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

| | | |
|---|---|---|
| In the Matter of: | ) | **COMPLAINANT'S REPLY TO RSEPONDENT'S RESPONSE IN OPPOSITION OF COMPLAINANT'S MOTION FOR ADDITIONAL DISCOVERY** |
| ADAMAS CONSTRUCTION AND DEVELOPMENT SERVICES, PLLC | ) | |
| AND | ) | |
| NATHAN PIERCE, | ) | |
| Respondents. | ) | Docket No. CWA-07-2019-0262 |

## I. INTRODUCTION

COMES NOW, the U.S. Environmental Protection Agency, Region 7 ("Complainant"), through its undersigned counsel, to respectfully provide Complainant's Reply to Respondent's Response in Opposition of Complainant's Motion for Additional Discovery.

Respondents raise several substantive issues in their Response beyond the scope of the Motion currently before the Court that relate to the merits of the case. Complainant will address such issues through the hearing and post-hearing briefs and will not burden the Court with a discussion of the merits of the case where such discussion is not wholly appropriate. Complainant requests that the Court be advised that Complainant's refusal to engage in a discussion of the merits in this Reply does not amount to any admissions related to any arguments raised by the Respondent.

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). Complainant, in its Motion for Additional Discovery, has satisfied 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.

In their Response in Opposition of Complainants Motion for Additional Discovery ("Response"), Respondents provide several unsupported and conclusory arguments that Complainant has not met the requirements for a Motion for Additional Discovery. Respondents also admit that Sheri Bement "played a unique role in the circumstances that gave rise to this case" and "possessed a uniquely involved role in the facts of the case." Further, Respondents admit to providing "an extraordinarily narrow reading of the discovery provisions of 40 C.F.R. § 22.19(e)" in arguing that a written deposition of Sheri Bement is not appropriate. In this Reply, Complainant provides a basis for this Court to hold that Sheri Bement's testimony is not available by alternative methods of discovery and will otherwise not be preserved for hearing.

Respondents argue that interrogatories, teleconference, or video testimony may be an appropriate alternative to written depositions, but imply that any form of discovery not mentioned in the Consolidated Rules of Practice is disallowed. Complainant points out that the Consolidated Rules provide a broad authorization for "additional discovery," with an elevated threshold for oral depositions which Complainant has also satisfied. 40 C.F.R. § 22.19(e).

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

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

Respondents argue the Motion for Additional Discovery could unreasonably delay the proceeding. Complainant has, by filing the Motion on June 23, 2022, provided notice to Respondents of the opportunity to engage in the written deposition of Sheri Bement. The Motion for Additional Discovery will not unreasonably delay the proceeding because it was filed in accordance with the timetable set forth in this Court's Notice of Hearing Order dated May 23, 2022. According to the Order, "[n]on-dispositive motions, such as motions for additional discovery . . . shall be filed no later than June 24, 2022." Complainant's Motion for Additional Discovery was filed on June 23, 2022. Because Complainant has complied with the timetable set forth in the Order, and because the Order judiciously

sets forth a timetable for the proceeding, the Motion for Additional Discovery will not create an unreasonable delay.

The Motion for Additional Discovery will not unreasonably burden Respondents by, as Respondents argue, limiting their ability to cross-examine the witness and creating additional work for them that will detract from their preparation for the hearing. Although Respondents repeatedly claim a written deposition will limit their ability to cross-examine Sheri Bement, Respondents fail to explain *how* it will be limited. Complainant argues that first, Respondents can submit their own written deposition to Sheri Bement. Second, Respondents were notified of the hearing date on May 23, 2022, three months prior to the scheduled hearing. Therefore, Respondents have had, and still have, sufficient time and opportunity to otherwise prepare for a hearing. Third, answers provided by Sheri Bement via written deposition questions submitted by Respondents would arguably be part of that preparation and would aid, rather than detract, in Respondents' hearing preparation.

**B. 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**

In its Response, Respondents make several conclusory statements arguing that there is no dispute and that "the record is quite clear" regarding liability for the alleged violations and the "established facts of this case." However, Complainant argues in its Motion for Additional Discovery, Section III, subsection (E), there is a disputed issue of material fact. A central dispute in this case is whether Respondents were operators of the Lame Deer Publicly Owned Treatment Works. Respondents deny their role as an operator, and Complainant argues Respondents were operators of the treatment works. Moreover, this Court ruled in its April 20, 2022 Order that genuine issues of material fact exist concerning Respondents' status as operators.

Additionally, Respondents claim "Complainant points to no proposed evidence to support their disingenuous claims." In its prehearing exchange, however, Complainant provided several evidentiary citations demonstrating that Respondents were operators. Complainant's Prehearing Exchange, pages

13-14. Complainant argues that if there are deficiencies in the evidence, they can be partially resolved by the testimony of Sheri Bement.

Lastly, in its Response, Respondents argue that Complainant's "proposed questions would not provide a fuller picture [and would] only limit the testimony of Sheri Bement." Because of Sheri Bement's unavailability (discussed below), she is unable to testify either in-person or via video conference. It is unclear how the *addition* of information by a witness would *limit* testimony, as opposed to the complete omission of any testimony from that witness. Complainant argues that the proposed questions would provide additional information and detail regarding the roles of NCUC, Sheri Bement, and Respondents in the events that gave rise to the alleged violations.

