

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

IN THE MATTER OF:

Evergreen Development, Inc.)	
)	
and)	MOTION FOR RULING, RESPONSE TO
)	ANSWER OPPOSING REQUEST TO
Mark Schmidt,)	DISMISS, AND MOTION FOR ORDER
)	TO FILE COMPLETE ANSWER
)	
Proceedings under Section 309(g) of the)	Docket No. CWA-07-2022-0134
Clean Water Act, 33 U.S.C. § 1319(g))	
)	

I. INTRODUCTION

The United States Environmental Protection Agency, Region 7 (Complainant or EPA), hereby moves for a ruling that the request to dismiss the Complaint contained in the Answer to the Complaint and Request for Hearing (Answer) filed by Respondents Evergreen Development, Inc. and Mr. Mark Schmidt does not constitute a motion to dismiss the Complaint pursuant to Rule 22.16(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation / Termination or Suspension of Permits (Rules of Practice), 40 C.F.R. § 22.16(a) (Motion for Ruling). In the alternative, EPA files this response to the request to dismiss the Complaint contained within the Answer and respectfully requests that the Tribunal deny Respondents' request (Response to Answer Opposing Request to Dismiss). EPA also hereby moves for an order requiring Respondents to file a complete and proper Answer that complies with the requirements of Rule 22.15(b) of the Rules of Practice, 40 C.F.R. § 22.15(b) (Motion for Order to File Complete Answer).

In support of Complainant's Motion for Ruling, Response to Answer Opposing Request

to Dismiss, and Motion for Order to File Complete Answer, Complainant states as follows:

II. PROCEDURAL HISTORY

On October 13, 2022, EPA filed a civil administrative Complaint and Notice of Opportunity for Hearing alleging Respondents violated Sections 301, 402, and 404 of the Clean Water Act (CWA), 33 U.S.C. §§ 1311, 1342, and 1344, and regulations promulgated thereunder, by failing to comply with its construction stormwater National Pollutant Discharge Elimination System (NPDES) Permit No. NER160000, tracking number CSW-21903475, and by discharging dredged and/or fill material into a tributary of the Little Nemaha River and abutting wetlands that are waters of the United States without authorization (Complaint). On November 14, 2022, the initial deadline for the Answer, Respondents filed and the Regional Judicial Officer granted a Request for an Extension of Time, requiring that the Answer be filed by December 16, 2022. On that deadline, Respondents filed and the Regional Judicial Officer granted a Second Request for an Extension of Time, requiring that the Answer be filed by January 20, 2023. On January 20, 2023, counsel for Respondents filed Respondents' Answer.

III. LEGAL STANDARD

A. Motion to Dismiss

This proceeding is governed by the Rules of Practice. 40 C.F.R. Part 22. The Rules of Practice address motions and decisions to dismiss as follows:

All motions, except those made orally on the record during a hearing, shall:

- (1) Be in writing;
- (2) State the grounds therefor, with particularity;
- (3) Set forth the relief sought; and
- (4) Be accompanied by any affidavit, certificate, other evidence or legal memorandum relied upon.

40 C.F.R. § 22.16(a)

The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

40 C.F.R. § 22.20(a).

Motions to dismiss pursuant to Section 22.20(a) of the Rules of Practice are analogous to motions to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure (Federal Rules). *In the matter of Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827 (EAB 1993); Fed. R. Civ. P. 12(b).¹ The Federal Rules provide for dismissal when the complaint fails “to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Such a motion must satisfy the criteria for all motions set forth in the Rule 22.16(a) of the Rules of Practice to be considered a motion. 40 C.F.R. 22.16(a); *see In the Matter of Birds Eye Foods*, Docket Nos. MM-05-2018-0002, CERCLA-05-2018-0005, EPCRA-05-2018-0009, “Order on Complainant’s Motion for a Court Ruling that the Answer Does Not Constitute a Motion to Dismiss the Complaint” 2018 WL 3966599 (ALJ Coughlin, Aug. 7, 2018).

To survive a proper motion to dismiss, a complaint “must contain sufficient factual matter, accepted as true, to ‘state a claim for relief that is plausible on its face’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In evaluating a motion to dismiss, courts must take all allegations in the complaint as true and draw all inferences in favor of the Complainant. *See Twombly*, 550 U.S. at 555. The court may grant dismissal for failure to state a claim when the complaint does not set forth “direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable

¹ While the Federal Rules of Civil Procedure do not apply to administrative proceedings, the Environmental Appeals Board has held that Rule 12(b)(6) and federal court decisions construing it provide useful guidance in adjudicating a motion to dismiss under the Rules of Practice. *Commercial Cartage Co., Inc.*, 5 E.A.D. 112, 117 n.9 (EAB 1994).

legal theory.” *Twombly*, 550 U.S. at 562 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)). Accordingly, to prevail on a motion to dismiss, Respondent must demonstrate that EPA has not properly pleaded a prima facie case.

