

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

2015 FEB 11 PM 12:43

In the Matter of:)
)
Edward and Theresa Washines,) Docket No. RCRA-10-2014-0100
Da Stor at Lillie's Corner,)
)
Respondents.)

**ORDER GRANTING COMPLAINANT'S UNOPPOSED SUPPLEMENTAL MOTION
FOR LEAVE TO AMEND THE COMPLAINT**

On April 30, 2014, the United States Environmental Protection Agency ("Agency"), Region 10 ("Complainant"), initiated this proceeding by filing a Complaint, Compliance Order, and Notice of Opportunity for Hearing ("Complaint") against Edward and Theresa Washines and Da Stor at Lillie's Corner ("Respondents"). The Complaint alleges that Respondents committed three violations of the regulations set forth at 40 C.F.R. part 280, which govern owners and operators of underground storage tanks ("USTs"). The Complaint divides the three alleged violations into nine counts, with Violation 1 consisting of Counts 1 through 4, Violation 2 consisting of Counts 5 and 6, and Violation 3 consisting of Counts 7 through 9. On July 2, 2014, Respondents, through counsel, filed an Answer and Request for Hearing ("Answer").

On December 2, 2014, Complainant filed an unopposed Motion for Leave to Amend the Complaint ("Original Motion"), to which Complainant attached a signed Proposed Amended Complaint, Compliance Order, and Notice of Opportunity for Hearing ("Original Proposed Amended Complaint"). By Order dated December 19, 2014, I granted the Original Motion but identified some inconsistencies between the changes proposed in it and those reflected in the Original Proposed Amended Complaint. I then directed Complainant to file a copy of the Amended Complaint, Compliance Order, and Notice of Opportunity for Hearing in accordance with the applicable provisions of 40 C.F.R. § 22.5 as soon as practicable.

As of February 3, 2015, Complainant had not yet amended the Complaint. On that date, however, Complainant filed an unopposed Supplemental Motion for Leave to Amend the Complaint ("Supplemental Motion"), to which Complainant attached a signed Proposed

Amended Complaint, Compliance Order, and Notice of Opportunity for Hearing (“Supplemental Proposed Amended Complaint”) and a redline-strikeout version of the Supplemental Proposed Amended Complaint. Complainant explains that the Supplemental Motion “seeks approval to amend the Complaint to address issues that were raised but not sufficiently described in the Original Motion, and identifies all changes proposed to be made to the Complaint pursuant to this Supplemental Motion.” Complainant further explains that the Supplemental Proposed Amended Complaint “incorporates both the amendments already authorized by the Order [of December 19] and those that are sought in this Supplemental Motion.”¹

Specifically, with respect to Violation 1, Complainant seeks to amend those portions of the Complaint that list the alleged periods of noncompliance in order to allege 47 additional days of violation occurring after the Complaint was filed. However, because “the additional 47 days were insufficient to affect the ‘Days of Noncompliance Multiplier’ in Complainant’s application of the November 1990 U.S. EPA Penalty Guidance for Violations of UST Requirements (‘UST Penalty Guidance’),” Complainant is not seeking to modify the proposed penalty for Violation 1. The proposed changes to Violation 1 are found in Paragraphs 3.16 – 3.18 and 4.4 of the Supplemental Proposed Amended Complaint.

With respect to Violation 2, Complainant seeks leave “to adjust how the \$3,931 economic benefit originally calculated for delayed costs [is] allocated between Count 5 and Count 6 . . . by increasing Count 5 and reducing Count 6 by \$1,965, with no effect on the aggregate penalty amount of proposed for Violation 2.” The purpose of this amendment, Complainant explains, is “to conform [the proposed penalty] to the UST Penalty Guidance,” and it is reflected in Paragraph 4.4 of the Supplemental Proposed Amended Complaint.

