UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Adamas Construction and Development Services,	)	
PLLC and Nathan Pierce,	)	Docket No. CWA-07-2019-0262
	)	
Respondents.	)	

ORDER ON COMPLAINANT'S MOTION FOR ACCELERATED DECISION AND RESPONDENTS' REQUESTS FOR DISMISSAL AND ADDITIONAL DISCOVERY

The Director of the Enforcement and Compliance Assurance Division at the United States Environmental Protection Agency ("EPA" or "Agency"), Region 7 ("Complainant"), initiated this proceeding on September 6, 2019, by filing a Complaint and Notice of Opportunity for Hearing ("Complaint" or "Compl.") against Adamas Construction and Development Services, PLLC, and Nathan Pierce ("Respondent Adamas" and "Respondent Pierce," respectively, or "Respondents," collectively), pursuant to Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act ("Act" or "CWA"), 33 U.S.C. § 1319(g). Complainant alleged in the Complaint that 1) Respondents failed to develop and maintain records required by 40 C.F.R. § 503.17, in violation of Section 405 of the CWA, 33 U.S.C. § 1345, and the implementing regulations at 40 C.F.R. Part 503, and 2) Respondents did not provide complete and timely responses to information requests sent by EPA pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318, in violation of that provision. On October 16, 2019, Respondents filed an Answer and Request for Hearing ("Answer" or "Ans.") denying the charged violations and requesting a hearing on the matter.[1] Answer at 1.

Pursuant to the Prehearing Order issued on October 18, 2019, and subsequent orders related to filing deadlines, the parties engaged in a prehearing exchange of information process. Specifically, Complainant filed its Initial Prehearing Exchange ("Complainant's Initial PHE") on November 26, 2019; Respondent Pierce filed an Initial Prehearing Exchange ("Respondent's

[1] The body of the Answer is unclear as to whether it was filed on behalf of both Respondents. For example, it begins as follows: "Comes now the Respondent Adamas Construction & Development Services, PLLC, ('Adamas'), by and through their attorney, Chris J Gallus, for its answer to the Complaint against the Respondent, by the United States Environmental Protection Agency Region 7 . . . ." Answer at 1. The Answer was signed by both "Respondent Nathan Pierce for Adamas" and Chris J. Gallus, who identified himself in the signature block as "Attorneys for the Plaintiff." *Id.* at 9. In an email to a staff member for this Tribunal, Mr. Gallus affirmed his representation of both Respondents. Respondent Pierce later identified the Answer as having been jointly filed by both Respondents. *See* Respondent's Initial Prehearing Exchange (Jan. 27, 2020), at 4, 8, 9.

PHE") on January 24, 2020[2]; and Complainant filed its Rebuttal Prehearing Exchange ("Complainant's Rebuttal PHE") on April 3, 2020.[3]

While the prehearing exchange process was underway, Complainant was also granted leave to amend the Complaint. Order on Complainant's Motion for Leave to Amend the Complaint and on the Parties' Motions for Extensions of Time for Prehearing Exchanges (Jan. 2, 2020), at 3. Deemed to have been filed on January 2, 2020, the Amended Complaint and Notice of Opportunity for Hearing ("Amended Complaint" or "Amended Compl.") contains several new legal and factual allegations but leaves the charged violations unchanged. Respondents did not file an answer to the Amended Complaint.

On May 1, 2020, Complainant filed a Motion for Accelerated Decision as to Liability ("AD Motion"), accompanied by a Memorandum and Points of Authority in Support of Complainant's Motion for Accelerated Decision as to Liability ("AD Memo"). Therein, Complainant seeks entry of an accelerated decision as to Respondents' liability for the alleged violations. Respondents subsequently filed a Response to Complainant's Motion for Accelerated Decision on Liability and Memorandum of Law ("AD Response"), in which Respondents not only oppose Complainant's AD Motion but also appear to request dismissal and additional discovery.[4] [5] Complainant filed its Reply to Response to Motion for Accelerated Decision as to Liability ("AD Reply") on June 8, 2020.

For the reasons set forth below, Complainant's AD Motion and the requests for dismissal and additional discovery embedded in the body of Respondents' AD Response are all denied.

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[2] This document is entitled "Respondent's Initial Prehearing Exchange" and begins as follows, "COMES NOW, the ("Respondent") NATHAN PIERCE, by and through his attorney, Chris J. Gallus, . . . submits this Initial Prehearing Exchange." Respondent's PHE at 1. Unlike the Answer, it was signed by Mr. Gallus alone. *Id.* at 17.

[3] As part of the prehearing exchange of information process, the parties identified the exhibits they intend to introduce into evidence at a hearing in this matter and provided copies to this Tribunal and each other. The exhibits proposed by Complainant will be cited herein as "CX [proposed exhibit number] at [exhibit page number]." The exhibits proposed by Respondent Pierce will be cited herein as "RX [proposed exhibit number] at [exhibit page number]."

[4] By Order dated May 26, 2020, I extended the deadline for Respondents to file their response to the AD Motion from May 18 to May 28, 2020. While the AD Response is dated May 28, Respondents did not actually file the document until June 2, 2020, as recorded by this Tribunal's electronic filing system. Thus, the AD Response is untimely. Nevertheless, the delay was very minor, and Complainant does not claim to have been prejudiced by it. Accordingly, I find that consideration of the AD Response on its merits is still appropriate.

[5] In their AD Response, Respondents twice refer to "Respondents Motion to Dismiss X1 'RMDX1.'" AD Response at 10, 14. I do not see any document with such a title in the record of this proceeding, however. Additionally, while Respondents assert elsewhere in their AD Response that they "will not restate in this pleading their arguments in support of their motion," AD Response at 2, it is unclear whether Respondents are referring to a motion to dismiss or some other motion. Respondents state in the preceding sentence that they seek to depose a particular individual identified as a potential witness in Complainant's Initial PHE, *see id.*, and they reiterate that request, along with a request to depose another individual identified by Complainant as a potential witness, later in their AD Response, *see id.* at 28. Again, however, a separate motion requesting such additional discovery does not appear to have been filed. Respondents themselves acknowledge in their AD Response that "[t]here are no other motions currently pending, in addition to the Complainant's Motion." *Id.* at 2. Accordingly, I am treating Respondents' requests for dismissal and for additional discovery as having first been raised in their AD Response.

I. APPLICABLE SUBSTANTIVE LAW

Codified at 33 U.S.C. §§ 1251-1388, the CWA was enacted by Congress to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In furtherance of this objective, Section 301(a) of the CWA prohibits "the discharge of any pollutant by any person," except as in compliance with certain sections of the statute. 33 U.S.C. § 1311(a). The CWA defines the phrase "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The term "pollutant" is defined to mean "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). The term "navigable waters" is defined as "waters of the United States," 33 U.S.C. § 1362(7), and the term "point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged," 33 U.S.C. § 1362(14). Finally, the term "person" is defined to include "an individual, corporation, partnership, [or] association." 33 U.S.C. § 1362(5).

Section 405 of the Act pertains specifically to the disposal and use of sewage sludge and directs EPA to develop regulations governing those activities. 33 U.S.C. § 1345(d)(1). EPA promulgated such regulations at 40 C.F.R. Part 503, wherein EPA defines the term "sewage sludge" as "solid, semi-solid, or liquid residue generated during the treatment of domestic sewage in a treatment works," 40 C.F.R. § 503.9(w); the term "domestic sewage" as "waste and wastewater from humans or household operations that is discharged to or otherwise enters a treatment works," 40 C.F.R. § 503.9(g); and the term "treatment works" as "either a federally owned, publicly owned, or privately owned device or system used to treat (including recycle and reclaim) either domestic sewage or a combination of domestic sewage and industrial waste of a liquid nature," 40 C.F.R. § 503.9(aa). EPA then defines the phrase "[t]reat or treatment of sewage sludge" as "the preparation of sewage sludge for final use or disposal. This includes, but is not limited to, thickening, stabilization, and dewatering of sewage sludge." 40 C.F.R. § 503.9(z).

In enacting the regulations, EPA explained that "[treatment works] receive wastewater from industrial facilities, domestic wastes from private residences, and run-off from various sources that must be treated prior to discharge. Treatment results in an effluent that may be discharged and a residual material, sewage sludge." Standards for the Use or Disposal of Sewage Sludge, 58 Fed. Reg. 9248, 9249 (Feb. 19, 1993). EPA acknowledged the beneficial uses of sewage sludge, explaining that "[s]ewage sludge is a valuable resource. The nutrients and other properties commonly found in sludge make it useful as a fertilizer and a soil conditioner. Sludge has been used for its beneficial qualities on agricultural lands, in forests, for landscaping projects, and to reclaim strip-mined land." *Id.* However, EPA also cautioned that sewage sludge can contain harmful chemicals and organisms and that, if handled improperly, it "can result in pollutants in the sludge re-entering the environment, and possibly contaminating a number of different media through a variety of exposure routes." *Id.* at 9250. With regard to the composition of sewage sludge, EPA explained:

> The chemical composition and biological constituents of the sludge depend upon the composition of the wastewater entering the treatment facilities and the subsequent treatment processes. Typically these constituents may include volatile organics, organic solids, nutrients, disease-causing pathogenic organisms (e.g., bacteria, viruses, and others), heavy metals and inorganic ions, and toxic organic chemicals from industrial wastes, household chemicals, and pesticides.

Id. at 9249. EPA thus established "specific rules by which parties can safely and beneficially apply . . . sewage sludge to land." *City of Salisbury*, 10 E.A.D. 263, 265 (EAB 2002).

Set out in 40 C.F.R. Part 503, Subpart B, those rules 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). "Any person who prepares sewage sludge shall ensure that the applicable requirements . . . are met when the sewage sludge is applied to the land . . . ." 40 C.F.R. § 503.7. The term "person" is defined in the regulations as "an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof." 40 C.F.R. § 503.9(q). In turn, a "[p]erson who prepares sewage sludge is either the person who generates sewage sludge during the treatment of domestic sewage in a treatment works or the person who derives a material from sewage sludge." 40 C.F.R. § 503.9(r). Finally, the phrase "[a]pply sewage sludge or sewage sludge applied to the land means land application of sewage sludge," 40 C.F.R. § 503.9(a), which is then defined as "the spraying or spreading of sewage sludge onto the land surface; the injection of sewage sludge below the land surface; or the incorporation of sewage sludge into the soil so that the sewage sludge can either condition the soil or fertilize crops or vegetation grown in the soil," 40 C.F.R. § 503.11(h).

