UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

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| HUGH B. KAUFMAN, | ) | |
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| Complainant, | ) | |
| | ) | |
| v. | ) | No. 2002-CAA-00022 |
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| UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, | ) | |
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| | ) | |
| Respondent. | ) | |

RESPONDENT'S OPPOSITION TO COMPLAINANT'S MOTION TO AMEND

After delaying for over six years since filing his complaints; after discovery has all but closed; and after indications that these much-delayed proceedings should be set for hearing; Complainant has moved to amend and supplement his complaints. The United States Environmental Protection Agency ("EPA" or the "Agency"), Respondent, opposes Complainant's belated request and respectfully requests that Complainant's Motion for Leave to File an Amended and Supplemental Complaint be denied.

**BACKGROUND**

On April 3, 2001, Complainant filed his first complaint of discrimination under the employee protection or nondiscrimination provisions of various environmental statutes. Complainant alleged that he had engaged in "protected activity" and that EPA "he was subject to the following illegal retaliation:"

1. On March 16, 2001, I was prohibited from performing investigations for the EPA Ombudsman;
2. I was badmouthed by my employer;
3. Investigations of my open cases have been improperly hindered, impeded and obstructed.

Complainant's April 3, 2001 "Complaint and Request for Relief" (the "First Complaint"), at 1-2.

On or about May 2, 2001, Complainant made a second complaint against EPA (the "Second Complaint"). In addition to the same provisions of the six environmental statutes relied upon in the First Complaint, Complainant sought relief under the employee protection provision of the Energy Reorganization Act, 42 U.S.C. § 5851. Second Complaint at 1. Complainant reasserted that he had engaged in protected activity and realleged the same incidents of retaliation, adding only the claim that: "On April 6, 2001, I was prohibited from being reassigned to Office of Solid Waste and Emergency Response Ombudsman Robert Martin in a vacant position assigned to him." *Id.* at 1-2.

Complainant submitted with his Second Complaint a "Chronology of Key Events" (the "Chronology").[1] The Chronology elaborates on the alleged incidents of retaliation identified in the complaints. Concerning the allegation that he was prohibited on March 16, 2001 from performing work for the ombudsman, for example, the Chronology states that "Acting Assistant Administrator Michael Shapiro prohibits me from performing my duties in my Position Description in assisting the National Ombudsman." Chronology at 2. Concerning the allegation in the Second Complaint that EPA retaliated against Complainant on April 6, 2001, when he was allegedly "prohibited from being reassigned" to work for "Ombudsman Robert Martin in a vacant position assigned to him," the Chronology states that "Acting Assistant Administrator

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[1]It appears that Complainant, in fact, submitted two, slightly different chronologies, the first accompanied his Second Complaint and was dated May 2, 2001 and the other, marked "updated May 3, 2001," was apparently submitted the following day. Except where otherwise indicated, references, here, are to the "updated" May 3, 2001 chronology. Accompanying the Chronology was a copy of an April 30, 2001 letter from Michael H. Shapiro to the Mayor of Throop Borough, Pennsylvania.

Shapiro refuse[d] National Ombudsman Martin's request to have me reassigned to Ombudsman Martin in a vacant position assigned to him." *Id.*

The First and Second Complaints were forwarded to an OSHA investigator in accordance with 29 C.F.R. § 24.4.[2] By notice dated July 12, 2002, an OSHA Regional Administrator reported the results of OSHA's investigation of the Complaints and recommended a finding that EPA had violated the employee protection provisions of various environmental statutes. In accordance with provisions of the various environmental statutes relied upon by Complainant and 29 C.F.R. § 24.4(d),[3] EPA requested a hearing on the First and Second Complaints.

On August 6, 2002, EPA filed a Motion to Dismiss, or in the alternative, for Summary Decision. On September 30, 2002, the presiding Administrative Law Judge issued an Order Granting Partial Summary Decision. In part, the Order Granting Partial Summary Decision dismissed Complainant's claims under the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §2622, and the Energy Reorganization Act ("ERA"), 42 U.S.C. §5851. The Order Granting Partial Summary Decision also rejected Complainant's claims of "badmouthing."

The parties subsequently engaged in a lengthy, protracted period of pre-hearing discovery.[4] In seeking discovery relating to the issues framed by Complainant's complaints, as

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[2]By interim final rule, effective August 10, 2007, new procedures for handling complaints under the environmental employee protection provisions have been issued. *See* 72 Fed. Reg. 44956 (Aug. 10, 2007). Citations, herein, are variously made to the procedural rules in existence at the time Complainant filed his complaints or the current rules, or both, depending, in large part, on the time period in question.

[3]New 29 C.F.R §24.106.

[4]The Complainant's extensive discovery requests have been catalogued and described, elsewhere, and will not be detailed again, here. The November 29, 2007 Order Granting Respondent's Motion for Protective Order and Denying Complainant's Motion to Continue

narrowed by the September 30, 2002 Order Granting Partial Summary Decision, EPA served, on October 11, 2002, Respondent's First Set of Interrogatories to Complainant and Respondent's First Request for Production of Documents. In December 2002, EPA deposed Complainant. EPA has served no other discovery requests and taken no other depositions.

