UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Conservation Law Foundation, Inc., Plaintiff v. Shell Oil Products US, Shell Oil Company, Shell Petroleum, Inc., Shell Trading (US) Company, and Motiva Enterprises LLC, Defendants.	No. 1:17-cv-00396-WES-LDA

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

INTRODUCTION

Defendants Shell Oil Products US, Shell Oil Company, Shell Petroleum, Inc., Shell Trading (US) Company, and Motiva Enterprises LLC (collectively, "Defendants") respectfully request that this Honorable Court deny Plaintiff Conservation Law Foundation, Inc.'s ("CLF") Motion for Leave to File Second Amended Complaint (ECF No. 36). CLF seeks leave to amend to add a claim alleging a regulatory violation under the Resource Conservation and Recovery Act ("RCRA"), but *CLF has failed to provide the required statutory notice for this claim*. Because RCRA's notice requirement is a mandatory prerequisite to assert a RCRA claim, CLF's motion for leave to amend must be denied as futile. Granting leave to add this unnoticed RCRA claim would result in significant prejudice by denying Defendants their right under the statute to both proper notice and the 60-day delay period before filing.

Further, CLF's motion for leave to amend has and will continue to cause delays in this case. CLF represented in a letter to the Court that it had satisfied the statutory prerequisites to amend, and on the basis of that letter the Court dismissed a substantial pending motion to dismiss that had the potential to significantly narrow the claims in this case and was fully briefed and argued. Now, CLF seeks to file a second amended complaint – that does not eliminate the grounds underlying the prior motion to dismiss – and adds an unnoticed RCRA claim. This will result in an additional round of briefing on CLF's failure to provide notice, followed by a 60-day delay while the statutory notice period elapses, and then re-filing of a motion for leave to amend – all at unnecessary time and expense and further disruption of the orderly and efficient schedule stipulated to by the parties (and now disregarded by CLF). The Court should deny CLF's motion.

RELEVANT BACKGROUND

On August 30, 2017, after sending Defendants a notice letter dated June 28, 2017 stating its intent to file suit under RCRA and the Clean Water Act ("CWA"), CLF filed its complaint asserting the CWA claims. ECF. No. 1. On October 25, 2017, CLF filed its Amended Complaint, adding a RCRA claim under 42 U.S.C. 6972(a)(1)(B). ECF No. 11. Defendants filed a motion to dismiss the Amended Complaint and supporting memorandum of law on January 12, 2018. ECF. Nos. 20, 20-1. CLF filed its opposition on February 12, 2018. ECF No. 24. On the same day, CLF sent Defendants a supplemental notice of intent to file suit to put the parties on notice of the already pending claims and "of the additional RCRA violation." ECF No. 36-1 at 2. The additional alleged RCRA violation in the notice related to CLF's allegation that the Facility is a Conditionally Exempt Small Quantity Generator ("CESQG") of hazardous waste, and cited R.I. Code R. 25-15-102:5.15(G)(1) and 40 C.F.R. 262.16(b)(8)(i) as the CESQG provisions alleged to be violated. *Id*. at 6, 8. Defendants submitted a reply brief in support of its motion to dismiss on February 22, 2018. ECF No. 25. Prior to completion of briefing on the Defendants' motion to dismiss, the parties submitted a stipulation, ECF No. 22, on January 30, 2018, which the Court entered on February 1, 2018. Among other things, the stipulation provided that Defendants would not oppose amendment of the complaint to add certain new defendants and the noticed RCRA CESQG claim, if leave to amend was sought after the required statutory notice period expired, *see* 33 U.S.C. § 1365(b) and 42 U.S.C. § 6972(b), and after Defendants' motion to dismiss was decided. ECF No. 22 at 3.

