IN RE ADAMAS CONSTRUCTION AND DEVELOPMENT SERVICES, PLLC, AND NATHAN PIERCE

CWA Appeal No. 25-01

FINAL DECISION AND ORDER

Decided September 4, 2025

Syllabus

Adamas Construction and Development Services, PLLC and its owner Nathan Pierce (collectively, "Respondents") appealed from an Initial Decision and Order assessing a penalty of $7,725 for violating Clean Water Act ("CWA") section 405 by failing to develop and retain information required of appliers of Class B sewage sludge.

Held: The Board affirms the Initial Decision. Respondents are appliers of sewage sludge and failed to comply with applicable recordkeeping and certification requirements and the penalty determination is well-explained, supported by the record, and consistent with the Clean Water Act as well as Board precedent. Respondents' arguments on appeal lack merit.

Before Environmental Appeals Judges Aaron P. Avila and Ammie Roseman-Orr.

Opinion of the Board by Judge Avila:

I. *INTRODUCTION*

Administrative Law Judge Christine Donelian Coughlin ("ALJ") issued an Initial Decision and Order ("Initial Decision") assessing a penalty of $7,725 to Adamas Construction and Development Services, PLLC ("Adamas") and its owner Nathan Pierce (collectively, "Respondents") for violating Clean Water Act ("CWA") section 405 by failing to develop and retain information required of appliers of Class B sewage sludge. Respondents filed an appeal with the Environmental Appeals Board. For the reasons stated below, the Board affirms the ALJ's decision.

II. *FACTUAL AND PROCEDURAL HISTORY*

This case concerns whether Respondents violated the CWA's recordkeeping and certification requirements related to land application of sewage sludge. Respondent Adamas was a professional limited liability company registered in Montana that provided water management services, among other things.[1] *See* Second Amended Complaint ¶ 25 (July 19, 2022); Complainant's Exhibit ("CX") 46, at 431 (Adamas Compatibility Statement).[2] Respondent Nathan Pierce owned Adamas and served as its general manager.[3] Administrative Hearing Transcript 481 (Aug. 22-23, 2023) ("Tr."); Second Amended Complaint ¶ 28.

Northern Cheyenne Utility Commission ("NCUC"), an organization of the Northern Cheyenne Tribe, provides wastewater treatment services to the Northern Cheyenne Indian Reservation, including operation of the Lame Deer Wastewater Treatment Facility ("Facility") in Lame Deer, Montana. In 2018, NCUC initiated a renovation of a portion of the Facility, which included removal and land application of sewage sludge that had settled in one of the Facility's lagoons. *See* CX 5, at 6 (NPDES Inspection Report – POTW (inspection date June 13-14, 2018)). NCUC and Sheri Bement, serving as NCUC's General Manager, worked with the Indian Health Service ("IHS") to fund the renovation. Tr. at 278-80. James Courtney served as IHS' project engineer. CX 3, at 1 (Pre-construction meeting notes from James Courtney (May 18, 2018)). Bement, on behalf of NCUC, entered into a contract with Respondents, pursuant to which Respondents would provide services related to the renovation. *See* CX 45, at 33 (Letter from Pierce to Bement (Apr. 20, 2018)). Subsequently, the renovation got underway, including pumping the sludge from the lagoon, dewatering the sludge, and applying the sludge to

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[1] Adamas appears to have been dissolved on September 1, 2018, *see* CX 48, at 1 (Montana Secretary of State online business filing system entry for Adamas (Nov. 21, 2019)), although the record includes conflicting evidence. *See* Second Amended Complaint ¶ 26; Respondents Answer to Second Amended Complaint and Request for Hearing 2 (Aug. 24, 2022); Administrative Hearing Transcript 462, 481 (Aug. 22-23, 2023).

[2] The ALJ proceeding documents can be found in the Administrative Law Judges' E- Docket Database (available at www.epa.gov/oalj).

[3] As will be discussed below, the record supports a finding that Pierce was at all relevant times in control of Adamas and is liable for the actions of Adamas as well as himself. For ease of discussion, we will use "Respondents" throughout this decision to refer to both Pierce and Adamas.

property belonging to Tom Robinson. *See* Initial Decision and Order 10-14 (Mar. 26, 2025) ("Initial Decision").

EPA Region 7 filed an administrative complaint against Respondents arising out of Respondents' work at the Facility and related application of sewage sludge to Robinson's property. *See generally* Complaint (Sept. 6, 2019). The complaint alleged violations of CWA section 405 and its implementing regulations at 40 C.F.R. part 503 concerning recordkeeping and certification requirements, as well as reporting requirements under CWA section 308. Second Amended Complaint ¶¶ 52-57.[4] Specifically, in Claim 1, the Region alleged Respondents failed to develop and maintain records as "preparers" and "appliers" of sewage sludge as required by 40 C.F.R. § 503.17. *Id.* ¶¶ 9, 13, 16, 52-54. In Claim 2, the Region alleged Respondents did not provide timely responses to EPA's information requests that were sent pursuant to CWA section 308, 33 U.S.C. § 1318. *Id*. ¶¶ 22, 55-57. The complaint sought a total administrative penalty of $59,583. *Id*. ¶ 59.

After a hearing, the ALJ issued an Initial Decision and Order finding Respondents liable on Claim 1 as appliers of Class B sewage sludge, but not liable as preparers of sewage sludge and not liable on Claim 2. Initial Decision at 33, 43, 58. The ALJ reduced the penalty to $7,725, from the $15,717 sought in the complaint for Claim 1. *See id*. at 69, 80.

Respondents filed a timely appeal with the Board. *See* Notice of Appeal (Apr. 22, 2025); Notice of Appeal (Apr. 23, 2025) (correcting the original certificate of service) ("Appeal Br.").[5] The Region filed a response to the appeal. *See* Response Brief (May 12, 2025).

III. *PRINCIPLES GOVERNING BOARD REVIEW*

Under the Consolidated Rules of Practice ("CROP"), a party appealing to the Board must provide sufficient specificity for the Board to properly analyze any

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[4] During the administrative proceeding before the ALJ, the Region twice amended its Complaint. *See* First Amended Complaint (Dec. 17, 2019); Second Amended Complaint (July 19, 2022). Unless specified otherwise, references and citations to the Complaint in this order refer to the July 19, 2022, Second Amended Complaint.