On March 16, 2006, this matter was set for a hearing in June 2006 because "it appears that this matter is ready to proceed to hearing." *See* March 10, 2006 Notice of Hearing. The scheduled hearing was subsequently postponed and, at one time, rescheduled for May 2007. *See* February 20, 2007 Order. The presiding Administrative Law Judge has more than once signaled that pre-hearing proceedings should conclude and that this matter should be ripe for hearing. The recently issued Order Granting Respondent's Motion for Protective Order and Denying Complainant's Motion to Continue Discovery Period (November 29, 2007), for example, indicated that discovery should be substantially complete.

## ARGUMENT

1. The Proposed Amended Complaint.

Complainant's "First Amended and Supplemental Complaint"[5] ("Amended Complaint") is, without counting attachments or exhibits, 122 pages long. The "Statement of Facts" portion of the Amended Complaint, alone, is 100 pages. In the "Retaliatory Conduct" portion of the Amended Complaint (pages 103-120), Complainant alleges a wide array of "general retaliatory

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Discovery Period, for example, recently described Complainant's "extensive and prolonged discovery."

[5]This is arguably a misnomer, because, as discussed above, Complainant filed the First Complaint in April 2001 and the Second Complaint–in actuality a "first amended complaint"–in May 2001. Accordingly, the instant proposed amended complaint is properly regarded as Complainant's second, not first, amended complaint.

conduct" and "specific retaliatory acts." Complainant also describes, at length, various alleged "protected activities," many of which were not asserted in the First or Second Complaint. In addition, many of the newly claimed retaliatory acts also were not included within the First and Second Complaints, including some which could not have been so included because they relate to events occurring after Second Complaint. Indeed, the so-called Amended Complaint is more truly a wholly new complaint.

Complainant's numerous new allegations of retaliation include: Complainant claims that EPA retaliated against him on December 14, 2000 by removing his ombudsman duties. Amended Complaint, ¶¶ 392-98. Complainant claims that EPA retaliated against him on March 5, 2001 by assigning ombudsman duties to another employee, Barry Stoll. *Id.*, ¶¶ 399-403. Complainant claims that EPA retaliated against him by failing to reassign him to ombudsman duties during the period March 2001-January 2002. *Id.*, ¶¶ 404-408. Complainant claims that EPA retaliated against him on April 16, 2001 by refusing to promote him. *Id.*, ¶¶ 419-23. Complainant claims that EPA retaliated against him on May 22, 2001 by refusing to promote him. Id., ¶¶ 424-28. Complainant claims that EPA retaliated against him by "eliminating" the OSWER ombudsman position in November 2001; by failing to establish an "appropriate" ombudsman position in the Office of Inspector General; and by "barring" him from consideration for a position in the Office of Inspector General. *Id.*, ¶¶ 429-33. Complainant claims that EPA retaliated against him on April 12, 2002 by effecting the transfer of the ombudsman function to the Office of Inspector General. *Id.*, ¶¶ 434-38. Complainant claims that EPA retaliated against him by subjecting him to a hostile work environment from June 2000 to April 12, 2002. *Id.*, ¶¶ 439-444. Complainant claims that EPA retaliated against him by engaging in a "systematic

policy of discrimination against" ombudsman staff, including Complainant. *Id.*, ¶¶ 445-449. Associated with these claims of retaliation are literally dozens of pages of newly-alleged factual contentions. Complainant now also makes a claim for punitive damages, as well as other forms of relief not previously demanded.

2. Standards, Generally, for Amended and Supplemental Complaints.

At the time Complainant filed his First and Second Complaints, no particular form of complaint was required, but Complainant was required to make a complaint in writing, which "should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violation." 29 C.F.R. §24.4 (now 29 C.F.R. §24.103).[6] Presumably heeding that requirement, Complainant filed in April and May 2001 his First and Second Complaints, alleging that he had engaged in protected activity and that EPA had retaliated against him in various respects, constituting a "full statement" of the claimed violations. Complainant's new Amended Complaint gives lie to that supposition.

The procedures specifically applicable to proceedings for handling complaints under the environmental employee protection provisions do not provide for amended complaints. The procedures do, however, generally provide that "[e]xcept as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges." 29 C.F.R. §24.107(a) (current rules). Those rules of practice and procedure do provide for amendments and supplemental pleadings:

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[6]No answer is provided for in the rules specifically applicable to proceedings for the handling of complaints under the environmental employee protection statutes. Rather, the filing of a complaint triggers an investigative process, in the course of which, the Assistant Secretary notifies the respondent of the filing of a complaint. 29 C.F.R. §24.104 (current rules).

