**UNITED STATES**
**ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

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| **IN THE MATTER OF** | ) | |
| | ) | |
| **ROGER BARBER, d/b/a** | ) | **DOCKET NO. CWA-05-2005-0004** |
| **BARBER TRUCKING** | ) | |
| | ) | |
| **RESPONDENT** | ) | |

# INITIAL DECISION

Pursuant to Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g), Roger Barber d/b/a Barber Trucking is assessed a civil administrative penalty of $60,000 for violations of Section 405(e) of the CWA, 33 U.S.C. § 1345(e), and its implementing regulations found at 40 C.F.R. part 503, "Standards for the Use or Disposal of Sewage Sludge."

**Issued:** May 11, 2007

**Before:** Barbara A. Gunning
Administrative Law Judge

**Appearances:**

For Complainant: Eaton Weiler, Esquire
Jeffrey A. Cahn, Esquire
U.S. EPA, Region V
Office of Regional Counsel
77 W. Jackson Boulevard (C-14J)
Chicago, IL 60604-3590

For Respondent: Roger Barber, *pro se*
119 S. High Street
Mt. Orab, OH 45154

## I. PROCEDURAL HISTORY

This civil administrative penalty proceeding arises under the authority of Section 309(g) of the of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g). This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), 40 C.F.R. part 22.

On April 28, 2005, the United States Environmental Protection Agency ("EPA") Region V ("Complainant" or "the Region") filed and served a Complaint (subsequently amended) on Roger Barber d/b/a Barber Trucking[1/] ("Respondent" or "Barber Trucking").[2/] The Region alleges that Respondent acted in violation of Section 405(e) of the CWA, 33 U.S.C. § 1345(e), entitled "Manner of Sludge Disposal," and the implementing regulations set forth at 40 C.F.R. part 503, entitled the "Standards for the Use or Disposal of Sewage Sludge." The Region claims that Respondent, through his business operations, unlawfully land disposed domestic septage on his property in Mt. Orab, Ohio, and failed to develop and maintain the appropriate

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[1/] Barber Trucking is a general partnership comprised of Roger Barber and William Barber. Compl. Ex. 11.

[2/] Complainant has amended the April 28, 2005 Complaint twice during this proceeding. First, on July 25, 2005, Complainant submitted a Motion to Amend Complaint by Interlineation Instanter and File Documentation of Public Notice ("Motion to Amend Complaint"), with the proposed amendment ("First Amended Complaint") attached. The First Amended Complaint proposed essentially ministerial modifications and was unopposed. The Complaint was amended by Order dated August 25, 2005. *See* Order Granting Amendment of Complaint at 5. Second, on September 23, 2005, Complainant submitted a Motion to Amend Complaint Instanter ("Second Motion to Amend Complaint"), with the proposed amendments ("Second Amended Complaint") attached. By Order dated October 19, 2005, I granted this motion and received the Second Amended Complaint into the record. Order Granting Complainant's Second Motion to Amend the Complaint. The Second Amended Complaint addresses factual inconsistencies relating to the alleged amount of domestic septage/sewage sludge applied, as alleged in Paragraphs 38, 40, 50, 51, and 66 the Complaint, and corrects "typographical error[s]" that incorrectly cited a regulation mentioned in Count I, as reflected in Paragraphs 48, 49, and 51. Respondent did not file an amended answer to address the Second Amended Complaint. Hereinafter, all references to the "Complaint" shall refer to Complainant's Second Amended Complaint.

records for such dumping activities. The Region seeks a civil administrative penalty of $60,000. Respondent is a *pro se* litigant in this matter.

The Complaint specifically asserts four counts of alleged violations for the period from May 2000 to mid-April 2002. Count I alleges Violation of Requirement to Comply with Vector Attraction Reduction Requirements for Domestic Septage - 40 C.F.R. § 503.15(d). Count II alleges Failure to Comply with Annual Application Rate Pollution Limits - 40 C.F.R. § 503.12(c), and Failure to Develop and Maintain Information on the Nitrogen Requirement - 40 C.F.R. § 503.17(b)(4). Count III alleges Failure to Develop and Maintain Certification Statement - 40 C.F.R. § 503.17(b)(6). Count IV alleges Failure to Develop and Maintain a Description of How the Vector Reduction Attraction Requirements Are Met - 40 C.F.R. § 503.17(b)(8).

Respondent submitted his Written Answer and Request for a Hearing ("Answer"), dated June 1, 2005, and subsequently filed two amendments to the Answer: one dated July 11, 2005 ("First Amended Answer"),[3/] and the other dated September 9, 2005 ("Second Amended Answer").[4/]

Shortly after Respondent submitted his initial Answer, Respondent filed a pleading dated July 14, 2005, entitled, "Third Party Complaint in Proceeding to Assess a Class II Civil Penalty Pursuant to Section 309(lg) [sic] of the Clean Water Act, 33USC & 1319(g)" ("Respondent's Third Party Complaint"). Respondent sought to implead both the Brown County Health Department

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[3/] Respondent submitted his July 11, 2005 Response for a More Definite Answer ("First Amended Answer") in response to the Region's July 7, 2005 Motion to Strike Portions of Respondent's Answer and to Deem Factual Allegations Admitted or, in the Alternative, Motion for a More Definite Answer ("Motion for a More Definite Answer").

[4/] Later, Respondent submitted his September 9, 2005 second Response for a More Definite Answer ("Second Amended Answer") in accordance with my August 25, 2005 Order on Complainant's Motion to Strike Portions of Respondent's Answer and to Deem Factual Allegations Admitted or, in the Alternative, Motion for a More Definite Answer ("Order on Complainant's Motion for a More Definite Answer"), which ruled that Respondent's amended answers to the factual allegations contained in Paragraphs 38, 50, 69, 73, and 77 of the Complaint were still ambiguous and required further clarification. *See* Order on Complainant's Motion for Accelerated Decision on Liability at 1.

("BCHD") and the Southwestern Ohio District of EPA ("OHEPA") into the matter before me. Respondent contended that as he took all actions under BCHD's and/or OHEPA's directions and in accordance with their guidelines, these entities were primarily responsible and liable for the violations alleged in the Complaint. Finding that the Region did not name either the BCHD or OHEPA as parties to the Region's Complaint, and that the Rules of Practice do not provide for third party complaints in administrative proceedings, by Order dated August 16, 2005, I rejected Respondent's Third Party Complaint as beyond the scope of authority granted to this Tribunal and Respondent. Order Rejecting Respondent's Third Party Complaint at 2-3.

On August 25, 2005, Complainant filed a Motion for Accelerated Decision on Liability for Each Violation Alleged in the Complaint ("Complainant's Motion for Accelerated Decision on Liability"). Respondent filed a one-page narrative Response to Complainant's Motion for Accelerated Decision on Liability, which is dated September 9, 2005. On September 23, 2005, Complainant submitted the following three pleadings: Reply Brief in Support of its Motion for Accelerated Decision on Liability ("Complainant's Reply Brief for Accelerated Decision on Liability"); Motion to Deem Specific Factual Allegations Admitted, and; Motion to Amend the Complaint Instanter ("Second Motion to Amend the Complaint"), attached to which was the newly amended Complaint ("Second Amended Complaint").

An Order on Complainant's Motion for Accelerated Decision on Liability was entered on December 7, 2005. Order on Complainant's Motion for Accelerated Decision on Liability. I granted accelerated decision in favor of Complainant on Count I (failure to comply with the vector attraction requirements as mandated by 40 C.F.R. § 503.15(d)) and on the portion of Count II alleging failure to comply with the annual application rate pollution limits stated in 40 C.F.R. § 503.13(c), in violation of 40 C.F.R. § 503.12(c). However, I denied accelerated decision as to the portion of Count II alleging failure to develop, and retain for five years, information on the nitrogen requirement for the vegetation grown on the Site during a 365-day period (the "Nitrogen Requirement"), pursuant to 40 C.F.R. § 503.17(b)(4), and I denied accelerated decision on Count III (failure to develop and maintain a certification statement required by 40 C.F.R. § 503.17(b)(6)), and Count IV (failure to develop and maintain a description of how the vector attraction reduction requirements for domestic septage are met, pursuant to 40 C.F.R. § 503.17(b)(8).

In adjudicating Complainant's Motion for Accelerated

Decision on Liability on part of Count II and on Counts III and IV, I expressly took Respondent's *pro se* status into account. Order on Complainant's Motion for Accelerated Decision on Liability at 12-14. Moreover, given that Complainant did not attach any documents to support the allegations in its Motion for Accelerated Decision on Liability, this Tribunal's ruling turned on whether Respondent had clearly admitted liability in his pleadings.[5/] *Id.* Even if a judge believes that summary judgment is technically proper upon review of the evidence in a case, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979). Accordingly, I held that Complainant had not sustained its burden to prove that there was no genuine issue of material fact for Counts III and IV and the portion of Count II alleging failure to develop and maintain information on the Nitrogen Requirement.

Following the parties' submission of their prehearing exchanges in this matter, an Order Scheduling Hearing was issued on December 20, 2005. That Order directed the parties to file a joint set of stipulated facts, exhibits, and testimony by April 7, 2006. The hearing was scheduled to begin on Tuesday, April 25, 2006 in Cincinnati, Ohio.

On January 10, 2006, Respondent submitted a Motion for Dismissal ("Respondent's Motion for Dismissal") that was simply a one sentence request for dismissal without any supporting argument:

> Respondent makes a motion as outlined in 40 C.F.R. 22.20 Code of Federal Re[g]ulations to request dismissal of ½ of Count II, Count III, and Count IV on the basis of failure to establish a prima facie case or other grounds

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[5/] The Order on Complainant's Motion for Accelerated Decision on Liability emphasizes that a motion for accelerated decision is akin to a motion for summary judgment, as the party filing the motion (i.e., the "movant") has the burden of showing that no genuine issue of material fact exists. Order on Complainant's Motion for Accelerated Decision on Liability at 2-4. Furthermore, it explains that in considering such a motion, the Presiding Officer must construe the evidentiary material and reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *Id.* at 2. Summary judgement on a matter is inappropriate when contradictory inferences may be drawn from the evidence. *Id.* at 3.

which show no right to relief on the part of the complainant.

Complainant's Response Objecting to Respondent's Motion for Dismissal, submitted January 23, 2006, correctly noted that Respondent's Motion for Dismissal failed to point to any defect in the Complaint or any other "grounds which show no right to relief on the part of . . . [C]omplainant." Complainant's Response Objecting to Respondent's Motion for Dismissal at 3 (quoting 40 C.F.R. § 22.20(a)). Furthermore, Complainant pointed out that Respondent's Motion for Dismissal failed to even specify on which "½ of Count II" Respondent sought dismissal, albeit it was logical to assume that Respondent sought dismissal of that portion of Count II that was denied accelerated decision (i.e., failure to develop, and retain for five years, information on the Nitrogen Requirement). In an Order dated February 16, 2006, I denied Respondent's Motion for Dismissal, noting Respondent's failure to challenge the factual allegations of the Complaint or to show that such allegations do not prove the violations of the CWA. Order Denying Motion to Dismiss at 3.

On February 17, 2006, Complainant filed an Initial Joint Set of Stipulated Facts, Exhibits, and Testimony ("Initial Set of Stipulations"),[6/] a Motion in Limine to Prohibit the Introduction of Additional Facts, Testimony, or Exhibits Related to the Matter of Respondent's Ability to Pay ("Motion in Limine"), and a Withdrawal of Complainant's Motion for Discovery Related to Respondent's Ability to Pay ("Withdrawal of Complainant's Motion

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[6/] The Initial Set of Stipulations provides as follows:

> 1. The Parties stipulate that Roger Barber d/b/a Barber Trucking is financially able to pay the proposed penalty of $60,000. To do so may require Mr. Barber to either: 1) pay the penalty over time, 2) secure a loan for a portion of the penalty to pay the penalty in one lump sum, or 3) utilize Mr. Barber's existing line of credit for a portion of the penalty to pay the penalty in one lump sum.
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> 2. The Parties stipulate that no further facts, exhibits or testimony related to Mr. Barber's ability to pay the proposed penalty, beyond those stipulated facts, will be introduced at the hearing.

for Discovery").[7] By its Motion in Limine, Complainant sought an order prohibiting the introduction of any additional facts, exhibits, or testimony related to the matter of Respondent's ability to pay beyond those contained in the Initial Set of Stipulations.[8] In view of the stipulations between the parties, I granted Complainant's unopposed Motion in Limine and ordered the withdrawal of Complainant's Motion for Discovery, by Order dated March 2, 2006. Order on Complainant's Motion in Limine at 2.

On March 1, 2006, Complainant filed its Second Motion for Partial Accelerated Decision on Liability ("Second Motion for Accelerated Decision on Liability"), which included a Memorandum and the "Declaration of Valdis Aistars," an environmental engineer in EPA Region V's Water Enforcement and Compliance Assurance Branch (executed March 1, 2006).[9] Respondent responded to the Second Motion for Accelerated Decision on Liability with a document captioned as, "Motion Opposing Petitioner's Motion to Reconsider" ("Respondent's Motion Opposing Complainant's Second Motion for Accelerated Decision on Liability").[10] On March 28, 2006, Complainant filed a document

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[7] Complainant's Motion for Discovery Related to Respondent's Ability to Pay was filed on January 27, 2006.

[8] Complainant stated that Respondent did not oppose the proposed order in limine. Motion in Limine at 2.

[9] In support of that Second Motion For Accelerated Decision on Liability, Complainant argued that its First Motion for Accelerated Decision on Liability was filed prior to the prehearing exchanges, making it more akin to a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) than a motion for accelerated decision. Additionally, Complainant argued that Mr. Aistars' affidavit, together with other documents and facts within the then recently-filed prehearing exchanges, provided greater support to the Second Motion for Accelerated Decision on Liability. Complainant further contended that Respondent's prehearing exchange provided neither information nor documents to establish compliance with the applicable statutory and regulatory requirements, and that Respondent's Answers and the narrative in Respondent's prehearing exchange constituted admissions of failure to comply with the applicable requirements.

[10] In that document, Respondent stated that this Tribunal already issued a ruling on accelerated decision, and he contended that the reasons stated in Complainant's Second Motion for Accelerated Decision on Liability are insufficient to warrant (continued...)

entitled, "Reply of the United States Environmental Protection Agency in Support of Second Motion for Partial Accelerated Decision on Liability" ("Complainant's Reply in Support of Second Motion for Accelerated Decision").[11/]

An Order dated April 12, 2006 regarded Complainant's Second Motion for Accelerated Decision on Liability as a motion for reconsideration. Order Denying Complainant's Second Motion for Accelerated Decision at 3. In making this designation, I noted my authority to adjudicate all issues despite the *pro se* litigant's relatively minor deviation from the response period provided for by the Rules of Practice. *Id.* I also expressly declined to re-analyze arguments previously made and resolved in the Order on Complainant's Motion for Accelerated Decision on Liability, noting that the documents submitted in support of the Second Motion for Accelerated Decision predated or were available prior to Complainant's first Motion for Accelerated Decision on Liability. Order Denying Complainant's Second Motion for Accelerated Decision at 3-4. Ultimately, Complainant's Second Motion for Accelerated Decision on Liability was denied, as questions of fact remained and such ruling would not inflict undue prejudice upon Complainant.

By oral order, memorialized in an Order on Motions dated April 12, 2006, I granted Complainant's motions for leave to file a first, a second, and a third supplement to its prehearing exchanges. Additionally, I granted both Complainant's and Respondent's requests for the subpoena of witnesses.

An evidentiary hearing was held from April 25 through 27, 2006 in Cincinnati, Ohio.[12/] Both parties were present at the

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[10/] (...continued)
reconsideration of a ruling already made. The certificate of service for Respondent's "Motion Opposing Petitioner's Motion to Reconsider" stated it was mailed to the Regional Hearing Clerk, Complainant, and this Tribunal by regular mail on March 23, 2006.

[11/] Complainant's reply stated, *inter alia,* that Respondent's Motion to Reconsider had not been filed with the Regional Hearing Clerk as of March 28, 2006, and contends it was not served on Complainant's counsel until eleven days after it was due.

[12/] It should be noted that the hearing transcript for this matter was prepared in a manner that does not reflect continuous, consecutive pagination throughout the course of the hearing. Instead, each day of the hearing is recorded in a separate volume,
(continued...)

hearing and had the opportunity to put forward evidence and to cross-examine witnesses.[13] During the hearing, Complainant proffered as evidence a sworn statement from Aaron Shultz based on Mr. Shultz's "Affidavit of Unavailability" and pursuant to 40 C.F.R. § 22.22(d). Compl. Ex. 92, 103. This proposed evidence was received into the record contingent upon Respondent's ability to submit interrogatories to Mr. Shultz and Mr. Shultz's responsibility to answer the interrogatories by May 26, 2006. Hr'g Tr. vol. 1, 25-29; Hr'g Tr. vol. 3, 263-64. Respondent mailed his interrogatories, entitled "Questions for Aaron Shultz," on May 8, 2006, and Mr. Shultz submitted his answers, entitled "In Response to Mr. Barber's 'Questions for Aaron Shultz,'" on May 23, 2006. Complainant submitted a motion, dated May 25, 2006, requesting: (1) that Respondent's interrogatories, entitled "Questions for Aaron Shultz," be received into the record as Respondent's Exhibit 12 and that Mr. Shultz's answers, entitled "In Response to Mr. Barber's 'Questions for Aaron Shultz,'" be received into the record as Complainant's Exhibit 105; (2) that this Tribunal deem the conditions to admit Complainant's Exhibit 92 fully satisfied; and (3) that this Tribunal issue an order formally closing the record in this matter. Complainant's aforementioned three motions were granted in an Order Closing Record, dated June 1, 2006.

On August 21, 2006, Complainant filed Complainant's Motion to Conform the Transcript to the Actual Testimony pursuant to 40 C.F.R. § 22.25.[14] Respondent did not respond to Complainant's

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[12] (...continued)
each beginning at page 1. Thus, this Initial Decision references the April 25, 2006 transcript record as "Hr'g Tr. vol. 1," the April 26, 2006 transcript record as "Hr'g Tr. vol. 2," and the April 27, 2006 transcript as "Hr'g Tr. vol. 3."

[13] Complainant has the burdens of presentation and persuasion in establishing that the alleged violations occurred and that the $60,000 penalty sought is appropriate. 40 C.F.R. §22.24(a). Similarly, Respondent has the burden of presenting and proving any defense to the allegations set forth in the Complaint and any response or evidence with respect to the appropriate penalty. *Id.* The Administrative Law Judge ("ALJ"), as the Presiding Officer, is responsible for determining "[e]ach matter of controversy . . . upon a preponderance of evidence." 40 C.F.R. §22.24(b).

[14] In addition to name corrections throughout all three volumes of the hearing transcript of record, Complainant's Motion to Conform the Transcript to the Actual Testimony requests changes (continued...)

motion. That Motion to Conform the Transcript to the Actual Testimony is hereby **GRANTED**, and the record of proceeding for the evidentiary hearing shall be changed accordingly.[15/]

Respondent and Complainant each filed post-hearing briefs[16/] and post-hearing reply briefs.[17/] On October 13, 2006, Complainant filed a Motion to Strike Assertions of "Fact" Outside the Record Contained in Respondent's Post-Hearing Reply Brief ("Complainant's Motion to Strike Assertions of 'Fact'"). As discussed in detail, *infra*, Complainant's Motion to Strike Assertions of "Fact" is hereby **GRANTED, in part, AND DENIED, in part**.

All Orders previously entered in this proceeding are incorporated by reference into this Initial Decision. For the reasons both previously stated and discussed below, having fully considered the record in the case, the arguments of counsel and Respondent, and being fully advised, I find Respondent to be in violation of the CWA as alleged in Counts I through IV of the Complaint. For these violations, Respondent shall pay a civil administrative penalty in the amount of $60,000.

## II. RULING ON COMPLAINANT'S MOTION TO STRIKE

As noted *supra*, after the filing of the post-hearing briefs, Complainant filed Complainant's Motion to Strike Assertions of "Fact," contending Respondent's post-hearing reply brief alleged

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[14/] (...continued)
specifically within all of Volume 1 of the Hearing Transcript and within pages 6 through 186 of Volume 2 of the Hearing Transcript. No specific line changes were requested within Volume 3.

[15/] Thus, all citations to the transcript in this Order refer to the transcript as amended to conform to the actual testimony.

[16/] The Regional Hearing Clerk for EPA Region V ("Region V RHC") received Complainant's Post-Hearing Brief of the United States Environmental Protection Agency ("Complainant's Post-Hearing Brief") on September 20, 2006. The Region V RHC also received Respondent's Final Answer Brief ("Respondent's Post-Hearing Brief") on September 20, 2006.

[17/] The Region V RHC received Complainant's Post-Hearing Reply Brief on October 3, 2006. The Region V RHC received Respondent's Answer to Final Brief ("Respondent's Post-Hearing Reply Brief") the following day.

facts outside the record. Respondent did not respond to Complainant's motion. Complainant's Motion to Strike Assertions of "Fact" is hereby **GRANTED, in part, AND DENIED, in part.**

Although the Rules of Practice make no express provision for motions to strike in civil administrative proceedings, the Environmental Appeals Board ("EAB") has ruled such motions permissible. *See, e.g., Wego Chemical & Mineral Corporation*, 4 E.A.D. 513 (EAB, 1993) (upholding ALJ's denial of motion to strike). *See also Asbestos Specialists, Inc.*, 4 E.A.D. 813 (EAB 1993) (approving reliance on Federal Rules of Civil Procedure for guidance under the Rules of Practice). Courts generally disfavor motions to strike and will deny them unless the moving party can show the pleadings are impertinent or the claim or defense is legally insufficient. *See Environmental Protection Services, Inc.*, Docket No. TSCA-03-2001-0331, 2003 EPA ALJ LEXIS 13, *1 (ALJ February 28, 2003); General Motors Automotive-North America, Docket No. RCRA-05-2004-0001, 2005 EPA ALJ LEXIS 31, *5 (ALJ June 8, 2005); *Dearborn Recycling Co.*, Docket No. RCRA-05-2001-0019, 2003 EPA ALJ LEXIS 10, *6 (ALJ January 3, 2003). Motions to strike are generally disfavored "because striking a portion of the pleading is a drastic remedy and because such motions are regarded as a dilatory tactic." *Dearborn Recycling Co.*, 2003 EPA ALJ LEXIS 10, *6-7 (internal citations omitted).

Here, Complainant moves to strike several assertions of "fact" contained in Respondent's Reply Brief. Compl. Motion to Strike at 2. These assertions are discussed in numbered paragraphs and are ruled upon as such, in turn.

**A. Assertions in Paragraph 1**

Complainant first moves to strike Respondent's assertion that: "Mr. Waits is the one that originally approved both sites, telling both Mr. Wardlow and myself they would inspect and keep us in compliance." Reply Br. at 1. Complainant argues that "[w]ithout agreeing that Mr. Waits 'approved' dumping at the site, there is no evidence in the record (and Respondent does not cite to any evidence) that Mr. Waits informed Respondent that Mr. Waits would keep Barber Trucking in 'compliance.'" Motion to Strike at 2. Complainant is persuasive, and this motion is **GRANTED.**

**B. Assertions in Paragraph 2**

Complainant next moves to strike Respondent's assertion that: "[s]teps were taken at the site under the direction of sanitarian Jeff Pulsely, under Director Jerry Waits, to ensure

septage stayed on the site these steps included mounting dirt to ensure no run off occurred and evidence showed that the steps taken succeeded." Reply Br. at 1. Complainant argues that "[w]ithout agreeing to the remainder of the statement, there is no evidence in the record (and Respondent does not cite to any evidence) that Mr. Pulsely directed Respondent to 'moun[d] dirt to ensure no run off occurred.'" Motion to Strike at 2-3. Complainant is persuasive, although I note that Respondent did testify he created a mound of dirt in an attempt to contain the septage. Thus, this motion is **GRANTED** with that qualification.

