

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

BEFORE THE
ADMINISTRATOR

IN THE MATTER OF)
)
ADAMAS CONSTRUCTION AND) RESPONDENT'S MOTION FOR
DEVELOPMENT SERVICES, PLLC) LEAVE TO FILE OUT OF TIME
) RESPONDENTS MOTION TO
AND) DISMISS
NATHAN PIERCE,)
) Docket No. CWA-07-2019-0262
)
Respondents)
Proceedings under Section 309(g) of the)
Clean Water Act, 33 U.S.C. § 1319(g))
)
)
)

**MOTION FOR LEAVE TO FILE OUT OF TIME RESPONDENT'S MOTION TO
DISMISS**

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 Motion for leave to Move this Court to grant Respondent's Motion for Dismissal; and Respondent's Motion to Dismiss, filed July 19th, 2022, and All Exhibits Thereto.

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 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 Respondent seek to submit a motion to this Court to Dismiss this matter entirely with prejudice.
9. Respondent has contacted the Complainant and Complainant does generally oppose this motion and the motion to dismiss. Granting this motion to file a Motion to Dismiss will not cause prejudice to Complainant.
10. Respondents is providing Complainant notice to and an opportunity to answer before the scheduled hearing.
11. Section 22.14 of the Rules of Practice requires a complaint to include, among other elements, “[a] concise statement of the factual basis for each violation alleged.” 40 C.F.R. § 22.14(a)(3). A respondent may challenge the sufficiency of a complaint pursuant to Section 22.20, which authorizes the presiding Administrative Law Judge to dismiss a proceeding,

upon motion of the respondent, “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.” 40 C.F.R. § 22.20(a). The Complainant in this case has failed to establish such a prima facie case or there are other grounds which show no right to relief on the part of the Complainant, as they fail to allege the critical elements of liability that would entitle them to relief, among other things.

12. Complainant in several filings before this court asserts that Ms. Bement’s testimony would help resolve the question of whether Respondents were an “operator” at the Site. As Complainant notes, such a determination is central to its charge that Respondents violated the recordkeeping requirements of Section 308 of the CWA, 33 U.S.C. § 1318. However, the Complainant has informed the Respondents that they will not be calling Ms. Bement as a witness and the remaining witness the Complainant intends to call will not be able to resolve this question as they were not representatives for NCUC, therefore the Complainant will not be able to demonstrate the Respondents were operators and fail to point to any evidence in the record to support such a claim and therefor they cannot prove they are entitled to the relief they seek in their claim. Also this information was just recently disclosed to the Respondents by the Complainant and could have not been previously know by the Respondents, as such the Respondents are filing this timely motion and their motion to dismiss.

13. 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.

14. It is clear from the record that a more carefully drafted complaint would still be unable to show a right to relief on the part of the complainant. As such this court can and should dismiss this matter.
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).
16. Finally, Dismissal of this matter is in the public interest and will promote Due Process, fundamental fairness, and the true justiciable disposition of this matter.
17. For the above mentioned reasons, the Respondents Respectfully request the Court to grant leave to file a Motion to Dismiss.

RESPECTFULLY SUBMITTED this 19th day of July 2022.

Nathan Pierce

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Respondent
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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.

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Attorneys for Complainant

Date: Tuesday, July 19th, 2022

Nathan Pierce

/s/ Nathan Pierce

Nathan Pierce

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