

**BEFORE THE  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

In the Matter of:

EDWARD AND THERESA WASHINES,  
DA STOR AT LILLIE'S CORNER

Wapato, Washington

Respondents.

**DOCKET NO. RCRA-10-2014-0100**

**COMPLAINANT'S UNOPPOSED  
MOTION FOR LEAVE TO AMEND  
THE COMPLAINT**

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FOR LEAVE TO AMEND THE COMPLAINT**

Complainant respectfully requests leave to amend the Complaint, pursuant to Rules 22.14(c) and 22.16 of the Consolidated Rules of Practice. 40 C.F.R. §§ 22.14(c), 22.16.

Complainant respectfully requests permission to amend the Complaint to (1) include additional dates of violation for Violation 1 and Violation 3 for periods of violation that occurred after the Complaint was filed, (2) to revise Complainant's proposed Compliance Order to require Respondents to demonstrate continuous and current compliance with the financial responsibility requirements for their USTs, and (3) conform Complainant's proposed penalty amounts within the Amended Complaint with the November 1990 U.S. EPA Penalty Guidance for Violations of UST Requirements ("UST Penalty Guidance").

*Amendments to include the most recent periods of violation*

In October 2014, Complainant obtained evidence that Respondents failed to conduct their annual test of the operation of each automatic line leak detector (ALLD), in violation of 40 C.F.R. §§ 280.41(b)(1)(i) and 280.44(a), and that Respondents failed to monitor each pressurized line, in violation of 40 C.F.R. §§ 280.41(b)(1)(ii) and 280.44(b), from August 27, 2014, through October 12, 2014. In October 2014, Complainant also obtained evidence that Respondents failed to maintain financial responsibility for their UST systems, in violation of 40 C.F.R. § 280.93, for a period starting on May 2, 2014, and which remains ongoing. For purposes of calculating the proposed penalty within the Proposed Amended Complaint, Complainant has used the date on which this motion was filed as an end date of the period of noncompliance for which a penalty should be assessed.

Complainant respectfully requests permission to amend the Complaint to add those periods of noncompliance to the appropriate counts within Violations 1 and 3, and to revise Paragraph 4.4 of the Complaint so the penalties proposed in the Proposed Amended Complaint include all known periods of noncompliance up to the filing date of this motion, calculated in accordance with the UST Penalty Guidance. Complainant also requests permission to amend the compliance tasks within the proposed Compliance Order to require Respondents to demonstrate continuous and current compliance with the financial responsibility requirements for their USTs.

*Amendments to conform the Amended Complaint to the UST Penalty Guidance*

Also in October 2014, Complainant discovered a calculation error in the penalty amount originally proposed for Violation 3 (Failure to Maintain Financial Responsibility). Complainant erroneously used the \$1,076 down-payment cost of Respondents' financial assurance instrument instead of the \$4,306 annual cost for the instrument when calculating the economic benefit for

Violation 3. Complainant's Initial Prehearing Exchange, at page 25. As a result, the penalty proposed within the Complaint for Violation 3 is currently \$6,205 lower than the value supported by a correct application of the Penalty Guidance. Complainant respectfully seeks leave to amend Paragraph 4.4 of the Complaint to correct this error, so the penalties proposed within the Amended Complaint conform to the UST Penalty Guidance.

If given leave to conform the proposed penalty amount to conform to the UST Penalty Guidance, Complainant also seeks leave to adjust how the \$3,931 economic benefit for delayed costs are allocated between Counts 5 and 6, to more accurately conform to the UST Penalty Guidance. *Ibid.* at Page 24, Footnote 3. The effect of the adjustment on Complainant's penalty recommendation would increase Count 5 and reduce Count 6 by \$1,965. The proposed change would have no effect on the aggregate penalty proposed for Violation 2.

*Standard of Review for 40 C.F.R. § 22.14(c)*

The Consolidated Rules of Practice ("Rules of Practice") provide that after the Answer has been filed, a Complaint may be amended upon motion granted by the Presiding Officer. 40 C.F.R. § 22.14(c). Although there is no standard in the Rules of Practice for determining whether to grant an amendment, EPA often uses the Federal Rules of Civil Procedure ("FRCP") and how the federal courts have interpreted FRCP Rule 15 to provide guidance. *See, e.g., In re Port of Oakland and Great Lakes Dredge and Dock Co.*, E.A.D. 170, 205 (EAB 1992). The general rule for FRCP Rule 15(a) is 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. *Foman v. Davis*, 371 U.S. 178, 182 (1962). The Environmental Appeals Board similarly stated that administrative pleadings are to be liberally construed and easily

amended, to promote accurate decisions on the merits of each case. *In the Matter of Asbestos Specialists, Inc.*, TSCA Appeal No. 92-3, 4 E.A.D. 819, 827 n. 20, 830 (1993).

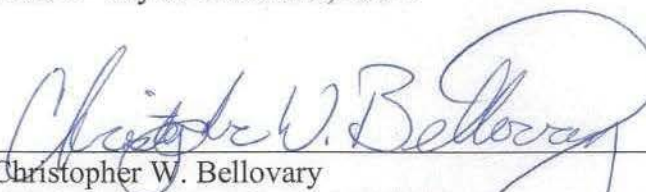
Complainant's Motion for Leave to Amend the Complaint seeks to clarify the violations alleged, conform the penalties proposed therein to the UST Penalty Guidance, and establish a more accurate record for the Hearing. Complainant makes this motion in good faith, with no dilatory motive. If leave to amend the Complaint is given, additional days of noncompliance would be alleged but no new counts would be added. Amending the allegations in the Complaint to include periods of violation which occurred after the Complaint was originally filed will serve the interests of both parties and is in the public interest, as it allows all known allegations to be resolved in the current action.

A copy of the Proposed Amended Complaint is attached to this motion. Complainant's Initial Prehearing Exchange will not need to be amended if this motion is granted.

Prior to filing this Motion, the undersigned Complainant's Counsel contacted the opposing party as to the amendments requested herein. Respondents' Counsel stated that he does not oppose this Motion, but he reserves the right to dispute the additional alleged period of failure to demonstrate compliance with the financial responsibility requirements if he finds evidence to the contrary, and reserves the right to dispute the proposed penalties. For the reasons cited above, Complainant respectfully requests leave of the Court to amend the Complaint.

Complainant's Counsel may be contacted by phone at (206) 553-2723, by email at bellovary.chris@epa.gov, or by mail at Christopher W. Bellovary, EPA Region 10, 1200 Sixth Avenue, Suite 900, Mail Stop ORC-158, Seattle, Washington 98101.

Respectfully submitted this 2<sup>nd</sup> day of December, 2014.

  
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Christopher W. Bellovary  
COUNSEL FOR COMPLAINANT  
U.S. Environmental Protection Agency, Region 10