

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS  
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT  
ADMINISTRATIVE ADJUDICATION DIVISION

IN RE: D.T.P., Inc.  
Notice of Violation No. UST 726

DECISION AND ORDER  
ON THE STATE'S REQUEST TO AMEND A VIOLATION

On February 22, 1993, the Department of Environmental Management ("DEM") moved to amend notice of violation and penalty ("NOVAP") No. 726 issued in December, 1988, against Respondent D.T.P., Inc. The State provided the Hearing Officer and the Respondent with a complete copy of the intended complaint. The Company objected to DEM's request on February 26, 1993 and denied the allegations therein.

The Rhode Island Superior Court Rules of Civil Procedure ("the Rules") Rule 15(a) allow a party to amend a complaint by leave of court. The Supreme Court has held in the matter of Inleasing Corp. v. Jessup, 475 A.2d 989, 992 (1984) that Rule 15(a) is to be liberally construed. Barring substantial prejudice to the non-moving party, the motion is to be granted. Id. at 992.

A review of the Department's request show that DEM has also alleged subsequent violations. Rule 15(d) addresses supplemental pleadings and permits a party to serve these pleadings at the discretion of the court. The Supreme Court

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has determined that a supplemental complaint is not barred simply because it sets forth new claims of relief. Black v. Black, 119 RI 127, 377 A.2d 1308 (1977).

It is the burden of the party opposing the motion to amend to show a compelling reason warranting dismissal of the amended complaint, such as substantial prejudice. Zenith Radio Co. v. Hazeltine Research, Inc., 401 US 321, 91 S. Ct. 795, 28 L.Ed.2d 77 (1971).

The Respondent is unable to present any arguments to persuade this tribunal that the company would sustain substantial prejudice if the State is allowed to amend its complaint. Since the hearing on this matter has not commenced, is not scheduled for approximately four weeks and discovery has not yet been completed, the Respondent is not prejudiced by the Department's motion. Therefore, the State's request to amend violation No. 726 is granted.

The State has provided this tribunal with a copy of the amended violation it wishes to serve on D.T.P., Inc., and a copy of a cover letter sent to the Respondent on February 22, 1993 explaining that DEM had filed a motion to amend.

Pursuant to Rule 15, the Hearing Officer has reviewed the amended complaint and finds Section G of the amended violation entitled, "Right to an Adjudicatory Hearing" contains misinformation which must be corrected.

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The requirements that State has set forth in Section G(2) a-e and G(3) - G(6) on pages 5 and 6 of the amended complaint are in error. This section informs the Respondent of his right to an adjudicatory hearing pursuant to R.I.G.L.

42-17.1-2(u), 42-17.6-4 and 42-35; the violation further explains that the Respondent must request a hearing and outlines the criteria which must be followed to request that hearing. The substance of the information supplied to Respondent is correct but does not apply to an amended violation. Violation No. 726 is an existing violation to which Respondent has already requested an adjudicatory hearing. By choosing to amend this violation, DEM has alleviated the Respondent from the responsibility of complying with statutory requirements for requesting a hearing. Had the State issued a new NOV, requirements for requesting a hearing as set forth in the amended complaint would be applicable.

The Department should have substituted the hearing request language in Section (G) with language that gives sufficient notice to the Respondent of his obligation under Rule 15(a) to answer new allegations.

The Hearing Officer has also reviewed the cover letter sent to D.T.P., Inc. This letter contains the same misinformation as in the amended complaint. Unfortunately, the proposed amended complaint and cover letter containing the

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misinformation has already been forwarded to the Respondent. It is now incumbent upon DEM to immediately correct this error. In response to the Department's motion to amend, the Hearing Officer enters the following order:

ORDERED

1. That the Department of Environmental Management Request to amend Notice of Violation No. 726 is granted.
2. That the amended Notice of Violation submitted to this tribunal is an acceptable complaint with the exception of the Section G "Right to Administrative Hearing" which is to be deleted from the complaint.
3. That a new request for hearing is not required when a respondent is served with an amended complaint.
4. That the State is to provide a Respondent with adequate notice of any obligations under Rule 15 to answer the amended complaint.

Entered as an Administrative Order this 17<sup>th</sup> day of March, 1993.

  
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Patricia Byrnes  
Hearing Officer  
Department of Environmental Management  
Administrative Adjudication Division  
One Capitol Hill, Third Floor  
Providence, RI 02908

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CERTIFICATION

I hereby certify that I caused a true copy of the within Decision and Order on the State's Request to Amend a Violation to be forwarded via regular mail, postage prepaid to George Potter, President, D.T.P., Inc., 83 Merrymount Avenue, Warwick, RI 02886 and via interoffice mail to Brian A. Wagner, Esq., Office of Legal Services, 9 Hayes Street, Providence, RI 02908 on this 18th day of March, 1993.

Tracy Shields

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