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

IN THE MATTER OF ADAMAS CONSTRUCTION AND DEVELOPMENT SERVICES, PLLC AND NATHAN PIERCE, Respondents Proceedings under Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g)	) RESPODENT'S RESPONSE IN) OPPOSITION TO) COMPLAINANT'S MOTION) FOR LEAVE TO SUPPLEMENT) COMPLAINANT'S) PREHEARING EXCHANGE (S)) and;) RESPONDENTS CROSSMOTION) FOR DEFAULT AND TO) DISMISS) and;) MOTION FOR ATTORNEY FEES)) Docket No. CWA-07-2019-0262)

RESPONDENTS' RESPONSE IN OPPOSITION TO COMPLAINANT'S MOTION FOR LEAVE TO SUPPLEMENT COMPLAINANT'S PREHEARING EXCHANGE, and; RESPONDENTS CROSSMOTION FOR DEFAULT AND TO DISMISS, and; MOTION FOR ATTORNEY FEES

COMES NOW, the RESPONDENT ("Respondent"), by and through their attorney, Chris J Gallus, pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. §§ 22.1 to 22.45 and submits this Response in Opposition to Complainant's Motion for Leave to Supplement Complainant's Prehearing Exchange and; Respondents Cross-motion for Default and to Dismiss and Motion For Attorney Fees.

A. RESPONDENTS' RESPONSE IN OPPOSITION TO COMPLAINANT'S MOTION FOR LEAVE TO SUPPLEMENT COMPLAINANT'S PREHEARING EXCHANGE

1. Respondent files this Response in Opposition to the Complainants' Motion to Supplement their Pre-hearing Exchange because the Complainant failed to comply with the information exchange requirements of 40 C.F.R. § 22.19(f), as the Complainant failed to promptly supplement or correct the exchange, operating in bad faith, as a delay tactic and to unduly prejudice the Respondent/s and their case. Specifically the Complainant has had the pre-hearing exchange information (CX41) since February 25th, 2020, according to the time stamp on the document, submitted by complainant, and has delayed or failed to submit this document for almost 8 months as part of their prehearing exchange, this extensive delay by the Complainant is neither prompt nor operating in good faith.

> *40 CFR §22.19* ***(f)*** *Supplementing prior exchanges. A party who has made an information exchange under paragraph (a) of this section, or who has exchanged information in response to a request for information or a discovery order pursuant to paragraph (e) of this section, shall promptly supplement or correct the exchange when the party learns that the information exchanged or response provided is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party pursuant to this section.*

The Complainant claims they were unable to promptly supplement their exchange, "due to circumstances related to the pandemic, including the continued closure of the Complainants' office since mid-March 2020, Complainant did not become aware of the Document until early October." This is directly contradicted by the document the Complainant is requesting to supplement, (CX41) and proves the complainant is operating in bad faith and may have committed perjury to this court. The, EPA ECAD/WATER, time stamp on the top right of the document shows the document was received by the complainant office on February 25, 2020. This provided the Complainant more than 3 weeks before their office closed in mid-March to

supplement their pre-hearing exchange and failed to do so. It is also unfathomable that the US EPA did not have proper protocols in place to ensure important court documents were scanned, forwarded, or made available to the Complainant. Furthermore, the Complainant was able file and served the Respondent with a Motion for Accelerated Decision on May 1, 2020 that included, not previously submitted documents from Ernie Sprague of D&R disposal, despite their office closure in mid-March, demonstrating the complainant still had access to case documents and files, contrary to the claims of the Complainant. The Complainant had more than enough time and ample opportunity to promptly supplement their pre-hearing exchange and failed to do so, as such the conditions of 40 C.F.R. §22.19(f) have not been met. The lack of protocol, to ensure proper flow of documents during emergency situations, by the complainant and/or their office, does not excuse them from failing to comply with the rules, they also fail to state any authority, executive order or statute which would excuse them from complying with the rules to promptly file this document, and allowing it to go unfiled for almost 8 months.

2. Respondent files this Response in Opposition to the Complainants' Motion to Supplement their Pre-hearing Exchange as the Complainant's motion contains inaccurate, false, or misleading information. Specifically, in paragraph 5 of the Complainant's Motion to Supplement Documents, they falsely claim that the document they wish to submit, supports, the Complainants motion for Accelerated Decision as to Liability, stating "Mr. Robinson states in his response that Respondent Nathan Pierce place the biosolids on his property, supporting the allegation that respondents were persons who applied sewage sludge pursuant to 40 CFR 503.10 (a)," (CX41) when in fact the document provided by the Complainant proves just the opposite.

