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

IN THE MATTER OF ADAMAS CONSTRUCTION AND DEVELOPMENT SERVICES, PLLC AND NATHAN PIERCE, Respondents Proceedings under Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g)	)	RESPONDENTS RESPONSE IN OPPOSITION OF COMPLAINANTS MOTION FOR ADDITIONAL DISCOVERY Docket No. CWA-07-2019-0262

RESPONDENTS RESPONSE IN OPPOSITION OF COMPLAINANTS MOTION FOR ADDITIONAL DISCOVERY

I. INTRODUCTION

COMES NOW, the ("Respondents") NATHAN PIERCE and ADAMAS CONSTRUCTION AND DEVELOPMENT SERVICES PLLC, PRO-SE, pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. §§ 22.1 to 22.45, and Administrative Law Judge Christine Donelian Coughlin's Order of June 28, 2022, submits this RESPONDENTS RESPONSE IN OPPOSITION OF COMPLAINANTS MOTION FOR ADDITIONAL DISCOVERY.

The Respondent opposes Complainant's deposition request as to Sheri Bement,

generally arguing that in administrative enforcement hearings discovery is “limited,” and “indeed is disfavored and allowed only in an extremely limited set of circumstances.” Compl. Opp. at 1. Offering an extraordinarily narrow reading of the discovery provisions of 40 C.F.R. 22.19(e)(1), respondent submits that depositions are not appropriate where a narrative of the witness’s expected testimony is provided and where the opposing party will have the opportunity at hearing to conduct cross-examination. It is not clear why any testimony that Complainant wish to elicit from Sheri Bement would not be preserved for hearing. Complainants also do not explain why the evidence sought could not reasonably be obtained by alternative methods of discovery, such as interrogatories, teleconference or by video Testimony as sought by the Complainant with witness James Courtney. Thus, Complainants have not met the heightened threshold set forth in the Rules of Practice for this Tribunal to order depositions. Accordingly, denial of Complainants’ request to depose Sheri Bement is appropriate.

The U.S. Environmental Protection Agency, Region 7 (“Complainant”), through its undersigned counsel, requests 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 and not Oral 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 for a motion for written depositions, the Complainant has also failed to satisfy 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). Therefore, this Court should Deny the Complainants 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 DENY THE 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, limiting her testimony and ability to be cross examined. The proposed discovery instrument from Complainant, a list of written not oral deposition questions, again limiting her testimony and ability to be cross examined. 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. Therefore her in-person testimony and the ability to cross examine her is vital to this case and should not limited as proposed by the Complainant.

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.

C. The Motion for Other Discovery May Unreasonably Delay the Proceeding and Will Unreasonably Burden the Non-Moving Party. The Complainant's motion could unreasonably delay the proceeding as the hearing has already been scheduled and there may not be sufficient time for both parties and Sheri Bement to complete the discovery requested including follow-up or cross examination questions. According to this Court's May 23, 2022 Hearing Order, a hearing is scheduled for August 22-26, 2022.

Additionally, this motion will create an unreasonable burden for Respondents because this additional discovery limits the ability of the Respondent to cross examine witnesses. If Respondents do elect to engage in additional discovery, the form of discovery will create an unreasonable burden that require the drafting and mailing of written questions to both the witness and to the other party, taking time away from the Respondent preparing for the hearing. Given the significance of the witness's testimony the Tribunal should Deny this request.

D. This Tribunal should reject the Complainant's argument that 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. Yet the record

is quite clear, and the Complainant still has not pointed to any proposed evidence in the record that would refute the EPA's own records showing who the Owner and Operator of the Lame Deer Lagoons are or were, nor will the Complainant's proposed questions significantly change alter what is already in the record point to who was the operator of the POTW.

The Tribunal should reject Complainant EPA's claim they were not present at the treatment plant as the Tribunal Points out in their order dated April 20, 2022, the EPA had representatives on site who described the roles of the Owner (Nothern Cheyenne Tribe) and Operator (NCUC) of the POTW and this information is already in the possession of the Complainant and it is unnecessary for it to be obtained from the non-moving party (the Respondents). Again, the evidence refutes the claim from the Complainant that, the Respondents have provided a one-side story as to its responsibilities and activities at the treatment plant and regarding the Lame Deer sludge removal project, the EPA's own records reflect these facts and it is the Complaint who is unable or unwilling to accept the established facts of this case, including those point out by this tribunal in previous orders. The proposed evidence in this case further supports the 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 and the Complainant points to no proposed evidence to support their disingenuous claims otherwise. The Complainant is unable to accept the fair and objective evidence and instead is attempting to create a false 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, however their proposed questions would not provide a fuller picture only limit the testimony of Sheri Bement.

