

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

IN THE MATTER OF	)	RESPONDENTS' INITIAL
	)	POST-HEARING BRIEF
ADAMAS CONSTRUCTION AND	)	
DEVELOPMENT SERVICES, PLLC	)	
	)	Docket No. CWA-07-2019-
AND	)	0262
NATHAN PIERCE,	)	
	)	
RESPONDENTS	)	
PROCEEDINGS UNDER SECTION	)	
309(G) OF THE	)	
CLEAN WATER ACT, 33 U.S.C. §	)	
1319(g)	)	
	)	

**RESPONDENTS' INITIAL POST-HEARING BRIEF**

Comes Now, The Respondents, and files, this Respondents' Initial Post-Hearing Brief is submitted on behalf of Nathan Pierce and Adamas Construction and Development Services PLLC (collectively, "Respondents"). We challenge the EPA's allegations by asserting compliance with the Clean Water Act (CWA) and highlighting contradictions in the government's position, particularly in light of the Sackett v. EPA case, lack of subject matter jurisdiction, the principle of estoppel and failure to fulfill burden of proof on the part of the EPA;

**I. INTRODUCTION**

This counter-reply contests the EPA's claims, emphasizing the Respondents' adherence to the CWA and underscoring new evidence and testimonies. We also draw attention to the Sackett v. EPA case, focusing on potential EPA overreach and due process concerns as well as lack of subject matter jurisdiction, the principle of estoppel and failure to fulfill burden of proof on the part of the EPA.

**II. Key Points of Contention, Sackett Implications, and Estoppel**

## **A. Roles and Responsibilities in Sewage Sludge Application**

1. Contrary to the EPA's assertion, the Respondents have complied with 40 C.F.R. § 503.17. As indicated during the hearing, EPA witness Erin Kleffner acknowledged receiving guidance from Respondent Pierce on the location of the records. This action demonstrates an effort to comply with EPA's information request, aligning with the spirit of the regulation which emphasizes the availability and accessibility of records, rather than their physical transfer.
2. Tom Robinson and Ernie Sprague's Direct Involvement: Both testified to being the sole individuals involved in the application of sewage sludge, which falls under the definition of "Land application" per § 503.11(h). This direct involvement by parties other than Nathan Pierce raises serious questions about the EPA's assignment of responsibility.
3. Non-Involvement of Nathan Pierce: Their testimonies confirm Nathan Pierce's absence during the sludge application, contradicting EPA's claims of his direct involvement, akin to considerations in Sackett regarding factual basis for EPA's actions.

## **B. EPA's Approach to Documentation and Witness Testimonies**

1. Incomplete Documentation and Lack of Follow-up: The acknowledgment of receiving "incomplete" documents by Erin Kleffner, without further pursuit, reflects procedural gaps, echoing due process concerns as highlighted in Sackett.
2. Limited Witness Presentation by EPA: The EPA's failure to present all witnesses limits the Respondents' ability to challenge evidence, mirroring due process issues in Sackett.
3. EPA's Coaching of witness at hearing: In a significant development during the proceedings, Ernie Sprague provided testimony that raised serious concerns about the conduct of the EPA's legal representatives. According to Sprague, attorneys representing the EPA explicitly requested that he withhold certain information from the hearing. Furthermore, Sprague alleged that these attorneys coached him on specific points to articulate during his testimony. This revelation is troubling as it not only suggests an attempt by the EPA to manipulate the evidence presented in the hearing, but also raises questions about the integrity of the legal process and the fairness of the proceedings. Such actions, if proven true, could potentially undermine the credibility of the EPA's case against Nathan Pierce and Adamas Construction and

Development Services PLLC, indicating a deliberate effort to skew the facts in favor of the EPA's claims. This aspect of Sprague's testimony underscores the necessity for a thorough examination of the EPA's conduct and the veracity of the information presented during the hearing. Again, underscoring the need for scrutiny on EPA's enforcement actions, as emphasized in Sackett.

