

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION**

NATURAL RESOURCES DEFENSE)	
COUNCIL, INC.,)	
Plaintiff,)	
)	
v.)	CAUSE NO.: 2:08-CV-204-PPS-PRC
)	
BP PRODUCTS NORTH AMERICA,)	
INC.,)	
Defendant.)	

OPINION AND ORDER

This matter is before the Court on Plaintiff's Motion for Leave to Amend the Complaint [DE 29], filed by Plaintiff on November 5, 2008. On November 18, 2008, Defendant filed a Memorandum in Opposition to Plaintiff's Motion for Leave to Amend the Complaint, and on November 25, 2008, Plaintiff filed its Reply Memorandum in Support of Motion for Leave to Amend the Complaint.

PROCEDURAL AND FACTUAL BACKGROUND

On July 9, 2008, Plaintiff filed a Complaint alleging that Defendant violated the Clean Air Act ("CAA") by engaging in construction of a \$4 billion expansion of its refinery in Whiting, Indiana without a preconstruction permit as required by Parts C and D of subchapter I of the CAA, 42 U.S.C. §§ 7475 and 7503. In particular, the Complaint alleges that in 2006, Defendant applied to the Indiana Department of Environmental Management ("the IDEM") for a CAA major source permit for a proposed expansion of its Whiting, Indiana refinery. In October 2007, Defendant withdrew its application for a major source permit and submitted a new application to the IDEM for

a state-only minor source permit, based on the assertion that the proposed expansion would not trigger the CAA major source permitting requirements. On May 1, 2008, the IDEM subsequently granted the minor source permit to Defendant for the proposed expansion (“the Canadian Crude Project”). Plaintiff’s Complaint alleges that the expansion actually required a major source permit pursuant to Parts C and D of subchapter I of the CAA.

On August 6, 2008, Defendant Filed a Motion to Dismiss. On September 12, 2008, Plaintiff filed a Memorandum in Opposition to Defendant’s Motion to Dismiss. Defendant filed a reply brief on September 29, 2008.

On November 5, 2008, Plaintiff filed a Motion for Leave to Amend the Complaint. Plaintiff seeks to amend the Complaint to add new claims and allegations that Defendant has been in violation of the CAA since 2005 by constructing a major modification without a major source permit. In particular, Plaintiff alleges that on October 2, 2008, the Environmental Protection Agency Region 5 issued an amendment to a CAA Notice of Violation that it originally issued in November 2007. The November 2007 Notice of Violation alleged that a 2005 “turnaround projection” (“TAR Project”) at a fluidized cracking unit in the refinery was a major modification that Defendant constructed without a permit in violation of the CAA. The October 2, 2008 Amendment found that the 2005 TAR Project was not only itself a major modification, but was the initial stage in the construction of a larger expansion project, which included the Canadian Crude Project. Plaintiff also argues that the permit issued for the Canadian Crude Project was insufficient to cure the Defendant’s ongoing CAA violations in failing to obtain a major source permit for the TAR Project. Plaintiff represents that it first became aware of the new claims against Defendant when the October 2, 2008 Amendment was issued.

Defendant filed a Memorandum in Opposition on November 18, 2008. On November 25, 2008, Plaintiff filed a Reply Memorandum.