"whenever determination of a controversy on the merits will be facilitated thereby, the administrative law judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to complaints, answers, or other pleadings." 29 C.F.R. §18.5(e). A complaint may be amended "once as a matter of right prior to the answer, and thereafter if the administrative law judge determines that the amendment is reasonably within the scope of the original complaint." *Id.* In addition, the "administrative law judge may, upon reasonable notice and such terms as are just, permit supplemental pleadings setting forth transactions, occurrences or events which have happened since the date of the pleadings and which are relevant to any of the issues involved." *Id.*

There are distinctions between amended and supplemental pleadings: "**amended** pleadings generally incorporate matters occurring before the filing of the original pleading and replace the pleading in its entirety, **supplemental** pleadings address events subsequent to the original pleading and represent a continuation of that pleading." *Ruud v. Westinghouse Hanford Co.*, ARB No. 96-087, 1997 DOL Ad. Rev. Bd. LEXIS 40 *53 (emphasis original). In practice, however, the "formal distinction" between the two is often of "no consequence," as similar discretion is exercised in either event. *Id.* "Supplementation should be freely permitted absent a showing by the opposing party of undue delay, bad faith, dilatory motive, or prejudice." *Id.* at 1997 DOL Ad. Rev. Bd. LEXIS 40, *53-4.

3. Leave to Amend or Supplement Should be Denied Because of Complainant's Undue Delay and Prejudice.

Complainant has delayed seeking leave to amend for over six years. By any measure, such delay is "undue," and his motion should be denied. Leave to amend (or supplement) has

frequently been denied because of delay: *Walker v. UPS, Inc.*, 240 F.3d 1268, 1278-79 (10th Cir. 2001) (motion to supplement made one year after case filed made too "late in the day"); *Glatt v. Chicago Park District*, 87 F.3d 190, 194 (7th Cir. 1996) (motion to supplement rejected where, among other considerations, the "claim could have been added earlier"); *Atchinson v. District of Columbia*, 73 F.3d 418, 427 (D.C. Cir. 1996) (leave to amend denied where plaintiff "did not move to amend until nearly two years after filing his complaint–on the eve of trial, when discovery was complete"); *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 247-48 (D.C. Cir. 1987) (denial of leave to amend "fully warranted" where "so much time has passed and where the movant has an abundant opportunity over the course of a half-dozen years to raise the issue"); *Isaac v. Harvard University*, 769 F.2d 817 (1st Cir. 1985) (no abuse of discretion in denying motion to amend made nearly four years after complaint filed); *Twin Disc, Inc. v. Big Bud Tractor, Inc.*, 772 F. 2d 1329, 1338 (7th Cir. 1985) (no error in denying motion to supplement complaint four years after filing of original complaint and shortly before trial); *Nilsen v. City of Moss Point, Mississippi*, 621 F.2d 117, 121-22 (5th Cir. 1980) (leave to amend made over one year after case filed denied because of plaintiff's "dilatoriness"); *Debry v. Transamerica Corp.*, 601 F.2d 480, 492 (10th Cir. 1979) (third amended complaint denied where "the case had been on file for eighteen months" and "the trial setting was three months off"); *Bradick v. Israel*, 377 F.2d 262, 263 (2d Cir. 1967) (no abuse of discretion in denying leave to amend where motion made "more than four years after the filing of the original complaint" and on "the eve of trial"); *Sidari v. Orleans County*, 169 F.Supp.2d 158, 162-63 (W.D. N.Y. 2000) (leave to supplement denied where new claims were "raised three years after the action was commenced and after significant discovery").

Here, Complainant seeks to amend and supplement his complaint **over six years** after filing his First and Second Complaints. Here, it is clear that Complainant's lengthy delay in seeking leave to amend is repugnant to the statutory and regulatory provisions requiring prompt submission and disposition of claims under the various employee protection provisions in question. The employee protection or antidiscrimination provisions of CERCLA, the Clean Air Act, the Federal Water Pollution Control Act, the Solid Waste Disposal Act, and the Safe Drinking Water Act all provide that employees, such as Complainant, must file a complaint with DOL within a relatively short 30 days after the alleged violation occurs. 42 U.S.C. § 9610(b); 42 U.S.C. § 7622(b); 33 U.S.C. § 1367(b); 42 U.S.C. § 6971(b); 42 U.S.C. § 300j-9(i)(2)(A). *See also* 29 C.F.R. § 24.3(b) (a complaint "shall be filed within 30 days after the occurrence of the alleged violation") (currently, under 29 C.F.R. §24.103(d), a complaint may be filed "within 30 days after an alleged violation).

Moreover, in addition to prescribing a short complaint filing period, Congress has also provided that claims of discrimination under the environmental employee protection provisions must speedily be resolved. Under the Clean Air Act, for example:

> Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of the settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint.

42 U.S.C. §7622(b)(2)(A); *see also* SDWA, 42 U.S.C. §300j-9(i)(2)(B)(I). Newly promulgated regulations reaffirm the need for speedy resolution of proceedings under the environmental employee protection provisions: the "hearing is to commence expeditiously, except upon a

showing of good cause or otherwise agreed to by the parties."[7] 29 C.F.R. §24.107(b). Indeed, the Administrative Law Judges are expressly granted "broad discretion to limit discovery in order to expedite the hearing." *Id.*

Well over 90 days have elapsed since Complainant's First and Second Complaints, and, contrary to the statutory requirements, there has been no final order either providing the relief requested or denying the complaints. Complainant's lengthy delay in seeking leave to amend and supplement his complaints is not only undue, it makes a mockery of the applicable statutory and regulatory speedy trial provisions.