**C. Assertions in Paragraphs 3, 4, 5, 6, 7, 8**

In paragraph 3, Complainant moves to strike Respondent's assertion that: "[t]he fact that the Brown County Health Department Board was informed at least once about problems associated in using a land application site year round is undeniable." Reply Br. at 2. Complainant argues that "[w]ithout agreeing to the inference that there were 'problems associated in using a land application site year round, there is no evidence in the record (and Respondent does not cite to any evidence) that the Brown County Board of Health was 'informed about the problems associated in using a land application site year round.'" Motion to Strike at 3. Complainant is not persuasive, as this statement is more appropriately characterized as an argument rather than a statement of fact. This motion is **DENIED**.

In paragraph 4, Complainant moves to strike Respondent's assertion that: "[t]his problem is still going on in most counties to our East, all rural counties without a city sewage plant big enough to accept sewage are[,] in wetter times of the year[,] unable to follow Rule 503, this includes Highland County right next door to Brown County." Reply Br. at 2. Complainant argues that "[t]here is no evidence in the record (and Respondent does not cite to any evidence) to support the assertions of 'fact' that it is not possible to comply [with] part 503 during wetter times of the year, or that 'this problem is still going on' in other counties'" Motion to Strike at 3. Complainant is not persuasive. There is some evidence in the form of Respondent's testimony and Mr. Griffith's testimony to support these assertions of fact. This motion is **DENIED**.

In paragraph 5, Complainant moves to strike Respondent's assertion that: "I was told by the people that licensed and approved me that this problem has always existed and until a plant was located to accept Brown County sewage no other answer existed." Reply Br. at 2. Complainant argues that "[t]his assertion of 'fact' simply finds no basis in the record and

Respondent does not cite to any evidence in the record." Motion to Strike at 3. Complainant is not persuasive. There is some evidence in the form of Respondent's testimony to support this assertion of fact. This motion is **DENIED**.

In paragraph 6, Complainant moves to strike Respondent's assertion that: "as the testimony proved[,] local health departments know nothing of Rule 503." Reply Br. at 2. Complainant argues that "[w]ithout agreeing that some individuals at some health departments are not informed of the requirement of part 503, there is no evidence in the record (and Respondent does not cite to any evidence) that local health departments in the area, or in general, are not aware of the requirements of part 503." Motion to Strike at 4. Complainant is not persuasive. There is some evidence in the form of Respondent's testimony, as well as the testimony of several other witnesses, to support this assertion of fact. This motion is **DENIED**.

In paragraph 7, Complainant moves to strike Respondent's assertion that: "I think some phone calls to Highland, Clermont, Adams, and all Southwestern County Health Department would end the arguments about who has received information and knows about Rule 503." Reply Br. at 2-3. Complainant argues that "to the extent Respondent is attempting to make a factual assertion about the knowledge of individuals in the named health departments, this factual assertion finds no basis in the record." Motion to Strike at 4. Complainant is not persuasive, as this statement is more appropriately characterized as an argument rather than a statement of fact. This motion is **DENIED**.

In paragraph 8, Complainant moves to strike Respondent's assertion that: "most counties to our East, including Highland, are land applying year round unable to cover their sewage the same as the two Brown County sites were, unaware of Rule 503 which could be followed for a few dollars per load, if they were informed about it." Reply Br. at 3-4. Complainant argues that "[w]ithout agreeing that Respondent was unable to cover septage at the Barber Trucking disposal site, and without agreeing that part 503 could be 'followed for a few dollars per load,' there is no evidence in the record that septage haulers, in '[m]ost counties to our East, including Highland, [who] are land applying year round [are] unable to cover their sewage.'" Motion to Strike at 4. Complainant is not persuasive, as this statement is more appropriately characterized as an argument rather than a statement of fact. This motion is **DENIED**.

## III. DISCUSSION

## A. Statutory and Regulatory Background

Congress enacted the Clean Water Act, 33 U.S.C. §§ 1251-1387, in 1972, as amended, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a). Section 405 of the CWA governs the disposal and use of sewage sludge. Specifically, Section 405(e) of the CWA provides:

> The determination of the manner of disposal or use of sludge is a local determination, except that it shall be unlawful for any person to dispose of 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 [CWA § 405(d)], except in accordance with such regulations.

33 U.S.C. § 1345(e).

In Section 405(d) of the CWA, Congress directed the EPA Administrator to develop and publish regulations establishing guidelines for the use and disposal of sludge. Section 405(d) provides that "such regulations shall: (A) identify uses for sludge, including disposal; (B) specify factors to be taken into account in determining the measures and practices applicable to each such use or disposal . . .; [and] (C) identify concentrations of pollutants which interfere with each such use or disposal." 33 U.S.C. § 1345(d)(1). Additionally, Congress noted that the management practices and criteria devised in the EPA regulations shall adequately "protect public health and the environment from any reasonably anticipated adverse effects of each pollutant." 33 U.S.C. § 1345(d)(2)(D).

Pursuant to the authority granted in Section 405(d) of the CWA, the EPA promulgated "Standards for the Use or Disposal of Sewage Sludge" at 40 C.F.R. part 503 ("Part 503 regulations") on February 19, 1993. Standards for the Use or Disposal of Sewage Sludge, 58 Fed. Reg. 9248 (February 19, 1993). The requirements contained within the Part 503 regulations regarding frequency of monitoring, recordkeeping, and reporting became effective on July 20, 1993. 40 C.F.R. § 503.2(c). The remainder of the Part 503 regulations became effective the following year, February 19, 1994, excepting situations where compliance with the operational standards required construction of new pollution control facilities. 40 C.F.R. § 503.2.

The Part 503 regulations establish standards for sewage sludge that is applied to the land, managed through surface disposal, or fired in a sewage sludge incinerator. In crafting the regulations, the EPA Administrator recognized that "use and disposal of sewage sludge is not new in this country . . . sewage sludge is a valuable resource, [as] [t]he nutrients and other properties commonly found in sludge make it useful as a fertilizer and a soil conditioner . . . on agricultural lands, in forests, for landscaping projects, and to reclaim strip-mined land." 58 Fed. Reg. at 9249. At the same time, however, "proper disposal of sewage sludge is important because contaminated or improperly handled sludge 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 . . . lead[ing] to environmental degradation of the land and air . . . [also] surface and ground water and wetlands, as well as human health." 58 Fed. Reg. at 9250. The EPA Administrator noted "[v]irtually all sewage sludge contains nutrients (e.g., nitrogen, phosphorus) and significant numbers of pathogens (e.g., bacteria, viruses, protozoa, and eggs of parasitic worms)." 58 Fed. Reg. at 9256. The EPA Administrator continued this discussion, pointing out that "[t]he major human health, environmental, and aesthetic factors of concern in the land application of sewage sludge are related to pathogens, metals and persistent organic chemicals content, and odors." 58 Fed. Reg. at 9258. Thus, although EPA policy encourages the beneficial use of sewage sludge, including domestic septage, such use must be regulated to adequately protect human health and the environment.

The Part 503 regulations highlight three of EPA's particular concerns surrounding the use and disposal of sewage sludge: (1) regulating the presence of pollutants in sludge that potentially contaminate ground and surface waters (e.g., toxic pollutants or nutrients such as nitrogen and phosphorus); (2) establishing requirements for minimizing pathogenic organisms present in sewage sludge (e.g. bacteria, viruses, protozoa, and eggs of parasitic worms); and (3) destroying or reducing the characteristics of sewage sludge that attract birds, insects, rats and other animals (so-called "vectors"), which can consequently transfer pathogens in sewage sludge to humans, spreading disease. 58 Fed. Reg. at 9255-56, 9322. Thus, to achieve these objectives, the Part 503 regulations contain numerical pollutant limits (40 C.F.R. § 503.13), instruct on management practices (40 C.F.R. § 503.14), and announce operational standards (40 C.F.R. § 503.15) "to protect human health and prevent gross abuse of the environment." 58 Fed. Reg. at 9255. Additionally, the Part 503 regulations include monitoring requirements (40 C.F.R. § 503.16), recordkeeping

requirements (40 C.F.R. § 503.17), and reporting requirements (40 C.F.R. § 503.18) specific to the method of use or disposal of sewage sludge and domestic septage.

In part, the EPA designed the Part 503 regulations with such detail to effect self-implementation of the rules and procedures contained therein. This concept is explicitly described in the preamble to the final rule, where the EPA declares:

> Section 405(e) of the CWA requires any person that uses or disposes of sewage sludge generated by a treatment works to comply with part 503 standards. Realistically, the Agency cannot issue permits to every user of sewage sludge. Therefore, primary responsibility, and liability, is placed on treatment works for ensuring that sewage sludge is disposed in accordance with the rule's requirements. The final part 503 rule is designed to be self-implementing, and therefore, clearly spells out how the requirements apply to persons using or disposing of sewage sludge . . . the rule assumes that simple instructions on proper use will be followed.

58 Fed. Reg. at 9252. The final regulations cover entities such as publicly and privately owned treatment works, as well as domestic septage haulers. 58 Fed. Reg. at 9254.

**B. Jurisdiction**

Section 309(g) of the CWA grants the EPA Administrator authority to commence a civil administrative action to assess a civil penalty "[w]henever on the basis of any information available - the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or **1345** of [the CWA]." 33 U.S.C. § 1319(g)(emphasis added). Pursuant to 40 C.F.R. § 22.1(a)(6), the Rules of Practice "govern administrative adjudicatory proceedings for the assessment of any penalty under section[] 309(g) . . . of the Clean Water Act, as amended." Further, the Rules of Practice grant an ALJ, such as myself, jurisdiction to preside in an administrative adjudication until an initial decision becomes final or is appealed. 40 C.F.R. § 22.4(c).

Section 405 of the CWA regulates the use and disposal of sewage sludge. As noted above, Section 405(e) of the CWA makes it "unlawful for any person to dispose of 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 [CWA § 405(d)], except in accordance with such regulations." 33 U.S.C. 1345(e). Pursuant to Section 405(d) of the CWA, the EPA promulgated "Standards for the Use or Disposal of Sewage Sludge" at 40 C.F.R. part 503. Thus, the CWA grants the EPA jurisdiction to bring a civil administrative proceeding for any violations of 40 C.F.R. part 503.

In this matter, the Region alleges four counts of violations. Count I alleges Violation of Requirement to Comply with Vector Attraction Reduction Requirements for Domestic Septage - 40 C.F.R. § 503.15(d). Count II alleges Failure to Comply with Annual Application Rate Pollution Limits - 40 C.F.R. § 503.12(c), and Failure to Develop and Maintain Information on the Nitrogen Requirement - 40 C.F.R. § 503.17(b)(4). Count III alleges Failure to Develop and Maintain Certification Statement - 40 C.F.R. § 503.17(b)(6). Count IV alleges Failure to Develop and Maintain a Description of How the Vector Reduction Attraction Requirements Are Met - 40 C.F.R. § 503.17(b)(8).

**1. 40 C.F.R. Part 503 Subpart B Covers Respondent**

Within the Part 503 regulations, "Subpart B - Land Application," 40 C.F.R. §§ 503.10-.18, ("Part 503 Subpart B regulations") governs land application of sewage sludge.[18/] The Part 503 Subpart B regulations apply to "any person who prepares sewage sludge that is applied to the land, to any person who applies sewage sludge to the land, to sewage sludge applied to the land, and to the land on which sewage sludge is applied." 40 C.F.R. § 503.10(a). Thus, the Part 503 regulations assume jurisdiction over Respondent if Respondent is, at minimum, a "person who applies sewage sludge to the land."

A person is defined for Part 503 purposes as "an individual, association, partnership, corporation municipality, State or Federal agency, or an agent or employee thereof." 40 C.F.R. § 503.9(q). The term "sewage sludge" is defined as:

> a solid, semi-solid, or liquid residue generated during the treatment of domestic sewage in a treatment works. Sewage sludge

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[18/] Federal regulations govern the land disposal of sewage sludge, and since the February 19, 1993 promulgation of the Part 503 regulations, neither Ohio state regulations nor Ohio county guidance control the land disposal of sewage sludge. 59 Fed. Reg. 9248.

> includes, but is not limited to, domestic septage; scum or solids removed in primary, secondary, or advanced wastewater treatment processes; and a material derived from sewage sludge . . .

40 C.F.R. § 503.9(w).

"Domestic sewage," a term used within the definition of sewage sludge, is defined 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). Under 40 C.F.R. § 503.9(aa), a "treatment works" is "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." Also included in the definition of sewage sludge, *inter alia*, is the term "domestic septage." Under 40 C.F.R. § 503.9(f), "domestic septage" is:

> either liquid or solid material removed from a septic tank, cesspool, portable toilet, Type III marine sanitation device, or similar treatment works that receives only domestic sewage. Domestic septage does not include liquid or solid material removed from a septic tank, cesspool, or similar treatment works that receives either commercial wastewater or industrial wastewater . . .

In short, when waste and wastewater from humans or household operations enters a treatment works, the material is classified as "domestic sewage." 40 C.F.R. § 503.9(g). Then, a liquid, semi-solid or solid material forms within a treatment works from domestic sewage, and this material is "sewage sludge." 40 C.F.R. § 503.9(w). When liquid or solid material is removed from the treatment works, it is classified as "domestic septage" under 40 C.F.R. § 503.9(f). The term "sewage sludge" includes, but is not limited to, domestic septage.

As used in the Part 503 regulations, the terms "apply sewage sludge or sewage sludge applied to the land," mean "land application of sewage sludge." 40 C.F.R. § 503.9(a). The regulation at 40 C.F.R. § 503.11(h) lends clarity to the term "land application," defining it 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.

Respondent is a "person" within the meaning of 40 C.F.R. § 503.9(q), and Respondent himself admits this. First Amended Answer ¶ 16.[19/] Respondent also admits that he owns two trucks, a newer one holding 1,400 gallons and an older one holding 1,200 gallons, and that each such truck load averaged at least 600 gallons of domestic septage/sewage sludge. First Amended Answer ¶¶ 39 64; Compl. Ex. 39, 40; Hr'g Tr. vol. 2, 27; Hr'g Tr. vol. 3, 249-50. Respondent further admits that from at least May 2000 through mid-April 2002 he operated a business collecting, with his trucks, liquid or solid material from residential septic tanks. First Amended Answer ¶ 36. Septic tanks, which are used to treat domestic sewage, are "treatment works" within the meaning of 40 C.F.R. § 503.9(aa). 40 C.F.R. § 503.9(f) (examples of treatment works include septic tanks, cesspools, and portable toilets). Respondent admits that the collected liquid or solid material constituted domestic septage within the meaning of 40 C.F.R. § 503.9(f) and sewage sludge within the meaning of 40 C.F.R. § 503.9(w). First Amended Answer ¶ 37.

Respondent acknowledges that he transported sewage sludge that he emptied from residential septic tanks and ultimately disposed of it on his land located at 16607 Clements Road, Mt. Orab, Ohio (the "Site" or "Property"), from May 2000 through mid-April 2002. First Amended Answer ¶¶ 17, 40; Compl. Ex. 38, 39, 40. Indeed, Respondent admits that from May 2000 through mid-April 2002, he was a person who applied domestic septage and sewage sludge to the land within the meaning of 40 C.F.R. § 503.10(a). First Amended Answer ¶ 43.

As such, Respondent's admissions in his Answers establish that Respondent is covered by Section 405(e) of the CWA and the implementing regulations at 40 C.F.R. Part 503 that establish the Standards for the Use or Disposal of Sewage Sludge. These standards include: general requirements; pollutant limits; management practices; operational standards; pathogen and

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[19/] The Complaint identifies Respondent as Roger Barber, d/b/a Barber Trucking. Respondent submitted a 1999 U.S. Partnership Return of Income (Form 1065) for Barber Trucking and Sanitation that lists Roger L. And William E. Barber (Respondent's Father) as partners. Compl. Ex. 11. At the hearing, Respondent testified that Barber Trucking and Sanitation is now a sole proprietorship known as Barber Septic Service. Hr'g Tr. vol. 3, 237.

alternative vector attraction reduction requirements; and frequency of monitoring, recordkeeping, and reporting requirements. 40 C.F.R. § 503.1(a). More specifically in this matter, Respondent is subject to the operational standards and the recordkeeping requirements applicable to the land application of sewage sludge, as set forth in the Part 503 Subpart B regulations. 40 C.F.R. § 503.10(a).

a) Respondent is Subject to Achieving Vector Attraction Reduction Requirements for Domestic Septage Under 40 C.F.R. § 503.33

"Vector attraction" is "the characteristic of sewage sludge that attracts rodents, flies, mosquitos, or other organisms capable of transporting infectious agents." 40 C.F.R. § 503.31(k). In promulgating the regulations setting Standards for Use and Disposal of Sewage Sludge, the EPA recognized that "[v]irtually all sewage sludge contains . . . significant numbers of pathogens (e.g., bacteria, viruses, protozoa, and eggs of parasitic worms)." 58 Fed. Reg. at 9256. EPA's regulations include requirements for destroying or reducing those characteristics of sewage sludge that attract birds, insects, rats, and other animals (i.e., "vectors"). 58 Fed. Reg. at 9254. The EPA recognizes that "'[v]ector' exposure to the pathogenic organisms in sludge can cause transfer of pathogens (and consequently spread disease) from these disease vectors to humans." *Id.* Accordingly, the EPA requires measures for reducing the attraction of vectors to sewage sludge, such as destroying the odor-causing properties of sludge that lure insects and animals. *Id.*

The operational standards for pathogen and vector attraction reduction for domestic septage at 40 C.F.R. § 503.15(d) provide, "The vector attraction reduction requirements in 40 C.F.R. § 503.33(b)(9), (b)(10), or (b)(12) shall be met when domestic septage is applied to agricultural land, forest, or a reclamation site." That is, for each load of domestic septage applied to such land, the land applier must abide by one of three available methods of vector attraction reduction. First, 40 C.F.R. § 503.33(b)(9) provides, "Sewage sludge shall be injected below the surface of the land . . . [such that] [n]o significant amount of the sewage sludge shall be present on the land surface within one hour after the sewage sludge is injected."[20/] Alternatively,

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[20/] Additionally, 40 C.F.R. § 503.33(9)(iii) provides that "[w]hen the sewage sludge that is injected below the surface of the land is Class A with respect to pathogens, the sewage sludge shall (continued...)

40 C.F.R. § 503.33(b)(10) provides, "Sewage sludge applied to the land surface . . . shall be incorporated into the soil within six hours after application to or placement on the land."[21/] Finally, 40 C.F.R. § 503.33(b)(12) provides, "The pH of domestic septage shall be raised to 12 or higher by alkali addition and, without the addition of more alkali, shall remain at 12 or higher for 30 minutes."

As discussed *supra*, Respondent is subject to the Part 503 Subpart B regulations because he is a person who applies sewage sludge to the land. The Property at issue in this matter "is 16 acres of dense woods . . . ." First Amended Answer ¶ 61. *See also* Compl. Ex. 39 (Respondent notes his Site is "dense woods" and a "type of forest"), 41 (Engineer describes composition of the Site as a "woody vegetation;" Respondent inquires about county rules regarding a "younger stand of forest").[22/] Forest is defined as a tract of land thick with trees and underbrush. 40 C.F.R. § 503.11(g). Thus, Respondent, a land applier of domestic septage, must comply with the vector attraction reduction requirements for domestic septage at 40 C.F.R. § 503.33(b)(9), (b)(10), or (b)(12) when applying domestic septage to an agricultural land, forest or a reclamation site. 40 C.F.R. § 503.15(d).

b) The Annual Application Rate Pollution Limits at 40 C.F.R. § 503.12(c) apply to Respondent and Respondent Must Develop and Maintain Information on the Nitrogen Requirement of 40 C.F.R. § 503.17(b)(4)

In promulgating the regulations setting Standards for Use and Disposal of Sewage Sludge, the EPA recognized that sewage sludge contains three to five percent nitrogen. 58 Fed. Reg. at 9311. The EPA was concerned about the risks nitrogen poses to

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[20/] (...continued)
be injected below the land surface within eight hours after being discharged from the pathogen treatment process."

[21/] Additionally, 40 C.F.R. § 503.33(10)(ii) provides that "[w]hen the sewage sludge that is incorporated into the soil is Class A with respect to pathogens, the sewage sludge shall be applied to or placed on the land within eight hours after being discharged from the pathogen treatment process."

[22/] The record reflects that the 16-acre Site is also a salvage yard containing 700 junk cars plus other junk and debris. Compl. Ex. 16, 18, 39; Hr'g Tr. vol. 3, 111, 189, 232. Nonetheless, Respondent concedes that the Site is a forest, as charged in the Complaint. Complaint ¶ 61; Answer ¶ 61.

human health, such as groundwater contamination leading to "blue baby syndrome" (methemoglobinemia), and the potential it has to harm the environment. *Id.* at 9276. The EPA determined that "limiting the hydraulic loading of septage, based on the nitrogen requirements of crops of vegetation, will adequately protect the public health and the environment." *Id.* at 9308.

Furthermore, the EPA determined that "septage applied at the appropriate hydraulic loading rate will satisfy nitrogen demands for growing crops without adversely affecting surface or ground water because available inorganic nitrogen will be taken up by the crops and organic nitrogen will be released too slowly (over a period of years) to cause contamination of surface or ground waters." *Id.* That is, the EPA formulated that if sewage sludge is spread over a large enough area, the vegetation will take up the excess nitrogen contained in the sludge to protect ground and surface waters from nitrogen contamination.

The general requirements of the Part 503 Subpart B regulations provide that "No person shall apply domestic septage to agricultural land, forest, or a reclamation site during a 365 day period if the annual application rate in § 503.13(c) [pollutant limits for domestic septage] has been reached during that period." 40 C.F.R. § 503.12(c). According to 40 C.F.R. § 503.13(c), the annual application rate for domestic septage applied to agricultural land, forest, or a reclamation site shall not exceed the annual application rate calculated using the following equation:

$$AAR = \frac{N}{0.0026}$$

Under that equation, "AAR" represents the annual application rate in gallons per acre per 365-day period, and "N" represents the amount of nitrogen in pounds per acre per 365-day period needed by the crop or vegetation grown on the land ("Nitrogen Requirement"). 40 C.F.R. § 503.13(c).

Here, Respondent submits that the Nitrogen Requirement (N) on the Site is 30 pounds of nitrogen per acre per year, which would allow an AAR of 11,538 gallons per acre per year. First Amended Answer ¶¶ 59, 60; Compl. Ex. 39. I emphasize that under the Part 503 regulations, Respondent is charged with developing and retaining the Nitrogen Requirement for his Site, 40 C.F.R. § 503.17(b), and that I have not determined the correct Nitrogen Requirement or AAR. I have only confirmed the correctness of the Region's determination of the AAR based upon information Respondent provided to the EPA in his First Response to the information requests and based upon his admissions. *See* Order

Granting Complainant's Motion for Accelerated Decision on Liability. Further, neither the Region nor Respondent has disputed or contested these numerical determinations throughout the course of this proceeding.

