UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Adamas Construction and	)	**Docket No. CWA-07-2019-0262**
Development Services, PLLC, and	)	
Nathan Pierce,	)	
	)	
Respondents.	)	

ORDER ON COMPLAINANT'S MOTION FOR LEAVE TO AMEND THE AMENDED COMPLAINT

I. BACKGROUND

On September 6, 2019, the Director of the Enforcement and Compliance Assurance Division for Region 7 ("Complainant") of the United States Environmental Protection Agency ("EPA") initiated this proceeding by filing a Complaint and Notice of Opportunity for Hearing ("Complaint") against Adamas Construction and Development Services, PLLC, and Nathan Pierce ("Respondent Adamas" and "Respondent Pierce," respectively, or "Respondents," collectively) pursuant to Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1319(g), for alleged violations associated with Respondents' work as a sludge removal contractor for the Northern Cheyenne Utility Commission at the Lame Deer Lagoon Wastewater Treatment Facility. Specifically, Complainant alleged as Claim 1 that Respondents "failed to develop and maintain records required by 40 C.F.R. § 503.17," in violation of Section 405 of the CWA, 33 U.S.C. § 1345, and the implementing regulations at 40 C.F.R. Part 503, and as Claim 2 that Respondents failed to provide complete and timely responses to information requests sent by EPA pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318, in violation of that provision. On October 16, 2019, Respondents filed an Answer and Request for Hearing ("Answer") denying the charged violations and requesting a hearing on the matter. Answer at 1-2.

I was subsequently designated to preside over this proceeding, as governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), set forth at 40 C.F.R. Part 22. Pursuant to the Prehearing Order issued on October 18, 2019, and subsequent orders related to filing deadlines, the parties engaged in a prehearing exchange of information. While that process was underway, I granted Complainant leave to amend the Complaint. Order

on Complainant's Motion for Leave to Amend the Complaint and on the Parties' Motions for Extensions of Time for Prehearing Exchanges (Jan. 2, 2020), at 3. The Amended Complaint and Notice of Opportunity for Hearing ("Amended Complaint" or "Amended Compl."), which left the charged violations unchanged, was deemed to have been filed on January 2, 2020.

The parties subsequently engaged in motions practice, including the filing by Complainant of a motion seeking an accelerated decision, which I denied by Order dated April 20, 2022. Thereafter, I scheduled the hearing in this matter to commence in Billings, Montana, on August 22, 2022. I also set deadlines for a number of prehearing procedures, including June 24, 2022, as the date by which the parties were required to file any non-dispositive motions, "such as motions for additional discovery, motions for subpoenas, and motions in limine." Notice of Hearing Order (May 23, 2022), at 1.

The parties proceeded to file additional motions, including the filing by Respondents of a motion seeking leave to file a motion to dismiss out of time, which I denied by Order dated July 21, 2022. At issue here is the motion most recently filed by Complainant, namely, its Motion for Leave to Amend the Amended Complaint ("Motion to Amend"), to which Complainant attached a signed copy of the proposed second Amended Complaint and Notice of Opportunity for Hearing ("proposed second Amended Complaint"), filed on July 19, 2022. After I shortened the time for Respondents to file a response to the Motion to Amend and dispensed with any reply pursuant to my authority under the Rules of Practice to "set a shorter . . . time for response or reply, or make other orders concerning the disposition of motions," 40 C.F.R. § 22.16(b), Respondents timely filed a Response in Opposition to Complainant's Motion to Amend the Complaint ("Respondents' Response") on July 28, 2022.

II. APPLICABLE LAW

The Rules of Practice provide, in pertinent part, that once an answer has been filed, "the complainant may amend the complaint only upon motion granted by the Presiding Officer." 40 C.F.R. § 22.14(c). However, the Rules of Practice do not provide a standard for adjudicating such a motion. In the absence of administrative rules on a subject, I may look to the Federal Rules of Civil Procedure ("FRCP") and related case law for guidance. *See, e.g.*, *Envtl. Prot. Servs., Inc.*, 13 E.A.D. 506, 560 n.65 (EAB 2008) (citing *J. Phillip Adams*, 13 E.A.D. 310, 330 n.22 (EAB 2007); *Lazarus, Inc.*, 7 E.A.D. 318, 330 n.25 (EAB 1997)); *Carroll Oil Co.*, 10 E.A.D. 635, 649 (EAB 2002); *Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827 n.20 (EAB 1993).

