

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:)	Docket No.: RCRA-05-2014-0006
)	
Summit, Inc.)	Proceeding to Assess a Civil Penalty
6901 West Chicago Avenue)	Under Section 3008(a) of the Resource
Gary, Indiana)	Conservation and Recovery Act,
)	42 U.S.C. § 6928(a)
U.S. EPA ID #: INX 000 028 902)	
)	
Respondent.)	
_____)	

MOTION TO AMEND THE COMPLAINT

The Complainant requests the Presiding Officer to allow it to amend the Complaint pursuant to the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits*, (Consolidated Rules), 40 C.F.R. § 22.14(c). The Complainant proposes to reduce the total toxicity characteristic leachate procedure (TCLP) benzene concentrations for drums 2, 3 and 4 cited in paragraph 63 of the Complaint. The Complainant submits the attached Memorandum of Law in Support of its Motion to Amend the Complaint.

RESPECTFULLY SUBMITTED,

2/2/16

Date



Richard J. Clarizio, Associate Regional Counsel

2/2/16

Date



Mark J. Koller, Associate Regional Counsel

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MEMORANDUM OF LAW
IN SUPPORT OF THE COMPLAINANT'S
MOTION TO AMEND THE COMPLAINT

I. RELIEF REQUESTED - LEAVE TO AMEND THE COMPLAINT

The Complainant requests leave to amend paragraph 63 of the Complaint to read as follows with the changes highlighted:

63. According to EPA's analysis, the four drums sampled contained total TCLP benzene concentrations above the regulatory level of 0.5 mg/L. Specifically, sample # 3180905 collected from Drum 1 had a total Toxicity Characteristic Leachate Procedure (TCLP) benzene total-concentration of 4.30 mg/L; sample # 3180908 collected from Drum 2 had a total TCLP benzene total-concentration of ~~14.2~~ 0.528 mg/L; sample # 3180911 collected from a Drum 3 had a total TCLP benzene total-concentration of ~~213~~ 9.54 mg/L; sample # 3180914 collected from Drum 4 had a total TCLP benzene total-concentration of ~~1,080~~ 82.1 mg/L.

II. PROCEDURAL BACKGROUND

The Complainant filed the Complaint in this matter on March 17, 2014, alleging violations of section 3008(a) the Solid Waste Disposal Act, as amended, also known as the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(a). The Complainant alleged in Counts 2-4 of the Complaint that the Respondent violated the RCRA hazardous waste regulations, in part, because the TCLP benzene concentrations in four drums EPA sampled exceeded the regulatory concentration of 0.5 milligrams per liter (0.5 mg/L). The Respondent filed its Answer on or about April 18, 2014, denying liability on all counts and requesting a hearing.

On June 10, 2014, the Presiding Officer issued a Prehearing Order which required the Parties to respond to specific questions and submit specific information. The Complainant filed its prehearing exchange on July 17, 2014. The Respondent filed its prehearing exchange on or about September 8, 2014, pursuant to the Presiding Officer's August 14, 2014, Order granting the Respondent an extension of time. The Complainant filed its rebuttal prehearing exchange on September 19, 2014.

On October 21, 2014, the Complainant filed a Memorandum of Law and Motion for Accelerated Decision related to the Respondent's liability for all seven counts in the Complaint. The Respondent did not file a response. The Presiding Officer issued an Order on the Complainant's Motion for Accelerated Decision on July 24, 2015. She granted accelerated decision on Counts 1, 4, 5, 6 and 7. She denied accelerated decision on Counts 2 and 3. The Presiding Officer also ordered the Parties to make good faith efforts to settle the case and to file a status report on September 4, 2015.

The Presiding Officer issued an Order Scheduling Hearing (Scheduling Order) dated September 9, 2015. She required the Complainant to file status reports by October 20, 2015, December 16, 2015 and February 22, 2016.¹ The Parties filed Joint Status Reports on or about October 20, 2015 and December 16, 2015.² The Complainant's December 16, 2015 Status Report stated that no progress had been made toward settlement.