Furthermore, to permit Complainant's requested amendment and supplementation would not only condone his delay, thus far, but would likely engender further significant delay of these proceedings. Complainant's proposed Amended Complaint is, by any measure, substantially different than his First and Second Complaints. Complainant details dozens of pages of specific factual contentions, alleging assorted protected activities and the addressing the conduct of various present or former EPA officials, as well as numerous individuals outside EPA. He seeks to add a number of new claims, several of which postdate his First and Second Complaints and extend into late 2001 and 2002. Indeed, in his motion for leave to amend, he admits that his proposed Amended Complaint asserts "eleven claims," including "nine new specific claims." Complainant's Motion for Leave, at 16. He claims, for example, that throughout 2001 and until at least January 12, 2002, EPA did "not consider [him] for vacant positions." Amended Complaint, ¶¶ 405-06. He also claims that EPA retaliated against him on or after November

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[7]Of course, Respondent has entered into no agreement to waive the requirement for expeditious hearing in these proceedings. To the contrary, Respondent has, on more than one occasion in the course of these proceedings, requested more speedier resolution of the claims.

2001 by deciding to transfer the ombudsman function from OSWER to the Office of Inspector General (OIG) and by barring him "from applying for any position at the transferred 'Ombudsman' function." *Id.*, ¶ 430. He also claims that EPA retaliated against him in April 2002 by effecting the transfer of the ombudsman function to OIG. Id., ¶¶ 434-38. He advances a new "hostile environment" claim, including within that claim allegations relating to conduct occurring as late as February 2002. *Id.*, ¶ 442. He claims, generally, that over a broad span of time running to April 2002, EPA "practiced systematic policy of discrimination."

Despite Complainant's suggestion that these claims are "similar in time and nature to the original claims," none of the claims were encompassed within his First and Second Complaints. Indeed, because the claims rely on events occurring after May 2001, none of those claims could have been included in First and Second Complaints. Of course, the single set of interrogatories and document requests and the deposition inquiry (of Complainant) conducted by EPA in late 2002 did not address these newly stated claims and allegations, but were developed, instead, in light of the claims that were raised in the First and Second Complaints. If Complainant were granted leave to amend and supplement, EPA would be required to determine what further, additional discovery may be required related to Complainant's new and expanded claims and allegations. It is probable that further discovery will be necessary.

Despite the fact that the presiding Administrative Law Judge has repeatedly indicated that this matter should be set for hearing and that discovery should be concluded, the unavoidable consequence of granting Complainant's request to amend and supplement will be to encourage further discovery and to further delay any hearing. In addition, in light of the significant new claims and allegations advanced by Complainant, the range and nature of issues to be heard may

be substantially broadened and complicated. Undoubtedly, further prehearing motions practice will be undertaken by the parties. There can be little doubt that Complainant's proposed Amended Complaint will lead to significant further delay of these already protracted proceedings. Complainant, himself, indicates that further delay is likely by suggesting that any alleged "detrimental effect" of these new claims can "be cured by a continuance of the imposition of some other condition on allowing the amendment." Complainant's Motion for Leave, at 20 (citing Ruud v. Westinghouse Hanford Co., 88-ERA-33).

The further delay and complication associated with Complainant's proposed Amended Complaint may be particularly severe in light of Complainant's new allegations and claims that relate to EPA's Office of Inspector General ("OIG"). The Amended Complaint makes, explicitly or implicitly, allegations about the conduct or activities of the OIG employees. Complainant, for example, makes allegations about meetings and communications with "OIG representatives," including OIG Counsel, Mark Bialek, and "an Assistant Inspector General." Amended Complaint, ¶ 36; *see also* Amended Complaint, ¶¶ 45, 70. Complainant also claims that the decision to transfer the ombudsman function to OIG was retaliatory and that he was "barred" from working in OIG. Id., ¶¶ 429-38. With regard to the transfer to OIG, he alleges that the former Inspector General, Nikki Tinsley, herself, met to discuss the decision and "specifically discussed" his role. Id., ¶ 240. Complainant also makes a number specific allegations about how OIG established or managed the transferred ombudsman function and about OIG communications relating to the matter. *See, for example*, Amended Complaint, ¶¶ 245-247, 254-262.

