UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219
BEFORE THE ENVIRONMENTAL APPEALS BOARD

IN THE MATTER OF	)	
	)	
ADAMAS CONSTRUCTION AND DEVELOPMENT SERVICES, PLLC	)	CWA Appeal 25-01
	)	
AND	)	
	)	
NATHAN PIERCE,	)	
	)	
Appellants	)	
	)	

Docket No. CWA-07-2019-0262

RESPONSE BRIEF

RESPECTFULLY SUBMITTED this 12th day of May, 2025.

CHRISTOPHER MUEHLBERGER
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TABLE OF AUTHORITIES

Caselaw

Statutory and Regulatory Citations

I. INTRODUCTION

Appellants Adamas Construction and Development Services, PLLC and Nathan Pierce. ("Appellants") appealed an Initial Decision and Order ("Initial Decision") that Chief Administrative Law Judge Christine Donelian Coughlin ("ALJ") issued in a proceeding initiated by the Director of the Enforcement Division for the EPA, Region 7, against Appellants. The Initial Decision, which the ALJ issued after holding a two-day hearing with live witness testimony, found Appellants liable, in part, for violations of Section 405 of the Clean Water Act ("CWA"), 33 U.S.C. § 1345, and assessed Appellants a civil penalty of $7,725. For the reasons stated below, the ALJ did not err in her liability determinations or penalty assessment and the Environmental Appeals Board ("EAB") should affirm her decision in its entirety.

II. PROCEDURAL, LEGAL, AND FACTUAL BACKGROUND

Appellee refers the EAB to Judge Coughlin's comprehensive and uncontested Procedural, Legal, and Factual Backgrounds in her Initial Decision. At 1-14.

III. Issues Presented for Review

Appellants presented 15 issues for appeal, each of which Appellee responds to herein. These responses will demonstrate that the EAB should affirm Judge Coughlin's initial decision:

a. The Biosolids regulations do not require jurisdictional waters

In the appeal, Appellants assert that EPA lacked jurisdiction in the case because the land to which the biosolids were applied was ten miles from the nearest navigable water. Appellants' appeal at 10-11. In her initial decision, Judge Coughlin exhaustively evaluated and rejected this argument, pointing to the regulatory language found in 40 C.F.R. § 503.1(b) and the preamble to Part 503 to conclude that the biosolids regulations contain a "broad mandate to protect public health and the environment" that applies to "… *any person* who prepares sewage sludge [or]

applies sewage sludge …" regardless of proximity to jurisdictional waters. Initial Decision at 66-67.

Appellants cite *Sackett v. EPA,* 598 U.S. 651 (2023), in support of their jurisdictional claims. However, *Sackett* is inapposite as it involved a dispute over what constitutes a water of the United States in the context of Section 404 of the CWA, 33 U.S.C. § 1344, and its underlying regulations, not the scope of EPA's congressionally-mandated biosolids land application program found in CWA Section 405 and 40 C.F.R. Part 503. Appellants do not cite to any authority asserting or suggesting that the biosolids statute or regulations are limited to jurisdictional waters. Therefore, the EAB should affirm the ALJ's initial decision.

b. Appellants applied sewage sludge

Appellants claim that they cannot be the appliers of the sludge because they "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's standards." Appellants' appeal at 11. Appellants also testified at hearing, argued in their post-hearing brief, and repeat in their appeal that they were "locked out" of the application site prior to the application of sludge. Tr. at 507-508; Appellants' appeal at 13, 17.

In her Initial Decision, upon consideration of the entire record, Judge Coughlin held that Appellants provided direct oversight of the sludge application and "were among the persons who applied sewage sludge … and therefore, they were obligated to maintain records independent of any other participant in the project." Initial Decision at 39, 41.

In addition to the ALJ's correct ruling that Appellants' supervision of the sludge application alone made them liable under the biosolids regulations' recordkeeping requirements, Appellants' repeated assertions in their appeal that they were not present, were "locked out" of

the site during application, and had no supervisory control during the application is contradicted by witness testimony elicited by Judge Coughlin, herself.