III. STANDARD FOR AMENDING A COMPLAINT

A Complainant may amend its complaint, after an answer has been filed, "only upon motion granted by the Presiding Officer." 40 C.F.R. § 22.14(c). The Environmental Appeals Board (Board) has adopted the liberal pleading policy embodied in *Federal Rule of Civil Procedure 15*. The Board has allowed a Complainant to amend its complaint provided there has not been undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previously allowed amendments or undue prejudice. *In re Carroll Oil Co.*, 10 E.A.D. 635, 649-50 (EAB 2002) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)); *In the Matter of: Chem-Solv. Inc.*, 2014 EPA ALJ LEXIS 14, *17 (E.P.A. June 5, 2014). A complaint may be amended to correct factual errors and typographical errors. See, *In the Matter of: Carbon Injection Sys. LLC*, 2012 EPA ALJ LEXIS 13, *1-2 (E.P.A. Mar. 26, 2012) (allowing an amendment that included correction of factual details and allegations).

Once the Complainant has established that its motion is timely filed, the Respondent has the burden of showing prejudice, bad faith, undue delay or futility. To demonstrate prejudice, the Respondent must show that it was unfairly disadvantaged or deprived in some way of an opportunity to prepare or present its case. *In the Matter of: D.A. Stuart Co.*, 2007 EPA ALJ

¹ In her Scheduling Order, the Presiding Officer set other dates not relevant here.

² The Complainant filed a Status Report on December 16, 2015, and the Parties filed the same Status Report as a Joint Status Report on or about December 18, 2015.

LEXIS 19, *17-18 (E.P.A. May 31, 2007). Prejudice does not exist where the Respondent has been afforded due process, a full understanding of the charges and an opportunity to defend itself. *Yaffe Iron & Metal Co. v. United States Environmental Protection Agency*, 774 F.2d 1008, 1013 (3d Cir. 1985). Issues related to timeliness and delay matter most with respect to prejudice to Respondent. See, *In the Matter of: D.A. Stuart Co.*, 2007 EPA ALJ LEXIS at *17-18.

The Complainant must show that its motion is timely filed. See, *In the Matter of: San Antonio Shoe, Inc.*, EPCRA Docket No. VI-501-S, 1992 EPA ALJ LEXIS 525, *6 (E.P.A. April 2, 1992) (citing *Vargas v. McNamara*, 608 F.2d 15, 19 (1st Cir. 1979)). A motion to amend a complaint may be made as late as the hearing or afterwards. See, *In the Matter of: Chem-Solv, Inc.*, 2014 EPA ALJ LEXIS 14, *26-27 (complaint amended orally at hearing); *In the Matter of: Serv. Oil, Inc.*, 2006 EPA ALJ LEXIS 15, *19 (E.P.A. Apr. 10, 2006), (“Moreover, if the Motion to Amend [filed six weeks before the evidentiary hearing] were denied now, then after the hearing the complaint could be amended to conform it to the proof”).

IV. DISCUSSION

The Complainant requests leave to amend the Complaint to correct an error in the total TCLP benzene concentrations cited in paragraph 63 of the Complaint. The Complaint states that the TCLP benzene concentrations in the samples from the four drums were 4.30 mg/L (sample 3180905), 14.2 mg/L (sample 3180908), 213 mg/L (sample 3180911) and 1080 mg/L (sample 3180914). See, Complaint, ¶ 63. The Complainant derived these values from the sample analysis report provided by the Chicago Regional Laboratory (CRL), included with the Complainant’s initial Prehearing Exchange as CX 14.

CRL provided a detailed summary of its analytical results for these samples. See, CX 14, pp. 000690-723, Memorandum, *Review of Region 5 Data for Summit Inc.*, June 8, 2009. CRL included summary charts which present the results for each of the samples and chemicals analyzed. See, CX 14, pp. 000695-714, *Volatiles by GC/MS, EPA 8260B – Quality Control*. The summary charts for samples 3180905, 3180908, 3180911 and 3180914 presented the TCLP oil filtrate benzene concentrations as 4.3 mg/L, 14.2 mg/L, 213 mg/L and 1084 mg/L. See CX 14, pp. 000696-99, 716-18. The Complainant believed these were the appropriate concentrations to use for total TCLP benzene concentrations in a sample. Consequently, the Complainant cited these concentrations in the Complaint.