### **C. Questioning EPA's Enforcement Basis and Overreach**

1. Discrepancy in Complaint Origin: Contrary to EPA's claims, Tom Robinson did not initiate the complaint against the project. Tom Robinson's testimony contradicts the EPA's claim about the complaint's origin, underscoring the need for scrutiny on EPA's enforcement actions. This discrepancy aligns with the Sackett case, emphasizing scrutiny on EPA's initiation of enforcement actions.
2. The Complainant also contends that the property "Could" or "might" have been over applied with sewer sludge from Tom Robinson applying the sludge to his own barley field that was irrigated with a wheel line, however they provide no testimony, lab or soil tests or analytical data to support such a claim, as such they fail to provide any support for such a claim that can be independent verified and this court lacks jurisdiction to hear such a claim. Furthermore, this puts the court in the awkward position of trying to determine "could be" and "maybe" situations, when the burden is on the Complainant to prove their claim beyond a reasonable doubt, without independent verification and laboratory analysis it is impossible for the complainant to prove that Tom Robinson didn't apply anything more than water on his property.
3. EPA's Regulatory Overreach: In light of the recent Supreme Court decision in Sackett v. EPA, we encourage a review of EPA's jurisdictional reach and the extent of its authority. In Sackett, the Court emphasized the necessity for clear statutory boundaries and due process in EPA's enforcement actions. We argue that similar principles apply here, where the EPA's interpretation of its regulatory authority may be overly expansive, potentially impacting the fair application of CWA provisions.
4. The Clean Water Act defines "discharge of a pollutant" as any addition of any pollutant to navigable waters from any point source. 33 U.S.C.S. § 1362(12)(A). Clearly applying sludge to a barley field with no nexus to a navigable water does not meet this definition and the EPA has overreached its authority requiring further scrutiny as demonstrated in Sackett v. EPA.

### **D. Authority and Control Issues at NCUC and Estoppel**

1. **Exclusive Operational Control by NCUC:** Evidence presented indicates that NCUC held exclusive operational control over the project. This control was demonstrated most explicitly when NCUC exercised its authority to lock out other parties, including Nathan Pierce and his associates, from the facility. Such actions signify a level of control that goes beyond mere contractual oversight.
2. **Implications for Responsibility and Liability:** The pervasive control exerted by NCUC raises significant questions about the allocation of responsibility and liability for any alleged violations. If NCUC, as the main contractor, held such sweeping authority over the project, it stands to reason that they would also bear the primary responsibility for ensuring compliance with relevant regulations, including those of the CWA.
3. **Challenging EPA's Attribution of Responsibility:** The EPA's attempt to attribute primary responsibility or control to Nathan Pierce and Adamas Construction and Development Services PLLC seems incongruent with the reality of NCUC's dominant role. This discrepancy is a critical point of contention, as it challenges the basis of the EPA's enforcement action against the Respondents.
4. **Relevance to Legal and Regulatory Framework:** The issue of control is pivotal in environmental law, particularly in determining liability under the CWA. The Act often attributes responsibility to those who have the power to prevent violations. In this scenario, NCUC's demonstrable control over the facility and the project activities suggests that any inquiry into compliance or non-compliance should primarily focus on them.
5. **The pervasive control exercised by NCUC as the main contractor,** especially their ability to lock out other parties from the facility, suggests that they held the primary operational control over the project. This level of control implicates NCUC more directly in matters of regulatory compliance and potential violations, challenging the EPA's focus on Nathan Pierce and Adamas Construction and Development Services PLLC as the primary responsible parties.
6. **Estoppel Argument:** The U.S. government, through the Indian Health Services (IHS), has previously communicated to U.S. Senator Steve Daines that Nathan Pierce was not the main contractor and that NCUC held the primary role. This contradictory stance by a government agency introduces an argument for estoppel, suggesting that the government cannot now, through the EPA, inconsistently claim Nathan Pierce had control, again akin to considerations in Sackett regarding factual basis for EPA's actions.

