UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
E. I. du Pont de Nemours	)	**DOCKET NOS. TSCA-HQ-2004-0016**
and Company,	)	**RCRA-HQ-2004-0016**
	)	
	)	
RESPONDENT	)	

ORDER DENYING DUPONT'S MOTION TO DEFER ORE'S MOTION FOR LEAVE TO AMEND PENDING RESOLUTION OF CROSS-MOTIONS ON COUNT III; ORDER GRANTING MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

This order rules upon a motion by Complainant, the United States Environmental Protection Agency ("EPA"), Office of Regulatory Enforcement's ("ORE") Motion for Leave to File First Amended Complaint ("Motion to Amend"), and Respondent E.I. du Pont de Nemours and Company's ("DuPont") Motion to Defer ORE's Motion for Leave to Amend Pending Resolution of Cross-Motions on Count III ("Motion to Defer").

ORE's Motion to Amend would conform the complaint to ORE's new legal theory on Count III and correct a technical error regarding the name of the chemical at issue in this matter. DuPont proposes that I defer ruling on the Motion to Amend until I have ruled on the parties' cross-motions for accelerated decision on Count III. DuPont contends, *inter alia*, that amending the complaint to adopt the new theory on Count III would be moot and should be denied on grounds of futility. DuPont has not stated any opposition to the proposed correction of the chemical name.

For the reasons stated herein, I DENY DuPont's Motion to Defer and GRANT ORE's Motion to Amend the complaint.

Procedural Background

ORE commenced this matter on July 8, 2004, with the filing of the Complaint and Notice of Opportunity for Hearing ("Complaint"). DuPont filed its Answer and Request for Hearing ("Answer") on August 11, 2004.

In the Complaint, ORE alleged, in Counts I and II, that DuPont violated Section 8(e) of the Toxic Substances Control Act ("TSCA"), which provides that:

> Any person who manufactures, processes, or distributes in commerce a chemical substance or mixture and who obtains information which reasonably supports the conclusion that such substance or mixture presents a substantial risk of injury to health or the environment shall immediately inform the [EPA] Administrator of such information unless such person has actual knowledge that the [EPA] Administrator has been adequately informed of such information.

15 U.S.C. § 2607(e). Count I concerns blood sampling information regarding transplacental movement of PFOA in humans, and Count II concerns information regarding public water supply contamination.

In Count III of the Complaint, ORE alleged that DuPont violated its Resource Conservation and Recovery Act ("RCRA") permit by failing to provide the blood sampling information concerning the transplacental movement of PFOA (also referred to as "C-8" in the Complaint) in humans. In the Complaint, ORE expressed its position that PFOA (or C-8) was a "hazardous constituent."

On September 8, 2004, DuPont filed its Motion for Accelerated Decision on Counts II and III, and requested oral argument on that motion. As to Count III, DuPont contended, *inter alia*, that the EPA had no authority under RCRA or under DuPont's permit to require DuPont to investigate releases of C-8, as it was not a listed or characteristic (identified) hazardous waste nor a hazardous constituent. I issued a Prehearing Order on September 16, 2004, which granted DuPont's request for oral argument on DuPont's Motion for Accelerated Decision and, originally, set an oral argument date of October 28, 2004.

On October 8, 2004, ORE filed a response to DuPont's Motion for Accelerated Decision and filed a cross-motion for accelerated decision on liability for Count III. In the latter response, ORE changed legal theories on Count III by alleging that PFOA (or C-8) is a hazardous waste within the broad definition of the term under Section 1004(5) of RCRA, 42 U.S.C. § 6903(5).

On October 13, 2004, ORE filed its Motion to Amend and the proposed amended complaint, First Amended Complaint and Notice of Opportunity for Hearing ("Amended Complaint"). The amendment would conform ORE's pleadings to add ORE's new theory on Count III and, as stated by ORE, would correct a technical error regarding the name of the chemical at issue in this matter. *See* Motion to Amend at 1-2. ORE states that the substitution of terms "will not change the nucleus of operative facts upon which the Complaint relies" and will not prejudice DuPont in any way. *Id.* at 1.

On October 14, 2004, the parties filed a Joint Motion to Extend Dates for Briefing Cross-Motions on Count III and to Modify Prehearing Order ("Joint Motion"). In the Joint Motion, the parties requested that I move back the date of the oral argument for the Motion for Accelerated

Decision on Count III, extend the due date for DuPont's combined reply on Count III and response to EPA's cross-motion on Count III, extend ORE's due date for filing the reply on ORE's cross-motion on Count III, and extend the dates for the parties' prehearing exchanges. In the Joint Motion, the parties recognized that ORE was advancing a different theory, relating to Count III, as to the definition of hazardous waste, and that DuPont would need additional time, up to and including November 8, 2004 to respond to ORE's cross-motion on Count III. Joint Motion at 2.

