UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
City of St. Charles, Illinois	)	**Docket No. CWA-04-2008-5192**
a Municipal Corporation operating as	)	
St. Charles Wastewater Treatment Facility	)	
	)	
Respondent.	)	

ORDER GRANTING MOTION TO AMEND COMPLAINT

I. Background

On December 7, 2007, the U.S. Environmental Protection Agency, Region V ("Complainant," or "EPA"), initiated this action by the filing of an Administrative Complaint against the City of St. Charles, Illinois, a municipal corporation operating as St. Charles Wastewater Treatment Facility ("Respondent"). The caption of the Complaint was amended to fully identify the Respondent, and the Amended Administrative Complaint was filed on January 17, 2008. The Complaint charges Respondent in eight counts with violations of the Clean Air Act ("CAA") 42 U.S.C. §§ 7401 to 7671. Count 1 of the Complaint alleges that Respondent, an owner or operator of stationary source subject to 40 C.F.R. Part 68, failed to review and update its Risk Management Plan and submit it to EPA in violation of 40 C.F.R. § 68.190. Count 2 alleges that Respondent violated 40 C.F.R. § 68.36 by failing to review and update its "offsite consequences analysis." Count 3 alleges that Respondent failed to maintain and produce proper records documenting its "offsite consequences analysis," and therefore violated 40 C.F.R. § 68.39. Count 4 alleges violations of 40 C.F.R. § 68.15, whose subsections require documentation of lines of authority among employees assigned responsibility for implementing requirements of 40 C.F.R. Part 68. Count 5 alleges a violation of 40 C.F.R. § 68.48 in that Respondent failed to maintain safety information records and could not produce such records during an August 2004 inspection. Count 6 alleges that Respondent violated 40 C.F.R. § 68.50 by failing to review the hazards associated with its regulated substances, process, and procedures with respect to "1943 chlorine," CAS No. 7782-50-5. Count 7 alleges Respondent violated 40 C.F.R. § 68.52 because it could not produce written operating procedures which addresses normal operations, temporary operations, emergency shutdown and operations, normal shutdown, start up following a shutdown or a major change that requires a hazards review, consequences of deviations and steps required to correct or avoid deviations, and equipment inspections. Count 8 alleges a violation of 40 C.F.R. § 68.58 for Respondent's failure to produce certification of having conducted a compliance audit as required. Complainant proposes a penalty of $36,000 against Respondent for these CAA violations.

Respondent filed an Answer to the Complaint, denying the alleged violations and requesting a hearing.

On March 14, 2008, Complainant submitted a Motion to Amend Complaint ("Motion") to add another count of violation, Count 9, based upon information in Respondent's Answer, and to include a proposed penalty of $10,000 for Count 9.

To date, no response has been received from Respondent.

II. The Applicable Standard

Section 22.14(c) of the Rules of Practice, 40 C.F.R. § 22.14(c), provides that once an Answer has been filed, the Complainant may amend the complaint only upon motion granted by the presiding judge. The Rules of Practice, however, provide no standard for determining when leave to amend should be granted. Rule 15(a) of the Federal Rules of Civil Procedure provides that "leave [to amend a complaint] shall be freely given when justice so requires." The Supreme Court has interpreted Rule 15(a) to mean that leave to amend pleadings 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. *Foman v. Davis,* 371 U.S. 178, 182 (1962).

The most significant of the *Foman* factors is whether the amendment would unduly prejudice the opposing party. *Carroll Oil Company*, 10 E.A.D. 635, 650, 2002 EPA App. LEXIS 14 (EAB 2002). Undue prejudice has been discussed as follows:

> [N]early every amendment results in some prejudice to the non-moving party. New discovery and some delay inevitably follow when a party significantly supplements its pleadings. The test in each case, then, must be whether *undue* prejudice would result. The district court, in exercising its discretion, must balance the general policy behind [FRCP] Rule 15 that controversies should be decided on the merits--against the prejudice that would result from permitting a particular amendment. Only where the prejudice outweighs the moving party's right to have the case decided on the merits should the amendments be prohibited. * * *
> In balancing these interests, the court will consider the position of both parties and the effect the request might have on them. Thus, the court will inquire into the hardship to the moving party if leave to amend is denied, the reasons for the moving party failing to include the material to be added in the original pleading, and the injustice resulting to the party opposing the motion should it be granted.