The rules that apply to the sewage sludge itself require that certain standards be met in order for the sewage sludge to be applied to the land. *See* 40 C.F.R. §§ 503.13, 503.15. For example, sewage sludge cannot be applied to the land if it contains concentrations of certain pollutants that exceed the "ceiling concentrations" specified in the regulations. 40 C.F.R. § 503.13(a)(1). Additionally, in order for bulk sewage sludge[6] to be applied to agricultural land, forest, a public contact site, or a reclamation site,[7] it must satisfy one of two pollutant limits: either the concentrations of certain pollutants contained in the sludge cannot exceed limits specified in the regulations (beyond the ceiling concentrations previously discussed) or the

[6] In enacting the regulations, EPA explained that the regulations recognize two categories of sewage sludge applied to the land: "bulk sewage sludge applied to the land" and "sewage sludge sold or given away in a bag or other container for application to the land." 58 Fed. Reg. at 9328. The term "bulk sewage sludge" is defined in the regulations simply as "sewage sludge that is not sold or given away in a bag or other container for application to the land." 40 C.F.R. § 503.11(e).

[7] The applicable regulations define these categories of land as follows: "agricultural land" is "land on which a food crop, a feed crop, or a fiber crop is grown," 40 C.F.R. § 503.11(a); "forest" is "a tract of land thick with trees and underbrush," 40 C.F.R. § 503.11(g); a "public contact site" is "land with a high potential for contact by the public," such as public parks and golf courses, 40 C.F.R. § 503.11(l); and a "reclamation site" is "drastically disturbed land," such as strip mines and construction sites, "that is reclaimed using sewage sludge," 40 C.F.R. § 503.11(n).

amount of given pollutants in the sludge cannot exceed the cumulative pollutant loading rates identified in the regulations.[8] 40 C.F.R. § 503.13(a)(2).

With regard to the rules that apply to the persons who prepare and apply the sewage sludge to the land, as observed by the Environmental Appeals Board ("EAB"), "[r]egulated entities are tasked with a number of responsibilities." *City of Salisbury*, 10 E.A.D. at 267. Those responsibilities include the duty to keep certain records, with the regulations identifying "the information that must be developed, the person who must develop and retain the information, and the period that the information must be retained." 58 Fed. Reg. at 9339. The information required to be developed and maintained "varies depending on which pollutant limits are met and which pathogen and vector attraction reduction requirements are met." *Id.* For example, "[i]f the requirements in § 503.13(a)(2)(i) [concerning cumulative pollutant loading rates] are met when bulk sewage sludge is applied to agricultural land, forest, a public contact site, or a reclamation site," the persons who prepared and applied the sludge are required to develop and retain certain information. 40 C.F.R. § 503.17(a)(5). Specifically, the person who prepared the subject sludge is required to develop and retain for five years the following information:

> (A) The concentration of each pollutant listed in Table 1 of § 503.13 in the bulk sewage sludge.
>
> (B) The following certification statement:
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> I certify, under penalty of law, that the information that will be used to determine compliance with the pathogen requirements in (insert either § 503.32(a) or § 503.32(b)) and the vector attraction reduction requirement in (insert one of the vector attraction reduction requirements in § 503.33(b)(1) through (b)(8) if one of those requirements is met) was prepared under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate this information. I am aware that there are significant penalties for false certification including the possibility of fine and imprisonment.
>
> (C) A description of how the pathogen requirements in either § 503.32(a) or (b) are met.
>
> (D) When one of the vector attraction requirements in § 503.33(b)(1) through (b)(8) is met, a description of how the vector attraction requirement is met.

40 C.F.R. § 503.17(a)(5)(i). In turn, the person who applied the subject sludge is required to develop and retain for varying lengths of time the following information:

> (A) The location, by either street address or latitude and longitude, of each site on which bulk sewage sludge is applied.

[8] The term "cumulative pollutant loading rate" is defined in the regulations as "the maximum amount of an inorganic pollutant that can be applied to an area of land." 40 C.F.R. § 503.11(f).

(B) The number of hectares in each site on which bulk sewage sludge is applied.

(C) The date bulk sewage sludge is applied to each site.

(D) The cumulative amount of each pollutant (i.e. kilograms) listed in Table 2 of § 503.13 in the bulk sewage sludge applied to each site, including the amount in § 503.12(e)(2)(iii).

(E) The amount of sewage sludge (i.e. metric tons) applied to each site.

(F) The following certification statement:

I certify, under penalty of law, that the information that will be used to determine compliance with the requirement to obtain information § 503.12(e)(2) was prepared for each site on which bulk sewage sludge was applied under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate this information. I am aware that there are significant penalties for false certification including the possibility of fine and imprisonment.

(G) A description of how the requirements to obtain information in § 503.12(e)(2) are met.

(H) The following certification statement:

I certify, under penalty of law, that the information that will be used to determine compliance with the management practices in § 503.14 was prepared for each site on which bulk sewage sludge was applied under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate this information. I am aware that there are significant penalties for false certification including the possibility of fine and imprisonment.

(I) A description of how the management practices in § 503.14 are met for each site on which bulk sewage sludge is applied.

(J) The following certification statement when the bulk sewage sludge meets the Class B pathogen requirements in § 502.32(b)[9]:

I certify, under penalty of law, that the information that will be used to determine compliance with the site restrictions in § 503.32(b)(5) for each site on which Class B sewage sludge was applied was prepared under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate this information. I am aware that there are significant penalties for false certification including the possibility of fine and imprisonment.

[9] Sewage sludge is classified as "Class B sewage sludge" with respect to pathogens when the requirements in either 40 C.F.R. § 503.32(b)(2), (b)(3), or (b)(4) are met. 40 C.F.R. § 503.32(b)(1)(i).

> (K) A description of how the site restrictions in § 503.32(b)(5) are met for each site on which Class B bulk sewage sludge is applied.
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> (L) The following certification statement when the vector attraction reduction requirement in either § 503.33(b)(9) or (b)(l0) is met:
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> I certify, under penalty of law, that the information that will be used to determine compliance with the vector attraction reduction requirement in (insert either § 503.33(b)(9) or § 503.33(b)(10)) was prepared under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate this information. I am aware that there are significant penalties for false certification including the possibility of fine and imprisonment.
>
> (M) If the vector attraction reduction requirements in either § 503.33(b)(9) or (b)(10) are met, a description of how the requirements are met.

40 C.F.R. § 503.17(a)(5)(ii).

Section 405(e) of the CWA prohibits any person from disposing of sewage sludge from a publicly owned treatment works or any other treatment works treating domestic sewage "for any use for which regulations have been established" pursuant to the Act except in accordance with those regulations. 33 U.S.C. § 1345(e). Section 308 of the CWA provides:

> Whenever required to carry out the objective of this chapter, including but not limited to . . . determining whether any person is in violation of any . . . effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance . . . or . . . carrying out [Section 405]--
>
> (A) the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require . . . .

33 U.S.C. § 1318(a). Where a person is found to have violated Section 405 or 308 of the Act, Section 309(g)(1) authorizes the issuance of a civil administrative penalty against that person "after consultation with the State in which the violation occurs." 33 U.S.C. § 1319(g)(1).

II. CRITICAL ELEMENTS OF LIABILITY

In the Amended Complaint, Respondents are charged with two violations of the CWA. First, Complainant alleges as Claim 1 that "Respondents have failed to develop and maintain records required by 40 C.F.R. § 503.17 [the section of the regulations imposing recordkeeping

requirements]," in violation of Section 405 of the CWA, 33 U.S.C. § 1345, and the implementing regulations at 40 C.F.R. Part 503. Amended Compl. ¶¶ 53, 54. Other parts of the Amended Complaint, which Complainant incorporates by reference into Claim 1, Amended Compl. ¶ 52, cite specifically to the records required by 40 C.F.R. § 503.17(a)(5)(ii) to be kept by persons who apply bulk sewage sludge, Amended Compl. ¶¶ 19, 20. The bases of Claim 1 are the allegations in the Amended Complaint that on or about the week of July 9, 2018, Respondents "pumped and dewatered" sewage sludge satisfying the requirements of 40 C.F.R. § 503.32(b)(2)(ii), such that it could be classified as "Class B sewage sludge," from "Cell #2 at the Lame Deer treatment lagoon" ("Facility")[10] and then on or about August 22, 2018, Respondents or their subcontractors applied the subject sewage sludge to land in or near Lame Deer, Montana. Amended Compl. ¶¶ 18, 38, 39, 48. Based on the substantive governing law described above, the elements that must be proven to establish liability for Claim 1 are as follows:

> (1) Respondents were "persons," as that term is defined by 33 U.S.C. § 1362(5) and 40 C.F.R. § 503.9(q);
>
> (2) Respondents "applied sewage sludge," as that phrase is defined by 40 C.F.R. §§ 503.9(a), 503.11(h);
>
> (3) The sewage sludge was classified as "Class B sewage sludge" by virtue of meeting the requirements set forth in 40 C.F.R. § 503.32(b)(2)(ii);
>
> (4) The requirements of 40 C.F.R. § 503.13(a)(2)(i) were met when the sewage sludge was applied to the land in or near Lame Deer, Montana;
>
> (5) The subject land was "agricultural land," "forest," "a public contact site," or "a reclamation site," as those terms are defined in 40 C.F.R. § 503.11; and
>
> (6) Respondents failed to develop and retain the information identified in 40 C.F.R. § 503.17(a)(5)(ii).

Second, Complainant alleges as Claim 2 that Respondents did not provide complete and timely responses to requests for information sent by EPA on September 25, 2018, and June 11, 2019, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318, in violation of that provision. Amended Compl. ¶¶ 56, 57. The bases of Claim 2 are the allegations in the Amended Complaint that on September 25, 2018, EPA sent a request for information to Respondents related to the land application of sewage sludge on August 22, 2018 ("Information Request"), to which Respondents provided an untimely and incomplete response lacking certain information that Respondents were required to develop and maintain pursuant to 40 C.F.R. § 503.17(a)(5)(ii) and only after EPA persisted in seeking a response over several months.[11] Amended Compl.