[5] Subsequent citations to Respondents' appeal in this order refer to their April 23, 2025, corrected appeal. The Notice of Appeal and accompanying brief were submitted in a single PDF document. Neither the Notice of Appeal nor the brief are paginated. This order cites to the pagination of the single, combined PDF document.

allegations. In particular, the brief accompanying a notice of appeal must contain "a statement of the nature of the case and the facts relevant to the issues presented for review (with specific citation or other appropriate reference to the record (e.g., by including the document name and page number))." 40 C.F.R. § 22.30(a)(1)(iii). When a party is proceeding pro se, as Respondents here are, the Board endeavors to construe filings by the pro se litigant liberally and does not expect such filings to contain sophisticated legal arguments or to employ precise technical or legal terms. *In re Erlanson*, 18 E.A.D. 393, 402 (EAB 2021). That said, a party's lack of legal representation or sophistication does not excuse a failure to comply with regulatory requirements, and the Board expects filings to provide sufficient specificity to apprise the Board of the issues being raised and to articulate supportable reasons for allegations of error. *Id*.; *In re Sargent Enters.*, CAA Appeal No. 10-02, at 7 (May 11, 2010) ("Final Decision and Order") ("The Board has stated on numerous occasions that *pro se* litigants are not excused from complying with the CROP.").

Where an issue is properly presented on appeal to the Board, the Board generally reviews an ALJ's factual and legal conclusions on a de novo basis. 40 C.F.R. § 22.30(f) (establishing that Board shall "adopt, modify, or set aside" ALJ's findings of fact and conclusions of law or exercise of discretion); *see* Administrative Procedure Act § 8(a), 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."). In so doing, the Board typically will grant deference to an ALJ's determinations regarding witness credibility and the judge's factual findings based thereon. *See, e.g.*, *In re Euclid of Va., Inc.*, 13 E.A.D. 616, 673-75 (EAB 2008), *pet. for review vol. dismissed*, No. 08-1088 (D.D.C. Oct. 21, 2008); *In re Cutler*, 11 E.A.D. 622, 640-41 (EAB 2004); *In re City of Salisbury*, 10 E.A.D. 263, 276, 293-96 (EAB 2002) (deferring to ALJ's reasoned analysis of witness credibility). But when an ALJ's credibility determinations do not turn on the ALJ's "observations of witnesses" or are unsupported by the record, the Board generally will not defer to the ALJ and is not bound by any findings of fact derivatively made. *In re Carbon Injection Sys., L.L.C.*, 17 E.A.D. 1, 14 (EAB 2016); *In re Smith Farm Enters., L.L.C.*, 15 EA.D. 222, 229, 255-58 (EAB 2011), *pet. for review vol. dismissed*, No. 11-1355 (4th Cir. Oct. 25, 2013).

All matters in controversy must be established by a preponderance of the evidence. 40 C.F.R. § 22.24(b); *see, e.g.*, *In re Mayes*, 12 E.A.D. 54, 62, 87-88 (EAB 2005), *aff'd*, No. 3:05-cv-478 (E.D. Tenn. Jan. 4, 2008). This standard is achieved when a factfinder determines particular facts to be "more likely true than not." *In re Stevenson*, 16 E.A.D. 151, 158 (EAB 2013) (citing cases). The complainant has the burdens of presentation and persuasion to prove that "the

violation occurred as set forth in the complaint and that the relief sought is appropriate." 40 C.F.R. § 22.24(a). Once the complainant meets those burdens, the respondent has the burdens of presentation and persuasion to prove any affirmative defense(s) that excuse it from liability. *Id.*; *see In re Gen. Motors Auto.–N. Am.*, 14 E.A.D. 1, 54-55 (EAB 2008) (describing burden of proof for affirmative defenses); *see also Pac. Coast Fed'n of Fishermen's Ass'ns v. Glaser*, 937 F.3d 1191, 1197 (9th Cir. 2019) (holding that once plaintiff establishes its prima facie case, burden of proving defenses such as statutory exception is on defendant, not on plaintiff).

IV. *LEGAL FRAMEWORK*

Treatment works (often referred to as publicly owned treatment works or POTWs) include any devices or systems that treat municipal sewage or industrial wastes. CWA § 212(2), 33 U.S.C. § 1292(2); Standards for the Use or Disposal of Sewage Sludge, 58 Fed. Reg. 9248, 9249 (Feb. 19, 1993) ("POTWs receive wastewater from industrial facilities, domestic wastes from private residences, and run-off from various sources"). Treatment works, like the Facility, produce effluent and residual material referred to as sewage sludge. 58 Fed. Reg. at 9249. Sewage sludge, while usually largely water, does contain solids and dissolved substances. *Id.* Constituents of those solids and dissolved substances typically include volatile organics, organic solids, nutrients, disease-causing pathogenic organisms, heavy metals and inorganic ions, and toxic organic chemicals. *Id.* Treatment works have various ways to dispose of their sewage sludge, including putting the sewage sludge to beneficial uses because nutrients and other properties commonly found in sewage sludge are useful as fertilizer and soil conditioner. *Id.* But sewage sludge may also contain harmful pollutants, making critically important the proper disposal of sewage sludge. *Id.* at 9249-50.

Congress therefore directed EPA to promulgate regulations "providing guidelines for the disposal of sludge and the utilization of sludge for various purposes" and made it unlawful not to comply with those regulations. CWA § 405 (d)(1), (e), 33 U.S.C. § 1345(d)(1), (e). Congress also authorized EPA to assess civil penalties for violations of those regulations. CWA § 309(g), 33 U.S.C. § 1319(g).

Pursuant to Congress's direction and authorization, EPA promulgated regulations for the disposal and utilization of sewage sludge. *See generally* 40 C.F.R. part 503. Relevant to this appeal are the regulations dealing with land application of sewage sludge. *Id.* at subpart B.

V. *ANALYSIS*

Respondents raise a wide variety of arguments challenging the ALJ's Initial Decision. This order analyzes those arguments as follows: (a) liability-related issues, (b) ALJ process-related issues, (c) broad challenges to the Region's enforcement action against Respondents, and (d) the ALJ's penalty calculation. For the reasons explained below, the Board affirms the ALJ's decision on both liability and penalty.

A. *The ALJ's Determinations on Liability Are Supported by the Record*

The Initial Decision held that Respondents failed to comply with recordkeeping and certification obligations that Respondents had as appliers of sewage sludge. For the reasons below, we agree that Respondents are appliers of sewage sludge and failed to comply with recordkeeping and certification requirements.

1. *The Record Supports a Violation of the Sewage Sludge Applier Provisions by Respondents*

The sewage sludge regulations apply to "any person who prepares sewage sludge that is applied to the land, to any person who applies sewage sludge to the land, to sewage sludge applied to the land, and to the land on which sewage sludge is applied." 40 C.F.R. § 503.10(a).[6] Applying sewage sludge means the "land application of sewage sludge." *Id.* § 503.9. For sewage sludge that meets certain pollutant concentrations and meets the "Class B" pathogen requirements in 40 C.F.R. § 503.32(b), "[t]he person who applies the bulk sewage shall develop * * * and retain" for five years a certification statement, a description of how management practices are met, a description of how site restrictions are met, a description of how the vector attraction reduction requirement is met, and the date sewage sludge is applied to each site. *Id.* § 503.17(a)(4)(ii). Appliers are not limited to those physically applying sludge; one who has sufficient control over the application process may also be liable as an applier. *See Smith v. Hankinson*, No. 98-0451-P-S, 1999 U.S. Dist. LEXIS 5151, at *24-25 (S.D. Ala. Mar. 31, 1999); *United States v. Lambert*, 915 F. Supp. 797, 802-03 (S.D. W.Va. 1996).