The Complainant began hearing preparation after it filed the December 16, 2015 status report. The Complainant requested the assistance of its National Enforcement Investigations Center (NEIC) to determine the TCLP benzene concentration of the mixture of the four drums in the 3,000 gallons the Respondent shipped off-site to Beaver Oil on or about March 21, 2009. See Complaint, ¶ 65. Theresa Morris,³ Chemist, NEIC reviewed the CRL TCLP benzene information for samples 3180905, 3180908, 3180911 and 3180914. As a result of her review, the Complainant realized that it had misread CX 14 and CRL's report of the TCLP benzene concentrations for three of the drums. In particular, the Complainant inadvertently relied on the summary charts and not CRL's narrative explanation presented in CX 14. CRL's narrative explanation is contained in CX 14, from pp. 000691-692. According to CRL's narrative explanation, the benzene concentrations presented in the summary charts for drums with sample numbers 3180908, 3180911 and 3180914 were only for the TCLP oil filtrate portion of the sample analyzed. That value did not represent the total TCLP

³ The Complainant will file a motion to supplement its prehearing exchange to add Mrs. Morris and certain other documents related to her analysis of the mixture of the four drums with the total 3,000 gallons.

benzene concentration for these samples. CRL stated in CX 14, pp.000691-692, the following for these three samples:

Sample 3180908 The *combined final concentration* for Benzene is 0.528 mg/L (PPM). Please note the LIMS final report of *14.2 mg/L is the concentration of the oil filtrate portion only*. CX 14, p. 000691 (emphasis added).

Sample 3180911 The *combined final concentration . . .* is 9.54 mg/L (PPM). Please note the LIMS final report of *214 mg/L is the concentration of the filtrate portion only*. CX 14, p. 000692 (emphasis added).

Sample 3180914. . . . The *combined final concentration . . .* is 82.1 mg/L (PPM). Please note the LIMS final report of *1,080 mg/L is the concentration of the oil filtrate portion only*. CX 14, p. 000692 (emphasis added).

The correct concentration to use when determining whether a waste exceeds the hazardous waste characteristic of toxicity for benzene (0.5 mg/L) should consider all phases of the sample that are present in sufficient quantities: solid, oil and water. The oil and water phases are referred to collectively as the filtrate portion. If the sample contains a small amount of solids, such as sample 3180905, then the combined final concentration is the filtrate concentration. The concentration for sample 3180905 is unchanged because it contained a small amount of solids. Consequently, the combined final TCLP concentration for benzene for sample 3180905 is 4.3 mg/L, as reported in CX 14, p. 000691 and on the summary chart in CX 14, p. 000696. However, for samples 3180908, 3180911 and 3180914 the correct, final, combined TCLP concentration of benzene should be:

0.528 mg/L, not 14.2 mg/L (sample 3180908);
9.54 mg/L, not 213 mg/L (sample 3180911); and
82.1 mg/L, not 1080 mg/L (sample 3180914).

These are reported as the final combined TCLP concentrations of benzene in the CRL report. See CX 14, pp. 000691-692.

The changed values are less than the values used in paragraph 63 of the Complaint. However, they do not change Respondent's liability for the violations alleged in the Complaint because they are all above the regulatory concentration for benzene of 0.5 mg/L. Additionally, they do not affect the allegations related to drum 3 exceeding the hazardous waste characteristic for ignitability.

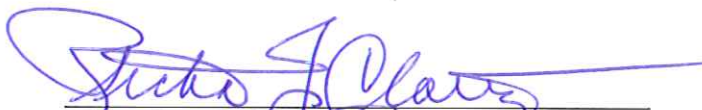
The Complainant asked its penalty witness, Spiros Bourgikos, to re-examine his penalty calculation to determine whether the proposed amendment to paragraph 63 would change the proposed penalty. After reviewing the data and the RCRA Civil Penalty Policy, CX 4 and 4a, Mr. Bourgikos believes that this amendment would not alter his calculation of the proposed penalty. Mr. Bourgikos will be available at hearing to explain his rationale. In summary, he may explain that because all four of the drums had TCLP concentrations of benzene above the regulatory concentration of 0.5 mg/L, they were all toxic. Consequently, his analysis of the toxicity of the drum contents does not change. After verifying the accuracy of the CRL supporting data and consulting with Mr. Bourgikos, the Complainant provided the Respondent's counsel with notice of this error on January 22, 2016. See, Exhibit 1.