On June 27, 2018, the Court held oral argument on the motion to dismiss and took the parties' arguments under advisement. On August 27, 2018, CLF filed a status report, ECF No. 32, informing the Court of its intention to move for leave to further amend its complaint. CLF

represented that the proposed second amended complaint would (1) remove Royal Dutch Shell from the Complaint; (2) add Triton Terminaling LLC and Equilon Enterprises LLC as additional defendants; and (3) add "facts regarding Shell's Terminal's, status as a RCRA facility and a correlating count under [RCRA] regarding [CESQG] requirements." *Id*. at 1-2. CLF also represented to the Court that notice had been provided and the statutory delay period had passed for the claims it sought to add. *Id*. at 1 n.2.

Based on the representations made by CLF in its August 27, 2018 status report, the Court entered a text order on September 20, 2018 denying Defendants' motion to dismiss without prejudice to re-filing a new motion to dismiss the complaint following CLF's forthcoming motion to amend. As stated in CLF's motion for leave, the parties endeavored to negotiate a stipulation that they believed would allow the complaint to be amended consistent with CLF's August 27, 2018 status report and eliminate the need for costly and duplicative motion to dismiss briefing on the proposed second amended complaint on grounds that are identical to those raised with respect to the October 25, 2017 Amended Complaint. ECF No. 36 ¶¶ 7, 41.

Then, during an October 1, 2018 telephone conference, counsel for CLF informed counsel for Defendants that CLF intended to move for leave to amend, and stated for the first time that the proposed amended complaint would include a new claim alleging the Facility is in violation of RCRA regulations applicable to a *Large Quantity Generator* ("LQG") of hazardous waste. Defendants raised the lack of notice for the new LQG claim at that time. On October 4, 2018, CLF filed its motion for leave to file a second amended complaint, ECF. No. 36, that proposed to add a new RCRA claim (Twenty-Second Cause of Action) that stated as its basis, among other things, a violation of the RCRA regulation applicable to LQGs of hazardous waste, citing 40 C.F.R. § 262.251. *Id*. ¶ 28; *see also* ECF No. 36-2 (draft proposed second amended

complaint) ¶ 434 (citing same). None of CLF's prior notice letters, draft amended complaints shared with Defendants, or submissions to the Court made reference to the Facility's alleged LQG status or 40 C.F.R. § 262.251, or otherwise identified it as a basis for any of CLF's claims.

LEGAL STANDARD

A. Standard for Leave to Amend

Although Rule 15 gives courts discretion to allow amendments to pleadings when "justice so requires" (Fed. R. Civ. P. 15(a)(3)), courts generally do not allow amendments that would cause '"undue prejudice to the opposing party . . . .,"' are sought in bad faith, are futile, or would create "undue delay." *Acosta-Mestre v. Hilton Int'l of Puerto Rico, Inc.*, 156 F.3d 49, 51 (1st Cir. 1998) (citation omitted); *see also Villanueva v. U.S.*, 662 F.3d 124, 127 (1st Cir. 2011). In evaluating a motion to amend, the court "must consider the totality of the circumstances." *Nikitine v. Wilmington Trust Co.*, 715 F.3d 388, 390 (1st Cir. 2013). "Whether the plaintiff, by rule or court order, had a prior opportunity to amend is one data point to be taken into account . . . ." *Id.* (citation omitted). Courts have particularly broad discretion to deny a plaintiff leave to amend if the plaintiff "previously [has] amended [its] complaint." *Calderon-Serra v. Wilmington Trust Co.*, 715 F.3d 14, 20 (1st Cir. 2013).

To assess futility, the court "must apply the standard which applies to motions to dismiss under Fed. R. Civ. P. 12(b)(6)." *Morgan v. Town of Lexington, MA*, 823 F.3d 737, 742 (1st Cir. 2016). 'Futility' "means that the complaint, as amended, would fail to state a claim upon which relief could be granted." *Glassman v. Computervision Corp.*, 90 F.3d 617, 623 (1st Cir. 1996) (citation omitted).