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[6] The Region argued below that Adamas and/or Pierce are liable as preparers of sewage sludge. *See* Initial Decision at 18. The Initial Decision found that Respondents were not preparers. *Id.* at 33. Because neither party raises the issue before the Board, we do not address the issue.

Respondents played an integral role throughout the sludge removal and application process. Respondents engaged in a months-long discussion with NCUC regarding the sludge removal project, where Respondents took responsibility as the "project manager and technical consultant" for the sludge removal project at the Facility. *See* CX 1 (NCUC Proposal); CX 46, at 4 (citing emails from Nathan Pierce). Respondents signed a contract with NCUC, by which Respondents would remove the sludge from the Facility. *See* CX 45, at 17-19 (Contractor Agreement #NCUC-LR-01-2018 (May 15, 2018)). Respondents hired two people, Tom Robinson and Ernie Sprague, as subcontractors to perform some of the land application duties and provided explicit oral and written directions on how to do so. *See, e.g.*, CX 7, at 1 (Subcontractor Agreement between Adamas and Robinson); CX 42 (Sprague's response to EPA's information request); Initial Decision at 38. Testimony from the hearing before the ALJ also supports that Respondents were present at the application site when the project "first got started" and directed a subcontractor to dump sludge onto the soil. Tr. at 393-394. The record before the ALJ includes several other examples of Respondents' control of and participation in the project. *See id.* at 139-73, 219-20, 253-54 (testimony from Erin Kleffner, Region 7 compliance officer); *id.* at 281-86, 294-99 (testimony from Courtney); *id.* at 388 (testimony from Robinson); *id.* at 407, 431 (testimony from Sprague). In sum, the record demonstrates that Respondents controlled and participated in the application process and thus were appliers under the sewage sludge regulation.[7]

As an applier of Class B sewage sludge, Respondents have the recordkeeping and certification obligations discussed above.[8] Respondents do not dispute that they did not create and retain a certification statement required by

[7] Respondents argue that they could not be an applier because they were excluded from the application site. Appeal Br. at 11, 18. The ALJ thoroughly reviewed the evidence and concluded that "the record demonstrates that Respondents indeed guided the disposition of the sewage sludge after Respondents had removed the materials from * * * the Facility, even if [Respondents were] not physically present at the application site each time the material was spread on" Robinson's property. Initial Decision at 38. We agree with the ALJ's assessment of the record, and regardless of any purported exclusion, Respondents had sufficient control of the application process to qualify as applier under the regulations.

[8] Respondents argue that the Region improperly classified the sludge as Class B and the ALJ failed to address sampling inconsistencies. Appeal Br. at 19-20. We disagree and discuss this argument in Part V.A.3, below.

40 C.F.R. part 503. Respondents instead argue that the Region could have relied on an alternative source for the information, namely records submitted by Sprague, and that they were unable to comply.[9] Appeal Br. at 12, 17-18. We disagree. The regulation offers no exception for applier liability if there might be alternative sources for the information. *See* 40 C.F.R. § 503.17(a)(4)(ii). Any applier "shall develop" the information and "shall retain" the certification and other information required by part 503 for five years. *Id.* It is incumbent upon anyone applying sewage sludge to comply with those requirements.[10] Having been found to be appliers, Respondents were obligated to comply with the regulatory recordkeeping and certification requirements.[11]

2. *Allegations About Inconsistencies in Liability Determination Lack Merit*

Respondents argue that the Initial Decision contained inconsistent legal reasoning because the ALJ found that (1) Respondents were not operators or preparers but were appliers and (2) Respondents were not liable for Claim 2 but were liable for Claim 1. *See* Appeal Br. at 16-17, 20-21. Respondents seem to be arguing that they must either be liable on all bases for liability or none, with nothing in between. That is incorrect. As thoroughly explained in the ALJ's decision, the

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[9] Respondents also argue that the Agency improperly shifted its burden to prove the adequacy of materials submitted by others. Appeal Br. at 12. This argument relates to the appropriateness of the penalty assessment, addressed in Part V.D, below.

[10] To the extent Respondents contend they were unable to comply with the regulatory recordkeeping and certification requirements because they lacked sufficient access to the Facility or control over the application process, we disagree. We have concluded that the record demonstrates that Respondents had sufficient control over and participation in the application process to be "appliers" under the regulations. That is all that is required for the regulatory requirements and obligations to apply to Respondents.

[11] Respondents' arguments relating to the responsible corporate officer doctrine do not absolve Pierce of liability. The record supports a finding that Pierce was at all relevant times in control of Adamas and was "intimately involved in the operations and decisionmaking on behalf" of Adamas. *In re Rocky Well Serv., Inc.*, 14 E.A.D. 541, 554 (EAB 2010) (Board found individual properly held liable where they were actively involved in operations of corporation), *vacated & remanded on other grounds*, No. 3:10-cv-325 (S.D. Ill. Mar. 21, 2012). That is enough to impart liability to Pierce for the actions of Adamas. *See id.*; *United States v. Iverson*, 162 F.3d 1015, 1022-1025 (9th Cir. 1998). Furthermore, and as discussed above, Pierce's actions on their own make him liable even without application of the responsible corporate officer doctrine.

factual and legal bases for preparer and applier liability in Claim 1, as well as for operator liability in Claim 2, are distinct. *See* Initial Decision at 29-43, 46-58 (providing the ALJ's assessment of liability for preparers, appliers, operators, and associated recordkeeping and certification requirements). The ALJ properly analyzed the definitions of "preparer" and "applier" and the differences between them and found that Respondents satisfied the latter, but not the former. *See id.* at 29-39. Similarly, the ALJ separately and appropriately addressed the elements of Claim 1 for appliers and the elements of Claim 2 for operators and concluded that Respondents violated the regulatory requirements for appliers, but not for operators.[12] As a result, Respondents' argument lacks merit.

In sum, the ALJ undertook the appropriate analysis of the Region's claims to find Respondents liable for violating the requirements applicable to appliers but not liable for violating the requirements for preparers or operators.

3. *Allegation that ALJ Inconsistently or Improperly Weighed Respondents' Scientific Data Is Unsupported and Without Merit*

Respondents assert that the ALJ "inconsistent[ly] or improperly weighted [their] scientific data," but provide no examples or specificity for their assertion. Appeal Br. at 21. The entirety of this claim is presented on one line of text. *Id*. As explained above, the CROP requires parties appearing before the Board to provide relevant facts in support of their claims. *See* 40 C.F.R. § 22.30(a)(1)(iii). Without any details to support this allegation, the Board rejects the Respondents' assertion as being without merit.