During the landowner Tom Robinson's testimony at hearing, Judge Coughlin asked Mr. Robinson if Nathan Pierce was present during the sludge application:

> Q: Do you recall how often … you saw Mr. Pierce at your site?
> A: Uh-huh
> Q: I think you might have said a couple of times?
> A: Yes.
> Q: Okay. And when you say, "We first got started," tell me what that means in terms of the stages of this project.
> A: Oh, he had a big tanker truck come in, and it had some spray bars on there … And he was there. We tried that first. It wouldn't work. It kept plugging up. Then after that he got Ernie Sprague to come in and dump it on.
> Q: Onto the soil?
> A: Yes … And he was there … when that was going on.
>
> Tr. at 393-394.

Witness Ernie Sprague, who hauled and applied the sewage sludge, established in his response to EPA's Information Request that Mr. Pierce was present at the application site: "Nathan and his team were on both ends of the Job, I saw them taking samples and moving pipes etc … On 8-17-18 Nathan hired a tanker truck to help when I showed up. They had showed up the day before but had difficulty off loading, Nathan asked me to off load them so I did." CX42 at 3.

Based on Messrs. Sprague's and Robinson's testimonies, "both ends" refers to the sludge extraction site at the Lame Deer publicly owned treatment works and the Tom Robinson-owned application site since both accounts of Mr. Pierce's securing of a tanker truck at the application site match up. See CX42 at 3; Tr. at 393-394.

As for Appellants' assertions they were "locked out" of the application site and were therefore not present, the evidence also tells a different story. During his testimony at hearing, Ernie Sprague indicated sludge had already been applied when this lock out occurred:

> Q: And the issues with her [Sheri Bement] and with being locked out happened after the application project, correct? Or mid-application project?
> A: Right. It happened during the application project.

Tr. at 431-432.

Mr. Pierce also indicated during his hearing testimony that at least some sludge was applied prior to the alleged lock out:

> Q: Okay. This dispute between NCUC and the subcontractors, most of this took place after the sludge had already been applied to Mr. Robinson's land, right?
> A: That's not correct.
> Q: Okay. Around the time that it got applied?
> A: Near the time that it got applied, yes.

Tr. at 503.

Taking the three accounts of Messrs. Pierce, Robinson, and Sprague together, it is clear that Appellants were present at the time of initial sludge application in contravention of Appellants' claims in their brief. Even if it were not true, however, Appellants are still liable for biosolids recordkeeping requirements because they expressly took responsibility for the logistics and implementation the project (*see* CX4 at 1; CX7 at 1; CX19 at 1; CX43 at 7; CX45 at 21, 24, 33, 36, 37; CX49 at 9; CX55 at 5).

Because Appellants exerted control over the hiring and logistics of the sludge application project, were physically present at the time of application, and subsequently demanded payment for the project, Judge Coughlin was correct in finding Appellants liable for failure to comply with the biosolids regulation's recordkeeping requirements. Several pages of the Initial Decision are dedicated to thoroughly evaluating and rejecting assertions that Appellants could contract

away their liability (*See* Initial Decision 36-39). Thus, the EAB should affirm the ALJ's Initial Decision.

c. Appellants did not comply with the biosolids recordkeeping requirements

Appellants point to records submitted by Ernie Sprague as "alternative sources of information" that EPA should have considered that would have satisfied the recordkeeping requirements found in 40 C.F.R. § 503.17. Appellants appeal at 12. However, in the testimony by EPA Compliance Officer Erin Kleffner that Appellants cite from the hearing as support for their position, Ms. Kleffner explains how the submissions from Mr. Sprague were insufficient to satisfy the regulatory requirements. Tr. at 202-202.

Ms. Kleffner described the specific documents that must be created and maintained by an applier of biosolids under 40 C.F.R.§ 503.17 – including management practices, site restrictions, and vector attraction reduction – and that Appellants never provided such documentation. Tr. at 99. At hearing, Mr. Pierce confirmed that he had never provided EPA with such documentation. Tr. at 505-506.

In her Initial Decision, Judge Coughlin found there to be "ample evidence demonstrating Respondents were sufficiently responsible for and in control of the application of the sewage sludge" (at 36) and "they were obligated to maintain records independent of any other participant in the project" (at 41).

