UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
WAYNE VAUGHN, SR., WAYNE VAUGHN, JR., AND CARRIAGE HOMES,	)	**DOCKET NO. CWA-9-2001-0002**
	)	
	)	
RESPONDENTS	)	

ORDER GRANTING COMPLAINANT'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

ORDER GRANTING RESPONDENT CARRIAGE HOMES' REQUEST TO ACCEPT PROPOSED ANSWER

The Complaint in this administrative enforcement proceeding was filed on February 26, 2001, against Mr. Wayne Vaughn, Sr., Mr. Wayne Vaughn, Jr., and the corporate entity, Carriage Homes. On March 20, 2001, Respondents Vaughn, Sr. and Vaughn, Jr. filed Answers to the Complaint and requested a hearing in this matter.

The undersigned issued a Prehearing Order on October 1, 2001, establishing the prehearing exchange schedule. Pursuant to that Order, Respondents Vaughn, Sr. and Vaughn, Jr. filed their prehearing exchange.[1/] The hearing in this matter has not yet been scheduled.

Complainant's Motion for Leave to File First Amended Complaint

On March 7, 2002, the United States Environmental Protection Agency ("Complainant" or "the EPA") filed a Motion for Leave to File First Amended Complaint ("Motion for Leave to Amend") and appended a proposed First Amended Complaint to its Motion.[2/] In

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[1/] Respondents Vaughn, Sr. and Vaughn, Jr., as common parties with the same attorney, filed a joint prehearing exchange.

[2/] Two additional motions are pending before me; Complainant's (continued...)

this motion, Complainant seeks to add a new Clean Water Act ("CWA") claim against Respondents and delete the decedent, Mr. Wayne Vaughn, Sr., from this administrative enforcement proceeding. Respondents filed an Opposition to Complainant's Motion for Leave to File First Amended Complaint ("Respondents' Opposition") on March 27, 2002.[3/] In this filing, Respondents oppose Complainant's proposed CWA claim but do not oppose Complainant's request to delete Mr. Vaughn, Sr. from the Complaint.[4/]

The proposed claim that Complainant seeks to add to the Complaint alleges that Respondents failed to respond to an information request issued to Respondents on October 22, 2001, pursuant to Section 308 of the Clean Water Act, 33 U.S.C. § 1318 ("Section 308 Request"). This Section 308 Request was sent to Respondents after the undersigned had issued the Prehearing Order. *See* Respondents' Opposition Ex. B ("Requests for Information under Section 308(a) of the Clean Water Act," October 22, 2001). Complainant contends that the Request was issued in response to information that Complainant learned after filing the Complaint, information which Complainant contends "is relevant to proper adjudication of the claims already raised in this proceeding." Complainant's Motion for Leave to Amend at 4. Complainant maintains that this proposed claim should be heard in this administrative enforcement proceeding "to promote agency economy and to vindicate these meritorious claims in the most efficient manner." Complainant's Motion for Leave to Amend at 2.

As previously noted in the Prehearing Order, 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 (the "Rules of Practice"), 40 C.F.R. §§ 22.1-22.32. The procedural rule governing

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[2/] (...continued)
Motion for Discovery, and Complainant's Motion in Limine and for Order Concerning Attendance of Witnesses and Hearing Procedures, each of which is accompanied by opposition briefs. Disposition of these motions will be forthcoming.

[3/] Counsel indicates that Respondents' Opposition was filed on behalf of all three Respondents.

[4/] All parties agree that Mr. Vaughn, Sr. should be deleted from this proceeding, and the undersigned sees no reason why this amendment should not be granted. Thus, the remainder of this Order will address the contested CWA claim without reference to the request to delete the decedent from this proceeding.

the amendment of a complaint is found at Section 22.14(c) of the Rules of Practice, 40 C.F.R. § 22.14(c). Section 22.14(c) provides:

> *Amendment of the complaint*. The complainant may amend the complaint once as a matter of right at any time before the answer is filed. Otherwise the complainant may amend the complaint only upon motion granted by the Presiding Officer. Respondent shall have 20 additional days from the date of service of the amended complaint to file its answer.