## **E. Consistency and Transparency in EPA's Investigative Approach: Reflections from Sackett v. EPA**

1. The EPA's shifting focus in their requests for information, from the application to the preparation of sludge, mirrors concerns highlighted in the Sackett v. EPA case regarding the clarity and consistency of regulatory actions. Initially, the EPA directed inquiries to all involved parties, including Tom Robinson, Ernie Sprague, Nathan Pierce, and NCUC, specifically concerning records related to the application of sludge. This approach indicated a clear and targeted investigation scope. However, the agency's subsequent claim that their interest was actually in the preparation phase of the sludge represents a significant and seemingly arbitrary change in the investigation's focus.

This change is particularly relevant in light of the Sackett implications, which emphasize the necessity for regulatory agencies like the EPA to maintain clear and consistent statutory and regulatory boundaries. The Sackett decision underscored the importance of due process and fair treatment in enforcement actions, including the need for transparency and consistency in the agencies' investigative and enforcement strategies.

The EPA's inconsistent approach in this case raises questions about the agency's adherence to these principles. By altering the focus of their inquiry post-facto, the EPA not only potentially misleads the parties involved but also seems to be manipulating the investigative process to better suit their narrative or desired outcome. This tactic, if perceived as such, could undermine the credibility of the EPA's case against the Respondents, echoing the concerns of regulatory overreach and lack of due process that were central in the Sackett ruling. Such actions by the EPA necessitate careful scrutiny to ensure that the principles of fair enforcement, as highlighted in Sackett, are upheld.

## **F. Lack of Subject Matter Jurisdiction**

1. **33 U.S.C. §1251 et seq. (1972)** The Clean Water Act (CWA) establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters. The basis of the CWA was enacted in 1948 and was called the Federal Water Pollution Control Act, but the Act was significantly reorganized and expanded in 1972. "Clean Water Act" became the Act's common name with amendments in 1972.
2. The Federal Water Pollution Control Act , [33 U.S.C.S. § 1251 et seq.](#), called for a two-phase program to limit discharges of effluents. Direct dischargers of toxic wastes were to comply with the best practicable

control technology (BPT) by July 1, 1977. [33 U.S.C.S. §§ 1311\(b\)\(1\)\(A\), 1314\(b\)\(1\)](#). Between 1983 and 1987, direct dischargers of toxic wastes were to meet the more stringent standards consistent with the best available technology economically achievable (BAT). [33 U.S.C.S. § 1311\(b\)\(2\)](#). The statute also mandated that the **EPA** set effluent limitations for publicly owned treatment works (POTW) engaged in the treatment of municipal sewage or industrial wastewater. [33 U.S.C.S. §§ 1311\(b\)\(1\)\(B\)-\(C\), 1314\(d\)\(1\)](#). Such limitations were to result in equal levels of treatment for all toxic discharges, whether issued directly into navigable waters or channeled by a sewage system through a POTW.

3. Congress, in the Clean Water Act, explicitly directed the Agencies to protect “navigable waters.”
4. The phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams," "oceans, rivers, [and] lakes," Webster's New International Dictionary 2882 (2d ed.), and does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The EPA’s expansive interpretation of that phrase is thus not "based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694. Pp. 730-739.

While the meaning of "navigable waters" in the CWA is broader than the traditional definition found in *The Daniel Ball*, 77 U.S. 557, 10 Wall. 557, 19 L. Ed. 999, see *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 167, 121 S. Ct. 675, 148 L. Ed. 2d 576 (SWANCC); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133, 106 S. Ct. 455, 88 L. Ed. 2d 419, the CWA authorizes federal jurisdiction only over "waters."

The use of the definite article "the" and the plural number "waters" show plainly that § 1362(7) does not refer to water in general, but more narrowly to water "[a]s found in streams," "oceans, rivers, [and] lakes," Webster's New International Dictionary 2882 (2d ed.). Those terms all connote relatively permanent bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows. Pp. 730-734. Again, the Clean Water Act authorizes federal jurisdiction only over "waters." [33 U.S.C.S. § 1362\(7\)](#).

