



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY BEFORE THE ADMINISTRATOR

In the Matter of: )
Borla Performance Industries, Inc., ) Docket No. CAA-09-2020-0044
Respondent. )

ORDER ON COMPLAINANT’S MOTION FOR LEAVE TO AMEND COMPLAINT

This matter commenced on June 30, 2020, when the Director of the Enforcement and Compliance Assurance Division of the U.S. Environmental Protection Agency (“EPA”), Region 9 (“Complainant”) filed a Complaint and Notice of Opportunity for Hearing (“Complaint”) against Borla Performance Industries, Inc. (“Respondent”), alleging violations of Title II of the Clean Air Act, 42 U.S.C. § 7521 et seq. Complainant amended its Complaint on August 6, 2020 (“First Amended Complaint”). Respondent filed its Answer requesting a hearing on September 28, 2020. The matter was subsequently transferred to this Tribunal for adjudication on October 15, 2020.

On February 23, 2021, Complainant filed its Unopposed Motion for Leave to Amend Complaint (“Motion”) pursuant to 40 C.F.R § 22.14(c). Complainant claims that, while preparing its Initial Prehearing Exchange for submission, it realized that “the number of Subject Exhaust Parts Respondent manufactured, sold, and offered for sale” during the relevant time period was greater than indicated in the First Amended Complaint; it therefore asks to adjust the number of violations in the Second Amended Complaint. Mot. at 2. Complainant states that the new Civil Monetary Penalty Inflation Adjustment Rule, published December 23, 2020, and the new Clean Air Act Title II Vehicle & Engine Civil Penalty Policy, published January 18, 2021, have necessitated changes to the First Amended Complaint. Mot. at 2-4. Complainant also seeks to add a paragraph acknowledging the parties’ Tolling Agreement because “[Complainant] asserts [the agreement] is relevant to the application of the statute of limitations to this Proceeding.” Mot. at 2-3. Complainant further asks to make minor amendments to revise the numbering of paragraphs and adjust references accordingly. Mot. at 3-4. Attached to the Motion was the Second Amended Complaint.

Complainant avers that Respondent does not oppose the Motion. Mot. at 1.

Under the Consolidated Rules of Practice governing this proceeding, set out at 40 C.F.R. Part 22 (“Rules”), “[t]he complainant may amend the complaint once as a matter of right at any time before the answer is filed. Otherwise the complainant may amend the complaint only upon motion granted by the Presiding Officer.” 40 C.F.R. § 22.14(c). As has been observed by EPA’s Environmental Appeals Board (“Board”), the Rules do not set a standard by which to evaluate a motion to amend a complaint after the filing of an answer. Carroll Oil Co., 10 E.A.D. 635, 2002 WL 1773052, at \*12 (EAB 2002). However, in comparable situations, the Board has looked to the Federal Rules of Civil Procedure (and to federal caselaw interpreting them). Id.

Federal Rule of Civil Procedure 15 states that “a party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.” Fed. R. Civ. P. 15(a)(2). The Supreme Court has interpreted this language as encouraging a liberal approach to the amendment of pleadings. *Foman v. Davis*, 371 U.S. 178, 181-82 (1962) (“Rule 15(a) declares that leave to amend ‘shall be freely given when justice so requires’; this mandate is to be heeded.”). Accordingly, “[t]he Board has on several occasions followed the liberal pleading policy enunciated by the Federal Rules and *Foman*.” *Carroll Oil*, 2002 WL 1773052, at \*12. The Board has also recognized the constraints, delineated in *Foman*, that counsel against freely permitting amendments: undue delay by the movant; bad faith or dilatory motive; repeated failure to cure deficiencies through prior amendments; undue prejudice to the nonmoving party; or futility of the amendment. *Id.* at \*12-13. *Accord Lazarus, Inc.*, 7 E.A.D. 318, 331-34 (EAB 1997); *Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827-30 (EAB 1993) (Order); *David E. Easterday & Co., Inc., d/b/a Woodwright Finishing*, EPA Docket No. FIFRA-05-2019-0005, 2019 WL 2246133, at \*1 (ALJ, May 14, 2019) (Order Granting Complainant’s Motion for Leave to Amend Complaint); *Univ. of Kan. Med. Ctr.*, EPA Docket No. RCRA-07-2006-0261, 2007 WL 2192953, at \*2, \*6 (ALJ, Apr. 20, 2007) (Order Granting Motions to Amend Complaint and Answer).

With respect to this framework for assessing requests to amend pleadings, Complainant attests that it “has not unduly delayed bringing this Motion and is not acting in bad faith or with dilatory motive.” Mot. at 5. Complainant also asserts that amending the First Amended Complaint will not unduly delay the proceeding, cause undue surprise or prejudice to Respondent, or impact Respondent’s preparation of its Prehearing Exchange. Mot. at 5.

The Tribunal agrees. Complainant is attempting to include a reference to an agreement entered into by the parties and incorporate updated policies recently promulgated by EPA. Complainant also seeks to revise the number of violations to ensure its accuracy; errors became apparent after a recent review of records by Complainant. There is no evidence that Complainant has unduly delayed amending the First Amended Complaint or has acted in bad faith or with dilatory motive. There will not be undue prejudice to Respondent, and the proposed amendments are not futile. Complainant has not repeatedly failed to cure deficiencies through prior amendments. Granting Complainant leave to file a Second Amended Complaint is therefore warranted.

The Motion is **GRANTED**. Complainant shall serve the Second Amended Complaint on Respondent no later than March 12, 2021. Respondent shall have 20 days from the date of service to file an Answer. 40 C.F.R. § 22.14(c).

**SO ORDERED.**



Susan L. Biro  
Chief Administrative Law Judge

Dated: March 8, 2021  
Washington, D.C.

In the Matter of *Borla Performance Industries, Inc.*, Respondent.  
Docket No. CAA-09-2020-0044

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **Order on Complainant's Motion for Leave to Amend Complaint**, dated March 8, 2021, and issued by Chief Administrative Law Judge Susan L. Biro, was sent this day to the following parties in the manner indicated below.

  
\_\_\_\_\_  
Alyssa Katzenelson  
Attorney-Advisor

Copy by OALJ E-Filing System to:  
Mary Angeles, Headquarters Hearing Clerk  
U.S. Environmental Protection Agency  
Office of Administrative Law Judges  
Ronald Reagan Building, Room M1200  
1300 Pennsylvania Ave. NW  
Washington, DC 20004

Copy by Electronic Mail to:  
Allan Zabel, Attorney-Advisor  
Sylvia Quast, Regional Counsel  
Nathaniel Moore, Attorney-Advisor  
U.S. Environmental Protection Agency, Region 9  
Email: zabel.allan@epa.gov  
Email: quast.sylvia@epa.gov  
Email: moore.nathaniel@epa.gov  
*For Complainant*

Mark Palermo, Attorney-Advisor  
U.S. Environmental Protection Agency, Office of Civil Enforcement  
Email: palermo.mark@epa.gov  
*For Complainant*

Erik S. Jaffe  
Schaerr | Jaffe LLP  
Email: ejaffe@schaerr-jaffe.com  
*For Respondent*

Kent Mayo  
Julie A. Cress  
Baker Botts L.L.P.  
Email: kent.mayo@bakerbotts.com  
Email: julie.cress@bakerbotts.com  
*For Respondent*

Dated: March 8, 2021  
Washington, D.C.