B. Motion for Order to File Complete Answer

The Rules of Practice require an Answer to be filed with 30 days of the service of the Complaint in the following circumstances:

Where respondent: Contests any material fact upon which the complaint is based; contends that the proposed penalty, compliance or corrective action order, or Permit Action, as the case may be, is inappropriate; or contends that it is entitled to judgment as a matter of law.

40 C.F.R. § 22.15(a). The Rules of Practice also specify the contents of an Answer:

The answer shall clearly and directly admit, deny or explain each of the factual allegations contained in the complaint with regard to which respondent has any knowledge. Where respondent has no knowledge of a particular factual allegation and so states, the allegation is deemed denied. The answer shall also state: The circumstances or arguments which are alleged to constitute the grounds of any defense; the facts which respondent disputes; the basis for opposing any proposed relief; and whether a hearing is requested.

40 C.F.R. § 22.15(b).

A document that does not request a hearing or clearly and directly admit, deny or explain *each* of the factual allegations contained in the complaint does not comply with the Rules of Practice and will not be construed to be an Answer. *See In the matter of Silky Associates, LLC*, Docket No. RCRA-03-2018-0131, “Order of Remand” (ALJ Biro, Dec. 10, 2018).

IV. ARGUMENT

A. The Tribunal Should Grant Complainant's Motion for a Ruling that Respondent's Answer Is Not a Motion to Dismiss Because Respondents Failed to Comply with the Procedural Requirements in the Rules of Practice.

Respondent's Answer states "the Respondents respectfully request that the Complaint be dismissed as well as any additional relief which may be just and equitable" (Request). This Request fails to comply with two of the four procedural requirements set forth in 40 C.F.R. § 22.16(a) for motions. The Rules require that "[a]ll motions, except those made orally on the record during a hearing shall: (1) [b]e in writing; (2) [s]tate the grounds therefor, with particularity; (3) [s]et forth the relief sought; and (4) [b]e accompanied by any affidavit, certificate, other evidence or legal memorandum relied upon." 40 C.F.R. § 22.16(a).

Here, Respondent's Request is in writing and sets forth the relief sought; however, it fails to state the grounds for dismissal with any particularity, as required by 40 C.F.R. § 22.16(a)(2), and fails to include any affidavit, certificate, other evidence or legal memorandum relied upon, as required by 40 C.F.R. § 22.16(a)(4). While Respondents' Answer contains several paragraphs above the Request that include an assertion, statement, reminder, and argument, respectively. It is not clear whether these are intended to be grounds for the Request or affirmative defenses.

The Rules of Practice "are not procedural niceties that parties are free to ignore," particularly in cases where, as here, a party is represented by a licensed attorney. *In re Polo Dev., Inc.*, 17 E.A.D. 100, 103 (EAB 2016); *In re Four Strong Builders, Inc.*, 12 E.A.D. 762, 772 (EAB 2006); *In re JHNY, Inc.*, 12 E.A.D. 372, 382 (EAB 2005). Respondents' bare assertions do not meet the requirements of 40 C.F.R. § 22.16(a) because they fail to provide EPA adequate notice of the basis for Respondents' Request or legal argument to which EPA can respond. Moreover, form matters: "For the sake of clarity, efficiency, and courtesy to other parties and [the] Tribunal, any request being made of [the] Tribunal should be filed and served as a separate

document with the term “motion” in the title.” *In the Matter of: Adamas Construction and Development Services, Plc and Nathan Pierce*, Docket No. CWA-07-2019-0262, “Order on Complainant’s Motion for Accelerated Decision and Respondents’ Requests for Dismissal and Additional Discovery” (ALJ Coughlin, April 20, 2022), 2022 WL 1520287, at *25. Similarly here, Respondents’ Request suffers procedural deficiencies and was included in its Answer without title of “motion.” Therefore, the Tribunal should issue a ruling to clarify that Respondents’ Request is not a motion to dismiss.

B. In the Alternative, the Tribunal Should Deny Respondents’ Request to Dismiss the Complaint Because EPA Sufficiently Stated a Claim Upon Which Relief Can Be Granted.