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[10] In the Amended Complaint, Complainant refers to both the "Lame Deer treatment lagoon" and the "Lame Deer Publicly Owned Treatment Works (POTW)." *See* Amended Compl. ¶¶ 33, 34, 38, 39. While not totally clear, those phrases appear to signify the same wastewater treatment plant or a unit thereof. For the sake of simplicity, I will refer to them collectively as the "Facility" in this Order.

[11] In the Amended Complaint, Complainant refers to 40 C.F.R. § 503.17(5)(ii), rather than 40 C.F.R.

¶¶ 43-45. Based on the substantive governing law described above, the elements that must be proven to establish liability for Claim 2 are as follows:

(1) Respondents were owners or operators of the Facility;

(2) The Facility was a "point source" as that term is defined by 33 U.S.C. § 1362(14);

(3) EPA requested that Respondents provide certain information pursuant to Section 308 of the Act, 33 U.S.C. § 1318(a); and

(4) Respondents failed to provide such information.

III. UNDISPUTED FACTS

The following facts consist of admissions contained in Respondents' Answer and admissions by virtue of Respondents not responding to certain factual allegations contained in the Amended Complaint[12]:

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§ 503.17(a)(5)(ii), as the provision setting forth the information that Respondents were required to develop and maintain. Amended Compl. ¶ 45. That citation appears to be a scrivener's error.

[12] As noted above, Complainant filed the Complaint on September 6, 2019, and Respondents filed an Answer on October 16, 2019. With leave of this Tribunal, Complainant subsequently filed an Amended Complaint that included ten new allegations but did not add any new counts of violation or propose any additional penalties. *Compare* Compl., *with* Amended Compl. Respondent did not file an answer to the Amended Complaint.

Set forth at 40 C.F.R. Part 22, the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice") that govern this proceeding provide with respect to a respondent's answer to a complaint:

> Where respondent: Contests any material fact upon which the complaint is based; contends that the proposed penalty, compliance or corrective action order, or Permit Action, as the case may be, is inappropriate; or contends that it is entitled to judgment as a matter of law, it shall file . . . a written answer to the complaint . . . and serve copies of the answer on all other parties.

40 C.F.R. § 22.15(a). In its answer, the respondent "shall clearly and directly admit, deny or explain each of the *factual* allegations contained in the complaint with regard to which respondent has any knowledge." 40 C.F.R. § 22.15(b) (emphasis added). Thus, a respondent is obligated to respond only to the factual allegations in a complaint. A failure to respond to a factual allegation "constitutes an admission of the allegation." 40 C.F.R. § 22.15(d). Where a complainant has been granted leave to amend the complaint, the respondent "shall have 20 additional days from the date of service of the amended complaint to file its answer." 40 C.F.R. § 22.14(c).

Complainant asserts in its AD Motion that "[b]ecause Respondents have not provided an answer nor provided any basis for disputing the legal and factual allegations contained in the Amended Complaint, Complainant believes the allegations in the Amended Complaint have been deemed admitted per 40 C.F.R. Part 22." AD Mot. at physical page 3. For support, Complainant cites three decisions finding the respective respondents to be in default and, consequently, the factual allegations against the respondents to have been admitted. *Id.* at physical page 3 fn. 3 (citing *Palimere*, 2000 WL 33126605 (EPA ALJ Dec. 13, 2000); *Rogers Petro-Chem, Inc.*, 1985 WL 57135 (EPA ALJ Feb. 27, 1985); *Dockmaster, Inc.*, 2012 WL 371965 (EPA RJO Jan. 25, 2012)). Respondents did not challenge this position in their AD Response.

(1) Section 405 of the CWA and the biosolids regulations created a self-implementing and self-monitoring program intended to ensure that sewage sludge is disposed in a manner that protects human health and the environment. Amended Compl. ¶ 24; Ans. ¶ 21.
(2) Respondent Adamas is a professional limited liability company that was registered in the State of Montana. Respondent Adamas's website states that it provides start-to-finish onsite water management services. Amended Compl. ¶ 25; Ans. ¶ 22.
(3) Respondent Adamas was involuntarily dissolved on September 1, 2018. Amended Compl. ¶ 26; Ans. ¶ 23.
(4) Respondent Pierce is a private individual, and together he and Michelle Pierce were members of Respondent Adamas. Amended Compl. ¶ 28; Ans. ¶ 25.

While I am not bound by the rulings of Regional Judicial Officers and other Administrative Law Judges as precedent, I may look to their rulings as persuasive authority. I do not consider the decisions cited by Complainant to be persuasive, however. In *Palimere*, the presiding Administrative Law Judge granted a motion seeking entry of a default judgment against certain respondents that were first named as parties in the complainant's amended complaint and then failed to file an answer (among other deficiencies), which the presiding Administrative Law Judge found to be an independent basis for default. *Palimere*, 2000 WL 33126605, at *1-3. Similarly, in *Rogers Petro-Chem, Inc.*, the presiding Administrative Law Judge granted a motion seeking entry of a default judgment against the three named respondents after they failed to respond to the factual allegations against them, either in the original complaint that named one of the respondents as a party or the amended complaint that added the other two respondents as parties. *Rogers Petro-Chem, Inc.*, 1985 WL 57135, at *1-3. Finally, in *Dockmaster, Inc.*, the presiding Regional Judicial Officer granted a motion seeking entry of a default judgment against the respondent after it failed to file an answer to the complaint. 2012 WL 371965, at *1.

Under the Rules of Practice, a respondent may be found to be in default "after motion, upon failure to file a timely answer to the complaint," and all facts alleged in the complaint are then deemed admitted. 40 C.F.R. § 22.17(a). Other than citing to the three decisions described above, Complainant did not clearly make such a motion. In any event, the circumstances of this matter differ from those of the decisions cited by Complainant in that the respondents in those cases wholly failed to respond to any of factual allegations against them, whereas here Respondents responded to all of the factual allegations contained in the original Complaint. Respondents also have otherwise fully engaged in this proceeding. Thus, I do not consider, in the context of default or otherwise, Respondents' failure to file an answer to the Amended Complaint to constitute an admission of all of the factual allegations contained therein, let alone an admission of both the legal and factual allegations as Complainant appears to argue.

Rather, I consider it appropriate to treat Respondents' Answer to the initial Complaint as an answer to the Amended Complaint, which is now the operative pleading in this matter. The Amended Complaint contains three new allegations of fact, namely, the allegation in paragraph 34 that the Facility "discharges wastewater into Lame Deer Creek pursuant to an NPDES permit," Amended Compl. ¶ 34; the allegation in paragraph 38 that "[o]n or about the week of July 9, 2018, Respondents pumped and dewatered approximately 1,000,000 gallons of []sewage sludge from Cell #2 of the [Facility]," Amended Compl. ¶ 38; and the allegation in paragraph 39 that "[o]n or about August 22, 2018, . . . [Respondents'] subcontractors applied approximately 1,000,000 gallons of []sewage sludge from Cell #2 of the [Facility] to land application property in or near Lame Deer, Montana," Amended Compl. ¶ 39. I omitted from those recitations the allegation in paragraphs 38 and 39 that the sewage sludge was "Class B sewage sludge," as certain facts need to be proven in order to demonstrate that the sewage sludge can be classified as Class B pursuant to 50 C.F.R. § 503.32(b)(2)(ii), thus rendering that allegation a conclusion of law rather than an allegation of fact. Similarly, I do not consider the new allegation in paragraph 33 that Respondents were operators of the Facility, Amended Compl. ¶ 33, to be a simple factual allegation, as certain facts need to be proven to establish that Respondents' actions amounted to the operation of the Facility, thus rendering that allegation a conclusion of law as well. As Respondents' Answer does not contain responses to the new factual allegations set forth in paragraphs 34, 38, and 39 of the Amended Complaint, Respondents are deemed to have no objection to those particular allegations under the Rules of Practice, and they will henceforth be treated as admitted. *See* 40 C.F.R. § 22.15(d).

(5) Respondent Pierce controlled the activities of Respondent Adamas at all times relevant to this action. Amended Compl. ¶ 30; Ans. ¶ 27.
(6) At all times relevant to this action, Respondent Pierce held himself out to the EPA and Indian Health Service ("IHS") as the primary contact of Respondent Adamas for environmental compliance. Amended Comp. ¶ 31; Ans. ¶ 28.
(7) At all times relevant to this action, Respondent Pierce managed, directed, or made decisions about environmental compliance for Respondent Adamas. Amended Comp. ¶ 32; Ans. ¶ 29.
(8) The Facility discharges wastewater into Lame Deer Creek pursuant to a National Pollutant Discharge Elimination System ("NPDES") Permit. Amended Compl. ¶ 34.
(9) At all times relevant to this action, Respondent Adamas was a subcontractor of the Northern Cheyenne Utilities Commission ("NCUC"). Amended Compl. ¶ 36; Ans. ¶ 30.
(10) Respondent Adamas and NCUC entered into a contract for Respondent Adamas to serve as a project manager and technical consultant to NCUC with regard to land application of sewage sludge generated by NCUC. Respondent Adamas then entered into a contract with Tom Robinson for Mr. Robinson to apply the sewage sludge to his own property. Ans. ¶ 31.
(11) On or about the week of July 9, 2018, Respondents pumped and dewatered approximately 1,000,000 gallons of sewage sludge from Cell #2 of the Facility. Amended Compl. ¶ 38.
(12) On or about August 22, 2018, subcontractors of Respondents applied approximately 1,000,000 gallons of sewage sludge from Cell #2 of the Facility to land application property in or near Lame Deer, Montana. Amended Compl. ¶ 39; Ans. ¶ 32.

IV. ARGUMENTS OF THE PARTIES

A. Complainant's Motion

Complainant argues that it is entitled to an accelerated decision because the record demonstrates that there is no genuine issue of material fact with respect to Respondents' liability for violations of the Clean Water Act by virtue of 1) failing to develop and maintain records pursuant to 40 C.F.R. Part 503, as alleged in Claim 1; and 2) failing to provide a timely and complete response to an information request issued pursuant to 33 U.S.C. § 1318, as alleged in Claim 2. AD Motion at physical page 3.

