

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2**

**U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG.11
JUL 12 4 03 37
REGIONAL HEARING
CLERK**

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In the Matter of :
Valvo's Convenience & Gas, Inc. :
And Stephen Valvo, Individually :
: :
: :
: :
: :
Proceeding under Section 9006 the :
Solid Waste Disposal Act, as amended :
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**MOTION TO FILE SECOND
AMENDED COMPLAINT**

Docket No. RCRA-02-2011-7507

Pursuant to 40 C.F.R. §§ 22.14(c), 22.16, and 22.4(c), Complainant hereby moves for an Order to file a Second Amended Complaint in this case. Based on information provided by Respondents and other new information, Complainant seeks to establish a more precise record for the Hearing scheduled to commence on September 11, 2012. Complainant respectfully requests permission to amend the Amended Complaint to (1) include the specific dates that certain violations were corrected, (2) update the time periods of the continuing violations and (3) add a new Count 8 alleging that Respondents failed to conduct release detection and maintain adequate records for the diesel underground storage tank at the former Hanover Convenience facility.

On June 3, 2011, Complainant filed a Complaint, Compliance Order and Notice of Opportunity for Hearing that alleged Respondents Valvo Convenience and Gas, Inc. [sic] and Stephen M. Valvo, individually, violated certain provisions of the underground storage tank regulations at 40 C.F.R. Part 280 at three facilities in Silver Creek, New York. Respondents filed an Answer with Affirmative Defenses on July 12, 2011. After the Answer was filed, Complainant was informed that the correct name of the corporate Respondent was Valvo's Convenience & Gas, Inc., not Valvo Convenience and Gas, Inc. Complainant filed a Motion for Change in Name of Corporate Respondent, and was granted permission to file an Amended Complaint. Complainant served the Amended Complaint on March 28, 2012. Respondents filed their Amended Answer on April 19, 2012. The parties have engaged in settlement discussions over a period of several months and have been unable to reach a settlement of this matter.

In accordance with the Order on Unopposed Motion to Re-Schedule Hearing, the Hearing in this case is scheduled to begin on September 11, 2012; dispositive and non-dispositive motions are due July 20, 2012 and August 3, 2012, respectively. Stipulated Facts, Exhibits and Testimony shall be filed on or before August 17, 2012, and any proposed new witness, document or exhibit to the Prehearing Exchanges must be filed no later than August 27, 2012.

The general rule is that motions to amend pleadings are liberally granted in the interest of justice, and if no prejudice to the opposing party results. *See Foman v. Davis*, 371 U.S. 178 (1962). Courts may give weight in their exercise of discretion on a motion to amend to such factors as undue delay, bad faith, dilatory motive, undue prejudice, and futility, as well as the effect that denial of

leave to amend would have on party seeking to amend. *Id.* The Environmental Appeals Board has found that a complainant should be given leave to amend freely. *In the Matter of JDN Intermountain Holdings, Inc.*, 2004 WL 1658585 (E.P.A. June 10, 2004). Leave to amend “shall be freely given.” *In Matter of Harpoon Partnership*, 2003 WL 21213219 (E.P.A. April 9, 2003); Fed. R.Civ.P 15(a). Motions for leave to amend have been granted at various stages of litigation.

The filing of a Second Amended Complaint is a good-faith effort by Complainant to state the current status of the violations that have been corrected and those that are continuing. The interests of the parties would be served by ensuring that the alleged violations are up to date. The Second Amended Complaint also provides notice to Respondents in Count 8 of an additional violation that was recently discovered. Despite the addition of this Count, Complainant has used its discretion and has not increased the amount of the proposed penalty in this case. Complainant has prepared the Second Amended Complaint to ensure there is no delay in service in the event this motion is granted. This request, made two months before the start of the scheduled Hearing, will not cause undue delay or prejudice Respondents’ preparation for the Hearing. For all the reasons stated herein, Complainant respectfully submits that granting this motion to file the Second Amended Complaint will provide clarity about the duration and nature of the violations in this case. The addition of Count 8 will not unduly prejudice Respondents since EPA is not increasing the size of the proposed penalty in light of this additional Count.

Counsel for Respondents informed counsel for Complainant that he cannot give an opinion or say whether Respondents will oppose this Motion.

Dated: July 11, 2012
New York, New York

Respectfully submitted,



Beverly Kolenberg
Assistant Regional Counsel
Counsel for Complainant
U.S. Environmental Protection Agency, Region 2
290 Broadway
New York, New York 10007-1866

To: Honorable M. Lisa Buschmann
Administrative Law Judge
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1900L
Washington, DC 20460

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

Paul A. Chiaravalloti, Esq., for the Respondents
1967 Wehrle Drive
Suite 1
Williamsville, New York 14221

CERTIFICATE OF SERVICE

This is to certify that I have this day caused to be mailed copies of the foregoing Motion to File Second Amended Complaint, bearing the Docket Number RCRA-02-2011-7507 by pouch mail to Honorable M. Lisa Buschmann, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, N.W., Mail Code 1900L, Washington, D.C. 20460-2001 and by regular mail to Paul A. Chiaravalloti, Esq., counsel for the Respondents, 1967 Wehrle Drive, Suite 1, Williamsville, N.Y. 14221.

I hand-carried the original and a copy of the foregoing Complaint to the Office of Regional Hearing Clerk, United States Environmental Protection Agency, Region 2.

Dated: July 11, 2012
New York, New York

Beverly Kalenberg

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ORDER

In consideration of Complainant's motion pursuant to 40 C.F.R. §§ 22.14(c), 22.16, and 22.4(c)(10), and the pleadings in this case, it is hereby ordered that Complainant is permitted to file a Second Amended Complaint.

Dated: _____, 2012

Hon. M. Lisa Buschmann
Administrative Law Judge
EPA Office of Administrative Law Judges
1200 Pennsylvania Avenue, NW
Mail Code 1900L
Washington, DC 20460