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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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| IN THE MATTER OF | ) | |
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| PEPPERELL ASSOCIATES, | ) | DOCKET NO. CWA-2-I-97-1088 |
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| RESPONDENT | ) | |

**ORDER GRANTING COMPLAINANT'S MOTION TO AMEND COMPLAINT AND PREHEARING EXCHANGE**

The Complainant's Motion to Amend the Complaint and Prehearing Exchange is **Granted.**[(1)] Upon the filing of the Amended Complaint and Opportunity to Request Hearing ("Amended Complaint"), the Amended Complaint will become the Complaint in this matter. In this motion filed on August 11, 1998, the Complainant, the Environmental Protection Agency ("EPA"), moves to amend the Complaint to add a new Count II which alleges an additional period of violation of Section 311 of the Clean Water Act, 33 U.S.C. § 1321, and the federal regulations at 40 C.F.R. Part 112.5. The EPA also moves to amend the Complaint in order to substitute Alternative Count III for the count set forth as Alternative Count II in the initial Complaint. The Respondent opposes the Motion to Amend the Complaint and Prehearing Exchange.

On motion to amend the complaint, the EPA states that amendment of the Complaint is based on new information received after the Complaint was filed in this case. Specifically, the EPA moves to amend the Complaint to add an alleged period of violation of Section 311 of the Clean Water Act and the federal regulations at 40 C.F.R. Part 112.5 for an alleged additional period of Spill Prevention, Control, and Countermeasure ("SPCC") violation from October 16, 1997, through September 15, 1998. This alleged additional period of SPCC violation is based on allegations that the Respondent removed three 30,000 gallon underground oil storage tanks in July 1997 and installed one 20,000 gallon above ground oil storage tank on October 16,

1997, failing to prepare a SPCC Plan until April 16, 1998, and failing to implement the SPCC Plan within six months of the installation of the 20,000 gallon tank. The EPA maintains that these alleged violations occurred after the EPA filed its initial Complaint in this matter. In the amended Complaint, the EPA proposes an increased penalty of $9,200 based on the additional period of alleged violation in the new Count II.

The EPA requests that it be permitted to amend its Complaint in this action in order that all claims against the Respondent be adjudicated in one proceeding rather than in a new proceeding. The EPA contends that the Respondent is not prejudiced by the filing of this additional claim as it is well aware of the circumstances underlying the allegations, and that documentation supporting the alleged additional violations is provided with the EPA's Motion to Amend the Prehearing Exchange which is filed contemporaneously with the Motion to Amend the Complaint.

Further, the EPA moves to amend the Complaint to replace Alternative Count II (Discharge Without a Permit) with Alternative Count III (Pretreatment Violation). The substituted Alternative Count III charges that the Respondent's alleged October 17, 1996, discharge of oil from its Facility through a sewer conduit into the Lewiston-Auburn Water Pollution Control Authority's ("LAWPCA") publicly owned treatment works violated Section 307(d) of the Clean Water Act, 33 U.S.C. § 1317(d). The EPA contends that this amendment is requested in light of the Respondent's apparent position taken in its prehearing exchange that because the oil spilled into a sewer system prior to reaching Gully Brook, the oil spill does not constitute a violation of Section 311 of the Clean Water Act for which it is legally accountable. The EPA maintains that all documentation and expected witness testimony supporting this amended Alternative Count III was provided to the Respondent in the Complainant's Rebuttal Prehearing Exchange.

As previously noted in the Prehearing Order entered by the undersigned on December 30, 1997, this proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.01 et seq. Section 22.14(d) of the Rules of Practice provides that the Complainant, after the answer is filed, may amend the complaint only upon motion granted by the Presiding Officer.[(2)] 40 C.F.R. § 22.14(d).