In an order dated October 15, 2004, I granted the Joint Motion and rescheduled the date of the oral argument on Counts II and III to December 16, 2004. Further, I provided DuPont (and correspondingly ORE) with more time than requested in the Joint Motion, by providing DuPont until November 15, 2004 to file its combined response on Count III.

On October 26, 2004, DuPont filed its Motion to Defer. DuPont sought to defer further proceedings on the Motion to Amend until after I have ruled on DuPont's motion for accelerated decision as to Count III. Motion to Defer at 8-9. DuPont contends that EPA's amendment adopting the new theory on Count III would be moot, and if not withdrawn, should be denied on grounds of futility. *Id.* at 6-8. In doing so, DuPont announced its intention to contest both EPA's new and old theories on Count III in its combined brief on that Count, due November 15, 2004. *Id.* at 4. DuPont submitted that it made little sense to require the parties to complete briefing on ORE'S Motion to Amend or for the undersigned to decide the Motion to Amend where one of the two proposed amendments may be rendered moot by the granting of DuPont's motion for accelerated decision. *Id.* at 7.

I granted DuPont's unopposed motion for a one-week extension of time to file a response to ORE's Motion to Amend. DuPont's Response in Opposition to Complainant's Motion for Leave to Amend Complaint ("Opposition to Motion to Amend") incorporates by reference many of the arguments DuPont made in its earlier Motion to Defer. Opposition to Motion to Amend at 3 (Nov. 8, 2004). However, DuPont clarifies that it does not intend to oppose ORE's amendment as it relates to Count I, but only opposes ORE's request at this time to allege that PFOA is a hazardous waste as defined under Section 1004(5) of RCRA. *Id.* at 1. Further, DuPont contends that further proceedings on amending Count III "are premature until the parties' dispositive cross-motions on Count III are decided." *Id.* at 1-2. On November 10, 2004, ORE filed its opposition to DuPont's Motion to Defer ("Opposition to Motion to Defer"). ORE's reply to DuPont's Opposition to Motion to Amend was filed November 18, 2004. ORE asserts that amendment of the Complaint is not futile, but instead is a valid request to conform the pleadings in this matter to the issues that will be considered at oral argument.

Discussion

Pursuant to the Consolidated Rules of Practice ("Rules of Practice"), at 40 C.F.R. part 22, if a motion to amend the complaint is filed after an answer has been filed, the complainant can only amend the complaint upon a motion granted by the Administrative Law Judge ("ALJ"). 40 C.F.R. § 22.14(c). As the Rules of Practice do not illuminate the circumstances when

amendment of the complaint is appropriate, I am guided by the Federal Rules of Civil Procedure ("FRCP"), specifically FRCP 15(a), and by the federal caselaw, including *Foman v. Davis*, 371 U.S. 178 (1962), which is the landmark federal court case on amending complaints. *In re Carroll Oil Co.*, RCRA (9006) Appeal No. 01-02, 10 E.A.D. 635, 649 (EAB, July 31, 2002). Whether to grant or deny a motion for leave to amend is within the discretion of the adjudicator. *Foman*, 371 U.S. at 182; *accord Carroll Oil*, 10 E.A.D. at 649. Under the liberal pleading policy of the federal courts and of this tribunal, leave to amend should be "freely given," in 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 amendments, or futility of amendments. *Id.* (quoting FRCP 15(a)); *accord Carroll Oil*, 10 E.A.D. at 649-50; *see also Yaffe Iron and Metal Co. v. U.S. EPA*, 774 F.2d 1008, 1012 (10th Cir. 1985) (administrative pleadings should be "liberally construed" and "easily amended"). In deciding on a motion for leave to amend, often the most significant factor to consider is whether the amendment would unduly prejudice the opposing party. *Carroll Oil*, 10 E.A.D. at 650 (citing cases); *In re Asbestos Specialists, Inc.*, TSCA Appeal No. 92-3, 4 E.A.D. 819, 828 (EAB, Oct. 6, 1993); *In re Port of Oakland and Great Lakes Dredge and Dock Co.*, MPRSA Appeal No. 92-1, 4 E.A.D. 170, 205 (EAB, Aug. 5, 1992).

DuPont urges that I should defer ruling on the Motion to Amend in the interests of judicial economy, as one of the two proposed amendments may be rendered moot by the granting of DuPont's motion for accelerated decision on Count III and that the motion to amend will not be ripe for decision until the filing of ORE's reply brief as to Count III. DuPont has also submitted that it makes little sense to require the parties to complete briefing of ORE's motion for leave to amend or for the undersigned to decide the motion where one of the two proposed amendments may be rendered moot by the granting of DuPont's motion for accelerated decision. The other portion of the motion for leave to amend concerns changing the legal theory on Count III, which is set for oral argument on the cross-motions for accelerated decision on December 16, 2004. I agree with ORE that the Motion to Defer is not conserving the resources of the parties or of this tribunal. Opposition to Motion to Defer at 2. The motion to defer has necessitated consideration of the Motion to Defer and ORE's response thereto *in addition* to the motion for leave to amend and DuPont's response to the latter motion. Furthermore, DuPont's futility argument, which suggests that ORE will ultimately fail under its new theory on Count III, is intertwined with the parties' cross-motions for accelerated decision, and thus repeats the arguments made regarding accelerated decision. *See* Motion to Defer at 2-6.

