



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
JDN INTERMOUNTAIN) DOCKET NO. CWA-08-2003-0073
HOLDINGS, INC.,)
)
)
RESPONDENT)

ORDER GRANTING COMPLAINANT'S MOTION TO AMEND THE AMENDED
COMPLAINT

Procedural Background

As previously noted in the Prehearing Order entered by the undersigned on March 12, 2004, this civil administrative proceeding arises under the authority of Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act ("CWA"), as amended, 33 U.S.C. § 1319(g), and 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. §§ 22.1-32.

On July 11, 2003, the United States Environmental Protection Agency, Region VIII (the "EPA" or "Complainant") filed a Complaint against JDN Intermountain Holdings, Inc. ("Respondent"), alleging (1) that Respondent's failure to develop a storm water management plan ("SWMP") at least ten days prior to the commencement of the construction, as required by permit, constitutes violations of the CWA (33 U.S.C. §§ 1319, 1342), and (2) that Respondent's failure to implement best management practices ("BMPs") as required by the permit constitutes violations of the CWA (33 U.S.C. §§ 1319, 1342(p)). Complainant seeks a civil penalty of \$125,000 for these alleged violations.

On October 30, 2003, before the Answer was filed, Complainant filed an Amended Complaint to correct minor typographical errors. On December 3, 2003, Respondent filed an Answer denying many of the factual allegations made in the Complaint and raising several affirmative defenses. The parties

participated in the Alternative Dispute Resolution ("ADR") process from January 8, 2004 through March 11, 2004, but did not reach a settlement agreement.

On May 7, 2004, Complainant filed a Motion to Amend the Amended Penalty Complaint and Notice of Opportunity for Hearing ("Motion"). The Motion seeks to amend the Amended Complaint by (1) correcting the Respondent's name, and (2) adding an additional count relating to Respondent's alleged self-inspection violations. If the Motion is granted, then Complainant requests that the Court's March 12, 2004 Prehearing Order be stayed pending the filing of Respondent's Answer.

On May 27, 2004, Respondent filed its Response to EPA's Motion to Amend the Amended Penalty Complaint ("Response"), stating that it does not object to naming the correct entity as the Respondent, but that it does oppose (1) EPA's motion to amend to add an additional count relating to alleged self-inspection violations, and (2) EPA's motion to stay the Court's prehearing exchange deadlines. Respondent contends that the EPA has not shown good cause for amending the Complaint at this late date. Further, Respondent maintains that it will be prejudiced by EPA's Motion due to the time that has lapsed since the events at issue occurred, as well as the resulting difficulties of locating witnesses and documents.

On June 4, 2004, Complainant filed a Reply to Respondent's Response ("Reply"). Complainant properly notes in its Reply that the Motion to stay the Court's prehearing exchange deadlines is now moot, as the EPA timely filed its prehearing exchange on May 27, 2004. The EPA argues that it has shown good cause to amend the Amended Complaint to add the count for self-inspection violations, and that Respondent has not demonstrated any undue prejudice or hardship that would result from granting the motion.

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^{1/} 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).

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).^{2/} 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*

^{1/} 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).

^{2/} 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.

Lakes Dredge and Dock Company, MPRSA Appeal No. 91-1, 4 E.A.D. 170, 205 (EAB, August 5, 1992).

Discussion

The EPA's arguments, as developed in its Reply, sufficiently demonstrate good cause for amending the Amended Complaint. First, I observe the liberal standard for adjudicating Motions to Amend the Complaint. Fed. R. Civ. P. 15(a), *supra*. Second, the EPA asserts that the information pertaining to the alleged self-inspection violations was not obtained until April 7, 2004, when all responses from the Section 308(a) letters were received, which was subsequent to the filing of the Amended Complaint. Thus, the EPA maintains that its Motion to Amend the Amended Complaint filed on May 7, 2004 was not untimely.

With regard to Respondent's argument that it will have difficulties locating witnesses and documents, the EPA points out that the self-inspection reports, as well as other documents, were and are required to be maintained pursuant to Respondent's stormwater permit, and that, to date, no Notice of Termination has been issued by the Colorado Department of Public Health and the Environment for this site. The EPA also contends that on May 31, 2002, the EPA inspectors advised the Respondent's on-site representatives of their findings.

As such, Complainant's Motion to Amend the Amended Complaint is 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.

Order

Complainant's Motion to Amend the Amended Complaint is GRANTED.

Barbara A. Gunning
Administrative Law Judge

Dated: June 10, 2004
Washington, DC