



Issue Date: 12 October 2011

Case No. 2006-ERA-26

In the Matter of:

GARY S. VANDER BOEGH,

Complainant,

v.

U.S. DEPARTMENT OF ENERGY,  
PADUCAH REMEDIATION SERVICES, LLC,  
ENERGYSOLUTIONS, INC., (formerly Duratek, Inc.),  
BECHTEL JACOBS CO., LLC,

Respondents.<sup>1</sup>

**DECISION AND ORDER GRANTING DISMISSAL  
OF CLAIMS IN ABEYANCE  
AND DISMISSING COMPLAINT**

This proceeding arises under the employee protection provisions, or “whistleblower” provisions, of seven environmental statutes: the Energy Reorganization Act (“ERA”), 42 U.S.C. § 5851; the Clean Air Act (“CAA”), 42 U.S.C. § 7622; the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (“CERCLA”), 42 U.S.C. § 9610; the Federal Water Pollution Control Act (“FWPCA”), 33 U.S.C. § 1367; the Safe Drinking Water Act (“SDWA”), 42 U.S.C. § 300j-9; the Solid Waste Disposal Act (“SWDA”), 42 U.S.C. § 6971; and the Toxic Substances Control Act (“TSCA”), 15 U.S.C. § 2622, and implementing regulations found at 29 C.F.R. Part 24.

On June 17, 2011, Respondent, *EnergySolutions, Inc.*, filed a Motion for Summary Decision on Claims in Abeyance. Upon reviewing the motion, I find that *EnergySolutions’* motion is more properly characterized as a motion to dismiss the claims held in abeyance as these claims have been filed in United States district court. For the following reasons, I grant this motion.

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<sup>1</sup> WESKEM, LLC, was formerly a Respondent in this case. Complainant and WESKEM, LLC, reached a settlement agreement, which I approved by Order issued February 16, 2010.

## **BACKGROUND**

On February 11, 2010, Complainant filed a combined motion to dismiss his ERA claim and to hold in abeyance his remaining environmental whistleblower claims under the CAA, CERCLA, FWPCA, SDWA, SWDA, and TSCA. Complainant explained that he elected to pursue his ERA claim in United States district court, pursuant to 42 U.S.C. § 5851(b)(4) and 29 C.F.R. § 24.114. Complainant also filed his non-ERA environmental whistleblower claims in federal district court as supplemental claims pursuant to 28 U.S.C. § 1367. Complainant requested that the non-ERA claims be placed in abeyance pending a decision by the district court on whether that court would exercise jurisdiction over those claims.

By Order, issued February 16, 2010, I granted Complainant's motion and dismissed the ERA claim. I also placed the remaining claims in abeyance pending a decision by the district court on its jurisdiction to hear those claims. I further ordered Complainant to update this Court every 60 days until a decision is made by the district court regarding jurisdiction over his non-ERA claims.

On June 17, 2011, Respondent, *EnergySolutions, Inc.*, filed a Motion for Summary Decision on Claims in Abeyance along with a Memorandum in Support of Respondent *EnergySolutions'* Motion for Summary Decision on Claims in Abeyance. On June 27, 2011, Respondent, Paducah Remediation Services, LLC, filed its Joinder in Motion for Summary Decision on Claims in Abeyance. The aforementioned parties request that the Court dismiss the remaining claims under CAA, CERCLA, FWPCA, SDWA, SWDA, and TSCA for the following reasons:

First, Vander Boegh has abandoned three claims now in abeyance – the CAA, the CERCLA, and the FWPCA claims - when he chose to not file these claims in federal court. Second, even though the Complaint was filed on February 10, 2010, no one has challenged the federal court's supplemental jurisdiction over the three remaining claims - SDWA, the SWDA, and the TSCA. Therefore, because Vander Boegh has either abandoned the claims held in abeyance or is pursuing them in federal court, *EnergySolutions* [and Paducah Remediation Services, LLC] respectively request[] the Court to dismiss each of these claims.

(Respondent *EnergySolutions'* Motion for Summary Decision on Claims in Abeyance at 2).

On July 14, 2011, I issued an Order to Show Cause ordering Complainant to show cause, in writing, why Respondents' Motion for Summary Decision on Claims in Abeyance should not be granted. Complainant filed his response to the Order to Show

Cause on August 8, 2011. Complainant stated that he had abandoned his CAA and CERCLA claims in federal court. (Complainant's Response to Order to Show Cause at 2). Thus, Complainant would "stipulate to the dismissal of his CAA and CERCLA claims which he has chosen not to pursue." *Id.* at 3. However, Complainant further stated that he has not abandoned his FWPCA claim, as "Count III of [Complainant's federal district court] Complaint does explicitly state a FWPCA claim." *Id.* Complainant refers to the Clean Water Act as CWA rather than FWCPA in his federal district court Complaint. *Id.* Therefore, the "FWPCA a.k.a. CWA . . . claim should not be dismissed as abandoned as it is being pursued in the federal court action." *Id.*

Regarding the claims under "SDWA, SWDA, and TSCA (and CWA/FWPCA)," Complainant states the following:

Respondents note that after Complainant's federal Complaint was filed on February 10, 2010, no Defendant in that action has challenged the federal court's supplemental jurisdiction over the SDWA, the SWDA, and TSCA claims. This is true (thus far). However, under the current federal district court case management Order, dispositive motions can be filed until January 31, 2012. Further, under well-established rules of federal law, a claim of lack of subject matter jurisdiction may be raised at any time. Thus, the fact that no Defendant in the federal district court action has filed a motion to dismiss any of the claims at issue based on jurisdiction yet, does not mean that they will not so later.

