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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
CITY OF ORLANDO, FL,	)	DOCKET NO. CWA-04-501-99
	)	
	)	
RESPONDENT	)	

ORDER GRANTING MOTION TO AMEND COMPLAINT

The complaint in this proceeding under Section 309(g)(2)(B) of the Clean Water Act, 33 U.S.C. § 1319(g)(2)(B), issued and filed on March 12, 1999, charged Respondent, City of Orlando, with the unlawful use or disposal of sewage sludge in violation of Section 405(e) of the Act. Specifically, the complaint alleged that 136.44 metric tons of sewage sludge were disposed of on land in 1997 in violation of the regulation, 40 C.F.R. § 503.13(a)(1), in that molybdenum concentrations in samples of the sludge exceeded concentrations set forth in the table at 40 C.F.R. § 503.13 and thus, land disposal of the sludge was prohibited. This alleged violation was based on the "annual sludge report", required by 40 C.F.R. § 503.18(a), submitted by the City on March 3, 1998. For this alleged violation, it was proposed to assess the City a penalty of $60,000.

The City's answer, filed on April 12, 1999, raised certain affirmative defenses, including that the Complainant failed to consider an appropriate margin of error as to test results, contended that the proposed penalty was arbitrary and excessive, and requested a hearing.

Based on its contention that the answer to the complaint was not timely filed, Complainant filed a motion for a default order on May 26, 1999. The motion

indicated that Complainant would request a hearing on the recommended penalty, even if its motion for a default order were to be granted. The City's reply to the motion for default, dated June 15, 1999, noted, inter alia, that Complainant appeared to be abandoning its proposed penalty and apparently intended to seek a higher penalty. The City emphasized that in no event should it be subjected to a penalty higher than that proposed in the complaint, absent a motion to amend the complaint approved by the ALJ. On June 18, 1999, while the motion for a default order was pending, Complainant filed a motion to amend the complaint. The motion, which was not accompanied by a copy of the proposed amended complaint, stated Complainant's belief that the prospects of settlement would be enhanced if the complaint were amended to address the City's concerns expressed in its reply to the motion for default and to specifically outline all of the alleged violations of 40 C.F.R. Part 503. On July 1, 1999, the City filed a reply to the motion to amend the complaint, stating essentially that it did not object to the amendment insofar as it would allow a further explanation of the proposed penalty calculation.[(1)]

Complainant's motion for a default order was denied by an order, dated July 7, 1999. The order pointed out that Complainant's motion to amend the complaint would not be perfected until it filed a copy of the proposed amended complaint and directed Complainant to file the proposed amended complaint forthwith. Complainant filed its proposed First Amended Complaint on July 13, 1999. The principal change effected by the proposed amendment is to add charges for land disposal of sewage sludge in 1994 and 1995 having molybdenum concentrations in excess of the regulatory maximum based on sludge reports submitted by the City on February 15, 1996, and February 6, 1995. The amended complaint increases the proposed penalty by 50% to $90,000. The City requested and was granted an opportunity to file an amended reply.

In its amended reply to Complainant's motion to amend the complaint, the City emphasizes that Complainant has not alleged fraud, mistake, newly-discovered evidence or other grounds for recalculation of the penalty initially proposed. Attached to the City's reply is an affidavit by Mr. Thomas L. Lothrop, Director of Environmental Services for the City, stating, among other things, that he is responsible for the City of Orlando's wastewater system, including the Water Conser I Water Reclamation Facility [referred to in the complaint], that he participated in the discussions, correspondence and implementation of the resolution of EPA Region 4's Administrative Order No. 99-004 regarding the City's Water Conser I Water Reclamation Facility, that at no time during the pendency of Administrative Order No. 99-004 was an offer to settle any civil penalty made either verbally or in writing to the City, that indeed, the City was not informed of EPA's intention to seek a penalty until the complaint was received on March 16, 1999, and that on March 26, 1999, he received a letter from EPA, dated March 26, 1999, stating that Administrative Order No. 99-004 had been closed out based upon compliance with its terms.