To ensure compliance with the Nitrogen Requirement, 40 C.F.R. § 503.17(b) requires any person who applies domestic septage to agricultural land, forest, or a reclamation site to develop particular information and retain it for a period of five years. Under subsection (4) of § 503.17(b), one such piece of information is "the nitrogen requirement for the crop or vegetation grown on each site during a 365 day period" ("Record of Nitrogen Requirement"). 40 C.F.R. § 503.17(b)(4).

As noted *supra*, Respondent admits he was a person who applied domestic septage/sewage sludge to a forest within the meaning of 40 C.F.R. § 503.10(a). *See* First Amended Answer ¶¶ 43, 61; Compl. Ex. 39, 40. Thus, Respondent is subject to both the Nitrogen Requirement of 40 C.F.R. §503.12(c) and the attendant Record of Nitrogen Requirement of 40 C.F.R. § 503.17(b)(4).

c) The Requirement at 40 C.F.R. § 503.17(b)(6) To Develop and Maintain a Certification Statement Applies to Respondent

Pursuant to 40 C.F.R. § 503.17(b)(6), when domestic septage is applied to agricultural land, forest, or a reclamation site, the person who applies the domestic septage shall develop, and retain for five years, the following certification statement:

> I certify, under penalty of law, that the information that will be used to determine compliance with the pathogen requirements (insert either § 503.32(c)(1) or § 503.32(c)(2)) and the vector attraction reduction requirement in [insert § 503.33(b)(9), 503.33(b)(10), or § 503.33(b)(12)] 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.

("Record of the Certification Statement").

Again, Respondent admits he was a person who applied domestic septage/sewage sludge to a forest within the meaning of 40 C.F.R. § 503.10(a). *See* First Amended Answer ¶¶ 43, 61; Compl. Ex. 39, 40. Thus, Respondent is subject to develop, and retain for five years, a Record of the Certification Statement required pursuant to 40 C.F.R. § 503.17(b)(6).

d) Under 40 C.F.R. § 503.17(b)(8), Respondent Must Develop and Maintain a Description of Meeting the Vector Attraction Reduction Requirements

Pursuant to 40 C.F.R. § 503.17(b)(8), when domestic septage is applied to agricultural land, forest, or a reclamation site, the person who land applies the domestic septage shall develop, and retain for five years, "a description of how the vector attraction reduction requirements in 40 C.F.R. § 503.33(b)(9), (b)(10), or (b)(12), are met." ("Record of Vector Attraction Reduction"). Again, Respondent admits that from May 2000 through mid-April 2002 he was a person who applied domestic septage/sewage sludge to a forest within the meaning of 40 C.F.R. § 503.10(a). *See* First Amended Answer ¶¶ 43, 61; Compl. Ex. 39, 40. Thus, Respondent is subject to develop, and retain for five years, a Record of Vector Attraction Reduction as required by 40 C.F.R. § 503.17(b)(8).

**C. Respondent's Professed Ignorance Does Not Defeat Liability**

Section 405 of the CWA unambiguously provides that the determination of "the manner of disposal or use of sludge is a local determination, *except* that" persons disposing of sewage sludge from a treatment works must comply with the federal regulations at 40 C.F.R. part 503 promulgated pursuant to Section 405(d) of the CWA. 33 U.S.C. § 1345(e)(emphasis added). As noted *supra*, Respondent does not argue that he did not dispose of sewage sludge from a treatment works for which federal regulations have been established pursuant to Section 405(d). Order on Complainant's Motion for Accelerated Decision on Liability at 7. *See* First Amended Answer ¶¶ 50, 51, 69, 70, 73, 74, 77, 78; Compl. Ex. 39, 40. Rather, throughout the course of this proceeding, Respondent does argue that he was ignorant of the federal law.[23/] First Amended Answer ¶¶ 50, 51, 69, 70, 73,

[23/] Respondent contends that he "was following guide lines and instructions supplied by the Brown County Health Department and the Southwestern District of the Ohio EPA," which never referred him to the Part 503 regulations, suggesting such reliance excuses noncompliance with federal regulations. First Amended Answer (continued...)

74, 77, 78; Second Amended Answer ¶¶ 69, 73, 77; Compl. Ex. 39, 40. As previously discussed in the Order on Complainant's Motion for Accelerated Decision on Liability, dated December 7, 2005, and as further discussed *infra*, such professed ignorance of the law does not obviate Respondent's liability for violating federal law.

Furthermore, the Clean Water Act is a strict liability statute. 33 U.S.C. § 1311(a)("Except in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful"). *See Am. Canoe Ass'n v. Murphy Farms, Inc.*, 412 F.3d 536, 540 (4th Cir. 2005)("the CWA creates a regime of strict liability for violation of its standards"). The EPA is not required to personally stress the general obligation to comply with the mandates of the CWA to all persons falling within the Act's jurisdiction. Therefore, Respondent's continued assertion of his ignorance of the law and reliance on state and local "guidelines and instructions" throughout this record of proceeding does not disturb my earlier findings of liability,[24/] nor does it affect the additional findings of liability on the remaining counts made herein.

**D. Liability**

The record of proceeding in this matter, which is replete with Respondent's own admissions, clearly establishes Respondent's liability for all four counts of violations alleged in the Complaint. In fact, significantly, one of Respondent's initial statements at the evidentiary hearing on this matter was, "Your Honor, it would be so silly for me to claim compliance with 503, since one thing, I had no idea what 503 was at the time . . . [so] I am in no way trying to claim compliance with 503, but I am claiming I followed all direction given me by the departments that licensed me, the Brown County Health Department." Hr'g Tr.

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(...continued)
¶¶ 50, 51, 69, 70, 73, 74, 77, 78. Respondent further asserts that he "was never told" that "he should be concerned about developing or retaining any information on Nitrogen Requirements," that he "was never told anything about the requirements for a certification statement pursuant to 40 C.F.R. 503.17(b)(6)," and that he "was never told anything about Vector Attraction Reduction requirements in 503.33(b)(9), (b)(10), (b)(12)." Second Amended Answer ¶¶ 69, 73, 77.

[24/] The earlier findings of liability are summarized on page 14 of the Order on Complainant's Motion for Accelerated Decision on Liability.

vol. 1, 19. In response to this statement, I noted my understanding that Respondent was "not contesting [his] liability in the sense . . . [of] denying counts one, two, three or four, in terms of liability," rather he was in essence admitting his failure to meet the Part 503 requirements while "arguing that he believed he was complying with some of the rules." Hr'g Tr. vol. 1, 20. Respondent affirmed that this assessment of his argument was correct. Hr'g Tr. vol. 1, 21.

Although the allegations in Count I and part of Count II[25] of the Complaint were fully and finally adjudicated based on Respondent's pleadings in the Order on Complainant's Motion for Accelerated Decision on Liability, I nevertheless revisit these issues here. Further, the testimony and evidence presented during the hearing on this matter clearly establish Respondent's liability for the remaining counts, i.e. the portion of Count II not previously ruled upon in the Order on Complainant's Motion for Accelerated Decision on Liability as well as Counts III and IV. Specifically, Respondent's liability under Section 405(e) of the CWA for each of the alleged violations of the Part 503 regulations is discussed below, in turn.

### 1. Respondent Failed to Comply with Vector Attraction Reduction Requirements for Domestic Septage, Pursuant to 40 C.F.R. § 503.15(d)

In Count I of the Complaint, the Region alleges that "For each of the 1,092 truck loads of domestic septage applied to the Site," Respondent failed to meet the vector attraction reduction requirements in 40 C.F.R. § 503.33(b)(9), (b)(10), or (b)(12) as mandated by 40 C.F.R. § 503.15(d). Complaint ¶ 50. Based on several of Respondent's admissions in the Answer and First Amended Answer and on Respondent's failure to comply with the Order Granting Motion for a More Definite Answer, the Order on Complainant's Motion for Accelerated Decision on Liability held that Respondent violated 40 C.F.R. § 503.15(d) when land applying domestic septage to the Site from May 2000 to mid-April 2002.[26]

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[25] Specifically, Respondent was found liable for the portion of Count II that alleged that he failed to comply with the Annual Application Rate Pollution Limits set forth at 40 C.F.R. § 503.12(c).

[26] As previously discussed in the Order on Complainant's Motion for Accelerated Decision on Liability, Respondent admitted that he "did apply approximately 1246 truck loads of domestic septage from May 2000 to Mid-April 2002, following rules and specifications supplied to him by the Brown County Health (continued...)

Order on Complainant's Motion for Accelerated Decision on Liability at 10. These admissions, standing alone, are sufficient to sustain the earlier finding of Respondent's liability under Section 405(e) of the CWA based on the allegations contained in Count I.

Nevertheless, Respondent again admitted his liability for violations of 40 C.F.R. § 503.15(d) at the evidentiary hearing in this matter. At the hearing, Respondent admitted, "Never in any way, shape or form have I ever intended that I was in compliance with 503 because I was not." Hr'g Tr. vol. 3, 204-206. Indeed, Respondent testified that given his current understanding of the operational and recordkeeping requirements of the Part 503 Subpart B regulations, he believes he "*could have* met" them. Hr'g Tr. vol. 3, 204 (emphasis added).

In fact, Respondent apparently believes he could have satisfied 40 C.F.R. § 503.15(d) simply by adding lime to each truckload of septage prior to land applying it.[27] Compl. Ex. 42 He opined that it is not "a complicated process to take care of liming the sewer inside a truck . . . the trucks that are out

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[26] (...continued)
Department and the Southwestern district of the Ohio Environmental Protection Agency, these instructions did not include any of these specifications therefore Respondent did not follow these guidelines." First Amended Answer ¶ 50. I noted such response was part of a pattern of responses in the First Amended Answer and Second Amended Answer, in which Respondent failed to directly answer whether he complied with the vector attraction requirements and instead simply challenged the accuracy of the number of truckloads of sewage sludge dumped. I further noted that the vector attraction reduction requirements are triggered once *any* amount of domestic septage is applied to the land. *See* 40 C.F.R. §§ 503.15(d), 503.33(b)(9), (b)(10), and (b)(12). Although Respondent's answers did not clearly respond to the allegations in Count I, I deemed such allegations as admitted, pursuant to the Order Granting Motion for a More Definite Answer.

[27] Vector attraction reduction under 40 C.F.R. § 503.15(d) is achieved via 40 C.F.R. § 503.33(b)(9) and/or (b)(10) by injecting septage into the ground and/or incorporating septage into the soil. The soil "is used as a barrier between the septage and the environment . . . to keep the vectors away . . . and becomes a treatment medium for that septage [by incorporating it into the soil matrix]." Hr'g Tr. vol. 2, 20. Alternatively, vector attraction reduction is achieved via 40 C.F.R. § 503.33(b)(12) by using an alkaline substance, such as lime, to treat the septage, reducing its odor and accelerating the death of some pathogens. Hr'g Tr. vol. 2, 21-22.

there that are using this method . . . say that 20 pounds would treat a thousand gallons pretty well no matter what its content is, how much solids is in it." Hr'g Tr. vol. 3, 204-05. He continued, "I am not completely ignorant, and if I would have known this [liming method] was a possibility, my site would still be open today and I would be pulling a lime slurry onto my trucks." Hr'g Tr. vol. 3, 205. Complainant's witness Mr. Valdis Aistars[28/] disagreed, testifying that adding an alkaline substance, such as lime, to a truckload of septage alone is not enough. The alkaline addition method of vector attraction reduction involves taking before- and after-addition pH measurements to ensure each load of septage maintains the proper pH of 12 or above for at least thirty minutes, and best management practices advise the application of a thin layer of sludge to the land. Hr'g Tr. vol. 2, 186-87. *See* Compl. Ex. 7, 8. Additionally, the land applier must keep a record of the pH for each truckload before the septage is land applied. Hr'g Tr. vol. 2, 188. See Compl. Ex. 7, 8. Further, the requisite amount of lime varies from load-to-load, so multiple measurements must be taken for each truckload, regardless of past experience with the approximate amount of lime required. Hr'g Tr. vol. 2, 187-88.

During the evidentiary hearing, Mr. Larry Griffith, a former Director of Environmental Health at the BCHD who held that position during the time relevant to the Complaint, testified that Respondent engaged in liming activity at the Site to combat a mosquito problem.[29/] Hr'g Tr. vol. 2, 261-62, 272-73; Hr'g Tr. vol. 3, 18-19. The record reflects Respondent similarly claimed he did apply some lime to the Site. *See* Compl. Ex. 39 ("I did add probably 400 pounds of lime to the site just to make sure the odor stayed in the woods and I did spray for mosquitoes every

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[28/] Mr. Aistars is an environmental engineer who has served as Sludge Program Manager in the Water Enforcement and Compliance Assurance Branch of U.S. EPA Region V since 1994. Hr'g Tr. vol. 1, 239-41. As Sludge Program Manager, Mr. Aistars inspects sites falling under EPA jurisdiction according to 40 C.F.R. part 503 and has received and given extensive training on the Part 503 sewage sludge regulations. Hr'g Tr. vol. 1, 243. He estimates that he has worked on 60 to 70 septage enforcement cases since becoming the Septage Program Manager. Hr'g Tr. vol. 1, 260.

[29/] Interestingly, Mr. Griffith also testified that "a large fishing lake" was built directly across from the Site in 2001, and he believed this contributed to the mosquito problem on Clement Road. Hr'g Tr. vol. 3, 16-18. In fact, Mr. Griffith went so far as to note his belief that "the mosquito problem probably come much more likely from that large lake . . . than it was coming from the septage site that was built several hundred feet away. Hr'g Tr. vol. 3, 19.

year"). However, there was no demonstration that such liming was done in a measured, timed, methodical manner.

Even assuming, *arguendo*, that some liming activities were conducted, Respondent's liability for failing to comply with the vector attraction reduction requirements of 40 C.F.R. § 503.15(d) still stands. The proffered testimony fails to demonstrate sufficient compliance with 40 C.F.R. § 503.33(b)(9), (b)(10), or (b)(12) during the period between May 2000 and mid-April 2002, and Respondent did not produce any corroborating exhibits or testimony to suggest otherwise. In fact, Respondent himself certified he was not in compliance with the vector attraction reduction requirements. Hr'g Tr. vol. 2, 75; Compl. Ex. 41. The record reflects Respondent used a system of pipes to pump untreated septage either directly out onto the surface of the ground, or, at a minimum, into a system of open trenches.[30/] Hr'g Tr. vol 1, 132-37; Hr'g Tr. vol 2, 22-25; Hr'g Tr. vol 3, 182-83.

Moreover, Complainant's exhibits further demonstrate Respondent's liability for failure to comply with the vector attraction reduction requirements for domestic septage, set forth at 40 C.F.R. § 503.15(d). Inspections of the Site were conducted on April 11, 2002 and April 15, 2002, prompted by a nuisance complaint lodged with the BCHD alleging the Site emanated a strong odor and attracted a large number of mosquitoes. Hr'g Tr. vol. 1, 121-22, 127. Observations of the Site, according to the testimony of several witnesses and the written investigation reports, revealed the presence of standing and pooled sewage sludge, approximately one to two feet in depth,[31/] and a system of above-ground PVC pipes used to pump and transport the sludge from the Site's driveway area to farther back on the Site. Hr'g Tr. vol. 1, 123-39, 209-13, 228-30; Hr'g Tr. vol. 2, 110-11; Compl. Ex. 13, 14, 15, 16. Photographs of the Site confirm the observations testified to by the witnesses and cited in the investigation reports. Hr'g Tr. vol. 1, 132-39; Compl. Ex. 55-

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[30/] Respondent described his property as having "approximately 15 trenches, 200 feet long, some 8 inches wide and some 24 inches wide," which were open conduits that received the septage pumped from Respondent's trucks. Compl. Ex. 39; Hr'g Tr. vol. 2, 25. Respondent testified, "we were not covering the trenches. It was too difficult to cut a trench and even think it would be likely that you would cover it . . . the same day." Hr'g Tr. vol. 3, 183.

[31/] Even though Respondent admits the standing septage at his Site was "probably eight, maybe ten inches deep," Respondent argues the depth appeared much greater than it was because of "a good size swale" on his Property. Hr'g Tr. vol. 3, 180-81. I find no merit to this theory of illusion.

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Additionally, in Respondent's first response to the EPA's information requests, Respondent admitted "[t]here was approximately 15 trenches . . . since we had trouble plowing the sewage into the ground due to the water . . . [and] the problem of standing sewage." Compl. Ex. 39. Additionally, Lieutenant John Fetters, of the Brown County Sheriff's Department, stated that in 2001 he observed Respondent dumping septage from his pump truck onto the Site, which was plagued by standing water. Compl. Ex. 52.

In response to EPA's investigation into this case, Respondent himself certified that he "was instructed that the surfacing septage was not significant as long as it stayed on my property." Compl. Ex. 41. This certification that the Site contained untreated septage exposed to the environment demonstrates that Respondent was not in compliance with the vector attraction reduction requirements from May 2000 through mid-April 2002. Hr'g Tr. Vol. 2, 22-23.

Finally, Respondent does not dispute his liability in his post-hearing briefs. Thus, my previous ruling finding Respondent liable for the violations alleged in Count I still stands.

### 2. Respondent Failed to Comply with Annual Application Rate for Domestic Septage, Pursuant to 40 C.F.R. § 503.12(c)

In Count II of the Complaint, the Region charges Respondent with violations of two requirements. The first allegation is that Respondent failed to comply with the annual application rate pollution limit set forth at 40 C.F.R. § 503.13(c), in violation of 40 C.F.R. § 503.12(c). Complaint ¶ 67. Under 40 C.F.R. § 503.12(c), no person shall apply domestic septage to the land after the annual application rate specified by 40 C.F.R. § 503.13(c) is reached. According to 40 C.F.R. § 503.13(c), the annual application rate for domestic septage applied to agricultural land, forest, or a reclamation site shall not exceed the annual application rate calculated using the following equation:

$$AAR = \frac{N}{0.0026}$$

Under that equation, "AAR" represents the annual application rate in gallons per acre per 365-day period, and "N" represents the amount of nitrogen in pounds per acre per 365-day period needed by the crop or vegetation grown on the land ("Nitrogen

Requirement"). 40 C.F.R. § 503.13(c). Here, according to information provided by Respondent in his First Response to the EPA information requests on August 13, 2002, the Nitrogen Requirement for the Site is 30 pounds of nitrogen per acre per year, which would allow for an annual application rate of 11,538 gallons per acre per year.[32] Compl. Ex. 39. *See* First Amended Answer ¶¶ 59, 60.

The Order on Complainant's Motion for Accelerated Decision on Liability found Respondent liable under 40 C.F.R. § 503.12(c) for failure to comply with the annual application rate pollution limits, based on several of Respondent's admissions contained in Respondent's First Amended Answer.[33] Respondent's admissions,

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[32] I again emphasize that the figures for the Nitrogen Requirement and, derivatively, the AAR originate solely from information Respondent provided in his pleadings. This is appropriate considering the regulations place the burden of developing and retaining the Nitrogen Requirement on the septage pumper who land applies domestic septage. 40 C.F.R. § 503.17(b). In Respondent's August 13, 2002 Response to the EPA information requests, he admitted that "maybe 6 acres [of his Property was] used to dump on since June 1997." Compl. Ex. 39. Other estimates of the area of the 16-acre Site used for land applying domestic septage ranged from one to three acres. Compl. Ex. 15, 16. The approximate size of the Site, as used to calculate the AAR is 5.5 acres. First Amended Answer ¶ 66. Additionally, the accuracy of these figures is premised on Respondent's admissions and Complainant's allegations deemed admitted. *See* First Amended Answer ¶¶ 59, 60, 66. Further, neither the Region nor Respondent has disputed the Nitrogen Requirement or AAR calculations used throughout this proceeding.

[33] As previously discussed in the Order on Complainant's Motion for Accelerated Decision on Liability, Respondent has admitted ownership of two trucks used to haul the collected domestic septage/sewage sludge, with each truck load averaging at least 600 gallons of domestic septage/sewage sludge. First Amended Answer ¶ 64. Respondent admitted that he applied at least 852,200 gallons of domestic septage/sewage sludge to the Site between May 1999 through mid-April 2002. More significantly, Respondent admitted to applying domestic septage/sewage sludge to the Site in at least the following annual application rates alleged in the Second Amended Complaint: 35,781 gallons per acre per year from May 1999 through April 2000; 42,218 gallons per acre per year from May 2000 through April 2001; 78,581 gallons per acre per year from May 2001 through mid-April 2002. These rates were based on an estimated acreage of 5.5 acres for the portion of the Site utilized for land applying. *See* Order on Complainant's Motion for (continued...)

standing alone, are sufficient to sustain the previous finding of liability for failure to comply with the annual application rate pollution limits of 40 C.F.R. § 503.12(c).

Regardless, I note again that Respondent conceded such liability at the hearing when he admitted, "Never in any way, shape or form have I ever intended that I was in compliance with 503 because I was not." Hr'g Tr. vol. 3, 204-206. Further, Complainant's witness Mr. Aistars testified that, based on his review of the EPA's enforcement file, Respondent did "nothing" to comply with the annual application rate limit between May 2000 and mid-April 2002. Hr'g Tr. vol. 2, 38.

Respondent attempted to argue at the hearing, "Once I knew what 503 was, I could have met the requirements of 503 first by utilizing all 16 acres that I had." Hr'g Tr. vol. 3, 204. Even assuming, *arguendo*, that Respondent utilized the entire 16 acre Site, Respondent's liability for failing to comply with the AAR pollution limits of 40 C.F.R. § 503.12(c) still stands.[34/] The

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(...continued)
Accelerated Decision on Liability. Thus, based on Respondent's admissions, between May 1999 and April 2000, Respondent's rate of land applying domestic septage had already exceeded, threefold, the annual application rate of 11,538 gallons/acre/year. Similarly, between May 2000 to April 2001, and between May 2001 to mid-April 2002, Respondent's rate of land applying domestic septage again exceeded the annual application rate of 11,538 gallons/acre/year, these times fourfold and sevenfold, respectively.

[34/] The calculations for the AAR during the periods of time relevant to this proceeding, discussed in detail *supra*, utilized 5.5 acres as the estimated acreage for the portion of the site utilized by Respondent for land applying domestic septage. While Respondent's Property may be 16 acres in total, the entire Site clearly is not available space for land applying domestic septage. A portion of the 16 acres is used as a salvage yard and not established as agricultural land, forest land, or a land reclamation site. Thus, Respondent could not utilize the entire 16 acres for land applying domestic septage. Nevertheless, for the purposes of argument, it is worthy to note that even if the entire 16 acres were used in making the AAR calculations (gallons per year ÷ 16 acres, instead of gallons per year ÷ 5.5 acres), the numerical determinations would still be in excess of the 11,538 gallons per acre per year AAR determined applicable to this Site. The AAR calculations based on gallons per year divided by 16 acres would be as follows: May 1999 through April 2000: 12,300 gallons per acre per year; May 2000 through April 2001: 14,513 gallons per acre per year; May 2001 through mid-April 2002: 26,450 gallons per acre per
(continued...)

proffered testimony fails to demonstrate sufficient compliance with 40 C.F.R. § 503.12(c), and Respondent did not produce any corroborating exhibits or testimony at the hearing to suggest otherwise. Nor did he dispute his liability in his post-hearing briefs.

