



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 COMPLAINT AND ON THE PARTIES’ MOTIONS
FOR EXTENSIONS OF TIME FOR PREHEARING EXCHANGES**

This proceeding was initiated on September 16, 2019, by Complainant, the Director of the Enforcement and Compliance Assurance Division of the U.S. Environmental Protection Agency, Region 7, filing a Complaint and Notice of Opportunity for Hearing (“Complaint”) against Respondents, Adamas Construction and Development Services, PLLC, and Nathan Pierce, pursuant to Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act, 33 U.S.C. § 1319(g). Through counsel, Respondents jointly filed an Answer and Request for Hearing on October 16, 2019.

On October 18, 2019, I issued a Prehearing Order setting forth various prehearing filing deadlines and procedures, including deadlines for the parties to engage in a prehearing exchange of information. Thereafter, Complainant filed a Motion for Leave to Amend the Complaint, and both Complainant and Respondents filed motions seeking to extend the deadlines for completion of the prehearing exchange process. Those motions, and the parties’ responses thereto, are considered below.

A. Complainant’s Motion for Leave to Amend the Complaint

Filed on December 17, 2019, Complainant’s Motion for Leave to Amend the Complaint (“Motion to Amend”) describes six sets of amendments that Complainant seeks to make to the Complaint. Complainant attached two documents to its Motion to Amend: 1) a signed copy of the Amended Complaint and Notice of Opportunity for Hearing (“Amended Complaint”), and 2) a copy of an email thread between counsel for Complainant and counsel for Respondents in which they discuss Respondents’ position on the Motion to Amend. Complainant notes in the Motion to Amend that, as reflected in the aforementioned email thread, Respondents’ counsel informed counsel for Complainant that Respondents’ default position is to oppose the Motion to Amend. On December 20, 2019, Respondents filed a document entitled Motion for Extension of

Time to File Prehearing Exchange(s) and Opposition to Complainant's Motion for Leave to Amend the Complaint ("Respondents' Opposition"). Therein, Respondents refer to emails between their counsel and counsel for Complainant¹ in which Respondents' counsel purportedly requested a copy of the proposed amended complaint in advance of Complainant filing the Motion to Amend and advised counsel for Complainant of Respondents' objection to the Motion to Amend. Also on December 20, 2019, Complainant filed a Response to Respondents' Motion for Extension of Time to File Prehearing Exchange(s) and Opposition to Complainant's Motion for Leave to Amend the Complaint ("Complainant's Response")

This proceeding is 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. 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., *Env'tl. 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). Consistent with this rule, the United States Supreme Court held in the leading case on the issue, *Foman v. Davis*, 371 U.S. 178 (1962), that leave to amend a pleading should be freely given in the absence of any apparent or declared reason, such as "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." *Id.* at 182. The Court observed 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.

The Environmental Appeals Board ("EAB" or "Board") has since adopted the liberal stance articulated in Rule 15 and *Foman* as a means of promoting decisions on the merits in the administrative proceedings before it. *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,

¹ Respondents state that they attached a copy of this correspondence to their filing, but I do not see any such attachment in the record.

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).