McCann v. Frank B. Hall & Co., 109 F.R.D. 363, 365, 1986 U.S. Dist LEXIS 29844 (N.D. Ill. Jan. 30, 1986)(citing, *inter alia*, *Alberto-Culver Co. v. Gillette Co.,* 408 F. Supp. 1160, 1161 (N.D. Ill. 1976) and 6 Wright, Miller & Cooper, Federal Practice & Procedure § 1487 at p. 429 (2nd ed. 1990).

Injustice resulting to the opposing party which weighs against granting a motion to amend may result from need for additional discovery, delayed litigation, or presentation of new legal theories shortly before trial, with attendant legal costs and burdens to the opposing party. *Carroll Oil,* 2002 EPA App. LEXIS 14 * 42; *Block v. First Blood Associates*, 988 F.2d 344, 350 (2nd Cir. 1992). "The need for additional discovery does not conclusively establish prejudice." *Nesselrotte v. Allegheny Energy, Inc.,* Civ. No. 06-01390 2007 U.S. Dist. LEXIS 79147 *14-15 (W.D. Pa., Oct. 25, 2007)(no prejudice where trial date was not set, case was less than a year old, and additional discovery could be worked into case schedule). Prejudice may be undue where granting the motion to amend would require opponent to expend significant additional resources to conduct discovery and prepare for trial or significantly delay resolution of the dispute. *Stephenson v. Dow Chemical Co.,* 220 F.R.D. 22, 25 (E.D. NY 2004), citing *Block v. First Blood Associates*, 988 F.2d at 350. Prejudice that is sufficient to deny a motion to amend a pleading must be such that the non-moving party was "unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the . . . amendments been timely." *Bechtel v. Robinson*, 886 F.2d 644, 652 (3rd Cir. 1989)(quoting *Heyl & Patterson Int'l v. F.D. Rich Housing*, 663 F.2d 419, 426 (3rd Cir. 1981). In addition, "the court should consider judicial economy and whether the amendments would lead to expeditious disposition of the merits of the litigation." *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.,* 690 F.2d 1157, 1163 (5th Cir. 1982).

III. Discussion

Complainant's proposed Count 9 alleges that Respondent violated 40 C.F.R. § 68.190(c), which provides that if a stationary source is no longer subject to 40 C.F.R. Part 68, the owner operator shall submit a de-registration to EPA within six months indicating that the stationary source is no longer covered under Part 68. Respondent admitted in its Answer (¶ 30) that prior to August 2004, it made submissions to the Illinois Environmental Protection Agency which included a facility plan, construction loan application, and construction permit application for the installation of an ultraviolet disinfection system to replace a day-to-day chlorine disinfection system. While Respondent states that it is without knowledge as to whether this information was received by EPA, Respondent admits to replacing the chlorine disinfection system and asserts that the facility is below the threshold requirements of Section 112(r) of the CAA. Answer pp. 10, 22.

The Rules of Practice provide that a "party's response to any written motion must be filed within 15 days after service of such motion." 40 C.F.R. § 22.16(b). The Motion was

served on March 14, 2008, and Respondent has neither filed a response, nor has it filed a motion to extend the deadline. The Rules of Practice provide that "A party who fails to respond within the designated period waives any objection to the granting of the motion." 40 C.F.R. § 22.16(b). Consequently, the Motion may be granted for Respondent's failure to respond.

The Motion is also granted on its merits. The Court in *Foman* stated that "if the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*, 371 U.S. at 181. No undue prejudice is apparent in this case, as it is still in the very early stages of the litigation process. The parties have not yet been directed to file their prehearing exchange, and no hearing date has yet been set. Inefficiency would result to the parties as well as to this Tribunal if the Motion were denied and Complainant were to file a separate complaint to allege a violation of 40 C.F.R. § 68.190(c). Therefore, the Complainant's Motion to Amend the Complaint will be granted.

ORDER

1. Complainant's Motion to Amend the Complaint is hereby **GRANTED**. Complainant shall file the Second Amended Administrative Complaint, as described in its Motion to Amend Complaint, within seven (7) days from the date of this Order.

2. Respondent shall file an Answer to the Second Amended Complaint within 20 days of the date of service of the Second Amended Complaint.

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Susan L. Biro
Chief Administrative Law Judge

Date: April 8, 2008
Washington, D.C.