BEFORE THE ENVIRONMENTAL APPEALS BOARD UNITED STATES ENVIRONMENTAL PROTECTION AGENCY WASHINGTON, D.C.

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

NOTICE OF APPEAL

Pursuant to 40 C.F.R. § 22.30, Respondents Nathan Pierce and Adamas Construction and Development Services, PLLC hereby file this Notice of Appeal from the Initial Decision and Order issued by Administrative Law Judge Christine Donelian Coughlin on March 26, 2025, assessed a civil penalty of **$7,725**.

Respondents respectfully request that the Environmental Appeals Board (EAB) review the Final Initial Decision in this matter, and submit herewith a Statement of Issues and Appeal Brief outlining the errors of fact and law that merit reversal, remand, or modification of the ALJ's ruling.

Respondents expressly acknowledge and do not challenge the ALJ's findings in favor of Respondents on Claim 2, nor do they seek to relitigate matters correctly decided in the

Respondents' favor. This appeal is narrowly focused on the remaining legal errors that resulted in the imposition of liability under Claim 1 and the associated civil penalty.

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Respondents also respectfully request electronic filing access and notification that the authorized email above shall serve as the address of record for pro se correspondence.

Dated: April 22, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this April 22, 2025, I served a true and correct copy of the foregoing **Notice of Appeal** and accompanying **Appeal Brief** upon the following parties by electronic mail and/or first-class mail, postage prepaid:

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

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Executed this April 22, 2025 by:

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Respondent, Pro Se

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I. INTRODUCTION

Respondents, Nathan Pierce and Adamas Construction and Development Services, PLLC, respectfully appeal from the Initial Decision issued by Administrative Law Judge Christine Donelian Coughlin on March 26, 2025, assessing a civil penalty of $7,725 for alleged violations of Section 405 of the Clean Water Act, 33 U.S.C. § 1345, and implementing regulations under 40 C.F.R. Part 503. The ALJ found that Respondents violated 40 C.F.R. § 503.17(a)(4)(ii) by failing to develop and retain records required of individuals who apply sewage sludge to land.

The ALJ dismissed one of two central claims—finding that Respondents were not "operators" or "preparers" of sewage sludge—but imposed liability under Claim 1 on the theory that Respondents qualified as "appliers" and failed to comply with the recordkeeping obligations assigned to that role.

Respondents respectfully submit that the ALJ erred in concluding they were "appliers" under the regulation and further erred by imposing liability for recordkeeping and certification duties they were not capable of fulfilling due to being denied access to the site. The uncontested record shows that the sewage sludge was applied by third parties, namely, the landowner/lessor Tom Robinson and Ernie Sprague with D&R Disposal, who created, maintained, and submitted the required records directly to EPA in response to agency inquiries. Additionally, key testimony from Mr. Robinson contradicts the EPA's narrative that he initiated the complaint, with Mr. Robinson stating under oath that he did not file any complaint and was surprised when the project was shut down.

Despite the direct testimony of Sprague and Robinson, as well as written contracts assigning them regulatory obligations under Part 503, the EPA proceeded to cite only Adamas and Mr. Pierce—ignoring the actual sludge appliers, the permit holder (NCUC), and the overseeing federal agency (IHS). Mr. Pierce, representing himself pro se, introduced live testimony, contracts, correspondence, and emails that contradict the EPA's assertions. Notably, EPA staff member Erin Kleffner admitted during the hearing that she received the required records from Sprague but rejected them without offering any follow-up or chance to correct deficiencies.

The ALJ's failure to credit this evidence and her misapplication of regulatory definitions and liability standards resulted in a flawed decision that penalized a pro se contractor while excusing the conduct of the actual responsible parties.

Respondents now appeal to the Environmental Appeals Board to correct these significant legal and factual errors and to restore the fairness and integrity of the administrative process.

II. STATEMENT OF ISSUES

Respondents respectfully submit the following issues for the Board's review:

1. **Lack of Jurisdiction Under the Clean Water Act**
   Whether the EPA exceeded its statutory jurisdiction under the Clean Water Act by regulating land application of biosolids that occurred approximately ten miles from the nearest navigable water, with no direct surface hydrologic connection.

2. **Improper Designation of Respondents as "Preparers" or "Appliers"**
   Whether the ALJ erred in concluding that Respondents acted as "appliers" of sewage sludge within the meaning of 40 C.F.R. Part 503 despite testimony and contracts showing others performed the work.

3. **Failure to Carry Burden of Proof on Recordkeeping Allegation**
   Whether the ALJ erred in finding Respondents liable for recordkeeping violations under 40 C.F.R. § 503.17(a)(4)(ii) when records were submitted by others and EPA failed to demonstrate that Respondents had the legal duty or physical capacity to maintain them.

4. **Selective Enforcement and Arbitrary Targeting**
   Whether EPA acted arbitrarily and capriciously in targeting only Respondents while ignoring the landowners, NCUC, and IHS who had primary control and responsibility.

5. **Improper Use of Responsible Corporate Officer Doctrine**
   Whether the ALJ improperly held Mr. Pierce personally liable despite the absence of operational control or the ability to prevent the alleged violations.

6. **Due Process Violations – Certification Requirement**
   Whether the ALJ's imposition of a sworn certification requirement on Respondents violated due process where the Respondents were not present and could not have supervised application.