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. In particular, the Environmental Appeals Board ("EAB") has offered guidance on the subject, informed by the Federal Rules of Civil Procedure ("FRCP"). 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 In the Matter of Asbestos Specialists, Inc., TSCA Appeal 92-3, 4 EAD 819, 830 (EAB Oct. 6, 1993); see also In the Matter of Port of Oakland and Great Lakes Dredge and Dock Company, MPRSA Appeal No. 91-1, 4 EAD 170, 205 (EAB Aug. 5, 1992).[(3)]

With regard to the amendment of pleadings, the United States Supreme Court has interpreted FRCP 15 to mean that there should be 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 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 the instant case, the EPA argues that the amendments to the Complaint are not introduced for dilatory purposes, but rather are introduced so that all matters related to the Respondent's compliance with the Clean Water Act and the SPCC regulations may be adjudicated at the scheduled hearing. The EPA contends that the Respondent is fully aware of the allegations of additional non-compliance and is in possession of all documentation relied upon by the EPA in alleging the additional

violation and corresponding penalty. With respect to the new Alternative Count III (Pretreatment Violation), the EPA contends that the Respondent has raised the issue of the LAWPCA's responsibility for the spill, and that the EPA has provided all documentation supporting Alternative Count III with its Rebuttal Prehearing Exchange. The EPA argues, therefore, that the Motion to Amend the Complaint and Prehearing Exchange should be granted.

The Respondent opposes the motion to amend the complaint. The Respondent argues that the motion to amend should be denied because the proposed amendment does not state a claim on which relief can be granted. Specifically, the Respondent argues that the EPA has no jurisdiction to require a SPCC Plan for a facility with an underground storage capacity of 42,000 gallons or less of oil and, as a result, the EPA had no jurisdiction to require a SPCC Plan once the Respondent's facility had less than 42,000 gallons of underground storage capacity. 70 C.F.R. § 112.1(a)(2)(i). The Respondent maintains that it submitted a certified SPCC Plan within six months of the installation of an above ground oil storage tank and implemented the plan within the deadlines set out in the regulations. The Respondent argues that the EPA attempts to turn the Respondent's compliance into a violation by arguing that its SPCC Plan is actually an amendment and not a new plan. According to the Respondent, the EPA's argument places form over substance, defies common sense, and more importantly, tries to boot strap jurisdiction where none exists.

Further, the Respondent objects to an allegation that it committed a pretreatment violation. In this regard, the Respondent states that the EPA apparently misunderstands its position in its prehearing exchange. The Respondent does not allege that LAWPCA is responsible for the discharge. Rather, the Respondent's reference to LAWPCA in its prehearing exchange relates to its jurisdictional argument that waters of the United States do not include "waste treatment systems, including treatment ponds." 40 C.F.R. § 122.2(d).

Under the standard set forth above, the EPA's motion to amend the complaint and prehearing exchange is granted. There is no apparent reason, such as undue delay, undue prejudice, or dilatory motive on the EPA's part, to deny the motion. Without ruling on the merits of the Respondent's arguments in opposition to the motion, I find that futility of amendment is not apparent. I note that the arguments raised by the Respondent may be renewed as defenses in an Amended Answer or as legal arguments on motion or briefing.

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(d), the Respondent shall have twenty (20) additional days from the date of service of the Amended Complaint to file its Amended Answer. See 40 C.F.R. § 22.14(d). The Complainant's Amended Prehearing Exchange shall be filed along with the Amended Complaint.

The hearing in this matter scheduled to commence on October 20, 1998, remains as scheduled, but the location, upon the approval of both parties, has been moved to Portland, Maine. The Regional Hearing Clerk will make appropriate arrangements for a courtroom and retain a stenographic reporter. The parties will be notified of the exact location and of other procedures pertinent to the hearing when those arrangements are complete.

Original signed by undersigned

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Barbara A. Gunning
Administrative Law Judge

Dated: 9-16-98
Washington, DC

1. The Complainant's Motion for Partial Accelerated Decision on Liability filed on August 31, 1998, is pending. See 40 C.F.R. §§ 22.07, 22.14(d), 22.16(b). The Complainant's Motion in Limine to exclude the proposed Respondent's Exhibits 6A, 6C, 6D, and 6E is denied. See 40 C.F.R.§ 22.22(a).

2. 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. § 22.03(a).

3. The Federal Rules of Civil Procedure 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, TSCA Appeal No. 92-4, 4 EAD 513, n. 10 (EAB Feb. 24, 1993).