E. This Tribunal should reject the Complainant's argument that The Motion for Other Discovery Seeks Information that Has Significant Probative Value on a Disputed Issue of Material Fact Relevant to the Relief Sought. The Complainant seeks information as to Sheri Bement's role in

the Lame Deer sludge removal project, however the record is clear what Sheri Bements role was. This tribunal pointed to her role in the Accelerated decision order dated April 20,2022 stating, "In particular, NCUC was named as the entity satisfying the definition of "operator" in the pertinent field, CX 5 at 3, as well as in the following narrative:

On Wednesday, June 13, 2018, and Thursday, June 14, 2018, we, U.S. Environmental Protection Agency (EPA) inspectors Akash Johnson and Emilio Llamozas, conducted an announced compliance evaluation inspection of the Lame Deer Wastewater Treatment Facility (WWTF) (the lagoon; the facility; the site), located in Lame Deer, Montana, on the Northern Cheyenne Indian Reservation, to evaluate compliance with the facility's National Pollutant Discharge Elimination System (NPDES) Permit No. MT0029360 (the Permit). The lagoon was owned by the Northern Cheyenne Tribe (the Tribe) and operated by the Northern Cheyenne Utilities Commission (NCUC)'..

The Resondant agrees that Sheri Bement's role has an impact on Respondents' roles in the sludge removal project, she is also provides a clear example of the Complainants use of Selective Prosecution in this matter as the complainant has only singled out the Respondents despite the record being clear, including documents from EPA officials who were on site at the project naming the Owner and Operator of the Lame Deer Lagoons. The record is clear that NCUC Retained Ultimate Control of the project were Sheri Bement and Raymond Pine monitored the project daily. RX 15 at 10.

Therefor the information the Complainant seeks as to who qualifies as an "operator" of the Lame Deer Publicly Owned Treatment Works is already a matter of record before this tribunal including in the Complainants and Respondents exhibits. 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 not disputed issue of material fact. As noted by the tribunal in previous orders The Respondents never finished the application process as the respondent had a heart attack and therefore was never named an operator, also, NCUC and the Respondents did not enter into a contract for the Respondent to be the operator of the lagoon systems.

As discussed above, the EPA's own documents demonstrate NCUC served as the operator and it is a material fact because it affects who (NCUC) is responsible for providing records under Section 308 of the CWA. The complainant is aware of this and is simply attempting to mislead this tribunal by refusing to accept fact presented in their own documents.

However, whether Respondents were operators should not be disputed fact because the record and evidence clearly show NCUC was the operator. The Record and evidence before this tribunal clearly support the Respondents' claim "Adamas and Nathan Piercer [sic] were at all time under the control and direction of Sheri Bement and NCUC as evidence by the Tribunals order date April 20, 2022, directly refuting the claims made by the Complainant in their motion.

IV. METHOD OF ADDITIONAL DISCOVERY SOUGHT

Complainant seeks to engage in a written not Oral deposition of Sheri Bement, a witness listed in Complainant's Initial Prehearing Exchange.

V. STANDARD FOR ORAL NOT 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).

As the Complainant points out 40 C.F.R. § 22.19(e)(3) only refers to oral depositions and Complainant requests the use of written depositions, the Respondent contends that use of written depositions do not satisfy 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.

The Complainant's motion fails to satisfy the general three elements for additional discovery is found in Section III above.

The Complainant Fails to demonstrate how the information sought cannot reasonably obtained by alternative methods of discovery such as testimony via teleconference or video appearance, they simply state that it is "because it involves knowledge of events and communications of a witness who was intimately involved in the facts of the case". The Respondents agree Sheri Bement played a unique role in the circumstances that gave rise to this case.

The complainant only point toward evidence in their motion that support the Respondents claims stating; 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."

There is substantial reason to doubt that the relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing. Because Sheri Bement possessed a uniquely involved role in the facts of the case, and because Complaintant fails to demostrate why she is unavailable for other means of testimony due to physical illness, the Complainant has Failed 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. While the respondent is sympathetic to Sheri Bements alleged illness, as the complaintat points out 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 . . . ." However the Complainant fails to

state or demonstrate why, Sheri Bement is unavailable for video or other types of testimony simply stating, it is due to physical illness that impedes her ability to travel and be present for a hearing. Clearly she can correspond with the Complainant via email or computer therefore it is hard to believe video testimony won't work for her. Therefore, Sheri Bement fails to meet the definition of an unavailable witness as provided in Federal Rule of Evidence 804.

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 not oral 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 for a motion for written depositions, the Complainant has also failed to 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).

Therefore, this Court should DENY the Complainant's Motion for Additional Discovery seeking a written deposition of Sheri Bement.

RESPECTFULLY RESUBMITTED this 5th day of July 2022.

Nathan Pierce

Nathan Pierce

Respondent

16550 Cottontail Trail

Shepherd, MT 59079

CERTIFICATE OF SERVICE

I certify that the foregoing Respondents Supplemental Prehearing Exhibits, Docket No. CWA-07- 2019-0262, has been submitted to Judge Coughlin electronically using the OALJ E-Filing System.

Copy by Electronic Mail to:

Christopher Muehlberger, Esq.

Katherine Kacsur, Esq.

Assistant Regional Counsel

Office of Regional Counsel

U.S. Environmental Protection Agency, Region 7

Email: muehlberger.christopher@epa.gov

Email: kacsur.katherine@epa.gov

Attorneys for Complainant

Date: Tuesday, July 5th, 2022

/s Nathan Pierce ________

Nathan Pierce

Respondent