UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
SPRING GROVE RESOURCE RECOVERY, INC.	)	Docket No. TSCA-V-C-081-94
	)	
Respondent,	)	

ORDER

For the reasons stated in a motion served May 10, 1995[1], complainant seeks to amend its complaint. Respondent served a response in opposition to the motion on June 19. Complainant served a motion on June 28 for leave to reply to the response. The undersigned Administrative Law Judge (ALJ) granted this motion by order of June 30, and complainant replied on July 17.

Without attempting to be exhaustive, and sparing the reader, some brief introductory observations are appropriate here. The pertinent sections of the Consolidated Rules of Practice (Rules), 40 C.F.R. § 22.14(d), provide that after respondent has filed its answer, complainant may amend the complaint upon motion granted by the ALJ.

Administrative agencies are not bound by the standards of the Federal Rules of Civil Procedure (Fed. R. Civ. P.), and they traditionally enjoy "wide latitude" in fashioning their own rules

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[1] Unless otherwise shown, all dates hereinafter are for the year 1995.

of procedure.[2] Although administrative agencies generally are unrestricted by the technical or formal rules of procedure which govern trials before a court, rules such as the Fed. R. Civ P. often guide decision making in the administrative context. Leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). "Courts have a strong liberality . . . in allowing amendments under Rules 15(a)." 3 Moore's Federal Practice ¶ 15.08(2) at 15-59 (2d ed. 1980), in order to encourage the disposition of cases on their merits. The parties should avoid becoming tangled in technicalities. "The purpose of pleading is to facilitate a proper decision on the merits." See Conley v. Gibson, 355 U.S. 41 (1957); Hildebrand v. Honeywell, Inc., 622 F.2d 179, 181 (5th Cir. 1980).

In Foman v. Davis, 371 U.S. 178, 182 (1962), the Supreme Court set forth some criteria. It stated that leave should be given freely in the absence of "undue delay, bad faith, or a dilatory motive on the part of the movant, . . . undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of the amendment . . . ."

Respondent has put forth several reasons why complainant's motion should be denied. The first of these is that the motion is procedurally deficient for the reason the proposed amended complaint was not submitted to the forum with the motion but merely

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[2] See, e.g., In the Matter of Katzson Brothers, Inc. FIFRA Appeal No. 85-2 (Final Decision November 13, 1985); Oak Tree Farm Dairy, Inc. v. Block, 544 F. Supp. 1351, 1356 n.3 (E.D. N.Y. 1982); and Silverman v. Commodities Futures Trading Commission, 549 F.2d 28, 33 (7th Cir. 1977).

a summary concerning the basis of the amendment. In support of its position, respondent cites Grombach v. Oerlikon Tool and Arms Corp. of America, 276 F.2d 155 (4th Cir. 1960). Respondent's objection is frail, indeed. The ALJ concurs in complainant's assessment that the case is clearly distinguishable from the instant matter. A reading of Grombach shows that it is inapposite. The pertinent language being:

> Appellant's counsel complain that the court improperly refused to grant plaintiff's request for leave to amend his complaint, made orally near the end of the trial. No actual amendment was tendered, and no amendment to his pleadings could have saved the day for appellant nor bettered his position. (Emphasis supplied.)

Id. at 165.

In the subject matter the motion to amend is in writing and was made in the incipient stages of the proceeding. For example, the prehearing exchanges have not even taken place. Even where a long delay has occurred, under Fed. R. Civ. P. 15(a), federal courts have permitted amendments where no prejudice to the opposing party or bad faith on the part of the movant is shown and such amendments are in the interest of justice. "Undue prejudice is the touchstone for the denial of leave to amend." Heyl & Patterson Intern v. F.D. Rich Housing, 663 F.2d 419, 425 (3rd Cir. 1981); Farkas v. Texas Instruments,Inc., 429 F.2d 849, 851 (1st Cir. 1970). An examination of respondent's opposition to the motion fails to disclose a claim, or evidence, of undue prejudice. In one regard, the opposite seems to be the case. For example, the

original complaint seeks a penalty of $25,000, while the amended complaint reduces it to $13,000. (Mot. at 3.)