In the alternative, if the Tribunal construes Respondents’ Request as a motion to dismiss that properly satisfies the procedural requirements of 40 C.F.R. § 22.16(a), then EPA responds that it should be denied for the following reasons. Reading the paragraphs of the Answer that immediately proceed the Request as the Respondents’ stated grounds for dismissal, the Request must fail because several of the stated grounds are not legally sufficient and EPA properly pleaded a “claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6).

Respondents include several statements in their Answer which are not legally sufficient reasons to dismiss the Complaint. Respondents state that they relied on advice from their engineer that federal permitting was not necessary. Answer at p. 4. Respondents also state that they did not receive the notices referenced in the Complaint.² *Id.* These excuses are not legally sufficient grounds for dismissal because lack of knowledge of the law, or lack of intent to violate

² The notices referenced in the Complaint are notices sent by the Nebraska Department of Energy and Environment (NDEE) and the Army Corps of Engineers (Corps) to Respondents and described in Paragraphs 33, 34, 35, 38, and 39, some of which were personally served on Respondents by the Lancaster County Sheriff as described in Paragraph 34. Respondents’ Answer states that EPA acknowledged the notices were being sent back as undeliverable. EPA does not believe it made such an acknowledgement but notes that issue is irrelevant to establishing a prima facie case. EPA relied on representations made by the NDEE and the Corps that such notices were sent and the Respondents failed to respond to them.

the law, are not defenses to liability or adequate reasons to dismiss a complaint. *United States v. Bailey*, 571 F.3d 791, 805 (8th Cir. 2009) (“Civil liability under the Clean Water Act is strict, and the government was not required to show that [Respondent] knew that his act... violated the Act.”); *See also United States v. Sheyenne Tooling & Mfg. Co.*, 952 F. Supp. 1414, 1418 (D.N.D. 1996) (“Ignorance of the law is no defense.”); *In the Matter of Dr. Marshall C. Sasser*, 3 E.A.D. 703, 1991 WL 319991, at *3 (EAB 1991)(“The statute makes the unauthorized discharge of any pollutant unlawful regardless of the discharger's intent.”). Respondents also argue for any penalty to be reduced for financial hardship. Inability to pay is an affirmative defense but not part of the EPA’s prima facie case and not legally sufficient grounds for dismissal of the Complaint.³ *In the Matter of Dr. Marshall C. Sasser*, supra, at *5; *See also In Re: Carroll Oil Company*, 10 E.A.D. 635, 2002 WL 1773052, at *22 (EAB 2002).

Respondents Answer may be construed as arguing that the Complaint fails to state a claim upon which relief can be granted, where it states:

[N]o facts are present in the pleading which would purport to prove that the area is in fact a tributary, what specific activities are alleged to have been done within the tributary and whether that activities have cause any damage or hardship to either the tributary or the Little Nemaha River.

Answer at p. 4. To state a prima facie violation of Section 301(a) of the CWA in this case, EPA must demonstrate that Respondents: (1) are each a person (2) who discharged a pollutant (3) from a point source (4) into a navigable water (5) without a Section 404 permit. *See* 33 U.S.C. §§ 1311(a), 1344 and 1362 (definitions); *see also U.S. v. RGM Corp.*, 222 F.Supp.2d 780, 786 (E.D. Va. 2002).

Section 502(5) of the CWA defines “person” to include an “individual” and a “corporation.” 33 U.S.C § 1362(5). In its Complaint, EPA alleged that Respondents are each a

³ EPA has not received any information related to Respondents’ inability to pay.

“person” as defined by Section 502(5) of the CWA because Evergreen Development, Inc. is a corporation and Mr. Mark Schmidt is an individual who is an operator of the site. Complaint at ¶¶ 4, 17, 18.

Section 502(12) defines “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12). Section 502(6) of the CWA defines “pollutant” to include, inter alia, dredged spoil, solid waste, garbage, biological materials, rock, sand, and industrial waste discharged into water. 33 U.S.C. § 1362(6). “Fill material” includes material placed in waters of the United States where the material has the effect of replacing any portion of a water of the United States with dry land or changing the bottom elevation of any portion of a water of the United States. Examples of fill material include rock, sand, soil, clay, construction debris, wood chips, overburden from excavation activities, and materials used to create any structure or infrastructure in the waters of the United States, 40 C.F.R. § 232.2, and each of which constitutes a “pollutant” within the meaning of CWA Section 502(6), 33 U.S.C. § 1362(6). In its Complaint, EPA alleged that Respondents “discharged a pollutant” when Respondents conducted earthmoving work using heavy equipment within the tributary to the Little Nemaha River and abutting wetlands in September through October of 2020. Complaint at ¶ 36, 43. In its Complaint, EPA alleged fill material is a pollutant and alleged the location and extent of the fill material impacts. Complaint at ¶¶ 37, 40, 41.

