UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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In the Matter of:	)	
	)	
Empire Lumber Co.,	)	**Docket No. CAA-10-2012-0054**
	)	
Respondent.	)	Dated: January 23, 2013
	)	

ORDER GRANTING MOTION TO AMEND COMPLAINT TO REVISE THE PENALTY AMOUNT SOUGHT

On April 16, 2012, Complainant, the Director of the Office of Compliance and Enforcement, EPA Region 10, filed a Complaint against Respondent Empire Lumber Company charging it with three counts of violating 40 C.F.R. § 49.124(d)(1) and 40 C.F.R § 49.10410(b), which are provisions of the Federal Air Rules for Indian Reservations in Region 10, promulgated under the Clean Air Act, Section 301, 42 U.S.C. § 7601. The Complaint stated a proposed penalty of $90,200 which complainant "determined in accordance with the penalty assessment criteria identified in CAA Section 133(e), 42 U.S.C. § 7413(e)." Complaint at 6.

On November 29, 2012, Complainant filed a Motion to Amend the Complaint to Revise the Penalty Amount Sought ("Motion" or "Mot."), with an attached Amended Complaint. The Complainant stated that it has "identified errors in the calculation that formed the basis of the penalty amount originally sought in the Complaint," and stated that the "original penalty calculation did not include an adjustment . . . to account for inflation in accordance with the 2008 Civil Monetary Inflation Adjustment Rule." Mot. at 1. The Complainant also identified "two minor factual errors in the calculation of the economic benefit of noncompliance component of the penalty calculation" discovered by Complainant during the preparation of the Prehearing Exchange. Mot. at 1–2. Complainant argues that amendment of the complaint should be allowed so that a penalty assessment "reflects the inflationary increase mandated by Congress" in the Debt Collection Improvement Act of 1996 and "will have an adequate deterrent effect." Mot. at 3. Complainant asserts that it filed the Motion as expeditiously as possible following its discovery of the errors, and just after the Prehearing Exchange which explained in detail the calculation of the proposed penalty. Complainant points out that the Complaint referenced the Civil Monetary Penalty Inflation Adjustment Rule. Thus, Complainant moves to amend the Complaint and raise the civil penalty to $111,175. Complainant asserts that, prior to filing this Motion, it was informed by Respondent's counsel "that they would decide whether to oppose the Motion after it was filed and served, and they had the opportunity to review it." Mot. at 5.

Respondent did not file any response to the Motion within the 15-day time period for filing responses to motions provided in the applicable procedural Rules ("Rules"), and therefore

may be deemed to have waived any objection to the granting of the motion. 40 C.F.R. § 22.16(b). Furthermore, on December 26, 2012, Respondent submitted an Answer to the Amended Complaint.

The applicable procedural rules, 40 C.F.R. part 22 ("Rules"), provide that once an answer has been filed, "the complainant may amend the complaint only upon motion granted by the Presiding Officer." 40 C.F.R. § 22.14(c). The Rules do not provide any standard for granting leave to amend a complaint, but the Federal Rules of Civil Procedure ("FRCP") and federal court decisions interpreting the FRCP provide guidance. FRCP 15(a) provides that "[t]he court "should freely give leave" to amend a complaint "when justice so requires." In *Foman v. Davis*, 371 U.S. 178, 182 (1962), the Supreme Court stated:

> 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 amendment, etc. -- the leave sought should, as the rules require, be "freely given."

There is no bad faith, dilatory motive, futility of amendment, or repeated failure to cure deficiencies apparent in this case. There is no undue delay, and the recalculation of the proposed penalty is not unduly prejudicial, especially where the hearing in this matter is not yet scheduled. Therefore it is appropriate to grant the Motion.

In the Motion, Complainant requests that the Amended Complaint be deemed filed and served on Respondent pursuant to 40 C.F.R. § 22.14(c) as of the date of the order granting the Motion. Where Respondent has already filed an Answer to EPA's Amended Complaint, there is no need for Complainant to serve the Amended Complaint upon receipt of this Order. Therefore, consistent with 40 C.F.R. § 22.14(c), it is appropriate to deem the Amended Complaint attached to the Motion as filed and served on Respondent on the date of this Order.

Accordingly, Complainant's Motion to Amend the Compliant to Revise the Penalty Amount Sought is **GRANTED**. The Amended Complaint is deemed to be filed and served on the date of this Order.

SO ORDERED.

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M. Lisa Buschmann
Administrative Law Judge

In the Matter of Empire Lumber Co. Respondent
Docket No. CAA-10-2012-0054

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Granting Motion to Amend Complaint to Revise the Penalty Amount Sought**, dated January 23, 2013, was sent this day in the following manner to the addressees listed below.

Knolyn R. Jones
Legal Staff Assistant

Dated: January 23, 2013

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