



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:)
)
Valvo's Convenience & Gas, Inc.,) Docket No. RCRA-02-2011-7507
and Stephen M. Valvo,)
) Dated: August 17, 2012
Respondents.)

**ORDER ON MOTION TO FILE SECOND AMENDED COMPLAINT AND
ORDER RESCHEDULING HEARING**

I. Order on Motion to File Second Amended Complaint

On June 3, 2011, the United States Environmental Protection Agency, Region 2 ("Complainant"), initiated this proceeding by filing a Complaint, Compliance Order and Notice of Opportunity for Hearing against Valvo Convenience and Gas, Inc., and Stephen M. Valvo ("Respondents"). Respondents filed an Answer to the Complaint on July 12, 2011. The Complaint was subsequently amended to modify the name of the corporate Respondent to Valvo's Convenience & Gas, Inc. and to make other ministerial changes. Complainant filed the Amended Complaint, Compliance Order and Notice of Opportunity for Hearing ("First Amended Complaint") on March 28, 2012, to which Respondents filed an Answer on April 25, 2012.

On July 11, 2012, Complainant filed a Motion to File Second Amended Complaint ("Motion to Amend"). Shortly thereafter, Complainant filed an Addendum to the Motion to File Second Amended Complaint ("Addendum"), to which Complainant attached a copy of the Proposed Draft Second Amended Complaint, Compliance Order and Notice of Opportunity for Hearing ("Proposed Second Amended Complaint") and a black-lined copy comparing it to the First Amended Complaint. As explained in the Motion to Amend and the Addendum, Complainant seeks to amend the First Amended Complaint to: (1) include specific dates that certain violations were corrected, (2) update the time periods of the continuing violations, and (3) add another count alleging that Respondents failed to conduct release detection and maintain adequate records for the diesel underground storage tank at the former Hanover Convenience facility in 2011 and 2012. The black-lined copy of the Proposed Second Amended Complaint reflects numerous proposed changes throughout the First Amended Complaint.

On July 26, 2012, counsel for Respondents notified one of the undersigned's staff attorneys that Respondents have no objection to the Motion to Amend.

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“Rules”), 40 C.F.R. §§ 22.1-22.32. Section 22.14(c) of the Rules allows the complainant to amend the complaint once as a matter of right at any time before the answer is filed and otherwise “only upon motion granted by the Presiding Officer.” 40 C.F.R. § 22.14(c). The Rules do not provide a standard for adjudicating such a motion, but the Federal Rules of Civil Procedure (“FRCP”) and federal court decisions interpreting the FRCP provide guidance. *See, e.g., Carroll Oil Co.*, 10 E.A.D. 635, 649 (EAB 2002); *Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827 n. 20 (EAB 1993). The FRCP adopt a liberal stance toward amending pleadings, stating that “[t]he court should freely give leave [to amend a complaint] when justice so requires.” FRCP 15(a)(2). In construing Rule 15(a), the Supreme Court has held that,

In the absence of any apparent or declared reason -- 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, etc. -- the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962).

Here, nothing in the record suggests undue delay, bad faith, dilatory motive or repeated failure to cure deficiencies by previous amendments to the Complaint. In the Motion to Amend, Complainant claims that the violation alleged in the additional count was “recently discovered” and that the other proposed amendments reflect “a good-faith effort by Complainant to state the current status of the violations that have been corrected and those that are continuing.” Complainant contends that the proposed addition of another count will not unduly prejudice Respondents as Complainant has exercised its discretion not to increase the amount of the proposed penalty. Significantly, Respondents do not object to the relief sought, and undue prejudice to Respondents is not otherwise apparent, particularly considering that the hearing is being rescheduled as stated below.