7. **Reliance on Hearsay and Evidentiary Irregularities**
   Whether the ALJ improperly relied on hearsay evidence and failed to address suppression or exclusion of testimony and witnesses.

8. **Inconsistent Legal Reasoning and Internal Contradictions**
   Whether the ALJ's decision contains contradictory findings regarding status, responsibility, and obligations that undermine the logical and legal foundation of liability.

9. **Denial of Access, Control, and Opportunity to Comply**
   Whether Respondents were improperly held liable despite being barred from the site and lacking legal or physical ability to comply.

10. **Misinterpretation of "Applier" Definition**
    Whether the ALJ improperly expanded the regulatory definition of "applier" beyond those who physically apply or supervise land application.

11. **Penalty Misapplication**
    Whether the ALJ misapplied the EPA's Penalty Framework by overstating gravity and failing to account for mitigating circumstances, including lack of harm and alternative data sources.

12. **Mischaracterization of Sludge Quality and Sampling**
    Whether the ALJ erroneously relied on a single sample while ignoring more representative data and mischaracterized dewatering as non-treatment.

13. **Burden of Proof and Inconsistency Between Claims**
    Whether the ALJ's dismissal of Claim 2 for lack of evidence undermines the credibility of findings on Claim 1.

14. **Cumulative Procedural and Substantive Error**
    Whether the combination of procedural flaws and legal misapplications cumulatively denied Respondents a fair hearing.

15. **Improper Attribution of Complaint Origin to Key Witness**
    Whether the ALJ erred in accepting EPA's assertion that Tom Robinson initiated or supported the complaint, despite his testimony under oath that he did not complain and was surprised the project was shut down (Tr. at 231–233).

III. FACTUAL BACKGROUND

During the EPA's enforcement proceeding, the ALJ relied on 40 C.F.R. § 503.17(a)(4)(ii), which requires a certification by the person applying sewage sludge that certain management, site restriction, and vector attraction reduction standards were satisfied under their direct supervision. The ALJ concluded that Respondent Nathan Pierce was the "applier" of the material, and therefore obligated to develop and sign the certification under penalty of law.

However, the record contains uncontroverted testimony that Respondent was not present during the land application and did not personally supervise or direct the activities in question. Multiple witnesses, including Tom Robinson and Ernie Sprague, testified that they performed the actual sludge application and maintained the relevant records. (See Tr. at 231–33, 259–60, 400–405.) Moreover, written contracts confirm that those duties were delegated explicitly to Robinson and Sprague and that they agreed to prepare and retain the records required by the rule. (CX 29; RX 12.) The ALJ acknowledged that Respondents were not operators or preparers and did not control the site during the application period. (Order at 78–80.)

By requiring Respondent to sign a certification of supervision that he could not truthfully execute, the ALJ effectively placed him in the position of either submitting a false statement or facing liability for noncompliance. This creates a direct due process violation, as it compels a legal declaration unsupported by fact. Courts have long held that requiring knowingly false

certifications violates basic fairness. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985); *Greene v. McElroy*, 360 U.S. 474, 496 (1959). [1]The Clean Water Act and implementing regulations do not permit enforcement based on presumed responsibility alone — especially when the record demonstrates that Respondent was excluded from the site, lacked supervisory authority, and had contractually delegated the task to qualified personnel.

This legal and ethical dilemma compounds the ALJ's acknowledged findings that Respondents were not "operators" or "preparers," and further undermines the legitimacy of the recordkeeping liability determination. A regulatory certification under 40 C.F.R. § 503.17(a)(4)(ii) must be based on actual, verifiable control — not retroactive enforcement theories that disregard the structure and execution of the project. Holding Respondent liable for failing to sign a certification he could not legally or ethically make is a reversible legal error that violates both regulatory intent and constitutional principles of fairness. the errors already acknowledged regarding operator status and undermines the legitimacy of the ALJ's findings regarding recordkeeping liability.

IV. ARGUMENT

A. Lack of Jurisdiction Under the Clean Water Act

The ALJ's findings should be reversed because the EPA lacked jurisdiction over the land application of biosolids conducted on agricultural fields located approximately ten miles from any navigable water, with no direct surface connection. The Clean Water Act (CWA) grants EPA enforcement authority only over "navigable waters," defined by statute as "waters of the United States." 33 U.S.C. § 1362(7).

In *Sackett v. EPA*, 598 U.S. 651 (2023)[2], the U.S. Supreme Court rejected expansive readings of EPA's jurisdiction and clarified that the CWA only extends to "relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" Id. at 676 (internal quotations omitted). Sackett further held that features such as "ephemeral streams, ditches, and channels that carry water only after rainfall" are excluded unless they have a continuous surface connection to a navigable body of water.

Here, the record reflects that the land application site is more than ten miles from Lame Deer Creek a dry, intermittent stream which itself has no regular or continuous flow into a navigable water. (Tr. at 232–33; testimony of Sprague and Kleffner.) Testimony confirmed that the only water flow originates from the municipal sewer lagoons, and the creek routinely runs dry

[1] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985); *Greene v. McElroy*, 360 U.S. 474, 496 (1959).
[2] *Sackett v. EPA*, 598 U.S. 651 (2023)

upstream. This fact, which went unchallenged, removes the activity from federal jurisdiction under the Sackett standard.

The EPA's enforcement action attempts to regulate purely intrastate activity, the land application of treated biosolids on non-hydrologically connected agricultural land, in direct conflict with the narrowing of agency authority outlined in *Sackett*. As a matter of law, jurisdiction does not exist.