1) Complainant argues that there is no genuine issue of material fact that Respondents failed to develop and maintain records as required by 40 C.F.R. Part 503

With respect to Claim 1, Complainant first argues that Respondent Pierce was the responsible corporate officer for Respondent Adamas and, therefore, can be held individually liable for any violations of the Clean Water Act that Respondent Adamas committed pursuant to the responsible corporate officer doctrine. AD Memo at 16. In the context of the Clean Water Act, Complainant contends, a person is a "responsible corporate officer" when the individual at least possesses the authority to control the activities causing an unlawful discharge but not does not necessarily exercise that authority. *Id.* at 16-17 (citing *United States v. Iverson*, 162 F.3d

1015, 1025 (9th Cir. 1998)). Complainant notes that in the context of an administrative action to enforce the Clean Water Act, however, my esteemed colleague, Chief Administrative Law Judge Susan L. Biro, recognized that an individual purporting to act through a corporate entity can be held personally liable for violations of the Act where the individual personally directed, caused, participated in, or controlled the violative activity. *Id.* at 17 (citing *Smith*, 2004 WL 1658484, at *32 (EPA ALJ July 15, 2004)).

To show that Respondent Pierce was sufficiently involved in the activities underlying the alleged violations here, Complainant first points to certain admissions by Respondents, including that Respondent Pierce controlled the activities of Respondent Adamas and managed, directed, or made decisions about environmental compliance for Respondent Adamas at all times relevant to this action. AD Memo at 16, 17 (citing Amended Compl. ¶¶ 29-32; Ans. ¶¶ 24-29). Complainant then refers to items in the record, including emails and correspondence signed by Respondent Pierce, as demonstrating his personal involvement "in all aspects of preparing and land applying the sewage sludge." AD Memo at 17 (citing Respondent's PHE at 12; CX 43 at 11; CX 45 at 5-7, 9-11, 20-24, 37-38, 42-44; CX 46 at 5-12; CX 49 at 27).

Next, Complainant argues that Respondents are undisputedly the preparers of the Class B sewage sludge at issue. AD Memo at 18. With regard to the classification of the sewage sludge as Class B, Complainant asserts, without citing any evidence in the record, that "[b]ased on analytical testing, the sewage sludge at issue falls within Class B, meaning that there are reduced levels of pathogens after treatment in a wastewater treatment facility." *Id.* at 18 n.5.[13] Complainant then notes that Respondents did not deny this allegation in their Answer or otherwise dispute the classification of the sewage sludge with rebuttal evidence in their prehearing exchange. *Id.*

As for Respondents' role as the preparers of the sewage sludge, Complainant points to correspondence in the record in which Respondents' attorney identifies Respondents as such to the Department of Health and Human Services. AD Memo at 18 (citing CX 45 at 16). Additionally, Complainant refers to the regulatory definition of a "person who prepares sewage sludge," *id.* (citing 40 C.F.R. § 503.9(r)), and argues that Respondents satisfy this definition by virtue of their operation of the Facility, as shown by unrefuted proposed evidence in the record, *id.* at 18-21. Specifically, Complainant argues that the Facility constitutes a publicly owned treatment works inasmuch as the proposed evidence shows that it consists of a lagoon system in which municipal or industrial wastewater undergoes different stages of treatment – including the removal of grit and trash, collection of the wastewater in the lagoon where solids settle to the bottom and can then be removed, and further processing of the solids once removed using such methods as dewatering – that generates sewage sludge. *Id.* at 18-19 n.6 (citing CX 5, 37). Complainant then argues, in essence, that Respondents took certain actions amounting to the operation of the Facility and for support points to such proposed evidence as their application to the State of Montana to be the certified operator of the Facility, *id.* at 19 (citing CX 50); documentation reflecting the control that they exercised as the project manager and technical consultant for the removal of the sewage sludge at issue, *id.* at 19-20 (citing CX 4, 6-8, 19, 29, 45, 46); and a July 20, 2018 report of an inspection that EPA conducted at the Facility on June

[13] This quotation appears in a footnote that is identified with the superscript numeral "5" in the body of the AD Memo but with the superscript numeral "6" at the bottom of the page.

13-14, 2018, during which Respondents were identified as a contractor of the NCUC and a lead contact for the inspection and provided pertinent information to EPA, *id.* at 19 (citing CX 5). Finally, citing a decision of my esteemed colleague Judge Biro, Complainant argues that Respondents can be considered to have generated the sewage sludge at issue through their actions as the operator of the Facility. *Id.* at 19 (citing *City of Salisbury*, 2000 WL 190658 (EPA ALJ Feb. 8, 2000) (finding that the respondent "in its capacity as owner and operator of a Publicly Owned Treatment Works (POTW) generates sewage sludge during the treatment of domestic sewage"[14]), *aff'd*, 10 E.A.D. 263 (EAB 2002)).

Complainant next urges that the proposed evidence overwhelmingly demonstrates that Respondents took responsibility for and directed the land application of the sewage sludge at issue, while their own subcontractors performed the work, which Respondents have not refuted. AD Memo at 21-22, 25. For example, Complainant argues, the contract between NCUC and Respondents for the land application of the sewage sludge specified that Respondents, as the contractor, could engage subcontractors to perform work under the contract but that Respondents would remain responsible for "proper completion" of the contract. *Id.* at 22-23 (citing CX 45 at 18). As another example, Complainant cites proposed evidence that Respondents then held themselves out as the parties responsible for the land application, including the timing of the land application and the completion of the work in a manner consistent with the regulations at 40 C.F.R. Part 503. *Id.* at 23-24 (citing, e.g., CX 45 at 5-7 (invoices from Respondent Adamas to NCUC seeking payment for work performed, including land application); CX 46 at 10-11 (August 22, 2018 email from Respondent Pierce on behalf of Respondent Adamas to counsel for NCUC stating that "we all agreed that our company has [to] be credited by IHS as pumping, hauling and application of 600,000/gallons [of sewage sludge]"); CX 45 at 32-36 (April 21, 2018 email from Respondent Pierce on behalf of Respondent Adamas to NCUC with an attached letter setting forth a schedule of project milestones; the scope of work to be performed by Respondents, including such tasks as removal, dewatering, transportation, and land application of the sewage sludge; a commitment to complete the work in accordance with applicable law; and the understanding that for purposes of the contract, any references to "Adamas" therein would include Respondents' subcontractors); CX 49 at 8-10 (May 31, 2019 correspondence from Respondent Pierce to U.S. Senator Steve Daines seeking help with receiving compensation from IHS and NCUC for the work performed, in which he asserted that Respondent Adamas "completed its application of sludge")). Complainant also cites proposed evidence of Respondents communicating with NCUC and IHS about the status of the land application, *id.* at 24-25 (citing CX 45 at 37; CX 49 at 27); arranging with subcontractors to transport and apply the sewage sludge, *id.* at 25 (citing CX 45 at 42; CX 42 at 3); and agreeing with the subcontractor to retain logs of each day of application prepared by the subcontractor, *id.* (citing CX 7).

In sum, Complainant argues, the cited evidence shows that Respondents assumed responsibility for and controlled the land application of the subject sewage sludge, and the record lacks any evidence that any other entity, including any subcontractors, exercised such control. AD Memo at 25-26. Complainant then argues that liability for violations of the CWA may be imposed not only on parties who performed the violative activity but also on parties with responsibility for or control over the performance of the activity. *Id.* at 22 (citing *United States*

[14] This finding was, in fact, a joint stipulation of the parties. *City of Salisbury*, 1999 WL 608844, at *1 (EPA ALJ July 30, 1999) (Order Granting in Part and Denying in Part Complainant's Motion for Accelerated Decision).

v. Lambert, 915 F. Supp. 797, 802 (S.D.W.Va. Jan. 31, 1996); *United States v. Chuchua*, No. 01cv1479-DMS (S.D. Ca. Mar. 10, 2004)).

Finally, Complainant contends that Respondents' response to the Information Request is proof of their failure to develop and maintain records as required by 40 C.F.R. Part 503 and that although Respondents denied that failure in their Answer, they have neither stated that they did, in fact, develop and maintain the required records nor "provided a scintilla of evidence in support of their denial." AD Memo at 26-27, 28. Rather, Complainant argues, "Respondents' apparent basis for denying this allegation is grounded in their mistaken belief that they were not required to develop and maintain records." *Id.* at 27. To disabuse Respondents of this belief, Complainant reiterates that the proposed evidence establishes Respondents' roles as preparers and land appliers of the sewage sludge*, id.* at 27-28, and cites the regulations imposing requirements on such actors, noting that the regulations apply to both persons who prepare sewage sludge that is applied to the land and persons who apply it to the land, *id.* at 27 (citing 40 C.F.R. § 503.10(a); that they impose an obligation on persons who prepare sewage sludge to ensure that the applicable requirements are met when the sewage sludge is applied to the land, *id.* (citing 40 C.F.R. § 503.7); and that pursuant to 40 C.F.R. § 503.17(a)(5)(ii), the person who applies the sewage sludge shall develop and retain certain information, *id.* (citing 40 C.F.R. § 503.17(a)(5)(ii)). Complainant then points to Respondents' response to the Information Request as lacking six pieces of information that land appliers of sewage sludge are required by 40 C.F.R. § 503.17(a)(5)(ii) to develop and maintain. *Id.* at 28-29 (citing CX 18, 19).

2) Complainant argues that there is no genuine issue of material fact that Respondents failed to provide a timely and complete response to the Information Request issued pursuant to 33 U.S.C. § 1318

Turning to Claim 2, Complainant first asserts that "[c]ourts have found that EPA's ability to obtain timely and accurate information pursuant to Section 308 of the CWA is central to EPA's enforcement of the CWA and that failure to timely respond to EPA's [i]nformation [r]equests subjects [r]espondents to administrative, civil, and even criminal penalties in accordance with Section 309 of the CWA." AD Memo at 29-30 (citing various cases). Complainant then argues that Respondents have not disputed or provided evidence to support a denial of the factual allegations underlying Claim 2. *Id.* at 30.

