

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

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

**RESPONDENT’S RESPONSE IN OPPOSITION TO COMPLAINANT’S MOTION TO
AMEND THE COMPLAINT**

Comes now Respondents Adamas Construction and Development Services PLLC and Nathan Pierce, 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 submits this RESPONDENT’S RESPONSE IN OPPOSITION TO COMPLAINANT’S MOTION TO AMEND THE COMPLAINT, and Respectfully request the court to DENY the Complainants motion for the reasons herein;

1. The Complaint in this matter was filed September 6, 2019. The Complaint contains two counts alleging that Respondents violated the Clean Water Act (“CWA”). The counts allege that Respondents failed to maintain records as required by 33 U.S.C. § 1345 (“Count 1”) and failed to respond to an information request as required by 33 U.S.C. § 1318 (“Count 2”). EPA pleaded a penalty of \$59,583.

2. Respondents filed an Answer with EPA's Regional Hearing Clerk on October 16, 2019.
3. Complainant filed an Amended Complaint on January 2, 2020.
4. The Complainant filled a motion for Accelerated Decision for the determination of liability On May 1, 2020.
5. The court issued an order Denying the Complainants Motion for Accelerated Decision and the Respondents Motion to Dismiss on April 20, 2022.
6. The time for both parties to file dispositive and non-dispositive motions ordered by this court has passed and therefore leave of this court is necessary.
7. The hearing on this matter has been scheduled for the week of August 22, 2022.
8. The Complainant now seeks to submit a motion to this Court to Amend the Complaint for a second time, 32 days before the scheduled hearing in this matter, and after the deadline for dispositive and non-dispositive set by the court has passed, without seeking leave of the court to file out of time.
9. The Motion for amended complaint only serves as evidence of dilatory motive on the part of the movant, 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", yet fails to explain why it took them 2 year 7 months from the first amended complaint to include this new information and only seek to amend their complaint to delay an adverse decision or ruling. Rather than dismiss the claim as would be right, in good faith and to server justice in this matter, the Claimant is requesting the tribunal allow them to significantly change their claim against the Respondent with regards to the information requested and recordkeeping requirements applicable to Respondents. This is also a clear admission by the Complainant the regulations cited in the

request for information did not apply to the Respondents and supports the Respondents repeated claim they had no obligation to respond as the regulation cited did not apply to them. Now, only after seeing they will lose does the Complainant request the court to change the rules and allow them to change regulations. This should compel the tribunal to dismiss this matter or at the very least be grounds to Deny the Complainant motion.

10. The Court should Deny the Complainant's motion to Amend the Complaint as it will cause prejudice to Respondent, as it is past the deadline for such a motion it is also in such close proximity to the scheduled hearing and may require additional fact finding and investigation and the Complainant presented new legal theories that could also result in additional discovery, unduly delayed litigation, and increased costs. It will also unduly burden the Respondents as they are completely representing themselves and have no legal representation to assist them in Answering the second amended complaint and takes away their ability to prepare for the scheduled hearing in this matter.
11. The court should reject the Complainant's argument that Claim 1 "remains unchanged, but the proposed clarification will aid the Court and the Respondents" this is factually false on its face and both the Court, and the Respondent were clear as to the claim made by the Claimants when the Order for Accelerated Decision was issued to both parties. The Respondents respectfully request this tribunal to reject the motion of the Complainant.
12. As the tribunal noted in its AD order, the "Complainant has not alleged any facts in the Amended Complaint from which to conclude that Respondents were operators of the Facility other than the allegation in paragraph 38 that "on or about the week of July 9, 2018, Respondents pumped and dewatered approximately 1,000,000 gallons of sewage sludge from Cell #2 of the Lame Deer treatment lagoon." Amended Compl. ¶ 38.
13. Changing the regulations requiring different documents or records other than the ones originally requested and cited for Claim 1, significantly changes the recordkeeping or

document production requirements applicable to Respondents, which form the basis of Claim 1, despite the claims otherwise by the Complainant, especially after the Court has already rule on a motion for accelerated decision in this matter. This court should reject the argument from the Complainant that amendment does not significantly change this matter. The Complainants argument essentially boils down to “we requested information on the purple card and brought claims against the Respondent for failing to provide the purple card, when the Respondent told use they had no obligation to provide such information, we now agree they had no obligation to provide information on the purple card, however we should be able to amend our complaint to say we requested the Orange card, after requesting an accelerated decision on the purple card”.

14. Leave to amend a complaint is routinely denied when the moving party seeks to add substantive claims shortly before a trial or hearing is set to begin, citing Environmental Appeals Board (EAB) opinion upholding the denial of EPA’s motion to amend a complaint, *Carroll Oil Co.*, 2002 EPA App. LEXIS 14, RCRA (9006) Appeal No. 01-02 (EAB, July 31, 2002). The EAB in that decision quotes the Seventh Circuit: “Substantive amendments to the complaint just before trial are not to be countenanced and only serve to defeat these interests” of the parties in the speedy resolution of their disputes without undue expense. *Feldman v. Allegheny International, Inc.*, 850 F.2d 1217, 1225 (7th Cir. 1988)(quoted in *Carroll Oil*, slip op. at 21), in addition there are several Federal court opinions which note as a factor in denying amendments the failure to offer a reasonable explanation for a delay of several months in moving to amend, where the movant knew of the facts underlying the proposed amendment much earlier, but inexplicably waited to request the amendment until near the date of trial, *Southmark Corp. v. Shulte Roth 4 & Zabel*, 88 F.3d 311, 315-316 (5th Cir. 1996), “where a party seeking amendment knows or should have known of the facts upon which the proposed amendment is based but fails to

include them in the original complaint, the motion to amend is subject to denial.” *Las Vegas Ice & Cold Storage v. Far West Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990). The Eighth Circuit notes that when late-tendered amendments involve new theories of recovery and impose additional discovery requirements, courts are more likely to uphold findings of prejudice justifying denial of the amendment. *Bell v. Allstate Insurance Co.*, 160 F.3d 452, 454 (8th Cir. 1998).

15. The Consolidated Rules of Practice provide that “[t]he Presiding Officer, upon motion of 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 complainant.” 40 C.F.R. § 22.20(a) (emphasis added). As the Presiding Officer in this matter denied the Respondent Leave to file a motion, stating that the deadline for such motions has passed despite the rules allowing dismissal at “any time”, the respondent ask this tribunal to apply Fundamental Fairness and deny the Complainant’s motion on the same grounds, as it “past the deadline for such a motion and in such close proximity to the scheduled hearing.”
16. Finally, Dismissal of this matter or at the very least dismissal of Claim 1, is in the public interest and will promote Due Process, fundamental fairness, and the true justiciable disposition of this matter as the Complainant has conceded 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”. U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). The “plausibility standard” requires the complaint to present “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (citing *Twombly*, 550 U.S. at 557). The allegations must cross “the line between possibility and plausibility of ‘entitlement to relief.’” *Id.*

17. For the above-mentioned reasons, the Respondents Respectfully request the Court to DENY the Complainant's Motion to Amend the Complaint and Dismiss this matter as a matter of Justice.

RESPECTFULLY SUBMITTED this 28th day of July 2022.

Nathan Pierce

Nathan Pierce
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CERTIFICATE OF SERVICE

I certify that the foregoing Respondent's MOTION FOR LEAVE TO FILE OUT OF TIME, Docket No. CWA-07-2019-0262, has been submitted to Judge Coughlin electronically using the OALJ E-Filing System. A copy was sent by email to:

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
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Attorneys for Complainant

Date: Tuesday, July 28th, 2022

Nathan Pierce

/s/ Nathan Pierce
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