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

IN THE MATTER OF	)	
	)	
ADAMAS CONSTRUCTION AND	)	RESPONDENTS' REPLY TO COMPLAINANT'S
DEVELOPMENT SERVICES, PLLC	)	RESPONSE TO RESPONDENTS'
	)	CROSS-MOTION FOR DEFAULT
	)	AND ATTORNEYS' FEES
	)	
	)	
	)	
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	)	
AND	)	
	)	
NATHAN PIERCE,	)	
	)	
Respondents	)	Docket No. CWA-07-2019-0262
	)	
Proceedings under Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g)	)	

RESPONDENTS'REPLY TO COMPLAINANT'S RESPONSE TO RESPONDENTS' CROSS-MOTION FOR DEFAULT AND ATTORNEYS' FEES

COMES NOW, the Respondent, Pro-Se, pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. §§ 22.1 to 22.45 and submits this Reply to Complainant's Response to Respondents' Cross- Motion for Default and Attorneys' Fees.

I. Reply to Complainant's Response to Respondents' Motion for Default and Attorneys' Fees

Respondents in-fact correctly asserts the Court should enter default judgment against Complainant, not for the Complainant requesting to supplement the Prehearing Exchange, but

for failing to promptly provide information within its control pursuant to 40 C.F.R. §22.19(f), and for operating in bad faith. While both the Consolidated Rules of Practice and the Court's Prehearing Order specifically allow for either party to supplement the Prehearing Exchange, *See* 40 C.F.R. §22.19(f); Court's Prehearing Order, Oct. 18, 2019, the parties must promptly provide that information within its control and almost 8 month from the time the EPA timestamped the document into its control on February 25, 2020, until it disclosed the document on October 26, 2020, is not, under any reasonable terms, prompt.

Although a date for the hearing has not yet been set, this document could have been used by the respondent much earlier and could have helped the respondent avoid unnecessary attorney and litigation fees.

The Complainant received this document into their control or custody and did not disclose this document with their Motion for Accelerated Decision that was filed months after the EPA received this document. The, Respondents, did not have the full opportunity to review and respond to the information presented before they had to respond to the Complainant's Motion for Accelerated Decision. It is the belief of the Respondent that the Complainant intentionally withheld this document in hopes that the Court would give them a favorable decision on their Motion for Accelerated Decision, realizing that months had passed without the court giving a favorable ruling their Motion the Complainant finally produced this document knowing a hearing would be scheduled soon.

Respondent questions why the Complainant did not attach the Affidavit of Ms. Kleffner, to the Complainant's original Motion, to earlier provide this additional information regarding why the document was supposedly not known to be in Complainant's possession until early October 2020, despite the U.S. EPA - Enforcement and Compliance Assurance Division (ECAD/Water) time stamp indicating otherwise. Also, why the Complainant did not

attach the emails or additional affidavits from the persons mentioned in Ms. Kleffners affidavit.

The affidavit from Ms. Kleffner contains information that is false or misleading on its face, in that Ms. Kleffner, states in paragraph 6, in her affidavit that, "EPA was unaware that a response was received until October 15, 2020", the EPA-ECAD time stamp clearly shows the Document was in the "possession, custody or control" of the EPA since February 25, 2020. Ms. Kleffner goes on in the next paragraph of her affidavit to explain how the document was misplaced after it was received, and time stamped by the EPA. To help determine if the EPA was in fact in possession, custody or control of the document in question the respondent would point the court to the case authority that can be found in Kickapoo Tribe of Indians v. Nemaha Brown Watershed Joint Dist. No. 7, 294 F.R.D. 610, 613 (D. Kan. 2013), wherein the court held that "[d]ocuments are deemed to be within the possession, custody or control under Rule 34 if the party has actual possession, custody or control or has the legal right to obtain the documents on demand," the Complainant was in physical possession of the document and had custody and control of said document, they time stamped the document and therefor they were aware the document was received.

The affidavit also fails to adequately explain why the Document, if misplaced, was not found during the 20 actual days or 15 business days, from the time it was received and time stamped by the ECAD/Water division on February 25th, 2020, until the office closure on March 16, 2020. The only explanation offered is "the letter was opened by an EPA office manager and mistakenly placed in the wrong bin" and "mailed reports are typically reviewed later in the year as a low priority". Again, the lack of proper protocol by the Complainant the EPA, to ensure documents are not misplaced, especially when they are addressed with special attention to a certain employee, or in times of emergency, is no excuse and does not show

good cause as to why the Complainant failed to "promptly" supplement their Prehearing Exchange. Clearly someone at the EPA office was aware of the document was received, by the EPA, to time stamp it into the EPA's custody, possession, and control.