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

In their Response, Respondents make another conclusory statement that "the record is clear" regarding Sheri Bement's role. Respondents admit in their Response that information as to who qualifies as an operator has probative value on an issue of material fact, but that this issue is not disputed because Respondents were not operators of the Lame Deer Publicly Owned Treatment Works. Complainant argues that Respondents were operators of the treatment works and provides evidence to support its claim in its filings. Complainant intends to provide evidence on this issue at the hearing and in its post-hearing brief, for which the testimony of Sheri Bement would be relevant.

## III. STANDARD FOR WRITTEN DEPOSITIONS

Respondents imply that because the Consolidated Rules don't specifically mention written depositions, they are not a tenable form of discovery (*see* Respondents' Motion in Opposition, page 2, "40 C.F.R. Part 22 does not provide for a motion for written depositions"; page 8, "As the Complainant points out 40 C.F.R. § 22.19(e)(3) only refers to oral depositions.") However, the Consolidated Rules provide an open-ended option to engage in "additional discovery" in 40 C.F.R. § 22.19(e)(1), with a few special requirements for oral depositions in 40 C.F.R. § 22.19(e)(3). The Consolidated Rules of Practice

do not disallow the use of written depositions. According to 40 C.F.R. § 22.19(e)(1), "[a]fter the information exchange provided for in paragraph (a) of this section, a party may move for additional discovery." In a separate section under 40 C.F.R. § 22.19(e), the Consolidated Rules provide a standard for oral depositions.[1] 40 C.F.R. § 22.19(e)(3). Notably, Respondents themselves argue for the use of other forms of discovery not mentioned in the Consolidated Rules, such as interrogatories and video conference.

Respondents first argue that the special requirements for oral depositions were not met by Complainant's Motion. Specifically, Respondents argue the first element, which requires that the elements set forth in 40 C.F.R. § 22.19(e)(1) be met, is not satisfied; Complainant points to Section III in its Motion to demonstrate that the three requirements of 40 C.F.R. § 22.19(e)(1) are met.

Second, Respondents argue Complainant has not satisfied the second element, which is that Sheri Bement's testimony cannot reasonably be obtained by teleconference or video appearance. This Court also directed Complainant to address this issue in its Order dated June 28, 2022. Sheri Bement is an unavailable witness, as described in Complainant's Motion for Additional Discovery, due to physical illness. Due to (1) her physical illness,[2] (2) the fact that she has not been subpoenaed, and (3) the difficulty Complainant has had communicating with Sheri Bement, Complainant asserts that it is unlikely that Sheri Bement will appear to testify, live and/or via videoconference, for the duration of an examination and cross-examination.

Third, Respondents fail to provide a clear argument that the third element is not met: that there is not a "substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing." In fact, in its Response, Respondents state that they "agree

[1] No specific standards are set forth for written depositions in 40 C.F.R. Part 22. To demonstrate that Complainant has met all possible standards for additional discovery, it points to the higher standards for oral testimony found in Part 22.
[2] Due to concerns about releasing private health information, Complainant does not describe Ms. Bement's asserted health issues. However, in its draft Written Deposition questionnaire, Complainant asks Ms. Bement to describe the reasons she is unable to testify. Alternatively, Complainant is willing to ask Ms. Bement to provide an affidavit in support of her asserted health condition.

Sheri Bement played a unique role in the circumstances that gave rise to this case." Respondents then copy Complainant's citations to the record that demonstrate Sheri Bement's significance in this case. Without Sheri's testimony, relevant and probative evidence may not otherwise be preserved for presentation at the hearing. Therefore, Respondents have failed to provide any evidence or argument that there is not a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

## IV. WITNESS SHERI BEMENT IS UNAVAILABLE

Respondents argue that Sheri Bement should be made available for video or other types of testimony such as interrogatories or video testimony. Respondents argue that if Sheri Bement can communicate via email, she therefore has the capacity to provide video testimony.

Regarding interrogatories, interrogatories are a form of inter-party discovery. According to the Federal Rules of Civil Procedure, Rule 33, "a party may serve on any other party no more than 25 written interrogatories." Here, Sheri Bement is not a party. However, the Federal Rules of Civil Procedure, Rule 31, provides for written depositions of any "any person, including a party," Therefore, written depositions are appropriate, rather than interrogatories, for obtaining information from non-parties.

Regarding video testimony, Complainant argues that having access to email does not mean a person also has access to reliable Wifi, a camera, and a microphone, which are all required in order to provide any form of video testimony. Additionally, Complainant discussed in the previous section that it has been difficult to maintain consistent communication with Sheri Bement. Therefore, Complainant is concerned about her reliability in providing video testimony at a specified date and time.

## V. CONCLUSION

For the reasons discussed above and in Complainant's Motion for Additional Discovery, the Court should rule for Complainant and allow Complainant to proceed with additional discovery.

Respectfully submitted this 8th day of July 2022.

KATHERINE KACSUR

Digitally signed by KATHERINE KACSUR
Date: 2022.07.08 14:30:02 -05'00'

Katherine Kacsur
Assistant Regional Counsel
11201 Renner Boulevard
Lenexa, KS 66209
(913) 551-7734
email: kacsur.katherine@epa.gov

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 Reply to Respondent's Response in Opposition of 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*

Date: July 8, 2022

Respectfully Submitted,

KATHERINE KACSUR

Digitally signed by KATHERINE KACSUR
Date: 2022.07.08 14:30:25 -05'00'

Katherine Kacsur
Assistant Regional Counsel
11201 Renner Boulevard
Lenexa, KS 66209
(913) 551-7734
email: kacsur.katherine@epa.gov