Section 502(14) of the CWA defines “point source” to include, inter alia, “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, [or] container . . . from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). In its Complaint, EPA alleged that Respondents conducted earthmoving work using a trackhoe, backhoe, bulldozer, and/or other heavy equipment to discharge fill material into the tributary to the Little Nemaha River and its abutting

wetlands. Complaint at ¶ 36. EPA alleged that heavy earthmoving equipment, such as the equipment used by Respondents, constitute point sources as defined by Section 502(14) of the CWA. *Id.* at ¶ 42.

Section 502(7) of the CWA defines “navigable waters” as “waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7). Federal regulations define “waters of the United States” to include all tributaries of traditionally navigable waters and abutting wetlands of such tributaries, and case law has upheld the inclusion of perennial tributaries and abutting wetlands as “waters of the United States.”⁴ In its Complaint, EPA alleged that a tributary to the Little Nemaha River flows through the site and flows 0.27 miles into the Little Nemaha River. Complaint at ¶¶ 21, 21. In its Complaint, EPA also alleged the tributary has perennial flow and a hydrological connection to the Little Nemaha River and that the tributary and its abutting wetlands are “navigable waters” as defined by Section 502(7) of the CWA. Complaint at ¶ 27.

In its Complaint, EPA alleged that Respondent did not obtain a CWA permit issued by U.S. Army Corps of Engineers (Corps) prior to conducting the fill placement activity described in the Complaint. Complaint at ¶ 66. Accordingly, EPA alleged Respondent’s activity was not authorized by any permit issued pursuant to Section 404 of the CWA.

Respondents also argued that no facts are present in the pleading that the activities have

⁴ In Nebraska, the applicable regulatory definition of “waters of the United States” has remained the same since the 1988 regulations because neither the 2015 rule nor the 2020 rule, cited below, ever went into effect. *See* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206 (Nov. 13, 1986); Clean Water Act Section 404 Program Definitions and Permit Exemptions; Section 404 State Program Regulations, 53 Fed. Reg. 20,764 (June 6, 1988); *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006); Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054 (June 29, 2015) (2015 Rule); *North Dakota v. U.S. Env’tl. Prot. Agency*, 127 F. Supp. 3d 1047 (D.N.D. 2015) (preliminarily enjoining implementation of the 2015 Rule as to parties before the court); Definition of “Waters of the United States” – Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019) (recodifying pre-2015 Rule regulations, effective Dec. 23, 2019); The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22,250 (April 21, 2020) (NWPR); *Pascua Yaqui Tribe, et al. v. U.S. Env’tl. Prot. Agency*, No. CV-20-00266 (D. Ariz. Aug. 30, 2021) (order vacating the NWPR). Thus, the waterbodies at issue have met the requirements of the applicable regulatory definition of “waters of the United States” from the time of the initial alleged violations to the present.

caused any damage or hardship to either the tributary or the Little Nemaha River. Answer at p. 4. To establish a prima facie case, EPA need not show Respondents' discharge or other activities caused any deleterious effect on downstream waters. *United States v. Hubenka*, 438 F.3d 1026, 1035 (10th Cir. 2006). EPA only need to show that Respondents discharged a pollutant to waters of the United States from a point source without a permit. *Id.* Furthermore, the CWA "does not distinguish between small discharges and large discharges." *Conn. Fund for the Env't, Inc. v. Upjohn Co.*, 660 F.Supp. 1397, 1418 (D. Conn. 1987). The CWA also does not recognize "a de minimis defense." *Int'l. Union v. Amerace Corp., Inc.*, 740 F. Supp. 1072, 1083 (D. N.J. 1990). Nonetheless, the Complaint did allege that stormwater contains pollutants and that fill material is a pollutant. Complaint at ¶¶ 26, 41. EPA is prepared to present evidence of harm to the tributary, abutting wetlands, and the Little Nemaha River in the course of this proceeding.

