

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

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

**RESPONDENTS' REPLY TO COMPLAINANT'S POST-HEARING**  
**BRIEF**

Pursuant to 40 C.F.R. § 22.26 and the Presiding Officer's September 21, 2023 Order Scheduling Post-Hearing Submissions, the Respondents files this Respondents' reply to the Complainants Initial Post-Hearing Brief and it is submitted on behalf of Nathan Pierce and Adamas Construction and Development Services PLLC (collectively, "Respondents"). We challenge and continue to refute all the EPA's allegations by asserting compliance with the Clean Water Act (CWA). Respondents respectfully submit this Reply Brief in response to the

Complainant's allegations regarding the operation and management of the Lane Deer Publicly Owned Treatment Works (POTW). This brief aims to clarify factual inaccuracies, challenge legal misinterpretations, and assert the Respondents' compliance with the relevant statutes and regulations;

## **I. INTRODUCTION**

This Reply aims to address, clarify, and counter the assertions and interpretations made by the Complainants regarding the activities and operations at the Lane Deer Publicly Owned Treatment Works (POTW), specifically in the context of the Clean Water Act (CWA) violations alleged.

The hearing and the subsequent Post-Hearing Brief by the Complainants have brought to the fore critical issues and interpretations that warrant careful consideration and rebuttal.

Firstly, it is essential to reiterate the previously acknowledged fact by the government that the Respondents were not the primary contractors for the POTW project. This recognition plays a crucial role in defining the scope and extent of the Respondents' responsibilities and liabilities.

Secondly, the Complainants' failure to produce pivotal witnesses, as initially indicated, casts significant doubt on the completeness and reliability of the evidence

presented. This gap in the Complainants' case is further compounded by the contradictory testimony of Mr. Tom Robinson, the landowner involved, whose statements diverge from the narrative put forth by the Complainants and the EPA.

Furthermore, the legal precedents set in landmark cases such as *Atlantic States Legal Foundation v. Tyson Foods*, *Beartooth Alliance v. Crown Butte Mines*, and *Gwaltney v. Chesapeake Bay Foundation* provide a crucial backdrop against which the Respondents' actions and the allegations must be evaluated. These cases highlight important aspects related to jurisdictional requirements for ongoing violations, the impact of compliance on civil penalties, and nuanced interpretations of operational roles under the CWA.

Through this Reply, the Respondents aim to systematically dismantle the allegations posed, using a combination of factual rebuttals and legal arguments. The goal is to demonstrate conclusively that the Respondents, in their capacity as technical consultants and project managers, acted within the legal frameworks and guidelines, thereby warranting the dismissal of all charges laid against them.

## **II. Argument**

The Respondents' reply to the Complainant's post-hearing brief focuses on countering the allegations pertaining to Counts I and II, as well as addressing the

broader context of the Respondents' involvement in the Lane Deer Publicly Owned Treatment Works (POTW).

1. Count I - Clarifications and Counterarguments:

- Contrary to the EPA's assertion, the Respondents have complied with 40 C.F.R. § 503.17. As indicated during the hearing, EPA witness Erin Kleffner acknowledged receiving guidance from Respondent Pierce on the location of the records. This action demonstrates an effort to comply with EPA's information request, aligning with the spirit of the regulation which emphasizes the availability and accessibility of records, rather than their physical transfer. TR 199-201: 22-19
- Incomplete Documentation and Lack of Follow-up: The acknowledgment of receiving "incomplete" documents by Erin Kleffner, without further pursuit, reflects procedural gaps, and due process concerns. TR 199-201: 22-19
- Tom Robinson and Ernie Sprague's Direct Involvement: Both testified to being the sole individuals involved in the application of sewage sludge, which falls under the definition of "Land application" per § 503.11(h). This direct involvement by parties other than Nathan Pierce raises serious questions about the EPA's assignment of responsibility. TR 375: 3-35
- There is also Discrepancy in Complaint Origin: Contrary to EPA's

claims, Tom Robinson did not initiate the complaint against the project. Tom Robinson's testimony contradicts the EPA's claim about the complaint's origin. TR 373-374: 1-20