OIG was established by the Inspector General Act of 1978, as amended. (The Act is set out as an Appendix to Title 5, United States Code. *See* http://www.epa.gov/oig/igact.pdf) Consistent with the Inspector General Act, OIG is an independent office within EPA. http://www.epa.gov/oig/about_epa_oig.htm. Importantly, OIG has its own Office of Counsel, separate from the Agency's Office of General Counsel, that "provides independent legal and policy advice to all components of the Office of the Inspector General (OIG) on a variety of substantive and procedural matters relating to the OIG's audit, program evaluation, investigation, and Ombudsman activities." http://www.epa.gov/oig/organization/oc.htm. OIG Counsel represents OIG in various administrative proceedings, including proceedings before the United States Department of Labor. *Id.* Even if OIG Counsel does not seek to appear in these proceedings, Complainant's numerous new and substantial claims and allegations concerning OIG employees and activities, will, at a minimum, require Agency Counsel and OIG Counsel to confer and coordinate responses to Complainant's OIG claims.

The delay, thus far, has already had created potential prejudice for the Agency, which is magnified by the Amended Complaint and only grows greater with further delay. Witness' recollections do not grow fresher and more reliable with the passage of time. Also, particular issues and facts may be less readily recalled if, in the ensuing years, there have been significant program changes or if witnesses have undertaken new responsibilities or pursued other areas of interest. Indeed, because of the passage of time, witnesses may become practically, if not entirely, unavailable.

Here, a preliminary review indicates that a number of important witnesses or persons with knowledge relating to the broader, expanded claims of the proposed Amended Complaint have

either moved into new positions with significantly different responsibilities or have left the Agency altogether.[8] For the first time, Complainant now claims–for example–that the Agency retaliated against him in December 2000 when former OSWER Assistant Administrator Timothy Fields decided that he would no longer perform ombudsman duties. Amended Complaint, ¶¶ 392-98. Mr. Fields, however, is no longer employed by EPA. Declaration of Michael Shapiro ("Shapiro Decl."), attached as Exhibit 1. In addition and as discussed above, Complainant makes allegations about certain OIG actions, including specific allegations about the involvement of former Inspector General Nikki Tinsley. Amended Complaint, ¶ 240. Ms. Tinsley, also, is no longer employed by EPA. Shapiro Decl. Complainant advances a number of allegations, including some very pointed allegations, about the conduct of Stephen Luftig. *See, for example*, Amended Complaint, ¶¶ 48- 9. Mr. Luftig, too, is no longer employed by EPA. Shapiro Decl.

Many of Complainant's new allegations and claims are directed at very high ranking former EPA officials, including former EPA Administrator Christine Todd Whitman. Ms. Whitman, as well as her former Chief of Staff, Eileen McGinnis, and the former Deputy Administrator, Linda Fisher, are all no longer EPA employees. Shapiro Decl. Michael Shapiro, Complainant's former supervisor, although still an EPA employee, has long since left OSWER and moved into a significant new position in an entirely different program area, EPA's Office of Water. *Id.* Laurie May, another individual with substantial familiarity with Complainant's

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[8]EPA has, thus far, only begun to examine the detailed allegations and broad claims of the Amended Complaint and, of course, the Agency has conducted no discovery related to the Amended Complaint. Accordingly, EPA has been unable to definitively identify all persons who may have knowledge relating to Complainant's new allegations. It may be that, upon further review and discovery, the Agency will identify additional potential witnesses who are no longer EPA employees and who may not be readily available for examination or testimony.

activities and EPA actions relating to Complainant and the OSWER ombudsman function, has also retired from the Agency. *Id.* To require the Agency to attempt to answer, in these proceedings, the much broader claims and allegations of the Amended Complaint would only exacerbate the potential prejudice to which EPA is already exposed because of the lengthy delay in these proceedings, so far.

Complainant makes no serious effort to explain or justify his delay in seeking leave to amend.[9] Instead, the thrust of his argument is that EPA has been "on notice" of his claims and has, therefore, not been harmed by his delay. In essence, Complainant seeks to claim a fait accompli, arguing that he should be granted leave to amend because he has somehow previously told the Agency that he intended to make some such claims. Complainant's argument would make the rules on amendment and supplementation of pleadings mere formalities and confine the presiding judge's discretion to a simple inquiry into whether in some random correspondence or stray interrogatory response Complainant may have hinted at some broader, more expansive claim than stated in his First or Second Complaint.

Complainant argues, for example, that in his answers to the Agency's first set of interrogatories (as well as his opposition to the Agency's motion to dismiss), he referred to a

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[9]Complainant generally asserts that upon receiving documents produced from the backup tapes, he was "finally able for the first time to begin the intensive process" of reviewing documents, creating a "timeline," and reviewing "legal precedent." Motion for Leave to Amend at 12. Complainant makes no effort to demonstrate that he was unable to seek leave to amend until after he received documents obtained from the backup tapes. He identifies no particular documents and does not begin to attempt to explain how such documents might be critical to his ability to seek to amend his complaint. In fact, any attempt by Complainant to claim that the basis for his new claims was not known to him or that he was otherwise unable to seek leave to amend until after receiving documents from the backup tapes would be inconsistent with his primary contention that EPA has long been "on notice" that he intended to pursue such claims.

