

**BEFORE THE  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

In the Matter of:

EDWARD AND THERESA WASHINES,  
DA STOR AT LILLIE'S CORNER

Wapato, Washington

Respondents.

**DOCKET NO. RCRA-10-2014-0100**

**COMPLAINANT'S UNOPPOSED  
SUPPLEMENTAL MOTION FOR LEAVE  
TO AMEND THE COMPLAINT**

**COMPLAINANT'S UNOPPOSED SUPPLEMENTAL  
MOTION FOR LEAVE TO AMEND THE COMPLAINT**

Complainant respectfully submits this unopposed supplemental motion for leave to amend the complaint ("Supplemental Motion") pursuant to Rules 22.14(c) and 22.16(a) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation / Termination or Suspension of Permits* ("Part 22 Rules"), 40 C.F.R. part 22. This Supplemental Motion supplements and clarifies Complainant's Unopposed Motion for Leave to Amend the Complaint ("Original Motion"), filed on December 2, 2014. The Administrative Law Judge's Order Granting Complainant's Unopposed Motion for Leave to Amend the Complaint ("Order"), issued on December 19, 2014, granted Complainant's request to amend the Complaint, Compliance Order, and Notice of Opportunity for Hearing ("Complaint") in a manner consistent with that Order. The Order concluded that Complainant's Original Motion was inconsistent with the proposed amended complaint that had been filed with

the Original Motion, and that the Original Motion did not identify every proposed change to the pleading.<sup>1</sup> Complainant was ordered to file and serve a copy of an amended complaint, in accordance with the applicable provisions of 40 C.F.R. § 22.5, as soon as practicable. Order, page 3. This Supplemental Motion, therefore, seeks approval to amend the Complaint to address issues that were raised but not sufficiently described in the Original Motion, and identifies all changes proposed to be made to the Complaint pursuant to this Supplemental Motion. This Supplemental Motion seeks approval to amend the Complainant's penalty demand for Violations 2 and 3. A proposed Amended Complaint ("Proposed Amended Complaint") is attached to this Supplemental Motion as Attachment 1. The Proposed Amended Complaint incorporates both the amendments already authorized by the Order and those that are sought in this Supplemental Motion.<sup>2</sup> For ease of reference, a redline-strikeout version of the Proposed Amended Complaint that identifies all differences between the Complaint and the Proposed Amended Complaint is also included as Attachment 2.

The Part 22 Rules do not specify the standard by which motions to amend a complaint are to be adjudicated. Federal Rule of Civil Procedure 15, which may be consulted as guidance in this proceeding, provides that "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). In Forman v. Davis, the United States Supreme Court interpreted this Rule liberally, providing that amendments should be allowed unless they reflect

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<sup>1</sup> The Order found that "[t]he proposed changes related to the proposed penalty... are not accurately reflected in the Proposed Amended Complaint. The proposed penalty for Violation 3 found in the Proposed Amended Complaint is \$7,731 greater than that found in the original Complaint which is inconsistent with Complainant's request to increase that figure by \$6,205. Additionally, the proposed penalties for Counts 5 and 6 appear to be the same in both the Complaint and the Proposed Amended Complaint." Order at fn 1.

<sup>2</sup> Complainant does not intend to submit an amendment to the Complaint to incorporate additional relief under the Compliance Order section.

reasons such as “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment” or similar reasons.

Forman v. Davis, 371 U.S. 178, 182 (1962). Complainant’s request in this Supplemental Motion is made in good faith and should be allowed, as it will not unduly prejudice the Respondent and the Respondent does not oppose this Supplemental Motion. Furthermore, it is in the interest of judicial economy to allow all related claims to be resolved in the same proceeding.

A description and clarification of the changes proposed to be made to the Complaint in the Original Motion and in this Supplemental Motion related to the Complainant’s penalty proposal are as follows:

*Penalty Proposal – Violation 1.*

The Original Motion requested leave to amend Violation 1 of the Complaint to allege periods of violation which occurred after the original Complaint was filed, and to revise the penalties proposed by Complainant to include those additional periods of violation. Original Motion, page 2. Complainant’s request to amend the Complaint to allege additional days of violation was approved. Order, page 3. As a result, the Proposed Amended Complaint, Violation 1, alleges 47 additional days of violation. However, the additional 47 days were insufficient to affect the “Days of Noncompliance Multiplier” in Complainant’s application of the November 1990 U.S. EPA Penalty Guidance for Violations of UST Requirements (“UST Penalty Guidance”). As a result, Complainant’s proposed penalty for Violation 1 remains unchanged in Paragraph 4.4 of the Proposed Amended Complaint, at \$5,284 per count for Counts 1 through 4.

*Penalty Proposal – Violation 2.*

The Original Motion requested leave to amend Violation 2 of the Complaint to adjust how the \$3,931 economic benefit originally calculated for delayed costs was allocated between Counts 5 and Count 6, to conform to the UST Penalty Guidance. Original Motion, page 3. The Original Motion proposed to do this by increasing Count 5 and reducing Count 6 by \$1,965, with no effect on the aggregate penalty amount proposed for Violation 2. This change is reflected in Paragraph 4.4 of the Proposed Amended Complaint.