ANALYSIS

Federal Rule of Civil Procedure 15(a)(2) provides that “a party may amend its pleading only with . . . the court’s leave.” Fed. R. Civ. P. 15(a)(2). Rule 15(a)(2) further provides that the court “should freely give leave when justice so requires.” *Id.* Thus, if the underlying facts or circumstances relied upon by a plaintiff are a potentially proper subject of relief, the party should be afforded an opportunity to test the claim on the merits. *Foman v. Davis*, 371 U.S. 178, 182 (1962). The decision whether to grant or deny a motion to amend lies within the sound discretion of the district court. *Campbell v. Ingersoll Milling Mach. Co.*, 893 F.2d 925, 927 (7th Cir. 1990). However, leave to amend is “inappropriate where there is undue delay, bad faith, dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of the amendment.” *Villa v. City of Chicago*, 924 F.2d 629, 632 (7th Cir. 1991) (citing *Foman*, 371 U.S. at 183). An amendment is considered “futile” if it would not withstand a motion to dismiss. *Vargas-Harrison v. Racine Unified Sch. Dist.*, 272 F.3d 964, 974 (7th Cir. 2001). Nevertheless, unless it is clear from the face of the complaint that the amendment would be futile, such that “it appears to a certainty that plaintiff cannot state a claim,” the district court should grant leave to amend. *Barry Aviation Inc. v. Land O’Lakes Mun. Airport Comm’n*, 377 F.3d 682, 687 (7th Cir. 2004)(citing *Bisciglia v. Kenosha Unified Sch. Dist. No. 1*, 45 F.3d 223, 230 (7th Cir.1995); *Rohler v. TRW, Inc.*, 576 F.2d 1260, 1266 (7th Cir.1978); *Austin v. House of Vision, Inc.*, 385 F.2d 171, 172

(7th Cir.1967) (per curiam); *Polich v. Burlington N., Inc.*, 942 F.2d 1467, 1472 (9th Cir.1991); *Garcia v. City of Chicago*, 24 F.3d 966, 970 (7th Cir.1994)).

Defendant argues in its Memorandum in Opposition that leave to amend should be denied as futile because the new allegations in Plaintiff's Amended Complaint challenge, as in the original Complaint, the adequacy of the permit issued for the Canadian Crude Project, for which there are adequate state law remedies. Defendant also argues that the Court is required to abstain from exercising jurisdiction over this matter because of appellate proceedings that are already underway before the Indiana Office of Environmental Adjudication ("OEA").¹

Plaintiff argues in its Reply Memorandum that, unlike the original Complaint, the new allegations and claims in the Amended Complaint do not attack the sufficiency of the minor permit issued for the Canadian Crude Project, but instead allege ongoing violations of the CAA by failure to obtain the major source permit for the TAR Project.

Having reviewed the instant Motion and Plaintiff's Amended Complaint, the Court concludes that Plaintiff's proposed amendments focus on Defendant's alleged CAA violation in its failure to obtain a major source permit for the TAR Project, rather than the sufficiency of the minor source permit for the Canadian Crude Project. Although Plaintiff's amendments do allege that the Canadian Crude Project is part of a larger expansion plan that began with the TAR Project, Plaintiff's primary focus with the proposed amendments is on the separate 2005 CAA violation related to the TAR Project. Additionally, Defendant's Response brief implicitly acknowledges that it did not have a permit for the TAR Project. *See* Def.'s Resp. Br. 3-4 (stating that "BP concedes that this Court

¹ Plaintiff is also currently challenging the adequacy of the minor source permit for the Canadian Crude Project in front of the OEA.

might well have had jurisdiction over this claim in 2005 . . . 2006 or 2007 or early 2008, after the turnaround was complete but before BP had received its permit to construct its Canadian Crude Project. But today, BP does have a permit and is constructing its [Canadian Crude] project pursuant to that permit.”). Accordingly, the Court cannot say with certainty from the face of the proposed amendments that Plaintiff’s Amended Complaint fails to state a claim under the CAA. Therefore, the Court cannot say at this point that Plaintiff’s Amended Complaint would be futile.²

Given the liberal standard that applies when deciding whether to grant a motion to amend a complaint, the Court finds, in the interest of justice, that the Plaintiffs’ Motion for Leave to Amend the Complaint should be granted.

CONCLUSION

For the foregoing reasons, the Court hereby **GRANTS** the Plaintiff’s Motion for Leave to Amend the Complaint [DE 29]. The Court **ORDERS** the Plaintiff to **FILE** the Amended Complaint on or before **December 3, 2008**.

SO ORDERED this 26th day of November, 2008.

s/ Paul R. Cherry
MAGISTRATE JUDGE PAUL R. CHERRY
UNITED STATES DISTRICT COURT

cc: All counsel of record.

² Defendant does not argue that there is undue delay, bad faith, dilatory motive on Plaintiff’s behalf, or undue prejudice in permitting Plaintiff to amend its Complaint.