

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:)	COMPLAINANT’S MOTION FOR ADDITIONAL DISCOVERY
)	
ADAMAS CONSTRUCTION AND DEVELOPMENT SERVICES, PLLC)	
)	
AND)	
)	
NATHAN PIERCE,)	
)	Docket No. CWA-07-2019-0262
Respondents.)	
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I. INTRODUCTION

COMES NOW, the U.S. Environmental Protection Agency, Region 7 (“Complainant”), through its undersigned counsel, to respectfully request that this Court issue an Order for Additional Discovery pursuant to 40 C.F.R. § 22.19(e)(1). A Motion for Additional Discovery may be granted when the prehearing exchange has already taken place and the motion satisfies the three elements listed in 40 C.F.R. § 22.19(e)(1). Complainant seeks an Order from this Court allowing for the written deposition of Sheri Bement, a fact witness, as a representative of the Northern Cheyenne Utility Commission (NCUC). 40 C.F.R. Part 22 does not provide specific requirements for a motion for written depositions, but Complainant has satisfied all of the requirements for a motion for additional discovery in 40 C.F.R. § 22.19(e)(1) and for a motion for oral depositions in 40 C.F.R. § 22.19(e)(3). Sheri Bement is unavailable as a witness due to physical illness. Therefore, this Court should grant this Motion for Additional Discovery seeking a written deposition of Sheri Bement.

II. STANDARD FOR GRANTING A MOTION FOR OTHER DISCOVERY

Motions for additional discovery are governed by Section 22.19(e) of the Consolidated Rules of Practice. 40 C.F.R. § 22.19(e). 40 C.F.R. § 22.19(e)(1) requires that a motion for additional discovery shall specify the method of discovery sought, provide the proposed discovery instruments, and describe

in detail the nature of the information and/or documents sought. The Presiding Officer may order such other discovery only if it: (1) will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party; (2) seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and (3) seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought. As explained in Section III, below, this motion for other discovery satisfies each of these elements.

III. THIS COURT SHOULD GRANT COMPLAINANT'S MOTION FOR ADDITIONAL DISCOVERY

A. Method Of Discovery Sought, Proposed Discovery Instruments, Nature Of The Information Sought

The method of discovery sought by Complainant is written depositions directed at Sheri Bement, former General Manager of NCUC. The proposed discovery instrument from Complainant, a list of written deposition questions, is attached. The nature of the information sought is testimony of Sheri Bement's personal involvement in the facts of the case. Specifically, Sheri Bement worked and communicated with Respondents during Respondents' contractual arrangement with NCUC. She was personally familiar with many of Respondents' responsibilities, actions, and statements regarding the sludge removal project.

B. The Prehearing Exchange Has Taken Place

The prehearing information exchanges in this case concluded with the filing and service of Complainant's Rebuttal Prehearing Exchange on April 3, 2020. Further, this Court's May 23, 2022 Hearing Order allows for the parties to file non-dispositive motions, such as motions for additional discovery, on or before June 24, 2022. Therefore, as the prehearing exchange has taken place and as this motion is filed prior to the June 24, 2022 deadline, it is appropriate for Complainant to file this motion for additional discovery.

C. The Motion for Other Discovery will Neither Unreasonably Delay the Proceeding nor Unreasonably Burden the Non-Moving Party

This motion will neither unreasonably delay the proceeding as the hearing has been scheduled with sufficient time for both parties to complete the discovery requested. According to this Court's May 23, 2022 Hearing Order, a hearing is scheduled for August 22-26, 2022. Additionally, the Hearing Order states that the parties may supplement their prehearing exchange by motion after June 24, 2022. This Motion is to be filed on or about June 24, 2022. Therefore, the parties will have approximately two months to create, communicate, and move to supplement their prehearing exchange (by motion) with any information garnered from such discovery.

Additionally, this motion will not create an unreasonable burden for Respondents because this additional discovery is not mandatory and therefore Respondents may choose not to engage in additional discovery. If Respondents do elect to engage in additional discovery, the form of discovery will not create an unreasonable burden because it will only require the drafting and mailing of written questions to both the witness and to the other party. While these activities may create some of a burden for Respondents, Complainants believe this burden is not unreasonable given the significance of the witness's testimony. Respondent Pierce has been notified that EPA intends to file this motion and has expressed that he intends to file a motion to subpoena Sheri Bement.

D. The Motion for Other Discovery Seeks Information that is Most Reasonably Obtained from the Non-Moving Party, and which the Non-Moving Party Has Refused to Provide Voluntarily

Complainant seeks testimony as to Respondents' responsibilities at the Lame Deer Publicly Owned Treatment Works. Because Respondents were present at the treatment plant and were directly involved in the Lame Deer sludge removal project and Complainant was not, this information is most reasonably obtained from the non-moving party (the Respondents). However, the Respondents have provided a one-side story as to its responsibilities and activities at the treatment plant and with regard to the Lame Deer sludge removal project. Further, Respondents' repeated assertions that they were not

fully responsible for carrying out the sludge removal project and other responsibilities at the Lame Deer Publicly Owned Treatment Works are directly contradicted by the evidence. Because Respondents were directly involved in the activity for which they seek to absolve themselves of liability, Respondents are likely to provide a self-serving perspective of the events that took place at the treatment plant. Because Complainant is unable to obtain a fair and objective narrative as to the events at the treatment plant, Complainant seeks the testimony of a third party, Sheri Bement, to provide a fuller picture of these events.