hostile work environment. Motion for Leave to Amend, at 6. The Agency, however, is entitled to rely on the issues framed by the complaint and is not required to treat every assertion made by Complainant in the course of the litigation presages an additional, new, or different claim. The Agency is, moreover, entitled to assume that Complainant will comply with the rules concerning amended and supplemental pleadings by seeking–where appropriate and without undue delay–leave to amend or supplement. Again, by Complainant's analysis, so long as he has in some manner stated–in interrogatory responses, correspondence, or oppositions to motions filed by the Agency–that he is making a claim, actually seeking leave to amend is a mere formality which can be indefinitely deferred, even until after more than six years has passed, discovery has all but closed, and the parties are approaching a hearing. That analysis, however, ignores the ample precedent clearly establishing that "when so much time has passed and where the movant has had abundant opportunity over the course of a half-dozen years to raise the issue," leave to amend may be denied. *Williamsburg Wax Museum*, 810 F.2d 243, 247.

Complainant vigorously presses this point with regard to the portions of the Amended Complaint that relate to EPA's decision to transfer the ombudsman function from OSWER to OIG. He quotes, at length, for example, from the August 8, 2003 Order Denying Complainant's Motion for Reconsideration Regarding Vacating the Protective Order for Linda Fisher. Motion for Leave to Amend at 8-9. To be sure, in opposing Complainant's request to depose Ms. Fisher, the Agency, in part, questioned the relevance of the proposed discovery. The presiding judge initially sustained the relevance objection but subsequently–although still sustaining the Agency's other objections to the deposition–reconsidered and concluded that the inquiry was relevant. Complainant did not, however, at that time seek leave to amend his complaints; nor did

the August 8, 2003 Order grant any such leave. Rather, the Order simply indicated that discovery related to the ombudsman function transfer met the broad and liberal test of sufficient relevance to the claims of the First and Second Complaint. That conclusion is hardly tantamount to a determination that the First and Second Complaints are or would be deemed amended to include a new, separate claim that EPA retaliated against Complainant by transferring the ombudsman function.

4. Leave to Amend Should be Denied Because the Proposed Amendments are Outside the Scope of the First and Second Complaints.

Although motions to amend and motions to supplement complaints are similarly addressed to the presiding judge's discretion, there are some distinctions. Leave to amend may only be granted "if the administrative law judge determines that the amendment is reasonably within the scope of the original complaint."[10] 29 C.F.R. §18.5(e). Complainant's proposed amendments should be denied because they are not "reasonably within the scope of the original complaint." 29 C.F.R. §18.5(e).[11]

Complainant's proposed **amendments**, as distinct from the proposed **supplements**, include Complainant the following claims and related factual contentions: that EPA removed his

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[10]Inasmuch as there is no answer called for in these proceedings, the provision for amendment as a matter of right before an answer is filed is inapplicable. In any event, Complainant has already once amended his complaint: his Second Complaint is, in essence, his true first amended and supplemented complaint.

[11]Although clearly not identical, 29 C.F.R. §18.5(e) requirement that proposed amendments must be "reasonably within the scope of the original complaint," is somewhat similar to the "relation back" provision of F.R. Civ. P. 15(c), which allows relation back when the amended claim "arose out of the conduct, transaction, or occurrence" of the original complaint. Under F. R. Civ. P. 15(c), "relation back depends on the existence of a 'common core of operative facts' uniting the original and newly asserted claims." *Mayle v. Felix*, 545 U.S. 644, 659 (2005).

ombudsman duties on December 14, 2000 (Amended Complaint, ¶¶ 392-98); that EPA retaliated against Complainant on March 5, 2001 by assigning ombudsman duties to another employee, Barry Stoll (Amended Complaint, ¶¶ 399-403); that EPA refused to promote Complainant on April 16, 2001 (Amended Complaint, ¶¶ 419-23); that EPA subjected Complainant to a hostile work environment from June 2000 to April 12, 2002 (Amended Complaint, ¶¶ 439-444); and that EPA engaged in a "systematic policy of discrimination against" ombudsman staff, including Complainant (Amended Complaint, ¶¶ 445-449).

It is not sufficient for Complainant to simply argue that because all his proposed amended claims allege unlawful retaliation by EPA and because his original complaint also claimed retaliation, the proposed amendments are "within the scope" of the original complaint. Such a broad reading would serve as no limitation, whatsoever, on Complainant's efforts to amend. Rather, there must some more meaningful, substantive connection shown between the amendments and the original complaint. *Compare Mayle v. Felix*, 545 U.S. 644, 657-8 (criticizing an overly broad reading of Rule 15(c), by which "virtually any new claim introduced in an amended petition will relate back"). Complainant can make no such showing.

In the First and Second Complaints, Complainant assiduously elected not to make any claim related to Mr. Fields' December 2000 decision that Complainant would not perform ombudsman duties. Clearly, Complainant was aware of that decision at the time of his First and Second Complaints, and–by way of background–he described that decision in the "Chronology" attached to his Second Complaint. He opted, however, not to include the claim within the scope of his original complaints. In describing the alleged "acts of retaliation" by the Agency, he omitted any reference to that decision. Indeed, in response to the Agency's Motion to Dismiss

or, in the alternative, for Summary Decision, Complainant essentially argued that the December 2000 decision was a nullity, a matter of no material effect, maintaining–for all intents and purposes–that it was not "within the scope" of his complaints.

