

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

IN THE MATTER OF)
)
ADAMAS CONSTRUCTION AND) COMPLAINANT’S INITIAL PRE-
DEVELOPMENT SERVICES, PLLC) HEARING EXCHANGE
)
AND)
)
NATHAN PIERCE,)
)
Respondents) Docket No. CWA-07-2019-0262
)
Proceedings under Section 309(g) of the)
Clean Water Act, 33 U.S.C. § 1319(g))

COMPLAINANT’S INITIAL PREHEARING EXCHANGE

COMES NOW, the United States Environmental Protection Agency (“EPA” or “Complainant”), pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. §§ 22.1 to 22.45, and Administrative Law Judge Christine Donelian Coughlin’s Prehearing Order of October 18, 2019, submits this Initial Prehearing Exchange.

1.(A) WITNESSES

Erin Kleffner
Life Scientist
Enforcement and Compliance Assurance Division, Water Branch
U.S. Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219

Ms. Kleffner will testify as a fact witness. Ms. Kleffner has worked in EPA Region 7 for 3 years, primarily specializing in biosolids compliance and enforcement. Her duties include reviewing biosolids annual reports to determine if violations are present, reviewing inspection reports, drafting and reviewing information requests, and calculating penalties for violations found. She will testify regarding her personal, education and employment background, including her training and work experience at EPA. She will also testify regarding her investigation into

this matter, review of evidence, and the factual and evidentiary support for the determination that Respondents have violated the Clean Water Act (CWA) and the regulations promulgated thereunder. Ms. Kleffner will also testify to the facts that support EPA's proposed penalty. Ms. Kleffner may testify regarding Respondents' ability to pay the proposed penalty or the effect of the proposed penalty on their ability to continue to do business, if Respondents raise this statutory factor, which, to date, they have not.

Jodi Bruno
National Biosolids Coordinator
Enforcement and Compliance Assurance Division, Water Branch
U.S. Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219

Ms. Bruno will testify as a fact witness. Ms. Bruno has worked in EPA Region 7 for 21 years, primarily specializing in water enforcement and related programs. Her duties include providing enforcement and technical expertise and policy interpretation to enforcement staff and other affected staff regarding compliance determinations, appropriate enforcement response, evidentiary requirements, penalty calculations, and other matters related to enforcement response and case development. She will testify regarding her personal, education and employment background, including her training and work experience at EPA. She will testify regarding her specific knowledge of EPA's biosolids program and regulations.

Akash Johnson
Environmental Engineer
U.S. Environmental Protection Agency, Region 8
1595 Wynkoop Street
Denver, Colorado 80202

Mr. Johnson will testify as a fact witness. Mr. Johnson has worked in EPA Region 8 for 3.5 years, primarily specializing in NPDES inspections and enforcement. His duties include conducting inspections, preparing inspection reports, offering compliance assistance, and providing technical support to enforcement case development. He will testify regarding his personal education and employment background, including his training and work experience at EPA. He will also testify regarding his June 2018 inspection of the Lame Deer WWTF, where biosolids compliance assistance was provided to the Respondents.

Emilio Llamozas
Environmental Engineer
U.S. Environmental Protection Agency, Region 8
1595 Wynkoop Street
Denver, Colorado 80202

Mr. Llamozas will testify as a fact witness. Mr. Llamozas has worked in EPA Region 8 for 16 years, with 8.5 years in NPDES Enforcement. His duties include conducting inspections, preparing inspection reports, offering compliance assistance, and providing technical support to enforcement case development. He will testify regarding his personal education and employment background, including his training and work experience at EPA. He will also testify regarding his June 2018 inspection of the Lame Deer WWTF, where biosolids compliance assistance was provided to the Respondents.

Nathan Pierce
16650 Cottontail Trail
Shepherd, Montana 59079

Mr. Pierce is a Respondent, individually and as the President of Adamas Construction and Development Services, PLLC. Mr. Pierce will testify as a fact witness. Mr. Pierce is expected to testify regarding his role and responsibilities as an individual and as the President of Adamas Construction and Development Services, PLLC (Adamas). Mr. Pierce is expected to testify regarding Respondents' contract with the Northern Cheyenne Utilities Commission as the project manager to remove, transport and apply 1,000,000 gallons of sludge from Cell #2 of the Lame Deer Lagoon. Mr. Pierce is expected to testify regarding Respondents' activities related to the removal, transportation, and land application of the sludge from Cell #2 of the Lame Deer Lagoon. Mr. Pierce is expected to testify regarding Respondents' Subcontract with Mr. Robinson. Mr. Pierce is expected to testify regarding certain documents included in this Prehearing Exchange.

Michelle Pierce
16650 Cottontail Trail
Shepherd, Montana 59079

Mrs. Pierce is the wife of Nathan Pierce and, as described in Respondents' Answer, an integral part of Adamas Construction and Development Services, PLLC. Mrs. Pierce is expected to testify as a fact witness. Mrs. Pierce will testify regarding her role and responsibilities as an individual and as a member of Adamas Construction and Development Services, PLLC. Mrs. Pierce is expected to testify regarding Respondents' contract with the Northern Cheyenne Utilities Commission as the project manager to remove, transport and apply 1,000,000 gallons of sludge from Cell #2 of the Lame Deer lagoon. Mrs. Pierce is expected to testify regarding Respondents' activities related to the removal, transportation, and land application of the sludge from Cell #2 of the Lame Deer Lagoon. Mrs. Pierce is expected to testify regarding Respondents' Subcontract with Mr. Robinson. Mrs. Pierce is expected to testify regarding certain documents included in this Prehearing Exchange.

Tom Robinson
34819 Highway 212
Lame Deer, Montana 59043

Mr. Robinson is the person who subcontracted with Respondents regarding land application. Mr. Robinson also called Indian Health Services after the sludge was mis-applied to

his land. Mr. Robinson is expected to testify as a fact witness. Mr. Robinson is expected to testify regarding the subcontract that he entered into with Respondents, his communications with Respondents, and all activities related to the land application of biosolids on his land. Mr. Robinson is expected to testify regarding certain documents included in this Prehearing Exchange.

Representative of the Northern Cheyenne Utilities Commission (NCUC)
P.O. Box 747
Lame Deer, Montana 59043

EPA will work with the Northern Cheyenne Utilities Commission to identify the appropriate fact witness or witnesses. The former manager, Sheri Bement, no longer works at the NCUC, and, therefore, a new witness will need to be identified. EPA expects this witness or witnesses will testify regarding NCUC interactions with Respondents and observations of the projects and activities related to the Lame Deer Sludge Removal Project and Respondents' role in the Lame Deer Sludge Removal Project. EPA expects this witness or witnesses to testify regarding the contract between NCUC and Adamas for the sludge removal project. EPA also expects this witness or witnesses to testify regarding Respondents' role as operator of the wastewater treatment facility, particularly related to the facts and circumstances of the EPA Region 8 inspection. The NCUC representative will testify regarding certain documents included in this Prehearing Exchange.