E. The Motion for Other Discovery Seeks Information that Has Significant Probative Value on a Disputed Issue of Material Fact Relevant to the Relief Sought

Complainant seeks information as to Sheri Bement's role in the Lame Deer sludge removal project. Sheri Bement's role has an impact on Respondents' roles in the sludge removal project. Specifically, Complainant seeks information as to who qualifies as an "operator" of the Lame Deer Publicly Owned Treatment Works. This information has probative value on an issue of material fact because an operator is subject to Section 308 of the Clean Water Act (CWA), 33 U.S.C. § 1318, which states that "[w]henever required to carry out the objective of this chapter . . . the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, . . . and (v) provide such other information as he may reasonably require." In its Complaint, Complainant alleges that Respondents violated 33 U.S.C. § 1318 by not providing records in response to information requests by the EPA.

Whether Respondents were operators of the Lame Deer Treatment Works is a disputed issue of material fact. As discussed above, who served as an operator is a material fact because it affects who is responsible for providing records under Section 308 of the CWA. However, whether Respondents were operators is a disputed fact because Complainant alleges it in its Complaint, whereas Respondents deny it in both their Answer ("[I]t is not the responsibility of Adamas or Pierce to provide information as they did not apply any sludge.") and their Prehearing Exchange ("The Respondents is [sic] NOT liable as the

NCUC was the primary contractor,” “Adamas and Nathan Piercer [sic] were at all time under the control and direction of Sheri Bement and NCUC as evidence by the June 27 2018, letter.”).

IV. METHOD OF ADDITIONAL DISCOVERY SOUGHT

Complainant seeks to engage in a written deposition of Sheri Bement, a witness listed in Complainant’s Initial Prehearing Exchange.

V. STANDARD FOR WRITTEN DEPOSITIONS

40 C.F.R. § 22.19 allows for additional discovery including, but not limited to, depositions. 40 C.F.R. 22.19(e)(3).

Although 40 C.F.R. § 22.19(e)(3) only refers to oral depositions and Complainant requests the use of written depositions, the use of written depositions satisfies the elements set forth for oral depositions in 40 C.F.R. § 22.19(e)(3). According to 40 C.F.R. § 22.19(e)(3), the Court may order depositions upon oral questions only if (1) the general three elements for additional discovery are satisfied, (2) the information sought cannot reasonably be obtained by alternative methods of discovery; or (3) there is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

First, discussion of how this motion satisfies the general three elements for additional discovery is found in Section III above.

Second, the information sought cannot reasonably be obtained by alternative methods of discovery because it involves knowledge of events and communications of a witness who was intimately involved in the facts of the case. Sheri Bement played a unique role in the circumstances that gave rise to this case. In Respondents’ Answer, Respondents include as an attachment a memo dated May 18, 2018, wherein Sheri Bement is listed as one of two NCUC attendees (the other being the NCUC attorney) at a Pre-Construction meeting for the Lame Deer Lagoon Sludge Removal project. Respondent also include in their Answer an email dated July 2, 2019, wherein Respondent Pierce states “[o]ur company was as given the directive from NCUC GM Sheri Bement and Northern Cheyenne tribal president Jace

Killsback to proceed with sludge removal and application” Lastly, Respondents say in Respondents’ Prehearing Exchange, “Adamas and Nathan Piercer [sic] were at all time under the control and direction of Sheri Bement and NCUC as evidence by the June 27 2018, letter.”

Third, there is substantial reason to believe that the relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing. The evidence is relevant and probative due to Sheri Bement’s involvement in the facts of the case, as described in the preceding paragraph. Additionally, the evidence may otherwise not be preserved for presentation at the hearing because Sheri Bement is an unavailable witness, as described in Section VI below. Because Sheri Bement possessed a uniquely involved role in the facts of the case, and because she is unavailable due to physical illness, Complainant has satisfied the requirements of oral depositions as set forth by 40 C.F.R. 22.10(e).

VI. WITNESS SHERI BEMENT IS UNAVAILABLE

Complainant lists a representative of the Northern Cheyenne Utilities Commission (NCUC) in its Initial Prehearing Exchange. Although Sheri Bement no longer works for NCUC, she was employed by NCUC and was heavily involved in the circumstances that underly this case. It is undisputed that Sheri Bement was the General Manager of the NCUC at the time the NCUC contracted with Respondents regarding sludge removal and application. *See Complainant’s Initial Prehearing Exchange and Respondents’ Prehearing Exchange.* Federal Rule of Evidence 804 states “[a] declarant is considered to be unavailable as a witness if the declarant . . . cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness”

Here, Sheri Bement is unavailable due to physical illness that impedes her ability to travel and be present for a hearing. Therefore, Sheri Bement meets the definition of an unavailable witness as provided in Federal Rule of Evidence 804. Because Sheri Bement is unavailable, an alternative form of discovery is necessary in order to obtain her testimony.

VII. CONCLUSION

A Motion for Additional Discovery may be granted when the prehearing exchange has already taken place and the motion satisfies the three elements listed in 40 C.F.R. § 22.19(e)(1). Complainant seeks an Order from this Court allowing for the written deposition of Sheri Bement, a fact witness, as a representative of the Northern Cheyenne Utility Commission. 40 C.F.R. Part 22 does not provide specific requirements for a motion for written depositions, but Complainant has satisfied all of the requirements for a motion for additional discovery in 40 C.F.R. § 22.19(e)(1) and for a motion for oral depositions in 40 C.F.R. § 22.19(e)(3). Sheri Bement is unavailable as a witness due to physical illness. Therefore, this Court should grant this Motion for Additional Discovery seeking a written deposition of Sheri Bement.

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I certify that the foregoing Complainant's Motion for Additional Discovery, Docket No. CWA-07-2019-0262, has been submitted electronically using the OALJ E-Filing System.

A copy was sent by email to:

Nathan Pierce, Owner, Adamas Construction and Development Services PLLC:

Nathan Pierce

Email: adamas.mt.406@gmail.com

Dated: June 23, 2022

Respectfully submitted,

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