

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

IN THE MATTER OF CVS CORPORATION, Respondent))))))	Docket No. CAA-05-2002-0007
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**ORDER GRANTING COMPLAINANT’S MOTION FOR LEAVE
TO AMEND AND FILE FIRST AMENDED COMPLAINT**

The Complaint in this matter was filed on May 13, 2002. Respondent’s Answer was filed on June 18, 2002. On July 17, 2002, a Prehearing Order was issued directing the parties to submit their prehearing exchange in *seriatim* manner, commencing with the filing of Complainant’s initial prehearing exchange on October 22, 2002. Complainant has timely filed its prehearing exchange. Respondent’s prehearing exchange is due November 22, 2002.

On October 22, 2002, Complainant filed a Motion for Leave to Amend and File First Amended Complaint. Complainant moves to amend the Complaint to reduce the amount of the proposed penalty from \$54,200 to \$30,200. Complainant’s lower proposed penalty amount is based on a recalculation of the economic benefit component of the penalty. Complainant acknowledges that this change in the economic component is based on guidance that it became aware of after the proposed penalty was calculated. Respondent has not filed a response to Complainant’s Motion for Leave to Amend and File First Amended Complaint.

As previously noted in the Prehearing Order entered by the undersigned on July 17, 2002, this proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-22.32. The procedural rule governing the amendment of a complaint is found at Section 22.14(c) of the Rules of Practice, 40 C.F.R. § 22.14(c). Section 22.14(c) provides:

Amendment of the complaint. The 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. Respondent shall have 20 additional days from the date of service of the amended complaint to file its answer.

The Rules of Practice do not, however, illuminate the circumstances when amendment of the complaint is or is not appropriate. Nevertheless, some parameters have been developed through various administrative decisions. Specifically, the Environmental Appeals Board ("EAB") has offered guidance on the subject, informed by the Federal Rules of Civil Procedure ("FRCP")¹ and judicial interpretation of the FRCP. See *In the Matter of Asbestos Specialists, Inc.*, 4 E.A.D. 819 (EAB 1993); see also *In the Matter of Port of Oakland and Great Lakes Dredge and Dock Company*, 4 E.A.D. 170 (EAB 1992). Rule 15(a) of the FRCP addresses the amendment of pleadings.²

The United States Supreme Court has interpreted FRCP 15(a) to mean that there should be a strong liberality in allowing amendments to pleadings. *Foman v. Davis*, 371 U.S. 178, 181-82 (1962). Leave to amend pleadings under Rule 15(a) should be given freely in the

¹The FRCP are not binding on administrative agencies but many times these rules provide useful and instructive guidance in applying the Rules of Practice. See *Oak Tree Farm Dairy, Inc. v. Block*, 544 F. Supp. 1351, 1356 n. 3 (E.D.N.Y. 1982); *In re Wego Chemical & Mineral Corporation*, 4 E.A.D. 513, 524 n. 10 (EAB 1993).

²FRCP 15(a) states:

Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

FED. R. CIV. P. 15(a).

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. See *Id.*

In similar fashion to Rule 15(a), Section 22.14(c) of the Rules of Practice provides that a complainant, after the answer is filed, may amend the complaint only upon motion granted by the Presiding Officer.³ The EAB has held that a complainant should be given leave to freely amend a complaint in EPA proceedings, in accord with the liberal policy of FRCP 15(a), inasmuch as it promotes accurate decisions on the merits of each case. See *Matter of Asbestos Specialists, supra*, at 830; see also *Matter of Port of Oakland, supra*, at 205.

In the instant case, there is no apparent reason to deny Complainant's Motion for Leave to Amend and File First Amended Complaint. Complainant seeks to reduce the amount of the proposed penalty because it mistakenly calculated the amount of the proposed penalty. Further, Respondent has failed to respond to the Motion for Leave to Amend and File First Amended Complaint. Pursuant to Section 22.16(b) of the Rules of Practice, if no response to a written motion is filed within the designated period, a party may be deemed to have waived any objection to the granting of the motion. Inasmuch as Respondent is deemed to have waived any objection to the granting of the Motion for Leave to Amend and File First Amended Complaint and there is no apparent reason to deny the Motion, Complainant's Motion is **GRANTED**.

Upon the filing of the Amended Complaint, the Amended Complaint will become the Complaint in this matter. Pursuant to 40 C.F.R. § 22.14(c), Respondent shall have twenty (20) additional days from the date of service of the amended complaint to file its amended answer, should it choose to do so. Inasmuch as the proposed First Amended Complaint concerns only the reduction of the amount of the proposed penalty, no amended answer is required. Likewise, there is no need for an amended prehearing exchange.⁴ Thus, Respondent's prehearing exchange is due on November 22, 2002, as directed.

³ The term "Presiding Officer" refers to the Administrative Law Judge designated by the Chief Administrative Law Judge to serve as the Presiding Officer. 40 C.F.R. § 22.3(a).

⁴ Complainant's prehearing exchange encompasses the reduced proposed penalty amount.

Barbara A. Gunning
United States Administrative Law Judge

Dated: November 12, 2002
Washington, DC

In the Matter of CVS Corporation, Respondent
Docket No. CAA-05-2002-0007

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order Granting Complainant's Motion for Leave to Amend and File First Amended Complaint**, dated November 12, 2002 was sent this day in the following manner to the addressees listed below.

Mary Keemer
Legal Staff Assistant

Dated: November 12, 2002

Original and One Copy by Pouch Mail to:

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