### 3. Respondent Failed to Develop, and Retain for Five Years, Information on the Site's Nitrogen Requirement, a Land Applier's Certification Statement, and a Description of the Vector Attraction Reduction Requirements Utilized on the Site, Pursuant to 40 C.F.R. § 503.17(b)

Although the Order on Complainant's Motion for Accelerated Decision granted accelerated decision on liability for Count I and the portion of Count II alleging failure to comply with the annual application rate pollution limits stated in 40 C.F.R. § 503.13(c), in violation of 40 C.F.R. § 503.12(c), the Order denied accelerated decision on the Region's three remaining allegations (i.e. the portion of Count II alleging failure to develop, and retain for five years, information on the Nitrogen Requirement, pursuant to 40 C.F.R. § 503.17(b)(4), and Counts III and IV). Given that these remaining allegations, each of which allege a violation of a different subsection of 40 C.F.R. § 503.17(b), are in the nature of recordkeeping violations,[35] I deal with them collectively here for purposes of determining liability.

In the latter portion of Count II of the Complaint, the Region alleges that, at the time Respondent applied domestic septage to the Site, he did not develop, and retain for five years, information on the Site's Nitrogen Requirement, described in 40 C.F.R. § 503.13(c), as he was required to do pursuant to 40 C.F.R. § 503.17(b)(4). Complaint ¶ 69. Similarly, in Count III of the Complaint, the Region alleges that at the time Respondent applied domestic septage to the Site, he did not develop, and retain for five years, a domestic septage land applier's certification statement used to determine compliance with pathogen and vector attraction reduction requirements, pursuant to 40 C.F.R. § 503.17(b)(6). Complaint ¶ 73. Similarly again, in Count IV of the Complaint, the Region alleges that at the time Respondent applied domestic septage to the Site, he did not

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[34] (...continued)
year. These AAR determinations are all still in excess of the 11,538 gallons per acre per year AAR applicable to this Site.

[35] The regulations at 40 C.F.R. § 503.17 follow the section's title of "Recordkeeping."

develop, and retain for five years, a description of how the vector attraction reduction requirements in 40 C.F.R. §§ 503.33(b)(9), (b)(10), or (b)(12) were met, pursuant to 40 C.F.R. § 503.17(b)(8). Complaint ¶ 77.

The Order on Complainant's Motion for Accelerated Decision on Liability emphasized that at the time the Region filed its motion, it did not attach any documents in support of its bare allegations regarding the three above-described alleged recordkeeping violations. *Id.*[36/] I concluded that Respondent's statement in paragraph 69 of the Second Amended Answer that he "was never told . . . [he] should be concerned about developing or retaining any information on Nitrogen Requirements," Respondent's statement in paragraph 73 of the Second Amended Answer that he "was never told anything about the requirements for a certification statement pursuant to 40 C.F.R. 503.17(b)(6)," and Respondent's statement in paragraph 77 of the Second Amended Answer that he "was never told anything about Vector Attraction Reduction Requirements in 40 C.F.R. 503.33(b)(9),(b)(10), or (b)(12)," could each arguably be read as Respondent claiming insufficient knowledge to answer the allegations, rather than as admissions of such allegations. Order on Complainant's Motion for Accelerated Decision on Liability at 12-14. In making such rulings, Respondent's status as a *pro se* litigant was expressly taken into account, and it was determined that sound judicial policy would afford Respondent the opportunity to fully develop his defense to the recordkeeping allegations at an evidentiary hearing. *Id.* *See also* Order Denying Complainant's Second Motion for Accelerated Decision on Liability at 4-5 (Respondent's statements in his Initial Prehearing Exchange (dated Nov. 10, 2005)[37/] are taken out of

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[36/] In a subsequent ruling on a Complainant's Second Motion for Accelerated Decision on Liability, I acknowledged Complainant's assertions that nothing in Respondent's prehearing exchange demonstrates compliance with 40 C.F.R. § 503.17(b). Order Denying Complainant's Second Motion for Accelerated Decision on Liability at 4. However, I also noted that such absence would not support a finding of liability, as, generally, the Rules of Practice place the burdens of presentation and persuasion on the complainant. *Id.* (citing 40 C.F.R. § 22.24(a).)

[37/] Specifically, Respondent stated: "It is alleged that I was fully aware of those [Part 503] regulations and simply chose not to comply with them. That is absolutely not true. In fact, now that I am aware of those regulations, I see that compliance would have been a simple, very inexpensive matter and it would have been simple to fully comply with all the regulations and I would have done so." Compl. Ex. 98.

context and do not necessarily concede liability, given his *pro se* status; production of a January 2002 certification statement raises some question of fact as to compliance with 40 C.F.R. § 503.17(b)).

Nevertheless, at the evidentiary hearing on this matter, Respondent made several admissions as to his liability under 40 C.F.R. § 503.17(b) for his failure to develop, and retain for five years: (1) information on the site's Nitrogen Requirement; (2) a land applier's certification statement; and (3) a description of the vector attraction reduction requirements used on the site. These admissions, and the corresponding liability, are in turn discussed, *infra*. In addition to these admissions, it should be noted that over the course of this hearing, Respondent did not once dispute his failure to comply with the recordkeeping requirements of Part 503, nor did he present any probative evidence concerning these alleged violations. Further, Respondent did not dispute his liability in his post-hearing briefs.

a) Failure to Develop, and Retain for Five Years, Information on the Nitrogen Requirement for the Vegetation Grown on the Site During a 365-Day Period, Pursuant to 40 C.F.R. § 503.17(b)(4).

At the evidentiary hearing on this matter, Respondent repeatedly admitted that he failed to develop and maintain information on the Nitrogen Requirement for the Site when applying domestic septage to the Site during the period from May 2000 to mid-April 2002 for at least 1,092 loads of domestic septage, as required by 40 C.F.R. § 503.17(b)(4). In fact, in his opening statement Respondent admitted, "[I]t would be so silly for me to claim compliance with 503, since one thing, I had no idea what 503 was at the time." Hr'g Tr. vol. 1, 19. Perhaps the most compelling admission came when Respondent later testified "The papers that's required to stay up with 503 . . . seems to be very simple . . . [so] I'm sure that I could have complied with 503 . . . [but] [n]ever in any way, shape or form have I ever intended that I was in compliance with [the requirements of Part] 503 because I was not." Hr'g Tr. vol. 3, 205-06.

Additionally, the Region proved that Respondent failed to produce any records of compliance with the Nitrogen Requirement for the Site, 40 C.F.R. § 503.17(b)(4), prior to or at the hearing, though he had ample opportunity to do so. Specifically, the Region showed that beginning on July 9, 2002, it issued a

series of information requests seeking submission of 40 C.F.R. § 503.17(b)(4) records kept on the Nitrogen Requirement;[38] however, the Region demonstrated through the unrefuted testimony of Mr. Aistars that, despite numerous opportunities,[39] Respondent never provided any responsive records prior to the evidentiary hearing. Hr'g Tr. vol. 2, 51-58. In fact, the only information Respondent provided related to the Nitrogen Requirement apparently was prepared and produced only in response to the EPA's repeated requests and was not prepared before, or while, Respondent applied domestic septage to the site, as required by 40 C.F.R. § 503.17(b)(4).[40] *See* Compl. Ex. 39-44. Even then, Mr. Aistars

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[38] The July 9, 2002 information request stated: "Respondent shall submit the following information: septage records for the dates of June 1997, to the present, for the site . . . Verifying: . . the nitrogen requirement for the crop or vegetation growing on the site during the year, including the expected annual crop yield(s); . . . ." EPA's Findings of Violation and Order for Compliance at 4; Compl. Ex. 30. *See* Hr'g Tr. vol. 2, 46-50. *See also* Compl. Ex. 31-37 (follow-up information request correspondence).

[39] Some examples of Respondent's opportunities to demonstrate compliance with 40 C.F.R. § 503.17(b)(4), as described by Mr. Aistars in his testimony and as cited by Complainant in its post-hearing brief, include: the chance to respond to "Notice of Intent to File a Civil Administrative Complaint" (Compl. Ex. 9, Compl. Ex. 10); his Responses to the EPA Information Requests (Compl. Ex. 39-44); his Answer, First Amended Answer, and Second Amended Answer; his Response to Complainant's Motion for Accelerated Decision; his Initial Prehearing Exchange (Compl. Ex. 98); and his Reply to Complainant's Second Motion for Accelerated Decision. Hr'g Tr. vol. 2, 46-58. *See* Compl.'s Post-Hr'g Br. 19.

[40] The regulations state, "*When* domestic septage is applied . . . the person who applies the domestic septage *shall develop* the following information and shall retain the information for five years . . ." 40 C.F.R. § 503.17(b) (Emphasis added). Complainant's witness Mr. Aistars noted Respondent's statement in his first reply to the EPA's Administrative Order, "I was never told to keep daily time sheets or anything else so I only have monthly records of what I've dumped . . . I am sorry for not following rule 503 with better dumping records but I was never told anything like that was necessary" Compl. Ex. 39; Hr'g Tr. vol. 2, 52. Mr. Aistars further pointed out Respondent's statement in his second response to the EPA information request where he again states, "all I have is monthly records. I could estimate dates to make a daily log, but it would only be an estimation." Compl. Ex. 40; Hr'g Tr. vol. 2, 53. In fact, Respondent acknowledged that he never kept a record of his activities at the time of application because he was

(continued...)

testified that the information provided was "information regarding [Respondent's] operations . . . [h]e never provided [EPA] the records [EPA] asked for." Hr'g Tr. vol. 2, 51.

Respondent similarly failed to produce the requested records at the evidentiary hearing, or to set forth a legitimate excuse for the absence of the records. As such, I must conclude that the records required under 40 C.F.R. § 503.17(b)(4) were never prepared, let alone retained for a period of five years. Accordingly, I find Respondent liable for violating 40 C.F.R. § 503.17(b)(4) for failing to develop, and retain for five years, information on the Site's Nitrogen Requirement, as alleged in the second portion of Count II in the Complaint.

b) Failure to Develop, and Retain for Five Years, a Certification Statement, Pursuant to 40 C.F.R. § 503.17(b)(6)

At the hearing, the Region proved that Respondent failed to develop and retain for five years a certification statement attesting his compliance with the pathogen and the vector attraction reduction requirements of the Part 503 Subpart B regulations during the period from May 2000 to mid-April 2002, as required by 40 C.F.R. § 503.17(b)(4).[41] The Region demonstrated that it issued several information requests seeking records of Respondent's 40 C.F.R. § 503.17(b)(6) certification statements from June 1997 to the present, yet Respondent never provided such records. Compl. Ex. 30-35; Hr'g Tr. vol. 2, 65-66, 70-73, 75-76. As was the case for the records of the Nitrogen Requirement for the Site, Respondent had ample opportunity prior to and at the hearing to provide records of the required 40 C.F.R. §

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[40] (...continued)
"never told" to keep daily records by the BCHD. Hr'g Tr. vol. 2, 53; Compl. Ex. 40 (p. 564).

[41] Pursuant to 40 C.F.R. § 503.17(b)(6), the certification statement must contain the following language:

> I certify, under penalty of law, that the information that will be used to determine compliance with the pathogen requirements (insert either § 503.32(c)(1) or § 503.32(c)(2)) and the vector attraction reduction requirement in [insert § 503.33(b)(9), § 503.33(b)(10), or § 503.33(b)(12)] 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.

503.17(b)(6) certification statements, yet he failed to do so.[42]

Although Respondent did produce a document entitled "certification" as part of his third reply to the EPA's information requests,[43] that document is not sufficient to satisfy the specific requirements of 40 C.F.R. § 503.17(b)(6). Compl. Ex. 41; Hr'g Tr. vol. 2, 67-69, 73-76. First and foremost, as pointed out by the EPA, Respondent's "certification" does not comply with the substantive requirements of that regulation. Compl.'s Post-Hr'g Br. 21 n.9 (citing Hr'g Tr. vol.

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[42] Again, some examples of Respondent's opportunities to demonstrate compliance with 40 C.F.R. § 503.17(b)(6), as described by Mr. Aistars in his testimony and as cited by Complainant in its post-hearing brief, include: the chance to respond to "Notice of Intent to File a Civil Administrative Complaint" (Compl. Ex. 9, Compl. Ex. 10); his Responses to the EPA Information Requests (Compl. Ex. 39-44); his Answer, First Amended Answer, and Second Amended Answer; his Response to Complainant's Motion for Accelerated Decision; his Initial Prehearing Exchange (Compl. Ex. 98); and his Reply to Complainant's Second Motion for Accelerated Decision. Hr'g Tr. vol. 2 at 65-76; *See* Compl.'s Post-Hr'g Br. 21-22.

The Region also points out Respondent's statement in his first reply to the EPA's Administrative Order where Respondent claimed "I was never told to keep daily time sheets or anything else . . . I am sorry for not following rule 503 with better dumping records but I was never told anything like that was necessary." Compl. Ex. 39; Hr'g Tr. vol. 2, 52, 70-71.

[43] Respondent provided the following "certification" to the EPA:

> I certify under penalty of law, that the pathogen requirements in (alternative 1) and the vector attraction requirements in (vector reduction alternative 1) was meet [sic] based on direction from the head sanitarian and a training sanitarian from the Brown County Health Department. I made this determination with the guidance and direction of the head sanitarian who was at the time running the Brown County Health Department. I was instructed that the surfacing septage was not significant as long as it stayed on my property. I am aware that there are significant penalties for false certification including the possibility of fine and imprisonment.

Compl. Ex. 41; Aistars Decl. at ¶ 51. This statement in no way assures the EPA that Respondent understands his responsibility to comply with the Part 503 regulations, as intended by 40 C.F.R. § 503.17(b)(6). Hr'g Tr. vol. 2, 74-75.

2, 67-69). Also, as the EPA argues, it is undated and does not mirror the language required by 40 C.F.R. § 503.17(b)(6). Compl.'s Post-Hr'g Br. 44-45; Hr'g Tr. vol. 2, 69, 74-76 . Further, Mr. Aistars' testimony revealed there is no indication or affirmation that Respondent's "certification" was prepared while Respondent applied domestic septage to the site; rather, it appears it was prepared and produced only as a reaction to the EPA's information requests. Hr'g Tr. vol. 2, 68-70. *See* Compl. Ex. 41.

Again, perhaps Respondent's own admissions at the evidentiary hearing are the most compelling evidence regarding a violation of 40 C.F.R. § 503.17(b)(6). In his opening statement Respondent admitted, "[I]t would be so silly for me to claim compliance with 503, since one thing, I had no idea what 503 was at the time." Hr'g Tr. vol. 1, 19. He later testified, "The papers that's required to stay up with 503 . . . seems to be very simple . . . [so] I'm sure that I could have complied with 503 . . . [but] [n]ever in any way, shape or form have I ever intended that I was in compliance with [the requirements of Part] 503 because I was not." Hr'g Tr. vol. 3, 205-06. As such, I must conclude that the records required under 40 C.F.R. § 503.17(b)(6) were never prepared, let alone retained for a period of five years.

Accordingly, I find Respondent liable for violating 40 C.F.R. § 503.17(b)(6) for failing to develop, and retain for five years, proper certification statements, as alleged in the Count III in the Complaint.

c) Failure to Develop, and Retain for Five Years, a Description of How the Vector Attraction Reduction Requirements are Met, Pursuant to 40 C.F.R. § 503.17(b)(8)

At the evidentiary hearing on this matter, the Region proved that Respondent failed to develop and retain for five years a record describing how the vector attraction reduction requirements in 40 C.F.R. §§ 503.33(b)(9),(b)(10), or (b)(12) were met during the period from May 2000 to mid-April 2002 when Respondent was applying domestic septage to the site, pursuant to 40 C.F.R. § 503.17(b)(8). The Region demonstrated that in several information requests, it sought records of Respondent's 40 C.F.R. § 503.17(b)(8) vector attraction reduction compliance records from June 1997 to the present, yet Respondent never provided such records. Compl. Ex. 30-35; Hr'g Tr. vol. 2, 80-81.

As was true for the records of the Nitrogen Requirement and the certification statements, Respondent had ample opportunity

prior to and at the hearing to provide records of the required 40 C.F.R. § 503.17(b)(8) vector attraction reduction compliance records, yet he failed to do so.[44/] Further, Respondent failed to produce the required records at the evidentiary hearing, or to set forth a legitimate excuse for the absence of the records. Indeed, again, by Respondent's own admission, he notes "[I]t would be so silly for me to claim compliance with 503, since one thing, I had no idea what 503 was at the time." Hr'g Tr. vol. 1, 19. He later continued, "Never in any way, shape or form have I ever intended that I was in compliance with [the requirements of Part] 503 because I was not." Hr'g Tr. vol. 3, 205-06. As such, I must conclude that the records required under 40 C.F.R. § 503.17(b)(8) were never prepared, let alone retained for a period of five years.

Accordingly, I find Respondent liable for violating 40 C.F.R. § 503.17(b)(8) by failing to develop, and retain for five years, a description of how the vector attraction reduction requirements in 40 C.F.R. §§ 503.33(b)(9), (b)(10), or (b)(12) were met, as alleged in the second portion of Count IV in the Complaint.

## IV. PENALTY

Section 309(g) of the CWA authorizes the EPA Administrator to assess a civil administrative penalty upon a finding that a person has violated, *inter alia*, Section 405(e) of the CWA. The maximum penalty level per violation for each class of civil penalty is set by Section 309(g)(2) of the CWA, while Section 309(g)(3) provides factors the Administrator must consider in determining the amount of any penalty assessed. The factors the EPA is required to consider under Section 309(g)(3) of the CWA are:

> the nature, circumstances, extent and gravity of the violation or violations, and, with respect to the violator, ability to pay, any

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[44/] Again, some examples of Respondent's opportunities to demonstrate compliance with 40 C.F.R. § 503.17(b)(6), as described by Mr. Aistars in his testimony and as cited by Complainant in its post-hearing brief, include: the chance to respond to "Notice of Intent to File a Civil Administrative Complaint" (Compl. Ex. 9, Compl. Ex. 10); his Responses to the EPA Information Requests (Compl. Ex. 39-44); his Answer, First Amended Answer, and Second Amended Answer; his Response to Complainant's Motion for Accelerated Decision; his Initial Prehearing Exchange (Compl. Ex. 98); and his Reply to Complainant's Second Motion for Accelerated Decision. Hr'g Tr. vol. 2 at 79-83. *See* Compl.'s Post-Hr'g Br. 23.

> prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.

33 U.S.C. § 1319(g)(3).

Courts have interpreted the "nature, circumstances, and extent" of the violation(s) as measures of the seriousness of the violation(s). *In re Allen Family Foods,* Inc., Docket No. CWA-3-2001-0002, 2004 EPA ALJ LEXIS 3 at n.26 (ALJ February 17, 2004); *In re Urban Drainage and Flood Control District and Kemp & Hoffman, Inc.*, Docket No. CWA-7-94-20, 1998 EPA ALJ LEXIS 42 (ALJ June 24, 1998). As the Region indicated in its post-hearing brief, in this case these factors encompass the septage disposal methodology employed, levels of septage applications as they relate to regulatory standards, the size and consequences of the violations, and the completeness or absence of records. Compl.'s Post-Hr'g Br. 26 (citing, for comparison, *In re Advanced Electronics, Inc.*, Docket No. CWA-5-98-021, 2000 EPA ALJ LEXIS 64 at 19-22 (August 15, 2000), *aff'd in part, rev'd in part, In Re Advanced Electronics*, CWA Appeal No. 00-5, 10 E.A.D. 385, 399-401 (EAB 2002); *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 244 F. Supp. 2d 41, 49-50 (2d Cir. 2003), *aff'd in part and remanded in part on other grounds,* 451 F.3d 77 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 1373 (U.S. 2007)).

Additionally the "gravity" factor is a measure of the seriousness of the violation(s). As noted by the Region, analyzing the "gravity" of a violation requires consideration of both the actual harm and the potential harm posed by the violation. Compl.'s Post-Hr'g Br. 38 (citing *United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338, 344 (E.D. Va. 1997), *aff'd in part rev'd in part on other grounds*, 191 F.3d 516 (4th Cir. 1999)). Achieving the purposes of the CWA requires restorative measures, protective tactics and preventative actions; thus, it is not enough only to impose penalties in the wake of actual harm. *See* 33 U.S.C. § 1251(a). Moreover, for purposes of determining the gravity of violations, even seemingly minor violations must be taken seriously by the courts, as collectively a large number of seemingly minor violations can reap significant environmental harm and threaten public health.

In a class II penalty case, such as the instant case, the EPA may propose a penalty up to $11,000 per day each day the

violation continues up to the statutory maximum of $137,500.[45/] 33 U.S.C. 1319(g)(2)(B). The final assessment of civil penalties is committed to the informed discretion of the court. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77,87 (2d Cir. 2006); *United States v. Gurley*, 384 F.3d 316, 324 (6th Cir. 2004), *reh'g denied* 2005 U.S. App. LEXIS 425 (6th Cir. January 6, 2005)(en banc).

CWA Penalties are designed to serve both as a specific deterrent, dissuading the violator against whom penalties are assessed from future violations, and as a general deterrent, deterring all potential CWA violators from similar actions. *United States v. Mun. Auth. of Union Township*, 929 F. Supp. 800, 806 (M.D. Pa. 1996), *aff'd*, 150 F.3d 259 (3rd Cir. 1998). They are also designed to effect retribution and serve the purpose of payment of restitution. *Tull v. U.S.*, 481 U.S. 412, 422 (1987).

In this case, the Region requested the assessment of a $60,000 penalty pursuant to Section 309(g)(2)(B) of the CWA. Complaint at 18-19; Compl.'s Post-Hr'g Br. 2, 27; Hr'g Tr. vol. 2, 90. This figure is the sum of the $30,000 sought for Count I, the $20,000 sought for Count II, the $5,000 sought for Count III, and the $5,000 sought for Count IV. Complaint at 18-19; Hr'g Tr. vol. 2, 91, 133, 149, 154. Complainant's witness Valdis Aistars, a long-term employee of the enforcement branch of Region V's water division, provided testimony at the hearing on EPA's penalty calculation in this case."[46/] Hr'g Tr. vol. 1, 244, 260. However, Mr. Aistars testimony did not specifically elaborate on the logistics employed by the Region with regard to each of the nine statutory factors. In fact, it is not entirely clear exactly how the Region accounted for each statutory factor, in terms of whether it increased or decreased the final penalty proposal, and no testimony or exhibits were offered to clarify how each statutory factor affected, if at all, the proposed $60,000 penalty calculation.[47/]

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[45/] The $11,000 and $137,500 figures are the inflation-adjusted amounts applicable to penalties effective between January 30, 1997 and March 15 2004, pursuant to the Civil Monetary Inflation Adjustment Rule. 40 C.F.R. part 19.

[46/] A penalty policy was not utilized in calculating Complainant's proposed penalty under the CWA. Rather, the Region apparently focused holistically on the statutory penalty factors in proposing the $60,000 amount.

[47/] Although the Region's prehearing exchange included a detailed explanation of how the proposed penalty was determined in

(continued...)

Mr. Aistars testified that prior to issuing a complaint to a septage hauler alleged to be in violation of Section 405(e) of the CWA, the Region sends the hauler a prefiling letter known as a "SBREFA letter".[48] Hr'g Tr. vol. 1, 256. The SBREFA letter typically contains an initial penalty amount, based on the facts as the EPA is aware of them at the time of the prefiling letter. Hr'g Tr. vol. 1, 257. Both the initial proposed penalty amount in the SBREFA letter and the proposed penalty amount in the Complaint require management review and approval to ensure consistency between various enforcement proceedings. Hr'g Tr. vol. 1, 257-58.