James Courtney
Engineer
Billings Area Indian Health Service
2900 4th Ave. N. Billings, Montana 59101

Mr. Courtney is expected to testify as a fact witness. Mr. Courtney was the primary Indian Health Services point of contact for Mr. Pierce regarding the land application of biosolids from the Lame Deer Lagoon. Mr. Courtney also conducted a site visit of the land application site after receiving a complaint from the land owner, Tom Robinson, and will testify regarding his observations and interactions with Mr. Robinson, Respondents, and NCUC. Mr. Courtney can testify to the role that Mr. Pierce had with respect to the land application of the biosolids from the Lame Deer Lagoon and to his observations regarding the land application site. Mr. Courtney will testify regarding certain documents included in this Prehearing Exchange.

George Cummins
Construction Inspector
Lame Deer Service Unit Indian Health Service
2900 4th Ave. N. Billings, Montana 59101

Mr. Cummins is expected to testify as a fact witness. Along with Mr. Courtney, Mr. Cummins conducted a site visit of the land application site after receiving a complaint from the land owner, Tom Robinson. Mr. Cummins will testify regarding his observations and interactions with Mr. Robinson, Respondents, and NCUC. Mr. Cummins can testify to the role that Mr. Pierce had with respect to the land application of the biosolids from the Lame Deer

Lagoon and to his observations regarding the land application site. Mr. Cummins will testify regarding certain documents included in this Prehearing Exchange.

Ernie Sprague
 D and R Disposal
 215 Birch Court
 Colstrip, Montana 59323

Mr. Sprague is expected to testify as a fact witness. Mr. Sprague can testify to his involvement in the land application of sludge on Mr. Robinson’s land and can testify to his communications with Mr. Pierce and Mr. Robinson. Mr. Sprague is expected to testify regarding certain documents included in this Prehearing Exchange.

1.(B) EXHIBITS

For purposes of the list of documents below, “Complainant’s Exhibit” is abbreviated as “CX__.” Copies of documents and exhibits which Complainant intends to introduce into evidence at the hearing are herein submitted electronically using the OALJ E-filing system.

| CX # | Description |
|------|--|
| 1 | Undated NCUC proposal attached to Respondents’ Answer. |
| 2 | December 23, 2015, Biosolids Delegation to EPA Region 7. |
| 3 | May 18, 2018, Pre-Construction Meeting Minutes. |
| 4 | July 13, 2018, Email from Adamas to Indian Health Services to provide an update on the status of the land application project. |
| 5 | July 20, 2018, EPA Region 8 Inspection Report for the Lame Deer Wastewater Treatment Facility (WWTF or Facility or Plant). |
| 6 | August 2, 2018, Analytical Summary Report, submitted by Adamas to EPA. |
| 7 | August 8, 2018, Subcontract between Adamas and Tom Robinson, the owner of the application site. |
| 8 | August 13, 2018, Indian Health Services letter to NCUC expressing concerns with claims that Adamas had made regarding the sludge at Lame Deer Lagoon and expressed concerns that Adamas had failed to provide land application logs. |
| 9 | August 28, 2018, Indian Health Services Site Report regarding the land application. |
| 10 | July 7, 2015, Findings of Violations to NCUC. |
| 11 | September 25, 2018, EPA CWA Section 308 information request for information related to the August 22, 2018, land application of sewage sludge. |
| 12 | October 17, 2018, Respondents’ response to the EPA’s information request. Respondents stated that they needed to obtain information from NCUC and requested an extension to respond and was granted a 30-day extension on October 29, 2018. EPA did not receive a copy of the letter sent to NCUC. |
| 13 | October 29, 2018, EPA response to the request for an extension of time. |
| 14 | March 4, 2019, EPA Letter to Respondents regarding pre-filing negotiations. |
| 15 | May 14, 2019, Email from EPA to Indian Health Services. |
| 16 | May 15, 2019, Email from Indian Health Services to EPA. |

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| 17 | June 14, 2019, Email from EPA to Adamas after Respondents failed or refused to respond to the EPA's September 28, 2018, information request. |
| 18 | June 21, 2019, Email from Respondents to EPA. |
| 19 | July 2, 2019, Email with attachments from Respondents to EPA providing some information in response to EPA's request for information. |
| 20 | July 8, 2019, Email from EPA to Respondents. |
| 21 | July 18, 2019, Email from EPA to Respondents. |
| 22 | EJSCREEN Report dated September 4, 2019. |
| 23 | September 25, 2019, Email from Wyatt Golding to EPA. |
| 24 | Adamas Construction and Development Services Website Printout (November 18, 2019). |
| 25 | Documentation of Service of the Complaint. |
| 26 | Public Notice of Complaint. |
| 27 | October 9, 2019, Email from Respondents to EPA. |
| 28 | October 16, 2019, Email between EPA and Respondents. |
| 29 | October 31, 2019, Emails from Respondents to EPA with attachments. |
| 30 | November 14, 2019, CWA 308 Information Request Sent to Tom Robinson. |
| 31 | November 14, 2019, CWA 308 Information Request Sent to D & R Disposal. |
| 32 | November 14, 2019, CWA 308 Information Request Sent to Northern Cheyenne Utilities Commission. |
| 33 | Preamble to the Biosolids Regulations, 58 Fed. Reg. 9248 (February 19, 1993), |
| 34 | Legislative History, 99 Cong. Senate Report 50; WQA87 Leg. Hist.31, April 15, 1985. |
| 35 | EPA guidance document entitled "Land Application of Sewage Sludge", dated December 1994. |
| 36 | EPA guidance document entitled "A Plain English Guide to Part the EPA Part 503 Biosolids Rule", dated September 1994. |
| 37 | EPA guidance document entitled "Biosolids Generation, Use, and Disposal in the United States, dated September 1999. |
| 38 | EPA guidance document entitled "Control of Pathogens and Vector Attraction in Sewage Sludge" dated July 2003. |
| 39 | EPA Technical Support Document for Land Application of Sewage Sludge, Volume 1, dated November 1992. |
| 40 | EPA Technical Support Document for Land Application of Sewage Sludge, Volume 2, dated November 1992. |
| 41 | [PLACEHOLDER FOR 308 Responses from Tom Robinson] |
| 42 | [PLACEHOLDER FOR 308 Responses from D&R Disposal] |
| 43 | [PLACEHOLDER FOR 308 Responses from NCUC] |
| 44 | May 30, 2019, Letter from EPA to Mr. Gallus re-sending 308 Information Request Letter. |
| 45 | November 20, 2019, First Email with Attachments from James Courtney at Indian Health Services to EPA. |
| 46 | November 20, 2019, Second Email with Attachments from James Courtney at Indian Health Services to EPA. |

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| 47 | November 20, 2019, Third Email with Attachments from James Courtney at Indian Health Services to EPA |
| 48 | Montana Secretary of State Information regarding Adamas Construction and Development, PLLC |
| 49 | November 21, 2019, Email with Attachments from James Courtney at Indian Health Services to EPA |
| 50 | [PLACEHOLDER] Sewer Operator Application from Respondents submitted to State of Montana |

1. (C) STATEMENT SPECIFYING AMOUNT OF TIME NEEDED BY COMPLAINANT TO PRESENT ITS DIRECT CASE AND WHETHER AN INTEPRETER IS NECESSARY

Complainant estimates that it will require approximately 2-2.5 days to present its case in chief. The length of time required for rebuttal testimony and cross-examination of Respondents' witnesses will depend on the number and substance of documents and witnesses disclosed in Respondents' Prehearing Exchange. Complainant does not anticipate that the services of an interpreter with regard to the testimony of any witnesses will be necessary.