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[12] Respondents also claim they "[f]aced * * * [a] shifting liability theory (from 'preparer' to 'applier')." Appeal Br. at 21. Respondents offer no support for this allegation and dedicate only eight words in their brief to this claim. *Id*. As such, Respondents have failed to properly present this issue for appeal and the Board denies it on that ground. *See* Part III, above. We further note that Respondents' claim is factually incorrect. The Region initially alleged Respondents were *appliers* (i.e., the basis on which the ALJ held Respondents liable), *see* First Filed Complaint (Sept. 6, 2019) (failing to refer to Respondents as "preparers"), and later amended the complaint to allege Respondents were also *preparers* (i.e., the basis on which the ALJ held Respondents *were not* liable). *See* Complainant's Motion for Leave to Amend the Complaint ¶ 6 (Dec. 17, 2019) (requesting to amend the Complaint "to identify Respondents as 'preparers of sewage sludge'"); Initial Decision at 61 (explaining that the Region's original complaint did not allege Respondents were "preparers"). Thus, to the extent a "shifting liability theory" existed, it operated in the opposite manner to what Respondents assert.

Even if we were to liberally construe Respondents' argument, we would still reject it. The issue most related to "scientific data" is the ALJ's evaluation of Respondents' evidence related to the sludge class determination. Based on our review of the record, the ALJ properly evaluated and gave fair consideration to the evidence proffered by the Region as well as Respondents. *See* Initial Decision at 19-23.

The regulations categorize sewage sludge into two groups based on pathogen levels following treatment of the sewage sludge. "Class A" sewage sludge has undergone treatment that leaves it "virtually pathogen free" and is not subject to any regulatory requirements relative to pathogens. CX 35, at 27 (U.S. EPA, *Land Application of Sewage Sludge: A Guide for Land Appliers on the Requirements of the Federal Standards for the Use or Disposal of Sewage Sludge, 40 CFR Part 503*, at 20 (Dec. 1994)); *see also* 40 C.F.R. § 503.32(a). "Class B" sewage sludge has undergone treatment that does not eliminate all pathogens and, as a result, the regulations require that its use include site restrictions. *See* CX 35, at 20; 40 C.F.R. § 503.32(b). Before the ALJ, Respondents maintained that the sewage sludge was "Exceptional Quality," apparently meaning the sewage sludge should have been considered "Class A." Respondents Answer to Second Amended Complaint and Request for Hearing at 5-6; *see also* CX 17, at 2 (Letter from Chris Gallus, Respondents' Counsel, to Erin Kleffner, EPA Region 7 (June 14, 2019)). The ALJ found the sampling was insufficient to support a "Class A" designation. *See* Initial Decision at 23. A laboratory report showed that the density of fecal coliform in the sewage sludge was 4244 Most Probable Number per gram of total solids on a dry weight basis, but the regulations limit Class A sewage sludge to 1000 Most Probable Number per gram. *See* CX 6, at 17 (Energy Laboratories, Laboratory Analytical Report at page 9 of 19 (June 13, 2017)); 40 C.F.R. § 503.32(a); Initial Decision at 23. In addition, the sampling occurred a year before the project began, but the regulations set the fecal coliform level "at the time the sewage sludge is used or disposed." 40 C.F.R. § 503.32(a); *see also* Initial Decision at 23. Finally, the ALJ was unable to find any evidence in the record that the sewage sludge had been treated for pathogen reduction, which is required for Class A sludge. Initial Decision at 23; *see* 40 C.F.R. § 503.32(a).

Respondents' brief refers to "earlier sampling that supported Respondents' claim," but fails to identify that "earlier sampling" or to otherwise rebut the ALJ's conclusions about the untimely sampling or the density of fecal coliform. *See* Appeal Br. at 19. Respondents then argue that the ALJ's assessment of this issue ignored the fact that the sewage sludge was treated by dewatering. *See id*. at 20. The dewatering argument is a red herring. Although the sewage sludge was dewatered, that process is used to reduce the volume of sewage sludge and to

eliminate runoff. *See* U.S. EPA, *Biosolids Technology Fact Sheet: Centrifuge Thickening and Dewatering* 1 (Sept. 2000) (explaining the advantages of dewatering). Dewatering is not a treatment for pathogen reduction. *See* 40 C.F.R. § 503.32(a); *see also* 40 C.F.R. part 503, app. B (providing a list of Processes to Further Reduce Pathogens, which does not include dewatering); 58 Fed. Reg. 9248, 9360 (Feb. 19, 1993) ("EPA does not consider dewatering, of itself, to constitute a change in sludge quality."). Thus, the dewatering argument does not provide a basis for reconsidering the class of the sewage sludge at issue.

4. *Allegation About Certification Requirement Violating Due Process Is a Restatement of Another Allegation and Is Without Merit*

Respondents argue that holding them liable for failing to sign and submit a certification under 40 C.F.R. § 503.17(a)(4)(ii) constitutes a due process violation. *See* Appeal Br. at 14-15. The certification regulation directs "[t]he person who applies the bulk sewage sludge" to acknowledge, under penalty of law, that the information used to determine compliance with required management practices, site restriction, and vector attraction reduction requirements were "prepared under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate this information." 40 C.F.R. § 503.17(a)(4)(ii)(A). Respondents argue that they "did not supervise the land application and w[ere] not present at the time it occurred" and, as a result, signing the certification "is tantamount to compelling a false legal declaration" and violates due process. Appeal Br. at 14-15.

This argument is again based on the same factual arguments used to argue that the ALJ's finding that Respondents were "appliers" was incorrect. Their effort to relitigate the facts that establish the Respondents as "appliers" in the context of this claim can be seen in the similarity of the substance and language of the two sections of their brief. In the section of their appeal titled "Improper Designation of Respondents as 'Appliers,'" Respondents argue that (1) they were not present during the application, (2) they did not supervise the application, and (3) Robinson and Sprague performed the application.

> Tom Robinson and Ernie Sprague executed the land application, using their own equipment and acting under contracts that explicitly assigned them responsibility for field preparation, sludge incorporation, and recordkeeping. * * * Respondents were not present on site, had no supervisory control during application, and relied reasonably on the landowners and contractors to execute the project in compliance with EPA standards.

Id. at 11. Respondents use the same arguments and very similar language to challenge the certification:

> Nathan Pierce did not supervise the land application and was not present at the time it occurred. * * * Ernie Sprague and Tom Robinson further confirmed that they performed the application independently, using their own equipment, and had agreed by contract to perform and document that work.

Id. at 14-15. Later in the same section of their brief about certification, Respondents offer another iteration of the same argument:

> [T]he [certification] regulation does not impose strict liability for recordkeeping failure when supervision is contractually delegated and physical presence is absent due to actions beyond a party's control.

Id. at 15. Both of these arguments are simply reformulations of the facts asserted in arguing that Respondents were not appliers.