The plain language of the Part 503 recordkeeping requirements do not include EPA's consideration of "alternative sources of information" and Appellants admitted to not providing the required application records. Therefore, the EAB should affirm Judge Coughlin's Initial Decision.

d. EPA correctly selected Appellants for enforcement

Appellants assert that EPA improperly and arbitrarily selected Appellants for enforcement when there were other parties responsible for applying sludge in the present case. Appellants' appeal at 13.

Throughout Appellee's filings and testimony at hearing, Appellee recognized the contributing roles of all parties in the sludge removal and application project. However, Appellee's initial request for information and subsequent pursuit of enforcement against Appellants came as a result of Appellants' repeated assertions that they were in charge of the sludge application (*see* CX4 at 1; CX7 at 1; CX19 at 1; CX43 at 7; CX45 at 21, 24, 33, 36, 37; CX49 at 9; CX55 at 5) and expected to get paid for completing the project (*see* CX43 at 7, 28).

Judge Coughlin correctly found that Appellants "took responsibility for and led the planning and execution" of the sludge removal and application project "even though Respondents did not personally perform each phase of the project" (Initial Decision at 38) and that multiple parties can be liable for sludge application (Initial Decision at 41). Therefore, the EAB should affirm Judge Coughlin's decision.

e. Nathan Pierce is a responsible corporate officer

Respondent Nathan Pierce asserts in his appeal that he cannot be held personally liable under the "responsible corporate officer" doctrine because he was "excluded from the site and denied access by NCUC prior to application" and that he delegated responsibilities to subcontractors for sludge application. Appellants' appeal at 14.

Appellants appear to conflate the issues of applier liability under 40 C.F.R. Part 503 with personal liability under the responsible corporate officer doctrine. At issue here is whether

Respondent Pierce can be held personally liable for the actions of his company, Adamas; and regarding this, the ALJ and the relevant authorities have been clear.

Judge Coughlin ruled in her Order on Accelerated Decision that it is "undisputed" that Mr. Pierce controlled the activities of his company at all times relevant to the proceeding (at 9, 11). Further, in her Initial Decision, Judge Coughlin points out that Appellants' post-hearing briefs do not dispute that Pierce held himself out "as the primary contact of Respondent Adamas for environmental compliance" and that he "managed, directed, or made decisions about environmental compliance for Adamas." At 16.

Indeed, Appellants' citation of the responsible corporate officer elements in *United States v. Park* (421 U.S. 658 (1975)) supports EPA's and the ALJ's conclusions that Pierce is a responsible corporate officer: Pierce had actual control over the project from its inception through land application; he directly participated "at both ends" of the project per his subcontractor's testimony (CX42 at 3); and he had a realistic opportunity to prevent the alleged violations because he repeatedly assured NCUC that he would comply with CWA biosolids regulations (*see* CX45 at 21; CX45 at 33-36; CX45 at 37).

For these reasons, the EAB should affirm the ALJ's Initial Decision.

f. Appellants were the obvious parties to certify regulatory compliance

Appellants assert that they could not sign a required certification of compliance pursuant to 40 C.F.R. § 503.17(a)(4)(ii) because there was "uncontroverted evidence that Respondent Nathan Pierce did not supervise the land application and was not present at the time it occurred." Appendants' appeal at 14-15.

As discussed above, it is indeed controverted that Pierce was onsite at the time of the application based on his own and his contractors' testimony at hearing as well as the evidentiary

record. Additionally, as EPA Compliance Officer Erin Kleffner testified at hearing, Mr. Pierce was the obvious party in this case able to demonstrate compliance with the biosolids recordkeeping requirements:

> 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 he … land applied, he directed, he was present for all of that, that was the best contact in order for us to get all of the recordkeeping requirements fulfilled.
>
> Tr. at 178-179.

Further, the certification statement is only one of multiple records required to be created and maintained by appliers per 40 C.F.R. § 503.17(a)(4)(ii), and Appellants admitted under oath that they did not submit such records to EPA. Tr. at 505-506. Finally, given the control that Appellants exerted over the project and contractors – the same control Judge Coughlin references in her decision (at 38) – there is no reason why Appellants could not have created and maintained the required records, whether or not they were present at the actual application site.