Because jurisdiction is a threshold requirement, this issue must be resolved before reaching any regulatory analysis under 40 C.F.R. Part 503. Where the agency lacks jurisdiction, the complaint must be dismissed. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)[3] (a court must have jurisdiction before proceeding to the merits).

Accordingly, the EPA's claim should be dismissed in full for lack of jurisdiction under the CWA

B. Improper Designation of Respondents as "Appliers"

The ALJ erred in concluding that Nathan Pierce and Adamas Construction were "appliers" of sewage sludge under 40 C.F.R. § 503.11(g), which defines a person who "applies sewage sludge to land" as one who physically applies the sludge or supervises the application. The record demonstrates that Respondents did neither. Instead, landowners Tom Robinson and Ernie Sprague executed the land application, using their own equipment and acting under contracts that explicitly assigned them responsibility for field preparation, sludge incorporation, and recordkeeping.

Robinson testified that he tilled and incorporated the material into his own farmland using his tractor, and that he was unaware of any regulatory issues until the project was shut down. (Tr. at 231–233.) Sprague confirmed that he was contracted to oversee application activities and submit related documentation. (Tr. at 400–405.) These individuals, not Respondents, had direct control over the timing, manner, and execution of the application. Notably, Respondents were not present at the application site during these activities.

Moreover, EPA's own Plain English Guide to Part 503 supports this interpretation by distinguishing between preparers, appliers, and treatment operators, with application responsibilities tied to those physically engaged in or supervising the act of land application. Respondents were not present on site, had no supervisory control during application, and relied reasonably on the landowners and contractors to execute the project in compliance with EPA standards. This was reinforced by contract terms and uncontroverted testimony.

The ALJ's finding that Respondents were "appliers" despite this overwhelming contrary evidence was clearly erroneous. It improperly expands the definition of applier beyond the bounds of the regulation and results in a misapplication of liability. Because physical application

[3] *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (a court must have jurisdiction before proceeding to the merits)

and direction of that activity were demonstrably carried out by third parties, Respondents cannot be held liable under § 503.11(g).

C. Failure to Carry Burden of Proof on Recordkeeping Allegation

The ALJ's determination that Respondents failed to develop and maintain the documentation required under 40 C.F.R. § 503.17(a)(4)(ii) is clearly erroneous and unsupported by the evidentiary record. Under 40 C.F.R. § 22.24, the burden of proof rests with the EPA to demonstrate by a preponderance of the evidence that the Respondents personally failed to create and retain the specified records. That burden was not met.

The ALJ acknowledged in the Initial Decision that Respondents produced a contract between Adamas Construction and Tom Robinson, which incorporated agronomic rate details and vector attraction reduction practices (CX 29). The contract reflects compliance with § 503.33(b)(10), including incorporation of biosolids within six hours of application. Ms. Kleffner testified that this contractual provision aligned with the regulatory requirements (Tr. at 102–104).

Further, Ernie Sprague submitted hauling logs, site restriction descriptions, and agronomic calculations to EPA in response to its formal request. (Tr. at 201; CX 42). Although Kleffner disputed one portion of his methodology, the majority of Sprague's submitted materials addressed the very information required under § 503.17. Additionally, Sprague testified that he submitted this information only after being directed by Nathan Pierce to provide it to the appropriate authorities (Tr. at 400–405), and Kleffner admitted she did not follow up after deeming the records inadequate.

Rather than conclude that EPA failed to prove a lack of recordkeeping, the ALJ improperly shifted the burden to Respondents to prove the adequacy of records submitted by others. This inversion of the burden of proof violates administrative law principles and controlling EPA precedent. See *In re Lazarus, Inc.*, 7 E.A.D. 318, 332 (EAB 1997)[4] (agency bears burden on all elements of the alleged violation).

Moreover, the ALJ acknowledged that Respondents were not operators or preparers of the treatment works and did not control the site during the application process. Given their lack of presence or control, it was objectively reasonable for Respondents to rely on Robinson, Sprague, and the NCUC to fulfill any recordkeeping duties related to land application.

The record demonstrates that documentation was submitted to the EPA by the parties actually performing the application. The EPA's own Penalty Framework advises leniency where alternative sources of information are available, and the record proves that EPA had access to the records in question through its own investigations and correspondence (CX 30–32).

[4] *In re Lazarus, Inc.*, 7 E.A.D. 318, 332 (EAB 1997) (agency bears burden on all elements of the alleged violation).

In light of these facts, the ALJ's finding that Respondents failed to maintain records is unsupported, clearly erroneous, and must be reversed.

D. Selective Enforcement and Arbitrary Targeting of Respondents

The EPA's decision to pursue enforcement solely against Nathan Pierce and Adamas Construction, while declining to cite or penalize the actual sludge appliers, landowners, and project initiators, constitutes selective enforcement and arbitrary agency action contrary to principles of equal protection and administrative fairness.

The record demonstrates that the Northern Cheyenne Utilities Commission (NCUC) was the operator of the treatment works and the "preparer" of the sewage sludge. The IHS served as project initiator, funding and coordinating the sludge removal. Notably, NCUC was not only the permit holder and operator, but also the primary contractor retained by IHS to manage the project. NCUC then subcontracted Respondents to perform discrete services under NCUC's oversight. After tensions arose, NCUC abruptly terminated its agreement, locked Respondents and other subcontractors out of the site, and withheld access to equipment and records, further illustrating their ultimate control and supervisory authority over the project.