The Complainant believes this motion is timely. The cases make clear that amendments may be made to complaints under 40 C.F.R. § 22.14(c) as late as post-hearing. The Complainant seeks to amend the Complaint approximately four weeks before the hearing and after the Complainant specifically notified the Respondent of this error on January 22, 2016. This amendment does not prejudice the Respondent because it seeks to conform the concentrations alleged in the Complaint to the evidence the Respondent has had since July 17, 2014. See CX 14. This amendment does not

increase or decrease the Respondent's liability because the combined TCLP benzene concentrations for each of these three drums still exceeds the regulatory limit of 0.5 mg/L for benzene. For these reasons, the Complainant requests the Presiding Officer to grant its Motion to Amend the Complaint.

RESPECTFULLY SUBMITTED,

2/2/16
Date


Richard J. Clarizio, Associate Regional Counsel
U.S. EPA, Region 5, Office of Regional Counsel

2/2/16
Date

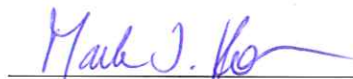

Mark J. Koller, Associate Regional Counsel
U.S. EPA, Region 5, Office of Regional Counsel

EXHIBIT 1
January 22, 2016 Email

Clarizio, Richard

From: Clarizio, Richard
Sent: Friday, January 22, 2016 2:19 PM
To: Mark Thiros
Cc: Koller, Mark; Rountree, Jillian; Clarizio, Richard
Subject: Summit - Complaint - correction to the benzene concentrations for 3 of the 4 drums.

Hello Mark,

As part of our preparations for hearing we have determined that we need to correct references we have made to the benzene concentrations for three of the four drums we sampled. The regulatory concentration for benzene is 0.5 mg/L. We identified the benzene concentrations in three of the samples as 14.2 mg/L (sample 31080908), 213 mg/L (sample 3180911) and 1084 mg/L (3180914). See Complaint, ¶ 63, and Complainant's Motion for Accelerated Decision, p. 12. These concentrations are reported in CX 14, pp. CX000696-699 and are for the oil phase of the sample.

The correct concentration for these samples should be 0.528 mg/L not 14.2 mg/L (sample 31080908); 9.54 mg/L not 213 mg/L (sample 3180911) and 82.1 mg/L not 1084 mg/L (sample 3180914). These are reported as the final combined concentration of benzene which includes consideration of the oil, water and solid phases that were present. See CX 14, pp. CX000691-692.

Sample 3180905 remains 4.3 mg/L since there was not a separate solid phase.

This correction does not change the analysis of liability or penalty because each of these concentrations of benzene are still above the 0.5 mg/L concentration contained in the regulations.

Let me know if you would like to discuss.

Rich Clarizio

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)	42 U.S.C. § 6928(a)
U.S. EPA ID #: INX 000 028 902)	
)	RCRA-05-2014-0006
Respondent.)	
_____)	

CERTIFICATE OF SERVICE

I certify that the *Complainant's Motion to Amend the Complainant and Memorandum of Law* was sent this day to the addressees as listed below:

By email of original PDF to
OALJfiling@epa.gov and
Original and one copy by
UPS Overnight delivery to:

Sybil Anderson
Headquarters Hearing Clerk
U.S. EPA, Office of Administrative Law Judges
Ronald Reagan Building, Room M1200
1300 Pennsylvania Avenue, NW
Washington, D.C. 20460

By email of original PDF to
OALJfiling@epa.gov and
One copy by UPS Overnight delivery to:

M. Lisa Buschmann, Administrative Law Judge
U.S.EPA, Office of Administrative Law Judges
Ronald Reagan Building, Room M1200
1300 Pennsylvania Avenue, NW
Washington, D.C. 20460

By causing a copy to be sent
UPS Overnight delivery to:

Mark A. Thiros, Esq.
Thiros & Stracci, P.C.
200 East 90th Drive
Merillville, Indiana 46410-8102

FEB 02 2016

Dated: _____



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