Complainant also cannot show that EPA's alleged decision to assign ombudsman duties to Mr. Stoll in March 2001 was within the scope of the original complaints or that EPA's alleged failure to promote Complainant on April 16, 2001 was within the scope of the original complaint. Failure to promote is generally regarded as a "discrete" act. The First and Second Complaints make no reference to EPA's alleged failure to promote Complainant. Even where Complainant specifically requests various forms of relief, he fails to request that the Agency be ordered, in relief, to promote him.

Complainant's broad claims of hostile work environment and "systematic policy of discrimination" are also outside the scope of his First and Second Complaints. A hostile environment claim entails significantly different elements and burdens of proof than claims of retaliation tied to particular acts or occurrences. *See National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 115-16 (2002) (hostile environment "claims are different in kind from discrete acts"); *Sivulich-Boddy v. Clearfield City*, 365 F.Supp. 2d 1174, (D. Utah 2005) (sexual harassment claim is not "reasonably related" to other claims of discriminatory acts). To conclude that a hostile environment claim is within the scope of Complainant's First and Second Complaints would, in essence, lead to the overbroad conclusion that a hostile environment claim is "within the scope" of any claim of retaliation.

5. Leave to Amend or Supplement Should be Denied Because it Would be Futile.

Leave to amend may be denied if amendment is futile. *Foman v. Davis*, 371 U.S. 178, 182 (1962). "The amendment of a complaint is futile if the amended portion would not survive a motion to dismiss." *Szabo v. Reilly*, No. 91-Civ-5209 (JFK), 1994 U.S. Dist. LEXIS 1085 *2 (S.D. N.Y. 1994). Because of the futility of Complainant's proposed amendments, leave to amend or supplement should be denied.[12]

On September 30, 2002, by Order Granting Partial Summary Decision, Complainant's claims under the ERA, 42 U.S.C., §5851, and TSCA, 15 U.S.C. § 2622, were dismissed. Notwithstanding that determination, Complainant's proposed Amended Complaint reasserts claims under the ERA and TSCA. The Amended Complaint advances no new allegations that would compel a different result than that previously reached in the September 30, 2002 Order Granting Partial Summary Decision. Accordingly, because it would be futile to permit Complainant to reassert his ERA and TSCA claims, leave should be denied.

Complainant also makes a number of apparently time-barred amended and supplemental claims. Leave to amend should be denied because it would be futile to attempt to assert time-barred claims. The various environmental employee protection provisions require that a complaint must be filed within 30 days of the alleged violation. 42 U.S.C. § 9610(b); 42 U.S.C. § 7622(b); 33 U.S.C. § 1367(b); 42 U.S.C. § 6971(b); 42 U.S.C. § 300j-9(i)(2)(A); 15 U.S.C. §

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[12]The Agency does not attempt, herein, to fully argue all issues related to Complainant's TSCA or ERA claims or to fully support and argue all statute of limitations issues. Instead, the Agency merely contends that the claims Complainant attempts to raise by amendment or supplementation are so clearly untenable that granting leave to amend would be futile. Should leave to amend, nonetheless, be granted, EPA reserves the right to challenge the amended and supplemented complaint by more fully-supported motion to dismiss or for summary judgment.

2622(b). *See also* 29 C.F.R. § 24.3(b) (a complaint "shall be filed within 30 days after the occurrence of the alleged violation"). (New 29 C.F.R. §24.103(d) is similar.)

The following new claims are among the claims that Complainant seeks to add: EPA retaliated against Complainant by failing to reassign him to ombudsman duties during the period March 2001-January 2002 (Amended Complaint, ¶¶ 404-408); EPA retaliated against him on May 22, 2001 by refusing to promote him (*Id.*, ¶¶ 424-28); EPA retaliated against him by "eliminating" the OSWER ombudsman position in November 2001, by failing to establish an "appropriate" ombudsman position in the Office of Inspector General, and by "barring" him from consideration for a position in the Office of Inspector General (*Id.*, ¶¶ 429-33); and EPA retaliated against him on April 12, 2002 by effecting the transfer of the ombudsman function to the Office of Inspector General (*Id.*, ¶¶ 434-38). All of these alleged violations occurred well over 30 days prior to the Motion for Leave to Amend. In most cases, the alleged violations occurred several **years** earlier. It would be futile to grant Complainant leave to amend his complaint to raise these claims, because they are clearly time-barred.