Contracts, correspondence, and testimony confirm that Tom Robinson and Ernie Sprague physically applied the sludge, maintained the relevant records, and signed contracts assuming responsibility for application in accordance with EPA rules. (See Tr. at 231–233, 400–405.)

Despite this, only Respondents were subjected to formal enforcement, even though the ALJ herself found that the Respondents were not operators or preparers of the sludge. This omission is especially glaring given that the EPA had record evidence implicating other parties and issued separate information requests to NCUC, Robinson, and D&R Disposal. (CX 30–32.)

The Equal Protection Clause and EPA's own policies prohibit enforcement that is arbitrary, capricious, or discriminatory. *See United States v. Armstrong*, 517 U.S. 456 (1996) (government action that singles out similarly situated individuals without a rational basis may violate equal protection principles).[5] Here, the EPA singled out a private contractor for recordkeeping violations while declining to cite those with direct control and statutory obligations under 40 C.F.R. § 503.12(e)–(f).

The ALJ's decision perpetuates this inequity by assigning exclusive liability to Respondents based on an expansive reading of "applier" and "recordkeeper," while excusing the more directly responsible parties. Such selective enforcement cannot withstand scrutiny under principles of administrative law and due process.

The EPA's failure to enforce uniformly undermines the legitimacy of the enforcement process and further supports reversal of the liability finding. by assigning exclusive liability to

[5] *United States v. Armstrong*, 517 U.S. 456 (1996) (government action that singles out similarly situated individuals without a rational basis may violate equal protection principles).

Respondents based on an expansive reading of "applier" and "recordkeeper," while excusing the more directly responsible parties. Such selective enforcement cannot withstand scrutiny under principles of administrative law and due process.

E. Misapplication of the Responsible Corporate Officer Doctrine

The ALJ erred in attributing personal liability to Nathan Pierce without proper application of the Responsible Corporate Officer ("RCO") doctrine. Under controlling precedent, the RCO doctrine applies only when a corporate officer had actual control, direct participation, or a realistic opportunity to prevent the alleged violations. See *United States v. Park*, 421 U.S. 658 (1975); *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 44 (1st Cir. 1991); *United States v. Dotterweich*, 320 U.S. 277 (1943).[6]

The record contains no evidence that Nathan Pierce personally directed the land application or had physical or supervisory control at the time it occurred. In fact, the ALJ found that the Northern Cheyenne Utilities Commission (NCUC) was the operator and retained control over the project site. Testimony from multiple witnesses, including Mr. Pierce himself, confirmed that he was excluded from the site and denied access by NCUC prior to the application. (Tr. at 489–90.)

Contracts between Adamas and the landowners, Tom Robinson and Ernie Sprague, show that application and compliance duties were delegated to them by agreement. (CX 29; RX 12.) These parties performed the physical application, recorded data, and submitted information to EPA in response to inquiries. (Tr. at 231–233, 400–405.) Delegation of these functions, coupled with exclusion from the site, precludes the inference of responsible corporate control.

The ALJ's imposition of personal liability on Mr. Pierce disregards the necessary legal threshold under the RCO doctrine. Without physical presence, direct authority, or the ability to prevent the alleged violations, liability cannot lawfully attach. *See In re New Waterbury, Ltd.*, 5 E.A.D. 529, 540 (EAB 1994) (officer must have authority and capacity to ensure compliance).[7] The ALJ's conclusion therefore must be reversed.

F. Improper Certification Requirement and Due Process Violation

The ALJ committed legal error by finding Respondents liable for failing to sign and submit a certification under 40 C.F.R. § 503.17(a)(4)(ii), despite uncontroverted evidence that Respondent Nathan Pierce did not supervise the land application and was not present at the time it occurred. This regulatory certification requires the signer to attest, under penalty of law, that they directly supervised the application and ensured compliance with site restrictions, vector attraction

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[6] *United States v. Park*, 421 U.S. 658 (1975); *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 44 (1st Cir. 1991); *United States v. Dotterweich*, 320 U.S. 277 (1943).

[7] *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 540 (EAB 1994) (officer must have authority and capacity to ensure compliance).

reduction practices, and management controls. Forcing such a certification when the individual neither participated in nor oversaw the relevant activities is tantamount to compelling a false legal declaration.

The ALJ's own findings acknowledged that Respondents were not operators or preparers of the sewage sludge and had been excluded from the site by NCUC prior to and during the application event. (Order at 78–80; Tr. at 489–90.) Testimony from Ernie Sprague and Tom Robinson further confirmed that they performed the application independently, using their own equipment, and had agreed by contract to perform and document that work. (CX 29; RX 12; Tr. at 231–233, 400–405.)

Despite these uncontested facts, the ALJ imposed liability on Respondent for failing to develop and maintain the records required under § 503.17(a)(4)(ii), which are linked to the execution of the certification. However, the regulation clearly presumes that the certifier has direct control and supervision over the application activity. Requiring Respondent to sign such a document would have forced him to falsely attest to supervision he did not exercise.

This creates a due process violation. As the Supreme Court held in *Greene v. McElroy*, 360 U.S. 474, 496 (1959), administrative proceedings must provide "procedures which are fair and which have traditionally been associated with the judicial process."[8] Requiring a party to submit a certification they cannot truthfully sign under threat of liability contravenes these principles.