Specifically, with regard to Respondents' role as an operator of the Facility, Complainant maintains that Respondents have not denied this allegation or pointed to anything to rebut the evidence in the record establishing it. AD Memo at 30-31 (citing Amended Compl. ¶ 33). Complainant further argues that the Facility satisfies the statutory definition of "point source" inasmuch as it discharges wastewater to Lame Deer Creek[15] via several outfall locations, as shown by the July 20, 2018 report of the inspection that EPA conducted at the Facility on June 13-14, 2018. *Id.* at 31 (citing CX 5). As for the allegation regarding EPA's issuance of the Information Request, Complainant argues that there is no genuine issue of material fact that EPA issued, and Respondents received, the Information Request. *Id.* at 32. For support, Complainant

[15] In its AD Memo, Complainant refers to the receiving waterbody as "Logan Creek." AD Memo at 31. However, the inspection report cited by Complainant reflects that the name of the waterbody is, in fact, "Lame Deer Creek," CX 5 at 4, which is consistent with the allegation in the Amended Complaint on the matter, Amended Compl. ¶ 34.

notes that while Respondents deny the allegation in their Answer, they do not actually contest the issuance of the Information Request in their explanation of the denial; rather, they maintain that they were not the ones to apply the sludge. *Id.* (citing Ans. ¶ 36). Complainant then points to the proposed evidence in the record of the Information Request sent on September 25, 2018, *id.* (citing CX 11); a letter dated October 17, 2018, in which Respondent Adamas seeks an extension of the deadline to respond on account of the need to coordinate with NCUC, *id.* (citing CX 12); and documentation reflecting EPA's subsequent efforts to communicate with Respondents about the Information Request and their responses, *id.* at 31-32 (citing CX 14, 17-21).

Similarly, Complainant notes that while Respondents deny the allegation that they failed to provide a timely and complete response to the Information Request, they do not assert in their explanation of the denial that they did, in fact, provide a timely and complete response; rather, they maintain once again that they were not the ones to apply the sludge. AD Memo at 32 (citing Ans. ¶ 38). Complainant then points to the proposed evidence in the record of the response that Respondents ultimately provided by email on July 2, 2019, nine months after EPA issued the Information Request, arguing that it was incomplete inasmuch as Respondents did not respond to the portion of the Information Request seeking information required to be maintained by land appliers of sewage sludge under 40 C.F.R. § 503.17(a)(5)(ii) and that it was untimely inasmuch as the information that Respondents did provide had been in their possession at the time the Information Request was first issued. *Id.* at 33 (citing CX 19). Complainant also points to the proposed evidence in the record of an email subsequently sent to Respondents, once again requesting that Respondents provide the information required to be maintained by land appliers or affirmatively state that they did not possess the information, to which Respondents did not respond. *Id.* (citing CX 21). Complainant asserts that it ultimately received documentation from IHS, NCUC, and a subcontractor of Respondents that originated from Respondents and that would have at least partially answered the outstanding questions in the Information Request. *Id.* at 34 (citing CX 42, 43, 45-50, 54-56). However, Complainant argues, Respondents did not provide this information themselves and, "[i]n their Prehearing Exchange, readily admit that they willfully did not respond to EPA's Information Request to avoid revealing any additional violations of the Clean Water Act." *Id.* (citing Respondent's PHE at 15). Complainant then urges that Respondents have not pointed to anything to rebut this proposed evidence. *Id.* at 32.

B. Respondents' Response

1) Respondents request additional discovery and dismissal

In its AD Response, Respondents first appear to request additional discovery. Specifically, Respondents assert that Complainant attached to its AD Motion statements made by Ernie Sprague and that they seek to depose that individual. AD Response at 2. Respondents later reiterate their request to depose Mr. Sprague and add that they also wish to depose Tom Robinson, stating as grounds for the request that Complainant "recently submitted new evidence and statements from Ernie Sprague and Tom Robinson" and that "Complainant intends to call those individuals to testify at the hearing." *Id.* at 28.

Respondents next appear to request dismissal of this proceeding on two grounds, failure to state a claim upon which relief can be granted and lack of subject matter jurisdiction. With

regard to the former, Respondents describe the standard for dismissal of a proceeding set forth in Section 22.20(a) of the Rules of Practice, AD Response at 6 (citing 40 C.F.R. § 22.20(a)); the analogous standard for dismissal of a proceeding set forth in Rule 12(b)(6) of the Federal Rules of Civil Procedure, *id.* at 6-7 (citing Fed. R. Civ. P. 12(b)(6)); and case law construing those rules, *id.* at 7, 19 (citing various cases). Respondents then argue that that standard has been met, and that dismissal of the portions of the Amended Complaint holding Respondent Pierce personally liable for the charged violations is appropriate, because even if the facts alleged in the Amended Complaint are assumed to be true, Complainant has failed to prove the critical elements necessary to impose liability on Respondent Pierce individually. *Id.* at 19-20.

In particular, Respondents contend, "Complainant has not alleged facts sufficient to 'pierce the subcontractor or corporate veil.'" AD Response at 20. Respondents also point to the State of Montana's definition of the term "operator" in the context of wastewater treatment plants as "the person in direct responsible charge of the operation of a water treatment plant, water distribution system, or wastewater treatment plant," *id.* at 22 (citing MONT. CODE ANN. § 37-42-102), and a standard articulated by the EAB in *Southern Timber Products, Inc.*, 3 E.A.D. 880 (JO 1992) ("*Southern Timber II*"), requiring that a corporate officer exercise active and pervasive control over the overall operation of a facility in order to be considered an "operator," *id.* (citing *Southern Timber*, 3 E.A.D. at 895-96). Respondents then argue that "Complainant did not plead any of the factors set forth by the EAB in *Southern Timber II* that rise to the level of 'active and pervasive' control" of the Facility by Respondent Pierce, such that he could be held liable as an operator. *Id.* at 20. Rather, Respondents argue, Complainant merely claims in the Amended Complaint that Respondent Pierce is an "operator" and then names him in each of the alleged violations without setting forth anything further to establish that legal conclusion. *Id.*

With regard to subject matter jurisdiction, Respondents proceed under a heading entitled "Motion to dismiss for Lack of Subject matter Jurisdiction" to provide an overview of the Act and the scope of federal jurisdiction over "waters of the United States," as that term of art was defined at the time Respondents filed their AD Response. *Id.* at 7-10 (citing various sources). Respondents then contend that Complainant has not shown that the property on which the sewage sludge in question was applied falls within CWA jurisdiction, arguing that "Complainant failed to demonstrate the land or feature possesses a 'significant nexus' to waters that are navigable." *Id.* at 11.[16] Respondents continue that "there is no way the CWA, which authorizes federal jurisdiction only over 'waters,' would apply in this case," given that wastewater treatment systems, groundwater, and prior converted cropland being artificially irrigated by a wheel irrigation line are excluded from the definition of "waters of the United States," and that "the EPA's expansive interpretation of that phrase is thus not 'based on a permissible construction of the statute.'" *Id.* at 11-12 (quoting *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984)). In conclusion, Respondents argue, "the complaint lacks subject matter jurisdiction" and must be dismissed. *Id.* at 12 (citing Fed. R. Civ. P. 12(h)(3)).

[16] Respondents do not cite any source for this reference to a "significant nexus." Presumably, however, Respondents are invoking the concurring opinion authored by Justice Kennedy in *Rapanos v. United States*, 547 U.S. 715 (2006), in which he declared there to be CWA jurisdiction over a stream or wetland when a "significant nexus" exists between the stream or wetland and "navigable waters in the traditional sense." 547 U.S. at 779.

2) Respondents argue that genuine disputes of material fact exist

Respondents begin by challenging Complainant's characterization of their business relationships with their subcontractors, NCUC, and IHS. In particular, Respondents argue with respect to their subcontractors:

> The common rule is that a general contractor, which hires an independent contractor, will not be liable for the negligence of an independent sub-contractor. This is because the general contractor generally does not supervise the details of the independent contractor's work and, as a result, is not in a position to prevent the contractor from working in a negligent manner. An exception exists when a general contractor "retains control" over the work efforts of the independent contractor.

AD Response at 15-16. Respondents then deny that they exercised such control over their subcontractors, Tom Robinson and Ernie Sprague. *Id.* at 16. Respondents further describe their confusion about being blamed for the improper application of sewage sludge to Mr. Robinson's property, which was brought to light by Mr. Robinson's complaint to authorities, when Mr. Robinson was the one with whom Respondents subcontracted to perform that work. *Id.* As for Respondents' relationship with NCUC and IHS, Respondents point to a letter from IHS to U.S. Senator Steve Daines, dated July 12, 2019, in which IHS represents that it entered into a contract with NCUC for NCUC to perform the project at issue. *Id.* at 16-17 (citing RX 18). Thus, Respondents contend, the main contractor was not Respondents but NCUC. *Id.* at 167-17.

Respondents proceed to argue, as an alternative to their request for dismissal on the subject, that a genuine issue of material fact exists with respect to the characterization of Respondent Pierce as an operator of the Facility. AD Response at 17-18, 19. Respondents urge that NCUC be held liable under the doctrine of respondeat superior, rather than Respondent Pierce, because of the "active and pervasive control" exercised by NCUC over the operation of the Facility, including "managing resources and personnel to achieve compliance with EPA regulatory requirements." *Id.* at 18. Respondents maintain that the proposed evidence cited by Complainant in its AD Memo, contrary to any arguments by Complainant, actually favors a finding that NCUC retained such control, including responsibility for records management, inasmuch as it details NCUC's duties and refers to Respondents as the subcontractor. *Id.* at 24 (citing RX 2). Acknowledging the application made to the State of Montana for Respondent Pierce to be the certified operator of the Facility, Respondents argue that they nevertheless did not enter into any contract with NCUC to perform the work of an operator and that Raymond Pine was instead named as the operator by NCUC. *Id.* at 18. In sum, Respondents contend, "[t]his issue simply requires further development at the hearing." *Id.* at 23.

Respondents next argue that a genuine issue of material fact exists with respect to the allegation that Respondents applied or directed the application of the sewage sludge, as shown by the proposed evidence of the contract between Respondent Adamas and Tom Robinson. AD Response at 25 (citing RX 5). Respondents maintain that they entered into the contract because of their lack of resources to complete the work themselves. *Id.* at 26, 28. Respondents then argue:

> From a practical and legal standpoint, Tom Robinson and Ernie Sprague, rather than the Respondents[,] were the only ones in a position to develop and maintain the records required by 40 C.F.R. § 503.17 as they were the persons who did the work of spraying and spreading of sewage sludge onto the land surface and Tom Robinson used his tractor for the incorporation of sewage sludge into the soil so that the sewage sludge can either condition the soil or fertilize the crops or vegetation grown in the soil.

Id. at 26.