2.(A) DOCUMENTATION SHOWING THAT SERVICE OF THE COMPLAINT WAS COMPLETED IN ACCORDANCE WITH SECTION 22.5(b)(1) OF THE RULES OF PRACTICE, 40 C.F.R. § 22.5(b)(1)

Documentation of service of the Complaint can be found in CX25.

2.(B) A BRIEF NARRATIVE STATEMENT, AND A COPY OF ANY DOCUMENTS IN SUPPORT, EXPLAINING IN DETAIL THE FACTUAL AND/OR LEGAL BASES FOR THE ALLEGATIONS DENIED OR NOT OTHERWISE ADMITTED IN RESPONDENT'S ANSWER

Respondents' Answer, entitled, "Answer and Request for Hearing," appears to deny at least a portion of the allegations. In response to the "Introduction," the Respondents state, "The respondent hereby denies all allegations against them, requests a hearing and responds to each allegation below." 40 C.F.R. § 22.15(b), states that the answer "shall clearly and directly admit, deny, or explain each of the factual allegations contained in the complaint with regard to which respondent has any knowledge. Where respondent has no knowledge of a particular factual allegation and so states, the allegation is denied." 40 C.F.R. § 22.15(d) states that "failure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation." Many paragraphs of the Complaint are not specifically addressed by the Respondents in the Answer. Therefore, Complainant asserts that any material factual allegation not addressed by Respondents are admitted.

After the Complaint was filed, Respondents provided additional information to Complainant that had not previously been provided. As a result, Complainant is conducting additional investigation into the claims made by Respondents and continues to receive additional

information related to this matter. Therefore, Complainant reserves the right to supplement the prehearing exchange with any additional, relevant information and/or to include such information in Complainant's Rebuttal Prehearing Exchange. Complainant also reserves its right to timely amend the Complaint upon motion and approval by the Court.

Complainant will set forth its best response based on the information provided to date.

The narrative statement below follows the numbering sequence of the Complaint.

Jurisdiction, Parties, Statutory and Regulatory Framework

Respondents neither admit nor deny with adequate specificity any of the allegations set forth in Paragraphs 1-20 of the Complaint. Pursuant to 40 C.F.R. § 22.15, the Respondent shall clearly and directly admit, deny, or explain each of the factual allegations contained in the complaint with regarding to which respondent has any knowledge. The allegations in Paragraphs 1-20 contain statements related to Jurisdiction, the Parties, and the Statutory and Regulatory Background. Paragraphs 4 and 7 contain material factual allegations. Because Respondent provided no specific response to any of these statements, Complainant asserts that Paragraphs 4 and 7 are admitted pursuant to 40 C.F.R. § 22.15.

Factual Background

Respondents admit the allegations in Paragraphs 21, 22, 24 and 26-30.

23. *Although the currently available information states that Respondent Adamas involuntarily dissolved on September 1, 2018, Respondent Adamas' website is still active. <http://www.biomicrobicsmontana.com/projects/> (accessed August 2019). Further, Respondent Adamas or Nathan Pierce on Adamas' behalf is a party in active litigation with Indian Health Services.*

Response: Based on the information provided in Respondents' Answer, EPA is unable to discern whether Respondent Adamas is currently an active corporation. Although Respondents' admit in Paragraph 22 that the website states the purpose of the business, in Paragraph 23, Respondents deny operating the website, even though this website is listed in Nathan Pierce's signature block in CX19, p.8. The website lists the address to which EPA has been serving Respondent Adamas. CX24 is a printout of the website. CX48 contains the Montana Secretary of State information for Respondent Adamas.

Further, EPA believes that Respondents' admission that they have filed an administrative tort complaint is, in fact, "active litigation." Regardless of whether Respondent Adamas is currently an active corporation, in the proceeding paragraphs, Respondent Pierce admits that he is the responsible corporate officer for the activities of Respondent Adamas.

The “responsible corporate officer” doctrine allows courts to hold individuals who exercise control over business policies or activities personally liable for failing to prevent statutory offenses by subordinates, even if they themselves were not aware of any wrongdoing.¹

25. *Respondent Nathan Pierce is a private individual who is the sole member of Adamas.*

Response: Based on the response provided in the answer, Mr. Pierce is stating that his wife, Michelle Pierce is also a member of Adamas and was also a responsible corporate officer. Complainant does not dispute this contention.

31. *Respondent Adamas and NCUC entered into a contract for Respondent to land apply sewage sludge generated by NCUC.*

Response: Respondents’ basis for denial of this allegation is unclear. The contract Respondents entered into with NCUC on May 15, 2018, for the sludge removal and land application project is included in CX 45, pgs. 17-19. The contract details payments for the project, including payment for land application. *Id.* at p.17.

Although the contract itself is conclusive evidence of this allegation, Complainant points to the following correspondence and documents in further support of this allegation. Adamas submitted several invoices to NCUC for the land application of sludge removed from the Lame Deer Lagoon. CX45, pgs. 5,7, and 30. Respondents’ July 2, 2018, email to EPA and attached as a document to Respondents’ Answer states that “Our company was given the directive from NCUC GM Sheri Bement and Northern Cheyenne tribal president Jace Killsback to proceed with sludge removal and application... .” CX19, p.1. In various correspondence to NCUC and the Indian Health Services, Adamas held itself out as the party responsible for the land application. CX19, 45, 46, 47. In correspondence to U.S. Senator, Steve Daines, Adamas states that he entered into an agreement with NCUC and Indian Health Services to remove and land apply the Biosolids from the Lame Deer Lagoon in exchange for \$239,000. CX49, pgs. 8-11.

In an April 21, 2018, email from Adamas to NCUC that describes the scope of work for the Lame Deer Sludge Removal Project, Adamas states that the sludge will be removed from frack tanks and land applied. CX45, p.34. The Laboratory Analytical Report attached to Respondents’ Answer identifies Respondent Adamas as the Laboratory’s client for the Lame Deer Lagoon Sludge Removal Project and identifies Respondent Adamas as the party who took the sludge and soil samples. CX19, pgs. 12-28. The June 27, 2018, letter from NCUC to Adamas regarding the Lame Deer Lagoon Project references the contract that Adamas entered into with NCUC and authorizes Adamas to speak to Indian Health Services about the “day to day work that James Courtney, Project Engineer, can respond to.” CX29 p.10. It is clear from the documents that Respondents did, in fact, update Indian Health Services about the activities related to the Lame Deer Lagoon Project.