B. RCRA Pre-Suit Notice and Delay Requirements

RCRA's citizen suit provision contains a mandatory pre-suit notice and delay requirement. 42 U.S.C. 6972(b). *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, 33 (1989) ("we hold

that where a party suing under the citizen suit provisions of RCRA fails to meet the notice and 60–day delay requirements of § 6972(b), the district court must dismiss the action as barred by the terms of the statute."); *see also Meghrig v. KFC W., Inc*., 516 U.S. 479, 486 (1996) ("a private party may not bring suit under § 6972(a)(1)(B) without first giving 90 days' notice to the Administrator of the EPA, to 'the State. . . . and to potential defendants.'") (citation omitted).

Claims alleging violations of RCRA's regulatory provisions under 42 U.S.C. 6972(a)(1)(A) must provide notice to EPA, the State, and the alleged violator at least 60 days before filing such a claim. 42 U.S.C. § 6972(b)(1)(A). The notice must contain "sufficient information to permit the recipient to identify the specific permit, standard, regulation, condition, requirement, or order which has allegedly been violated. . . ." 40 C.F.R. § 254.3(a). "The notice requirement is not a technical wrinkle or superfluous formality that federal courts may waive at will." *Garcia v. Cecos Int'l, Inc*., 761 F.2d 76, 79 (1st Cir. 1985) (affirming dismissal of RCRA citizen suit claim for failure to comply with notice requirement).

Claims that fail to comply with RCRA's notice requirement are subject to dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6). *Id*.; *LM Nursing Serv., Inc. v. Ferreira*, No. 09-CV-413-SJM-DLM, 2011 WL 1222894, at *8 (D.R.I. Mar. 30, 2011) (McAuliffe, C.J.) (dismissing claim under RCRA for failure to comply with statutory and regulatory notice requirements); *see also Brod v. Omya, Inc.*, 653 F.3d 156, 170 (2d Cir. 2011) (affirming dismissal of RCRA claims for inadequate pre-suit notice).

ARGUMENT

A. CLF's motion for leave to amend to add a new RCRA claim would be futile because CLF has not satisfied RCRA's mandatory notice and delay requirement.

Plaintiff has failed to provide the requisite notice of its proposed new claim as mandated by RCRA. As such, its amendments would be futile, and its motion should be denied.[1] RCRA provides that no citizen suit "may be commenced . . . prior to sixty days after the plaintiff has given notice of the violation to (i) the Administrator, (ii) to the State in which the alleged violations occurs, and (iii) to any alleged violator of such permit, standard, regulation, condition, requirement, prohibition, or order." 42 U.S.C. § 6972(b)(1)(A). The purpose of the RCRA notice requirement is to provide government agencies or permit holders a chance to remedy an alleged violation prior to litigation. *Furrer v. Brown*, 62 F.3d 1092, 1098 (8th Cir. 1995) (citing *Hallstrom*, 493 U.S. at 29). Notice of an alleged violation of a RCRA regulation must include "sufficient information to permit the recipient to identify the specific permit, standard, *regulation*, condition, requirement, or order which has allegedly been violated. . . ." 40 C.F.R. § 254.3(a) (emphasis added). CLF failed to provide the requisite notice here.

None of CLF's prior notice letters to Defendants specified any violation of 40 C.F.R. § 262.251, the regulation governing LQGs. Indeed, despite being alerted to the lack of notice, CLF has failed to provide a reasonable explanation, in either its motion to amend or its Proposed Second Amended Complaint, how it provided Defendants with the requisite notice of this newly minted claim. CLF states that "[s]ince late *February 2018*, Shell has been categorized as a

[1] CLF's motion for leave to amend should be denied in its entirety due to the failure to provide notice of an alleged violation of the LQG regulation at 40 C.F.R. § 262.251. Allowing CLF to amend to add additional parties and a claim that Defendants have violated RCRA CESQG regulations would result in tremendous inefficiencies, as Defendants would be required to file a motion to dismiss the proposed second amended complaint that would be nearly identical in substance to Defendants' January 12, 2018 motion to dismiss, only to have to yet again file a similar motion to dismiss after CLF provides the required notice and delay and seeks to add its new LQG claim. As described below, Defendants respectfully propose that, after the current motion is decided, the parties schedule a status conference with the Court to discuss upcoming motion to dismiss proceedings.

