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2 UNITED STATES
3 ENVIRONMENTAL PROTECTION AGENCY
4 REGION IX
5 75 HAWTHORNE STREET
6 SAN FRANCISCO, CA 94105

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7 IN THE MATTER OF:) Docket No. EPCRA-09-2011-0004
8 BARRICK CORTEZ, INC.) MOTION FOR LEAVE TO FILE
9 Respondent) SECOND AMENDED COMPLAINT
10)

11 Pursuant to the authority set forth at 40 C.F.R. § 22.16(a),
12 Complainant, United States Environmental Protection Agency,
13 Region IX ("EPA"), moves the Presiding Administrative Law Judge
14 for leave to file a Second Amended Complaint and Notice Of
15 Opportunity For Hearing ("Second Amended Complaint") in this
16 matter, as provided in 40 C.F.R. § 22.14(c). Complainant's
17 reasons for seeking leave to file the Second Amended Complaint
18 are set forth below.

19 The Complaint in this action was issued on September 29,
20 2011. The Complaint alleged 37 violations of Section 313 of the
21 Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42
22 U.S.C. § 11045(c), in connection with Barrick Cortez
23 Incorporated's ("BCI") operation of its gold mining facility (the
24 "Facility") near Crescent Valley, Nevada.

25 On January 4, 2012, Complainant filed the First Amended
26 Complaint in this matter to withdraw three alleged violations of
27 EPCRA § 313 in connection with BCI's failure to submit a timely,
28 complete and accurate Toxic Chemical Release Inventory Form

1 ("Form R") for manganese compounds for reporting year 2005 and
2 failure to submit timely Form Rs for manganese compounds for
3 reporting years 2006 and 2007. On January 27, 2012, BCI filed
4 its Answer to the First Amended Complaint (the "Answer").

5 Complainant has determined that a Second Amended Complaint
6 is necessary for the following three reasons:

7 First, Complainant had provided an incomplete citation for
8 the Standard Industrial Classification ("SIC") codes subject to
9 EPCRA § 313 in the First Amended Complaint. Specifically,
10 Complainant only listed SIC codes 20 through 39 and omitted the
11 following SIC codes potentially triggering EPCRA § 313 reporting
12 requirements: 10 (except 1011, 1081, and 1094); 12 (except 1241);
13 4911, 4931, and 4939 (limited to facilities that combust coal
14 and/or oil for the purpose of generating power for distribution
15 in commerce); 4953 (limited to facilities regulated under the
16 Resource Conservation and Recovery Act); and 5169, 5171, and 7389
17 (limited to facilities primarily engaged in solvent recovery
18 services on a contract or fee basis). Consequently, Complainant
19 has prepared the Second Amended Complaint, which provides the
20 complete citation for the SIC codes subject to EPCRA § 313
21 requirements. This change is reflected in Paragraphs 10 and 15
22 of the Second Amended Complaint.

23 Second, Complainant determined that the violation alleged in
24 Count 21 (failure to report selenium for 2006) should be deleted
25 from this action.

26 Third, Complainant determined that the First Amended
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28

1 Complaint should be amended to incorporate alleged violations of
2 EPCRA § 313 at two other gold mining facilities owned and/or
3 operated by Barrick Gold U.S., Inc. ("BGI") and Homestake Mining
4 Company of California ("Homestake") in 2007-2008. Complainant
5 conducted inspections of the two facilities in 2009-2010 and
6 identified twenty-five alleged violations of EPCRA § 313. BGI
7 and Homestake are closely affiliated with BCI; all three are
8 subsidiaries of Barrick Gold Corporation of Canada.

9 As noted in the Fourth Joint Motion for Stay filed by
10 Complainant and BCI on September 10, 2012, the parties have
11 reached an agreement in principle to settle not only
12 Complainant's EPCRA § 313 claims against BCI, as set forth in the
13 First Amended Complaint, but also the Agency's EPCRA § 313 claims
14 against other facilities related to BCI. Accordingly, the Second
15 Amended Complaint alleges ten violations of EPCRA § 313 against
16 BGI in connection with its operation of a gold mining facility
17 located 70 miles southeast of Elko, Nevada (Counts 34-43); and
18 fifteen violations of EPCRA § 313 against Homestake in connection
19 with its operation of a gold mining facility located near Highway
20 50 and State Route 278 near Eureka, Nevada (Counts 44-58).

21 The Second Amended Complaint incorporates the above changes,
22 including renumbering, and is attached hereto as Attachment 1.