¹ See *U.S. v. Dotterweich*, 320 U.S.277, 64 S.Ct. (1943); *U.S. v. Osborne*, 2012 WL 1096087 (N.D. Ohio, 2012); *Humboldt Baykeeper v. Simpson Timber Co.*, 2006 WL 3545014 (N.D. Cal. 2006); *Waterkeepers N. Cal. v. AG Indus. Mfg., Inc.*, 2005 WL 2001037 (E.D. Cal. 2005); *Puget Soundkeeper Alliance v. Tacoma Metals, Inc.*, 2008 WL 3166767 (W.D. Wash. 2008).

Respondents updated Indian Health Services on the status of the sludge removal, sampling and timing of the land application. CX45, pgs.9-11; 20-24; 37-38, 42-44. EPA Region 8 inspected the Wastewater Treatment Facilities operated by the NCUC. CX5. EPA's inspection notes Adamas as the NCUC contractor and was the lead facility contact during that inspection. Adamas provided EPA with information regarding the inspection of manholes, the status of the collection system cleaning, and issues with the grinder, gate valves and lift stations. *Id.* The EPA inspection also noted that Adamas was preparing Cell #2 for sludge removal at the time of EPA's inspection. *Id.* In an August 27, 2018, email to NCUC and Indian Health Services requesting payment for the Lame Deer Sludge Removal Project, Adamas states that NCUC submitted an application to the State of Montana, naming Adamas as the sewer operator for the reservation. CX46, p.5-12.²

The Subcontractor Agreement attached to Respondents' Answer³ states that the Contractor (Adamas) will pay to the said Subcontractor (Tom Robinson), "the sum of Fifteen Thousand Dollars (\$15,000) for application of the sludge removed from the Lame Deer Lagoon and hauled to Tom Robinson's field and applied at an even rate." CX7. The subcontract goes on to specify that the Subcontractor (Tom Robinson) will be paid after completing the work to the "full satisfaction" of Adamas. *Id.* The subcontract also states that "the Subcontractor agrees to promptly begin said work as soon as notified by said Contractor" and that "the Subcontractor will furnish Contractor with logs for each day of application." *Id.*

If Respondent had not entered into a contract with NCUC to land apply the sludge, Complainant would like to better understand Respondent Adamas' legal authority to enter into the subcontract with Tom Robinson for said land application.

32. On or about August 22, 2018, Respondent Adamas applied sewage [sic] approximately 1,000,000 gallons of Class B sewage sludge from Cell #2 of the Lame Deer treatment lagoon to land application property in or near Lame Deer, Montana.

² EPA has contacted the State of Montana. The State confirmed an application was submitted and is sending the copy to EPA. EPA will supplement the prehearing exchange with the document.

³ At the time the Complaint was filed, despite sending two formal information requests letters to Respondents pursuant to Section 308 of the CWA, 33 U.S.C. §1318 (CX11 and 44), Complainant had only received four documents attached to the July 2, 2019, email (CX19) from Respondents. It was only after the Complaint was filed that Respondents raised the argument that Respondents were not responsible for the land application and provided the subcontract between Respondent Adamas and Tom Robinson. CX7. After EPA issued its first information request to Respondents pursuant to Section 308 of the CWA, 33 U.S.C. §1318 (CX11), Respondents stated that they needed to coordinate with NCUC, the permit holder, and indicated that it believed NCUC was the party responsible for complying with the information request. This letter was silent regarding Respondents subcontract for the land application nor did it reference Tom Robinson. CX12. Further, no documents were received from Respondents in response to the September 2018 information request.

Based on the new information provided by Respondents, EPA sent information requests pursuant to Section 308 of the CWA to Tom Robinson, D & R Hauling, and the Northern Cheyenne Utility Commission to discern the involvement of additional parties in the land application or disposal of the sludge removed from the Lame Deer lagoon. CX30-32. Complainant reserves its right to supplement the prehearing exchange with additional information received in response to the information requests, as necessary.

Response: In response to this allegation, Respondents first state that they did not apply any sewage sludge related to this or any other project. This statement is in direct contravention to the evidence at hand, including numerous prior statements from Respondents regarding Respondents' actions with regard to the land application of sludge removed from the Lame Deer Lagoon as described in Response to Paragraph 31 and herein. Respondents go on to state that Adamas entered into a subcontract with Tom Robinson to haul and apply the sludge to Tom Robinson's property. This statement, even if true, does not absolve Respondents of liability.

A. Factual and Legal Basis for Land Applicator Liability

As stated above, Respondents' argument that they bear no responsibility for the land application of sludge directly contradicts the evidence. First and most notably, Adamas entered into a contract with NCUC for the land application as described in Complainant's response to Paragraph 31 and submitted an invoice to NCUC for payment for the sludge application on Tom Robinson's property. CX45, p.5. The contract specifies that "contractor may, at its discretion, engage subcontractors to perform work hereunder, provided contractor shall fully pay said subcontractor, and in all instances remain responsible for the proper completion of this contract." CX45, p.18.

Second, Adamas held itself out as the party responsible for the land application in various correspondence to both the NCUC and Indian Health Services and was responsible for the entire Lame Deer Removal project as described in Complainant's response to Paragraph 31, above and described herein.

Of particular note is an email, dated April 21, 2018, from Adamas to NCUC and Indian Health Services that attaches a scope of work for the Lame Deer Sludge Removal Project, and a schedule with project milestones. CX45, p. 32. In the email, Adamas states that it is Adamas' understanding that the "Northern Cheyenne tribal council are receptive to sludge disposal by land application process on tribal lands" and that the "land application equipment will be a High Flow Liquid Fertilizer wheel injector or other method allowed by EPA and/or MTDEQ rules and regulations to include rain bird sprinklers or pivot lines." *Id.* In the letter attached to the email, Adamas outlines the scope of work to NCUC, and makes the following statements: (1) the work will be completed in compliance with EPA Part 503 regulations, and (2) "the term "Adamas" includes "all of our subcontractors, sub-consultants, engineers, and other team members." CX45, p. 33. The Scope of Work includes the following tasks: (1) Site Prep and Mobilization; (2) Bio-solid Sludge Removal and Dewatering; (3) Bio-Solid Sludge Transportation and Land Application; and (4) Clean-up and Demobilization. CX45, p.34. The schedule attached to the email sets forth dates for the completion of all of these tasks including a date for Adamas to complete the land application. CX45, p.36.

From this date forward, Adamas sent various email updates to NCUC and the Indian Health Services on the status of the project. In an email dated April 30, 2018, from Adamas to Indian Health Services, Adamas states that "if we are unable to use the wheel injector we will do application followed by tilling" and goes on to explain per Adamas' policies and procedures "all land application will meet or exceed the requirements of U.S. Environmental Protection Agency

(EPA) Part 503...and will demonstrate compliance with applicable laws, rules and regulations including, but not limited to...the Federal Water Pollution Control act [sic], 33 U.S.C. 1251 et.seq.” CX45, p. 37.