[LQG] of hazardous waste at the Providence Terminal." ECF No. 36 ¶ 25 (emphasis added). CLF's second notice letter, dated February 12, 2018, made no mention of 40 C.F.R. § 262.251, *see generally* ECF No. 36-1. This failure alone is sufficient to deny leave to amend. *See Hallstrom*, 493 U.S. at 33 (requiring dismissal of citizen suit where plaintiff fails to provide pre-suit notice); *LM Nursing Serv.*, 2011 WL 1222894, at *8 (dismissing RCRA claim for failure to comply with statutory and regulatory notice requirements). Moreover, no time subsequent did CLF refer to 40 C.F.R. § 262.251 or Shell's alleged status as a LQG. In CLF's August 27, 2018 status report for the Court, ECF No. 32, CLF again made no reference to Shell's alleged status as a LQG nor did it indicate any intention of expanding the additional RCRA count to include those regulations.[2] Having made no reference to LQG regulations in any of its notice letters or its communications with Defendants or the Court, CLF cannot credibly assert Defendants received sufficient notice of CLF's new RCRA claim.

CLF was obligated to provide Defendants with the grounds of its newly alleged violation of RCRA, including the regulations implicated by the alleged violations. CLF failed to provide this notice to Defendants prior to moving to amend the Amended Complaint, which is fatal to its new allegations, rendering the proposed Second Amended Complaint futile. *Hallstrom*, 493 U.S. at 33 ("we hold that where a party suing under the citizen suit provisions of RCRA fails to meet the notice and 60–day delay requirements of § 6972(b), the district court must dismiss the action as barred by the terms of the statute.")

[2] Additionally, CLF attempts a sleight of hand and mischaracterizes Defendants' prior arguments by claiming that it must "clarify" Shell's status because "Defendants have contested their status as a generator of hazardous wastes under RCRA." ECF. No. 36 ¶ 29. Defendants have made no such argument; rather, Defendants have repeatedly stated that CLF's allegations of mere "generation" of waste do not demonstrate the "handling, storage, treatment, transportation, or disposal" required to establish an imminent and substantial endangerment under RCRA. *See generally* ECF No. 20-1 at 19-28, ECF No. 25 at 10-12.

B. Allowing CLF to amend its Complaint would severely prejudice Defendants.

Defendants would be prejudiced if the Court allows CLF to add its new claim without the required notice and delay period. CLF asserts that no prejudice will result because "the facts that provide the basis of the new RCRA claim (Proposed Count Twenty-Two) were already known to both parties. . . ." ECF No. 36 ¶ 40.[3] As explained above, RCRA's notice and delay requirements demand more than disclosure of the factual basis for a claim (facts which CLF did not provide); a plaintiff must state the specific regulation alleged to have been violated. *See* 40 C.F.R. § 254.3. This is particularly significant here where CLF has expanded its proposed claim to include an entirely new regulatory standard with its own unique set of legal requirements that had not been at issue in the case. The First Circuit requires strict compliance with RCRA's notice and delay requirements to, among other things, comport with Congress' intent to provide both the alleged violator and the regulatory authorities an opportunity to address the alleged violation before claims proceed. *See Garcia*, 761 F.2d at 80-81 (discussing reasons for strict compliance with notice requirements). To permit CLF to amend its complaint to add a new claim alleging violations of a regulation for which Defendants never received notice prejudices Defendants by stripping them of this critical right under the statute, and would be contrary to RCRA's plain language and policy.

C. Allowing CLF to amend would cause additional and significant undue delays.

CLF's motion for leave to amend has unnecessarily delayed ruling on a motion to dismiss that could have substantially narrowed the scope of this case, and if granted, will cause even more delays.

