



**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 DENYING RESPONDENTS’ MOTION FOR LEAVE TO FILE OUT OF TIME
AND SHORTENING TIME FOR RESPONSE TO COMPLAINANT’S MOTION
FOR LEAVE TO AMEND THE AMENDED COMPLAINT**

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 (“NCUC”) at the Lame Deer Lagoon Wastewater Treatment Facility (“Site”). 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 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”), which left the charged violations unchanged, was deemed to have been filed on January 2, 2020.

Thereafter, the parties filed several motions, resulting in issuance of an Order on Complainant’s Motion to Supplement its Prehearing Exchange and Respondents’ Motions for Default and Attorneys’ Fees on December 14, 2021, and an Order on Complainant’s Motion for Accelerated Decision and Respondents’ Requests for Dismissal and Additional Discovery (“AD Order”) on April 20, 2022. By Notice of Hearing Order dated May 23, 2022, I then scheduled the hearing in this matter to commence in Billings, Montana, on August 22, 2022, and set deadlines for a number of prehearing procedures, including a deadline by which the parties were required to file any non-dispositive motions. Complainant proceeded to file three non-dispositive motions, which I ruled upon in an Order Granting Complainant’s Motion for Video Testimony and Shortening Time for Responses and Replies to Complainant’s Motions for Written Deposition and Production of Documents issued on June 28, 2022, and an Order on Complainant’s Motion for Additional Discovery and Motion to Compel Discovery, or in the Alternative, Motion in Limine issued on July 11, 2022.

The parties have now filed the additional motions described and ruled upon below:

1. Respondents’ Motion for Leave to File out of Time Respondent’s Motion to Dismiss (“Motion to File out of Time”), accompanied by Respondents’ Motion to Dismiss,¹ filed on July 19, 2022. In their Motion to File out of Time, Respondents acknowledge that the deadline for filing dispositive motions has passed and that leave of this Tribunal to file such a motion is now required. To support their request for leave to file a motion to dismiss, Respondents point out that Complainant has asserted in several filings that the testimony of a particular proposed witness, Sheri Bement,² would “help resolve the question of whether Respondents were an ‘operator’ at the Site,” which is “central” to Complainant’s charge in Claim 2 that Respondents violated Section 308 of the CWA, 33 U.S.C. § 1318. Motion to File out of Time at physical page 3. Stating that Complainant just recently informed Respondents that it will not be calling Ms. Bement to testify, Respondents argue that “the remaining witness [sic] the Complainant intends to call will not be able to resolve this question as they were not representatives for NCUC,” such that Complainant will not be able to demonstrate that Respondents were operators at the Site and therefore will be unable to prove Respondents’ liability for Claim 2. *Id.* Respondents then argue that “[i]t is clear from the record that a more carefully drafted complaint would still be unable to show a right to relief” and that “[d]ismissal of this matter is in the public interest and will

¹ Respondents subsequently filed a document they described in this Tribunal’s electronic filing system as “Respondents Corrected Motion to Dismiss.” However, the title and caption of the document do not identify it as such, and it is not clear from the body of the document what was corrected.

² In their prehearing exchange of information, both Complainant and Respondent Pierce stated their intention to call a representative of the NCUC to testify as a fact witness at the hearing. Complainant’s Initial Prehearing Exchange (“Complainant’s Initial PHE”) at 4; Respondent’s Prehearing Exchange (“Respondent’s PHE”) at 5. In discussing this potential witness, Complainant referenced Sheri Bement as follows: “The former manager, Sheri Bement, no longer works at the NCUC, and therefore, a new witness will need to be identified.” Complainant’s Initial PHE at 4. Respondent Pierce, meanwhile, stated as follows: “The former manager, Sheri Bement, no longer works at the NCUC and, therefore, will need to be compelled to testify as a fact witness as she has significant details about this case and the facts surrounding it.” Respondent’s PHE at 4.

promote Due Process, fundamental fairness, and the true justiciable disposition of this matter.” *Id.* at physical page 4. Finally, Respondents represent that Complainant informed Respondents of its opposition to their Motion to File out of Time and Motion to Dismiss.

As Respondents acknowledge, any motion to dismiss is untimely. Advising that motions not filed in a timely manner may not be considered, I directed the parties in the Prehearing Order to file any dispositive motions regarding liability, such as a motion to dismiss, within 30 days of the deadline for Complainant’s Rebuttal Prehearing Exchange, which was eventually extended to April 3, 2020. Thus, such motions were due on or before May 4, 2020. Respondents argue that Complainant’s decision not to call Ms. Bement to testify at the upcoming hearing warrants consideration of a dispositive motion past that deadline, but I disagree. While her expected testimony may have helped to resolve the question of whether Respondents were “operators” at the Site, I note that the record contains other proposed evidence, as discussed in the AD Order, that appears to be relevant to the issue and that testimony may be elicited from other witnesses at the hearing, including Respondent Pierce, that may also be relevant. Moreover, I note that Respondent Pierce, having identified Ms. Bement as a proposed witness in his prehearing exchange, is still at liberty to call her to testify at the hearing, either voluntarily or as compelled by a subpoena if Respondents seek a subpoena out of time. Accordingly, once I have weighed the evidence admitted into the record at hearing, it is still conceivable for me to find that Complainant has established the elements of liability for Claim 2, including that Respondents were “operators” at the Site. For the foregoing reasons, I find that Respondents have not offered a sufficient basis for me to consider its Motion to Dismiss well past the deadline for such a motion and in such close proximity to the scheduled hearing. Therefore, their Motion to File out of Time is hereby **DENIED**.³

2. Complainant’s Motion for Leave to Amend the Amended Complaint (“Motion to Amend”), accompanied by a signed copy of the second Amended Complaint and Notice of Opportunity for Hearing, filed on July 19, 2022. 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.* 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.* Finally, Complainant represents that Respondents informed Complainant of their intention to oppose the Motion to Amend.

As discussed earlier in this proceeding when Complainant sought leave to amend the original Complaint, the standard for adjudicating such a request is generally liberal.⁴ Given

³ While the time for Complainant to file a response has not expired, I find that no response is necessary given their expected opposition and my ruling on the matter.

⁴ See Order on Complainant’s Motion for Leave to Amend the Complaint and on the Parties’ Motions for

Respondents' expected opposition, however, I shall afford Respondents an opportunity to respond in writing as provided for in the Rules of Practice. *See* 40 C.F.R. § 22.16(a). The Rules of Practice provide that any response to a written motion must be filed within 15 days after service of such motion and that any reply to a response must be filed within 10 days after service of such response. 40 C.F.R. § 22.16(b). The Certificate of Service attached to the Motion to Amend appears to contain a scrivener's error, as it is dated July 18, 2019. The Motion to Amend itself is dated July 19, 2022, however, and that is the date on which the Motion to Amend was filed with this Tribunal. Assuming that service was completed on that date as well, any response and reply would be due on August 3 and August 15, 2022, respectively. *See* 40 C.F.R. § 22.7(a). Given the proximity of the hearing, I am hereby shortening the time for Respondents to file a response to the Motion to Amend and dispensing with any reply pursuant to my authority 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). Accordingly, Respondents shall file and serve any written response to Complainant's Motion to Amend no later than **Thursday, July 28, 2022**.

SO ORDERED.


Christine Donelian Coughlin
Administrative Law Judge

Dated: July 21, 2022
Washington, D.C.

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Respondents
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order Denying Respondents' Motion for Leave to File out of Time and Shortening Time for Response to Complainant's Motion to Amend**, dated July 21, 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: July 21, 2022
Washington, D.C.