It is an indisputable fact that *40 CFR 503.10 (a),* 40 C.F.R § 509.9 (a) & 503.11(h) *states*;

40 C.*F.R. 503.10 (a) – Applicability,; "This subpart applies to any person who prepares sewage sludge that is applied to the land, to any* ***person who applies sewage sludge to the land****, to sewage sludge applied to the land, and to the land on which sewage sludge is applied"[emphasis added]*, and;

40 *C.F.R. § 503.9(a) General definitions states, "Apply sewage sludge or sewage sludge applied to the land means land application of sewage sludge."*

40 C.F.R. § 503.11(h) Special definitions, "Land application is the spraying or spreading of sewage sludge onto the land surface; the injection of sewage sludge below the land surface; or the incorporation of sewage sludge into the soil so that the sewage sludge can either condition the soil or fertilize crops or vegetation grown in the soil," to-date all the Complainant's request for documents or information from both the Respondent and others including Tom Robinson has been directly related to the application of sludge applied to the land that Tom Robinson leases from the Northern Cheyenne tribe.

In the document in question (CX41), paragraph 2, Tom Robinson responds to the question, "did you help apply (for example spread, till or inject) sludge related material transported to your land or the land you lease from the tribe on or about August 22nd 2018 from the Lame deer lagoon" "please circle a response", Mr. Robinson circled the response "yes", and then when asked further described his role, he stated, "after D&R disposal (Ernie Sprague) dumped it, I use my tractor and disk and tilt it in."

This is important to note, as Mr. Tom Robinson makes an admission of guilt that both him and Ernie Sprague of D&R disposal, are the persons who applied sewer sludge to the land as defined by 40 CFR 503.11 (h), as such they would be the person or persons responsible to comply with and provide the information provided for in, *40 C.F.R. 503.10 (a),* not the Respondent who was Not physically on site during the application of the sludge, did not

operate any equipment and allowed D&R and Tom to operate as independent Subcontractors.

It is clear that *40 C.F.R. 503.10 (a)* states, "this subpart applies…to any person who applies sewage sludge to the land*",* it is also clear that *40 C.F.R. § 503.11(h)* defines land Application as, *"the spraying or spreading of sewage sludge onto the land surface; the injection of sewage sludge below the land surface; or the incorporation of sewage sludge into the soil so that the sewage sludge can either condition the soil or fertilize crops or vegetation grown in the soil,"* it is clear and indisputable that the actions that Mr. Robinson describes of both himself and D&R Disposal, in (CX41), meet the very definition described in *40 C.F.R. § 503.11(h)* and as such they would be the person or persons responsible to comply with and provide the information pursuant to, *40 C.F.R. 503.10 (a),*and not the Respondent.

As such the Complainant prejudice this case by using delay tactics in their filing of this document until well after they filed a Motion for Accelerated Decision, had the respondent been served this document earlier they could have filed motions to dismiss and incurred significantly less attorney fees. At the very least they could have referenced the document in their response to the Complainant's Motion for Accelerated Decision. It is the Respondents belief that the Complainant purposely delayed filing this document as they knew it provided direct evidence that it would be detrimental to their Motion for Accelerated Decision, the delayed the filing in hope of receiving a favorable ruling on their accelerated motion.

3. Respondent files this Response in Opposition to the Complainants' Motion to Supplement their Pre-hearing Exchange as the Complainant's motion contains inaccurate, false, or misleading information that may amount to perjury from Mr. Tom

Robinson. Specifically, Mr. Robinson answers when asked, on the complainant's document (CX41), titled "Information Request Response Form", "were you given any information about the agronomic rate of land application (i.e. the amount of sludge per acre) or the pollutants contained in the sludge that was land applied on or about August 22nd 2018, in response Mr. Robinson answered, "No", to question 4 of (CX41). This claim by Mr. Robinson that the respondent never gave him information related the agronomic rate to apply the sludge is clearly untrue, as evidenced in the first declaration of the sub-contract agreement between the respondent, Adamas Construction/Nathan Pierce and Tom Robinson (RX-5), as it clearly states in the "First" declaration of that document(RX-5), that Tom Robison agrees to; "furnish all material and perform all work necessary to complete the: Receive and apply bio-solid sludge from the frac tanks located at the Lame Deer Lagoons in Lame Deer Montana **at an agronomic rate** and haul it to the barley field with Pivot line owned or leased by Tom Robinson, in compliance with US 40 EPA 503 regulations. Subcontractor further agrees to prep the field and till the sludge incorporating it into the soil within 6 hour. Must apply to 50 acres **at a max application rate of 22,000 gallons per acres.**" As Mr. Robinson had a copy of this contract and signed the document agreeing to receive the sludge from the tanks and apply the sludge to his own land, clearly he was given information about the agronomic rate as it state the maximum application rate in the first declaration of the contract. At all times relevant to the contract Tom Robison was an independent subcontractor, MCA 28-2-2101(8) & (9) defines subcontract and Subcontractor as; "**(8)** "Subcontract" means a contract between a contractor and a subcontractor or between a subcontractor and another subcontractor, the purpose of which is the **performance of all or a part** of the construction contract, and;