In a June 21, 2018, email to NCUC and Indian Health Services, Adamas states that “Adamas-Nathan Pierce will be the project manager for the Sludge Removal Project with the understanding that no NCUC equipment and/or staff will be used for this project, at the request of NCUC. Adamas will use their employees only and reserves the right to hire other labor if needed.” CX49, p.27.

In a July 16, 2018, email exchange between Adamas and Indian Health Services, Indian Health Services conveys that Tom Robinson appears to be “interested in receiving the sludge on his property.” In response, Adamas states that he will “call and arrange” and goes on to explain that Adamas is “currently in Billings waiting on a part to be fabricated so that we can complete the pumping process and should begin land application this week.” CX45, p.42.

The August 28, 2018, Indian Health Services site report states that Tom Robinson submitted a complaint to the Indian Health Services regarding the land application of sludge on his property. CX9. Tom Robinson informed Indian Health Services that the sewage sludge was inappropriately land applied on his property making it difficult for him to till the sludge into his soil. *Id.* Mr. Robinson told Indian Health Services that Adamas refused to provide Mr. Robinson with sampling results, application logs and target application rates—all things that Adamas had or should have had in his possession. *Id.* While Adamas is now claiming that Tom Robinson was the party responsible for maintaining the land application records, it was impossible for Mr. Robinson to do so without additional information from Adamas. For instance, it would have been impossible for Mr. Robinson to maintain records regarding the annual application rate of biosolids as calculated, as required by 40 C.F.R. 503.17, without having first obtained the sludge and soil sample results from Adamas. From a practical perspective, Respondents were the only party in a position to maintain the records required by 40 C.F.R. 503.17.⁴

After the August 2018 land application, Adamas continued to represent to NCUC and Indian Health services, as well as to a U.S. Senator, that it was the party responsible for the land application of sludge. *See* December 12, 2018, invoice to NCUC for sludge application (CX45, pgs. 5-7); August 22, 2018, email from Adamas to the Northern Cheyenne Tribe (CX46, pgs. 10-11)⁵; August 26, 2018, email from Adamas to the Northern Cheyenne Tribe, the NCUC and the

⁴ Further, based on statements made during a November 11, 2019, conversation with EPA representatives, Ernie Sprague, of D & R Disposal, the contractor that hauled the sludge to Tom Robinson’s property, less than 100,000 gallons of sludge was applied to Tom Robinson’s property. Adamas submitted an invoice to NCUC and the Indian Health Services for the pumping and land application of 600,000 gallons of sludge to the Robinson property. CX45, p. 5. Based on the facts currently available, the amount and location of sludge disposal is unclear.

⁵ CX46 at p. 10-11 states, “we all agreed that our company has [to] be credited by Indian Health Services as pumping, hauling, and application of 600,000/gallons.”

Indian Health Services,⁶ CX46, pgs. 5-7. In correspondence to Senator Daines, dated June 3, 2019, Respondents again state that Respondents entered into an agreement for the land application of sludge and performed the land application. CX49, pgs. 8-10.

Regardless of whether Adamas contracted with another party to till the sewage sludge into the soil, a small piece of the sewage sludge removal and land application process, Adamas held itself out as the party responsible for the entire Lame Deer Sludge Removal Project and is liable as such. The CWA imposes liability on the parties that actually performed the work as well as on the parties with responsibility for or control over the performance of work. United States v. Lambert, 915 F. Supp. 797, 802, (S.D.W.Va. Jan. 31, 1996). United States v. Chuchua, 2004 U.S. Dist. Lexis 32365 (S.D. Ca. March 10, 2004) (owner of the property and project manager of stream alteration work both “persons” under the Act because both exercised control over the activities at the site; court rejected manager’s argument that he was merely following orders from owner, “He completed paperwork, engineering plans, applied for permits and did ‘whatever was required to...put that part of the project together.’”). As set forth above, Adamas assumed responsibility for and controlled the land application of sludge from the Lame Deer Wastewater Lagoon by: (1) serving as the contractor for the project; (2) serving as the project manager and technical consultant for the project; (3) controlling the timing of the land application and whether it would in fact take place; (4) assuming responsibility that the land application would be conducted in a manner consistent with EPA’s biosolid regulations; (5) retaining responsibility for the maintenance of land application records; (6) communicating directly with Indian Health Services on the status of the land application; (7) preparing the sludge for land application by dewatering the lagoon, removing sludge and taking soil samples; and (8) controlling the timing of land application and hauling.

This evidence demonstrates that Respondents were directly and substantially involved in all operations at the Lame Deer Wastewater Treatment Plant and directed the land application of the sludge from the Lame Deer Wastewater Lagoon. Land applicators are held accountable for complying with 40 C.F.R. 503.17. *See also* CX33.

B. Factual and Legal Basis for Operator Liability

Not only are Respondents liable as the parties responsible for land application, but Respondents were also the operator of the Lame Deer Wastewater Treatment Plant at the time of the sludge removal and land application. Respondents explain that they are the Facility’s operator in an August 26, 2018, email from Adamas to the Northern Cheyenne Tribe, the NCUC and the Indian Health Services. CX46, pgs. 5-7. In that email Pierce asserts, “as of April of this year Sheri Bement [NCUC GM] signed and submitted a[n] application to the State of Montana naming me the Sewer Operator for the reservation systems. This seems again I would fall under the NCUC umbrella as the sewer operator. She also represented to EPA Akash Johnson that I was the Sewer Operator. . . As for Adamas Construction not being a consultant of NCUC

⁶ CX 46 at p. 5-7 states, “as of April of this year Sheri Bement [NCUC GM] signed and submitted a[n] application to the State of Montana naming me the Sewer Operator for the reservation systems. This seems again I would fall under the NCUC umbrella as the sewer operator. She also represented to EPA Akash Johnson that I was the Sewer Operator. . . As for Adamas Construction not being a consultant of NCUC anymore we happily agree with this point and respectful[ly] request you inform the MTDEQ I am no longer the Temporary Sewer Operator for the NCUC.”

anymore we happily agree with this point and respectful[ly] request you inform the MTDEQ I am no longer the Temporary Sewer Operator for the NCUC.” Id.

