



UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF )  
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 )  
HARPOON PARTNERSHIP, ) Docket No. TSCA-05-2002-0004  
 )  
 )  
RESPONDENT )

ORDER GRANTING COMPLAINANT'S MOTION TO FILE  
THE SECOND AMENDED COMPLAINT

**Background**

This civil administrative penalty proceeding arises under the authority of Section 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a). This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-22.32.

On March 19, 2002, the United States Environmental Protection Agency, Region V (the "EPA" or "Complainant") filed a Complaint against Harpoon Partnership ("Respondent"), alleging violations of TSCA and its implementing regulations for the disclosure of lead-based paint and lead-based paint hazards found in 40 C.F.R. Part 745, Subpart F. Complainant seeks a civil penalty of \$56,980 for these alleged violations. On April 10, 2002, Complainant filed an Amended Complaint that included additional information regarding Respondent's ability to pay the proposed civil penalty. Respondent filed an Answer on May 2, 2002, denying many of the factual allegations made in the Complaint and raising several affirmative defenses.

After the parties engaged in a prehearing information exchange, Complainant filed a Motion to File the Second Amended Complaint ("Motion") on March 7, 2003. The Motion seeks to amend the Complaint in three areas: (1) correcting one of the addresses where Complainant alleges that Respondent failed to comply with

the requirements of 40 C.F.R. Part 745; (2) adding financial information regarding individual partners that comprise Harpoon Partnership and Respondent's inability to pay defense; and (3) providing greater specificity about Complainant's calculation of the proposed penalty. Complainant argues that it should be given leave to freely amend its Complaint in accordance with the liberal policy of Rule 15(a) of the Federal Rules of Civil Procedure ("FRCP"), and that amendment will not result in any prejudice to Respondent, is not the result of undue delay, bad faith, or dilatory motive, does not follow a repeated failure to cure deficiencies by previous amendment, and is not futile.

On March 24, 2003, Respondent filed its Response to Complainant's Motion to File Second Amended Complaint ("Response"). Respondent stated that it has no objection to Complainant correcting one of the addresses or providing greater specificity about Complainant's calculation of the proposed penalty, but it objects to the EPA adding financial information about individual partners that comprise Harpoon Partnership. Respondent contends that such information is futile since it has not pursued its defense of inability to pay, and states that it is formally withdrawing the inability to pay defense from the Answer.

#### **Standard for Adjudicating a Motion to Amend the Complaint**

Section 22.14(c) of the Rules of Practice allows the complainant to amend the complaint once as a matter of right at any time before the answer is filed, and otherwise "only upon motion granted by the Presiding Officer." 40 C.F.R. § 22.14(c). However, the Rules of Practice do not illuminate the circumstances when amendment of the complaint is appropriate. In the absence of administrative rules on this subject, the Environmental Appeals Board ("EAB") has offered guidance by consulting the FRCP<sup>1</sup> as they apply in analogous situations. *In re Carroll Oil Co.*, RCRA (9006) Appeal No. 01-02, 2002 EPA App. LEXIS 14 at \*35 (EAB, July 31, 2002); *In the Matter of Asbestos Specialists, Inc.*, TSCA Appeal No. 92-3, 4 E.A.D. 819, 827 n. 20 (October 6, 1993).

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<sup>1</sup>The FRCP are not binding on administrative agencies, but many times these rules provide useful and instructive guidance in applying the Rules of Practice. See *Oak Tree Farm Dairy, Inc. v. Block*, 544 F.Supp. 1351, 1356 n. 3 (E.D.N.Y. 1982); *Wego Chemical & Mineral Corp.*, TSCA Appeal No. 92-4, 4 E.A.D. 513, 524 n. 10 (EAB, February 24, 1993).

The FRCP adopt a liberal stance toward amending pleadings, stating that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a).<sup>2</sup> The Supreme Court has also expressed this liberality in interpreting Rule 15(a), finding that "the Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Foman v. Davis*, 371 U.S. 178, 181-82 (1962) (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)).

In considering a motion to amend under Rule 15(a), the Court has held that leave to amend shall be freely given in the absence of any apparent or declared reason, such as undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by previous amendment, undue prejudice, or futility of amendment. *Id.* at 182. Similarly, the EAB has found that a complainant should be given leave to freely amend a complaint in EPA proceedings in accordance with the liberal policy of FRCP 15(a), as it promotes accurate decisions on the merits of each case. *In the Matter of Asbestos Specialists, Inc.*, 4 E.A.D. at 830; *In the Matter of Port of Oakland and Great Lakes Dredge and Dock Company*, MPRSA Appeal No. 91-1, 4 E.A.D. 170, 205 (EAB, August 5, 1992).

### Discussion

Based on the liberal standard for adjudicating motions to amend the complaint, there is no apparent reason to deny Complainant's Motion to File the Second Amended Complaint. In determining the amount of a civil penalty under Section 16(a) of

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<sup>2</sup>FRCP 15(a) provides that:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

TSCA, the EPA must take into account respondent's "ability to pay" and the "effect on ability to continue to do business." 15 U.S.C. § 2615(a)(2)(B). According to Section 22.24 of the Rules of Practice, the complainant also has the burdens of presentation and persuasion that the relief sought is appropriate. 40 C.F.R. § 22.24(a). As a result, when pursuing administrative actions under Section 16(a) of TSCA, the EPA bears the burden of producing some evidence on and establishing the appropriateness of a penalty after considering all the statutory factors, including ability to pay. *In re Carroll Oil Co.*, 2002 EPA App. LEXIS at \*71 n. 24; *In re Employers Insurance of Wausau and Group Eight Technology, Inc.*, TSCA Appeal No. 95-6, 6 E.A.D. 735, 756 (EAB, February 11, 1997).

This allocation of the burden of proof makes consideration of the ability to pay or the economic impact of the penalty on business a part of the EPA's prima facie case, and not an affirmative defense as alleged by Respondent. *In re New Waterbury, Ltd.*, TSCA Appeal No. 93-2, 5 E.A.D. 529, 540 (EAB, October 20, 1994); see *In the Matter of Asbestex*, Docket No. CAA 3-2001-0004, 2002 EPA ALJ LEXIS 23 at \*32-33 (ALJ, April 24, 2002). Thus, regardless of whether Respondent withdraws the inability to pay defense from its Answer, the EPA must still consider this factor in establishing the appropriateness of the proposed penalty. As such, the EPA's motion to amend its Complaint to include additional factual allegations concerning this penalty factor is not futile. Accordingly, Complainant's Motion will be GRANTED.

Upon the filing of the Second Amended Complaint, the Second Amended Complaint will become the Complaint in this matter. Pursuant to 40 C.F.R. § 22.14(c), Respondent shall have twenty (20) additional days from the date of service of the amended complaint to file its answer, should it choose to do so. Inasmuch as Respondent does not intend to pursue inability to pay as a potential mitigating consideration and has no objection to the remaining amendments, an amended answer may not be required.

**Order**

Complainant's Motion to File the Second Amended Complaint is GRANTED.

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Barbara A. Gunning  
Administrative Law Judge

Dated: April 9, 2003  
Washington, DC

In the Matter of Harpoon Partnership, Respondent  
Docket No. TSCA-05-2002-0004

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Granting Complainant's Motion To File The Second Amended Complaint**, dated April 9, 2003, was sent this day in the following manner to the addressees listed below.

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Maria Whiting-Beale  
Legal Staff Assistant

Dated: April 9, 2003

Original and One Copy by Pouch Mail to:

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