At the time the EPA prepared the SBREFA letter to send to Respondent, the EPA calculated $90,000 as an appropriate penalty amount, given Respondent's status as a small business owner.[49] Hr'g Tr. vol. 2, 181-82. Complainant's witness Mr. Aistars testified that the EPA took "Barber Trucking's claim that he received instructions from the Brown County Health Department regarding his land application activities . . . into account when we reduced the penalty from the statutory maximum, which this case easily could have deserved." Hr'g Tr. vol. 2, 181. Then, based on information gained from Respondent's replies to the information requests, and the statutory factors of Section 309(g)(3) of the CWA, the EPA further reduced the amount of penalty to the $60,000 amount requested in the Complaint.[50] Hr'g Tr. vol. 2, 182. *See* Hr'g Tr. vol. 2, 91, 133, 149, 154. Mr. Aistars expressed his belief that Respondent may have received land application instructions contrary to the requirements of the Part 503 regulations from a former employee of the BCHD, Mr. Larry Griffith, and his testimony implies that the Region adjusted the penalty downwards to reflect this new information. Hr'g Tr. vol. 2, 182-83.

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[47] (...continued)
accordance with the CWA statutory factors, such explanation was not introduced into the record at the hearing.

[48] SBREFA refers to The Small Business Regulatory Enforcement Fairness Act of 1996.

[49] Mr. Aistars testified that management officials at the EPA approved the $90,000 penalty amount listed in the SBREFA letter sent to Mr. Barber. Hr'g Tr. vol. 1, 269.

[50] Mr. Aistars testified that management officials at EPA similarly approved the refined $60,000 penalty amount. Hr'g Tr. vol. 1, 269-70.

Under the Rules of Practice, Complainant must prove that its proposed penalty is appropriate, in light of the penalty factors of Section 309(g)(3) of the CWA. 40 C.F.R. § 22.24; *In Re Donald Cutler*, 11 E.A.D. 622, 631 (EAB 2004). A complainant demonstrates a penalty is appropriate by showing "that it considered each of the statutory penalty factors and that the recommended penalty is supported by analyses of those factors." *Id.* at 631-32. The statutory penalty factors are discussed, in turn, *infra*, immediately following a summary of Respondent's basic arguments.

**A. SUMMARY OF RESPONDENT'S BASIC ARGUMENTS**

Respondent asserts that any violations he may have committed with regard to his "waste removal business were done unwillingly and without intentional wrongdoing." Resp. Br. 1. He contends, "I made every possible effort to comply with the law as I understood it and conducted my business in as professionally and environmentally manner as I was able" to do. *Id.* According to Respondent, at all relevant times he was acting in accordance with the directives, instructions, and resolutions provided to him by the BCHD and the Southwestern District of OHEPA.

Respondent additionally claims that it is unreasonable to expect him to look beyond the BCHD or OHEPA for guidelines or instructions concerning the operation of his business, as he believed that these entities were aware of the requirements to keep him in compliance. Respondent insists that if he is in violation of any federal regulations, he is innocent of knowingly committing any violations and he was making diligent good faith efforts at all times to operate his business in compliance with all laws.

In view of the foregoing, Respondent believes that any penalty should be mitigated. Finally, Respondent asserts he should be indemnified by the BCHD and Southwestern District of OHEPA for any fines or penalties assessed against him.

**B. Gravity-Based Penalties for Counts I Through IV**

**1. Count I: Vector Attraction Reduction Requirements for Domestic Septage Under 40 C.F.R. § 503.33**

a) Nature, Circumstances, and Extent of Violation

Respondent's failure to comply with the vector attraction reduction requirements of 40 C.F.R. § 503.33(b)(9), (b)(10), or (b)(12), pursuant to 40 C.F.R. § 503.15(d), equates to a

violation of an operating standard that is designed to protect the population from the transmission of diseases associated with domestic septage. 58 Fed. Reg. at 9248-56, 9322; Hr'g Tr. vol. 2, 7-22.

The record reflects that an excessive amount of untreated septage was applied to a relatively small portion of the Site for at least the roughly two-year period alleged in the Complaint. The record establishes that between May 2000 and mid-April 2002, Respondent applied at least 1,092 loads, or approximately 660,000 gallons, of domestic septage to a small portion of his Site. Compl. Ex. 39; Hr'g Tr. vol. 2, 27-28. The portion of the Site where septage was land applied is at most five or six acres. Compl. Ex. 39, 43, 15, 16; Hr'g Tr. vol. 2, 103-05.

As the Region correctly noted in its post-hearing brief, Respondent's violations of the vector attraction reduction requirements (e.g. injection, incorporation, or alkaline treatment) at the Site were egregious, putting neighbors and others in the nearby residential area at risk for exposure to disease and contaminated drinking water obtained from cisterns or shallow dug wells. Compl.'s Post-Hr'g Br. 27. Respondent used a network of pipes to pump septage from his trucks on his driveway out onto the surface of the ground or into a makeshift system of open trenches, a practice that resulted in domestic septage accruing in large pools on the Site that reached depths of at least one or two feet. Hr'g Tr. vol. 1, 132-37; Hr'g Tr. vol. 2, 25-26; Hr'g Tr. vol. 3, 182-83. *See* Compl. Ex. 17, 39, 52. Respondent explained that he land applied domestic septage at the Site in this manner because it was too time consuming to cut a trench, cover it, and cut a new one in the same day or too difficult during the wet season, which was approximately 180 days a year. Hr'g Tr. vol. 3, 182-83. As duly noted by the Region, the result was feet-deep standing septage covering large parts of the Site, open and available to vectors and creating the danger of disease transmission. Compl.'s Post-Hr'g Br. 29-30. Mr. Joshua Jackson, an environmental specialist with OHEPA for approximately twelve years, testified that the PVC pipes conveyed domestic septage into "a swampy area" where scrapped automobiles sat with septage "half way up their tires," and that the odor at the Site was "overwhelming." Hr'g Tr. vol. 2, 229.

Further, even though Respondent knew there were problems with the methods he utilized to land apply, Respondent actually increased the volume of his business, doubling the number of loads he land applied to the Site in 2001 and even further increasing the number of loads he disposed there in 2002. Hr'g Tr. vol. 3, 250-51. Yet, from May 2000 to mid-April 2002, Respondent completely failed to comply with the vector attraction

reduction requirements of the Part 503 regulations. Hr'g Tr. vol. 2, 22-25, 93. That is, Respondent did not inject, incorporate, nor treat the domestic septage land applied to the Site. Nor did Respondent even come close to following the so-called rod-and-cover practices ("Rod and Cover Practices")apparently recommended by the local BCHD, which purportedly advised Respondent to maintain the septage at a specified distance (measured in rods) away from residences and cover the septage daily.[51/] Hr'g Tr. vol. 2, 271; Hr'g Tr. vol. 3, 13-14, 47, 177-78, 247-48.

b) Gravity of Violation (Actual or Potential Harm)

Respondent's violation of the operational requirement at 40 C.F.R. § 503.15(d) inflicted both actual and potential harm to the environment. Additionally, Respondent's failure to comply with the vector attraction reduction requirements created potential harm to human health. Moreover, Respondent's violations caused harm to the self-implementing nature of the Part 503 regulations and therefore the integrity of the Clean Water Act.

Regarding the general gravity of the violation, Respondent's actions exposed nearby residents to vectors, putting people at serious risk for contracting diseases contained in domestic septage. Hr'g Tr. vol. 2, 16-18, 122-23. *See* Compl. Ex. 24. At the hearing, Mr. Seth Meranda, a Sanitarian with the BCHD from February 2001 to April 2003, reviewed and authenticated his inspection report, written after his April 11, 2002 visit to Respondent's Site, which states in part:

> The first thing I observed was a stream with a lot of algae in it with a brown tinge of color and odor. This stream ran through a culvert under the access road to a sewage-dumping site. The sewage-dumping site is located in the center of the lot. The amount

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[51/] Both Respondent and Mr. Griffith testified that the Rod and Cover Practices were set forth in BCHD health manuals. Mr. Griffith noted his understanding that the practices were "state health department regulations." Hr'g Tr. vol. 2, 271. Respondent described seeing them in "the thick black books that's in the law library." Hr'g Tr. vol. 3, 47. Such "manuals" were never proffered, and I make no finding as to their existence or to the accuracy or legitimacy of their purported contents other than to note that, as far as they were described in hearsay-like fashion, Respondent was not in compliance with their alleged recommended practice for land applying domestic septage.

> of sewage in this area covered acres of the site varying in depth. Observed vehicles in sewage scattered throughout the waste site. Roger Barber stated that last week he dumped 22 loads of sewage with a minimum estimate of 25,000 gallons. Words cannot describe the foul odors and environmental hazards that are present without the help of numerous pictures taken.

Compl. Ex. 14. *See* Hr'g Tr. vol. 2, 211.

As the EPA points out, various witnesses testified about the shocking and deplorable conditions at the Site. Compl.'s Post-Hr'g Br., 30-32. Mr. Stephen Dick, the BCHD Environmental Health Director since December 2001, testified about the scenes depicted in photographs of the Site (entered into the record as Compl. Ex. 55-57, 60-67, 69, 75) that show a pipe network and septage pooled at a depth of approximately one foot with indications, based on markings on the abandoned automobiles sitting in the septage, that septage had pooled there to a depth of about two-and-one-half feet in the past. Hr'g Tr. vol. 1, 120, 132-37. Mr. Meranda characterized the Site as an "environmental disaster," elaborating that the stream that runs through the Site is a tributary to the Mt. Orab water supply, that abandoned automobiles and other scrap materials were sitting in pooled septage on the Site, and that he was "appalled to think that this was going on." Hr'g Tr. vol. 2, 209-10.

Mr. Kyle Arn, a former BCHD Sanitarian who was hired in October 2000 and still employed by the BCHD at the time of the April 11, 2002 inspection of Respondent's Site, testified that he observed a "large amount of sewage and junk cars in a small particular area." Hr'g Tr. vol. 3, 91, 107, 111. At the hearing, Mr. Arn reviewed and authenticated his inspection report, written after his April 11, 2002 visit to Respondent's Site, which states in part:

> Roger [Barber] also stated that he estimates that he has dumped over a million and a half gallons of untreated sewage on this property. It appeared that the majority of the sewage was concentrated to one area, approximately 1 to 3 acres in size. A large number of pictures were taken. There was a drainage way that initiated on Barber's property that crossed over several neighboring properties and eventually emptied into a creek. This drainage way on Barber's property appeared to

be receiving sewage runoff.

Compl. Ex. 16. *See* Hr'g Tr. vol. 3, 110. Mr. Arn, Respondent's own witness, admitted that as a sanitarian, he would not allow a site to be in the condition he observed Respondent's Site to be, noting he "suspected that the sewage had a potential of affecting the environment, especially because there was drainage waste nearby." Hr'g Tr. vol. 3, 111.

The potential for the spread of disease was amplified by the topography and geology of the Site. The EPA highlighted that Mr. Dick testified that the photograph designated Complainant's Exhibit 77 depicts the stream at the Site; that the photograph designated Complainant's Exhibit 78 depicts the stream running in a ditch along the driveway at the Site; that the photograph designated Complainant's Exhibit 80 depicts the stream exiting the Site; that the photograph designated Complainant's Exhibit 81 depicts the stream on the neighboring property; and that the photograph designated Complainant's Exhibit 82 depicts the house on the neighboring property. Compl.'s Post-Hr'g Br. 32 (citing Hr'g Tr. vol. 1, 138-39). Further, a map of the Site shows the drainage ditch that transects the Site. Compl. Ex. 43. This ditch runs in an east-to-southeast direction, flows along Clements Road into a neighboring property immediately to the south, and eventually connects to an unnamed tributary to Sterling Run. Hr'g Tr. vol. 2, 113-14. *See* Compl. Ex. 43, 91.

Mr. Aistars testified that the geology of the Site consists of "[t]ight clay soil," which makes the land more susceptible to septage runoff when domestic septage pools on the land. Hr'g Tr. vol. 2, 138-39. Evidence supports that such runoff entered the drainage ditch that transects the Site and crosses over neighboring properties. Hr'g Tr. vol. 2, 116-17; Compl. Ex. 91. Indeed, the 2005 "Stormwater Pollution Prevention Plan," which Respondent requested for his Site, states that the "domestic septage disposal area (center of [Respondent's] 16-acre parcel) is a potential source of nitrogen run-off." Compl. Ex. 91. Mr. Aistars testified that because the Site is a potential source of nitrogen run-off, the domestic septage pool was also a potential source of pathogen run-off. Hr'g Tr. vol. 2, 117. Moreover, Mr. Jackson testified: "I do distinctly remember evidence that septage had either made it to the creek . . . [by] an action of [Respondent] applying it and then draining there or via overland flow from storm water runoff . . . because you could see . . . tampons and . . . a gray fungus that . . . is usually associated with septic tank effluent or septage going into a stream." Hr'g Tr. vol. 2, 230. While there are no photographs demonstrating septage entering the stream, testimony such as Mr. Jackson's indicates that it did.

Respondent's violation of the vector attraction reduction requirements also created the potential for serious harm to human health through the threat of the spread of disease. The Site existed in a residential neighborhood with seven or eight homes, placing people in proximity to the Site.[52/] Hr'g Tr. vol. 2, 94, 97. The Region deftly points out that two homes are shown on a map of Respondent's Site, one approximately 400 feet from the Site (120 feet from the property line) and the other approximately 800 feet from the Site (300 feet from the property line), with one home having a well approximately 2,000 feet from the Site. Compl.'s Post-Hr'g Br. 33 (citing Compl. Ex. 43; Hr'g Tr. vol. 2, 98-99). In 2002 these homes obtained drinking water from cisterns or shallow wells. Hr'g Tr. vol. 1, 140.

The BCHD ran laboratory tests on these wells and the waterway along Clements Road, and they received positive test results for E. Coli and fecal coliform and confirmed the presence of Streptococcus in the stream, all of which are indicator organisms for contamination and the potential presence of other pathogenic organisms. Compl. Ex. 46; Hr'g Tr. vol. 1, 141; Hr'g Tr. vol. 2, 105-08, 197. *See* Compl. Ex. 25.[53/] While the levels of bacteria are not alarmingly high, they nonetheless show the existence of contamination. Respondent's witness Mr. Arn, referring to these BCHD test results in Complainant's Exhibit 46, testified that he took the samples according to protocol as part of his occupational duties as an employee of the BCHD, and he expects them to be correct and accurate. Hr'g Tr. vol. 3, 101-02, 107.

In contrast, Respondent attempts to use these test results to demonstrate the contrary; that is, the actual harm was not significant. In support of this position, Respondent testified

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[52/] The EPA argues in its post-hearing brief that the Site's residential nature is confirmed by limitations in the deed to the Clements Road Property, which Respondent described as prohibiting certain obnoxious uses or offensive activity. Compl.'s Post-Hr'g Br. n.13 (citing Hr'g Tr. vol. 3, 243-45; Compl. Ex. 87).

[53/] At the hearing and in its post-hearing brief, the EPA acknowledges that the contamination at the Site cannot be linked by a preponderance of evidence to the contaminated wells and cisterns on neighboring properties, which could have received contamination from a number of warm-blooded sources in a variety of ways. Compl.'s Post-Hr'g Br. 33, n.14. However, given the egregious state of Respondent's Site, which consisted of septage fully exposed to the environment in a large pool, and its high potential for harm, I agree that it is a reasonable assumption that Respondent's disposal practices well could have been responsible for the contamination of the wells and cisterns. *See* Hr'g Tr. vol. 2, 124-26.

that "all of the [BCHD] samples fall within allowable parameters for at least one type of . . . normal operating sewer system in the county." Hr'g Tr. vol. 3, 208-09. I emphasize that Respondent's argument about what is appropriate for other sewer systems is not relevant to this case. Respondent is charged with violating land application of domestic septage regulations at 40 C.F.R. Part 503, and a discussion of other potential sources of discharge in Brown County is beyond the scope of this case. Similarly, Respondent's argument that the Ohio River, which is promoted for recreational use by the State, has higher levels of bacteria than what was detected in the wells and waterways relevant at his Site is also beyond the scope of this case. Compl. Ex. 39; Hr'g Tr. vol. 2, 197-200.

Additionally, Respondent took his own water samples at the Site and then attempted to use the results to demonstrate that actual harm was not significant. Compl. Ex. 47. Respondent's test results are not reliable, nor is his argument persuasive. As Mr. Dick noted, a zero value for E. Coli and fecal coliform bacteria, purportedly collected from a drainage ditch in the natural environment, is unusual. Hr'g Tr. vol. 2, 112-13. *See* Compl. Ex. 47. Moreover, Respondent's sample results are "meaningless" because there is no associated sample date, they do not have a chain of custody to demonstrate prompt analysis and measures of quality assurance, and it appears that they were taken after the May 2000 to Mid-April 2002 time period at issue in this case. Hr'g Tr. vol. 2, 110-12; Compl. Ex. 47. In fact, the test report dates were in October 2003, well after the violation period, and possibly after the installation of a chlorinator in the ditch. Hr'g Tr. vol. 2, 103; Compl. Ex. 47

Exposure to pathogenic organisms (e.g. bacteria, viruses, parasites) contained in domestic septage can be deleterious to human health. Hr'g Tr. vol. 2, 8-12. *See* Compl. Ex. 54. Vectors are attracted to the characteristics of septage (e.g. its odor). Hr'g Tr. vol. 2, 8-9. When vectors are exposed to septage directly, or indirectly via water contamination, the potential for human exposure to disease, from the vectors' transfer of pathogens, increases immensely. Hr'g Tr. vol. 2, 8-12. Any vector that comes into contact with septage containing pathogenic organisms can transport the pathogens to any surface (e.g. a porch or a railing or a cistern or shallow dug well), exposing the environment and persons who come into contact with that surface to pathogenic organisms. Compl. Ex. 54; Hr'g Tr. vol. 2, 9-10, 17-19. The Part 503 regulations attempt to reduce the potential for such exposure by requiring land appliers of domestic septage to employ the vector attraction reduction mechanisms of injection, incorporation, or alkaline treatment. 40 C.F.R. § 503.15(d). Hr'g Tr. vol. 2, 19-22.

Respondent's activities also created harm to the CWA program. Respondent's failure to perform vector attraction reduction subverted the self-implementing nature of the Part 503 regulations, against the Agency's intent. Hr'g Tr. vol. 2, 12, 15-17, 122-23. Respondent's failure also undermined the CWA's fundamental goals of protecting human health and the environment and maintaining the integrity of the nation's waters. Hr'g Tr. vol. 2, 12, 15-17, 122-23. As a final observation, I note that as a result of the April 2002 inspections of the Site, the Brown County Board of Health ordered that land application of domestic septage cease, an injunction was issued against Respondent to ensure such at his Site, and the residents near the Site were directed not to drink water from their wells or cisterns. Compl.'s Ex. 38; Hr'g Tr. vol. 2, 106. *See* Hr'g Tr. vol. 2, 163; Hr'g Tr. vol. 3, 247.

c) Penalty Associated with Count I

The Region calculated a penalty of $30,000 associated with Respondent's violation of 40 C.F.R. § 503.15(d). Hr'g Tr. vol. 2, 91. Given the seriousness of this violation of an operational requirement under the Part 503 Subpart B regulations, I find a $30,000 penalty reasonable and appropriate. The record before me supports the award of this full amount for Count I.

**2. Initial Portion of Count II: The Annual Application Rate Pollution Limit at 40 C.F.R. § 503.13(c)**

a) Nature, Circumstances, and Extent of Violation

Respondent's failure to comply with the AAR (annual application rate) pollution limit of 40 C.F.R. § 503.13(c), pursuant to 40 C.F.R. § 503.12(c), equates to a violation of an operating standard. This operating standard is designed to prevent the consequences associated with excess nitrogen levels both in terms of the environment and human health. Hr'g Tr. vol. 2, 135-36, 141-43. Excess levels of nitrogen in groundwater and surface waters can foster eutrophication. Hr'g Tr. vol. 2, 142-43. Also, human exposure to high levels of nitrogen can lead to health ailments such as blue baby syndrome(methemoglobinemia). Hr'g Tr. vol. 2, 141-42.

The record reflects a large amount of septage was applied to a relatively small portion of the Site in gross excess of the AAR limit specified by 40 C.F.R. § 503.13(c) for at least the roughly two-year period alleged in the Complaint. Although 40 C.F.R. § 503.12(c) clearly requires a land applier of domestic septage to cease applying domestic septage once a property's AAR limit is

reached, Respondent failed to do this at his Site for at least the period of May 2000 to mid-April 2002. This operating standard is designed to protect human health and the environment from nitrogen contamination in surface water and groundwater. Hr'g Tr. vol. 2, 29-34.

Respondent's massive over-application of domestic septage to the Site far exceeded the Site's AAR of 11,538 gallons per acre per year.[54] In fact, even though 40 C.F.R. § 503.12(c) required Respondent to cease disposing of septage at the Site once the AAR was reached: by May 2000 Respondent had already applied more than three times the allowable AAR pollutant limit; between May 2000 and April 2001 Respondent applied approximately four times the allowable AAR pollutant limit; and between May 2001 and mid-April 2002 Respondent applied approximately seven times the allowable AAR pollutant limit. Hr'g Tr. vol. 2, 41-42.[55]

Such over-application of septage may have caused nitrogen contamination of surface waters and nitrogen contamination of ground water, putting the drinking water supplies of nearby neighbors at risk. Septage runoff from the Site could cause excess nitrogen to enter surface water and drinking water sources. Hr'g Tr. vol. 2, 136-42.

As the Region aptly argued in its post-hearing brief, the facts relevant to the potential spread of nitrogen contamination to surface water and groundwater, due to the topography and geology of the Site, are similar to the facts discussed with regard to vector attraction reduction and the potential spread of the septage runoff. Compl.'s Post-Hr'g Br. 37. That is, a stream or ditch transects Respondent's Site and exits into a ditch along Clements Road on the neighboring property. Hr'g Tr. vol. 1, 138-39; Hr'g Tr. vol. 2, 116; Compl. Ex. 42, 81, 91. The roadside ditch then joins an unnamed tributary of Sterling Run, which further enters the Ohio River. Hr'g Tr. vol. 2, 92-93, 99-100, 114; Compl. Ex. 91. Additionally, as the Region points out, the spread of nitrogen contamination to drinking water is enhanced by coupling the topography of the Site with the closeness of neighboring homes in the residential area that rely on drawing drinking water from cisterns and shallow wells. Compl.'s Post-Hr'g Br. 37 (citing Hr'g Tr. vol. 1, 140; Hr'g Tr. vol. 2, 94, 97-99, 113-14, 116-17, 135-41, 230; Compl. Ex. 43, 91).

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[54] As previously discussed, *supra*, the Site's AAR was premised on the Nitrogen Requirement Respondent provided the EPA, and the 11,538 figure for the AAR is not contested by either party.