Rule 15 of the FRCP provides that "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). The United States Supreme Court recognized this liberal stance in the leading case on the issue, *Foman v. Davis*, 371 U.S. 178 (1962), observing that "'[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.'" *Id.* at 181-82 (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)). The Court further stated that "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Id.* at 182. Also recognizing the discretion of

district courts in deciding whether to grant or deny a motion to amend a complaint, the Court proceeded to identify factors for courts to consider in exercising their discretion in this context. *Id.* In particular, the Court directed that leave to amend a complaint should be freely given, as advised by Rule 15, unless "any apparent or declared reason" – including "undue delay, bad faith or 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, [and] futility of amendment" – counsels otherwise. *Id.*

The Environmental Appeals Board ("EAB" or "Board") has since adopted the permissive approach articulated in Rule 15 and *Foman* as a means of promoting decisions on the merits in administrative proceedings. *Asbestos Specialists*, 4 E.A.D. at 830 ("[I]t is our view that the policy component of Rule 15(a) should apply to Agency practice. The objective of the Agency's rules should be to get to the merits of the controversy."); *Wego Chem. & Mineral Corp.*, 4 E.A.D. 513, 525 n.11 (EAB 1993) ("[A]dministrative pleadings should be liberally construed and easily amended to serve the merits of the action."); *Port of Oakland*, 4 E.A.D. 170, 205 (EAB 1992) ("[T]he Board adheres to the generally accepted legal principle that administrative pleadings are liberally construed and easily amended, and that permission to amend a complaint will ordinarily be freely granted.") (internal quotation marks omitted). Like the Supreme Court in *Foman*, however, the Board has also recognized the discretion of this Tribunal in considering the factors identified in *Foman* while adjudicating motions to amend. *See Carroll Oil Co.*, 10 E.A.D. at 650. For example, in upholding the denial of a complainant's motion to add new parties to a complaint filed seven weeks in advance of the scheduled hearing, the Board found in *Carroll Oil* that the Administrative Law Judge acted within his discretion to deny the motion on the basis that the complainant's delay in filing could potentially prejudice the respondent inasmuch as the introduction of new parties would "constitute substantive new claims that likely would have required additional fact-finding and investigation and presented new legal theories shortly before trial." *Id.* at 650-51. For support, the Board quoted the United States Court of Appeals for the Seventh Circuit that "'[s]ubstantive amendments to the complaint just before trial are not to be countenanced and only serve to defeat these interests'" of the parties in the prompt resolution of their disputes without undue expense. *Id.* at 651 (quoting *Feldman v. Allegheny Int'l, Inc.*, 850 F.2d 1217, 1225 (7th Cir. 1988)). The Board also found undue delay in the proceedings to be another ground for upholding the Administrative Law Judge's exercise of discretion in denying the motion, noting that federal courts interpreting the FRCP have cited burden to the judicial system as a basis for denial, *id.* at 651 (citing *Perrian v. O'Grady*, 958 F.2d 192, 194 (7th Cir. 1992); *Fort Howard Paper Co. v. Standard Havens, Inc.*, 901 F.2d 1373, 1380 (7th Cir. 1990)), and that the Rules of Practice "likewise demonstrate a solicitude for judicial economy," *id.* at 652 (citing 40 C.F.R. § 22.4(c)(10)).

III. PARTIES' ARGUMENTS

In its Motion to Amend, Complainant seeks leave to amend the Amended Complaint such that it "better conform[s]" to the evidence expected to be proffered at the hearing. Motion to Amend at physical page 2. Specifically, Complainant explains that the regulation cited in the Amended Complaint for the recordkeeping requirements applicable to Respondents, which form the basis of Claim 1, appears not to apply after all "given the evidence in the record or anticipated from witness testimony" and that the proposed amendment would revise those parts

of the Amended Complaint to cite to the regulation and recordkeeping requirements that do appear to apply. *Id.* Thus, Complainant asserts, it "seeks to revise Paragraphs 19 and 20 to include the applicable citations and requirements." *Id.* Complainant argues that Claim 1 "remains unchanged, but the proposed clarification will aid the Court and the Respondents" and benefit Complainant inasmuch as it "will allow [Complainant] to focus on the requirements more clearly applicable to the Respondents." *Id.*

In response, Respondents first assert that Complainant filed its Motion to Amend only 32 days before the scheduled hearing and after the deadlines I set for dispositive and non-dispositive motions, without seeking leave to file the Motion to Amend out of time. Response at physical page 2. Respondents then point out that Complainant fails to explain why it took two years and seven months from the time Complainant filed the Amended Complaint in January of 2020 to discern the information that is now prompting it to move to amend the Amended Complaint. *Id*. Noting that I recently denied Respondents' motion for leave to file a motion to dismiss out of time because of its belatedness, despite the Rules of Practice providing that I, "upon motion of the respondent, may at any time dismiss a proceeding," *id.* at 5 (citing 40 C.F.R. § 22.20(a)), Respondents request that I deny the Motion to Amend on the same grounds of it having been filed after the deadline for such a motion and in close proximity to the hearing, *id.*

Respondents next challenge Complainant's characterization of the proposed amendments, arguing that Complainant is, in fact, requesting to "significantly change" its claims. Response at physical page 2, 3-4. Respondents contend:

> The Complainants [sic] argument essentially boils down to "we requested information on the purple card and brought claims against the Respondent for failing to provide the purple card, when the Respondent told use [sic] they had no obligation to provide such information, we now agree they had no obligation to provide information on the purple card, however we should be able to amend our complaint to say we requested the Orange card, after requesting an accelerated decision on the purple card."