The Rules of Practice do not, however, illuminate the circumstances when amendment of the complaint is or is not appropriate. Nevertheless, some parameters have been developed through various administrative decisions. Specifically, the Environmental Appeals Board ("EAB") has offered guidance on the subject, informed by the Federal Rules of Civil Procedure ("FRCP")[5/] and judicial interpretation of the FRCP. *See In re Asbestos Specialists, Inc.* ("*Asbestos Specialists*"), 4 E.A.D. 819 (EAB 1993); s*ee also In re Port of Oakland and Great Lakes Dredge and Dock Company* ("*Port of Oakland*"), 4 E.A.D. 170 (EAB 1992). Rule 15(a) of the FRCP addresses the amendment of pleadings.[6/]

[5/] 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); *In re Wego Chemical & Mineral Corp.*, 4 E.A.D. 513, 524 n.10 (EAB 1993).

[6/] FRCP 15(a) states:

> **Amendments**. 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 longer, unless the court otherwise orders.

(continued...)

The United States Supreme Court has interpreted FRCP 15(a) to mean that there should be a strong liberality in allowing amendments to pleadings. *See Foman v. Davis*, 371 U.S. 178, 181-82 (1962). Leave to amend pleadings under Rule 15(a) should be given freely 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. *See Id.*

In similar fashion to Rule 15(a), Section 22.14(c) of the Rules of Practice provides that a complainant, after the answer is filed, may amend the complaint only upon motion granted by the Presiding Officer.[7/] The EAB has held that a complainant should be given leave to freely amend a complaint in EPA proceedings, in accord with the liberal policy of FRCP 15(a), inasmuch as it promotes accurate decisions on the merits of each case. *See Asbestos Specialists, supra,* at 830; *Port of Oakland, supra,* at 205.

In the instant matter, Complainant argues that the proposed amendment to the Complaint does not cause undue prejudice[8/], was not introduced in bad faith or with dilatory motive, and would not be futile.[9/] As to the undue prejudice factor, Complainant asserts

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[6/] (...continued)

FED. R. CIV. P. 15(a).

[7/] The term "Presiding Officer" refers to the Administrative Law Judge designated by the Chief Administrative Law Judge to serve as the Presiding Officer. 40 C.F.R. § 22.3(a).

[8/] Undue prejudice has been interpreted to mean that there will be an "undue difficulty in defending a lawsuit because of a change of tactics or theories on the part of the other party." *Heslop v. UCB, Inc.*, 175 F. Supp. 2d 1310 (D. Kan. 2001) (citing *Sithon Maritime Co. v. Holiday Mansion*, 177 F.R.D. 504, 508 (D. Kan. 1998); *LeaseAmerica Corp. v. Eckel*, 710 F.2d 1470, 1474 (10th Cir. 1983)).

[9/] Complainant characterizes the futility of amendment factor in terms of whether the proposed claim is "frivolous". Courts have treated the futility of amendment factor to mean that the amendment would not withstand a motion to dismiss. *See U.S. v. Keystone Sanitation Co., Inc.*, 903 F. Supp. 803, 814(M.D. Pa. 1995) (citing *Coventry v. United States Steel Corp.*, 856 F.2d 514, 519 (3d Cir.

(continued...)

that the addition of this allegation will not impair Respondents' ability to prepare a defense because Respondents already have the necessary and relevant evidence regarding this issue. *See* Complainant's Motion for Leave to Amend at 8-9 (citing *Howey v. United States*, 481 F.2d 1187, 1191 (9th Cir. 1973)). Rather, according to Complainant, defending this proposed allegation merely requires Respondents to demonstrate that they were not legally required to respond to the Section 308 Requests. Moreover, Complainant contends that the amendment would not be futile because Complainant had the authority to issue the Section 308 Request and Respondents made a conscious decision not to answer.