[55] *See supra* n.33.

b) Gravity of Violation (Actual or Potential Harm)

Respondent's violation of the operational requirement prohibiting any person from land applying domestic septage in excess of the Site's AAR, pursuant to 40 C.F.R. § 503.12(c) and, in turn, 40 C.F.R. § 503.13(c), inflicted both actual and potential harm to the environment. Additionally, Respondent's failure to comply with the AAR pollutant limits created potential harm to human health. Moreover, Respondent's violations caused harm to the self-implementing nature of the Part 503 regulations and therefore the integrity of the Clean Water Act.

Regarding the general gravity of the violation, Respondent's actions may have caused groundwater and/or drinking water contamination, putting nearby residents at risk for consuming excessive levels of nitrogen. Hr'g Tr. vol. 2, 141-43. Nitrate is a form of nitrogen that is highly mobile and moves quickly in water. 58 Fed. Reg. at 9276. Excess levels of nitrate in drinking water create the potential for methemoglobinemia (blue baby syndrome) in infants, which is a sensitive public health issue. Hr'g Tr. vol. 2, 33-34, 141-42; 58 Fed. Reg. at 9276. Although the BCHD did not test the wells for nitrogen contamination, Respondent's over-application of domestic septage at the Site put neighbors' drinking water supplies at risk for nitrogen contamination. Hr'g Tr. vol. 1, 142; Hr'g Tr. vol. 2, 141-42. Indeed, as the Region points out in its post-hearing brief, Respondent's own "Stormwater Pollution Prevention Plan," prepared for the Site in 2005, three years after Respondent stopped land applying septage to the Site, states that the "domestic septage disposal area (center of [Respondent's] 16-acre parcel) is a potential source of nitrogen run-off." Compl.'s Post-Hr'g Br. 39 (citing Compl. Ex. 91; Hr'g Tr. vol. 2, 116-17).

Respondent's actions also exposed the surrounding environment to nitrogen contamination and the potential of eutrophication. Hr'g Tr. vol. 2, 36, 141-43. Eutrophication occurs when excess nitrogen enters surface water and causes an over-abundant growth of aquatic plant life and algae, the decomposition of which depletes the water's dissolved oxygen supply, killing off fish and aquatic animals. Hr'g Tr. vol. 2, 36, 142-43. Thus, the presence of algae is an indicator of actual harm. Hr'g Tr. vol. 2, 143.

On the other hand, Respondent contends that septage did not reach the stream or ditch that transects the Site or the roadside ditch that exits the Site along Clements Road. Respondent testified that no septage reached the ditch and that he built a dirt ridge to protect against seepage that worked quite well. Hr'g Tr. vol. 3, 183-84. Respondent also notes that Mr. Dick testified that he did not observe sewage bleeding directly into

the stream. Hr'g Tr. vol. 1, 163.

However, Respondent himself and his witness, Mr. Griffith, acknowledged that BCHD tests show the presence of Streptococcus in the drainage ditch that transects the Site and exits the Site. Tr. vol. 3, 29, 33, 208-09. This acknowledgment supports the position that septage probably entered the stream because, as Mr. Griffith testified, the presence of Streptococcus shows the presence of human waste. Hr'g Tr. vol. 3, 22-33. Also, Mr. Dick observed during the April 11, 2002 inspection that water in the ditch was "definitely not clear" and had "a murky look to it." Hr'g Tr. vol. 3, 156.

Additionally, Mr. Meranda and Mr. Arn wrote inspection reports following their April 11, 2002 visit to the Site. These reports discuss, respectively, "a stream with a lot of algae in it with a brown tinge of color and odor," and the appearance of sewage contamination in the stream/ditch. Compl. Ex. 14, 16. *See* Compl. Ex. 77, 78, 80; Hr'g Tr. vol. 2, 210-14. Significantly, photographs of the stream/ditch transecting Respondent's Site, taken in mid-April 2002, show evidence of algae in the stream. Compl. Ex. 77, 78, 79. *See* Hr'g Tr. vol. 1, 132. Such indicates that there are nutrients in stream/ditch resulting from the over-application of septage that are contributing to the growth of algae. Hr'g Tr. vol. 2, 142-43. Mr. Jackson testified that during the April 15, 2005 inspection he observed that septage had either reached the stream/ditch on the Site from Respondent's direct application or flowed overland from storm water runoff. Hr'g Tr. vol. 2, 230. He observed a gray fungus in the stream typical of water contaminated with domestic septage. *Id.*

Further, Respondent argues his Site was not exposed to nitrogen contamination because "if the nitrogen level in the soil was tremendous it would have killed the trees within the dump site and we have no trees that have died." Hr'g Tr. vol. 3, 212-13. Respondent argues that the continuing presence of the trees on his Site refutes the Region's allegations of nitrogen contamination. Resp.'s Post-Hr'g Br. 25. I find no merit to this unfounded argument, as it is purportedly based on the advice of an individual Respondent proclaims is his geologist, but whose testimony was never proffered.

I conclude that the Region has adequately shown that the surface water exiting the Site was exposed to nitrogen contamination and exhibited the presence of contamination.

Finally, Respondent's activities also caused harm to the CWA program. Respondent's failure to comply with the Site's AAR subverted the self-implementing nature of the Part 503

regulations, against the Agency's intent. Hr'g Tr. vol. 2, 12, 15-17, 37, 143-44. It also undermined the CWA's fundamental goals of protecting human health and the environment and maintaining the integrity of the nation's waters. Hr'g Tr. vol. 2, 32-33, 36-37, 143-44.

c) Penalty Associated with Initial Portion of Count II

In Count II of its Complaint, the Region chose to combine two of Respondent's alleged violations into one count. That is, Count II addresses Respondent's failure to comply with regulations regarding the AAR for domestic septage at his Site, both in terms of the operational aspect of 40 C.F.R. § 503.13(c) (and, in turn, 40 C.F.R. § 503.12(c)) and the recordkeeping aspect of 40 C.F.R. § 503.17(b)(4). *See* Hr'g Tr. vol. 2, 31-32. The Region calculated a penalty of $20,000 associated with Respondent's violations regarding the AAR for domestic septage at his Site, a figure that considers both the violation of the above-mentioned operational requirement and the below-mentioned recordkeeping requirement. Hr'g Tr. vol. 2, 91.

Based on Complainant's pattern of requesting a higher ($30,000) penalty for the operational requirement violated as alleged in Count I and lower penalty for each of the recordkeeping requirements violated as alleged in Counts III and IV ($5,000 as discussed below), it is reasonable to assume that the Region proposes $15,000 as the appropriate penalty for Respondent's violations of 40 C.F.R. § 503.13(c) (and, in turn, 40 C.F.R. § 503.12(c)) and $5,000 as the penalty for Respondent's violation of 40 C.F.R. § 503.17(b)(4). Regardless of whether this assumption is true, I find that the total $20,000 penalty sought is reasonable and appropriate when collectively considering both Respondent's operational and recordkeeping violations concerning the AAR for domestic septage under the Part 503 regulations, discussed *supra*. Thus, the record before me supports the award of this full amount for Count II.

**3. Remaining Portion of Count II; Count III; and Count IV: Recordkeeping Requirements Concerning Information on the Nitrogen Requirement Pursuant to 40 C.F.R. § 503.17(b)(4), the Requisite Certification Statement Pursuant to 40 C.F.R. § 503.17(b)(6), and Compliance with the Vector Attraction Reduction Requirements Pursuant to 40 C.F.R. § 503.17(b)(8), Respectively.**

a) Nature, Circumstances, and Extent of Violations

i. Records Regarding the Nitrogen Requirement Pursuant to 40 C.F.R. § 503.17(b)(4)

Respondent's failure to develop, and retain for five years, a record of the Nitrogen Requirement for the Site between May 2000 and mid-April 2002 was, in essence, a violation of both an operational and recordkeeping requirement. Hr'g Tr. vol. 2, 43-44, 144-48. Satisfaction of the operational requirement concerning the site's AAR, at 40 C.F.R. § 503.13(c), hinges on the satisfaction of the recordkeeping requirement at 40 C.F.R. § 503.17(b)(4) because if a land applier does not develop and maintain information on the Nitrogen Requirement while applying septage to a site, it is impossible to determine and comply with the AAR for domestic septage at that site. 40 C.F.R. § 503.13(c). *See* Hr'g Tr. vol. 2, 43-44, 144-45. Thus, a land applier without accurate information on a site's AAR for domestic septage is more likely to over-apply domestic septage to a site, potentially resulting in nitrogen contamination of ground and surface waters. *See* Hr'g Tr. vol. 2, 33.

As a recordkeeping requirement, the regulation is designed to enable a land applier to determine the appropriate AAR for domestic septage and to help the EPA quickly assess a land applier's compliance with the Part 503 regulations. *See* Hr'g Tr. vol. 2, 144-48. The evidence at hand in this matter establishes that Respondent completely failed to prepare the required record. Respondent never determined what the Nitrogen Requirement was for his Site from at least May 2000 through mid-April 2002, and possibly as far back as 1997. Hr'g Tr. vol. 2, 145.

ii. Records Concerning the Requisite Certification Statement Under 40 C.F.R. § 503.17(b)(6)

Respondent failed to develop, and retain for five years, a record certifying that while he was applying domestic septage to the Site, and under his direction and supervision, he prepared and kept information useful for monitoring compliance with the Part 503 regulations, as required by 40 C.F.R. § 503.17(b)(6). Respondent's failure to monitor compliance at the Site, and certify responsibility for such, for at least the approximately two year period alleged in the Complaint, was a violation of a recordkeeping requirement.

From at least May 2000 to mid-April 2002, and perhaps as far back as 1997, according to Mr. Aistars' testimony, Respondent never provided the required certification.[56/] Hr'g Tr. vol. 2, 150.

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[56/] As previously discussed, *supra*, the document that Respondent eventually produced and deemed a certification (Complainant's Exhibit 41) did not meet the requirements of 40

(continued...)

This was a complete deviation from the regulation at 40 C.F.R. § 503.17(b)(6). In fact, the evidence demonstrates that Respondent never provided the required certification because he never kept these records. Hr'g Tr. vol. 2, 150-51. The only document EPA received that was even close to the required record was a statement apparently prepared in response to the Region's information requests that certified Respondent was not in compliance with the vector attraction reduction requirements. Hr'g Tr. vol. 2, 67-70, 74-76.

iii. Records Demonstrating Compliance with the Vector Attraction Reduction Requirements Pursuant to 40 C.F.R. § 503.17(b)(8)

Respondent's failure to develop, and retain for five years, a record describing how he was meeting the vector attraction reduction requirements at the Site between May 2000 and mid-April 2002 was a violation of a recordkeeping requirement. Given Respondent's failure to devise or implement mechanisms for meeting the vector attraction reduction requirements, as described in § 503.33(b)(9), (b)(10), and (b)(12), in violation of 40 C.F.R. § 503.15(d), Respondent's liability for failure to develop and retain a record describing compliance with such mechanisms is not surprising. The requirement was designed to enable the EPA to quickly determine compliance with the part 503 regulations and protect people from the transmission of diseases contained in domestic septage. Hr'g Tr. vol. 2, 155-58.

b) Gravity of Violations (Actual or Potential Harm)

Respondent's violation of the three recordkeeping requirements at 40 C.F.R. § 503.17(b)(4),(b)(6), and (b)(8), respectively, collectively inflicted both actual and potential harm to the environment. Hr'g Tr. vol. 2, 147-48, 153-54, 156-58. Specifically, the actual and potential harm to the environment discussed in the context of Respondent's violation of the Site's AAR, *supra*, arise also from Respondent's failure to create and retain records concerning the Site's Nitrogen Requirement pursuant

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[56/] (...continued)
C.F.R. § 503.17(b)(6) because, *inter alia*, it did not indicate that the information used to determine compliance with the pathogen and vector attraction reduction requirements was prepared under Respondent's direction and supervision, it was undated, and it did not indicate it was prepared while Respondent was applying domestic septage at the Site. The document Respondent produced in no way resembled the requisite certification statement. Hr'g Tr. vol. 2, 67-69, 73-75.

to 40 C.F.R. § 503.17(b)(4).[57] Hr'g Tr. vol. 2, 44. Similarly, the actual and potential harm to the environment discussed in the context of Respondent's failure to satisfy the operational requirements of the Part 503 regulations, *supra*, arise also from Respondent's failure to develop and retain a certification statement of compliance with such operational requirements. Hr'g Tr. vol. 2, 64-65. Finally, the actual and potential harm to the environment discussed in the context of Respondent's failure to meet the vector attraction reduction methods, *supra*, arise also in the context of Respondent's failure to create and retain records on his plan to meet the vector attraction reduction requirements. Hr'g Tr. vol. 2, 156-58.

Moreover, Respondent's failure to comply with these three recordkeeping requirements created potential harm to human health. Hr'g Tr. vol. 2, 147-48, 153-54, 156-58. *See* Hr'g Tr. vol. 2, 44. Respondent's failure to develop a record of the Nitrogen Requirement contributed to the over-application of domestic septage at the Site that led to exposure of the surface water and possibly groundwater, which potentially jeopardized the drinking water supplies of residents neighboring the Site who obtained their water from shallow wells or cisterns. Hr'g Tr. vol. 2, 142. *See* Compl. Ex. 42; Hr'g Tr. vol. 2, 96-99, 105-06. Additionally, Respondent's failure to develop and retain a certification statement while land applying septage created potential harm to human health because such failure is indicative of Respondent's failure to meet the operational standards concerning the Site's AAR and vector attraction reduction. Hr'g Tr. vol. 2, 62. Finally, Respondent's failure to keep a record demonstrating his plan to meet the vector attraction reduction requirements contributed to his failure to comply with the such requirements, which created potential harm to human health. Hr'g Tr. vol. 2, 77-79, 157-58.

Respondent's three recordkeeping violations also undermined the scheme of self-implementation envisioned by the Part 503 regulations, causing "harm to the program." Hr'g Tr. vol. 2, 45-46, 61, 65, 147-48, 152-54, 156-57. Respondent's recordkeeping violations directly contributed to the egregious nature of the

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[57] As the Region highlighted in its post-hearing brief, Respondent's failure to keep a record of the Nitrogen Requirement precluded him from complying with the AAR pollution limit for domestic septage, so the violation of the recordkeeping-operational requirement at 40 C.F.R. § 503.17(b)(4) inflicted the same types of harm upon the environment as previously discussed regarding the violation of the operational requirement at 40 C.F.R. § 503.12(c). Compl.'s Post-Hr'g Br. 42 (citing, Hr'g Tr. vol. 2, 116-17, 141-43, 210-11; Compl. Ex. 14, 91).

conditions at the Site because in addition to fostering the Part 503 program's design for self-implementation, the requisite records allow the EPA to quickly determine a land applier's compliance with 40 C.F.R. part 503 Subpart B. Hr'g Tr. vol. 2, 44-45, 77-78, 151-52. The EPA cannot effectively determine the Part 503 Subpart B compliance status of domestic septage land appliers where records are not made and kept describing the Site's AAR pollutant limits, the applier's certification of compliance, or how vector attraction reduction is achieved. This injures the effectiveness of, and harms, the Part 503 program. Harm to the program in turn threatens the integrity of the Clean Water Act, which seeks to protect human health and the environment from the adverse effects of water contamination. Hr'g Tr. vol. 2, 46, 61, 143-44, 147-48, 152, 156-57.

c) Penalty Associated with Remaining Portion of Count II; Count III and Count IV

As discussed *supra*, Count II of the Complaint addresses Respondent's failure to comply with regulations regarding the AAR for domestic septage at his Site, both in terms of the operational aspect of 40 C.F.R. § 503.13(c) (and, in turn, 40 C.F.R. § 503.12(c)) and the recordkeeping aspect of 40 C.F.R. § 503.17(b)(4). *See* Hr'g Tr. vol. 2, 31-32. The Region proposed a penalty of $20,000 as appropriate concerning Respondent's violations of these two requirements. Hr'g Tr. vol. 2, 91. As noted *supra*, I find this total $20,000 penalty reasonable and appropriate considering Respondent's violations as alleged in Count II.

The Region proposes a penalty of $5,000 for Respondent's violation of 40 C.F.R. § 503.17(b)(6), as alleged in Count III of the Complaint. Hr'g Tr. vol. 2, 149. Given the extensive nature of this recordkeeping violation and its impact on the integrity of the Part 503 Subpart B regulations, I find a $5,000 penalty reasonable and appropriate. The record before me supports the award of this full amount for Count III.

Similarly, the Region proposes a penalty of $5,000 for Respondent's violation of 40 C.F.R. § 503.17(b)(8), as alleged in Count IV of the Complaint. Hr'g Tr. vol. 2, 154. Given the extensive nature of this recordkeeping violation and its impact on the integrity of the Part 503 Subpart B regulations, I find a $5,000 penalty reasonable and appropriate. The record before me supports the award of this full amount for Count IV.

## C. Statutory Penalty Factors With Respect to the Violator

### 1. Ability to Pay

Respondent's ability to pay the penalty arising from his violations Section 405(e) of the CWA and, accordingly, the regulations at 40 C.F.R. part 503, is not in issue. In the parties' Initial Joint Set of Stipulated Facts, Exhibits, and Testimony ("Initial Set of Stipulations"), dated February 16, 2006 and filed February 17, 2006, Respondent stipulated that he has the financial ability to pay the proposed penalty of $60,000. Initial Set of Stipulations ¶ 1. He further agreed that "no further facts, exhibits or testimony, related to Mr. Barber's ability to pay the proposed penalty, beyond [the facts contained in the Initial Set of Stipulations], will be introduced at the hearing." Initial Set of Stipulations ¶ 2.

On February 17, 2006, Complainant filed, *inter alia*, a Motion in Limine To Prohibit the Introduction Additional Facts, Testimony, or Exhibits Related to the Matter of Respondent's Ability to Pay ("Motion in Limine"). That Motion sought an order in limine "prohibiting the introduction of any further facts, exhibits, or testimony related to Mr. Barber's ability to pay the proposed penalty beyond those contained in the Initial Joint Set of Stipulated Facts, Exhibits, and Testimony." *See* Complainant's Motion in Limine at 2. Although notably superfluous, by Order dated March 2, 2006, I granted Complainant's unopposed Motion in Limine. Order on Complainant's Motion in Limine at 2. Accordingly, no facts, testimony, or exhibits were introduced at trial regarding Respondent's inability to pay a $60,000 penalty because Respondent has affirmed he is so able to pay.

### 2. Prior History of Such Violations

The Region posits in its post-hearing brief that Respondent has a prior history of violations, discussing Respondent's failure to comply with the local BCHD Rod and Cover Practices and his "long history of not complying with the Part 503 regulations . . . [in some instances] since at least June 1997, predating the period alleged in the complaint."[58/] Compl.'s Post-Hr'g Br. 51 (citing Hr'g Tr. vol. 2, 28-29). I disagree with the Region's

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[58/] At the hearing, the Region also proffered evidence concerning Respondent's 1997 misdemeanor conviction for theft of services for improper disposal of septage. Compl. Ex. 85. The Region has not adequately demonstrated the relevance of this evidence to the question of Respondent's "prior history of such violations" and, as such, I have not considered this conviction in determining the appropriateness of the proposed penalty.

characterization of these facts as prior violations.

Respondent's alleged failure to comply with the local BCHD Rod and Cover Practices, which are not in the record before me nor presented as law, is not relevant to a discussion concerning a statutory factor designed to capture, in this case, any prior history of federal CWA violations. Contrary to what Complainant argues in its post-hearing brief, a mere resemblance between the structure and goals of local practices and federal regulations is not enough to make compliance history concerning the former applicable to the latter. *See* Compl.'s Post-Hr'g Br. 49-51. Facts relating to Respondent's alleged failure to comply with the BCHD Rod and Cover Practices are more pertinently discussed with regard to Respondent's culpability. *See* Hr'g Tr. vol. 2, 167-70.

Moreover, it would have been more appropriate for the Region to extend the time period of ongoing Part 503 violations alleged in the Complaint back to 1997 than to deem such previous activity of alleged noncompliance "prior history." EPA's July 9, 2002 Administrative Order requested Respondent's Part 503 compliance information dating back to June 1997. Hr'g Tr. vol. 2, 28-29. As the Region summarizes in its post-hearing brief, the hearing revealed that Respondent's compliance with the applicable Part 503 recordkeeping requirements was flawed dating back to June 1997. Compl.'s Post-Hr'g Br. 51 (citing Hr'g Tr. vol. 2, 46-48, 51-58, 65-66, 70-73, 79-82). Complainant argues, "These instances of non-compliance all pre-date the violations alleged in the Complaint, and U.S. EPA is not seeking a penalties [sic] for the years outside of those pled . . . [which are] fairly considered to reflect Barber Trucking's prior history of non-compliance with the Part 503 requirements and the CWA." Compl.'s Post-Hr'g Br. 51. I do not agree that this is a fair consideration.

The EAB has held that "full compliance history" under the CAA includes consideration of a respondent's prior notice(s) of violation, which in that case arrived in the form of an Immediate Compliance Order ("ICO"). *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 525-26 (EAB 1998). The *Ocean State Asbestos* case is a Clean Air Act ("CAA") case that utilizes similar, but different, statutory penalty factors.[59] 7 E.A.D. 522 (EAB 1998). In that case, the ALJ below concluded, with regard to the CAA statutory factor concerning a "violator's full compliance history

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[59] The equivalent factor for the CWA's "any prior history of such violations" is the CAA's "violator's full compliance history and good faith efforts to comply." 42 U.S.C. §7413(e). Additionally, unlike in the instant case, in the *Ocean State Asbestos* case, the EPA utilized CAA and Asbestos penalty policies. 7 E.A.D. 522, 535 n.11 (EAB 1998).

and good faith efforts to comply," that automatically increasing the penalty merely on account of a notice of violation in the form of an ICO "'amount[ed] to the deprivation of respondent's property . . . without due process of law . . . [and] violate[d] the enforcement provisions of the Clean Air Act itself,'" given the alleged prior violation at issue was "'never admitted or adjudicated.'" *In re Ocean State Asbestos Removal,* 7 E.A.D. 522, 541 (quoting the Initial Decision at 8; 1997 EPA ALJ LEXIS 109). The EAB disagreed with the ALJ below, reading the CAA's phrase "full compliance history" broadly and concluding that it applies to "both a history of violations as well as notices previously given to the respondent regarding alleged violations." *In re Ocean State Asbestos Removal,* 7 E.A.D. 522, 543.

The EAB determined the structure of Section 113(e) of the CAA, 42 U.S.C. § 7413(e), additionally supported its conclusion that a broad interpretation of the statutory factor is authorized, noting "the joinder of an analysis of the respondent's good faith along with the inquiry into compliance history further suggests Congress intended a broad inquiry." *In re Ocean State Asbestos Removal,* 7 E.A.D. 522, 543. The EAB explained its review of the breadth of this statutory factor was based on the plain meaning of the statutory language, employing tools of statutory construction and interpreting the intent of Congress. *In re Ocean State Asbestos Removal,* 7 E.A.D. 522, 542 (citing *Chevron U.S.A., Inc. V. Natural Resources Defense Council, Inc.* 467 U.S. 837, 843 (1984)).