Applying this standard to Complainant’s Motion to Amend, I do not discern any bad faith, dilatory motive, futility, undue prejudice, or other reason to deny it, and as noted by Complainant in its Response, Respondents do not identify any basis for opposing the proposed amendments in their Opposition. Complainant is not seeking leave to add any new counts or propose any additional penalties. Rather, Complainant asserts that the six sets of proposed amendments either correct minor drafting errors or incorporate additional legal and factual allegations based on information obtained by Complainant after the Complaint was filed. Specifically, Complainant first seeks to revise certain references to “Respondent” to state “Respondents” instead to ensure that, as appropriate, the allegations accurately identify both named respondents. Second, Complainant seeks to allege that Respondents were “preparers of sewage sludge,” as that term is defined by 40 C.F.R. § 503.9(r), and add a reference in the Statutory and Regulatory Framework section of the Complaint to 40 C.F.R. § 503.7, which identifies a requirement applicable to preparers of sewage sludge. Third, Complainant seeks to add to the Statutory and Regulatory Framework section the definition of the phrase “treat or treatment of sewage sludge,” as set forth in 40 C.F.R. § 503.9(z), and a reference to the applicability provision set forth at 40 C.F.R. § 503.10(a). Fourth, Complainant seeks to allege that Respondents were “operators” of the Lame Deer Publicly Owned Treatment Works and that that facility was a “point source,” as that term is defined by 33 U.S.C. § 502(14) and referenced in 33 U.S.C. § 1318(a)(A). Fifth, Complainant seeks to add a factual allegation related to Respondents’ purported dewatering activities. Finally, Complainant seeks to add a reference to “subcontractors” in the factual allegation related to the application of sewage sludge. Complainant argues, and Respondents do not dispute, that the information upon which the proposed amendments are based was in Respondents’ possession prior to the filing of the Complaint and that it was provided to Complainant only after the Complaint was filed. Thus, Complainant does not appear to be acting in bad faith or with undue delay, and the proposed amendments do not appear to be unduly prejudicial. In any event, Respondents have ample time to address the proposed amendments as Complainant filed its Motion to Amend in the early stages of the litigation process and a hearing has not yet been scheduled.

For the foregoing reasons, Complainant’s Motion to Amend is hereby **GRANTED**. Because Respondents and this Tribunal received a signed copy of the Amended Complaint as an attachment to the Motion to Amend, the 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 Amended Complaint within 20 days from the date of this Order. *See* 40 C.F.R. § 22.14(c).

B. The Parties’ Motions for Extensions of Time for Prehearing Exchanges

As noted above, both Complainant and Respondents filed motions seeking to extend the deadlines for completion of the prehearing exchange process. Specifically, Respondents request in their Opposition that the deadline for Respondents’ prehearing exchange(s) be extended until a ruling on Complainant’s Motion to Amend has been issued, at which time Respondents “will

have 14 day [sic] to file and [sic] response to the amended complaint or file prehearing exchanges.”² In addition to citing Complainant’s Motion to Amend as a basis for their request, Respondents note that illness, the holidays, and the work schedule of Respondents’ counsel has hindered his ability to confer with Respondents on the matters at hand. Complainant indicates in its Response that it does not oppose Respondents’ request. Meanwhile, Complainant requests in its Motion for Extension of Time to File Rebuttal Prehearing Exchange that the deadline for its rebuttal prehearing exchange be extended from January 3 to January 10, 2020, because of the holidays and work schedule of Complainant’s counsel. Complainant asserts that it sought Respondents’ position on its request by email but that Respondents’ counsel did not respond. To date, Respondents also have not filed a written response with this Tribunal.

The Rules of Practice allow the Presiding Officer to “grant an extension of time for filing any document: upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties.” 40 C.F.R. § 22.7(b). Upon consideration, I find that the parties’ motions for extensions of time for their prehearing exchanges were timely, demonstrate good cause, and are not prejudicial to the opposing party. Accordingly, the parties’ motions for extensions are hereby **GRANTED**. Respondents shall file their Prehearing Exchange(s) on or before **January 24, 2020**, and Complainant shall file its Rebuttal Prehearing Exchange on or before **February 7, 2020**.

SO ORDERED.


Christine Donelian Coughlin
Administrative Law Judge

Dated: January 2, 2020
Washington, D.C.

² Respondents do not cite any legal authority for the notion that they would have 14 days from a ruling on Complainant’s Motion to Amend to respond to the Amended Complaint or file their prehearing exchange(s).

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on Complainant's Motion for Leave to Amend the Complaint and on the Parties' Motions for Extensions of Time for Prehearing Exchanges**, dated January 2, 2020, and issued by Administrative Law Judge Christine Donelian Coughlin, was sent this day to the following parties in the manner indicated below.

Jennifer Almase
Attorney Advisor

Original and One Copy by Personal Delivery to:

Mary Angeles, Headquarters Hearing Clerk
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Dated: January 2, 2020
Washington, D.C.