Respondents oppose the amendment, arguing that not only will they suffer undue prejudice if Complainant's Motion is granted but also that the amendment would be futile. Respondents vaguely characterize the potential for undue prejudice in terms of temporal delay and financial burdens. *See* Respondents' Opposition at 5-6. Although delay and financial costs are relevant considerations of undue prejudice, Respondents cite no authority in support of their position. Generally, the type of vague financial burdens and delay associated with this proposed amendment are not sufficient reasons to support denial of leave to amend.[10/] Thus, I do not find Respondents' undue prejudice argument to be a persuasive justification to deny Complainant's Motion.

Respondents' alternative and more developed argument in opposition to Complainant's Motion is that amending the Complaint to add a Section 308 violation would be futile. *See* Respondents' Opposition at 2. Respondents submit that once the EPA instituted this administrative enforcement proceeding, and the undersigned issued the Prehearing Order, the EPA's investigative authority under Section 308 of the Clean Water Act could no longer operate to support the ongoing case. In essence, Respondents maintain that

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[9/] (...continued)
1988), *Massarsky v. General Motors Corp.*, 706 F.2d 111, 125 (3d Cir.), cert. denied, 464 U.S. 937, 104 S.Ct. 348, 78 L.Ed.2d 314 (1983); *Shane v. Fauver*, 213 F.3d 113, 115 (3d Cir. 2000) ("'Futility' means that the complaint, as amended, would fail to state a claim upon which relief could be granted."). Thus, in assessing futility, a trial court applies the same standard of legal sufficiency as required by FRCP 12(b)(6). *See Shane, 213 F.3d at 115*.

[10/] *See generally* 3 Moore's Federal Practice § 15.15[2], at 15-43 to -46.2 (3d ed. 2000).

the rules of discovery provided in the Rules of Practice supplant the EPA's Congressionally delegated investigative authority.

In support of this argument, Respondents rely on Section 22.19 of the Rules of Practice, which governs discovery in administrative enforcement proceedings. Section 22.19(a) of the Rules of Practice provides for the prehearing exchange of witness lists, documents, and information between the parties. Under Section 22.19(e) of the Rules of Practice, additional discovery may be requested, by motion, only after the information exchange has taken place and only if the discovery "(i) will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party; (ii) seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and (iii) seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought." 40 C.F.R. § 22.19(e)(1)(i)-(iii).

On the other hand, Section 22.19(e)(5) of the Rules of Practice states, in pertinent part,

> Nothing in this paragraph (e) shall limit . . . [the] EPA's authority under any applicable law to conduct inspections, issue information request letters or administrative subpoenas, or otherwise obtain information.

40 C.F.R. § 22.19(e)(5).

Subsection (e)(5) notwithstanding, Respondents maintain that once the undersigned issued the Prehearing Order, which established the prehearing exchange schedule, the substantive discovery requirements of the Rules of Practice became the exclusive means by which the EPA could obtain information from the Respondents regarding this matter. Respondents argue that to conclude otherwise would "make governmental discovery motions obsolete." *See* Respondents' Opposition at 4. Moreover, Respondents assert that under the Rules of Practice they are "entitled to a legitimate rationale for further discovery requests . . . and to have the opportunity to object" to those requests. *Id*. Although Respondents' observations regarding discovery practice may be correct, Respondents mistakenly ignore the exemption specifically provided by 40 C.F.R. § 22.19(e)(5) that allows the EPA to issue information request letters under any applicable law, even if such request relates to the ongoing proceeding. Here, the EPA's Section 308 Request falls within the exemption from discovery recognized under 40 C.F.R. § 22.19(e)(5).

Respondents assert that their interpretation is supported by administrative case law. *See* Respondents' Opposition at 4 (citing *In re ARCO Chem. Co. ("ARCO")*, Docket No. EPCRA-III-240 (ALJ, Mar. 8, 1999); *In re Atlas Metal and Iron Corp.*, Docket No. TSCA-PCB-VIII-91-08 (ALJ, Aug. 11, 1992)). However, these cases are not dispositive.[11/] The undersigned has ruled to the contrary on a similar issue in *In re Safety-Kleen Systems, Inc.*, Docket No. RCRA-5-2001-001 (ALJ, Aug. 24, 2001)(concluding that the EPA's authority to issue an information collection request under Section 3007(a) of RCRA, 42 U.S.C. § 6927(a), which sought information concerning one of the counts in the Complaint, was not limited by the rules for other discovery at 40 C.F.R. § 22.19(e)(1)-(4) pursuant to the exemption provided by 40 C.F.R. § 22.19(e)(5)).