In essence, *Ocean State Asbestos* distinguished the breadth of the "violator's full compliance history and good faith efforts to comply" factor under the CAA by noting its understanding that under the Toxic Substances and Control Act ("TSCA"), "it has been held that unadjudicated notices of violation sent to the respondent are relevant to the issue of respondent's good faith and commitment to comply [i.e. culpability], even if . . . such prior notices under TSCA are not relevant to a '*history of prior violations.*'" *In re Ocean State Asbestos Removal,* 7 E.A.D. 522, 543-44 (citing *In re Ketchikan Pulp Co.* 1986 EPA ALJ LEXIS 3 (ALJ Dec. 8, 1986)(emphasis added)). Thus, the EAB's reasoning in *Ocean State Asbestos* was premised on the "language and structure" of the CAA, so it is reasonable to conclude that a similar rationale concerning consideration of unadjudicated past notices of violation does not apply to the "prior history of violations" factor in Section 309(g)(2)(B) of the CWA at issue in the instant case.[60/]

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[60/] While the CWA's "any prior history of violations" factor (continued...)

Assuming *arguendo* that the instant case is distinguishable from *Ocean State Asbestos*, I find the EPA's argument that Respondent's alleged ongoing history of non-compliance may be interpreted as a "prior history of violations" is unpersuasive. Here, the EPA did not issue notices of violations or ICOs for any of Respondent's alleged "prior violations;" in fact, the most comparable EPA action would be the July 9, 2002 Administrative Order that the EPA issued Respondent ordering him to cease land applying domestic septage to his Property until compliance with 40 C.F.R. Part 503 has been documented. Compl. Ex. 30. There is no evidence that Respondent committed future violations after receipt of this Administrative Order. Indeed, Respondent ceased land applying domestic Septage at his Property in April 2002 and has not since resumed such activity, in accordance a July 17, 2002 permanent injunction against dumping. Compl.'s Ex. 38. *See* Hr'g Tr. vol. 2, 163; Hr'g Tr. vol. 3, 247. Notably, the Region did not include the alleged violations dating back to 1997 in its Complaint.

Thus, what the Region characterizes in its post-hearing brief as Respondent's "prior history" is not such, and to have such allegations considered the Region more appropriately could have sought to enlarge upon the period of alleged non-compliance. *See In re Harmon Electronics, Inc.* 7 E.A.D. 1 (EAB 1997), *cited in In re Oklahoma Metal Processing Co., Inc.* 1997 EPA ALJ LEXIS 21 (ALJ

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60/ (...continued)
is also broadly interpreted by federal courts, precedence implies this factor encapsulates only violations deemed as such through admission or adjudication. *In re Donald Cutler*, 11 E.A.D. 622, 646 (EAB 2004)("any history" penalty provision of Section 309(g)(3) of the CWA is analogous to that in Section 309(d), both of which broadly cover one's entire history of violations). *See, e.g., United States v. Allegheny Ludlum Corp.*, 187 F. Supp. 2d 426, 433, 445 (W.D. Pa. 2002) (defendant had seven year history of federal civil CWA violations and a history of administrative settlements dating back twenty years), *aff'd in part & rev'd in part on other grounds*, 366 F.3d 164, 175 (3d Cir. 2004); PIRG of N.J., Inc. V. Hercules, Inc., 830 F. Supp. 1525, 1544-45 (D.N.J. 1993)(eight years of CWA violations at another facility predating the complaint and already adjudicated are appropriately considered in the prior history component of the penalty assessment), *aff'd in part & rev'd in part & remanded on other grounds*, 50 F.3d 1329 (3d Cir. 1995).*Cf. United States v. Smithfield Foods, Inc.* , 972 F. Supp. 338, 349 (E.D. Va. 1997) (In determining prior history, courts consider duration of current violations, existence of similar violations in the past, including whether defendant has been sued for violations under the Act at issue, and the duration and nature of all violations), *aff'd in part & rev'd in part on other grounds*, 191 F.3d 516 (4th Cir. 1999).

1997)(recognizing the five year statute of limitations at 28 U.S.C. § 2462 and corresponding continuing violations doctrine apply to environmental administrative penalty cases).[61] *See also In Re Donald Cutler*, 11 E.A.D. 622, 647 (EAB 2004)(EPA has "enforcement discretion to restrict its consideration of prior history evidence if it so chooses").

Because the record of proceeding before me does not demonstrate that the Region actually increased the proposed penalty based on what it alleged to be Respondent's prior history of violations, my interpretation that there is no prior history of violations in the instant case does not disturb the $60,000 penalty ordered herein.

**3. Degree of Culpability**

a) Ignorance of Law is Not a Defense

Throughout the course of this proceeding, Respondent argues that he was totally unaware of the federal law.[62] First Amended

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[61] The EAB in the *Harmon Electronics* case described the continuing violations doctrine as deeming a continuing violation to accrue when the course of illegal conduct is complete, not when an action to enforce the violation can first be maintained. *In re Harmon Electronics, Inc.* 7 E.A.D. 1, 20 (EAB 1997). That is, this doctrine "'prevents the statute of limitations from protecting an offender in an ongoing wrong, and avoids claims that would be barred because they began before the statutory period.'" *Id.* at 21 (citing *Miami Nation of Indians of Indiana, Inc. v. Lujan*, 832 F. Supp.253, 256 (N.D. Ind. 1993). In summary, the EAB stated, "Given that a continuing violation tolls the running of the five year limitations period in 28 U.S.C. § 2462, it is readily apparent that the date when a violation 'first accrues' is not to be confused with the date when a violation 'first occurs.'" *In re Harmon Electronics, Inc.* 7 E.A.D. 1, 21 (EAB 1997).

[62] Respondent contends that he "was following guide lines and instructions supplied by the Brown County Health Department and the Southwestern District of the Ohio EPA," which never referred him to the Part 503 regulations, suggesting such reliance excuses noncompliance with federal regulations. First Amended Answer ¶¶ 50, 51, 69, 70, 73, 74, 77, 78. Respondent further asserts that he "was never told" that "he should be concerned about developing or retaining any information on Nitrogen Requirements," that he "was never told anything about the requirements for a certification statement pursuant to 40 C.F.R. 503.17(b)(6)," and that he "was never told anything about Vector Attraction Reduction requirements in 503.33(b)(9), (b)(10), (b)(12)." Second Amended Answer ¶¶ 69, (continued...)

Answer ¶¶ 50, 51, 69, 70, 73, 74, 77, 78; Second Amended Answer ¶¶ 69, 73, 77; Compl. Ex. 39, 40. As previously discussed in the Order on Complainant's Motion for Accelerated Decision on Liability, dated December 7, 2005, and *supra*, Respondent's professed ignorance of the law does not obviate his liability for violating federal law.[63/]

As Complainant's witness Mr. Aistars pointed out, the Part 503 regulations have been in existence since 1994, which is considerably earlier than the May 2000 to mid-April 2002 period at issue in this case, and information about the regulations since then has been readily available. Compl. Ex. 54, 88; Hr'g Tr. vol. 2, 174. Further, as Mr. Aistars testified, "they are self-implementing regulations . . . expected to be known by someone who is in the business of septage land application." Hr'g Tr. vol. 2, 174. *See also* 58 Fed. Reg. at 9252.

Significantly, Respondent's business centers on the pumping, hauling, and land disposal of domestic septage and sewage sludge. By entering into this line of work, Respondent has subjected himself to all applicable federal regulations and the presumption

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(...continued)
73, 77.

[63/] The December 7, 2005 Order specifically explains that as a general rule, "ignorance of the law is no excuse." *See, e.g., United States v. Int'l Mineral & Chems. Corp.*, 402 U.S. 558, 562-63 (1971) (the principle that ignorance of law is no excuse applies to statutes and duly promulgated and published federal regulations). An exception to that rule is that due process requires that parties receive "fair notice" before being deprived of property. *General Elec. Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). This principle is widely incorporated into the administrative context. *Id.* at 1329 (citing *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987). The court in *General Electric Co.* noted, "In the absence of notice - for example, where the regulation is not sufficiently clear to warn a party about what is expected of it - an agency may not deprive a party of property by imposing civil or criminal liability." *Id.* at 1328-29. That is, "[w]e must ask ourselves whether the regulated party received, or should have received, notice of the Agency's interpretation in the most obvious way of all: by reading the regulations." *Id.* at 1329. As fair notice is an affirmative defense, Respondent bears the burden of establishing a lack of notice. *In re Friedman*, 11 E.A.D. 302, 320 (EAB 2004) (citing *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 886 (S.D. Ohio 2003)). Here, Respondent does not raise the affirmative defense of fair notice.

of knowledge.[64] *See United States v. Int'l Mineral & Chems. Corp.*, 402 U.S. 558, 563 (1971)("anyone involved in the business of shipping dangerous materials would very likely know of the regulations involved"). Given its potential for direct and possibly dire effects on human health and the state of the environment, the sewage sludge disposal industry has obvious ties to environmental regulation. Respondent cannot participate in the septage disposal industry in a vacuum. Thus, it is incumbent on Respondent to keep abreast of knowledge pertinent to such industry.

Regulated individuals and entities cannot ignore the existence of self-implementing industry-wide applicable laws and regulations, nor expect to be "told" of such laws and regulations. I reject Respondent's argument that it was unreasonable to expect him to look beyond the BCHD or OHEPA for guidelines or instructions on how to operate his septage disposal business. Also, I find no merit to Respondent's claim that at all times he was making diligent, good faith efforts to operate his business in compliance with all laws. Indeed, Respondent's indifference to the applicable Part 503 regulations, given his general experience as a businessman operating in regulated arenas and the corresponding inference that his land applying activities would similarly be subject to regulation, aggravates his culpability.[65]

Moreover, the regulations at issue are not complex or burdensome. Indeed, they are designed to accomplish self-implementation. Hr'g Tr. vol. 1, 246, 250; Hr'g Tr. vol. 2, 152.

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[64] It is noteworthy that Respondent also was engaged in other businesses that, by their very nature, required compliance with various environmental regulations without first being "told" of such rules. Respondent's other business ventures include a gas station, multiple rental properties, and an auto salvage business. Hr'g Tr. vol. 2, 174. As Mr. Aistars opined, an intelligent business owner is presumed to "know the requirements as they pertain to each one of his businesses," such as the underground storage tank regulations that apply to the gas station, the lead paint regulations that apply to rental properties, the storm water regulations that apply to scrap yards, and the Part 503 land application regulations that apply to Barber Trucking's septage dumping activities. Hr'g Tr. vol. 2, 178-79. At minimum, Respondent's operation of other environmentally regulated businesses informs his culpability in the instant matter.

[65] As the Region argues, Respondent had at least two contacts at OHEPA that he could have used as resources for information about potential state or federal regulations that may apply to his business. Compl.'s Post-Hr'g Reply Br. n.1 (citing Hr'g Tr. vol. 3, 185-86, 251-52). Respondent chose not to conduct such research.

Respondent makes no argument that the federal regulations which he is charged with violating are ambiguous or unascertainable.

At the hearing, the EPA demonstrated that the Ohio Waste Hauler's Association ("OWHA") sent Respondent multiple mailings concerning the Part 503 regulations for the period from 1992 to the present. Hr'g Tr. vol. 1, 61-96. Mr. Timothy Frank, founder and President of the OWHA, testified that in order to disseminate information on the Part 503 regulations and to create a level playing field for all septage haulers in Ohio, OWHA engaged in educational and outreach programs. Hr'g Tr. vol. 1, 60-61, 65-69, 95. Mr. Frank explained that each year, OWHA solicited the names and addresses of all registered septage pumpers and haulers from the eighty-eight county health departments in Ohio and then sent fliers to all the registered pumpers and haulers in the State. Hr'g Tr. vol. 1, 62, 68-74; Compl. Ex. 101. Brown County provided such a list to Mr. Frank's office. Compl. Ex. 89. Every year, the mailing list was updated based on the return of any undeliverable mail. Hr. Tr. vol. 1, 71-72, 93. As such, Mr. Frank testified that the 1992 Part 503 literature sent to Respondent at 3657 Upper Five Mile Road, Mt. Orab, Ohio, 45154, as well as several subsequent OWHA mailings sent to that address, were not returned by the Post Office and should have been received by Respondent. Hr'g Tr. Vol. 1, 75, 86-94. The OWHA literature sent to Respondent provided extensive and detailed information concerning the applicability of the Part 503 regulations to land appliers of domestic septage and their respective responsibilities. Compl. Ex. 90.

In response, Respondent introduced photocopies of a 1997 phonebook for Georgetown, Ohio, and a 1993-1994 phonebook for Georgetown, Ohio. Hr'g Tr. vol. 3, 229-31; Resp. Ex. 10, 11. These exhibits collectively show that Barber Trucking and Sanitation was listed at 203 West Main Street, Mount Orab, Ohio in 1993, and 119 South High Street, Mount Orab, Ohio in 1997. Resp. Ex. 10, 11. Respondent stated that he was using these exhibits to establish what Barber Trucking's public mailing address was during the years 1993-1994 and 1997. Hr'g Tr. vol. 3, 229. Presumably, Respondent was attempting to show that he did not receive OWHA correspondence addressed to Barber Trucking at the address of 3657 Upper Five Mile Road, Mt. Orab, Ohio, 45151. Hr'g Tr. vol. 3, 229-31. In fact, Respondent himself insinuates this, stating, "things sent to Barber Trucking . . . were sent to the address that my father has . . . [and] I asked him about if he thought he ever received anything such as what's in the [Complainant's prehearing exchange] . . . [and] he does not remember that, but he is 70 years old." Hr'g Tr. vol. 3, 234-35. Even though Respondent testified that his father "does not remember" receiving OWHA mailings, the record does not reflect Respondent ever denying, via

testimony, that neither his father nor he actually received OWHA mailings.[66] Respondent's post-hearing arguments to the contrary are not persuasive.

Significantly, the Post Office did not return as undeliverable the OWHA's mailings sent to Respondent at the address the BCHD provided to the OWHA. Hr'g Tr. vol. 1, 75-76; Compl. Ex. 101. Moreover, Respondent chose not to use the same "public" mailing addresses [203 West Main Street, Mount Orab, Ohio and 119 South High Street, Mount Orab, Ohio] as Barber Trucking's official business address. *See* Compl. Ex. 10, 11, 19, 41, 89, 101. He listed 3657 Upper Five Mile Road, Mt. Orab, Ohio in submissions to the BCHD, including his January 3, 2002 application for a permit to haul liquid waste within Brown County. Hr'g Tr. vol. 1, 80-81; Compl. Ex. 19; Resp. Ex. 5. The permit itself lists 3657 Upper Five Mile Road, Mt. Orab, Ohio, as Respondent's address. Compl. Ex. 10. The Barber Trucking partnership tax return form for 1999 sent to the Internal Revenue Service listed the 3657 Upper Five Mile Road as the address for the business as well. Hr'g Tr. vol. 1, 79-80; Compl. Ex. 11.

b) Knowledge of Part 503 Regulations, or Wanton and Reckless Disregard Thereof

The Region argues in its post-hearing brief that Respondent was told about the existence and requirements of the Part 503 regulations while he was land applying domestic septage at his Site. Compl.'s Post-Hr'g Br. 52. The record of proceeding does not support such a conclusive statement by the preponderance of the evidence, even if it does imply the reasonable possibility of such. I find that the credible evidence of record demonstrates that at a meeting on October 12, 2000, Mr. Shultz and Mr. Jackson, both OHEPA employees at the time, told Mr. Griffith, then BCHD Director of Environmental Health who inspected the Site within the period of time relevant to the Complaint, about the regulatory requirements of 40 C.F.R. part 503.[67] Hr'g Tr. vol. 2, 223, 249;

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[66] The Region argues in its post-hearing reply brief that Respondent's failure to call his father as a witness further supports its conclusion that OWHA mailings were actually received at the 3657 Upper Five Mile Road address. Compl.'s Post-Hr'g Reply Br. 18. Under the circumstances of this case, this assertion is accorded little weight.

[67] The credible evidence of record reflects that Mr. Shultz and Mr. Jackson, both of OHEPA, attended the October 12, 2000 meeting with Mr. Griffith in which Respondent's Site was discussed and the existence of the federal septage regulations at 40 C.F.R.

(continued...)

Compl. Ex. 92. After Mr. Griffith's meeting with OHEPA, he was sent a facsimile transmission at the BCHD from Mr. Shultz, dated December 11, 2000.[68] Hr'g Tr. vol. 1, 199-201; Hr'g Tr. vol. 3, 63-68; Compl. Ex. 102. The December 11, 2000 facsimile was an EPA publication dated September 1993 and entitled, "A Guide to the

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[67] (...continued)
part 503 was emphasized to Mr. Griffith. Compl. Ex. 92; Hr'g Tr. vol. 2, 223, 249. Mr. Griffith denies any discussion of the regulations at 40 C.F.R. part 503 occurring at the October 12, 2000 meeting, but Mr. Shultz and Mr. Jackson insist that such occurred. Hr'g Tr. vol. 2, 223; Hr'g Tr. vol. 3, 36-37; Compl. Ex. 92. These officials of OHEPA have no motive to misstate the facts. Additionally, the content of the follow-up facsimile Mr. Shultz sent to Mr. Griffith on December 11, 2000, discussed *infra*, supports their recollection. OHEPA officials' recollection of Mr. Arn's presence at the meeting, which Mr. Arn himself does not remember and Mr. Griffith denies, does not change the nature of this discussion. Compl. Ex. 92; Hr'g Tr. vol. 2, 248-49; Hr'g Tr. vol. 3, 37, 94-95.

I note that Mr. Griffith's testimony was at times difficult to follow and overall hard to understand. This is especially true with regard to his knowledge, or purported lack thereof, of the federal regulations at 40 C.F.R. part 503 and his correspondence with OHEPA officials concerning the same. It is unclear whether this confusion arises from an attempt to mislead the Court or an inability to articulate. Nevertheless, due to these inconsistencies, much of Mr. Griffith's testimony is found to be incredible. Mr. Griffith's credibility is further tainted by his prior two convictions for theft while employed at the BCHD, and his termination from that same agency for "misfeasance, malfeasance, and nonfeasance." Compl. Ex. 23; Hr'g Tr. vol. 1, 232-233.

[68] Complainant's witness Danette York, Administrator of the BCHD since July 2002 and an Administrative Assistant prior to that time, testified that BCHD records contain the above-mentioned December 11, 2000 facsimile from Aaron Shultz to Larry Griffith. Hr'g Tr. vol. 1, 197-200. The document was on file at the BCHD, albeit misfiled in the "miscellaneous complaints file," which houses documents that the Environmental Health Director has reviewed and returned to the BCHD secretarial staff for filing in the ordinary course of business. Hr'g Tr. vol. 1, 198-201. Although Mr. Griffith denies he received the facsimile, Ms. York was able to retrieve the file, which was kept by the BCHD in the ordinary course of business. As such, it is reasonable that Mr. Griffith most likely received the document. Hr'g Tr. vol. 3, 38. Mr. Griffith was Environmental Health Director for the BCHD from approximately June 2000, when he replaced Mr. Jerry Waits, to August 2001, when he was terminated from that position. Hr'g Tr. vol. 1, 202, 223.

Federal EPA Rule for Land Application of Domestic Septage for Non-Public Contact Sites (Agricultural Land, Forests, and Reclamation Sites)." Compl. Ex. 102.[69] Thus, Mr. Griffith is charged with knowledge of the regulations at 40 C.F.R. part 503 at least as of December 11, 2000, if not before.

Respondent and Mr. Griffith are friends and business acquaintances. Hr'g Tr. vol. 2, 263-64, 272. As persuasively noted by the Region in its post-hearing brief, after Mr. Griffith became the Director of Environmental Health at the BCHD, he dealt exclusively with Respondent regarding the Site and did not delegate any inspections or correspondence to his subordinate sanitarians at the BCHD, Mr. Meranda and Mr. Arn. Compl.'s Post-Hr'g Br. 54 (citing Hr'g Tr. vol. 2, 207-09, 272; Hr'g Tr. vol. 3, 19, 107-09). While a strong argument can be made that Mr. Griffith passed his knowledge of the requirements of the Part 503 regulations onto Respondent, I cannot determine that such purported communication occurred, as it is not demonstrated by a preponderance of evidence.[70] This determination, that the record does not adequately establish that Respondent received information about the Part 503 regulations from Mr. Griffith, does not preclude me from charging Respondent with having gained knowledge of the Part 503 regulations from other sources, such as the OWHA mailings.

At minimum, the Region did demonstrate that Respondent can be charged with some knowledge of the existence of the Part 503 regulations and acted with wanton and reckless disregard for the regulations' requirements. Even so, as the Region has pointed

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[69] The facsimile's transmittal letter from Aaron Shultz to Larry Griffith states, "thought this may be of interest or use to you for the two application sites," one of which must have referred to Respondent's Site. Hr'g Tr. vol. 1, 199-200.

[70] The Region submits that there was a distinct possibility that Mr. Griffith and Mr. Barber agreed to cover up one another's knowledge concerning the Part 503 regulations as well as the egregious state of Respondent's Site, noting that "Mr. Griffith may have purposely misled the Board of Health because of his friendship with Mr. Barber . . . [and] Mr. Griffith was ultimately fired from the BCHD for misfeasance, malfeasance, nonfeasance, and two convictions of theft while employed at the BCHD." Compl.'s Post-Hr'g Br. n.15 (citing Hr'g Tr. vol. 2, 214-15; Hr'g Tr. vol. 1, 232; Compl. Ex. 23. Upon review of the record, a picture of this potential activity certainly emerges. The Region did not, however, establish this harsh conclusion by a preponderance of the evidence. Had the Region successfully demonstrated a conspiracy of this sort, a much higher penalty than the $60,000 requested would have been warranted.

out, Respondent persistently claims he lacked knowledge of the federal regulations governing the land disposal of septage during the time period of May 2000 to mid-April 2002. Compl.'s Post-Hr'g Br. 54 (citing Hr'g Tr. vol. 3, 206). In response, the Region cites the case of *In re Pepperell* for the principle that Respondent's knowledge of the existence of the regulations bestowed upon him a duty to make further inquiries to determine the substance of the regulations. Compl.'s Post-Hr'g Br. 55 (citing *In re Pepperell Associates*, 9 E.A.D. 83, 109 (EAB 2000), *aff'd* 246 F.3d 15 (1st Cir. 2001). The Region persuasively argues that, as in *Pepperell*, "'[t]his case is not about regulatory confusion, but about indifference.'" *Id.* At 112. As the Region further contends, Respondent could have easily contacted the OHEPA or EPA to determine his obligations. Compl.'s Post-Hr'g Br. 56. Respondent is culpable for his passive approach towards his regulatory responsibilities, a behavior that is unacceptable and conflicts with the goals and undermines the purposes of the CWA.

As a further matter, I note that the record shows that the BCHD, through Mr. Griffith, knew as of October 12, 2000 that Respondent was land applying domestic septage on his Property in violation of federal law. Hr'g Tr. vol. 2, 239-41. *See* Compl. Ex. 92, 105. It is also clear that Mr. Griffith informed the Brown County Board of Health at a February 7, 2001 meeting, at a minimum, that Respondent's Site was not in compliance with "Ohio EPA guidelines."[71/] Compl. Ex. 21. Nevertheless, the BCHD issued a permit to haul waste[72/] to Respondent on January 3, 2002, which specifically listed the Clements Road Site as a site where the hauler would partake in the "dumping of raw sewage." Compl. Ex.