For all of these reasons, it is logical and appropriate that Appellees selected Appellants for its information gathering efforts and subsequent enforcement, and the EAB should affirm the ALJ's Initial Decision.

g. Hearsay is permissible at administrative hearings and there were no "irregularities" in Appellee's presentation of evidence

Appellants argue that the ALJ impermissibly relied on hearsay over the live testimony of witnesses. Appelant's appeal at 15-16. Appellants also assert that Appellee improperly "coached" witness Ernie Sprague and failed to call several witnesses causing the ALJ to "infer" facts in favor of Appellee's case. Id. at 16.

In her opening statements at hearing, Judge Coughlin explained that hearsay is allowed in administrative hearings (at 23), but that the judge may give such evidence less weight in her deliberations (at 43). This is supported by administrative case law: "Hearsay evidence is clearly admissible under the liberal standards for admissibility of evidence in the 40 C.F.R. pt. 22 rules, which are not subject to the stricter Federal Rules of Evidence." *William E. Comely, Inc*., 11 E.A.D. 247, 266 (EAB 2004).

As for Appellants' allegation regarding improper coaching of a witness, Judge Coughlin accommodated and resolved Appellants' assertions at hearing, explaining that both sides of a case, including this case, can elicit desired testimony from its witnesses:

> I understand that parties will have a particular focus of what they want to draw out in a witness. And with regard to Mr. Sprague, since he was identified, I believe, as somebody both sides were going to call, you know, I -- I assumed, and I think what played out, is that you both drew out everything you wanted.
>
> Tr. at 513.

In her Initial Ruling, Judge Coughlin also correctly dismissed Appellants' allegations that EPA improperly failed to procure certain witnesses for the hearing, asserting that Appellants had the same rights and abilities to call witnesses as Appellee, yet failed to do so:

> Respondents do not explain why they did not, either prior to or during that period of postponement, seek additional discovery themselves or request a subpoena to compel the attendance of Ms. Bement or any other proposed witness at the hearing, as authorized by the Rules of Practice. Each party to a proceeding is responsible for presenting the evidence that it considers necessary to prove its case, and if Respondents felt that the testimony of certain proposed witnesses was "pivotal" for a full elicitation of the facts and development of their defenses, then it behooved Respondents to compel their attendance or obtain their testimony by alternative means.
>
> Initial Decision at 60.

Because Appellee acted within the scope of its ethical and regulatory obligations and authorities throughout the present litigation, the EAB should affirm Judge Coughlin's Initial Decision.

h. The ALJ's Initial Decision is consistent and logical

In over 80 pages of deliberation in her Initial Decision, Judge Coughlin found that the record "is replete with evidence that Respondents took responsibility for and led the planning and execution of the sludge removal project, including the transport and land application of the sewage sludge, even though Respondents did not personally perform each phase of the project." At 38. As such, Appellants were required to create and maintain application records. At 43. And based on Pierce's own testimony, Appellants failed to produce required records. At 42; Tr. at 505-506.

Appellants attempt to undermine and obfuscate the ALJ's painstaking analysis by calling into question her reasoning and conclusions through cherry-picking of facts and issues. Appellants present a handful of vague, confusing, and unsubstantiated arguments, concluding that the Judge's ruling is full of contradictions that warrant a reversal. At 16-17. Through a review of these facts in their full context and with the totality of the evidence in mind, the EAB should affirm the ALJ's Initial Decision.

i. The record contradicts Appellants' assertions they were denied access to the application site

Again in Sections I and J of their appeal, Appellants assert they were denied access to the application site and therefore could not be considered "appliers" under the regulatory scheme and thus were unable and not required to comply with the biosolids recordkeeping requirements. Respondent's appeal at 17-18. As discussed above, Appellants' testimony, as well as testimony of their subcontractors, contradict these assertions. And regardless of Appellants' onsite presence, the ALJ correctly found that Appellants exerted sufficient control over the application project to warrant liability under CWA Section 405. The EAB should affirm the ALJ's Initial Decision.