Because the City never received any offer of settlement relating to the proposed penalty, it objects that Complainant has not explained or justified why it has ignored its own "Interim Clean Water Act Settlement Policy", dated March 1, 1995, which provides, inter alia, that a settlement penalty calculation is generally required before the Agency files an administrative complaint or refers a civil action to the Department of Justice. (Id. 3) Additionally, the City complains that, notwithstanding its early action in resolving the administrative order, it was not offered a "Quick Settlement Adjustment Factor" of ten percent for signing an administrative consent order resolving the violations within four months of being notified of the problem.[(2)] Section IV.D. of the Settlement Policy is entitled "Litigation Considerations (to decrease preliminary penalty amount)" and the City asserts that Complainant has not explained or justified why it did not apply a national municipal litigation factor [to decrease the proposed penalty]. These are telling points, according to the City, because the $60,000 penalty demanded in the complaint must be more than the sum for which Complainant was willing to settle this matter.

The City asserts that it has tried to explore and have clarified the proposed penalty amount, but that these efforts have been thwarted by Complainant's refusal

to address the rationale for ignoring pre-trial settlement [offers or discussions] and its failure to explain the methodology for the original proposed penalty. The City says that Complainant's disregard of its own policies has been compounded by the proposal to amend the complaint to include new and additional charges, "upping the ante" in an apparent effort to intimidate the City. Assertedly, this is a violation of the Settlement Policy and deprives the City of an opportunity to invoke incentives for which it is qualified. According to the City, granting the motion would constitute an endorsement of this practice and still leave the City without an explanation of how the original penalty was calculated.

For all of the above reasons, the City argues that the motion to amend the complaint should be denied.

Discussion

The general rule is that motions to amend pleadings are liberally granted where the interests of justice are thereby served and no prejudice to the opposing party results. See, e.g., Foman v. Davis, 371 U.S. 178 (1962); 3 Moore's Federal Practice ¶ 15.08. This is especially true in administrative proceedings, the EAB having stated that: "...the Board adheres to the generally accepted legal principle that 'administrative pleadings are liberally construed and easily amended' and that permission to amend a complaint will ordinarily be freely granted." Port of Oakland and Great Lakes Dredge and Dock Company, MPRSA Appeal No. 91-1, Final Decision and Order, 4 E.A.D. 170, 209, at 205; 1992 EPA App. LEXIS 73*72 (EAB, August 5, 1992). The interests of justice are served by amendments which present the real, or all of the issues, in a case and prejudice within the meaning of the foregoing rule requires a showing that respondent will be seriously disadvantaged [in the presentation of its case]. Port of Oakland, supra. See also San Antonio Shoe, Inc., EPCRA Docket No. VI-501-S, Order Granting Motion to Amend Complaint, etc., 1992 EPA ALJ LEXIS 525 (ALJ, April 2, 1992).

Applying these principles, motions to amend complaints have generally been denied only where the proposed amendment, made on the eve of trial, would greatly expand the scope of the hearing or alter the nature of the defenses or where the proposed amendment would be futile. See, e.g., Everwood Treatment Company, Inc. and Cary W. Thigpen, RCRA (3008) Docket No. RCRA-IV-92-R, Order Denying Motion to Amend Complaint, 1993 EPA ALJ LEXIS 273 (ALJ, July 28, 1993) (proposed amendment denied as too near scheduled trial date). See also AZS Corporation, Docket No. TSCA-90-H-23, Order Denying in Part Motion to Amend Complaint, 1993 EPA ALJ LEXIS 147 (ALJ, March 18, 1993) and Hardin County, RCRA (3008) Appeal No. 93-1, Final Decision and Order, 5 E.A.D. 189, 1994 EPA App. LEXIS 19) (EAB, April 12, 1994) (proposed amendment denied as futile).