With respect to Violation 3, Complainant seeks leave to amend those portions of the Complaint that list the alleged periods of noncompliance in order to allege 215 additional days of violation occurring up to the filing date of the Original Motion. According to Complainant, “[t]he additional 215 days of alleged violation for Violation 3 increased the ‘Days of Noncompliance Multiplier’ used in the UST Penalty Guidelines for Violation 3, and as a result, Complainant seeks approval to increase its proposed penalty for Violation 3 by \$1,526.” Complainant also seeks leave to increase the proposed penalty for Violation 3 by an additional \$6,205, for a total increase of \$7,731, in order to “correct an error in the original calculation for capturing the economic benefit from the alleged noncompliance.” Consequently, the Complainant seeks to amend the total proposed penalty assessed in this proceeding from \$57,092

¹ For the sake of simplicity, I will treat each of the amendments sought by Complainant as first having been proposed in the Supplemental Motion, even if I already authorized the given amendment in the Order of December 19.

to \$64,823. These proposed changes are reflected in Paragraphs 3.28, 3.29, and 4.4 of the Supplemental Proposed Amended Complaint.

Complainant also seeks leave to modify the text of the Complaint in a number of other ways identified on pages 5 and 6 of the Supplemental Motion, such as changing references to the "Complaint" to references to the "Amended Complaint." Finally, Complainant explains that it "does not intend to submit an amendment to the Complaint to incorporate additional relief under the Compliance Order section."

Complainant states that Respondents' counsel was contacted in advance of filing the Supplemental Motion and that he does not oppose the relief sought, although he reserves the right to amend Respondents' Answer.

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") set forth at 40 C.F.R. part 22. The Rules provide, in pertinent part, 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 provide a standard for adjudicating such a motion, however. In the absence of administrative rules on a subject, this Tribunal may consult the Federal Rules of Civil Procedure ("FRCP") for guidance in analogous situations. *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).

FRCP Rule 15 provides that "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). The United States Supreme Court has interpreted this provision liberally, stating that "[i]n the absence of any apparent or declared reason . . . the leave sought should, as the [FRCP] require[s], be freely given." *Forman v. Davis*, 371 U.S. 178, 182 (1962) (internal quotation marks omitted). Reasons for denying such leave include "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," or similar deficiencies. *Id.*

Nothing in the record of this proceeding suggests that Complainant seeks leave to amend the Complaint for any of the above-described reasons. Moreover, Respondents do not object to the relief sought. Accordingly, the Supplemental Motion is hereby **GRANTED**. Complainant shall file and serve a final copy of the Amended Complaint, Compliance Order, and Notice of Opportunity for Hearing in accordance with the applicable provisions of 40 C.F.R. § 22.5 **on or before February 17, 2015**. Pursuant to the Rules, Respondents shall have 20 days from the date of service of the Amended Complaint, Compliance Order, and Notice of Opportunity for Hearing to file an answer. 40 C.F.R. § 22.14(c).

SO ORDERED.

Christine D. Coughlin

Christine D. Coughlin
Administrative Law Judge

Dated: February 11, 2015
Washington, D.C.

In the Matter of *Edward and Theresa Washines, Da Stor at Lillie's Corner*, Respondent.
Docket No. RCRA-10-2014-0100

CERTIFICATE OF SERVICE

I hereby certify that true copies of this Order Granting Complainant's Unopposed Supplemental Motion for Leave to Amend the Complaint, issued by Christine D. Coughlin, Administrative Law Judge, were sent to the following parties on this 11th day of February 2015, in the manner indicated:



Mary Angeles
Legal Assistant

Original and One Copy by Hand Delivery to:

Sybil Anderson
Headquarters Hearing Clerk
U.S. EPA / Office of Administrative Law Judges
Mail Code 1900R
1200 Pennsylvania Ave., NW
Washington, DC 20460

Copy by Electronic and Regular Mail to:

Chris Bellovary, Esq.
Assistant Regional Counsel
U.S. EPA, Region X
1200 South Avenue, Suite 900
Seattle, WA 981-1-3140
Email: bellovary.chris@epa.gov

Thomas Zeilman, Esq.
402 E. Yakima Ave., Ste. 710
P.O. Box 34
Yakima, WA 98907
Email: tzeilman@qwestoffice.net

Dated: February 11, 2015
Washington, DC