As detailed above in Part V.A.1, the Board upholds the ALJ's finding that Respondents are appliers. In doing so, we rejected Respondents' underlying factual assertions. Because the facts establishing their status as appliers were upheld above, they are upheld again here as well. *See In re USGen New Eng., Inc. Brayton Point Station*, 11 E.A.D. 525, 560 (EAB 2004) ("[W]e find that USGen's due process argument is essentially a repackaging of the same issues we have already discussed."). Consequently, as appliers, Respondents were required to submit the 40 C.F.R. § 503.17(a)(4) certification.

Because the record supports the determination that Respondents are liable as appliers of sewage sludge, failed to uphold their recordkeeping and certification obligations, and failed to make any meritorious arguments on appeal to the contrary, we affirm the Initial Decision's findings on Respondents' liability.

B. *Respondents' Challenges to the ALJ Process Lack Support or Merit*

Respondents raise multiple process challenges to the validity of the ALJ's decision. These include claims that Robinson's denial about making a complaint to IHS undermined the enforcement action, allegedly impermissible reliance on hearsay before the ALJ, and other evidentiary matters. For the reasons explained below, we find each argument to lack merit.

1. *Whether Robinson Complained About the Sludge Application Is Immaterial to Respondents' Liability*

The ALJ's Initial Decision observed that a complaint made by Robinson about sewage sludge being improperly applied to his property by Respondents prompted the IHS to visit Robinson's property. Initial Decision at 14; *see also* Complaint ¶ 40 ("On or about August 28, 2018, Indian Health Service visited the land application property after receiving a complaint from the landowner regarding the application.").[13] During the hearing, however, Robinson denied making a complaint. When Robinson was asked whether he "contact[ed] James Courtney [of IHS] regarding a complaint to the sludge being applied to your land," Robinson responded, "No." Tr. at 373; *see also* Tr. at 374. According to Respondents, Robinson's alleged complaint constituted "[a] central factual premise" of the Region's enforcement action, and Robinson's testimony denying that he filed a complaint calls into question the credibility and impartiality of the enforcement action. Appeal Br. at 22. We disagree.

What prompted the Region's investigation is immaterial to Respondents' liability. What matters is whether the evidence presented at the hearing before the ALJ established Respondents' liability with respect to applier's recordkeeping and certification obligations in Claim 1. And as discussed above, it conclusively did.

If Respondents are arguing that the Region may only initiate an investigation upon submission of a complaint, they have not identified any basis for such a conclusion and the Board is not aware of any such requirement. Congress empowered the Administrator to assess civil penalties, and to do so "on the basis of any information available." CWA § 309(g)(1), 33 U.S.C. § 1319(g)(1). That authority is not limited to situations originating from a specifically identified third-party complaint.

We therefore reject Respondents' argument.

2. *Respondents' Objection to the Evidence Presented Lacks Merit*

On appeal, Respondents raise several objections to the manner in which the evidence was presented and weighed before the ALJ, including: (a) the Region

[13] Courtney reported that Robinson "contacted the IHS on 8/27/2018 to express dissatisfaction with the sludge application on his property." CX 9, at 1 (IHS Technical Assistance Record dated Aug. 28, 2018); *see also* Tr. at 289; Initial Decision at 14 (summarizing Courtney's statements about Robinson's complaint).

impermissibly relied on hearsay before the ALJ, (b) the Region relied on written evidence whereas Respondents had live witnesses whose testimony was diminished, (c) the ALJ permitted the Region to improperly coach witnesses, (d) the Region failed to call several witnesses, (e) the ALJ held Respondents to a higher evidentiary standard, and (f) Respondents were procedurally disadvantaged as a pro se party. *See* Appeal Br. at 15-16. We address each of these arguments in turn and reject them.

a. *Hearsay*

Under the CROP, an ALJ "shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value" except evidence related to settlement under Federal Rule of Evidence 408. 40 C.F.R. § 22.22(a)(1). Contrary to Respondents' argument, an ALJ is not prohibited from considering or relying on hearsay. *See In re Taotao USA., Inc.*, 18 E.A.D. 40, 82 n.31 (EAB 2020) ("Hearsay is admissible in EPA administrative proceedings."). And Respondents make no argument that the ALJ considered or admitted evidence contrary to the CROP's standard.

In addition, Respondents fail to identify any hearsay that they allege the ALJ relied on, let alone maintain that none of the traditional exclusions and exceptions to the prohibition against hearsay would apply.[14] Respondents simply assert, "The ALJ's decision relied heavily on hearsay" without any additional argument or information. Appeal Br. at 15. As explained previously, Respondents must provide sufficient support for their claims to allow the Board to conduct a review, and having failed to do so, Respondents' argument also fails on that independent ground. *See* 40 C.F.R. § 22.30(a)(1)(iii).

b. *Region's Alleged Reliance on Written Testimony Rather than Live Witnesses*

Respondents claim the Region relied on written testimony rather than live witnesses whereas Respondents relied on live witnesses. Appeal Br. at 15-16 ("For example, several of the EPA's key factual assertions concerning site conditions,

[14] For example, under the Federal Rules of Evidence, hearsay is "a statement that (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c). The Federal Rules then carve out two types of statements that are excluded from hearsay, *see* Fed. R. Evid. 801(d), and thirty-one exceptions to the hearsay rule, *see* Fed. R. Evid. 803, 804, 805, 807.

material quality, and project supervision were admitted through written correspondence or indirect summaries, not live testimony."). Respondents' implicit view seems to be that witness testimony is necessarily superior to other forms of evidence. To the contrary, the Board has observed that witness testimony can be flawed and unreliable. *See In re Bricks, Inc.*, 11 E.A.D. 796, 805 (EAB 2004) (explaining the Board's concerns about the value of certain witness testimony due to questions about the witnesses' knowledge and about gaps, ambiguities, and contradictions in their testimony), *pet. for review denied*, 426 F.3d 918 (7th Cir. 2005). The Board has also recognized that written testimony and documentary evidence can have significant probative value. *See In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 795 (EAB 1997) (finding documentary evidence to be "probative and useful"). Here, the ALJ reasonably weighed the evidence submitted by all parties. *See, e.g.*, Initial Decision at 30 n.18, 38, 75 n.40, 79-80 (highlighting written testimony and documentary evidence considered by ALJ). During the hearing, the ALJ specifically acknowledged that the record would include evidence of varying types and quality, which she would have to evaluate and weigh in forming her decision. *See* Tr. at 164 ("I will be basing my decision on the evidentiary record created from this proceeding. Whether there [are] holes or no holes or circumstantial evidence or some direct evidence, I'm left with the record I'm left with, and it's not always so perfect. So that's—that's all on my shoulders.").

