



**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:)
)
 Summit, Inc.,)
) **Docket No. RCRA-05-2014-0006**
)
 Respondent) **Dated: March 1, 2016**

ORDER GRANTING COMPLAINANT’S MOTION TO AMEND THE COMPLAINT

Before me is the Complainant’s Motion to Amend the Complaint (“Motion”) to correct the benzene toxicity concentrations cited in the Complaint. The Complaint in this matter was filed under Section 3008(a) of the Solid Waste Disposal Act, as amended, also known as the Resource Conservation and Recovery Act (“RCRA” or “the Act”), 42 U.S.C. § 6928(a). The seven-count Complaint charges Respondent Summit, Inc., an automobile scrap recycling business located in Gary, Indiana, with violating various provisions of Indiana’s federally authorized regulations governing hazardous waste, used oil, and universal waste. The Complainant seeks a civil penalty of \$263,375 and an order that Summit maintain and certify its compliance with the regulations cited in the Complaint.

The seven violations alleged in the Complaint arise from an inspection of Summit’s facility that included a sampling of liquids contained in four 55-gallon drums. Regarding the samples taken from these drums, paragraph 63 of the Complaint states:

[T]he four drums sampled contained benzene concentration above the regulatory level of 0.5 mg/L. Specifically, sample # 3180905 collected from Drum 1 had a benzene concentration of 4.30 mg/L; sample # 3180908 collected from Drum 2 had a benzene concentration of 14.2 mg/L; sample # 3180911 collected from a Drum 3 had a benzene concentration of 213 mg/L; sample # 3180914 collected from Drum 4 had a benzene concentration of 1,080 mg/L.

In its Motion, filed February 2, 2016, the Complainant seeks to amend Paragraph 63 to correct the benzene concentration levels cited. According to the Complainant, when reviewing laboratory charts that summarized the chemical analysis of samples taken from the drums, the Complainant believed the appropriate total TCLP benzene concentrations to cite in the

Complaint were the TCLP¹ oil filtrate benzene concentrations presented in the charts. Mot. at 4-5. However, in preparing for hearing, and upon a chemist's review of the evidence and the laboratory report, Complainant realized that the benzene concentrations presented in the summary charts for drums with sample numbers 3180908, 3180911 and 3180914 were only for the TCLP oil filtrate portion of the sample analyzed, and did not represent the total TCLP benzene concentration for these samples. Mot. at 5-6. A correct analysis considers all phases of a sample – solid, oil, and water. Mot. at 6. When that is done, the correct, final, combined TCLP concentration of benzene should be 0.528 mg/L for sample 3180908; 9.54 mg/L for sample 3180911; and 82.1 mg/L for sample 3180914. Mot. at 6. The result for sample 3180905 is unchanged because it contained a small amount of solids. Mot. at 6. Complainant points out that although the altered values reflect decreased benzene concentrations, they still exceed the regulatory levels. Mot. at 7. Additionally, Complainant states that the proposed change does not affect its penalty calculation. Mot. at 7.

The Complainant notified Summit of the corrected measurements in a January 22, 2016 email. Mot., Ex. 1. During a prehearing conference with staff attorneys in this office on February 4, 2016, counsel for Summit indicated he did not oppose the amendment. Thus, no response to the Motion is necessary.

The Rules that govern this proceeding at 40 C.F.R. Part 22 provide that once an Answer has been filed, “the complainant may amend the complaint only upon motion granted by the Presiding Officer.” 40 C.F.R. § 22.14(c). The Rules do not offer any standard for granting leave to amend a complaint, but the Federal Rules of Civil Procedure and federal court decisions interpreting the federal rules provide guidance: A court “should freely give leave” to amend a complaint “when justice so requires.” Fed. R. Civ. P. 15(a). In *Foman v. Davis*, the United States Supreme Court stated:

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.”

371 U.S. 178, 182 (1962).

Here, there is no apparent undue delay, bad faith, dilatory motive, futility of amendment, or repeated failure to cure deficiencies. The proposed amendment merely corrects an oversight without changing the end result – the alleged toxicity of the sampled liquids in the four 55-gallon drums. Summit is not prejudiced by this amendment and does not oppose it.

Accordingly, the Complainant's Motion to Amend the Complaint is **GRANTED**. Paragraph 63 of the Complaint is hereby deemed amended to read as follows:

¹ TCLP refers to Toxicity Characteristic Leachate Procedure.

63. According to EPA's analysis, the four drums sampled contained total TCLP benzene concentrations above the regulatory level of 0.5 mg/L. Specifically, sample # 3180905 collected from Drum 1 had a total Toxicity Characteristic Leachate Procedure (TCLP) benzene concentration of 4.30 mg/L; sample #3180908 collected from Drum 2 had a total TCLP benzene concentration of 0.528 mg/L; sample 3180911 collected from Drum 3 had a total TCLP benzene concentration of 9.54 mg/L; sample # 3180914 collected from Drum 4 had a total TCLP benzene concentration of 82.1 mg/L.

SO ORDERED.

M. Lisa Buschmann
Administrative Law Judge

**In the Matter of *Summit Inc*, Respondent.
Docket No. RCRA-05-2014-0006**

CERTIFICATE OF SERVICE

I hereby certify that the ORDER GRANTING COMPLAINANT'S MOTION TO AMEND THE COMPLAINT, dated March 1, 2016, and was sent this day in the following manner to the addressees listed below.

Chronnia L. Warren
Paralegal

**Dated: March 1, 2016
Washington, DC**

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