While Respondents' argument in the Answer focused on actions within the tributary, the Complaint also alleged violations of Respondents' construction stormwater NPDES Permit that occurred outside the tributary. To state a prima facie violation of Section 402 of the CWA in this case, EPA must demonstrate that Respondents: (1) are each a person (2) who violated a condition of their NPDES Permit. *Student Public Interest Research Group v. P.D. Oil and Chem. Storage, Inc.*, 627 F. Supp. 1074, 1090 (D.N.J. 1986); *see also City of New York v. Anglebrook Ltd. P'ship*, 891 F. Supp. 900, 906 (S.D.N.Y. 1995). As noted above, the Complaint alleged Respondents are each a person. Complaint at ¶¶ 4, 17, and 18. The Complaint alleged Respondents held a NPDES Permit for construction activities at the Site that contained various terms and conditions and required the development and implementation of a Stormwater Pollution Prevention Plan (SWPPP). Complaint at ¶¶ 30, 31. The Complaint further alleged certain specific requirements of Respondents' NPDES Permit and SWPPP. Complaint at ¶¶ 46-53, 59-60. The Complaint also alleged the observations of conditions made on particular dates

that support the conclusion that the requirements of the NPDES Permit and SWPPP were violated. Complaint at ¶¶ 32, 54-56, 61-63.

In sum, EPA properly pleaded a case for a violation of Sections 301, 402, and 404 of the CWA and nothing in Respondent's Answer demonstrates that EPA's allegations, assumed to be true, could not prove a violation of Sections 301, 402, and 404 of the CWA. To the extent that any of Respondent's assertions could be construed as affirmative defenses, Respondent must plead and prove affirmative defenses, 40 C.F.R. § 22.24(a). Accordingly, the Tribunal should deny Respondent's Motion to Dismiss.

C. The Tribunal Should Grant Complainant's Motion for an Order to File a Complete Answer Because Respondents Failed to Comply with the Rules of Practice.

The Rules of Practice require that Respondents clearly admit, deny, or explain *each* of the facts alleged in the Complaint. 40 C.F.R. § 22.15(b). According to the Federal Register notice adopting the Rules of Practice, "[t]he purpose of the answer is to clarify what is contested and what is not contested at an early stage of the proceeding." 64 Fed. Reg. 40138, 40153 (July 23, 1999).

Respondents' Answer failed to admit, deny, or explain each of the facts alleged in the Complaint. The Answer begins with Paragraph 17 of the Complaint. Answer at p. 1. However, there are allegations made earlier in the Complaint; notably, Paragraph 4 alleges that Evergreen Development is a corporation incorporated under the laws of the state of Nebraska and that Mark Schmidt is an operator of the Site. In addition, the Answer ends its admissions, denials, and explanations at Paragraph 44. Answer at p. 3. but the Complaint contains many more allegations. The Answer states that Respondents generally deny all other allegations of the Complaint as legal conclusions rather than factual allegations. Answer at p. 4. However, the Complaint contains factual allegations regarding the requirements of Respondents' NPDES Permit and

SWPPP in Paragraphs 46-53 and 59-60. The Complaint also contains factual allegations regarding the conditions that were observed at the Site in Paragraphs 54-56 and 61-63. Finally, the Complaint alleges that Respondents did not obtain a permit issued pursuant to CWA Section 404 in Paragraph 66. Respondents' failure to admit, deny, or explain each factual allegation thwarted the purpose of the Answer in this case because it did not narrow the contested issues for the parties or this tribunal.

Respondent's Answer also failed to request a hearing. The Answer is titled "Answer to Complaint and Request for Hearing" but nowhere within the Answer itself does it state whether a hearing is requested as required by 40 C.F.R. § 22.15(b). Instead, the Answer includes a request for informal settlement conference. Answer at p. 5. The Complaint directed the requests for a settlement conference could be made "whether or not Respondents request a hearing" by directly contacting counsel for Complainant. Complaint at ¶ 80. Although the Tribunal may elect to hold a hearing even if Respondents do not request one where the Answer raises issues for adjudication, 40 C.F.R. § 22.15(c), it is not clear whether Respondents have or have not requested a hearing in this case

Accordingly, the Tribunal should grant Complainant's Motion for an Order to File a Complete Answer.

V. CONCLUSION

For the reasons stated above, Complainant respectfully requests that the Tribunal grant Complainant's Motion for a Ruling that Respondents' Answer Is Not a Motion to Dismiss or, in the alternative, deny Respondents' Request to Dismiss. Additionally, Complainant respectfully requests that the Tribunal grant Complainant's Motion for an Order to File a Complete Answer.

Dated this 1st day of February 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the date noted below I filed via the E-Filing system the original of this Motion for Ruling, Response to Answer Opposing Request to Dismiss, and Motion for Order to File a Complete Answer to the Office of Administrative Law Judges, Headquarters Hearing Clerk.

I further certify that on the date below I sent a copy of this Motion for Ruling, Response to Answer Opposing Request to Dismiss, and Motion for Order to File a Complete Answer by U.S. Certified Mail and by electronic mail to:

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