Respondent's core contention, however, is that complainant, in its amended complaint, alleges a distribution in commerce violation in lieu of the original disposal transgression. It is argued that there was no distribution in commerce because there was no sale of the 17 drums of PCB waste. Respondent urges that it did not sell, but merely transported the waste from respondent, a wholly owned subsidiary of Southddown Environmental Treatment Services, Inc. in Ohio, to another wholly owned subsidiary, Allworth Resource Recovery, Inc., in Tennessee; that such delivery was for purposes other than a sale; and that complainant cannot allege a sale because none existed. Additionally, respondent cites preamble language to a then regulation proposed under the Toxic Substances Control Act (Act) to support its position that distribution in commerce must involve the sale of a PCB. (Opp'n at 1, 5.) A reading of the pertinent statute and regulation do not support this argument.

We begin with the Act. The significant sections are those addressing the definitions. Section 3(3), 15 U.S.C. §2602(3), states:

> (3) The term "commerce" means trade, traffic, transportation or other commerce (A) between a place in a State and any place outside such State, or (B) which affects trade, traffic, transportation, or commerce as described in clause A. (Emphasis supplied.)

This is essentially the definition contained in the Act's regulations. 40 C.F.R. § 761.3.

Section 3(4), 15 U.S.C. § 2602(4), is better comprehended if set forth in its three clauses. The first clause is as follows:

> (4) The terms "distribute in commerce" and "distribution in commerce" when used to describe an action taken with respect to a chemical substance or mixture or article containing a substance or mixture mean to sell, or the sale of, the substance, mixture or article in commerce;

The second clause reads:

> to introduce or deliver for introduction into commerce, or the introduction into commerce of, the substance, mixture, or article;

The third clause states:

> or to hold, or the holding of, the substance, mixture, or article after its introduction into commerce.

Again, the definition of "distribute in commerce" and "distribution in commerce" in the regulations, 40 C.F.R. § 761.3, is fundamentally the same as that in the Act.

Respondent's contention that a sale is necessary is tenable if the statute consisted only of its first clause. However, respondent, in its argument, ignores completely the second clause. Under its language and the definition of commerce, a sale is unnecessary. All that is required is that the PCB waste be shipped between a place within a state to a location outside the state.

Reference by respondent to the Act's proposed regulation, 43 Fed. Reg. 24802, 24807 (June 7, 1978), is also misplaced. The only fair and reasonable interpretation that can be attributed to the preamble language is that it is confined to those situations which arise under the first clause of section 3(4) where a sale is

involved in the distribution chain. Also, to acquiesce in respondent's thinking would be to defy that firmly etched principle that the regulations are designed to supplement, not supplant, legislation.

Respondent's closing assertion is that the imposition of a proposed penalty of $13,000 does not further the goals of the Act. (Resp. at 6-7.) This is utterly unpersuasive. The Act is one of strict liability; it is not necessary that respondent's conduct be done in a willful or knowing manner. Also, on the facts, as known, complainant is correct in noting that neither the factors of lack of sufficient knowledge nor absence of control are present in this matter in order to reduce the penalty. (Reply at 9, n.7.)

IT IS ORDERED that:

1. Complainant's motion to amend its complaint be **GRANTED**.

2. The amended complaint shall be served within **15** days of the service date of this order.

Frank W. Vanderheyden
Administrative Law Judge

Dated: September 8, 1995

IN THE MATTER OF SPRING GROVE RESOURCE RECOVERY, INC., Respondent,
Docket No. TSCA-V-C-081-94

Certificate of Service

I certify that the foregoing Order, dated 9/8/95, was sent this day in the following manner to the below addressees.

Original by Regular Mail to:

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Dated: Sept. 8, 1995