[3] The cases CLF cites do not excuse its failure to provide notice; they are inapposite because statutory pre-suit notice was not even at issue in those cases. *See, e.g., Popp Telecom v. Am. Sharecom, Inc.*, 210 F.3d 928, 943 (8th Cir. 2000) (allowing addition of new claims not subject to any pre-suit notice requirements). Knowing the underlying facts (or having that information available) is irrelevant; courts require strict compliance with RCRA's notice requirements. *See Garcia v. Cecos Int'l, Inc*., 761 F.2d 76, 79 (1st Cir. 1985) (noting courts must not treat notice requirement as simple formality).

Contrary to CLF's claim, this case is not in "its earliest stages." ECF No. 36 ¶ 38. Rather, the parties and the Court have invested significant time and resources briefing and arguing core issues raised by CLF's amended complaint (and that remain in CLF's proposed second amended complaint). CLF represented to Defendants and to the Court in its August 27, 2018 status report that it met the statutory requirements for amending its complaint. Based on the face of CLF's notice letters and the proposed second amended complaint that has been filed, CLF had not. As a result of that representation, the Court dismissed without prejudice a motion to dismiss that was fully briefed and argued, subject to refilling against CLF's second amended complaint. These actions by CLF actions have derailed the orderly plan for amendment stipulated to by the parties[4] and already caused unnecessary delays in this case.

CLF's failure to provide notice of the purported grounds for a new RCRA claim effectively guarantees this matter will be further delayed — and result in several inefficiencies — if the Court allows leave to amend. If leave is granted, Defendants will be required to move to dismiss, including on the basis of CLF's failure to provide notice, then wait for RCRA's mandatory notice and 60–day delay requirements to be satisfied, then CLF will need to seek leave to amend again, and then another round of motion to dismiss briefing will ensue (on the same issues that were briefed to the Court on CLF's earlier amended complaint.) These delays are unnecessary, and CLF's motion for leave should be denied for this independent reason as well.

[4] Specifically, CLF has disregarded the parties' January 30, 2018 stipulation, which was entered by the Court on February 1, and contained an agreement that CLF would not seek leave to amend until after the Court ruled on the pending motion to dismiss. Defendants sought this agreement in an effort to minimize the need to re-brief the issues raised in Defendants' first motion to dismiss.

CONCLUSION

CLF's motion for leave to amend must be denied. CLF seeks to add a RCRA claim under 40 C.F.R. § 262.251 that is futile, because CLF has indisputably failed to provide the mandatory pre-suit notice of an alleged violation of 40 C.F.R. § 262.251 and the 60-day delay period required by both statute and regulation. Denial of Defendants' right to proper notice and delay with respect to this brand new claim severely prejudices Defendants, who (along with EPA and the State) are entitled to assess the allegations of non-compliance and take action, if necessary, before a citizen suit claim is filed. CLF's proposed amendment will also result in significant and unnecessary delays and duplicative briefing if leave to amend is granted.

Defendants respectfully propose that, after the present motion is decided, the parties schedule a status conference with the Court to discuss upcoming proceedings in this case, including with respect to a motion to dismiss.

Dated: October 18, 2018

Respectfully submitted,

/s/John S. Guttmann
John S. Guttmann*
Beveridge & Diamond, P.C.
1350 I Street, NW, Suite 700
Washington, DC 20005
(202) 789-6020
Fax (202) 789-6190
jguttmann@bdlaw.com

/s/ Robert D. Fine
Robert D. Fine (2447)
Chace, Ruttenberg & Freedman, LLP
One Park Roy, Suite 300
Providence, RI 02903
(401) 453-6400
Fax (401) 453-6411
rfine@crfllp.com

/s/ Bina Reddy
Bina Reddy*
Beveridge & Diamond, P.C.
98 San Jacinto Blvd. Suite 1420
Austin, Texas 78701
(512) 391-8045
Fax (512) 391-8099
breddy@bdlaw.com

Counsel for Defendants

**Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2018, the foregoing Defendants' Opposition To Plaintiff's Motion For Leave To File Second Amended Complaint was filed through the Court's electronic filing system ("ECF"), by which means the document is available for viewing and downloading from the ECF system and a copy of the filing will be sent electronically to all parties registered with the ECF system.

/s/ Bina Reddy
Bina Reddy