- Non-Involvement of Nathan Pierce: Ernie Sprague and Tom Robinson in their testimonies confirm Nathan Pierce's absence during the sludge application, contradicting EPA's claims of his direct involvement, directly contradicting the factual basis for EPA's actions. TR 375-376: 3-25 TR 405-409: 1-25
- Contrary to the Complainant's assertion, the evidence demonstrates that the Respondents were not the main contractors but served as technical consultants and project managers for the Northern Cheyenne Utilities Commission (NCUC).
- Testimonies and evidence reveal that NCUC maintained pervasive control over the project and the project area, effectively excluding the Respondents from operational decisions. RX-27 TR 410-411: 10-25
- "Persons" and Activities Involvement: While acknowledging their status as "persons" under the CWA, the Respondents contest the extent of their involvement. The allegations of preparing and applying sewage sludge are refuted with evidence indicating their role was limited to technical consultancy, not direct operational control. RX-27
- Compliance with 40 C.F.R. § 503.13(b)(3): The Respondents argue that their activities, within their defined roles, complied with the cited

regulations. If they were indeed involved in preparation or application, it was under the guidance and authority of the main contractor, NCUC.

- Information Retention (40 C.F.R. § 503.17(a)(4)): The Respondents dispute the claim of failure to develop and retain necessary information. They argue that the responsibility for maintaining such records fell primarily on NCUC, the main contractor, while their role did not extend to this aspect of the project. NCUC also made the representations to other they would ultimately comply with the rules.

RX-25 TR 411: 15-25

## 2. Count II - Responding to Allegations of Operational Control:

- Operator Status and Point Source Operation: The Respondents challenge the characterization of their role as operators of a point source. They emphasize their advisory and managerial capacity, which does not equate to operational control as defined under the CWA.
- Response to CWA Section 308 Information Request: Given their non-operational role, the Respondents assert that the obligation to respond to the Information Request did not apply to them as it would to an entity with direct operational control like NCUC and the Respondents requested NCUC send a reply. Ernie Sprague also testified to sending in a response and Erin Kleffner has acknowledged receiving a

response. TR 405: 1-5 & TR 199-201: 22-19

- **Exclusive Operational Control by NCUC:** Evidence presented indicates that NCUC held exclusive operational control over the project. This control was demonstrated most explicitly when NCUC exercised its authority to lock out other parties, including Nathan Pierce and his associates, from the facility. Such actions signify a level of control that goes beyond mere contractual oversight.
- **Implications for Responsibility and Liability:** The pervasive control exerted by NCUC raises significant questions about the allocation of responsibility and liability for any alleged violations. If NCUC, as the main contractor, held such sweeping authority over the project, it stands to reason that they would also bear the primary responsibility for ensuring compliance with relevant regulations, including those of the CWA. If fact evidence presented at hearing and in filings by both parties show
- **Challenging EPA's Attribution of Responsibility:** The EPA's attempt to attribute primary responsibility or control to Nathan Pierce and Adamas Construction and Development Services PLLC seems incongruent with the reality of NCUC's dominant role. This discrepancy is a critical point of contention, as it challenges the basis of the EPA's enforcement action against the Respondents.
- **Relevance to Legal and Regulatory Framework:** The issue of control is

pivotal in environmental law, particularly in determining liability under the CWA. The Act often attributes responsibility to those who have the power to prevent violations. In this scenario, NCUC's demonstrable control over the facility and the project activities suggests that any inquiry into compliance or non-compliance should primarily focus on them.

- The pervasive control exercised by NCUC as the main contractor, especially their ability to lock out other parties from the facility, suggests that they held the primary operational control over the project. This level of control implicates NCUC more directly in matters of regulatory compliance and potential violations, challenging the EPA's focus on Nathan Pierce and Adamas Construction and Development Services PLLC as the primary responsible parties.