Even assuming **arguendo** that the "relation back" provision of F. R. Civ. P. 15(c) applies in these proceedings,[13] Complainant's claims are not saved by that provision. Complainant has not shown that these new claims "arose out of the conduct, transaction, or occurrence" set out in the First or Second Complaint. Rule 15(c) "relaxes, but does not obliterate, the statute of limitations; hence relation back depends on the existence of a common 'core of operative facts'

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[13]EPA also assumes, for the sake of argument, that the "relation back" provision of Rule 15(c), despite its plain language, applies where, as here, Complainant seeks **supplementation** of the complaint, rather than **amendment**. *See U.S. v. Hicks*, 283 F.3d 380, (D.D.C. 2002) (unlike circumstances involving proposed amendments, "the circumstances under which supplements may relate back have not been codified").

uniting the original and newly asserted claims." *Mayle*, 545 U.S. at 659. In general, "an amendment offered for the purpose of adding to or amplifying the facts already alleged in support of a particular claim may relate back . . . one that attempts to introduce a new legal theory based on facts different from those underlying the timely claims may not." *Hicks*, 283 F.3d at 388.

Applying these standards, Complainant's Amended Complaint no more arises out of the same "conduct, transaction, or occurrence" of the First and Second Complaint than it is "reasonably within the scope" of the First and Second Complaint. The Amended Complaint is no mere appendage that bears some relationship to the First and Second Complaint, but it is a thoroughly, extensively broader set of allegations, advancing–by Complainant's own admissions–numerous new claims. To attempt to show a sufficient nexus, Complainant does little more than claim that the Amended Complaint, like the First and Second Complaints, also claims that Complainant was retaliated against because of his protected activity. More is required to satisfy the relation back doctrine, because is simply characterizing the "occurrence" as "retaliation" is enough, "virtually any purported amendment will relate back." Hicks, 283 F.3d at 388.

Complainant, however, cannot show that the Amended Complaint is offered "for the purpose of adding to or amplifying the facts already alleged in support of a particular claim." Instead, he makes extensive, numerous new factual allegations, about different events and occurrences, at different times, involving–in at least some instances–different actors, and he "attempts to introduce . . . new legal theor[ies] based on facts different from those underlying the timely claims." Hicks, 283 F.3d at 388. Accordingly, even assuming the Rule 15© relation back doctrine applies, here, it does not save Complainant's amendments and supplements.

In addition, at least one proposed amendment, the claim that the December 2000 decision by Mr. Fields was retaliatory is untimely even if "relation back" applies. Complainant's First Complaint was filed in April 2001, more than 30 days after the December 2000 Fields' memorandum. Even if the proposed amendment adding a claim relating to that decision were to "relate back" to the date of the First Complaint, it would still be untimely. Because the Amended Complaint is plainly untimely, leave to amend would be futile and should be denied.

## CONCLUSION

EPA respectfully submits that Complainant's Motion for Leave to File an Amended and Supplemented Complaint should be denied.

Respectfully submitted,

Charles G. Starrs
U.S. Environmental Protection Agency
Office of General Counsel
1200 Pennsylvania Ave., N.W. (2377A)
Washington, D.C. 20460
202-564-1996

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Respondent's Opposition to Complainant's Motion to Amend was sent to Complainant's Representative, Regina Markey, Esquire, Markey Law Office,1200 G St., N.W., Suite 800, Washington, D.C. 20005, by overnight delivery this 11 day of December 2007.

Charles G. Starrs

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

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| HUGH B. KAUFMAN, | ) | |
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| Complainant, | ) | |
| | ) | |
| v. | ) | No. 2002-CAA-00022 |
| | ) | |
| UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, | ) | |
| | ) | |
| Respondent. | ) | |

DECLARATION OF MICHAEL SHAPIRO

MICHAEL SHAPIRO declares and states that:

1. I am employee of the United States Environmental Protection Agency (EPA). I am the Deputy Assistant Administrator for EPA's Office of Water. I have been assigned to my current position since November 2002. I was formerly the Deputy Assistant Administrator for EPA's Office of Solid Waste and Emergency Response (OSWER), which is the organization with which the Complainant is employed.

2. Stephen Luftig is no longer an EPA employee. He was formerly an employee of OSWER, where he held various positions, including certain high level management positions. Mr. Luftig retired from EPA in January 2004.

3. Timothy Fields is no longer an EPA employee. He was formerly the Assistant Administrator for OSWER. Mr. Fields retired from EPA in January 2001.

4. Marianne Horinko became the Assistant Administrator for OSWER in about October 2001. Ms. Horinko was the Assistant Administrator at the time the decision was made to transfer the

EXHIBIT 1

OSWER ombudsman function to the Office of Inspector General (OIG). Ms. Horinko resigned from EPA in June 2004.

5. Laurie May is no longer an EPA employee. She was formerly an employee of OSWER, where she was last employed as the Director, Organizational Management and Integrity Staff. Ms. May was knowledgeable of personnel matters concerning Complainant and the former OSWER ombudsman function and she provided advice and assistance concerning such matters. Ms. May retired from EPA in September 2005.

6. Christine Todd Whitman was the former EPA Administrator. She resigned from EPA in June 2003.

7. Linda Fisher was the former EPA Deputy Administrator. She resigned from EPA in May 2003.

8. Nikki Tinsley was the former EPA Inspector General. She resigned from EPA in March 2006.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Date: 12/11/2007

Michael Shapiro