j. The ALJ's penalty assessment is supported by the evidence

Appellants assert that the penalty assessed by Judge Coughlin was unsupported by the evidence and EPA's penalty guidance. At 18-19. First, Appellants assert that there was no evidence of environmental or human health harm and therefore no "serious" violation. Id. Second, Appellants claim that EPA could have relied on "alternative sources" of information to satisfy the recordkeeping requirements. Third, Appellants reassert their lack of access to the application site prior to the alleged violations. Fourth, Appellants claim that the ALJ "misunderstood" Appellants' role in the sludge project.

The second, third, and fourth points are previously addressed above in Sections b, c, e, f, and i. Turning to the first point that no evidence of human health or environmental harm was presented, Appellee agrees with Appellants that evidence of harm was not proffered, but strongly disagrees that the violation was not "serious." Without access to the records required under 40 C.F.R. Part 503, the Agency cannot know the extent of contamination present in biosolids nor the potential impacts to human health or the environment. Tr. at 75, 104. Such impacts may include exposure to metals that may lead to behavioral or reproductive changes to wildlife, cancer or cognitive impairment in humans. Tr. at 52. Also, pathogen exposure can make humans or wildlife sick (Id. at 53). Finally, excess nitrogen in biosolids may lead to eutrophication in water bodies. Id.

EPA asserts that the ALJ did not err in her assessment of the penalty in her Initial Decision and the EAB should affirm.

k. Appellants submitted one sample result to EPA evidencing "Class B" sludge

Appellants assert that the ALJ erred by adopting EPA's conclusion that the applied sludge in the present case was "Class B" sludge.[1] At 19. Appellants attempt to justify their assertion that the Agency's analysis was based solely on one sample result and the Judge disregarded earlier sampling data. At 20.

This is a red herring on multiple fronts. First, EPA's Erin Kleffner testified that she only received one relevant sample result from Appellants. Tr. at 98.[2] Second, according to Ms. Kleffner, the submitted pathogen data showed exceedances of pathogen threshold, making it "Class B" sludge. At 173. Third, the results did not contain all the information required under the biosolids recordkeeping requirements. At 99.

There were no relevant "earlier sampling results" for EPA to analyze here. Even if there were, it would not have obviated Appellants' obligations to create and maintain other required records per 40 C.F.R. § 503.17. In her Initial Decision, Judge Coughlin ruled:

> The regulations plainly impose recordkeeping requirements directly on "persons who apply" sewage sludge. Respondents have been found to be among the persons who applied the sewage sludge … and therefore, they were obligated to maintain records

[1] Judge Coughlin cites EPA biosolids guidance in her Initial Decision that "Class A" sludge is "virtually pathogen free" and, thus, does not trigger requirements "relative to pathogens," including site restrictions. At 21.

Further, although Appellee is not seeking EAB reconsideration of Judge Coughlin's ruling that Appellants did not "prepare" the sludge (at 29-33), Appellants appear to undermine this part of the ALJ's ruling here. In the appeal, Appellants argue that their "treatment" of the sludge resulted in pathogen reductions. At 20. Citing to the 40 C.F.R. Part 503 Preamble, Judge Coughlin quotes "… the Agency considers sewage sludge to have undergone a change in quality, or a material to have been derived from the sewage sludge, only when its pollutant concentration, pathogen levels, or vector attraction properties are altered as a result of the process to which it is subjected." Initial Decision at 32-33. Appellants' insistence that their processing of the sludge resulted in reduced pathogen levels makes them sludge "preparers" by the standards laid out in the Preamble.

[2] Included in Appellants' submitted sample data were results from June 2017. Presumably, these are the "earlier sampling results" to which Appellants refer. Appellants' appeal at 20. Sampling data that is more than a year old at the time of preparation and application would be unusable to determine whether the sludge meets Class A status because it was not "at the time the sewage sludge is used or disposed; at the time the sewage sludge is prepared for sale or give away in a bag or other container for application to the land; or at the time the sewage sludge or material derived from sewage sludge is prepared to meet the requirements in § 503.10 (b), (c), (e), or (f)." 40 C.F.R § 503.32(a). Even if the samples were usable, the pathogen levels in the 2017 sampling data exceeded 1,000 Most Probable Number/gram, which would disqualify the sampled sludge as "Class A."

