

BEFORE THE  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

Dave Erlanson, Sr., Individual,

Swan Valley, Idaho,

Respondent.

DOCKET NO. CWA-10-2016-0109

**COMPLAINANT’S RESPONSE TO  
RESPONDENT’S MOTION TO DISMISS**

Pursuant to Section 22.16(b) of the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Complaint or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits” (“Part 22 Rules”), the United States Environmental Protection Agency, Region 10 (“Complainant” or “EPA”) submits this brief in response to the Motion to Dismiss<sup>1</sup> filed by Dave Erlanson, Sr. (“Respondent”).

Respondent’s Motion to Dismiss (1) provides no particular grounds for dismissal; and (2) was filed after his Answer and out of time by almost two years. For these reasons, Respondent’s Motion to Dismiss should be denied.

**BACKGROUND**

Complainant filed its Complaint in this matter on June 20, 2016. Respondent filed his Answer (Docket No. *unassigned*) on July 14, 2016. Counsel for Respondent appeared in this matter on September 23, 2016.

The parties jointly moved for alternative dispute resolution (“ADR”) on November 7, 2016. After the termination of ADR proceedings on February 21, 2017, the current Presiding

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<sup>1</sup> The instant motion is stamped “Received by OALJ 2019 APR 12 PM 1:26” and is styled as “Evidences in support of motion to dismiss, a brief under 309(g)(4)(b) evidences deemed exculpatory.” For the sake of clarity, Complainant will refer to this item throughout this response as “the Motion to Dismiss.” Beyond noting that the document is unsigned, this Response will not belabor technical defects in the filing, and leaves the judgment of those to the sound discretion of the Court.

Officer in this case was designated and she issued the Second Prehearing Order on February 24, 2017 (Docket No. 19). Relevant to adjudication of Respondent's Motion to Dismiss, the Second Prehearing Order set a deadline for dispositive motions regarding liability of "30 days after the due date for Complainant's Rebuttal Prehearing Exchange," which was set at May 12, 2017. Docket No. 19 at 4. The deadline for dispositive motions relevant to liability, therefore, was June 12, 2017.

The parties then proceeded to file their Prehearing Exchanges. Complainant filed its Prehearing Exchange on April 7, 2017 (Docket No. 23), Respondent filed his Prehearing Exchange on May 8, 2017 (Docket No. 27). Respondent also moved at that time to obtain leave to file an amended Prehearing Exchange due to medical reasons related to his former counsel. This Court granted that motion.

Complainant initially filed its Motion for Accelerated Decision on June 5, 2017 (Docket No. 31). Respondent's then-Counsel again sought additional time to respond to Complainant's Motion, which was granted by the Court. On August 14, 2017, Respondent filed his Response in Opposition to Complainant's Motion for Accelerated Decision (Docket No. 34). Complainant timely replied (Docket No. 35).

On April 20, 2018, in the interim between the Motion for Accelerated Decision becoming fully-briefed and this Court issuing its Order on that motion, Respondent's then-Counsel filed proposed exhibits to supplement Respondent's initial prehearing exchange.

Thereafter, on September 27, 2018, this Court issued its Order on Complainant's Motion for Accelerated Decision (Docket No. 38). That Order granted the Motion in part as to Respondent's liability under the Clean Water Act, finding no question of material fact as to the factors necessary to prove liability. That Order denied the Motion in part as it applied to the

harm of the activity and an appropriate penalty to be assessed against Respondent for his violation of the Clean Water Act, finding a genuine issue of material fact as to that issue and reserving that question for an evidentiary hearing scheduled for May 17, 2019. *See* Order Rescheduling Hearing, January 31, 2019 (Docket No. *unassigned*). The current hearing date was reset from the initial date of February 12, 2019, as ordered in the Court's November 15, 2018 Notice of Hearing Order (Docket No. *unassigned*). The Court reset this date to allow Respondent time to obtain new counsel after the departure of his prior counsel. Respondent thereafter chose to represent himself *pro se*, and filed the instant motion in that voluntary capacity.

Following this Court's Order on Complainant's Motion for Accelerated Decision, Respondent did not file any timely motion seeking interlocutory appeal or reconsideration of the Tribunal's findings, nor did Respondent at any time communicate an intention to file a dispositive motion in this matter.

On December 18, 2018, nearly three months following this Court's Order, Counsel for Respondent withdrew from this matter citing his personal health. Respondent now represents himself *pro se* and has indicated to Complainant and the Court that he intends to do so at the hearing scheduled in this matter.

Respondent filed the instant Motion to Dismiss on or around April 12, 2019, twenty-two months after the date of the dispositive motion deadline set by the Second Prehearing Order in this case (Docket No. 19).

## STANDARD

### **A. Motions to Dismiss**

A motion to dismiss an EPA administrative complaint is governed by Section 22.20 of the Part 22 Rules, which provides, in pertinent part:

The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a *prima facie* case or other grounds which show no right to relief on the part of the complainant.

*See* 40 C.F. R. § 22.20(a).

Because the Consolidated Rules of Practice provide less than exhaustive direction regarding the appropriateness of a 40 C.F.R. § 22.20 decision to dismiss, administrative courts have used Rule 12(b)(6) of the Federal Rules of Civil Procedure as guidance in assessing the Respondent's motion to dismiss. To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* at 556.

### **B. Standards applied to *pro se* litigants**

The federal courts have held that “more lenient standards of competence and compliance apply to *pro se* litigants.” *Hall v. Dworkin*, 829 F. Supp. 1403, 1414 (N.D.N.Y.1993); *see also In re Occidental Chemical and Agricultural Products*, 2 E.A.D. 30, 33 (JO 1985) (“[A] *pro se* party must be given reasonable latitude in effectuating its intent”).