Moreover, the regulation does not impose strict liability for recordkeeping failure when supervision is contractually delegated and physical presence is absent due to actions beyond a party’s control. The record shows that Respondent attempted in good faith to ensure records were kept by the parties who performed the work, that records were in fact submitted by those parties, and that EPA obtained the relevant information from alternative sources (CX 42; Tr. at 201).

The ALJ’s failure to consider these facts, and her reliance on a strict application of a regulatory certification not tailored to the actual conduct of Respondent, renders the finding of liability arbitrary, unreasonable, and legally deficient. It should be reversed.

G. Use of Hearsay and Evidentiary Irregularities

The ALJ’s decision relied heavily on hearsay and improperly admitted or credited statements that were never subjected to proper cross-examination or foundational authentication. Numerous key assertions made by EPA staff were not corroborated by first-hand testimony, while Respondents’ own witnesses were either discredited without cause or their testimony was selectively ignored.

For example, several of the EPA’s key factual assertions concerning site conditions, material quality, and project supervision were admitted through written correspondence or indirect summaries, not live testimony. By contrast, Ernie Sprague and Tom Robinson testified under

[8] *Greene v. McElroy*, 360 U.S. 474, 496 (1959), administrative proceedings must provide "procedures which are fair and which have traditionally been associated with the judicial process."

oath that they conducted the land application, maintained records, and had no complaints about Respondents' conduct. (Tr. at 231–233, 400–405.) Their testimony was credible, unrefuted by direct rebuttal, and yet was diminished in weight in favor of less direct assertions.

Further, the ALJ permitted improper witness coaching to go unremedied. Mr. Sprague testified that he was told by EPA enforcement counsel not to read portions of his statement, which he believed were exculpatory and relevant to the defense. (Tr. at 405–406.) The ALJ's treatment of this serious concern, as a routine matter of highlighting rather than a suppression of critical defense evidence, demonstrates a failure to safeguard procedural fairness.

EPA's enforcement counsel also failed to call several of its own witnesses, leaving gaps in the evidentiary record while still expecting the Tribunal to infer facts in the agency's favor. Meanwhile, the ALJ held Respondents to a higher evidentiary standard, requiring detailed record authentication that was not equally demanded of EPA's documentary submissions.

Administrative hearings must ensure a balanced application of evidentiary rules and protect against improper reliance on hearsay and coaching. When one party is permitted to rely on summaries and indirect assertions while the other is constrained by strict proof standards, the result is not a fair or impartial proceeding. The EAB should find that these evidentiary irregularities warrant reversal or remand.

H. Inconsistent Legal Reasoning and Internal Contradictions in the Initial Decision

The ALJ's decision contains internal inconsistencies and contradictory findings that undermine the integrity of the liability determination. These conflicting conclusions reflect a misapplication of law to fact and a failure to consistently interpret the regulatory framework under Part 503.

For example, the ALJ found that Respondents were not "operators" or "preparers" of the sewage sludge because they lacked control over the treatment facility and did not perform treatment that altered the sludge's quality. (Order at 78–80.) Yet, in the same decision, the ALJ held that Respondents were subject to the applier certification and recordkeeping obligations, obligations that presume supervisory control over the application process. These conclusions are irreconcilable.

Likewise, the ALJ acknowledged that Ernie Sprague and Tom Robinson signed contracts assuming application responsibility and submitted documentation in response to EPA inquiries. (CX 29; CX 42; Tr. at 201, 400–405.) However, she then faulted Respondents for failing to produce additional records and found that delegation of these responsibilities was insufficient. This contradicts the EPA's own position in its Penalty Framework, which allows for reliance on other parties when documentation is accessible elsewhere.

The ALJ also cited testimony from EPA staff about potential environmental harm in general terms, but admitted that there was no evidence of actual harm in this case. Nevertheless, she

maintained the gravity of the alleged violation without reconciling that absence of harm with the mitigating evidence in the record. (Order at 65–66.)

Finally, the ALJ accepted the contract-based agronomic rate relied on by Robinson and Sprague as accurate and compliant with EPA standards, while simultaneously accepting Ms. Kleffner's inaccurate characterization that it was based on septage constants, an error directly contradicted by the record. (Tr. at 201.)

These contradictions raise substantial doubts about the logic and fairness of the Initial Decision. Where a tribunal issues findings that are internally inconsistent or unsupported by the record, reversal is warranted. See *In re Bil-Dry Corp.*, 9 E.A.D. 575, 636 (EAB 2001) (reversal appropriate where conclusions are based on "internally inconsistent" or unsupported reasoning).[9]

I. Denial of Access, Control, and Opportunity to Comply

A fundamental flaw in the Initial Decision lies in the ALJ's failure to fully consider the legal implications of Respondents being denied access to the site and removed from the project by the Northern Cheyenne Utilities Commission (NCUC). The record is unambiguous: NCUC revoked Respondents' access to the facility and project site and locked them out of equipment and documentation prior to the period of alleged noncompliance. (Tr. at 489–490.)

This exclusion had far-reaching effects. It made it legally and practically impossible for Respondents to direct or supervise the application of sewage sludge, much less maintain documentation on activities to which they had no access. The ALJ acknowledged that NCUC retained authority over the site and that the Respondents were not the operators or preparers of the facility. Nevertheless, she imposed liability under a regulatory framework that presumes active participation and control.