> independent of any other participant in the project … (A) belief that others were fulfilling the recordkeeping requirements simply does not absolve Respondents of liability for failing to comply in their own right as "appliers."
>
> Initial Decision at 40-41.

Because the Judge correctly concluded that Appellants were liable for recordkeeping and failed to submit all required records under Part 503, the EAB should affirm her decision.

l. Appellee met its burden of proof that Appellants applied sewage sludge

In the appeal, Appellants assert that because the Judge ruled against EPA with respect to its burden of proof as to Appellants' status as "preparer" and "operator" but upheld the Agency's allegations with respect to "applier," the ALJ's decision must be based on "inconsistent" and "flawed" reasoning. Appellants' appeal at 20. Appellants make these claims without citing to any case law or support in the record. Moreover, the claims also ignore the Judge's thorough analysis of the facts and law in her Initial Decision. As such, the EAB should affirm Judge Coughlin's Initial Decision.

m. There is no "cumulative error" in the present proceeding

Appellants asks for vacatur of the ALJ's Initial Decision because of "numerous missteps" throughout the case proceedings resulting in "cumulative error." Appellants cite *United States v. Rivera*, which defines "cumulative error" as a series of errors that affect a defendant's "substantial rights." 900 F.2d 1462, 1471, citing *United States v. Kartman*, 417 F.2d 893, 894, 898 (9th Cir. 1969). As evidence of cumulative error, Appellants restate and summarize the previously addressed assertions.

In addition to Appellee's preceding rebuttals to Appellants' unsubstantiated allegations, Appellee points to Judge Coughlin's Procedural Background in her Initial Decision (at 1-2), which describes in detail how the parties proceeded through litigation in adherence to 40 C.F.R.

Part 22. Appellants were given every opportunity to respond to Appellee's allegations, procure witnesses, file motions, and present their evidence to a neutral factfinder. As such, the EAB should find that Appellants' substantial rights have not been affected and should affirm the ALJ's Initial Decision.

n. Whether or not Mr. Robinson initiated a complaint against Appellants is immaterial

Appellants argue in their appeal that, contrary to Appellee's assertions, Mr. Robinson did not initiate the complaint against Appellants that precipitated EPA's enforcement action and subsequent litigation. Respondent's appeal at 22. This argument belies the straightforward evidence presented in CX9, a report generated by Indian Health Services that says plainly, "A property owner in Lame Deer, Tommy Robinson … contacted the IHS on 8/27/2018 to express dissatisfaction with the sludge application on his property …" At 1. The report goes on to say that "(t)he property owner stated to IHS that he withdrew consent for the sludge to be applied …" At 4. At hearing, Indian Health Services engineer James Courtney testified under oath that he authored the IHS report and corroborated Appellee's assertion that Mr. Robinson initiated the complaint. Tr. at 287-288.

Whether or not Mr. Robinson initiated the complaint is another red herring, however. Regardless of who submitted the initial complaint, IHS identified Appellants as a responsible party for the sludge project (Tr. at 77), which led EPA to send an information request to Appellants compelling submission of required biosolids recordkeeping (at 78), which to date, Appellants never fully answered (at 107) and resulted in the filing of an administrative complaint. The EAB should disregard Appellants' irrelevant claims here and affirm the ALJ's Initial Decision.

For the reasons cited above, Appellee respectfully requests the EAB to affirm Judge Coughlin's Initial Decision.

CERTIFICATE OF SERVICE

I certify that the foregoing Appellee's Response Brief, CWA Appeal 25-01, Docket No. CWA-07-2019-0262, has been submitted electronically using the EAB E-Filing System.

A copy was sent by email to:

Appellants Adamas Construction and Development Services PLLC and Nathan Pierce at nathanpierce77@outlook.com.

EPA Region 7 Regional Hearing Clerk at R7_Hearing_Clerk_Filings@epa.gov.

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