Additionally, Respondents contend that a genuine issue of material fact exists with regard to its purported failure to respond to the Information Request. First, Respondents observe that EPA never requested information related to the preparation of the sewage sludge. AD Response at 26. Respondents proceed to argue that upon receipt of the Information Request, Respondents informed EPA that the information sought could be obtained from NCUC as the main contractor. *Id.* at 27. Respondents maintain that when EPA again requested the information from them, Respondents provided all of the documentation in their possession, such as copies of laboratory results, contracts, and emails. *Id.* (citing RX 27). However, Respondents argue, the contract between Respondent Adamas and Mr. Robinson demonstrates that he agreed to provide Respondent Adamas with the information required to be kept by the applicable regulations, as he, along with Ernie Sprague, were the ones to physically apply the sewage sludge. *Id.*

C. Complainant's Reply

In its AD Reply, Complainant urges that Respondents failed to identify any genuine issues of material fact that would preclude entry of an accelerated decision as to liability. AD Reply at 2. Complainant then addresses four arguments raised by Respondents in their AD Response. First, Complainant responds to Respondents' claim regarding a lack of subject matter jurisdiction, arguing that Respondents appear to have mischaracterized their position and that "[t]he authority to regulate under the CWA is distinct from the subject matter jurisdiction that defines a tribunal's authority to adjudicate a claim." *Id.* (citing *Adams*, 13 E.A.D. 310, 2007 WL 2285420, at *8 (EAB 2007); *Heser*, 2007 WL 2192943, at *3 (ALJ Feb. 23, 2007) (Order on Respondents' Motion to Dismiss for Lack of Jurisdiction)). To be sure, Complainant points to Section 309(g)(2)(B) of the CWA and 40 C.F.R. Part 22 as vesting subject matter jurisdiction in this Tribunal. *Id.* (citing 33 U.S.C. § 1319(g)(2)(B); 40 C.F.R. §§ 22.1(a)(6), 22.4(c)(1)). With regard to Respondents' claim that Complainant failed to demonstrate a significant nexus to waters that are navigable and, thus, failed to prove its case, Complainant argues that such a claim ignores its demonstration that Respondents operated a treatment works that discharges to Lame Deer Creek, a water of the United States, and the absence of any denial by Respondents of those discharges. *Id.* at 2-3 (citing Amended Compl. ¶ 34; Ans.). Complainant further argues that in the statutory provisions requiring EPA to regulate the disposal and use of sewage sludge, which Congress included in the CWA as originally enacted and then broadened in subsequent amendments, Congress directed the regulations to "be 'adequate to protect human health and the environment from any reasonably anticipated adverse effects of each pollutant.'" *Id.* at 3-4 (citing 33 U.S.C. § 1345(d)(2)(D)). Therefore, Complainant asserts, EPA explained in the

preamble to the rulemaking for 40 C.F.R. Part 503 that it was promulgating the regulations to protect human health and the environment from the adverse impacts of pollutants potentially contained in sewage sludge through a variety of routes of exposure, not simply surface water. *Id.* at 4 (citing CX 33 at 1, 3). Complainant thus denies that the regulation of the disposal and use of sewage sludge is limited by the proximity to a water of the United States, as Respondents appear to contend. *Id.* at 4-5.

Complainant next turns to Respondents' position that the claim for individual liability against Respondent Pierce should be dismissed or that, in the alternative, a genuine issue of material fact exists about Respondent Pierce's role as an operator of the Facility. With regard to the former argument, Complainant urges that Respondents have not met the burden of demonstrating that dismissal is appropriate. AD Reply at 6. Complainant maintains that it seeks to hold Respondent Pierce liable for the actions of Respondent Adamas under the responsible corporate officer doctrine, which, according to Complainant, is a particular theory of liability that has been recognized by my esteemed colleague Judge Biro, *id.* at 6-7 (citing *Smith*, 2004 WL 1658484 (EPA ALJ July 15, 2004)), and the elements of which it adequately plead in the Amended Complaint, *id.* at 6 (citing Amended Compl. ¶¶ 29-32). Complainant further argues that Respondents admitted to the allegations supporting those elements and did not present any evidence to contradict them. *Id.* at 7 (citing Ans. ¶¶ 27-29). Accordingly, Complainant contends, no genuine issue of material fact exists that Respondent Pierce can be held personally liable as the responsible corporate officer of Respondent Adamas for violations of the CWA. *Id.*

Complainant argues that there also is no genuine issue of material fact with regard to Respondents' operation of the Facility. AD Reply at 7. First, Complainant contends that Respondents did not deny the allegation that they were operators of the Facility or point to any contradictory proposed evidence in their Prehearing Exchange. *Id.* at 7-8. Complainant further argues that Respondents' unsubstantiated assertion in their AD Response that NCUC never entered into a contract naming Respondent Pierce as the operator is of little or no probative value given that "the record is replete with evidence" reflecting that Respondent Pierce operated the Facility in his role as a corporate officer of Respondent Adamas, including email correspondence and the application to the State of Montana in which Respondent Pierce held himself out as the operator. *Id.* at 8 (citing CX 44, 45, 46, 50). Complainant contends that Respondent Pierce's actions on behalf of Respondent Adamas – such as negotiating and signing contracts on Respondent Adamas's behalf, *id.* (citing CX 45 at 19; CX 7); attending meetings regarding the work to be performed, *id.* at 8-9 (citing CX 19 at 9-10, 29; CX 46 at 23-26); and communicating with NCUC and IHS on the status of projects, *id.* at 9 (citing CX 4; 6-8; 19 at 29; 45 at 6-48; 46 at 2-12, 23-26; and 47 at 6-9) – "also establish his liability," *id.* at 8. Complainant then urges that the arguments raised by Respondents with respect to the control exercised by NCUC and the unsubstantiated statement that NCUC named Raymond Pine as the operator of the Facility are irrelevant. *Id.* at 10. Even if true, Complainant maintains, the fact that other parties may also be liable does not absolve Respondents from liability, as there can be more than one operator of a facility and the CWA is a strict liability statute that provides for joint and several liability. *Id.* (citing multiple cases).

Citing a variety of legal authorities, Complainant argues that Respondents are also unable to skirt liability by pointing to its status as a contractor of NCUC or its subcontracts with others

to apply the sewage sludge. AD Reply at 10-11 (citing multiple cases). Complainant maintains that "Respondents were responsible for or performed the work necessary to complete the sludge removal and land application project" and, as such, "were responsible for ensuring that the entire project was completed in accordance with EPA's regulations[,] including the requirement to develop and maintain land application records." *Id.* at 10-11. Finally, Complainant maintains that Respondents did not respond to the Information Request as required and that "Respondents have failed to provide any evidence to the contrary other than to resort to shifting blame and misconstruing the evidence." *Id.* at 12. Accordingly, Complainant argues, no genuine issue of material fact exists and Complainant is entitled to an accelerated decision on liability.

V. LEGAL STANDARDS FOR ADJUDICATING THE PARTIES' MOTIONS

A. Standard for Adjudicating a Motion for Accelerated Decision

Section 22.20(a) of the Rules of Practice authorizes Administrative Law Judges to:

> render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 C.F.R. § 22.20(a). This standard is analogous to the standard governing motions for summary judgment prescribed by Rule 56 of the Federal Rules of Civil Procedure ("FRCP"), and while the FRCP do not apply here, the EAB has consistently looked to Rule 56 and its jurisprudence for guidance in adjudicating motions for accelerated decision filed under Section 22.20(a) of the Rules of Practice. *See, e.g.*, *Consumers Scrap Recycling, Inc.*, 11 E.A.D. 269, 285 (EAB 2004); *BWX Techs., Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000); *Clarksburg Casket Co.*, 8 E.A.D. 496, 501-02 (EAB 1999). Federal courts have endorsed this approach. For example, the United States Court of Appeals for the First Circuit described Rule 56 as "the prototype for administrative summary judgment procedures" and the jurisprudence surrounding it as "the most fertile source of information about administrative summary judgment." *Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995) (rejecting the argument that federal court rulings on motions for summary judgment are "inapposite" to administrative proceedings).

As for the particular standard set forth in Rule 56, it directs a federal court to grant summary judgment upon motion by a party "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In construing this standard, the U.S. Supreme Court has held that a factual dispute is material where, under the governing substantive law, it might affect the outcome of the proceeding. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1985). In turn, a factual dispute is genuine if a fact finder could reasonably resolve the dispute in favor of the non-moving party under the evidentiary standards applicable to the particular proceeding. *Id.* at 248, 250-52.

The Supreme Court has held that the party moving for summary judgment bears the burden of showing an absence of a genuine dispute as to any material fact. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). This burden consists of two components: an initial burden of production, which shifts to the non-moving party once it is satisfied by the moving party, and the ultimate burden of persuasion, which always remains with the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986) (Brennan, J., dissenting) (citing 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727 (2d ed. 1983)). To discharge its initial burden of production, the moving party is required to support its assertion that a material fact cannot be genuinely disputed either by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials," or by "showing that the materials cited do not establish the . . . presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). Once the moving party satisfies its initial burden of production, the burden shifts to the non-moving party to show that a genuine dispute of material fact exists by similarly "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence . . . of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *Id.*

In determining whether a genuine issue of material fact exists for trial, a federal court is required to construe the evidentiary material and reasonable inferences drawn therefrom in a light most favorable to the non-moving party. *See Anderson*, 477 U.S. at 255 ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) ("On summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion."). The court is then required to consider whether a fact finder could reasonably find in favor of the non-moving party under the applicable evidentiary standards. *Anderson*, 477 U.S. at 252-55. Where the evidence viewed in the light most favorable to the non-moving party is such that the fact finder could not reasonably find in favor of the non-moving party, summary judgment is appropriate. *See Adickes*, 398 U.S. at 158-59. Conversely, where conflicting inferences may be drawn from the evidence and a choice among those inferences would amount to fact-finding, summary judgment is inappropriate. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1105 (D.C. Cir. 2002). Even where summary judgment appears technically proper, sound judicial policy and the exercise of judicial discretion may support denial of the motion in order for the case to be more fully developed at hearing. *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979).