5. The Clean Water Act defines "discharge of a pollutant" as any addition of any pollutant to navigable waters from any point source. [33 U.S.C.S. § 1362\(12\)\(A\)](#).
6. On January 23, 2020, the President of the United states and the U.S.

Environmental Protection Agency (EPA) and the Department of the Army (Army) finalized the Navigable Waters Protection Rule to clearly define “waters of the United States” (WOTUS). The EPA as announced by Administrator Andrew Wheeler, made significant changes to the areas that the act applies to reduced governmental overreach.

7. EPA Administrator Andrew Wheeler said the administration’s Navigable Waters Protection Rule (NWPR), the successor to the Obama-era Waters of the United States (WOTUS) rule, would bring a clear guideline to businesses, landowners, and farmers “to support the economy and accelerate critical infrastructure projects.
8. As stated by the EPA in its own fact sheet, the following waters/features are not jurisdictional under the rule: Water bodies that are not included in the four categories of “waters of the United States”, this distinction will provide clarity that where a water or feature is not identified as jurisdictional in the final rule, **it is not a jurisdictional water under the Clean Water Act.** [emphasis added]
  - “• Groundwater, including groundwater drained through subsurface drainage systems, such as drains in agricultural lands.
  - Prior converted cropland retains its longstanding exclusion but is defined for the first time in the final rule. The agencies are clarifying that this exclusion will cease to apply when cropland is abandoned (i.e., not used for, or in support of, agricultural purposes in the immediately preceding five years) and has reverted to wetlands.
  - Artificially irrigated areas, including fields flooded for agricultural production, that would revert to upland should application of irrigation water to that area cease.
  - Waste treatment systems have been excluded from the definition of “waters of the United States” since 1979 and will continue to be excluded under the final rule. Waste treatment systems are defined for the first time in this rule. A waste treatment system includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to either convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater or stormwater prior to discharge (or eliminating any such discharge).” [emphasis added]
9. Most important to this case that has been Exempt from the NWPR is the Prior Converted Crop Land, Waste Treatment Systems including lagoons and Groundwater, including water through tile lines and other subsurface drainage systems; ephemeral streams, swales, gullies, rills, and pools; many farm and roadside ditches; artificial lakes and ponds such as farm ponds, irrigation ponds, and livestock watering ponds; groundwater recharge structures. This project involved all 3 and the

EPA failed to demonstrate how they have authority and the CWA extends to this case.

10. As the EPA bring this case under the CWA, Congress, and the CWA, explicitly directed the Agencies to protect “navigable waters,” and as activity alleged included, Waste Treatment Systems that have been excluded from the definition of “waters of the United States” since 1979, and Groundwater, and Prior converted cropland, and Irrigated areas, and Tribal lands and reservations, that are all excluded from the rule, the government has not shown that the property/feature or activities it says that, Adamas & Pierce, the defendant/s sub-contracted the property owner Tom Robinson to work on are jurisdictional under the CWA. As such this case should be dismissed.
11. The Complainant failed to demonstrate the land or feature possesses a "significant nexus" to waters that are navigable.
12. In fact as demonstrated at hearing the property in question is not located on or near a feature or body of water that meets the definition of waters of the United States and is related to a project involving waste water treatment systems that have been excluded from the definition of “waters of the United States” since 1979 and ground water that is exempt and the property was prior converted cropland, that was artificially being irrigated by a wheel irrigation line, there is no way the CWA, which authorizes federal jurisdiction only over "waters" would apply in this case, again the EPA’s expansive interpretation of that phrase is thus not "based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694. Pp. 730-739. the complaint lacks subject matter jurisdiction. As such this case/matter/complaint should be dismissed.

Subject matter jurisdiction may be challenged at any time, and if it is lacking the case must be dismissed. See Fed. R. Civ. P. 12(h)(3).