Administrative enforcement must take into account a respondent's ability to comply. The Environmental Appeals Board has recognized that where access is denied or compliance is made impossible by external actors, liability may not attach. *See In re Lazarus, Inc.*, 7 E.A.D. 318, 341 (EAB 1997). [10]Here, even after Respondents were excluded, they made good faith efforts through legal counsel to obtain the records from NCUC and alerted the EPA of the situation. (CX 12; Tr. at 501.) NCUC failed to cooperate, and no enforcement was pursued against them.

The ALJ's decision fails to meaningfully grapple with this impossibility of compliance. It disregards the legal doctrine that liability cannot attach when access, supervision, and execution are denied by another entity with superior authority. Without legal or factual support, Respondents were held liable for actions and documentation they were expressly prevented from

[9] See *In re Bil-Dry Corp.*, 9 E.A.D. 575, 636 (EAB 2001) (reversal appropriate where conclusions are based on "internally inconsistent" or unsupported reasoning).
[10] *In re Lazarus, Inc.*, 7 E.A.D. 318, 341 (EAB 1997).

undertaking. This constitutes reversible legal error and violates foundational due process guarantees.

J. Misinterpretation of the Definition of "Applier" Under 40 C.F.R. Part 503

The ALJ's interpretation of the term "person who applies sewage sludge to the land" under 40 C.F.R. § 503.11(g) deviates from its plain meaning and applicable agency guidance. The regulation defines an applier as a person who "applies sewage sludge to land." In its Plain English Guide to the Part 503 Rule, EPA emphasizes that appliers are those who physically place the material on the land or supervise others who do so.

Here, the ALJ imposed applier status on Respondents despite finding that they were not present during the land application, were denied access by the NCUC, and had subcontracted the work to parties who performed it directly. Tom Robinson and Ernie Sprague both testified they conducted the land application, using their own equipment and consistent with application rates specified in their contracts. (Tr. at 231–233, 400–405; CX 29; RX 12.)

Moreover, the ALJ failed to acknowledge or apply the regulatory obligation that when a landowner or lessor applies sewage sludge to their own land, the responsibility to maintain and retain the records falls directly on the landowner or lessor. 40 C.F.R. § 503.17(a)(4)(ii) and § 503.12(e)–(f). Mr. Robinson testified not only that he applied the sludge, but that he had previously applied biosolids to his property independently demonstrating both knowledge of the practice and a regulatory obligation as a landowner-applier. (Tr. at 232–233.)

The ALJ's interpretation improperly expands the definition of "applier" to include anyone remotely associated with a project where biosolids are used, regardless of their actual role. This approach ignores the text of the regulation and creates a strict liability framework unsupported by law. The EPA itself did not offer regulatory interpretation or guidance suggesting such an expansive view during the hearing, and no such precedent supports this reading.

Moreover, holding a party liable as an applier requires showing that they had direction and control over the work performed. The ALJ acknowledged that Respondents were excluded from the site and lacked physical or supervisory presence. Yet she held them liable as if they had conducted the application themselves. This is inconsistent with EPA precedent and violates fair notice principles under administrative law.

This misinterpretation formed the basis for improperly assigning regulatory responsibilities—including certification and recordkeeping—that do not apply under the facts of this case. The EAB should reverse the ALJ's interpretation and vacate the liability finding under Claim 1 accordingly.

K. Misapplication of Penalty Factors in Light of EPA's Own Framework

The ALJ's assessment of civil penalties failed to properly consider mitigating factors established in the EPA's own Penalty Framework, and instead relied on flawed conclusions that exaggerated

the gravity of the offense. Although the ALJ did ultimately reduce the gravity-based penalty, the remaining fine is not legally or factually supportable when measured against the Framework's standards.

First, the ALJ found no evidence of environmental harm or release. While generalized testimony about potential health risks was offered (Tr. at 52–53), no contamination, impact to wildlife, or downstream consequences were demonstrated. This sharply undercuts any conclusion of a "serious" violation under EPA penalty criteria.

Second, the ALJ acknowledged that the EPA obtained required documentation from other sources, including Ernie Sprague, Tom Robinson, and the NCUC. Kleffner testified that hauling logs, agronomic estimates, and other required details were submitted by Sprague and Robinson (Tr. at 201). EPA's Penalty Framework explicitly notes that where another party provides the missing documentation, or where a "readily available" alternative source exists, the violation's seriousness is mitigated.

Third, the ALJ failed to adequately weigh the impossibility of compliance. The ALJ's findings confirm that Respondents were denied site access and control by NCUC before any alleged violation occurred. This factual record should have been dispositive. EPA precedent establishes that compliance must be legally and practically possible. See *In re Lazarus, Inc.*, 7 E.A.D. 318, 341 (EAB 1997).[11]

Finally, the ALJ imposed liability based on a misunderstanding of Respondents' role, wrongly concluding that delegation to third parties (who in fact complied and submitted records) was insufficient. This not only contradicts the ALJ's own findings that NCUC was the operator and preparer, but also penalizes Respondents for the conduct of parties EPA never charged.

The result is a penalty unsupported by the EPA's own evaluative rubric and case law. The Board should vacate or further reduce the civil penalty accordingly.