(9) "Subcontractor" means a person who has contracted with a contractor or another

subcontractor for the purposes of **performance of all or a part** of a subcontract, As such he agreed to independently apply the sludge onto his own land in compliance with US 40 EPA 503 regulations, and in the Second Declaration of the Subcontract between Mr. Robionson and Adamas he also agreed to "Subcontractor will furnish Contractor with logs for each day of application," again demonstrating Mr. Robison was responsible to comply and he had the documents requested by the Complainant, not the respondent.

B. RESPONDENTS CROSSMOTION FOR DEFAULT AND TO DISMISS

The Complainant failed to comply with the information exchange requirements of § 22.19(a) & (f), specifically the Complainant failed to "promptly supplement or correct the exchange when the party learns that the information exchanged or response provided is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party pursuant to this section", there is evidence the Complainant failed to promptly supplement the exchange in bad faith, as a delay tactic and to unduly prejudice the Respondent/s and their case.

Pursuant to 40 CFR 22.19 (g)(3) "Where a party fails to provide information within its control as required pursuant to this section, the Presiding Officer may, in his discretion:" "(3)Issue a default order under § 22.17(c)."

40 C.F.R. § 22.17 Default.

(a) Default. A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; or upon failure to appear at a conference or hearing. Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in

the complaint and a waiver of respondent's right to contest such factual allegations. ***Default by complainant constitutes a waiver of complainant's right to proceed on the merits of the action, and shall result in the dismissal of the complaint with prejudice.*** *[emphasis added]*

Katzson Bros., Inc. v. United States Environmental Protection Agency, 839 F.2d 1396, 27 Env't Rep. Cas. (BNA) 1425, 18 Envtl. L. Rep. 20942, 1988 U.S. App. LEXIS 2110 (10th Cir. 1988).

C. MOTION FOR ATTORNEY FEES AND COSTS

Under the CWA, a court may award "costs of litigation . . . to any prevailing or substantially prevailing party whenever the court determines such award is appropriate." 33 U.S.C. § 1365(d).

The threshold determination is whether the moving party is a "prevailing party." Earth Island Inst., Inc. v. Southern Cal. Edison Co., 838 F. Supp. 458, 463 (S.D. Cal. 1993) (citing Hensley v. Eckerhart, 461 U.S. 424, 433-37, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983)). A prevailing party "must have succeeded on 'any significant issue in the litigation which achieves some of the benefit'" sought. Earth Island, 838 F. Supp. at 464 (quoting Hensley, 461 U.S. at 433). The Respondent has incurred considerable attorney fee far exceeding $50,000 in the cost of defending against this action and as such should be award attorney fees and costs. The respondent respectfully request the Court exercise its authority pursuant to 33 U.S.C. § 1365(d), to grant such relief to the respondent. The Respondent has exhausted their financial savings and has been un able to pay for their attorney, as such the attorney of record has been assisting in a limited capacity, the respondent incurred significant attorney fees and costs and an award for attorney fees and cost is warranted in this situation. The Court should award

the Respondent attorney fees in an amount the court deems justifiable and allowed by law.

For the above stated reasons, the Respondent, Opposes the Complainants motion and respectfully request the court to deny the complainant's motion; and the Respondent respectfully request the court to grant the Respondents cross motion for default and to dismiss the complaint with prejudice pursuant to 40 C.F.R. § 22.17. The Respondent further moves and respectfully request the court to award the respondent attorney fees and cost in this action.

RESPECTFULLY SUBMITTED this 2nd day of November 2020.

/s/ Nathan Pierce
Nathan Pierce
Respondent
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CERTIFICATE OF SERVICE

I certify that the foregoing Complainant's Motion to Amend the Complaint, 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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