Motions to amend a complaint made in bad faith, that is, motions designed to punish, harass or to gain an unfair advantage are also subject to denial. See, e.g., Nassau County Department of Public Works, et. al, Docket No. MPRSA-II-92-02, Order Granting Motion to Amend Complaint, 1992 EPA ALJ LEXIS 386 (ALJ, September 11, 1992) and cases cited. In Nassau County, the claim of bad faith was based primarily on the fact that the motion to amend increasing the penalty by 100% was not filed until after respondents rejected complainant's offer to settle for the penalty sought in the initial complaint. This circumstance warranted scrutiny and required an explanation, but was not, without more, sufficient to warrant denial of the motion.

Here, without being explicit, the City's opposition to the motion appears to be based upon the bad faith exception to the rule that complaints and other pleadings may normally be easily amended. The additional violations alleged in the proposed amended complaint are based upon sludge reports submitted by the City in 1995 and 1996 and Complainant has not, and indeed cannot, claim that these violations are based upon newly discovered evidence. This coupled with fact that Complainant has apparently not extended to the City any offer of settlement in accordance with the Interim Clean Water Act Settlement Policy, notwithstanding the City's apparent eligibility as a minimum for the "quick settlement adjustment factor," provides some support for the City's apparent contention that the motion to amend should be

denied as intended to intimidate or punish. Implicit in this contention, however, is the notion that settlement of the violations initially alleged would have included the additional violations alleged in the amended complaint. While it may well be that, if the initial complaint had been settled, Complainant would not have initiated a separate action for the additional violations alleged in the amended complaint, there would appear to be nothing to preclude Complainant from doing so as it is at least doubtful whether the rule against splitting causes of action applies to proceedings for the enforcement of environmental statutes. AZS Corporation, supra. The additional expense and inconvenience incurred by the City in defending the additional allegations in the amended complaint would seemingly be compounded by the necessity of defending the same alleged violations in a separate action. Moreover, Complainant's position is that documents engendered in calculating proposed penalties under the Settlement Policy are solely for settlement purposes, and thus, not subject to discovery. This position will not be accepted where it appears that Complainant is "playing fast and loose" with the penalty claimed or withholding information necessary for Respondent to prepare a defense. See, Stanchem, Inc., Docket No. CWA-2-I-95-1040, Order on Motions to Compel and for Discovery, 1998 EPA ALJ LEXIS 11 (ALJ, February 13, 1998). Nevertheless, absent exceptional circumstances, not shown here, Complainant's failure to comply with the Settlement Policy is not a defense available to the City.

For the foregoing reasons, Complainant's motion to amend the complaint will be granted. Complainant will, however, be directed to explain in detail the basis for the initial and revised penalties.

Order

Complainant's motion to amend the complaint is granted. The City shall file an answer to the amended complaint within 20 days after service of this order. Initial or amended prehearing exchanges will be filed within 20 days after the filing of the City's answer to the amended complaint. Complainant's amended prehearing exchange will include a detailed explanation of the calculation of the initial and revised penalties with particular reference, if such is the case, to how the penalty calculation relates to molybdenum concentrations in the sludge prohibited from land disposal.

Dated this 24th day of August 1999.

Original signed by undersigned

_____

Spencer T. Nissen
Administrative Law Judge

1. Notes on the Proposed Penalty, dated September 1998, attached to the complaint, reflect that approximately 136 dry metric tons of sludge were applied over 865 acres during eight months in 1997, that molybdenum concentrations in this sludge

exceeded ceiling concentrations by 3% to 29%, and that the proposed penalty for these factors is $59,000. To this figure $1,000 was added for the degree of culpability to arrive at the proposed penalty of $60,000.

2. Settlement Policy § IV.C. at 13. In the case of Class I penalties, a "quick settlement" is when the violator signs a consent order resolving the violations within four months from the date of the complaint or four months from the date a written offer of settlement is made, which ever date is earlier. The corresponding periods for Class II penalties are six months and 12 months, respectively.