Respondents' assertion as to the Region's reliance on written testimony rather than live witnesses is also inconsistent with the record. Before the ALJ, the Region offered live witnesses who testified about each of the topics of concern to Respondents:

- Site conditions and access: Kleffner (Tr. at 253-54), Sprague (Tr. at 405-10, 415-19)
- Material quality: Kleffner (Tr. at 173, 176-77)
- Project supervision: Kleffner (Tr. at 139-73, 219-20, 253-54), Courtney (Tr. at 281-86, 294-99), Robinson (Tr. at 388), Sprague (Tr. at 407, 431)

Respondents also attempt to contrast the alleged failure of the Region to provide live witnesses with the claim that Sprague and Robinson offered testimony in favor of Respondents. *See* Appeal Br. at 15-16. In drawing this contrast, Respondents seem to be suggesting that the Region failed to call the appropriate witnesses. But the question on appeal is whether the record supports a finding that Respondents are liable as found by the ALJ, and we have concluded it does. We further observe that Respondents' characterization of the record is factually

inaccurate—the Region called more witnesses than Respondents, and the Region's witnesses included both Sprague and Robinson.[15]

c. *Region Allegedly Engaged in Improper Witness Coaching*

Respondents argue the Region engaged in improper witness coaching. On appeal, Respondents provide one example, claiming Sprague "testified that [Sprague] was told by EPA enforcement counsel not to read portions of his statement, which [Sprague] believed were exculpatory and relevant to the defense." *Id.* at 16.

While testifying before the ALJ, Sprague stated that he was instructed "not to read anything other than the highlighted [text]" from his written response to the Region's information request. Tr. at 413[16]; *see also* CX 42. Counsel for the Region explained to the ALJ that counsel told Sprague they would ask him to read certain highlighted text, but they never directed Sprague not to read unhighlighted text. *See* Tr. at 413. Indeed, counsel for the Region invited Sprague to read whatever portion of his written response that he wanted to read, which Sprague did. *See id*. at 415-16 (EPA counsel inviting Sprague to read "the part of [his] statement that [he] would like to read," followed by Sprague reading from his statement).

The ALJ addressed that exchange during the hearing, explaining, "*Both sides* are going to be able to draw whatever testimony they want from [Sprague]." *Id*. at 414 (emphasis added); *see also id.* at 513 ("both [parties] drew out everything [they] wanted" from Sprague). In fact, Pierce used the same technique at the hearing before the ALJ that he complains the Region used. Pierce asked Sprague, "[C]an you read the highlighted portion [of an unspecified document] for us?" *Id.* at 429. In other words, Respondents used Sprague to elicit the testimony Respondents sought, just as any party would do. As explained by the ALJ, parties may elicit testimony from the witnesses and the ALJ found the Region, as well as Respondents, did not do anything inappropriate or atypical with its witnesses. *See* Initial Decision at 63-64. Further, the ALJ specifically indicated that her

[15] In terms of numbers of witnesses, the Region called four witnesses (Kleffner, Courtney, Robinson, and Sprague), while Respondents called three (Sprague, Michelle Pierce, and Pierce himself). *See* Initial Decision at 2 (identifying the parties' witnesses); Tr. at 3 (same).

[16] Respondents' brief cites pages 405-06 of the hearing transcript, *see* Appeal Br. at 16, which concerns instructions Sprague received about the sewage sludge application, but pages 412-16 appear to be more relevant to this issue.

assessment would not be limited to evidence highlighted by either party, so she evaluated the full breadth of the record rather than only considering what the parties emphasized. *See id*. at 64; Tr. at 473. The Board's review of the record indicates the Region did not engage in any improper witness coaching and the ALJ properly adjudicated the case because the testimony considered was permissible.

d. *Region's Alleged Failure to Call Certain Witnesses*

Respondents claim that the Region failed to call several of its own witnesses. Respondents' notice of appeal and brief lacks specificity about this allegation, so the Board cannot discern which witnesses Respondents are concerned with on appeal. While their brief does not name any particular witnesses, *see* Appeal Br. at 16, during the ALJ proceeding, Respondents specifically criticized the Region for choosing not to call Bement, NCUC's general manager, as a witness. *See* Motion for Leave to File Out of Time Respondent's Motion to Dismiss 3 (July 19, 2022) (stating that the Region chose not to call Bement as a witness). Assuming Respondents' argument on appeal concerns the Region's decision not to call Bement as a witness, the record explains that the Region sought to have her as a witness, but she was no longer employed by NCUC and was unavailable. Initial Decision at 60. As a result, the Region sought to obtain written testimony from Bement, *see* Complainant's Motion for Additional Discovery 1 (June 23, 2022), which the ALJ ultimately denied based on an objection by Respondents. Initial Decision at 60; *see* Complainant's Reply Post-Hearing Brief 7 (Dec. 15, 2023).

And as the ALJ observed, to the extent Respondents believed Bement had relevant testimony, Respondents could have attempted to call Bement and any other witnesses they felt necessary. *See* Order Denying Respondents' Motion for Leave to File Out of Time and Shortening Time for Response to Complainant's Motion for Leave to Amend the Amended Complaint 3 (July 21, 2022) ("Pierce, having identified Ms. Bement as a proposed witness in his prehearing exchange, is still at liberty to call her to testify at the hearing."); Respondent's Initial Prehearing Exchange 4 (Jan. 24, 2020) (listing "Representative of the Northern Cheyenne Utilities Commission" as a witness). But for whatever reason, Respondents ultimately limited their witnesses to Sprague, Michelle Pierce, and Pierce himself. *See* Tr. at 3 (listing witnesses). Respondents fail to address any of these problems with their argument and instead simply make an unsupported assertion about the Region's alleged failure to call certain, unnamed witnesses. The Board rejects Respondents' argument.

e. *ALJ Allegedly Held Respondents to a Higher Evidentiary Standard*

Respondents claim the ALJ held them to a higher evidentiary standard, but they offer no specifics or elaboration on appeal as required by the CROP. *See* Part III above (explaining CROP appeal requirements). The Board therefore rejects this argument for failure to comply with the CROP. Even so, the Board reviewed the record and found the ALJ applied the appropriate burden of proof standard—preponderance of the evidence. *See* Initial Decision at 15. The ALJ's Initial Decision does not reflect any inconsistency in how the ALJ considered and weighed evidence from the parties and the record does not reflect that the ALJ utilized an erroneous evidentiary standard.

Respondents offer no basis for the Board to question the ALJ's treatment of witnesses and evidence, and the Board finds no error by the ALJ.

f. *Respondents' Pro Se Status Before the ALJ*

Respondents seem to argue that their pro se status disadvantaged them procedurally.[17] We disagree. Respondents present this argument in a single line of text and offer no specificity as to how they were procedurally disadvantaged. Appeal Br. at 21. That lack of specificity is a sufficient and independent ground for rejecting this argument. The Board did, however, review the record and we conclude that it reflects the ALJ afforded Respondents an even-handed, reasonable, and extensive process. For example, the ALJ gave detailed consideration to Respondents' arguments and found in favor of Respondents with respect to whether they were "preparers" and "operators." *See* Initial Decision at 27-43, 45-58 (analyzing whether Respondents were "preparers" or "appliers" and violated corresponding recordkeeping and certification requirements under Claim 1 and whether Respondents were "operators" under Claim 2).