### **III. Challenging the Scope of EPA's Authority: Executive vs. Judicial Powers**

In the course of this enforcement action and at hearing, a fundamental question arises concerning the scope of the Environmental Protection Agency's (EPA) authority, particularly when juxtaposed with the powers traditionally reserved for the judicial branch. The Clean Water Act (CWA), while granting the EPA significant regulatory powers, does not confer upon it the authority to usurp roles traditionally held by the judiciary. This distinction is crucial for several reasons:



1. **Separation of Powers:** The U.S. Constitution establishes a clear separation of powers among the legislative, executive, and judicial branches. The EPA, as an executive agency, is primarily tasked with enforcing laws, not interpreting them in a judicial capacity. This distinction is fundamental to the American system of checks and balances. Both the judge in this case and the attorneys for the EPA acknowledged troubles with terms and distinctions in contract law highlighting the inability of the executive agency to interpret laws in a judicial capacity during the hearing.
2. **Judicial Review and Due Process:** The role of the judiciary in reviewing executive actions is a cornerstone of ensuring due process. The EPA's actions, especially in complex cases involving environmental regulations, must be subject to judicial review to ensure fairness and legality. As established in landmark cases like *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the role of the judiciary in interpreting laws is clear.
3. **EPA's Regulatory Limits:** The EPA's regulatory powers are bound by the statutes from which they derive, such as the CWA. As held in cases like *Sackett v. EPA*, 566 U.S. 120 (2012), the Supreme Court has emphasized the need for clarity in the EPA's regulatory actions and the limits of its authority. At hearing attorneys for the EPA did not provide any evidence or testimony that would specifically grant them this authority.
4. **CWA's Statutory Limits:** The CWA, while providing the EPA with enforcement capabilities, does not grant it judicial powers. The Act primarily addresses water pollution prevention and control, setting standards and permitting processes, but it does not empower the EPA to make judicial determinations.
5. **The EPA's attempt to extend its authority beyond regulatory enforcement into realms akin to judicial interpretation and application raises significant legal concerns.** This overreach not only blurs the lines of constitutional separation of powers but also potentially violates the principles of due process and judicial oversight.

#### **IV. Conclusion**

In light of the *Sackett v. EPA* decision, which underscores the need for statutory clarity and adherence to due process, alongside the testimonies and evidence presented, we assert that the EPA's allegations against the Respondents are substantively unfounded. The EPA has not only demonstrated procedural shortcomings and overreach but has also notably failed to fulfill the

burden of proof requirements, a fundamental aspect of any enforcement action. This failure is evident in their shifting investigative focus and in their apparent coaching and manipulation of witness testimonies, which undermines the integrity of the evidence presented. Furthermore, the principle of estoppel, brought forth by contradictory government statements, adds weight to our argument that the charges against Nathan Pierce and Adamas Construction and Development Services PLLC are unjustified. Considering these factors, along with the Respondents' demonstrated compliance with the Clean Water Act, we strongly advocate for a reevaluation of the charges. We respectfully request the dismissal of all allegations against the Respondents, underscoring the necessity for a fair and just legal process.

Because its conduct has been oppressive and dishonest, the United States government by and through the USEPA should be ordered to pay the reasonable attorney's fees, costs and lost wages incurred defending this suit. Attorney fees have been awarded to other defendant for these very same reasons in other case involving the USEPA and they should be awarded to the Defendant in this case. [United States v. Lipar, No. H-10-1904, 2015 U.S. Dist. LEXIS 115821 \(S.D. Tex. Aug. 30, 2015\)](#)

RESPECTFULLY RESUBMITTED this 1<sup>st</sup> day of December 2023.

/s Nathan Pierce  
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CERTIFICATE OF SERVICE

I certify that the foregoing Respondents Supplemental Prehearing Exhibits, Docket No. CWA-07- 2019-0262, has been submitted to Judge Coughlin electronically using the OALJ E-Filing System.

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Date: Friday, December 1st, 2023

/s Nathan Pierce  
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