

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

IN THE MATTER OF:)
)
DAVID E. EASTERDAY & CO., INC.,)
d/b/a WOODWRIGHT FINISHING,)
WILMOT, OHIO,)
)
RESPONDENT.)
_____)

Docket No.: FIFRA-05-2019-0005

COMPLAINANT'S MOTION FOR LEAVE TO AMEND COMPLAINT

Complainant files this motion seeking leave to amend its Complaint pursuant to 40 C.F.R. § 22.16(a), which requires a motion to be in writing, state with particularity the grounds therefor, and set forth the relief sought. Consequently, Complainant states as follows:

1. Federal regulations, at 40 C.F.R. § 22.14(c), permit Complainant to amend an answered complaint only upon motion granted by the Presiding Officer.

2. Complainant filed the Complaint in this matter on December 19, 2018.

Complainant alleged 34 violations of section 12(a)(1)(A) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136j(a)(1)(A), for sales of unregistered pesticides, and one violation of section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), for producing a pesticide in an unregistered establishment. Respondent filed its Answer to the Complaint on January 25, 2019.

3. On February 6, 2019, the Presiding Officer issued her Prehearing Order, requiring, among other things, that the parties confer prior to filing any motion. Complainant has conferred with opposing counsel, who does not oppose this motion.

4. Based on Respondent's Answer and subsequent Prehearing Exchange, as well as a realignment of enforcement functions within EPA Region 5, Complainant seeks leave to amend its Complaint as follows:

- a. Strike the text of paragraph 2 of the Complaint and replace it with the following: "Complainant is, by lawful delegation, the Director of the Enforcement and Compliance Assurance Division, United States Environmental Protection Agency, (EPA), Region 5.";
- b. Strike paragraphs 34-43 and paragraphs 66-77 of the Complaint, effectively withdrawing counts 8-23; and
- c. Strike the last full sentence on page 14 and replace it with the following: "This Complaint alleges 18 discrete sales of unregistered pesticides in the month of September 2014."

5. Case law supports granting leave to amend under 40 C.F.R. § 22.14(c). "While no standard is provided in the Rules for determining whether to grant an amendment, the general rule is that administrative pleadings are 'liberally construed and easily amended" *In re Port of Oakland and Great Lakes Dredge and Dock Co.*, MPRSA Appeal No. 91-1, 4 EAD 170, 205 (1992) (citing *Yaffe Iron & Metal Co, Inc., v. EPA*, 774 F.2d 1008, 1012 (10th Cir. 1985)). See also *In the Matter of Liphatech, Inc.*, Docket No. FIFRA-05-2010-0016 , 2010 EPA ALJ LEXIS 27 at *8 (December 29, 2010); *In the Matter of Bug Bam Product, LLC*, Docket No. FIFRA-09-2009-0013, 2010 EPA ALJ LEXIS 2 at *6 (January 7, 2010); and *In re Scranton Prods., Inc., et al.*, Docket No. CAA-03-2008-0004, 2008 EPA ALJ LEXIS 16 at *2 (April 3, 2006). Absent a showing that the proposed amendment is brought in bad faith or for dilatory purposes, results in undue delay or prejudice to the opposing party, or would be futile, leave to amend should be granted. *Scranton Prods.*, 2008 EPA ALJ LEXIS 16 at *2-3 (citing *Foman v. Davis*, 371 U.S. 178, 181-82 (1962)); *In the Matter of San Pedro Forklift*, Docket No. CWA-09-2009-0006, 2010 EPA ALJ LEXIS 17 at *5 (August 11, 2010); *In the Matter of FRM Chemical, Inc., et al.*,

Docket Nos. FIFRA-07-2008-0035 et seq., 2010 EPA ALJ LEXIS 12 at *7 (May 27, 2010); and *Bug Bam Product*, 2010 EPA ALJ LEXIS 2 at *6.

6. Because Complainant seeks to reduce the counts alleged in this action and make another small ministerial change to the Complaint, there is no prejudice to Respondent. *See Scranton Prods.*, 2008 EPA ALJ LEXIS 16 at *3. Furthermore, Complainant's request for leave to amend the Complaint to reduce the number of counts alleged is not the product of undue delay, bad faith or dilatory motive.

7. For the foregoing reasons, Complainant respectfully requests that the Presiding Officer grant it leave to amend its Complaint to reduce the number of counts alleged in this matter and make other minor changes to the Complaint.

Respectfully Submitted,

Counsel for EPA:

5/9/2019
Date

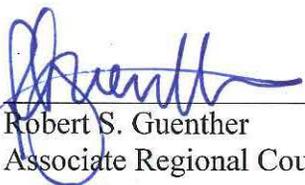


Robert Guenther, Associate Regional Counsel
Christopher Grubb, Associate Regional Counsel
Office of Regional Counsel
U.S. EPA Region 5
77 West Jackson Boulevard (C-14J)
Chicago, Illinois 60604
(312) 886-0566 (Guenther)
(312) 886-7187 (Grubb)
guenther.robert@epa.gov
grubb.christopher@epa.gov

Complainant's Motion for Leave to Amend Complaint
In the matter of: David E. Easterday & Co., Inc. d/b/a Woodwright Finishing
Docket Number: FIFRA-05-2019-0005

CERTIFICATE OF SERVICE

I certify that the foregoing Complainant's Motion for Leave to Amend Complaint, dated and filed May 9, 2019, was sent this day to the following addresses in the manner indicated below.



Robert S. Guenther
Associate Regional Counsel

Copy by email to:

Mr. Robert L. Brubaker
Mr. Christopher R. Schraff
RBrubaker@porterwright.com
CSchraff@porterwright.com