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[17] The Board notes that Respondents were represented by counsel for the first year of the ALJ proceeding, although, for much of that time, counsel assisted in a limited capacity. *See* Respondent's Response to Order to Show Cause ¶¶ 2-3, 8 (Mar. 5, 2020) (explaining that Respondents' attorney faced personal challenges and represented them "on a limited scope basis"); Respondents' Response in Opposition to Complainant's Motion for Leave to Supplement Complainant's Prehearing Exchange, and; Respondents Crossmotion for Default and to Dismiss, and; Motion for Attorney Fees 8 (Nov. 2, 2020) (stating that Respondents have "exhausted their financial savings and has been unable to pay for their attorney, as such the attorney of record has been assisting in a limited capacity.").

The ALJ also afforded Respondents many opportunities to state their case. *See id.* at 1-2. The ALJ docket reflects the extensive motions practice during the ALJ proceeding over five years and eight months. *See generally* Administrative Law Judges' E-Docket Database, *Adamas Constr. and Dev. Servs., PLLC and Nathan Pierce* (available at www.epa.gov/oalj). And notwithstanding the fact that Respondents failed to comply with two consecutive orders, the ALJ accepted an untimely filing from them and continued with the proceeding without drawing adverse inferences, excluding evidence, or otherwise sanctioning Respondents. *See* Order on Respondent's Response to Order to Show Cause and Complainant's Motion to Reserve the Right to File Rebuttal Prehearing Exchange (Mar. 10, 2020); *see also* 40 C.F.R. § 22.4(c)(5), (6), (10) (authorizing the Presiding Officer to take certain steps to maintain order and efficiency). In addition, during the hearing, the ALJ expressly acknowledged Pierce's status as a pro se litigant and at the commencement of the hearing, the ALJ explained the hearing process in greater detail than normal because Pierce was a pro se party. *See* Tr. at 12-13, 452-53.

The Board rejects Respondents' argument with respect to any perceived procedural disadvantage based on their pro se status.

C. *Respondents' Broad Challenges to the Region's Enforcement Action Lack Merit*

1. *Whether EPA Has Enforcement Authority*

Respondents argue that the Region lacks authority to enforce the sewage sludge provisions because the land where the sludge was applied is a "non-hydrologically connected agricultural land, in direct conflict with the narrowing of agency authority," citing *Sackett v. EPA*, 598 U.S. 651 (2023). Appeal Br. at 11. The Supreme Court's decision in *Sackett* is inapposite in that it addressed the definition of "navigable waters," and the case before us is brought under EPA's statutory authority to regulate sewage sludge.

Among the numerous and wide-ranging provisions of the Clean Water Act, Congress directed EPA to issue "regulations providing guidelines for the disposal of sludge and the utilization of sludge for various purposes." CWA § 405(d)(1), 33 U.S.C. § 1345(d)(1). The regulations must, among other things, identify uses for sludge and identify concentrations of pollutants which interfere with those uses. CWA § 405(d)(1)(A)-(C), 33 U.S.C. § 1345(d)(1)(A)-(C). EPA must also identify "toxic pollutants" that "may be present in sewage sludge in concentrations which may adversely affect public health or the environment." CWA § 405(d)(2)(A)-(B), 33 U.S.C. § 1345(d)(2)(A)-(B). Congress directed EPA to set management practices and numerical criteria that "shall be adequate to protect public health and

the environment from any reasonably anticipated adverse effects of each pollutant." CWA § 405(d)(2)(D), 33 U.S.C. § 1345(d)(2)(D). EPA issued those regulations at 40 C.F.R. part 503 and Congress made it unlawful not to comply with those regulations. CWA § 405(e), 33 U.S.C. § 1345(e). As such, Respondents' argument that the definition of "navigable waters" prevents the Region's authority to regulate the application of sewage sludge to land lacks merit.[18]

2. *Respondents' Allegation of Selective Enforcement Is Unsubstantiated*

Respondents argue that the Region engaged in selective enforcement by bringing an action against them and not against NCUC, Robinson, or Sprague.

A claim of selective enforcement "faces a daunting burden in establishing that the Agency engaged in illegal selective enforcement, for courts have traditionally accorded governments a wide berth of prosecutorial discretion in deciding whether, and against whom, to undertake enforcement actions." *In re Ram, Inc.*, 14 E.A.D. 357, 370 (EAB 2009) (quoting *In re B&R Oil Co.*, 8 E.A.D. 39, 51 (EAB 1998)), *pet. for review vol. dismissed*, No. 6:09-cv-09-00307 (E.D. Okla. Apr. 11, 2011). Federal courts have acknowledged that regulatory enforcement agencies need not prosecute every potential violator. *See Futernick v. Sumpter Twp.*, 78 F.3d 1051, 1058 (6th Cir. 1996) ("Legislatures often combine tough laws with limited funding for enforcement. A regulator is required to make difficult, and often completely arbitrary, decisions about who will bear the brunt of finite efforts to enforce the law.").

To establish their selective enforcement claim, Respondents would need to establish that (1) other similarly situated violators were left untouched and (2) the selection made was in bad faith based on impermissible considerations, such as race or religion. *See In re Env't Prot. Servs.*, 13 E.A.D. 506, 582 (EAB 2008), *pet. for review denied*, No. 08-1088 (D.C. Cir. Nov. 25, 2009); *see also In re Desert Rock Energy Co., LLC*, 14 E.A.D. 484, 504 (EAB 2009) (requiring a showing of intentionally different treatment than other similarly situated parties).

[18] A separate and distinct part of the CWA requires a permit if the application of sewage sludge "would result in any pollutant from such sewage sludge entering the navigable waters." CWA § 405(a), 33 U.S.C. § 1345(a). The matter on appeal, however, does not involve any allegation relating to a permit or the lack thereof. Thus, proximity to navigable waters is not an element for establishing the Region's enforcement authority here. *See also* Initial Decision at 66-67.