In addition to Adamas’ statements that it was the sewer operator, Respondents exercised control over the Lame Deer Wastewater Treatment Plant in the following ways: (1) Adamas served as the project manager and technical consultant for the Lame Deer Sludge Removal Project CX4, 6, 7, 8, 19, 29, 45, 46; (2) EPA’s Region 8 inspection notes that Adamas is the NCUC contractor and was the lead facility-contact during that inspection. Adamas provided EPA with information regarding the inspection of manholes, the status of the collection system cleaning, and issues with the grinder, gate valves and lift stations. The EPA inspection also noted that Adamas was preparing Cell #2 for sludge removal at the time of EPA’s inspection. CX5; (3) Adamas entered into an agreement to serve as the primary contractor for Lame Deer Sewer Main Camera and Cleaning project in exchange for \$130,250 and the Scatter Site Projects in exchange for \$200,000 CX49; (4) Adamas’ scope of work for the Lagoon project included site prep and mobilization, Bio-Solid Sludge Removal and Dewatering, Bio-Solid Sludge Transportation and Land Application and Clean up and Demobilization CX 45, pgs. 33-35; and (5) according to a June 21, 2018, email from Adamas to NCUC and the Indian Health Services and reiterated in a letter from Michelle Pierce [Member of Adamas] to the Indian Health Services it was determined that Respondents would complete the sludge removal and land application project without the use of NCUC equipment or staff. CX 49, p. 27.

As an operator who prepared sludge, Respondents are liable under 40 C.F.R. §503.⁷

33. On or about August 28, 2018, the Indian Health Service visited the land application property after receiving a complaint from the landowner regarding the application.

Response: The basis for the denial of this allegation is unclear. This statement is taken from CX9, the August 28, 2018, site report completed by Indian Health Service after the site visit.

34. On August 29, 2018, Indian Health Service observed, as noted in its site report, that the sludge was not appropriately spread during land application.

Response: The basis for the denial of this allegation is unclear. This statement is taken from CX9, the August 28, 2018, site report completed by Indian Health Service after the site visit. Further, as stated in the Subcontract between Respondent Adamas and Tom Robinson, (CX7), Respondents should have the application logs in their possession and able to provide Complainants with regulatorily-required information about the land application of the sewage sludge. Complainant incorporates its response to Paragraphs 31 and 32.

35. On August 28, 2018, Indian Health Service observed, as noted in its site report, that the Respondent refused to provide target application rates for the sludge, laboratory tests, and application logs to the landowner.

⁷ See also August 29, 2018, Email from Mr. Gallus to Human Health Services, “My Client by EPA definition was the sludge preparer.” CX45, p. 16.

Response: The basis for the denial of this allegation is unclear. This statement is taken from CX9, the August 28, 2018, site report completed by Indian Health Services after the site visit. Complainant received the subcontract with Tom Robinson (CX7) after the Complaint was filed. Further, as stated in the August 28, 2018, Indian Health Services site report (CX9), Respondents should have the application logs in their possession and able to provide Complainants with information about the land application of the sewage sludge. Complainant incorporates its response to Paragraphs 31 and 32.

36. On September 25, 2018, EPA issued Respondent Adamas a CWA Section 308, 33 U.S.C. § 1318 information request for information related to the August 22, 2018, land application of sewage sludge. On October 17, 2018, Respondent Adamas requested an extension to respond and was granted a 30-day extension on October 29, 2018. On March 7, 2019, EPA sent a letter to Respondent requesting a response to the information request and notifying Respondent of the violations associated with improper land application of sewage sludge and failure to respond to the information request and a potential enforcement action associated with those violations.

Response: The basis for the denial of this allegation is unclear. CX11 is the September 25, 2018, information request from EPA to Respondents. CX12 is the October 17, 2018, request for extension of time. CX13 details the EPA's grant of the extension to respond. CX14 is the March 4, 2019, letter offering to engaged Respondents in pre-filing negotiations and reminding them of their obligation to respond to the information request letter. Respondents' reason for denial is based on the argument that NCUC and Tom Robinson are responsible for providing the information and that Respondents are not responsible for responding to the information request. Respondents do not appear to be denying that the information requests and correspondence were issued. Complainant incorporate its responses to Paragraphs 31 and 32.

37. On June 11, 2019, after Respondents failed or refused to respond to the EPA's September 8, 2018, information request, EPA again issued the March 7, 2019, EPA correspondence to Respondents by electronic mail through the listed counsel.

Response: Complainant provides the following email exchanges between EPA and Respondents' counsel that demonstrate that Respondents failed to comply with the information request. CX20 and CX21. Respondents' reasons for denying this allegation are identical to the reasons provided in response to Paragraph 36 and do not appear to be denying that Respondents failed or refused to respond to EPA's information requests. Complainant incorporates its responses to Paragraphs 31 and 32.

38. Respondent provided an incomplete response to the June 11, 2019, Section 308 information request on July 2, 2019. The Respondent failed or refused to provide a response that contained the following information Respondent is required to develop and maintain by 40 C.F.R. § 503.17(5)(ii)

- a. The street address or legal description of the location;*
- b. The date(s) upon which the location was used for the land application of biosolids;*

- c. *The number of acres upon which biosolids were land applied;*
- d. *The number of loads applied;*
- e. *A description of how the site restrictions of 40 C.F.R. § 503.32(b)(5) were met; and*
- f. *The annual application rate of biosolids as calculated.*

Response: The basis for the denial of this response is unclear. The emails between Complainant, Mr. Gallus, and Respondents (CX20 and CX21) show the specific information requested by Complainant to respond to the information request letter. Further, the information received by Complainant in response to the 308 request letter (CX19) does not include the information required by 40 C.F.R. §503.17(5)(ii).

Respondents' July 2, 2019, email response demonstrates that Respondents had responsive documents in their possession at the time of EPA's first information request dated, September 25, 2018, but simply refused to provide such documents. The July 2, 2019, email included the following documents: (1) June 28, 2018, email from Adamas; (2) Pre-Construction Meeting Minutes, dated May 18, 2018; (3) Analytical Summary Report, dated August 2, 2018; (4) July 13, 2018 email from Adamas to Indian Health Services; and (5) June 28, 2018, email from Adamas to the Northern Cheyenne Tribe (CX 19).

The documents attached to Respondents' Answer demonstrate that Respondents had responsive documents in its possession at the time of EPA's September 2018 Information Request and EPA's March 7, 2019, correspondence to Adamas requesting a response to the information request, but again refused to provide those documents to EPA. The documents attached to Respondents' Answer include the following: (1) the contract between Adamas and Tom Robinson, dated August 8, 2018; (2) the NCUC contract with Indian Health Services and the Northern Cheyenne Tribe, dated May 11, 2018; and (3) the NCUC proposal with costs associated with the project.

On October 31, 2019, Adamas sent EPA additional documents that would also have been responsive to EPA's information request. The October 31, 2019, emails included the following new documents: NCUC letter to Adamas, dated June 27, 2018, and the August 13, 2018, letter from Indian Health Services to NCUC identifying issues and concerns with the Lame Deer Sludge Removal Project. CX29. Again, Respondents' reasons for denial are identical to its response to Paragraph 36 and do not appear to dispute the factual allegation. Complainant further incorporates its response to Paragraphs 31 and 32.

39. *At all times relevant to this action, Respondents were persons who "applied sewage sludge" pursuant to 40 C.F.R. § 503.10(a).*

Response: Again, Respondents' reasons for denial are identical to those provided in response to Paragraph 36. Complainant incorporates its response to Paragraphs 31 and 32.