The EAB has applied the foregoing principles in adjudicating motions for accelerated decision under Section 22.20(a) of the Rules of Practice, holding that the moving party "assumes the initial burden of production on a claim, and must make out a case for presumptive entitlement to summary judgment in his favor." *BWX Techs.*, 9 E.A.D. at 76. Where the moving party bears the burden of persuasion on an issue, it is entitled to an accelerated decision only if it presents "evidence that is so strong and persuasive that no reasonable [fact finder] is free to disregard it." *Id.* Where the moving party does not bear the burden of persuasion, it has the "lesser burden of 'showing' or 'pointing out' to the reviewing tribunal that there is an absence of evidence in the record to support the nonmoving party's case on that issue." *Id.* Once the

moving party has discharged this burden, the burden of production shifts to the non-moving party bearing the burden of persuasion on the issue to identify specific facts from which a finder of fact could reasonably find in its favor on each element of the claim. *Id.*

As noted by the EAB, "neither party can meet its burden of production by resting on mere allegations, assertions, or conclusions of evidence." *BWX Techs.*, 9 E.A.D. at 75. Likewise, a party opposing a properly supported motion for accelerated decision is required to "provide more than a *scintilla* of evidence on a disputed factual issue to show their entitlement to a[n] . . . evidentiary hearing: the evidence must be substantial and probative in light of the appropriate evidentiary standard of the case." *Id.* at 76.

Consistent with the jurisprudence of Rule 56, the EAB has held that a tribunal adjudicating a motion for accelerated decision is required to consider whether the parties have met their respective burdens in the context of the applicable evidentiary standard. *BWX Techs.*, 9 E.A.D. at 75. As prescribed by Section 22.24(b) of the Rules of Practice, 40 C.F.R. § 22.24(b), the evidentiary standard that applies here is proof by a preponderance of the evidence. Section 22.24(a) provides that the complainant bears the burdens of presentation and persuasion that a violation occurred as set forth in the complaint and that the relief sought is appropriate, while the respondent bears the burdens of presentation and persuasion for any affirmative defenses.

B. Standard for Adjudicating a Motion to Dismiss

Section 22.14 of the Rules of Practice requires a complaint to include, among other elements, "[a] concise statement of the factual basis for each violation alleged." 40 C.F.R. § 22.14(a)(3). A respondent may challenge the sufficiency of a complaint pursuant to Section 22.20, which authorizes the presiding Administrative Law Judge to dismiss a proceeding, upon motion of the respondent, "on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant." 40 C.F.R. § 22.20(a).

Motions to dismiss under Section 22.20(a) of the Rules of Practice are analogous to motions for dismissal under Rule 12(b)(6) of the FRCP. *Asbestos Specialists*, 4 E.A.D. 819, 827 (EAB 1993). While the FRCP do not apply to administrative proceedings, the EAB has held that Rule 12(b)(6) and federal court decisions construing it provide useful guidance in adjudicating a motion to dismiss under the Rules of Practice. *Commercial Cartage Co., Inc.*, 5 E.A.D. 112, 117 n.9 (EAB 1994). Rule 12(b)(6) of the FRCP provides that a complaint filed in federal court may be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. Pro. 12(b)(6). The general rules of pleading set forth in Rule 8 of the FRCP state, in part, that "[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." *Id*. at 8(a)(2).

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the U.S. Supreme Court discussed the standard for evaluating whether the factual allegations set forth in a given complaint are sufficient to withstand a motion to dismiss. As the Court explained in *Iqbal*:

[T]he pleading standard Rule 8 announces does not require detailed factual

> allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement.
>
> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement of relief.
>
> Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation.) Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not show[n] [as required by Rule 8(a)(2)]—that the pleader is entitled to relief.
>
> In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Iqbal, 556 U.S. at 678-79 (internal quotation marks and citations omitted).

The Court thus applied a two-pronged approach to evaluating the sufficiency of the factual allegations set forth in a complaint: 1) identify the allegations in the complaint that are not entitled to a presumption of truth because of their conclusory nature; and 2) determine whether the factual allegations plausibly suggest an entitlement to relief. *Iqbal*, 556 U.S. at 680-81. As the Court explained in *Twombly*, however, "[a]sking for plausible grounds to infer an [element of the cause of action at issue] does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [that element]." 550 U.S. at 556.

Relying on the standard for dismissal articulated in the FRCP, the EAB has held that, "[i]n determining whether dismissal is warranted, all factual allegations in the complaint should be presumed true, and all reasonable inferences therefrom should be made in favor of the complainant. In addition, in the event dismissal appears to be appropriate, dismissal of a complaint should ordinarily be without prejudice." *Commercial Cartage*, 5 E.A.D. at 117. The EAB elaborated on the appropriateness of dismissal with prejudice in *Asbestos Specialists*, first citing with approval the holding of the U.S. Court of Appeals for the Eleventh Circuit in *Bank v. Pitt*, 928 F.2d 1108 (11th Cir. 1991), that "[w]here a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice." 4 E.A.D. at 827 (citing *Bank v. Pitt*, 928 F.2d at 1112). The EAB also noted the objective, discussed above, of deciding cases on their merits. *Id.* at 830 (citing *Wego Chem.*, 4 E.A.D. at 525 n.11; *Port of Oakland*, 4 E.A.D. at 205 n.84). It then held:

> Therefore, as a general rule, dismissal with prejudice under the Agency's rules should rarely be invoked for the first instance of a pleading deficiency in the complaint; instead, it should be reserved for repeat occasions or where it is clear that a more carefully drafted complaint would still be unable to show a right to relief on the part of the complainant.

Id. at 830.

C. Standard for Adjudicating a Motion for Additional Discovery

Section 22.19(e) of the Rules of Practice sets forth requirements for motions for additional discovery, including procedures for a party to follow in moving for additional discovery after completion of the prehearing exchange and conditions that must be met for this Tribunal to grant such a motion. 40 C.F.R. § 22.19(e). Specifically, that provision requires a motion for additional discovery to "specify the method of discovery sought, provide the proposed discovery instruments, and describe in detail the nature of the information and/or documents sought." 40 C.F.R. § 22.19(e)(1). In turn, this Tribunal may order additional discovery only if it:

> (i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;
>
> (ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and
>
> (iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

40 C.F.R. § 22.19(e)(1).

The Rules of Practice are more restrictive with regard to depositions than other forms of additional discovery, authorizing this Tribunal to order depositions only upon an additional finding that:

> (i) The information sought cannot reasonably be obtained by alternative methods of discovery; or
>
> (ii) There is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

40 C.F.R. § 22.19(e)(3).

VI. DISCUSSION

At the outset, I note that, as observed by Complainant in its AD Reply, Respondents' request for dismissal of this matter was untimely. Advising that motions not filed in a timely manner may not be considered, I directed the parties in the Prehearing Order issued in this proceeding to file any dispositive motions regarding liability, such as a motion for accelerated decision or motion to dismiss, within 30 days of the deadline for Complainant's Rebuttal Prehearing Exchange, which was eventually extended to April 3, 2020. Thus, such motions were due on or before May 4, 2020. Respondents did not file their AD Response containing their request for dismissal until June 2, 2020, well past that deadline. Respondents did not seek leave to move for dismissal out of time. Nor did Respondents state that they contacted Complainant to determine whether it had any objection to their request for dismissal, as required by the Prehearing Order. Yet another flaw is that Respondents included their request for dismissal in the body of their AD Response. For the sake of clarity, efficiency, and courtesy to other parties and this Tribunal, any request being made of this Tribunal should be filed and served as a separate document with the term "motion" in the title. Considering all of these deficiencies, denial of Respondents' request for dismissal on procedural grounds is appropriate.

As for Respondents' request for depositions, I find that the requirements set forth in the Rules of Practice for motions for additional discovery generally and motions for depositions specifically have not been satisfied inasmuch as Respondents offer little in support of their request. First, Respondents state simply that Complainant attached to its AD Motion statements made by Ernie Sprague and that they seek to depose that individual. AD Response at 2. Later, Respondents request the opportunity to depose not only Mr. Sprague but also Tom Robinson and state as grounds for the request that Complainant "recently submitted new evidence and statements from Ernie Sprague and Tom Robinson" and that "Complainant intends to call those individuals to testify at the hearing." *Id.* at 28. It is true that Complainant named Mr. Sprague and Mr. Robinson as potential fact witnesses in Complainant's Initial Prehearing Exchange. Complainant's Initial PHE at 3-4, 5. Respondent Pierce also identified Mr. Sprague and Mr. Robinson as potential witnesses in his Prehearing Exchange. Respondent's PHE at 4-5. It is not clear why any testimony that Respondents wish to elicit from those witnesses would not be preserved for hearing. Respondents also do not explain why the evidence sought could not reasonably be obtained by alternative methods of discovery, such as interrogatories. Thus, Respondents have not met the heightened threshold set forth in the Rules of Practice for this

Tribunal to order depositions. Accordingly, denial of Respondents' request to depose Mr. Sprague and Mr. Robinson is appropriate.

Finally, I turn to Complainant's AD Motion. As discussed above, in order for Complainant to prevail on its request for accelerated decision as to liability, it must establish that genuine issues of material fact do not exist with respect to the critical elements of liability for Claims 1 and 2 and that it is entitled to judgment as a matter of law under the preponderance of the evidence standard. As previously described, the elements of liability for Claim 1 are as follows: (1) Respondents were "persons," as that term is defined by 33 U.S.C. § 1362(5) and 40 C.F.R. § 503.9(q); (2) Respondents "applied sewage sludge," as that phrase is defined by 40 C.F.R. §§ 503.9(a), 503.11(h); (3) the sewage sludge was classified as "Class B sewage sludge" by virtue of meeting the requirements set forth in 40 C.F.R. § 503.32(b)(2)(ii); (4) the requirements of 40 C.F.R. § 503.13(a)(2)(i) were met when the sewage sludge was applied to the land in or near Lame Deer, Montana; (5) the subject land was "agricultural land," "forest," "a public contact site," or "a reclamation site," as those terms are defined in 40 C.F.R. § 503.11; and (6) Respondents failed to develop and retain the information identified in 40 C.F.R. § 503.17(a)(5)(ii). In considering whether Complainant has met its burden in demonstrating that it is entitled to accelerated decision with respect to Claim 1, I note that it has not pointed to any proposed evidence in the record, or even seemingly alleged any facts in the Amended Complaint, in support of the third, fourth, and fifth elements of liability such that the recordkeeping requirements of 40 C.F.R. § 503.17(a)(5)(ii) would be invoked here. In the absence of alleged facts from which to conclude that those elements of liability are uncontroverted and proven as a matter of law, I am unable to say that Complainant has met its burden. Therefore, denial of Complainant's AD Motion with respect to Claim 1 is appropriate.