The Complainant in the case is the USEPA, per the timestamp on the document in question, the Complainant the USEPA had this document/s in its "possession, custody or control" since February 25, 2020, and failed to promptly supplement their exchange.

Although the Complainant is unaware of any caselaw that supports Respondents' position that default should be granted under these circumstances, this does not mean the law does not clearly allow for default to be granted under these circumstances, the Respondents cites to 40 CFR §22.19 (g), that clearly states "Failure to exchange information. Where a party fails to provide information within its control as required pursuant to this section, the Presiding Officer may, in his discretion:," (1)Infer that the information would be adverse to the party failing to provide it; (2)Exclude the information from evidence; or (3)Issue a default order under § 22.17(c). Although the Complainant has exchanged the information they failed to do so promptly when the document was within its control, as the information provided only proves that Tom Robinson and D&R Disposal are the only two persons to Apply sewer sludge to the land and therefore they would be persons responsible to provide the information to the EPA, and not the respondent, this information is already adverse to the Complainant, as the document proves the same as stated above and details the less than honest answers from Tom Robinson, the respondent is not asking that it be excluded, therefor the only viable option would be for the court to issue a default order dismissing this case under § 22.17(c), pursuant to CFR §22.19 (g)(3). The court has the statutory authority and should exercise its authority to issue a default order. As the Complainant's claims or litigating position in this matter are not reasonable in facts or law and is so factually incorrect on its face, this case should be dismissed as a matter of

justice.

The actions of the Complainant certainly rise to the level of egregious circumstances, as stated above, Complainant has failed to supplement the Prehearing Exchange properly or promptly in accordance with 40 C.F.R. §22.19(f) and the Prehearing Order. This did not allow the Respondents the opportunity to properly respond to the additional evidence in the Respondents response to the Complainants Motion for Accelerated Decision and more importantly, the Court could have ruled on the Complainant's Motion without being able determine its probative value to the Parties' briefings.

Finally, regarding Respondents' request for an award of attorneys' fees, Respondents did in fact cite both statutory and the regulatory basis for their argument, as evidenced in the Respondents Brief and Cross Motion.

The Complainant incorrectly states the governing rules of practice do not allow for the award of attorneys' fees as a remedy in this matter, the court should reject this argument from the Complainant.

The Complainant also incorrectly states in their Response brief, "the Court's only" authority to award attorneys' fees is governed by the Equal Access to Justice Act, 5 U.S.C. §504, which subsequently is also applicable if the court grants an order of Default. Again, the Complainant is incorrect in their interpretation of 5 U.S.C. §504 and the statutes that govern attorney fees and costs and the Court should reject their arguments.

28 U.S.C. § 2412(b) provides that "in any civil action brought by or against the United States" or any U.S. agency or official, the government "shall be liable" for attorney's fees "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." Section 2412(b) thus expands any existing statutory and court-created exceptions to the American rule to apply to the federal

government as they would to a private party. Second, 28 U.S.C. § 2412(d) requires a court to award attorney's fees and costs to a party prevailing against the United States in a civil action, "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." The Supreme Court has interpreted the substantial justification standard to require the government to prove that its litigating position was reasonable in both fact and law. Third, 5 U.S.C. § 504 authorizes awards of attorney's fees in proceedings before an administrative agency on the same terms as Section 2412(d).

One of the most often litigated questions under the EAJA is when a litigant may be considered a "prevailing party" entitled to attorney's fees. In Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782 (1989), the Supreme Court held that a party need not prevail on all of its claims, or even on the "central issue" in the case, but only on "any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing the suit." A party also need not prevail after a full trial on the merits. The EAJA allows that, "a prevailing party other than the United States" may receive attorney's fees, while the government may not.

The respondent has incurred a large amount of attorney fees in this case and has been unable to afford their attorney fees, as such they have been required to start representing themselves, Pro Se, with limited scope representation from their attorney of record as of this filing.

For these reasons, Respondent respectfully requests that the Court (1) grant Respondents' Motion for Default and Attorneys' Fees.

RESPECTFULLY SUBMITTED this 17th day of November 2020.

/s/ Nathan Pierce
Nathan Pierce
Respondent
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Email: adamas.mt.406@gmail.com

CERTIFICATE OF SERVICE

I certify that the foregoing Respondents' Reply to Complainant's Response to Respondents' Cross- Motion for Default and Attorneys' Fees, Docket No. CWA-07-2019-0262, has been submitted electronically using the OALJ E-Filing System.

A copy was sent by email to:

Attorney for Complainant:

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Date: 11/17/2020

/s/ Nathan Pierce
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