L. Misuse of Prior Sampling Data and Scientific Mischaracterization of Sludge Quality

The ALJ erred by adopting the EPA's characterization of the sewage sludge as "Class B" without properly weighing conflicting evidence, scientific standards, and the relevance of sampling methods used. The ALJ relied on a single fecal coliform result taken on July 26, 2018, while disregarding earlier sampling that supported Respondents' claim that the material was treated and of "Exceptional Quality."

Ms. Kleffner testified that the July 26, 2018 sample showed fecal coliform density of 28,000 MPN/g, exceeding the Class A threshold. However, this result was obtained after the sludge had been removed from Cell 2 and transferred to tanks, not during or immediately after any

[11] *In re Lazarus, Inc.*, 7 E.A.D. 318, 341 (EAB 1997).

stabilizing treatment. The ALJ disregarded Respondents' earlier sampling results without adequate analysis, even though EPA guidance emphasizes the importance of context and methodology in pathogen sampling.

Further, the ALJ acknowledged that Respondents dewatered the sludge, and Ms. Kleffner conceded that dewatering is a recognized form of treatment under Part 503. (Order at 31; Tr. at 59, 100, 242.) Despite this, the ALJ declared that there was "no evidence" of pathogen reduction, contradicting Kleffner's own testimony and the regulatory definitions.

This inconsistency undermines the credibility of the ALJ's conclusions about sludge quality. Scientific evidence must be interpreted within its methodological framework. Selectively disregarding competent and earlier evidence while elevating a single late-stage sample skews the factual determination and violates EPA's standards for technical reliability.

Because the determination of sludge quality played a key role in the finding of liability, the ALJ's failure to address these sampling inconsistencies and her mischaracterization of dewatering as non-treatment materially affected the outcome and warrants reversal.

M. ALJ's Acknowledgment of Complainant's Failure to Meet Burden in Part Confirms Need for Reversal

In her ruling, the ALJ explicitly found that the EPA failed to meet its burden of proof as to Claim 2 of the Second Amended Complaint, concluding that Respondents were not operators of the treatment facility and were not responsible for generating sewage sludge. This conclusion was based on detailed factual findings that emphasized the operational control of the Northern Cheyenne Utilities Commission (NCUC), its role as the NPDES permit holder, and its authority over the project site and staff (Order at 78–80).

This acknowledgment is legally significant for two reasons. First, it reinforces the argument that Respondents were not in a regulatory position that would subject them to the obligations imposed on either "operators" or "preparers" under Part 503. If they cannot be held responsible for the upstream generation and preparation of sewage sludge, then it is inconsistent to hold them liable for regulatory obligations tied to such roles, including recordkeeping and certification.

Second, the ALJ's dismissal of Claim 2 based on failure of proof affirms that EPA's evidentiary shortcomings materially affected the outcome. The same legal standard—preponderance of the evidence—applies to both claims. Accordingly, the Agency's failure to carry its burden on one claim should have been given greater weight in evaluating the credibility, scope, and sufficiency of its evidence on the remaining claim.

Instead, the ALJ engaged in inconsistent reasoning, dismissing Claim 2 for lack of evidence, while simultaneously sustaining Claim 1 on the basis of an expansive, novel, and unsupported interpretation of regulatory definitions, liability theory, and factual attribution. The disparity in treatment between claims illustrates the flawed reasoning that permeates the Initial Decision.

This internal contradiction supports reversal or remand of the ALJ's decision on Claim 1 and further undermines the logic of the penalty assessment.

N. Cumulative Error and the Totality of Procedural and Substantive Deficiencies

Even if any individual error discussed herein were deemed insufficient to warrant reversal, the cumulative effect of multiple substantive and procedural deficiencies requires vacatur of the ALJ's decision. The doctrine of cumulative error, well recognized in administrative and judicial review, holds that when numerous missteps collectively undermine the fairness of a proceeding, the resulting decision cannot stand. See *United States v. Rivera*, 900 F.2d 1462, 1471 (10th Cir. 1990) (cumulative errors may prejudice a proceeding even if individual errors are harmless); *In re Bil-Dry Corp.*, 9 E.A.D. 575, 636 (EAB 2001).[12]

Here, Respondents faced:

- A shifting liability theory (from "preparer" to "applier");
- A requirement to sign a false certification under penalty of law;
- The improper application of the RCO doctrine to impose personal liability on Mr. Pierce;
- Selective enforcement while key actors (NCUC, IHS, Robinson, Sprague) were not cited;
- Denial of access to the site, records, and equipment by the primary contractor (NCUC);
- Use of inconsistent or improperly weighted scientific data;
- Reliance on hearsay, omitted witnesses, and coached testimony;
- No evidence of environmental harm or actual regulatory noncompliance by Respondents;
- Burden-shifting and disregard for documentation submitted by third parties;
- Procedural disadvantage stemming from Respondent's pro se status.

Any one of these would raise serious concerns. Taken together, they render the Initial Decision unreliable and unjust. The record does not support the ALJ's conclusions when viewed in the totality of circumstances, and the integrity of the administrative process has been compromised.

The Environmental Appeals Board should reverse the liability finding, vacate the penalty, and remand for further proceedings only if absolutely necessary to preserve the appearance of fairness and due process.

O. Witness Testimony Undermines EPA's Basis for Enforcement

[12] See *United States v. Rivera*, 900 F.2d 1462, 1471 (10th Cir. 1990) (cumulative errors may prejudice a proceeding even if individual errors are harmless); *In re Bil-Dry Corp.*, 9 E.A.D. 575, 636 (EAB 2001).