As for Claim 2, the elements of liability, as described above, are as follows: (1) Respondents were owners or operators of the Facility; (2) the Facility was a "point source" as that term is defined by 33 U.S.C. § 1362(14); (3) EPA requested that Respondents provide certain information pursuant to Section 308 of the Act, 33 U.S.C. § 1318(a); and (4) Respondents failed to provide such information. In considering whether Complainant has met its burden in demonstrating that it is entitled to accelerated decision with respect to Claim 2, I first note that, despite the reference to the term "operator" in Section 308 of the CWA, neither the statute nor the implementing regulations appear to define the term or any of its grammatical variations for purposes of the CWA.[17] Complainant has not pointed to any specific definition in this matter but, in the context of arguing that Respondents were the preparers of the sewage sludge at issue, essentially contends that Respondents exercised control and took other actions with respect to the Facility, as shown by certain proposed evidence in the record, which lend support to characterizing Respondents as "operators."[18] *See, e.g.*, AD Memo at 19 ("Respondents also

[17] Conversely, as observed by Respondents in their AD Response, the State of Montana defines the term "operator" in the context of wastewater treatment plants as "the person in direct responsible charge of the operation of a water treatment plant, water distribution system, or wastewater treatment plant." MONT. CODE ANN. § 37-42-102. As discussed above, this definition appears to have informed Respondents' arguments in this proceeding, particularly with respect to whether Respondent Pierce can be considered to have been an "operator" for purposes of liability. However, state law does not govern here.

[18] Complainant also points out that Respondents did not deny the allegation in the Amended Complaint that Respondents were operators of the Facility. However, as noted above, Respondents' failure to respond to that

exercised control over the Lame Deer Wastewater Treatment Plant by serving as the project manager and technical consultant for the Lame Deer Sludge Removal project (CX 4, 6, 7, 8, 19, 29, 45, and 46) and acting as the NCUC contractor and lead facility-contact during the EPA Region 8 inspection"). Thus, Complainant seemingly construes the term "operator" as it is commonly understood.

I agree that such an interpretation is appropriate. Given the absence of a governing legal definition, the term does not appear to be used for purposes of the CWA as a term of art with a distinct meaning that differs meaningfully from its common usage. The EAB has held that where a particular term is not specifically defined by the applicable statute or regulations, it is appropriate to ascribe the commonly understood meaning to the term. *See, e.g.*, *Mayes*, 12 E.A.D. 54, 86 (EAB 2005) ("We look to the ordinary, contemporary, common meaning of a word used in a statute or regulation but not specifically defined therein."), *aff'd*, 2008 WL 65178 (E.D. Tenn. Jan. 4, 2008); *Odessa Union Warehouse Co-Op, Inc.*, 4 E.A.D. 550, 557 (EAB 1993) (Order on Interlocutory Appeal) ("[I]n the absence of a statutory or regulatory definition, it is appropriate to use the common meaning of the terms at issue."); *accord Perrin v. United States*, 444 U.S. 37, 44 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.").

In order to ascertain the common meaning of a term, "[c]ourts have traditionally relied on dictionaries as generally providing an objective extrinsic guide to the ordinary, non-technical meaning of a word." *Carbon Injection Sys., LLC*, 17 E.A.D. 1, 23 (EAB 2016). Likewise, the EAB has frequently looked to dictionaries for that purpose. *See, e.g.*, *Chase*, 16 E.A.D. 469, 479-80 (EAB 2014) (relying on various dictionary definitions for guidance in defining the term "annual" as used in a regulation requiring an "annual test" of certain equipment associated with underground storage tanks). Drawing from a representative sample of the many dictionaries available, I may reasonably conclude that the common meaning of the term "operator" is one whose job it is to use and control a device, machine, or business. BRITANNICA DICTIONARY, https://www.britannica.com/dictionary/operator (defining "operator" as, among other things, "a person who uses and controls something (such as a machine, device, or business)"); CAMBRIDGE DICTIONARY, http://dictionary.cambridge.org/us/dictionary/english/operator (defining "operator" as, among other things, "someone whose job is to use and control a machine or vehicle" or "a company that does a particular type of business"); MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/operator (defining "operator" as, among other things, "one that operates a machine or device" or "one that operates a business").

In seeking accelerated decision, Complainant asks me to find that Respondents undisputedly served in such a role with regard to the Facility. However, when the proposed evidence and the reasonable inferences drawn therefrom are construed in a light most favorable to Respondents, I am compelled to find that genuine issues of material fact exist with respect to

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particular allegation is not legally significant as I consider it to be a conclusion of law rather than an allegation of fact. Arguably, Complainant has not alleged any facts in the Amended Complaint from which to conclude that Respondents were operators of the Facility other than the allegation in paragraph 38 that "on or about the week of July 9, 2018, Respondents pumped and dewatered approximately 1,000,000 gallons of [] sewage sludge from Cell #2 of the Lame Deer treatment lagoon." Amended Compl. ¶ 38.

this issue. For example, in support of its position that Respondents were operators of the Facility, Complainant points to a document entitled "Montana Application for Certification as an Operator of a Municipal, Industrial, or On-Site Wastewater Treatment System," which a division of the State of Montana stamped as received on April 6, 2018, and which appears to request state certification of Respondent Pierce as an operator of the Facility, among other wastewater treatment plants owned by the NCUC. CX 50 at 2. Therein, Respondent Pierce identifies his job title as "Contract Sewer Operator" of the "Lame Deer Sewer Lagoons (NCUC)" and his associated duties to "Service, Maintain, [and] Operate all Waste Water systems of the NCUC on the Northern Cheyenne Reservation," including the Facility. CX 50 at 2-3. While this proposed evidence certainly weighs in favor of Complainant's characterization of Respondents as "operators" of the Facility, I note that the application outlines certain fees to be paid in order to receive certification, *see* CX 50 at 2, and that a staff person from the State of Montana's Operator Certification Program subsequently indicated in an email to EPA that "[n]o fees were ever paid and our office has not heard from [Respondent Pierce]," CX 50 at 1. Thus, Respondent Pierce appears to have never been named as the certified operator of the Facility.

For further support of its position, Complainant also points to the July 20, 2018 report of the inspection that EPA conducted at the Facility on June 13-14, 2018. As observed by Complainant, Respondents were named in the field of the report for "Facility Contacts" and identified in multiple locations of the report as a contractor of NCUC. CX 5 at 3, 5. The report also reflects that Respondent Pierce provided information to EPA throughout the inspection. CX 5. While this proposed evidence points to a certain degree of control exercised by Respondents, a finding that Respondents were, in fact, operators of the Facility is undercut by the portions of the report specifically identifying NCUC as such. In particular, NCUC was named as the entity satisfying the definition of "operator" in the pertinent field, CX 5 at 3, as well as in the following narrative:

> On Wednesday, June 13, 2018, and Thursday, June 14, 2018, we, U.S. Environmental Protection Agency (EPA) inspectors Akash Johnson and Emilio Llamozas, conducted an announced compliance evaluation inspection of the Lame Deer Wastewater Treatment Facility (WWTF) (the lagoon; the facility; the site), located in Lame Deer, Montana, on the Northern Cheyenne Indian Reservation, to evaluate compliance with the facility's National Pollutant Discharge Elimination System (NPDES) Permit No. MT0029360 (the Permit). The lagoon was owned by the Northern Cheyenne Tribe (the Tribe) and operated by the Northern Cheyenne Utilities Commission (NCUC).

CX 5 at 5. The report also identifies Sheri Bement, General Manager of NCUC, as the "primary inspection contact." *Id.*

Additionally, certain proposed evidence in the record suggests that NCUC retained ultimate control over the Facility and the preparation and application of the sewage sludge at issue during the relevant period. For example, a document consisting of "pre-construction meeting minutes" memorializes a meeting attended by representative of IHS and NCUC and Respondent Pierce on May 17, 2018, and states that "NCUC is responsible for the sludge removal work" and that "NCUC is ultimately responsible for following the requirements [set

forth in 40 C.F.R. Part 503]." RX 2 at 1. In a subsequent letter addressed to Respondent Pierce on June 27, 2018, Ms. Bement of NCUC advised, in pertinent part:

> This letter is formal notification that as the Northern Cheyenne Utilities Commission (NCUC) contract with Indian Health Service and our subsequent sub-contract with ADAMAS Construction Services, I am officially notifying of the following:
>
> 1) I am the NCUC representative that you need to direct all work-related questions or requests to. Further, you are not to go directly to Indian Health Service unless it relates to the day to day work that James Courtney, Project Engineer, can respond to. Any extensions of time, change orders, inquiries or requests for payment must go through me.
>
> 2) The project will be monitored on a daily basis by me and in my absence by the NCUC Foreman, Raymond Pine. He has the authority to act on my behalf on any matters on a daily basis if I am unavailable.

RX 15 at 10.

When this proposed evidence is construed in a light most favorable to Respondents, I find that it sufficiently calls into question the proposed evidence cited by Complainant to support its characterization of Respondents as "operators" of the Facility, such that genuine issues of material fact exist with regard to the first critical element of liability for Claim 2. Accordingly, denial of Complainant's AD Motion with respect to Claim 2 is also appropriate.

ORDER

1. Complainant's Motion for Accelerated Decision as to Liability is **DENIED**.

2. Respondents' requests for dismissal and additional discovery, as described in its Response to Complainant's Motion for Accelerated Decision on Liability and Memorandum of Law, are **DENIED**.

3. A hearing in this matter will be held to take evidence and argument over six days in either July, August, September, or October of 2022. On or before **April 29, 2022**, each party shall file a statement identifying any periods of unavailability for a hearing during that timeframe and stating any preference as to whether the hearing be held over videoconference or in person. An order scheduling the hearing will be issued shortly thereafter.

Christine Donelian Coughlin
Administrative Law Judge

Date: April 20, 2022
Washington, D.C.

In the Matter of Adamas Construction and Development Services, PLLC and Nathan Pierce, Respondents
Docket No. CWA-07-2019-0262

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on Complainant's Motion for Accelerated Decision and Respondents' Requests for Dismissal and Additional Discovery**, dated April 20, 2022, and issued by Administrative Law Judge Christine Donelian Coughlin, was sent this day to the following parties in the manner indicated below.

Mary Angeles
Paralegal Specialist

Original by OALJ E-Filing System to:
U.S. Environmental Protection Agency
Office of Administrative Law Judges
https://yosemite.epa.gov/OA/EAB/EAB-ALJ_Upload.nsf

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Dated: April 20, 2022
Washington, D.C.