UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**	
	)	
SUPERIOR ALUMINUM ALLOYS, LLC,	**)**	**Docket No. CAA-05-2004-0004**
	)	
Respondent.	**)**	

ORDER GRANTING MOTION TO AMEND COMPLAINT

On May 19, 2004, Complainant submitted a Motion to Amend Complaint (Motion), seeking to reduce the proposed penalty amount from $120,535 to $119,779. Complainant explains that in the original Complaint, it inadvertently increased the entire penalty for the penalty determination factor "history of noncompliance" rather than just increasing the gravity component of the penalty for that factor, as directed in the Clean Air Act Penalty Policy (Penalty Policy). The amendment would reduce the proposed penalty by $756. Enclosed with the Motion is an Amended Penalty Calculation Worksheet and an "Amended Administrative Complaint," with the penalty calculation replaced as Complainant requests in the Motion. Complainant points out that this proceeding has not yet been scheduled for hearing, and asserts that Respondent will not suffer any prejudice by the granting of the Motion.

Respondent submitted an Opposition to the Motion on May 27, 2004. Respondent argues that Complainant's Motion fails to disclose that the penalty in the proposed Amended Complaint actually exceeds, by over $10,000, Complainant's most recently proposed penalty stated in its Initial Prehearing Exchange. Respondent points out that the penalty calculation worksheet submitted as Exhibit 15 to its Prehearing Exchange proposes a penalty of $109,769 and refers to an alleged violation of approximately one month's duration, commencing on August 7, 2003. Further, Paragraph 2.E. of Complainant's Prehearing Exchange states, "Although U.S. EPA believes that both the [March 8, 2003] stack test and [U.S. EPA's later phone call to Superior's counsel] constitute notice of the violation, U.S. EPA has adjusted the duration of the violation to begin from the date of the August 7, 2003 Finding of Violation . . . Thus the total proposed penalty that U.S. EPA will seek at hearing is $109,769." Respondent asserts that it relied on this figure in drafting its Prehearing Exchange, and that the figure proposed in the Amended Complaint represents more than six times the duration of violation stated in Complainant's Prehearing Exchange. Respondent argues that, contrary to EPA's representation in its Motion, the increase of this magnitude is a material alteration to the substance of the allegations against Respondent.

Complainant submitted a Reply to the Opposition on June 3, 2004. Therein, Complainant asserts that the duration of violation is the same in the Amended Complaint as in the original Complaint, commencing on March 18, 2003. Complainant states that it reduced the

proposed penalty in the Prehearing Exchange based on Respondent's argument that Section 113(e)(2) of the Clear Air Act requires notice prior to penalty assessment, but that when Complainant later researched the subject, it found that case law and the Penalty Policy do not prevent EPA from seeking penalties from the first date of violation where it precedes notice to the respondent. Complainant states that it corrected its mistake in its Rebuttal Prehearing Exchange, filed on May 19, 2004, and submitted an Amended Penalty Calculation Worksheet as Exhibit 32, showing the proposed penalty as $119,779. Complainant further asserts that Respondent will not suffer undue prejudice, because it was aware of the facts supporting EPA's original calculation of the duration of the violation. Among other reasons, Complainant also argues that the original Complaint contains the proposed penalty of record until the Complaint is amended, that its Prehearing Exchange statement in Paragraph 2.E. indicated it would continue to argue that the alleged violation commenced on March 18, 2003, that the amendment does not require additional proof by Respondent, and that Respondent can move to supplement its Prehearing Exchange in response to Complainant's Rebuttal Prehearing Exchange.

The Consolidated Rules of Practice (Rules) provide at 40 C.F.R. § 22.14(d) that after the answer is filed, the Complainant may amend the complaint only upon motion granted by the Presiding Judge. No standard is provided in the Rules for determining whether to grant an amendment. The general rule, however, is that administrative pleadings are "liberally construed and easily amended." *In re Port of Oakland and Great Lakes Dredge and Dock Company*, 4 E.A.D. 170, 205, 1992 EPA App. LEXIS 73, *72 (EAB1992); *see also, Lazarus, Inc.*,7 E.A.D. 318, 334, 1997 EPA App. LEXIS 27, *38 (EAB 1997). The standard in Federal court for amendment of pleadings is set forth in *Foman v. Davis*, 371 U.S. 178, 181-82 (1962) as follows: "[i]n the absence of . . . undue delay, bad faith or dilatory motive on the part of the movant . . . undue prejudice to the opposing party . . . [or] futility of amendment," leave to amend pleadings should be allowed.

This matter has not yet been scheduled for hearing. No undue delay, bad faith or dilatory motive is evident on the part of Complainant in regard to the Motion, and the amendment is not futile.

As to prejudice, Respondent has not pointed to any specific prejudice resulting from any reliance on the proposed penalty figure of $109,769. Its Prehearing Exchange includes arguments that are relevant to both proposed penalty figures. Any evidence, testimony and/or argument as to the six month duration of the alleged violation may be submitted as a supplement to its Prehearing Exchange. The reduction in Complainant's Prehearing Exchange – and subsequent reinstatement in the Rebuttal Prehearing Exchange -- of five months duration of the alleged violation does not materially alter the facts alleged in the Complaint. Neither the original Complaint nor the Amended Complaint includes any allegation specifying the duration of the violation. It is the Penalty Calculation Worksheets and statements in Complainant's Initial and Rebuttal Prehearing Exchanges which specify the duration of violation. The proposed amendment merely changes the proposed penalty figure on the basis of a calculation error.

Accordingly, the Motion to Amend the Complaint is **GRANTED**. **Complainant shall file and serve the Amended Complaint within seven (7) days of the date of this Order**.

The Rules provide at 40 C.F.R. § 22.14(d) that a respondent shall have twenty (20) days from the date the amended complaint is served to file its answer. The amendment is not likely to affect Respondent's responses to the allegations. In the event that Respondent elects to file an Answer to the Amended Complaint, Respondent is bound by the requirement of 40 C.F.R. § 22.14(d) that it must be filed within twenty days of the date the Amended Complaint is served. If Respondent does not choose to do so, the Answer already filed by Respondent will be deemed as the Answer to the Amended Complaint.

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Susan L. Biro
Chief Administrative Law Judge

Date: June 14, 2004
Washington, D.C.