A central factual premise in EPA's enforcement posture was that landowner Tom Robinson had either initiated or supported the complaint against Respondents. However, Mr. Robinson testified unequivocally under oath that he never filed a complaint, did not raise any concern with EPA, and was surprised to learn the project had been shut down. (Tr. at 231–233.)

This testimony directly contradicts the narrative advanced by the EPA and casts doubt on the legitimacy of the complaint's origin. Moreover, the ALJ failed to address or reconcile this contradiction, despite its clear relevance to the foundation of the enforcement action. Mr. Robinson's statements suggest that the factual basis used to trigger enforcement proceedings was either erroneous or misrepresented.

The credibility and impartiality of the enforcement process are called into question when the very person alleged to have initiated the action denies doing so under oath. Such a discrepancy, left unexamined by the ALJ, contributes to the broader procedural irregularities in the case and further supports the claim that Respondents were unfairly and arbitrarily targeted.

In light of this record evidence, the EPA's enforcement rationale lacks credibility, and the ALJ's failure to address this material testimony constitutes reversible error.

V. ALTERNATIVE FINDINGS OF FACT

1. **Respondents did not apply sewage sludge to the land.** Tom Robinson and Ernie Sprague physically performed the land application, as shown in their sworn testimony and contractual responsibilities. (Tr. at 231–233, 400–405; CX 29; RX 12.)
2. **Respondents were denied access to the site prior to and during the land application.** NCUC terminated access and revoked equipment entry, barring Respondents from supervising or managing application activities. (Tr. at 489–490.)
3. **Respondents directed Sprague and Robinson to maintain records, and records were submitted.** The record shows Ernie Sprague and Tom Robinson submitted documentation directly to EPA. (CX 42; Tr. at 201.)
4. **The EPA had access to all required information.** Despite alleging missing records, the Agency received substantive compliance information from other regulated parties. (CX 30–32.)
5. **No evidence of environmental harm was presented.** EPA did not show any discharge, contamination, or threat to human health or the environment resulting from Respondents' alleged conduct. (Tr. at 52–53; Order at 65–66.)
6. **The July 2018 sludge sample was methodologically flawed and not representative.** Earlier sampling showed lower pathogen levels, and dewatering—acknowledged by EPA—was a treatment process that reduced sludge quality risks. (Tr. at 59, 100, 242; RX 12.)

VII. ALTERNATIVE CONCLUSIONS OF LAW

1. **Respondents were not "appliers" under 40 C.F.R. § 503.11(g).** The plain meaning of the regulation and agency guidance applies only to individuals who personally apply or supervise application of sewage sludge. Respondents did neither.
2. **Certification under 40 C.F.R. § 503.17(a)(4)(ii) was not legally required of Respondents.** The certification requirement presumes direct supervision, which the record shows Respondents did not have. Compelling a false certification violates due process. See *Greene v. McElroy*, 360 U.S. 474, 496 (1959).[13]
3. **The Responsible Corporate Officer (RCO) doctrine does not apply.** Mr. Pierce had no control or authority at the site during the application, making the RCO doctrine inapplicable. See *United States v. Park*, 421 U.S. 658 (1975).[14]
4. **EPA did not meet its burden of proof for recordkeeping violations.** The agency failed to show that Respondents were responsible for the records or that no documentation was submitted. See 40 C.F.R. § 22.24.
5. **Jurisdiction under the Clean Water Act was not established.** Under *Sackett v. EPA*, 598 U.S. 651 (2023)[15], there was no continuous surface connection to navigable waters.
6. **Selective enforcement renders the action arbitrary and capricious.** EPA pursued only Respondents while ignoring other responsible actors, including NCUC, IHS, and landowners. See *United States v. Armstrong*, 517 U.S. 456 (1996).[16]
7. **Cumulative procedural and substantive errors violated due process.** The ALJ's reliance on hearsay, inconsistent findings, and pro se disadvantage requires reversal or remand.

VIII. CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Environmental Appeals Board:

1. **Reverse the ALJ's finding of liability** under Claim 1 of the Second Amended Complaint;
2. **Vacate the civil penalty** imposed in the Initial Decision;
3. **Dismiss the enforcement action in full**, or in the alternative, remand the matter for further proceedings with appropriate due process safeguards and evidentiary standards;
4. **Acknowledge the ALJ's favorable ruling on Claim 2** as properly decided and not in dispute;

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[13] *Greene v. McElroy*, 360 U.S. 474, 496 (1959).
[14] *United States v. Park*, 421 U.S. 658 (1975).
[15] Under *Sackett v. EPA*, 598 U.S. 651 (2023)
[16] *United States v. Armstrong*, 517 U.S. 456 (1996).

5. **Recognize the disproportionate and procedurally flawed nature** of the enforcement action against pro se Respondents who lacked control over the site, application, and documentation process.

Respondents further request that the Board consider the totality of the factual record, the weight of the testimonial and documentary evidence, and the errors in legal reasoning that cumulatively deprived Respondents of a fair and impartial adjudication.

Respectfully submitted,

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April 22, 2025

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 2025, I served a true and correct copy of the **Appeal Brief** in the matter of *Adamas Construction and Development Services, PLLC, and Nathan Pierce*, EPA Docket No. CWA-07-2019-0262, upon the following parties by electronic mail and/or first-class U.S. mail, postage prepaid:

Original by OALJ E-Filing System to:
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Office of Administrative Law Judges
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