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[71/] Mr. Griffith denies this, arguing that the Secretary misinterpreted his statement in her transcription of the meeting and that the only so-called guidelines he was aware of at that time were the local BCHD Rod and Cover Practices he described. Hr'g Tr. vol. 2, 282. Given that the February 2001 meeting occurred less than two months after Mr. Griffith's receipt of the December 11, 2000 facsimile from Mr. Shultz of OHEPA, detailing the scope of the federal regulations at 40 C.F.R. Part 503, and that the existence of any "Ohio EPA Guidelines" was not placed into the record, it is more likely than not that Mr. Griffith in fact informed the Board about the federal EPA regulations. Further, the record discloses that there are no Ohio State or Brown County regulations concerning the disposal of sewage sludge. Hr'g Tr. vol. 1, 170, 203; Hr'g Tr. vol. 2, 220; Hr'g Tr. vol. 3, 142, 159.

[72/] Contrary to Respondent's averments, there is no evidence that he was granted a "permit" or "license" from the BCHD to land apply domestic septage on his Property.

19; Resp. Ex. 5.[73] Moreover, it took the BCHD until April 2002, over one year after it became aware of the nature of Respondent's Site and its potential for violating the federal regulations, to refer the matter to the EPA or to shut down Respondent's Site. Compl.'s Ex. 38. *See* Hr'g Tr. vol. 3, 245-46. The BCHD knew of, but avoided, the horrific problem of improper land application of domestic septage.[74] Nonetheless, the BCHD's inaction cannot be used by Respondent to deny culpability on his part, even though he perceives such conduct as the BCHD "hanging him out to dry." *See* Resp. Br. 3 (citing Hr'g Tr. vol. 1, 148).

c) Respondent was Aware of the Hazards Associated with the Surfacing of Septage and the Unacceptable State of his Site

Respondent's argument that if he is in violation of any federal regulations, he is innocent of knowingly committing any violations and he was at all times making diligent good faith efforts to operate his business in compliance with all laws is

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[73] Interestingly, the Permit to Haul Liquid Waste issued to Respondent on January 3, 2002 states that the permit was issued subject to all work being performed "in accordance with the rules and regulations of the Board of Health of the Lake County General Health District." Compl. Ex. 10. Testimony at the hearing discloses that the incorrect citation to "Lake County" was due to ministerial error as the permit was created from purchased software originating as a pilot in Lake County. Hr'g Tr. vol. 1, 222.

[74] As I noted at the hearing, the case before me just touches on what is essentially a problem for many municipalities in Ohio and possibly throughout the country: there are an inadequate number of facilities for accepting domestic septage and an ambivalence of local authorities towards helping septage haulers achieve proper disposal. *See* Hr'g Tr. vol. 3, 270-71; Resp.'s Post-Hr'g Br. 22 (citing Compl. Ex. 21, Resp. Ex. 3). Counties, such as Brown County, have knowledge that domestic septage is improperly dumped within their municipal limits by trucks they have permitted to haul such material, yet they avoid confronting the problem by deferring the task to federal regulators, who, in turn, assume the federal regulations by their design are obeyed through self-implementation. *See* Hr'g Tr. vol. 1, 176-77. This lack of action persists even though the BCHD recognizes that "any level of E. Coli in the [public drinking] water is unsafe." Hr'g Tr. vol. 1, 183. "Dirty little secrets" such as inadequate facilities to treat septage and Respondent's land applying activities are likely occurring and similarly ignored in many other municipalities. It is a federal problem with far greater implications than I have the authority to discuss in this opinion, yet one worth noting, nonetheless.

rejected. As the Region convincingly asserts, Respondent was aware of the hazards associated with the land disposal of septage, given his experience with installing septic systems and water lines. Compl.'s Post-Hr'g Br. 56 (citing Hr'g Tr. vol. 3, 238). Indeed, Respondent testified that he understood the importance of installing septic systems correctly to avoid a backup of septage that could surface on the ground. Hr'g Tr. vol. 3, 238. It is thus reasonable to assume he would likewise understand the importance of complying with proper methods for the land disposal of domestic septage. In fact, Respondent testified that he "built a ridge of dirt along the edge of that ditch [that transects the Site] . . . to try an protect the ditch" from contamination. Hr'g Tr. vol. 3, 184.

Additionally, Respondent admitted to knowing that his Site was in an unacceptable condition, given, *inter alia*, the standing sewage that would surface in colder, wet weather. Compl. Ex. 39. The condition of the Site became undeniably bad beginning in 2001, due to the combination of extremely wet weather in Brown County and Respondent's decision to nearly double the amount of his business, increasing his dumping to over fifty loads per month. Compl. Ex. 39, 40. These dreadful conditions were heightened further still in 2002 due to more wet weather and Respondent's decision to nevertheless again increase the number of loads he dumped at the Site. Compl. Ex. 39. Indeed Respondent testified that he went to see Mr. Dick in March of 2002 and "told him that the site [was] a mess . . . [and that] I'm embarrassed about it . . . [and needed] some advice on what to do." Hr'g Tr. vol. 3, 196.

Although it is possible that Respondent was misled into thinking that dumping and trenching domestic septage on his Property was acceptable in accordance with BCHD instructions from Mr. Griffith, a once-BCHD Director of Environmental Health, this does not defeat his culpability. *See* Compl. Ex. 39; Hr'g Tr. vol. 3, 19. Respondent stated "the trench idea worked very good during dryer [sic] times." Compl. Ex. 39. However, as the Region pointed out, Respondent also explained that it was too time consuming to cut a trench, cover it, and cut a new one in the same day, so as Barber Trucking's business picked up the Site "just got worse and worse." I do not find Respondent's and Mr. Griffith's assertions that the Board of Health knew and approved of the open trenching technique used at Respondent's Site persuasive, nor supported by the record.

Respondent claims that former BCHD Environmental Director, Jerry Waits, approved his use of uncovered trenches. Resp. Br. 22. I agree with the Region's assertion that this is a self-serving statement that is contradicted by the record. Compl.'s

Post-Hr'g Reply Br. n.4. For example, Respondent's own witness, Larry Griffith, testified that Mr. Waits instructed Respondent to cover the trenches. Compl.'s Post-Hr'g Reply Br. n.4 (citing Hr'g Tr. vol. 2, 270; Hr'g Tr. vol. 3, 46). A 1998 inspection report of the Site further shows the BCHD did not approve of open trenching at the Site. Compl.'s Post-Hr'g Reply Br. 9 (citing Compl. Ex. 17).[75] Regardless of whether or not BCHD "approved" Respondent's trenches, the photographs from the April 2002 inspections of the Site show the obliteration of many of the trenches and large pools of standing septage. Indeed, I note that the Region's argument in its post-hearing brief that Respondent's "indifference to even the less stringent BCHD guidelines" should aggravate his culpability is persuasive. Compl.'s Post-Hr'g Br. 57. Moreover, Respondent's contention that he was acting in accordance with the directives, instructions, and resolutions provided to him by the BCHD and OHEPA is specious.

The Region asserts that Respondent was grossly negligent in his land disposal practices because he was aware the Site was a mess, yet he nonetheless increased the large number of loads applied at the small Site and put another truck on the road in 2001, rather than choosing an alternate means for septage disposal. Compl.'s Post-Hr'g Br. 58 (citing Hr'g Tr. Vol. 3, 248-51); Compl.'s Post-Hr'g Reply Br. 2. I agree. It is significant that Respondent's increase in dumping corresponded to the time period after Mr. Griffith's termination when the BCHD's Environmental Health Director position was vacant, considering the Environmental Health Director is the one in charge of coordinating property inspections.[76] Moreover, the mid-April 2002 inspection reports and the April 11, 2002 Brown County Board of Health meeting minutes reflect Respondent admitted to dumping the cumulative 1.5 million gallons of septage at the Site as it existed on April 11, 2002. Compl. Ex. 15, 16, 24. Respondent acted with wanton and reckless disregard for the consequences of his actions to the safety of human health and the environment, and for that he is culpable. Respondent's acknowledged attempts to have Mr. Dick inspect the Site after Mr. Dick was hired as the BCHD Director of Environmental Health in December 2001 and before the April 2002 inspections do not negate his culpability.

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[75] Complainant's corresponding citation to 1992 meeting minutes of the Brown County Board of Health is irrelevant, as these minutes predate the existence of the controlling federal regulations. *See* Compl.'s Post-Hr'g Reply Br. 8-9.

[76] Mr. Griffith was terminated as the BCHD Environmental Health Director in August 2001, and Mr. Dick did not replace him in this position until December 2001. Hr'g Tr. vol. 1, 202, 223; Hr'g Tr. vol. 3, 193.

According to Mr. Aistars testimony concerning the penalty calculation, when reducing the penalty from the statutory maximum of $137,500 to the $60,000 requested, the Region considered, *inter alia*, Respondent's status as a small business, Respondent's alleged efforts to comply with the local Rod and Cover Practices, and Respondent's claim that he was following BCHD instructions with regard to trenching. Hr'g Tr. vol. 2, 181-82. Given Respondent's culpability and the mitigating factors for such culpability that the EPA already took into account for its penalty proposal, a further reduction of the $60,000 is not warranted.

**4. Economic Benefit or Savings Resulting from the Violation**

The Region considered Respondent's economic benefit from non-compliance when calculating the $60,000 penalty pled in the Complaint, although the Region did not calculate an exact dollar amount for those savings. Hr'g Tr. vol. 2, 84-183. That is, the $60,000 penalty pled did not specifically include an economic benefit component, but given the facts developed at the hearing, the Region now argues that if it had considered an exact figure for economic benefit, an *increase* in the penalty pled would have been warranted. Compl.'s Post-Hr'g Br. 58-59. Specifically, the Region argues that Respondent avoided costs of at least $27,000 through his non-compliance with the Part 503 regulations, which would make a greater penalty of $87,000 warranted. Compl.'s Post-Hr'g Br. 58-59. I note that the Complaint was never amended to reflect the Region's new argument. Also, I am not inclined to use this information at this late stage of the proceeding to increase the penalty in this matter.[77/]

The general "goal of economic benefit analysis is to prevent a violator from profiting from its wrongdoing." *United States v. Mun. Auth. of Union Township*, 150 F.3d 259, 263 (3rd Cir. 1998), *aff'g* 929 F. Supp. 800 (M.D. Pa. 1996). That is, the statutory factor is designed to recoup any benefit gained as a result of a violator's wrongdoing to "level the playing field." *See, United States v. Allegheny Ludlum Corp.*, 366 F.3d 164, 168 (3d Cir. 2003). For example, a violator may gain economic benefit from avoiding costs of compliance or by obtaining a competitive advantage over similarly situated competitors when the violator is able to offer goods or services at a lower cost, thereby increasing sales and its profit margin over time. *In re B.J.*

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[77/] Under 40 C.F.R. §22.27(b) an Administrative Law Judge has discretion to assess a penalty different in amount from the penalty proposed by the complainant, setting forth in the initial decision the specific reasons for the increase or decrease based on the evidence in the record and in accordance with the penalty criteria set forth in the applicable Act.

*Carney Industries, Inc.* 7 E.A.D. 171, 208 (EAB 1997) (discussing the types, importance, and standards for determination of economic benefit), *appeal dismissed as moot*, 200 F.3d 1222 (9th Cir. 2000); *accord United States v. Smithfield Foods, Inc.* 191 F.3d 516, 530 (4th Cir. 1999)("As part of the economic benefit analysis, the court must apply an interest rate to determine the present value of the avoided or delayed costs."), *aff'g in part, rev'g in part*, 972 F. Supp. 338 (E.D. Va. 1997).

As the Region highlighted in its post-hearing brief, the EAB has expressed the view that:

> A complainant need not demonstrate the exact amount of economic benefit enjoyed from a violation; a reasonable approximation will suffice. If the record supports a partial economic benefit, and the only choice is between finding a partial economic benefit or none at all, it is error to find none.

*In re B.J. Carney Industries, Inc.* 7 E.A.D. 171, 173 (EAB 1997). Economic benefit, as a whole, is difficult to prove. Recognizing this difficulty, courts have held that "[t]he determination of economic benefit . . . will not require an elaborate or burdensome evidentiary showing. *Reasonable approximations of economic benefit will suffice." Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc.* 913 F.2d 64, 80 (3d Cir. 1990)(*quoting the legislative history of the CWA* S. Rep. No. 99-50 at 25 (1995)(emphasis in original), *aff'g in part, rev'g in part*, 720 F. Supp. 1158 (D. N.J. 1989). *See United States v. Mun. Auth. of Union Township*, 929 F. Supp. 800, 806 (M.D. Pa. 1996) (determination of economic benefit is somewhat speculative and the nature of the factor results in imprecise quantification), *aff'd*, 150 F.3d 259, 263 (3rd Cir. 1998).

At the evidentiary hearing, EPA witness Mr. Aistars expressed his opinion that Respondent saved anywhere from $22,000 to at least $27,000 by avoiding the cost of compliance with the Part 503 Subpart B regulations, thereby increasing his profits.[78/] Hr'g Tr. vol. 2, 165-66. Notably, this calculation of economic benefit based on wastewater treatment plant fees avoided does not take into account the cost of hauling septage to a wastewater treatment

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[78/] These figures represent an approximation devised from taking the sum total of what it would cost Respondent to properly dispose of the estimated 1,092 loads of domestic septage he land applied at the Site, assuming a treatment plant fee of $20 to $25 per load of septage accepted. Hr'g Tr. vol. 2, 164-67.

plant, in terms of time, fuel, and truck maintenance, or the time value of money that Respondent saved. Additionally, the Region persuasively stated in its post-hearing brief that Respondent may have realized an economic benefit by obtaining a competitive advantage over competitors, thereby increasing sales and profits.[79] Compl.'s Post-Hr'g Br. 60 (citing Hr'g Tr. vol. 1, 94-95; Hr'g Tr. vol. 2, 165-66).

To comply with Part 503 regulations, Respondent would have had to expend money for equipment, materials, time and labor. Hr'g Tr. vol. 2, 160-62. Additionally, because of the amount of septage applied, Respondent was required to spread septage over an area larger than the Site to comply with the annual application rate limit. Specifically, to comply with the AAR from May 2000 to April 2001, Respondent was required to spread septage at least over 20 acres, and to comply from May 2001 to mid-April 2001, Respondent was required to spread septage over at least 36 acres.[80] Even ignoring the fact that the Property drains to a stream transecting the Property, Respondent's Site is not large enough for Respondent to have ever complied with the AAR for domestic septage devised under 40 C.F.R. § 503.13(c). Respondent's Property consists of only 16 acres, occupied by, *inter alia*, over 700 scrapped automobiles. Compl. Ex. 91, 15, 16, 29. Therefore, in addition to purchasing additional equipment, materials and expending time and labor, Respondent would have had to lease or buy additional land to comply with the Part 503 regulations. *See* Hr'g Tr. vol. 3, 247. Respondent considered

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[79] The Region points to Mr. Griffith's testimony that eight of the ten licensed septage haulers in Brown County disposed of septage at the Clermont County wastewater treatment plant. Hr'g Tr. vol. 2, 276. The Region additionally highlights Respondent's acknowledgment of the cost-competitive nature of the septage hauling business in his bidding to dispose of septage at the Sardinia wastewater treatment plant. *See* Compl.'s Post-Hr'g Br. N.18, *citing* Compl. Ex. 39 ("I wanted $20.00 per load and Don wanted $25.00 per load. This would have greatly improve the situation at my dump site . . . [but] [t]his was a bad business move giving my competition Wardlow a price advantage . . . .").

[80] From May 2000 to April 2001, Respondent applied at least 232,200 gallons of septage at the Site, whose AAR has been determined in this proceeding as 11,538 gallons per acre per year. Thus, to comply with 40 C.F.R. § 503.13(c) during this time, Respondent was required to spread the septage to over at least 20 acres (232,200 gallons per year ÷ 11,538 gallons per acre per year = 20.1 acres). Similarly from May 2001 to mid-April 2001, to comply with 40 C.F.R. § 503.13(c), Respondent was required to spread the septage to over at least 36 acres (423,000 gallons per year ÷ 11,538 gallons per acre per year = 36.7 acres).

setting up an additional land disposal site in Highland County in 2001, but ultimately chose not to do so. Compl. Ex. 39; Hr'g Tr. vol. 3, 176.

Even if Respondent were not willing to expend the costs required to comply with the Part 503 regulations, he still had another alternative available to him to avoid CWA liability. Respondent could have simply chosen to dispose of the domestic septage at a wastewater treatment plant (either the Maysville plant or Cincinnati Metropolitan Sewer District plant). Hr'g Tr. vol. 1, 36-38; Hr'g Tr. vol. 2, 162-64; Compl. Ex. 99. Since EPA's July 2002 Administrative Order, when Respondent was undeniably aware of the Part 503 regulations, Respondent chose to pay for the costs of hauling and disposing of septage to wastewater treatment plants rather than continuing to land apply septage at his Site. Hr'g Tr. vol. 3, 245-46; Compl. Ex. 30. Such conduct belies Respondent's testimony that he "could have met 503 for a very insignificant amount of money, and could have continued to dump, if [he] ever would have [known] of 503." Hr'g Tr. vol. 3, 234.

Thus, even though Complainant did not calculate a specific dollar amount of economic benefit in calculating the proposed penalty, evidence at trial revealed Respondent did acquire an economic benefit from noncompliance. This revelation further demonstrates the reasonableness and appropriateness a $60,000 penalty.

**5. Other Matters as Justice Requires**

Respondent puts forth arguments concerning "other matters as justice requires," but there are no additional facts in this matter outside those relevant to the statutory factors previously discussed that warrant additional consideration in the assessment of a penalty. In considering the use of this "other matters as justice requires" factor to adjust a proposed penalty downward, the EAB has concluded that this final statutory penalty factor should be used narrowly and far from routinely in light of the breadth of the other factors. *In re Catalina Yachts, Inc.* 8 E.A.D. 199, 216 (EAB 1999), *aff'd* 112 F. Supp. 2d 965 (C.D. Cal. 2000). In fact, the EAB has specifically stated "the justice factor comes into play only where the other adjustment factors have not resulted in a 'fair and just' penalty." *Id.* (quoting *In re Spang & Co.*, 6 E.A.D. 226, 250-51 (EAB 1995)). Here, the use of this factor is not necessary because the application of the other statutory factors has not produced a manifestly unjust penalty.

## V. FINDINGS OF FACT

1. Between May 2000 and mid-April 2002, Respondent land applied domestic septage to a forest without injecting it below the surface of the land in accordance with 40 C.F.R. § 503.33(b)(9), incorporating it into the soil in accordance with 40 C.F.R. § 503.33(b)(10), or raising its pH in accordance with 40 C.F.R. § 503.33(b)(12).

2. Also during that time, Respondent land applied domestic septage to a forest during a 365-day period in excess of the annual application rate established in 40 C.F.R. § 503.13(c).

3. Also during that time, Respondent land applied domestic septage to a forest without developing and retaining for five years information on the nitrogen requirement for the crop or vegetation grown there during a 365-day period.

4. Also during that time, Respondent land applied domestic septage to a forest without developing and retaining for five years the certification statement set forth at 40 C.F.R. § 503.17(b)(6).

5. Also during that time, Respondent land applied domestic septage to a forest without developing and retaining for five years a description of how the vector attraction reduction requirements in 40 C.F.R. § 503.33(b)(9), (b)(10), or (b)(12) were met.

## VI. CONCLUSIONS OF LAW

1. Respondent is a "person" within the meaning of Section 405(e) of the CWA and 40 C.F.R. part 503. 33 U.S.C. § 1345(e), 1362(5); 40 C.F.R. § 503.9(q).

2. Respondent is a "person who applies sewage sludge to the land" within the meaning of 40 C.F.R. § 503.10(a) and, thus, is subject to the requirements of 40 C.F.R. part 503.

3. Respondent violated 40 C.F.R. § 503.15(d) for failing to comply with the vector attraction reduction requirements for domestic septage under 40 C.F.R. § 503.33(b)(9), (b)(10), or (b)(12), and thus Respondent violated Section 405(e) of the CWA.

4. Respondent violated 40 C.F.R. § 503.12(c) for failing to comply with the annual application rate for domestic septage under 40 C.F.R. § 503.13(c), and thus Respondent violated Section 405(e) of the CWA.

5. Respondent violated 40 C.F.R. § 503.17(b)(4) for failing to develop, and retain for five years, information on the Site's Nitrogen Requirement, and thus Respondent violated Section 405(e) of the CWA.

6. Respondent violated 40 C.F.R. § 503.17(b)(6) by failing to develop, and retain for five years, the requisite certification statement, and thus Respondent violated Section 405(e) of the CWA.

7. Respondent violated 40 C.F.R. § 503.17(b)(8) for failing to develop, and retain for five years, a description of how the vector attraction reduction requirements in 40 C.F.R. §§ 503.33(b)(9), (b)(10), or (b)(12) were met, and thus Respondent violated Section 405(e) of the CWA.

8. An appropriate and reasonable civil administrative penalty for Respondent's violation of Section 405(e) of the CWA, and its implementing regulations at 40 C.F.R. §§ 503.15(d), 503.12(c), and 503.17(b)(4),(6), and (8), is $60,000. 33 U.S.C. § 1319(g)(2)(B).

**ORDER**

1. Respondent Roger Barber d/b/a Barber Trucking is assessed a civil administrative penalty in the amount of $60,000.

2. Payment of the full amount of this civil penalty shall be made within thirty (30) days of the effective date of the Final Order by submitting a cashier's check or certified check in the amount of $60,000, payable to "Treasurer, United States of America," and mailed to:

   EPA Region 5
   Attn: Regional Hearing Clerk
   P.O. Box 70753
   Chicago, IL 60673

3. A transmittal letter identifying the subject case title and EPA docket number (CWA-05-2005-0004), as well as Respondent's name and address, must accompany the check.

4. If Respondent fails to pay the penalty within the prescribed statutory period after the entry of the Order, interest on the civil penalty may be assessed. 31 U.S.C. § 3717; 31 C.F.R. § 901.9.

## Appeal Rights

This Order constitutes an Initial Decision as provided in Section 22.17(c) of the Rules of Practice, 40 C.F.R. § 22.17(c). Pursuant to Sections 22.27(c) and 22.30 of the Rules of Practice, 40 C.F.R. §§ 22.27(c) and 22.30, this Initial Decision shall become the Final Order of the Agency unless an appeal is filed with the Environmental Appeals Board within thirty (30) days of service of this Order, or the Environmental Appeals Board elects, *sua sponte*, to review this decision.

Barbara A. Gunning
Administrative Law Judge

Dated: May 11, 2007
Washington, D.C.

**In the Matter of *Roger Barber, d/b/a Barber Trucking, pro se*, Respondent.**
**Docket No. CWA-05-2005-0004**

CERTIFICATE OF SERVICE

I certify that the foregoing **Initial Decision,** dated May 11, 2007, was sent this day in the following manner to the addressees listed below.

Mary Angeles
Legal Staff Assistant

Original and One Copy by Pouch Mail to:

Sonja Brooks-Woodard
Regional Hearing Clerk
U.S. EPA, Region V, MC-13J
77 West Jackson Blvd., 13th Floor
Chicago, IL 60604-3590

Copy by Certified Mail to:

Eaton R. Weiler, Esq.
Jeffrey A. Cahn, Esq.
Assistant Regional Counsel
U.S. EPA - Region V
77 West Jackson Blvd., E-19J
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Copy by Certified Mail to:

Roger L Barber
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Mt. Orab, OH 45154

Copy by Interoffice Pouch Mail to:

Eurika Durr
Clerk of Board
U.S. EPA / EAB
Mail Code 1103B
1200 Pennsylvania Ave.
Washington, D.C. 20460-0001

**Dated: May 11, 2007**
**Washington, D.C.**