Id. at 4.

Respondents further argue that if granted, the amendments sought by Complainant will be prejudicial to Respondents, as the Motion to Amend was filed past the deadline for such motions and in close proximity to the scheduled hearing; the proposed amendments raise "new legal theories that could also result in additional discovery, unduly delayed litigation, and increased costs"; and it will "unduly burden the Respondents as they are completely representing themselves and have no legal representation to assist them in Answering the second amended complaint and takes away their ability to prepare for the scheduled hearing in this matter." Response at physical page 3. Pointing to *Carroll Oil* for support, Respondents urge that motions to amend a complaint are routinely denied when the complainant seeks to add substantive claims shortly before the hearing is scheduled to begin. *Id.* (citing *Carroll Oil*, 2002 EPA App. LEXIS 14 (EAB July 31, 2002)). Respondents also cite to federal court opinions denying motions to amend based on the moving party's failure to "offer a reasonable explanation for a delay of several months in moving to amend, where the movant knew of the facts underlying the

proposed amendment much earlier, but inexplicably waited to request the amendment until near the date of trial." *Id.* (citing *Southmark Corp. v. Shulte Roth & Zabel*, 88 F.2d 311, 315-16 (5th Cir. 1996) and *Las Vegas Ice & Cold Storage v. Far West Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990)).

IV. DISCUSSION

As a preliminary matter, I am not persuaded by Respondents' argument that the Motion to Amend should be denied as having been untimely filed. Here, the Rules of Practice speak explicitly to amendments to a complaint and authorize such amendments "only upon motion granted by the Presiding Officer" when the amendment is sought after the answer has been filed. 40 C.F.R. § 22.14(c). Guidance from the FRCP and interpretive case law, as detailed above, makes plain that amendments should be freely given when justice so requires and that the aim of administrative adjudication is to reach the merits of a controversy, permitting the claims to be tested. Thus, I do not consider it appropriate to liken a motion to amend to the types of motions that are subject to stringent deadlines in this proceeding.

I turn now to the particular amendments sought by Complainant. Upon examination of the proposed second Amended Complaint, I note that Complainant is seeking to amend not only Paragraphs 19 and 20 of the Amended Complaint, as represented by Complainant, but also Paragraph 45, which Complainant did not point out in its Motion to Amend. Consisting of conclusions of law to which no answer is necessary, *see* 40 C.F.R. § 22.15(b), Paragraphs 19 and 20 of the Amended Complaint cite to 40 C.F.R. § 503.17(a)(5)(ii) and describe the information that a person who applies bulk sewage sludge under certain circumstances is required by that regulatory provision to develop and maintain. Under the heading for Claim 1 in the Amended Complaint, Complainant alleges that Respondents "failed to develop and maintain records required by 40 C.F.R. § 503.17" generally, in violation of 33 U.S.C. § 1345, without specifying the particular set of recordkeeping requirements within that regulatory section that Respondents allegedly failed to satisfy. Amended Compl. ¶¶ 53-54. However, the Amended Complaint incorporates Paragraphs 19 and 20 by reference into Claim 1, Amended Compl. ¶ 52, thereby signaling that Complainant charges Respondents in the Amended Complaint with failing to develop and maintain the records required to be kept by 40 C.F.R. § 503.17(a)(5)(ii). Complainant now wishes to amend that citation from 40 C.F.R. § 503.17(a)(5)(ii) to 40 C.F.R. § 503.17(a)(4)(ii), which would invoke a different set of recordkeeping requirements. Thus, while Claim 1 "remains unchanged," as represented by Complainant, inasmuch as Complainant is not seeking to revise the allegation under the heading for that claim that Respondents "failed to develop and maintain records required by 40 C.F.R. § 503.17" generally, Complainant is seeking to modify the particular set of recordkeeping requirements within 40 C.F.R. § 503.17 that Respondents are charged with violating.