*Penalty Proposal – Violation 3.*

The Original Motion requested leave to amend Violation 3 of the Complaint to allege additional periods of noncompliance to include all known periods of noncompliance up to the filing date of the Original Motion and to revise the penalty proposed by Complainant for Violation 3 in Paragraph 4.4 of the Complaint. *Id.*, page 2. Complainant’s request to amend the Complaint to allege additional days of violation was approved. Order, page 3. Complainant’s Original Motion also requested leave to amend the Complaint to correct an error in Complainant’s originally proposed penalty amount for Violation 3. Original Motion, page 3. The additional 215 days of alleged violation for Violation 3 increased the “Days of Noncompliance Multiplier” used in the UST Penalty Guidelines for Violation 3, and as a result, Complainant seeks approval to increase its proposed penalty for Violation 3 by \$1,526.

The Original Motion also requested leave to amend the penalty proposed for Violation 3 to correct an error in the original calculation for capturing the economic benefit from the alleged noncompliance. *Id.*, page 3. This error resulted in an original penalty proposal that should have been \$6,205 higher than what was sought in the Complaint. Therefore, Complainant respectfully requests approval to increase its proposed penalty amount for Violation 3 by a total of \$7,731,

reflecting the \$1,526 increase attributable to the additional period of noncompliance and the \$6,205 economic benefit calculation error. This change is reflected in Paragraph 4.4 of the Proposed Amended Complaint.

*Total Penalty Amount Proposed by Complainant*

As discussed above, Complainant's revised penalty calculations for Violation 1 and Violation 2 result in no net change in their respective aggregate penalty amounts. Complainant's revised penalty calculation for Violation 3 results in a \$7,731 increase in the penalty amount. As a result, the total penalty amount proposed by Complainant in Paragraph 4.4 of the Proposed Amended Complaint has increased by a total of \$7,731, from a former amount of \$57,092 to a revised amount of \$64,823.

*Specific Proposed Changes to the Complaint*

The following list identifies all of the changes to the text of the Complaint, filed on April 30, 2014, that appear in the Proposed Amended Complaint (Attachment 1 to this Supplemental Motion):

- Title: Changed "Complaint ..." to "Amended Complaint ..."
- Footer: Changed "Complaint ..." to "Amended Complaint ..."
- ¶ 1.1: Changed "Complaint ..." to "Amended Complaint ..."
- ¶ 3.4: Changed "Complaint ..." to "Amended Complaint ..."
  
- ¶ 3.16: Added language to include additional period of violation for Violation 1.
- ¶ 3.17: Added language to include additional period of violation for Violation 1.
- ¶ 3.18: Added language to include additional period of violation for Violation 1.

- ¶ 3.28:<sup>3</sup> Added new paragraph for additional period of violation for Violation 3.
- ¶ 3.29:<sup>3</sup> The former paragraph 3.28 was renumbered to paragraph 3.29. The text of the allegation was altered, to include a reference to the new paragraph 3.28.
- ¶ 4.2: Added a new reference to regulations promulgated under the Debt Collection Improvement Act, addressing the maximum penalty amount that may be sought for the additional periods of noncompliance for Violation 1 and Violation 3.
- ¶ 4.4: Changed “Complaint ...” to “Amended Complaint ...”
- ¶ 4.4: Updated proposed penalties, details of which are explained in greater detail within this Supplemental Motion.
- ¶ 4.4: Changed “accompanies this Complaint” to “accompanied the original Complaint, Compliance Order, and Notice of Opportunity for Hearing (“Original Complaint”), and may be found in Complainant’s Initial Prehearing Exchange at Exhibit CX-36.” This change is intended to avoid confusion, as the original text only applied to the Original Complaint.
- ¶ 5.1: Changed “... request for a hearing must be incorporated ...” to “... request for a hearing was incorporated ...”. This change was to avoid confusion, as the original text only applied to the Original Complaint.

Complainant respectfully requests leave to amend the Complaint, in order to correct and conform its penalty proposal in this matter to the UST Penalty Guidance for those periods of noncompliance that were included in the Complaint or to which the Order has already authorized an amendment.

Prior to filing this Supplemental Motion, the undersigned Complainant’s Counsel contacted the opposing party as to the amendments requested herein. Respondents’ Counsel stated that he does not oppose this Supplemental Motion, but reserves the right to file an

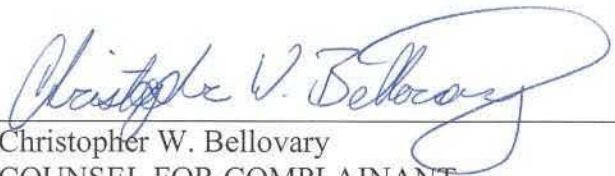
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<sup>3</sup> Unless stated otherwise, all paragraph references refer to the Proposed Amended Complaint.

amended Answer. For the reasons cited above, Complainant respectfully requests leave to amend the Complaint, as described within this Supplemental Motion.

Complainant's Counsel may be contacted by phone at (206) 553-2723, by email at [bellovary.chris@epa.gov](mailto:bellovary.chris@epa.gov), or by mail at Christopher W. Bellovary, EPA Region 10, 1200 Sixth Avenue, Suite 900, Mail Stop ORC-158, Seattle, Washington 98101.

Respectfully submitted this 3<sup>rd</sup> day of February, 2015.

  
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Christopher W. Bellovary  
COUNSEL FOR COMPLAINANT  
U.S. Environmental Protection Agency, Region 10