Respondents fail to offer any evidence that the Region treated them differently than other similarly situated parties in bad faith based on impermissible considerations. At most, Respondents point to other parties that they believe are similarly situated to themselves, but Respondents offer no evidence suggesting bad faith by the Region or that the Region treated Respondents differently for impermissible reasons. *See* Appeal Br. at 13-14. That other parties might also be liable, without any evidence that the Region's decision to proceed against Respondents was in bad faith for impermissible reasons, is insufficient to establish a claim of impermissible selective enforcement. *See Env't Prot. Servs.*, 13 E.A.D. at 589 n.99 ("the case law is at odds with [respondent]'s contention that inconsistency in treatment can alone suffice to show bad faith or invidiousness"). Consequently, we reject the Respondents' claim of selective enforcement.[19]

D. *Respondents' Have Not Established that the ALJ Erred in Her Penalty Determination*

Under the CROP, the ALJ, "shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any [statutory] penalty criteria." 40 C.F.R § 22.27(b). The ALJ also shall consider any civil penalty guidelines. *Id.* The statutory penalty factors for a CWA violation include "the nature, circumstances, extent, and gravity of the violation"; the violator's "ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation[;] and such other matters as justice may require." CWA § 309(g)(3), 33 U.S.C. § 1319(g)(3). EPA does not have any civil penalty guidelines for violations of section 405 of the Clean Water Act, but, as the Board has previously explained, EPA's General Enforcement Policy and Penalty Framework are often considered when no statute-specific guidance is available. *In re Phoenix Constr. Servs., Inc.*, 11 E.A.D. 379, 395 (EAB 2004); U.S. EPA, *EPA General Enforcement Policy #GM-21, Policy on Civil Penalties* (Feb. 16, 1984); U.S. EPA, *EPA General*

[19] We also observe that, in this case, the Region offered a reasonable explanation for bringing an enforcement action against Respondents. Kleffner, a Region 7 compliance officer, explained that Pierce had the necessary information to satisfy the recordkeeping requirements and was instrumental to the process. *See* Tr. at 178-79 ("Mr. Pierce conducted the sampling. He did not give any results to any other parties that we're aware of. It would have been very difficult for Mr. Robinson and Mr. Sprague to create and generate the entirety of the Part 503 regulations. In addition to that, since [Mr. Pierce] prepared, [he] land applied, he directed, he was present for all of that, [he] was the best contact in order for us to get all of the recordkeeping requirements fulfilled.").

Enforcement Policy #GM-22, A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties (Feb. 16, 1984) ("Framework").

Respondents argue that the ALJ misapplied the penalty framework because there was no evidence of harm, EPA was able to obtain documents from others, it was impossible for Respondents to comply, and Respondents delegated responsibility to other parties. Appeal Br. at 19. We disagree. These arguments are either simply restatements of the arguments regarding liability, which we have already rejected above or, as discussed below, were thoroughly addressed by the ALJ in her penalty calculation.

To determine the appropriate penalty in the present matter, the ALJ examined the CWA statutory factors.[20] The ALJ first focused on the nature, circumstances, extent, and gravity of the violation. Evaluating the factors as informed by the Framework,[21] the ALJ found mitigating factors to reduce the gravity of the penalty. Namely, Respondents had at least one piece of information required to be kept, EPA was able to obtain some (but not all) information from other parties, and the potential for harm posed by the violation in this matter was reduced in part due to the "nature of Mr. Robinson's property and the management practices and site restrictions observed during the application of the sewage sludge." Initial Decision at 72-76; *see also* Tr. at 384-85.[22] The ALJ noted harm to both wildlife and humans that could result from exposure to improperly applied

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[20] The ALJ determined that several factors were not relevant to the penalty determination, including economic benefit, prior enforcement actions, inability to pay, and other matters as justice may require. Initial Decision at 70-71. Respondents do not challenge these determinations.

[21] The Penalty Framework identifies several factors that are helpful to consider when assessing these statutory elements, including the harm caused by the activity, the importance of the requirements to achieving the goals of the Clean Water Act, and for recordkeeping violations the availability of other information. Framework at 13-16; *see also In re San Pedro Forklift, Inc.*, 15 E.A.D. 838, 880 (EAB 2013).

[22] To the extent Respondents' argument that the ALJ inconsistently or improperly weighed their "scientific data" could relate to the harm component of the penalty calculation, as discussed above, the record shows that the ALJ specifically considered Respondents' contentions about harm in the context of assessing the penalty.

sewage sludge and the seriousness of violating any recordkeeping requirements. Initial Decision at 72-76.

As the Board has previously explained, the violation of any recordkeeping requirement is "a very serious matter." Framework at 14-15; *see also Phoenix Constr. Servs.*, 11 E.A.D. at 397 ("risk to a regulatory program by disregarding the monitoring, reporting, or permitting requirements of an environmental statute also often results in potential environmental harm"), *In re Steeltech, Ltd.*, 8 E.A.D. 577, 588 (EAB 1999) (determining that reporting failures are significant and substantial penalties can be imposed even if there was no actual harm to the environment or health), *aff'd*, 105 F. Supp. 2d 760 (W.D. Mich. 2000), *aff'd*, 273 F.3d 652 (6th Cir. 2001).

The ALJ then evaluated whether Respondents' culpability warranted an upward or downward adjustment to the penalty. Initial Decision at 76-80. As to the culpability of the Respondents, the ALJ found that the Respondents claimed a "level of sophistication" in the industry of sludge removal and "should have known of their obligations and exercised greater care in developing and maintaining records independent of the other participants." *Id.* at 77. The ALJ found that the separate obligation of other entities as preparers did not "relieve Respondents of their duty to comply independently with" the applier requirements. *Id.* at 80.

Based on the analysis of the nature, circumstances, extent, and gravity and culpability of respondents, the ALJ reduced the gravity component from the penalty sought by the Region to $7,500 but added a three percent increase to the base penalty for the relative culpability of Respondents. *Id.* The final penalty assessed is $7,725, which is slightly less than half of the $15,717 proposed by the Region for Claim 1 and significantly less than the $59,583 penalty originally sought by the Region for both claims.

The penalty determination in the Initial Decision is well-explained and supported by the record and consistent with the Clean Water Act and Board precedent. The Board finds that the ALJ did not err in her assessment of the penalty amount. [23]

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[23] Respondents argue that "[e]ven if any individual error * * * were deemed insufficient to warrant reversal, the cumulative effect of multiple substantive and procedural deficiencies requires vacatur of the ALJ's decision." Appeal Br. at 21. Given

VI. *CONCLUSION AND ORDER*

For the foregoing reasons, the Board affirms the ALJ's finding of liability and penalty. Accordingly, Respondents are ordered to pay the full amount of the civil penalty assessed by the ALJ, $7,725.00, within thirty (30) days of receipt of this Final Order. Payment should be made by submitting a certified or cashier's check in the requisite amount, payable to "Treasurer, United States of America," and mailed to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979078
St. Louis, MO 63197-9000

A transmittal letter identifying the subject case and EPA docket number (CWA-07-2019-0262), as well as the name and address of Respondents, must accompany the check. Payment must be identified with "Docket No. CWA-07-2019-0262." Respondents may also pay by one of the electronic methods described at the following webpage: https://www.epa.gov/financial/additional-instructions-making-payments-epa. If Respondents fail to pay the penalty within the prescribed statutory period after entry of this decision, interest on the penalty may be assessed. *See* 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

So ordered.

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that we have found no individual error, Respondents' assertions regarding the cumulative effect of errors are without merit.