As I do not intend to rule on the cross-motions for accelerated decision until after I have listened to the parties' oral arguments, deferring ruling on leave to amend would introduce an unacceptable level of delay. *See* 40 C.F.R. § 22.4(c)(10) (ALJ may do all acts and take all measures necessary for the efficient, fair, and impartial adjudication of issues). Moreover, I find that having a clear concept of where the pleadings stand before oral argument will be beneficial,

and an expedient ruling on this motion will promote clarity.[1] "It is particularly important that a court allow amendments for the purpose of ensuring that all issues are before it." Motion to Amend at 3 (quoting *In re Microban Prods. Co.*, Docket No. FIFRA 98-H-01, 1998 EPA ALJ LEXIS 9, at *13 (ALJ, Apr. 3, 1998) (citing MOORE'S FED. PRAC. 3d, § 15.14)). Accordingly, I DENY DuPont's Motion to Defer.

Considering ORE's Motion to Amend, DuPont has not stated any opposition to the proposed change in the name of the chemical at issue in this matter. Rather, DuPont argues that the portion of the amendment which conforms the complaint to add ORE's new theory on Count III will be moot if I rule in favor of DuPont on Count III. Opposition to Motion to Amend at 1-3. I observe that DuPont does not contend that it will incur any prejudice due to the amendment, although undue prejudice is often the most significant factor in making a determination on a motion for leave to amend. *See Carroll Oil*, 10 E.A.D. at 650 (citing cases); *Asbestos Specialists*, 4 E.A.D. at 828; *Port of Oakland*, 4 E.A.D. at 205.

DuPont's contention about mootness and futility equates to a substantive argument that DuPont's motion for accelerated decision on Count III will be successful despite ORE's new theory on Count III and, thus, amending the complaint to incorporate ORE's new theory on Count III is pointless. Therefore, DuPont's opposition to ORE's amendment is intertwined with DuPont's attempts to obtain accelerated decision on Count III. DuPont does not appear to gain any greater benefit from denying the Motion to Amend than it would achieve if it were successful on its motion for acceleration decision.

Consistent with the liberal pleading policy, I GRANT ORE's Motion to Amend and treat the Amended Complaint as being filed. There is no undue prejudice to DuPont, as I will be ruling on accelerated decision as to Count III in the future. Furthermore, DuPont has not stated any opposition to the proposed amendment to the name of the chemical at issue in this matter. Considering that leave to amend should be "freely given," I believe expediency warrants ruling now on the Motion to Amend.

Pursuant to the Rules of Practice, DuPont may file an amended answer, if it so chooses, within twenty (20) days from the date this order is served.[2] 40 C.F.R. § 22.14(c). I observe that

---

[1] As noted by DuPont, Motion to Defer at 8 n.4, in the case of *In re Tri-State Mint, Inc.* an ALJ deferred ruling on a motion for leave to amend the complaint. Docket Nos. EPCRA-VIII-89-05, CEPC-VIII-89-01, 1992 EPA ALJ LEXIS 527, at *5 (ALJ, July 22, 1992), *rev'd and remanded*, EPCRA Appeal No. 92-3, CERCLA Appeal No. 92-1, 5 E.A.D. 229 (EAB, Apr. 21, 1994). However, the motion for leave to amend in *Tri-State* came upon the eve of the hearing. *Id.* In contrast, we are in the early stages of the instant case, with any potential hearing being in the distant future.

[2] ORE served DuPont with the Motion to Amend and the proposed Amended Complaint (continued...)

the due date for an amended answer is prior to the December 16, 2004 oral argument. Ruling on the Motion to Defer and granting the Motion Amend at this time ensures that the parties' most up-to-date pleadings are before this tribunal before oral argument commences on the motions for accelerated decision. *See* 40 C.F.R. § 22.4(c)(10) (ALJ may do all acts and take all measures necessary for the efficient, fair, and impartial adjudication of issues); *see also Microban*, 1998 EPA ALJ LEXIS 9, at *13. This ruling on the Motion to Amend does not decide the substantive issues, nor does it intimate any inclination towards either of the parties' arguments regarding accelerated decision.

So ordered.

Barbara A. Gunning
Administrative Law Judge

Dated: November 19, 2004
Washington, D.C.

[2](...continued)
on October 13, 2004.