40. *Based on the information provided in response to the Section 308 information request, the sewage sludge applied was Class B sewage sludge.*

Response: The Respondents provided no response to this allegation. Therefore, pursuant to 40 C.F.R. § 22.15, it is deemed admitted.

41. *40 C.F.R. § 503.17 requires Respondents to keep certain records. The documentation requirements of 40 C.F.R. § 503.17(5) allow the EPA to evaluate compliance. The intent of the statute and the regulations is thwarted when a land applier fails or refuses to develop and maintain documentation necessary to ensure proper land application and evaluation of compliance.*

Response: Again, Respondents' reasons for denial are identical to those provided in response to Paragraph 36. The agency must have the information to determine whether the sewage sludge disposal meets the requirements of the regulations. CX33. Complainant incorporates its response to Paragraphs 31 and 32.

42. *In this instance, the EPA believes it is highly likely that the Respondents failed to apply the Lame Deer Treatment Plant sewage sludge at agronomic rates and in a manner that protects human health and the environment. However, the Respondents' failure to develop and maintain required documentation and/or refusal to fully comply with EPA's information requests make it impossible for EPA to evaluate Respondents' compliance or possible threats to human health and the environment.*

Response: Respondents' basis for denial is again to argue that Tom Robinson was responsible for the land application.

The August 28, 2018, site report by Indian Health Services demonstrates that there were many issues with the land application of the sludge. CX9. The August 13, 2018, letter from Indian Health Services documents the increasing concerns that Indian Health Services had with the land application of sludge from the Lame Deer Lagoon and Respondents' significant role in this project. In this letter, Indian Health Services raises concerns with representations made by Adamas regarding the concentration of solids in the sludge, suggests that the sludge may not have been dewatered, notes that Adamas failed to use a certified lab, and explains that "no logs were provided to add credibility to the subcontractors (Adamas) estimate." CX8.

40 C.F.R. Part 503 is self-implementing and relies largely on reporting and recordkeeping requirements for biosolids preparers and land appliers to determine compliance with Part 503 regulations. Without the proper documentation, EPA is unable determine whether the land application has been done in accordance with the regulations. *See* CX33. Complainant incorporates its responses to Paragraphs 31 and 32.

43. *To date, despite repeated requests, pursuant to section 308 of the CWA, Respondent has not provided records it is required to develop and maintain to EPA.*

Response: Respondents' reasons for denial are again based on the argument that they were not responsible for maintaining the land application records because of the Subcontract with Tom Robinson. Complainant incorporates its response to Paragraphs, 31, 32, and 38.

Findings of Violation

Claim 1: Failure to Develop and Maintain Records

Response: Respondents "denies or disputes these findings of violations." As explained above, the evidence established that Respondents subcontracted with NCUC to direct and manage the entire Lame Deer Sludge Removal Project including land application. Respondents obtained the appropriate equipment, directed the lagoon pumping and determined the timing of land application. Therefore, pursuant to the regulations, Respondents were required to maintain the appropriate land application records. Complainant incorporates its responses Paragraphs 31 and 32.

Claim 2: Failure to Provide Records

Response: It does not appear, based on the Answer that Respondents have filed a response to this claim. Pursuant to 40 C.F.R. § 22.15, Complainant asserts that these claims have been admitted. However, Complainant provides the following response.

The failure to provide the records it had in its possession, as described above, demonstrates that Respondents received EPA's information requests and failed to provide the responsive documents despite multiple attempts to elicit a response. EPA has the authority to request records related to the biosolids regulations. 33 U.S.C. § 1318(a); (subsection (4) referencing 33 U.S.C. §1345).

The preamble to the biosolids regulations clearly states that the information and recordkeeping provisions of the biosolids regulations apply to the land appliers of the sludge. CX33; *see* 58 Fed. Reg. at 9318 and 9360. Further, the legislative history provides that the applicability of 33 U.S.C. 1345 expands to "any person" to impose the regulations on those who actually dispose of the sludge. CX34. Complainant incorporates its response to Paragraphs 31 and 32, above.

2.(C) ALL FACTUAL INFORMATION AND SUPPORTING DOCUMENTATION RELEVANT TO THE ASSESSMENT OF A PENALTY, AND A COPY, OR A STATEMENT OF THE INTERNET ADDRESS (URL), OF ANY POLICY OR GUIDANCE INTENDED TO BE RELIED ON BY COMPLAINANT IN CALCULATING A PROPOSED PENALTY

Section 309(g)(3) of the Clean Water Act, 33 U.S.C. § 1319(g)(3) provides that in determining the amount of a civil penalty, the EPA shall take into account the nature circumstances, extent and gravity of the violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and other such matters as justice may require. The supporting documentation has been included as exhibits to this prehearing exchange and will

be presented through witness testimony. Additional support for the proposed penalty will also be presented through witness testimony. EPA does not have a penalty policy to calculate CWA proposed penalties.

2.(D) A COPY, OR A STATEMENT OF THE INTERNET ADDRESS (URL), OF ANY EPA GUIDANCE DOCUMENTS AND/OR POLICIES, INCLUDING ANY UPDATES OR REVISIONS TO SUCH GUIDANCE AND/OR POLICIES, AND ANY PREAMBLES TO REGULATIONS THAT COMPLAINANT HAS RELIED UPON WITH REGARD TO THE ALLEGATIONS SET FORTH IN THE COMPLAINT

Complainant has included several guidance documents in its Exhibit list (Section 1. B) and may cite to those documents in subsequent briefings, in questioning witnesses, or arguing the proposed penalty.

2.(E) A DETAILED EXPLANATION OF THE FACTORS CONSIDERED AND METHODOLOGY UTILIZED IN CALCULATING THE AMOUNT OF THE PROPOSED PENALTY, IN ACCORDANCE WITH THE CRITERIA SET FORTH IN THE PARTICULAR STATUTE AUTHORIZING THIS PROCEEDING AND AS REFERENCED IN THE RELIEF SECTION OF THE COMPLAINT

Nature, Circumstances, Gravity, and Extent of Violations

The EPA Biosolids Program is a self-implementing program that relies on recordkeeping and reporting requirements and information requests to ascertain if biosolids are land applied in accordance with the 40 C.F.R. Part 503 regulations. In this case, Respondents were involved in the removal and land application of biosolids from the Lame Deer Wastewater Lagoon. 40 C.F.R. Part 503 requires persons who land apply sewage sludge to generate and maintain records to demonstrate the land-applied biosolids have met regulatory requirements for metals concentrations, pathogen reduction, and vector attraction reduction along with several other management practices including application of biosolids at agronomic rate when land applied.⁸ 40 C.F.R. §503.17(a)(5)(ii).