Additionally, other administrative law judges have similarly concluded that the EPA's statutorily-provided investigative authorities are not supplanted by the institution of an administrative enforcement action. *See In re Environmental Protection Services, Inc.*, Docket No. TSCA-3-2001-0331 (ALJ, Jan. 24, 2002); *In re Goodman Oil Co., and Goodman Oil Co. of Lewiston*, Docket No. RCRA-10-2000-0113 (ALJ, Aug. 22, 2001); *Dominick's Finer Foods, Inc.*, Docket No. CERCLA/EPCRA-007-95 (ALJ, Feb. 15, 1996). Such an interpretation of the EPA's statutory authority is consistent with federal court treatment of this issue and the

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[11/] In *ARCO*, pursuant to Respondent's Motion for Protective Order, the Administrative Law Judge quashed the EPA's subpoenas because the statutory authority EPA relied upon in issuing the subpoenas was for the limited purpose of gathering information for the allocation of liability in settlements under Section 122 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9622, and thus, the EPA's attempted use of this subpoena power in an enforcement proceeding for violations of Section 103 of CERCLA, 42 U.S.C. § 9603, was ultra vires. *Atlas Metal* similarly involved the EPA's use of its subpoena power, and as Complainant discusses in its Reply to Respondents' Opposition, was decided before the Rules of Practice were amended in 1999. *See* Complainant's Reply to Respondents' Opposition at 10-11. *See also* Preamble to the Amended Rules of Practice, 64 Fed. Reg. 40138, 40161 (July 23, 1999)(stating that "Section 22.19(e)(5) . . . make[s] clear that FOIA requests, inspections, statutorily provided information collection requests, and administrative subpoenas issued by an authorized Agency official other than the Presiding Officer do not constitute discovery and are not restricted by the [Rules of Practice].")

Preamble to the Rules of Practice.[12/] Although it may be "uncommon for [the] EPA to initiate inspections, information collection requests, or administrative subpoenas to gather information to support cases that have already been commenced" Section 22.19(e)(5) of the Rules of Practice makes clear that these activities "are not restricted by the [Rules of Practice]."[13/]

As such, I am compelled to find that the EPA's authority to issue to Respondents the Section 308 Request, which relates to claims raised in the Complaint, is not limited by the rules for "other discovery" found at 40 C.F.R. § 22.19(e)(1)-(4).[14/] Accordingly, the EPA is not precluded from amending the Complaint to add the charge that Respondents failed to respond to the Section 308 Request.

Respondents suggest that granting Complainant's Motion to add the Section 308 violation will punish them for asserting their rights under the Rules of Practice. *See* Respondents' Opposition at 5. I disagree. First, as previously noted, 40 C.F.R. § 22.19(e)(5) specifically advised Respondents that "[n]othing in this paragraph (e) shall limit ... [the] EPA's authority under any applicable law to ... issue information request letters ... or otherwise obtain information." Respondents' tactical decision to challenge the Request cannot be used now to avoid any possible liability for failure to comply with a validly issued information request letter. Additionally, Complainant provided Respondents with specific case law supporting the EPA's concurrent use of its investigative authority during the pendency of a related enforcement proceeding. See Complainant's Motion for Leave to Amend at 2-4. To now allow the EPA to add a claim against Respondents for failing to respond to the Section 308 Request does not punish the Respondents, but rather is the mere consequence of making the wrong tactical decision.

[12/] *See* 64 Fed. Reg. at 40161 n.2 (citing *National-Standard Co. v. Adamkus*, 881 F.2d 352, 363 (7th Cir. 1989); *In re Stanley Plating Co.*, 637 F. Supp. 71, 72-73 (D. Conn. 1986).

[13/] *Id.* at 40161.