Nonetheless, a litigant who elects to appear *pro se* takes upon himself or herself the responsibility for complying with the procedural rules and may suffer adverse consequences in the event of noncompliance. *In re Flying Lion, Inc.*, FIFRA Appeal No. 98-1 (EAB, Dec. 16,

1998) (Order Dismissing Appeal) (dismissing *pro se* appeal as untimely) (quoting *In re Rybond, Inc.*, 6 E.A.D. 614, 627 (EAB 1996)).

## DISCUSSION

### **I. Respondent's Motion should be denied outright**

Respondent does not provide particular grounds supporting his Motion to Dismiss. The Part 22 Rules provide that prehearing motions must set forth the relief sought and state the grounds for such relief with particularity. 40 C.F.R. § 22.16.<sup>2</sup>

The relief Respondent seeks is somewhat clear: dismissal of this action. However, Respondent's Motion serves as only a narrative of the author's interpretations of a range of various issues, but the document does not provide, with any degree of particularity, grounds supporting dismissal. The two items in the document that can be interpreted as arguments constituting grounds for dismissal are on the twelfth and fifteenth pages following the certificate of service. Interpreting these under a lenient standard of competence, pursuant to the requirements for *pro se* litigants, Respondent appears to argue that EPA provided in its Complaint insufficient evidence that Respondent committed a violation of the Clean Water Act. This basis for dismissal fails under the previous orders of this Court, including its March 18, 2019 order reaffirming that Respondent's "liability for the charge in the Complaint . . . has been decided." Docket No. 56, at 9. In addition to the fact that Respondent's arguments for dismissal have been settled in favor of Complainant in this case, Respondent's general legal arguments fail to meet the standard required for a motion to dismiss in the first instance. The Complaint in this

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<sup>2</sup> Pursuant to the Office of Administrative Law Judges Practice Manual, at Page 10: "If grounds for dismissal are not stated with particularity, it does not constitute a motion and therefore does not require any response." While this passage refers to requests for dismissal in a Respondent's Answer, its reasoning is applicable to the instant motion.

case laid out a claim that was at the very least factually plausible, surviving the *Twombly* standard, and this Court has since ruled in Complainant's favor as to that claim. Docket No. 38.

Respondent's filing should be denied outright on these fundamental criteria alone.

**II. In the alternative, Respondent's Motion should be denied as untimely and because it fails to identify any grounds showing Complainant has no right to relief**

Respondent filed his Answer on July 14, 2016. Rule 12(b) of the Fed. R. Civ. P. requires that a motion to dismiss asserting a range of defenses must be made before pleading. The Part 22 Rules apply a more permissive timeliness standard, allowing a presiding officer to dismiss at any time upon such limited additional evidence as she may require if a party fails to establish a *prima facie* case or the presiding officer identifies other grounds showing no right to relief on the part of the complainant.

Here, the Court has held that Respondent is liable for a violation of the Clean Water Act. Docket No. 38, at 25. That holding was rendered in favor of Complainant's *prima facie* case laid out in its Motion for Accelerated Decision. Docket No. 31. The Court ordered an evidentiary hearing to provide evidence to assist it in determining the appropriate relief for Respondent's liability. *Id.* Respondent has not identified in the instant motion any grounds showing Complainant has no right to relief, nor has Respondent contributed additional evidence to the record to create new grounds to that end. For these reasons, Respondent's Motion to Dismiss fails.

Even considering the more permissive timeliness requirements of the Part 22 Rules, Respondent filed his Motion to Dismiss twenty-two months after the dispositive motion deadline set in this case. Docket No. 19, at 4. Applying the most lenient standards of compliance, a *pro se* Respondent filing a dispositive motion almost two years late and only two months prior to the

scheduled hearing constitutes extreme noncompliance with the Court's clear procedural parameters. Moreover, application of lenience to this motion should be limited because Respondent was represented by his former Counsel (1) when the dispositive motion deadline was set; (2) when the deadline passed; (3) through Respondent's multiple motions for extension of time related to other filings which were duly granted by this Tribunal; and (4) for the duration of the adjudication period for Complainant's Motion for Accelerated Decision. All told, Respondent was only *pro se* for four of the twenty-two months between the running of the dispositive motion deadline and his filing of the instant motion. *See* Docket No. 19 (setting the deadline; *see* Docket No. 48 (withdrawal of Respondent's former counsel); and *see* Docket No. 62 (this motion).

Extreme untimeliness and failure to meet the requirements to support a motion to dismiss constitute both procedural and substantive grounds on which to deny the Motion to Dismiss.

### CONCLUSION

For these reasons, Respondent's Motion to Dismiss should be denied. Alternatively, if the Presiding Officer determines that the substance of Respondent's Motion should be entertained despite its defects, Complainant respectfully requests that time be set aside at the upcoming hearing in this matter for oral argument.

Dated this 26<sup>th</sup> day of April, 2019.

Respectfully submitted,

/s/ William M. McLaren

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COUNSEL FOR COMPLAINANT

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on April 26, 2019, a true and correct copy of the foregoing was also filed electronically with be the Clerk of the Office of Administrative Law Judges using the ALJ e-file system, which sends a Notice of Electronic Filing to Respondent. In addition, a paper copy of the foregoing was sent to Respondent at P.O. Box 46, Swan Valley, Idaho 83449.

*/s/ William M. McLaren* \_\_\_\_\_

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