When EPA promulgated the rule, it undertook extensive effort to evaluate the risks posed by pollutants that may be present in sludge applied to land. The EPA considered human exposure through inhalation, direct ingestion of soil fertilized with sewage sludge and through consumption of crops grown on the soil. CX33. EPA also assessed the potential risk to human health through contamination of drinking water sources or surface water when sludge is disposed of on land. *Id.* EPA also evaluated the potential effects directly on crops, cattle, surface water aquatic species, and wildlife. *Id.* EPA believed when promulgating the regulations that the regulations would be protective of human health and the environment. *Id.*

Following the regulations ensures that the goals of Congress are achieved in practice and is protective of human health and the environment. When the regulations are not followed, EPA

⁸ Lame Deer Lagoon operated by NCUC and its subcontractors, including Respondents, does not fall under the **annual** reporting requirements of Part 503 as it serves a population less than 10,000 people, operates under a 1 MGD capacity, and is not designated as a Class I Sludge Management Facility.

cannot ensure that the important goals of CWA Section 405, 33 U.S.C. 1345 and the 40 C.F.R. 503 regulations are met.

In August 2018, after Respondents land applied approximately 1,000,000 gallons⁹ of sewage sludge to his property, the landowner contacted Indian Health Services. Indian Health Services conducted an inspection of the land application site. Photographs taken during the inspection indicate that biosolids were likely land applied incorrectly, with several areas not spread to an agronomic rate. Without the reporting information required by 40 C.F.R. § 503.17, and only photographs of the site, EPA was unable to determine if the requirements of Part 503 were met.

In order to obtain the compliance information, EPA contacted Respondents multiple times over nine-month period about providing the requested records. Respondents' refusal to provide land application records thwarts the EPA's ability to determine if 40 C.F.R. Part 503 regulations were met. As stated in the Indian Health Services' site report, Mr. Robinson had difficulty tilling biosolids into the soil, so it is possible that Vector Attraction Reduction¹⁰ was not met. Along with the increased likelihood of overapplied nitrogen, the inability to meet VAR presents a significant threat to human health and the environment. Without records to evaluate the potential over-application, the EPA is unable to determine if any follow-up actions should have been taken at the site as well.

The extent of the violations and their gravity are severe. Respondents assumed the responsibility of disposing up to one million gallons of human waste and in turn, took on the regulatory responsibility of generating and maintaining the records required to show how the waste was disposed. When asked by the EPA to provide the information they are required to generate and maintain, Respondents asked for an extension of time to respond and appeared to hope the problem would go away. When it became clear that EPA would not go away, they provided a small portion of information, again, with the apparent hope the EPA would go away. Some additional information has been forthcoming but only after EPA was forced to file an administrative complaint. Even now, Respondents have not produced the required land application records. One can only conclude that the obligation to generate and maintain the records was ignored. Moreover, it can also be concluded that Respondents' failure to respond to the CWA 308 information request was done in an effort to avoid self-implication of other potential violations. Regardless, the violations thwart the EPA's ability to ensure human health and the environment is protected.

Economic Benefit

EPA's proposed penalty, at this time, does not include an alleged economic benefit to Respondents resulting from the failure to develop and maintain records or failure to respond to an information request. The economic benefit associated with the failure to generate and maintain records and the failure to respond to the information request is typically minimal. If

⁹ As stated above, it is not clear how much sludge was actually pumped or land applied from the lagoon. The documents show different estimates and amounts. EPA makes this statement on the currently available information.

¹⁰ (VAR, methods used to make biosolids less attractive to insects and animals in order to reduce the potential for transmitting diseases)

records become available demonstrating the biosolids were improperly applied, or should not have been land applied at all, then the economic benefit can become substantial. Therefore, the EPA reserves it right to pursue this statutory factor if more information becomes available.

Ability to Pay

To date, Respondents have not raised inability to pay as a defense. The Presiding Officer's Prehearing Order requires the Respondents to provide documentation in its prehearing exchange to support such a claim. Should Respondents provide such a defense, EPA will evaluate the supporting information to determine if they are unable to pay the proposed penalty.

Prior History

To EPA's knowledge, Respondents have no prior history with respect to CWA violations, directly. It should be noted; however, that Respondents are subcontractors of NCUC and assumed control of the Lame Deer Wastewater Treatment Plant and held themselves out to be contacts of the Wastewater Treatment Plant during the EPA Region 8 inspection. During Region 8's inspection of Lame Deer Lagoon, several potential permit violations were found.

Culpability

As presented above, Respondents were subcontractors to NCUC prior to the land application event and 40 C.F.R. Part 503 requirements were discussed with Respondents on several occasions by both Indian Health Services and EPA Region 8. Emails and other documents from Respondents demonstrate that Respondents knew of the 40 C.F.R. Part 503 violations and represented to the tribe and the Indian Health Services that Respondents would comply with EPA's Part 503 regulations.

EPA repeatedly requested compliance with the information request letters. Respondents provided limited information and failed to even state whether they had records in their possession. As additional information continues to be provided by parties other than the Respondents, it is clear that Respondents had significantly more information in their possession than what has been provided by them to EPA. This failure to fully respond to EPA's information request demonstrates a pattern of obstruction by Respondents. Further, the failure to provide these records has greatly inhibited the ability of EPA to carry out the intent of the statute and ensure that human health and the environment in these vulnerable communities is protected.

Additionally, only after a complaint was filed did Respondents provide any documents for his claim that he was not responsible for developing, maintaining, or providing records.

Respondents' culpability for the violations is high.

Other Matters as Justice May Require

EPA is presently unaware of any matters that require a penalty reduction.

Conclusion

EPA considered the seriousness of the violations, Mr. Pierce and Adamas' interactions with NCUC, Indian Health Services, and EPA, culpability, and lack of good-faith effort to comply with both 40 C.F.R. Part 503 and Section 308 of the CWA. For all the foregoing reasons, the violations alleged constitute serious CWA violations warranting the assessment of penalties.

2.(F) PROOF THAT PUBLIC NOTICE HAS BEEN PROVIDED REGARDING THE PROPOSED ASSESSMENT OF A CIVIL PENALTY UNDER SECTION 309(g) OF THE CLEAN WATER ACT. SEE 33 U.S.C. § 1319(g)(4)(A); 40 C.F.R. § 22.45(b)

Proof of public notice can be found at CX26 and at the following web address:
<https://www.epa.gov/ks/adamas-construction-and-development-services-pllc-and-nathan-pierce-clean-water-act-public-notice>.

RESERVATIONS

Complainant reserves the right to call all witnesses named by Respondents. Complainant further reserves the right to submit the names of additional witnesses and to submit additional exhibits prior to the hearing of this matter, upon timely notice to the Court and to Respondents. Moreover, because previously requested information is only now becoming available, Complainant reserve its right to amend the Complaint to better conform it to the facts available to this tribunal.

RESPECTFULLY SUBMITTED this 26th day of November 2019.

/s Sara Hertz Wu

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CERTIFICATE OF SERVICE

I certify that the foregoing Complainant's Prehearing Exchange, Docket No. CWA-07-2019-0262, has been submitted electronically using the OALJ E-Filing System.

A copy was sent by email and postal mail to:

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