it so. In regard to the amendment causing Respondent to expend significant additional resources, it is noted that the proposed amendment to the Complaint adds no new legal theories or causes of action or parties. Rather, the Amendment modifies a single paragraph in a single count to add or alter certain factual assertions forming the basis for the violation. Those modifications do not substantively change the claim made in Count 1, as only a single violation is alleged therein and Complainant has not increased the penalty it is proposing based upon the additional containers referenced. Moreover, Respondent was aware of the EPA's claim that no hazardous waste determination had been made as to the newly added containers in that the report of the inspection conducted at its facility on March 15, 2006 identified all those additional containers and stated that no hazardous waste determination had been made in regard thereto. More importantly, the case file also indicates that Respondent apparently investigated and responded in writing to the allegations of violations found on such inspection on March 30, 2006, stating in its response that it made a hazardous waste determination for the newly added containers. *See*, C's PHE Ex. 1, pp. 7, 10, 11 (Inspection Report) and Ex. 7 (Respondent's response thereto). Therefore, any additional investigation of such new factual assertions Respondent would have to undertake at this point should be fairly nominal.

Furthermore, it is noted that this case is still in the very early stages of the litigation process, as the parties have filed only in the last few days their "opening" prehearing exchanges, no substantive motions have been decided, and no hearing date has yet been set. It is easy enough for the parties to include any additional information required by the amendment in their replies to the prehearing exchange without changing the deadline thereof set for May 7, 2007.

Finally, it is in the interest of justice and all the parties to include all of the claims arising from the March 15, 2006 inspection in this action and not leave open the possibility for an additional or subsequent action in regard thereto.

Additionally, while Respondent alleges as such, there is simply no credible support for the assertion that the amendment was submitted by Complainant at this point in the litigation in bad faith or with a dilatory motive. To the contrary, the fact that these additional factual allegations were included in the Investigation Report and responded to as corrected by Respondent supports Complainant's assertion that its failure to include them in the original Complaint was inadvertent and not intentional.

Therefore, the Complainant's request to amend the Complaint to add these factual allegations will be granted. Considering that the Regional Hearing Clerk has filed, and Respondent was served, the fully executed Amended Complaint as the proposed Amended

Complaint attached to the Motion, and that the Motion is granted herein, the Amended Complaint shall be deemed filed and served on Respondent on the date of this Order. In accordance with the Rules at 40 C.F.R. § 22.13(c), Respondent shall have twenty days from the date of this Order, that is, until **May 10, 2007** to file any answer to the Amended Complaint. In view thereof, the date for filing the reply prehearing exchanges shall be extended to **May 18, 2007.**

ORDER

a. Respondent's Motion to Amend Answer to the extent of adding as an affirmative defense the claim of lack of "fair notice" is hereby granted;

b. Respondent's Motion to Amend Answer to the extent of adding a EAJA claim is hereby denied;

c. Complainant's Motion for Leave to File an Amended Complaint is hereby granted, and the (proposed) Amended Complaint filed with the Motion is hereby deemed filed and served as of this date;

d. Respondent shall file an Amended Answer to the Amended Complaint on or before **May 10, 2007**.

e. The parties shall file as part of their reply prehearing exchanges any and all amendments or additions required as a result of the amendments to the parties' pleadings provided by this Order, on or before **May 18, 2007**.

Susan L. Biro
Chief Administrative Law Judge

Date: April 20, 2007
Washington, D.C.

In the Matter of University of Kansas Medical Center, Respondent
Docket No.RCRA-07-2006-0261

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Granting Motions To Amend Complaint And Answer**, dated April 20, 2007, was sent this day in the following manner to the addressees listed below.

Maria Whiting-Beale
Maria Whiting-Beale
Legal Staff Assistant

Dated: April 20, 2007

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