For the foregoing reasons, the Motion to File Second Amended Complaint is hereby **GRANTED**. **Complainant shall file and serve the Second Amended Complaint, Compliance Order and Notice of Opportunity for Hearing as soon as practicable.**

Pursuant to Section 22.14(c) of the Rules of Practice, **Respondents shall have 20 days from the date of service of that document to file an answer to the Second Amended Complaint.**

II. Order Rescheduling Hearing

By Order dated May 10, 2012, deadlines for a number of prehearing procedures were established and the hearing in this matter was scheduled to commence on September 11, 2012. Due to the additional time needed for Respondents to file an answer to the Second Amended Complaint and for the parties to supplement their Prehearing Exchanges with respect to the additional count of violation, the hearing must be rescheduled. The parties' counsel have agreed that they are available for a hearing the week of October 22, 2012.

Accordingly, in the event the parties have not filed a fully executed Consent Agreement and Final Order settling this matter beforehand, the parties shall make prehearing filings according to the following schedule:

1. Complainant shall file, **on or before August 24, 2012**, a supplement to its Prehearing Exchange to submit any additional names and summaries of testimony of proposed witnesses, amended summaries of testimony, additional proposed exhibits, and amended calculation of the proposed penalty, in regard to the amendments in the Second Amended Complaint.
2. Respondents shall file, **on or before September 14, 2012**, a supplement to their Prehearing Exchange to submit any additional names and summaries of testimony of proposed witnesses, amended summaries of testimony, additional proposed exhibits, and/or amended statement explaining why the proposed penalty should be reduced or eliminated, in regard to the amendments in the Second Amended Complaint.
3. Any non-dispositive prehearing motions, such as motions for subpoena and motions in limine, shall be filed **on or before September 21, 2012**. This deadline does not apply to motions to supplement the prehearing exchange.
4. The parties shall file a Joint Set of Stipulated Facts, Exhibits and Testimony on or before **September 28, 2012**. The time allotted for the hearing is limited. Therefore, the parties must make a good faith effort to stipulate, as much as possible, to matters which cannot reasonably be contested so that the hearing can be concise and focused solely on those matters which can only be resolved after a hearing. Stipulated exhibits are a list of the proposed exhibits in the Prehearing Exchange to which the parties agree are admissible in evidence, and those to which the opposing party does not object with respect to authenticity. Stipulated testimony is direct testimony in written form of a witness who will appear at the hearing and be available for cross examination.
5. If, after the parties file supplements to the Prehearing Exchanges as directed above, a party wishes to add a proposed witness and/or exhibit to its prehearing exchange, it must file a timely motion to supplement the prehearing exchange, along with the proposed evidence, no later than **October 8, 2012**. Motions filed after this date will not be

considered absent extraordinary circumstances. The parties are reminded that any document or exhibit not included in the prehearing exchanges may not be admitted into evidence, and any witness whose name and testimony summary are not included in the prehearing exchange may not be allowed to testify at hearing.

6. The parties may file prehearing briefs (which may substitute for an opening statement at the hearing) on or before **October 12, 2012**. Any prehearing briefs should be emailed (oaljfilng@epa.gov), faxed, and/or hand-delivered to the undersigned's office by that date.

The hearing in this matter is hereby rescheduled to begin promptly at 9:30 a.m. on Tuesday, October 23, 2012 and continue as necessary through October 26, 2012, in Buffalo, New York. The Hearing Clerk will make appropriate arrangements for a courtroom. The parties will be notified of the exact location and of other procedures pertinent to the hearing when those arrangements are complete.

Individuals requiring special accommodations at the hearing, including wheelchair access, should contact the Regional Hearing Clerk, as soon as possible so that appropriate arrangements can be made.

RESPONDENT IS HEREBY ADVISED THAT FAILURE TO APPEAR AT THE HEARING, WITHOUT GOOD CAUSE BEING SHOWN THEREFOR, MAY RESULT IN A DEFAULT JUDGMENT BEING ENTERED AGAINST IT. COMPLAINANT IS HEREBY ADVISED THAT FAILURE TO APPEAR AT THE HEARING MAY RESULT IN DISMISSAL OF THIS MATTER.

If either party does not intend to attend the hearing, or has good cause for not being able to attend the hearing as scheduled, it shall notify the undersigned's staff at the earliest possible moment.

SO ORDERED.

M. Lisa Buschmann
Administrative Law Judge