### 3. Contextual Clarification:

- Role of Respondent Nathan Pierce and Adamas Construction: The Respondents clarify the extent of Nathan Pierce's responsibilities and the functions of Adamas Construction. They argue that these roles were misconstrued by the Complainant, leading to an overestimation of their direct involvement in the POTW's operational aspects.

### 4. Overall Rebuttal of Liability and Penalties:



- The Respondents assert that the Complainant has not sufficiently established their liability for the alleged violations. They argue that any penalties sought are not applicable, given their compliance with relevant regulations and the nature of their involvement in the project.

### **III. Conclusion**

In conclusion, the Respondents argue that the Complainant's claims are grounded in a misinterpretation of their roles and responsibilities. They assert that their actions were in line with legal and regulatory standards and that the charges against them should be dismissed.

This Reply has systematically addressed and countered each of the Complainant's claims, elucidating key facts and legal principles that collectively call for a reevaluation and dismissal of the alleged violations.

Firstly, the Respondents have established that their role in relation to the POTW project was primarily advisory and managerial, not operational. This distinction significantly impacts the assessment of their responsibilities and liabilities under the Clean Water Act. The evidence and testimonies presented underscore the Respondents' limited involvement in the preparation and application of the sewage

sludge and highlight the pivotal role of the Northern Cheyenne Utilities Commission (NCUC) as the main contractor.

Furthermore, the Respondents have demonstrated compliance with the regulatory standards set forth in 40 C.F.R. § 503.13(b)(3) and have contested the claim of failing to retain information as per § 503.17(a)(4). The burden of record-keeping and compliance in the context of the project's operational aspects falls within the purview of the primary contractor, not the Respondents, given their non-operational role.

In addressing Count II, the Respondents have robustly challenged their characterization as operators of a point source and, consequently, the requirement to respond to the Clean Water Act Section 308 Information Request. The allegation that the Respondents failed to respond adequately to the EPA's Information Request is predicated on a misinterpretation of their role and does not account for the nuances of their involvement in the project.

Legal precedents from cases such as *Atlantic States Legal Foundation v. Tyson Foods*, *Beartooth Alliance v. Crown Butte Mines*, and *Gwaltney v. Chesapeake Bay Foundation* have been instrumental in framing the Respondents' arguments. These cases provide clarity on jurisdictional requirements, the mootness of civil penalties upon compliance, standards for summary judgment, and the definitions of operators and point sources under the CWA. The application of these legal principles further substantiates the Respondents' position and supports the argument for dismissal.

The Respondents maintain that their conduct and actions concerning the Lane Deer POTW project were within the confines of the law and the scope of their defined roles. They assert that they acted in good faith, adhering to environmental standards and regulations. Thus, the charges and penalties sought by the Complainant are unwarranted and should be dismissed.

Therefore, the Respondents respectfully request this honorable agency to consider the arguments and evidence presented in this Reply Brief and to dismiss all charges against the Respondents in the interest of justice and fair legal process.

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

RESPECTFULLY RESUBMITTED this 2nd day of Jan 2024.

/s Nathan Pierce

Nathan Pierce

Respondent

16550 Cottontail Trail

Shepherd, MT 59079

CERTIFICATE OF SERVICE

I certify that the foregoing Respondents Supplemental Prehearing Exhibits, Docket No. CWA-07- 2019-0262, has been resubmitted to Judge Coughlin electronically using the OALJ E-Filing System. Re-submitted on January 2nd, 2024.

Copy by Electronic Mail to:

Christopher Muehlberger, Esq.

Katherine Kacsur, Esq.

Assistant Regional Counsel

Office of Regional Counsel

U.S. Environmental Protection Agency, Region 7

Email: muehlberger.christopher@epa.gov

Email: kacsur.katherine@epa.gov

Attorneys for Complainant

/s Nathan Pierce

Nathan Pierce

Respondent