23 While the Consolidated Rules of Practice Governing the
24 Administrative Assessment of Civil Penalties and the
25 Revocation/Termination or Suspension of Permits ("Rules of
26 Practice") at 40 C.F.R. Part 22 provide at § 22.14(c) that the
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1 Presiding Administrative Law Judge may grant the Complainant
2 leave to file an amended Complaint, the Rules of Practice provide
3 no standard for when leave to amend should be granted. In the
4 absence of an express standard in the Rules, the Environmental
5 Appeals Board ("EAB") has often relied on the guidance developed
6 by the federal courts in construing Rule 15(a) of the Federal
7 Rules of Civil Procedure ("FRCP"). In the Matter of Asbestos
8 Specialists, Inc., 4 E.A.D. 819, 827 n.20 (October 6, 1993).
9 Although the FRCP are not binding on administrative agencies,
10 guidance pertaining them has often been found to be instructive
11 in applying the Rules of Practice. See Wego Chemical & Mineral
12 Corp., 4 E.A.D. 513, 524 n.10 (February 24, 1993).

13 The FRCP take a liberal approach to the amendment of
14 pleadings. Specifically, Rule 15(a) provides that "leave to
15 amend shall be freely given when justice so requires." The
16 United States Supreme Court has interpreted Rule 15(a) to mean
17 that there should be "a strong liberality...in allowing
18 amendments" to pleadings, finding that "the Federal Rules reject
19 the approach that pleading is a game of skill in which one
20 misstep by counsel may be decisive to the outcome and accept the
21 principle that the purpose of pleading is to facilitate a proper
22 decision on the merits." Foman v. Davis, 371 U.S. 178, 181-82
23 (1962). Moreover, the Court held that, under Rule 15(a), in the
24 absence of factors such as undue delay, bad faith or dilatory
25 motive, repeated failure to cure deficiencies by previous
26 amendment, futility of amendment, or prejudice to the opposing
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1 party, leave to amend shall be freely given. Id at 182.
2 Accordingly, the EAB has found that a complainant should freely
3 be given leave to amend a complaint because it promotes accurate
4 decisions on the merits of the case. In the Matter of Asbestos
5 Specialists, Inc., 4 E.A.D. at 830; In the Matter of Port of
6 Oakland and Great Lakes Dredge and Dock Company, 4 E.A.D. 170,
7 205 (August 5, 1992).

8 In the present case, Complainant seeks to amend the First
9 Amended Complaint to conform the regulatory citation with the
10 violations alleged in the First Amended Complaint, delete one
11 alleged violation (i.e., failure to report selenium) based on the
12 most recent information received from BCI, and to add twenty-five
13 alleged violations against two corporations related to BCI.
14 These amendments are being sought as part of a comprehensive
15 settlement of EPCRA § 313 liability of BCI and related corporate
16 entities at their U.S. facilities. EPA has prepared and will
17 file a Consent Agreement and Final Order that resolves all the
18 violations alleged in the Second Amended Complaint once the
19 Presiding Administrative Law Judge issues an order allowing the
20 filing of the attached Second Amended Complaint.

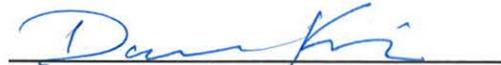
21 Consequently, granting leave to file the attached Second
22 Amended Complaint will serve the public interest in the efficient
23 and complete resolution of EPCRA § 313 liability of BCI and
24 related corporate entities. Additionally, BCI will not be
25 prejudiced if Complainant is permitted to amend the First Amended
26 Complaint at this time, and does not oppose this Motion.

1 For the reasons set forth herein, Complainant requests that
2 the Presiding Administrative Law Judge sign and enter an Order
3 that the attached Second Amended Complaint be deemed filed and
4 served pursuant to 40 C.F.R. § 22.14(c) as of the date of the
5 Order granting leave to file the Second Amended Complaint.

6
7 Respectfully submitted,

8
9 DATED: _____

1-24-13



David H. Kim
Assistant Regional Counsel

CERTIFICATE OF SERVICE

I hereby certify that the original and one copy of this Motion for Leave to File Second Amended Complaint was filed with the Headquarters Hearing Clerk, U.S. Environmental Protection Agency, and that a copy was sent by Pouch Mail and/or First Class Mail to:

The Honorable M. Lisa Buschmann
Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
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Washington, D.C. 20460

and

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1-24-2013

Date



Office of Regional Counsel
U.S.E.P.A., Region IX