(Complainant's Response to Order to Show Cause at 2-3). Complainant concluded that he would "stipulate to dismissal of his SDWA, TSCA, SWDA, CWA (FWPCA) claims (without prejudice to Complainant pursuing these claims in federal court action) . . . if and when the Respondents agree explicitly and in writing that they will not seek to have any of these claims dismissed on jurisdiction ground in the pending federal court action." *Id.* at 3.

Respondents EnergySolutions, Bechtel Jacobs Company, LLC, and Paducah Remediation Services filed three separate written stipulations, dated August 12, 2011, August 19, 2011, and August 22, 2011, respectively, each entitled "Stipulation Not to Contest Subject Matter Jurisdiction of Complainant's Statutory Claims Pending in Federal District Court." (hereinafter *Stipulations*). All three Respondents requested that the undersigned dismiss the CAA and CERCLA claims as Complainant chose not to pursue these claims in federal district court and stipulated to their dismissal. (*Stipulations* at 1). All three Respondents further agreed and stipulated that they would not seek to have Complainant's federal district court claims dismissed on the grounds that the court lacked jurisdiction over the claims. (*Stipulations* at 2). Based on this stipulation, Respondents EnergySolutions, Bechtel Jacobs Company, and Paducah Remediation

Services requested that the remaining claims held in abeyance be dismissed and that they be dismissed as parties. *Id.*

Respondent U.S. Department of Energy (“DOE”) filed a Motion for Summary Decision on Claims in Abeyance on September 12, 2011. DOE requested that Complainant’s pending CERCLA and CAA claims be dismissed based on Complainant’s stipulation that the claims should be dismissed. (DOE Motion for Summary Decision at 1). Regarding the remaining pending claims, DOE stated:

Because DOE is no longer a party to the pending federal action, it is not appropriate for DOE to . . . stipulate [not to pursue dismissal on jurisdictional grounds].” On October 14, 2010, the complaint against DOE was dismissed without prejudice. Exhibit 1. Further, the Scheduling Order for the federal claim required that additional parties be joined by April 4, 2011. Exhibit 2. Neither Complainant nor the remaining parties attempted to add DOE as a party by this date. The DOE contends that, even though the Court Order dismissed DOE as a party without prejudice, the passing of the April 4, 2011, deadline to join additional parties prevents DOE from again becoming a party to the federal action. As a result, the Complainant has abandoned all claims against DOE. DOE respectfully requests that all remaining claims currently in abeyance in this proceeding be dismissed as against DOE and that DOE be dismissed as a party from these proceedings.

*Id.* at 2.

## DISCUSSION

Complainant has whistleblower claims currently being held in abeyance by the undersigned under the following environmental statutes: CAA, CERCLA, FWPCA (referred by Complainant as CWA), SDWA, SWDA, and TSCA. Complainant stated in his Response to his Order to Show Cause that he was no longer pursuing the CAA and CERCLA claims in federal district court; thus, he stipulated to the dismissal of these claims. (Complainant’s Order to Show Cause at 2-3.). Respondents *EnergySolutions*, *Bechtel Jacobs Company*, *Paducah Remediation Services*, and DOE all seek dismissal of these claims due to Complainant’s stipulation. Accordingly, based on the agreement of all the parties, I find Complainant’s CAA and CERCLA claims should be dismissed against all parties.

Complainant further stated that he would “stipulate to dismissal of his SDWA, TSCA, SWDA, CWA (FWPCA) claims (without prejudice to Complainant pursuing these claims in federal court action) . . . if and when the Respondents agree explicitly and in writing that they will not seek to have any of these claims dismissed on jurisdiction

ground in the pending federal court action.” (Complainant’s Order to Show Cause at 3). Respondents EnergySolutions, Bechtel Jacobs Company, and Paducah Remediation Services all stipulated, explicitly and in writing, that they would not seek to have these claims dismissed in federal court on the grounds that the court lacked jurisdiction over the claims. Accordingly, I find that Complainant’s SDWA, TSCA, SWDA, and CWA (FWPCA) claims against Respondents EnergySolutions, Bechtel Jacobs Company, and Paducah Remediation Services should be dismissed.

District Court Judge Thomas B. Russell dismissed Complainant’s Complaint without prejudice against DOE for Insufficient Service of Process on October 12, 2010. (Exhibit 1, attached to DOE’s Motion for Summary Decision). Judge Russell gave the parties until April 4, 2011, to join additional parties. (Exhibit 2, attached to DOE’s Motion for Summary Decision). Neither the Complainant nor any of the Respondents has sought to join DOE as a party. Because the April 4, 2011, deadline has passed, DOE will not become a party in the future. Furthermore, Complainant has not filed any motion in opposition to DOE being dismissed on the grounds that DOE is not a party in the federal district court action. Accordingly, because DOE is not a party to the pending proceedings in federal district court, I find that Complainant’s SDWA, TSCA, SWDA, and CWA (FWPCA) claims against DOE should be dismissed. Accordingly,

### ORDER

**IT IS HEREBY ORDERED** that Complainant’s claims held in abeyance in this matter are **DISMISSED** against all Respondents. It is further **ORDERED** that Complainant’s complaint is **DISMISSED**.

**A**

LARRY S. MERCK  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., N.W., Washington, D.C., 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: [ARB-Correspondence@dol.gov](mailto:ARB-Correspondence@dol.gov).

At the same time that you file your petition with the Board, you must serve a copy of the petition on: (1) all parties; (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, N.W., Suite 400-North, Washington, D.C., 20001-8001; (3) the Assistant Secretary, Occupational Safety and Health Administration; and, (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed 30 double-spaced typed pages. With your supporting legal brief you may also submit an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed 30 double-spaced typed pages. In addition, an appendix (one copy only) may be submitted with the opposing legal brief consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed 10 double-spaced typed pages, within such time period as may be ordered by the Board.

If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110.