As for Paragraph 45 of the Amended Complaint, it consists of the factual allegation that Respondents provided an incomplete response to a June 11, 2019 information request. It then identifies the six pieces of information[1] that Respondents allegedly failed to provide despite

[1] Those six pieces of information are as follows:

a) The street address or legal description of the location;

having been required to develop and maintain such information by 40 C.F.R. § 503.17(a)(5)(ii).[2] That allegation forms the basis of Claim 2 of the Amended Complaint, in which Complainant charges Respondents with failing to provide information as requested in violation of 33 U.S.C. § 1318. Complainant now seeks to amend the citation in Paragraph 45 from 40 C.F.R. § 503.17(a)(5)(ii) to 40 C.F.R. § 503.17(a)(4)(ii)[3] and add another piece of information – "a certification statement" – that Respondents also allegedly failed to provide in response to the information request.

Considering the amendments proposed by Complainant, I agree with Respondents that the amendments would go beyond mere "clarification" of the charges against them. Looking more closely at the particular records required to be kept under 40 C.F.R. § 503.17, I note that the list of records under 40 C.F.R. § 503.17(a)(4)(ii) consists of five items that, while not necessarily worded identically, are at least similar in nature to items listed under 40 C.F.R. § 503.17(a)(5)(ii). Nevertheless, the recordkeeping requirements of 40 C.F.R. § 503.17(a)(4)(ii) appear to be triggered by circumstances differing from those that trigger the application of 40 C.F.R. § 503.17(a)(5)(ii). Furthermore, the proposed amendment to Paragraph 45 is such that Complainant is accusing Respondents of failing to provide an additional piece of information that is not listed in the Amended Complaint, an allegation of fact to which Respondents are entitled to respond. I also agree with Respondents that Complainant fails to explain the delay in moving to amend the Amended Complaint. While Complainant's view of the appropriate set of recordkeeping requirements to invoke and pieces of information to charge Respondents with failing to provide may have crystallized as the prehearing process ensued, the parties completed the prehearing exchange of information in 2020 and more than three months have elapsed since I denied Complainant's motion for accelerated decision with respect to the violations as alleged in the Amended Complaint. That being said, consistent with the prevailing permissive stance on the amendment of pleadings, I will grant Complainant's Motion to Amend. Out of fairness to Respondents, however, I consider it appropriate not to move forward with the hearing as scheduled in order to afford Respondents ample opportunity to file any answer and prepare to defend against the allegations as revised by the second Amended Complaint. To that end, the parties shall file statements regarding their availability for a hearing to be held virtually using videoconferencing technology in October, November, or December 2022 or January 2023.

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b) The date(s) upon which the location was used for the land application of biosolids;
c) The number of acres upon which biosolids were land applied;
d) The number of loads applied;
e) A description of how the site restrictions of 40 C.F.R. § 503.32(b)(5) were met; and
f) The annual application rate of biosolids as calculated.

Amended Compl. ¶ 45.

[2] Paragraph 45 of the Amended Complaint cites to 40 C.F.R. § 503.17(5)(ii), which presumably is a scrivener's error.

[3] Paragraph 45 of the proposed second Amended Complaint cites to 40 C.F.R. § 503.17(4)(ii), which again is presumably a scrivener's error.

V. ORDER

1. Complainant's Motion for Leave to Amend the Amended Complaint is **GRANTED**. Because Respondents and this Tribunal received a signed copy of the proposed second Amended Complaint as an attachment to the Motion to Amend, the second Amended Complaint is hereby deemed to have been filed and served as of the date of this Order, and it is now the governing complaint in this matter. Consistent with the Rules of Practice on the subject, Respondents may file an answer to the second Amended Complaint within 20 days from the date of this Order. *See* 40 C.F.R. § 22.14(c).

2. The hearing as scheduled to commence on August 22, 2022, is hereby **POSTPONED**. On or before **August 12, 2022**, each party shall file a statement identifying any periods of unavailability for a hearing to be held virtually using videoconferencing technology in October, November, or December 2022 or January 2023. In such statement, each party shall also include an updated estimate of the amount of time needed to present its direct case.

Christine Donelian Coughlin
Administrative Law Judge

Dated: August 4, 2022
Washington, D.C.

In the Matter of Adamas Construction and Development Services, PLLC, and Nathan Pierce, Respondents
Docket No. CWA-07-2019-0262

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on Complainant's Motion for Leave to Amend the Amended Complaint**, dated August 4, 2022, and issued by Administrative Law Judge Christine Donelian Coughlin, was sent this day to the following parties in the manner indicated below.

Mary Angeles
Paralegal Specialist

Original by OALJ E-Filing System to:
U.S. Environmental Protection Agency
Office of Administrative Law Judges
https://yosemite.epa.gov/OA/EAB/EAB-ALJ_Upload.nsf

Copy by Electronic Mail to:
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Dated: August 4, 2022
Washington, D.C.