[14/] The EPA is advised that under 40 C.F.R. §§ 22.4(c)(6), 22.4(c)(10), 22.17, and 22.22 an Administrative Law Judge has the authority to impose certain sanctions against a party, such as exclusion of evidence, that are not provided in the statute under which a case is commenced.

Yet the preceding discussion does not contemplate the ultimate question that must be answered in assessing futility of amendment; that is, whether Complainant's proposed CWA claim is legally sufficient.[15/] *See supra*, n.8. In determining whether to dismiss an administrative complaint, all facts alleged in the complaint are taken as true, and all reasonable inferences are drawn in favor of the complainant. *See Commercial Cartage Co., Inc.*, 5 EAD 112, 117 (EAB 1994) (relying on the standard used in FRCP 12(b)(6)); 40 C.F.R. § 22.20(a). If any element of a claim is not alleged, or if the Complainant can prove no set of facts in support of its claim which would entitle it to relief, then the Complaint may be dismissed. *See id*. at 117; *see also Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (complaint may be dismissed "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations").

Taking all facts alleged in the proposed First Amended Complaint as true, the Complainant has plead a prima facie case against Respondents for violating Section 308 of the Clean Water Act.[16/] Thus, Complainant's proposed First Amended Complaint would withstand a motion to dismiss. Therefore, without ruling on the merits of the proposed claim, and judged by a legally sufficient standard, I conclude that there would not be futility of amendment.

Accordingly, Complainant's Motion for Leave to File First Amended Complaint is **GRANTED**.[17/] Upon the filing of the proposed First Amended Complaint, it shall become the Complaint in this matter. Pursuant to Section 22.14(c) of the Rules of Practice,

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[15/] *See* 3 Moore's Federal Practice § 15.15[3], at 15-48 (stating that "[a]n amendment is futile if it merely restates the same facts as the original complaint in different terms, reasserts a claim on which the court previously ruled, fails to state a legal theory, or could not withstand a motion to dismiss") (citations omitted).

[16/] Respondents can challenge Complainant's authority to issue the Section 308 Request not because the Rules of Practice supplant the EPA's statutory authority, but rather based on whether the EPA had the requisite jurisdiction to issue the Request, a defense that Respondents implicitly raise in their Answers to the Complaint.

[17/] In future filings, the parties are reminded that the caption should reflect the deletion of Mr. Vaughn, Sr. as a party-Respondent to this proceeding.

Respondent shall have twenty (20) additional days from the date of service of the First Amended Complaint to file its amended Answer.

The schedule for the filing of supplemental prehearing information exchange concerning Complainant's new charge (Section 308 violation) and for supplementing the prior exchange pursuant to 40 C.F.R. § 22.19(f) is as follows: Complainant's supplemental prehearing exchange shall be filed no later than September 4, 2002; Respondent's supplemental prehearing exchange is due no later than September 25, 2002; and Complainant's supplemental rebuttal exchange, if any, is due October 5, 2002.[18/]

Respondent Carriage Homes' Answer

The undersigned issued an Order To Show Cause to Respondent Carriage Homes on June 12, 2002, concerning its failure to file an Answer to the Complaint. Respondent Carriage Homes filed a Response to Order to Show Cause as to Why Respondent Carriage Homes Did Not Individually Answer the Complaint and Why a Default Order Should Not Be Entered as to This Entity and Proposed Answer on June 25, 2002. Complainant has not filed a reply to Respondent Carriage Homes' Response. For good cause shown, Respondent Carriage Homes' Proposed Answer is deemed to have been timely filed.[19/]

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Barbara A. Gunning
Administrative Law Judge

Dated: July 25, 2002
Washington, DC

[18/] The setting of this schedule assumes that the First Amended Complaint will be filed immediately.

[19/] Respondent Carriage Homes is represented by the same attorney representing Respondents Wayne Vaughn, Jr. and Wayne Vaughn, Sr. These Respondents, as common parties, may file joint statements or documents, including a prehearing exchange and supplemental prehearing exchange. Respondent Carriage Homes should clarify whether the prehearing exchange already filed in this matter should be deemed to have been filed on its behalf or whether it will be filing a separate prehearing exchange.