

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	
The Beaumont Company)	Docket No. TSCA-09-2004-0004
)	
Respondent)	

**ORDER GRANTING MOTION FOR LEAVE TO FILE
SECOND AMENDED COMPLAINT**

This proceeding was initiated by a Complaint filed on September 30, 2004, under Section 16(a) of the Toxic Substances Control Act (TSCA), charging Respondent with 1510 counts of violation of 40 C.F.R. part 745, alleging that Respondent violated the regulations concerning Disclosure of Known Lead Based Paint and/or Lead Based Paint Hazards Upon Sale of Lease of Residential Property (“Disclosure Rule”). The Complaint was amended on November 4, 2004, as the First Amended Complaint. Respondent filed an Answer on December 8, 2004.

A Prehearing Order dated May 18, 2005 required Complainant to file a prehearing exchange or a fully executed Consent Agreement and Final Order (“CAFO”) in this matter by June 10, 2005. On June 9, 2005, Complainant filed a “Joint Stipulation and Motion for Filing of Second Amended Complaint” (“Motion”), along with a “Second Amended Complaint and Notice of Opportunity for Hearing,” (Motion, Attachment A) and what appears to be an e-mail with attached letter entitled “Joint Stipulation for Filing Second Amended Complaint,” dated June 9, to Complainant’s counsel from Respondent’s counsel (Motion, Attachment B).

In the Motion, Complainant states that the parties have resolved this matter, and intend to file a fully executed CAFO on the next day, June 10, 2005. Motion at 3. However, Complainant asserts, it discovered during negotiations that certain alleged violations were time barred and certain others were “not actionable for other reasons.” Motion at 2. Therefore, the parties stipulate to the filing of the Second Amended Complaint, which reduces the counts of violation from 1510 to 28. *Id.* In support of this stipulation, Complainant cites to Attachment B of its Motion.

Complainant’s request for relief states that “the parties offer this Joint Stipulation permitting the filing of this Second Amended Complaint pursuant to FRCP 14(a) [sic] or, in the alternative, request that the Administrative Law Judge immediately sign and enter an order that the attached Second Amended Complaint be deemed filed and served pursuant to 40 C.F.R. § 22.14(c).” In support of its Joint Stipulation to amend the complaint, Complainant cites to Rule 15(a) of the Federal Rules of Civil Procedure (FRCP), which provides that “a party may amend

the party's pleading . . . by written consent of the adverse party." *Id.* As to the alternative request, Complainant states, "to the extent that the presiding Administrative Law Judge feels compelled to affirmatively grant leave for the filing of the Second Amended Complaint prior to the June 10, 2005 filing of the CAFO, 40 C.F.R. §§ 22.16(a) and 22.14(c) of the Consolidated Rules of Practice . . . provide authority for the parties to file this motion." Motion at 2-3.

This proceeding is governed by the Consolidated Rules of Practice codified at 40 C.F.R. Part 22 ("Rules"). Rule 22.14(c) (40 C.F.R. § 22.14(c)), cited by Complainant provides that after the answer is filed, "the complainant may amend the complaint *only upon motion granted* by the Presiding Officer." (Emphasis added). Complainant's intent to amend the complaint by stipulation of the parties alone clearly is not in compliance with Rule 22.14(c).

The Federal Rules of Civil Procedure do not govern administrative enforcement proceedings, but merely serve as *guidance* where the Rules at 40 C.F.R. Part 22 do not address a particular procedure or standard, or where there is a similar procedure in both the FRCP and the Rules, such as summary judgment and accelerated decision. *Wego Chemical & Mineral Corporation*, 5 E.A.D. 513, 524 n.10 (EAB 1993)(noting "[a]lthough the Federal Rules of Civil Procedure do not apply to these proceedings, in some circumstances they have been relied upon for guidance," upholding use of FRCP 15(b) as guidance where Rules did not provide for motions to amend a complaint to conform to proof); *Patrick J. Neman, d/b/a The Main Exchange*, 5 E.A.D. 450, 455, n.2 (EAB 1994)("When a procedural issue arises that is not addressed in Part 22, the Board has discretion to resolve the issue as it deems appropriate. . . In the exercise of this discretion, the Board finds it instructive to examine analogous federal procedural rules and federal court decisions applying those rules."); *Puerto Rico Sewer and Aqueduct Authority v. U.S. EPA*, 35 F.3d 600, 606 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995)(applying principles of summary judgment from FRCP 56 and federal case law to accelerated decision under Rule 22.20) . The Rules at 22.14(c) specifically provide a procedure for amending a complaint: a complaint can only be amended by the Presiding Judge granting a motion to amend a complaint. The fact that FRCP 15(a) would allow parties in Federal court to stipulate to an amendment does not override the Rules which govern this proceeding.

Another procedural issue here is that Complainant has filed the Motion the day before the CAFO is due to be filed, which does not give a reasonable opportunity to issue an order prior to the CAFO being filed. *See*, 40 C.F.R. § 22.7(b)("Any motion for an extension of time shall be filed sufficiently in advance of the due date so as to allow the Presiding Officer . . . reasonable opportunity to issue an order."). Complainant should have filed its Motion as soon as it had notice of the need to amend the complaint, and if Complainant only had such notice the day prior to the due date of the CAFO, Complainant should have filed a motion for an extension of time to file the CAFO. Complainant seems to be under the mistaken impression that a request for an extension of time was not permissible, as the Motion quotes from the Prehearing Order but omits the text shown in bold italics: "**ONLY THE FILING WITH THE HEARING CLERK OF A FULLY EXECUTED CONSENT AGREEMENT AND FINAL ORDER, *OR AN ORDER OF THE JUDGE*, EXCUSES NONCOMPLIANCE WITH THE FILING DEADLINES."**

Under these circumstances, nevertheless, where Complainant has asserted with supporting documentation that Respondent agreed to the filing of the Motion, and in the interest of efficiency and furthering a timely amicable resolution of this proceeding, the request for filing the Second Amended Complaint will be addressed on its merits.

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.” *Port of Oakland and Great Lakes Dredge and Dock Company*, 4 E.A.D. 170, 205 (EAB 1992)(quoting *Yaffe Iron & Metal Co., Inc. v. U.S. EPA*, 774 F.2d 1008, 1012 (10th Cir. 1985)). The following standard in Federal court for amendment of pleadings, set forth in *Foman v. Davis*, 371 U.S. 178, 181-182 (1962), is applied to administrative pleadings: “[i]n the absence of ... undue delay, bad faith or dilatory motive on the part of the movant ... undue prejudice to the opposing party ... [or] futility of amendment,” leave to amend pleadings should be allowed.

In the present case, good cause exists for the granting of the Motion in that nothing in the case file suggests that there was “undue delay, bad faith or dilatory motive” on the part of Complainant. The proposed amendments reduce the number of alleged violations, Respondent does not oppose the Motion, and Complainant represents that the case is settled. Therefore, the proposed amendments are not “futile” and there is no “undue prejudice” to Respondent apparent from Complainant’s proposed amendments.

Accordingly, the Motion for Filing of Second Amended Complaint is hereby **GRANTED**. Complainant shall file and serve on Respondent the Second Amended Complaint on June 10, 2005, prior to or concurrently with the filing of the fully executed CAFO in this matter.

Susan L. Biro
Chief Administrative Law Judge

Dated: June 9, 2005
Washington, D.C.