

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 REBUTTAL 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 REBUTTAL 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, and submits this Rebuttal Prehearing Exchange.

Introduction

Complainant filed an Amended Complaint alleging Respondents are liable for two violations of the Clean Water Act: (1) failure to maintain records as required by Section 405 of the Clean Water Act and its implementing regulations; and (2) failure to respond to an information request issued under Section 308 of the Clean Water Act. The evidence presented by EPA in its Initial Prehearing Exchange and in this Rebuttal demonstrate that EPA has presented sufficient evidence to prove these claims.

The Court’s October 18, 2019, Prehearing Order required Respondents to file their Prehearing Exchange by December 20, 2019, in response to Complainant’s November 26, 2019, Initial Prehearing Exchange. The Order also required Complainant to submit Complainant’s Rebuttal Prehearing Exchange by January 3, 2020. On December 17, 2019, Complainant filed a Motion for Leave to Amend the Complaint and a proposed Amended Complaint. On December 19, 2020, Respondents filed their Motion in Opposition for Leave to File the Amended Complaint. Included in that motion was a request for an extension of time to file a prehearing

exchange.

On January 2, 2020, the Court entered an Order granting the filing of the Amended Complaint and granting the extension of time for Respondents to file their Prehearing Exchange to January 24, 2020. As described in Complainant's February 5, 2020, Motion for Extension of Time to File a Rebuttal Prehearing Exchange, Respondents did file their Prehearing Exchange with the Court on January 24, 2020. However, Respondents did not serve Complainant with the Prehearing Exchange. Complainant moved for an extension of time to file the Rebuttal Prehearing Exchange and the Court granted the motion on February 5, 2020. The Court also ordered Respondents to serve Complainant by February 12, 2020 and granted Complainant two weeks after service of the Respondents' Initial Prehearing Exchange and accompanying exhibits.

Respondents again failed to serve Complainant with their initial prehearing exchange. On February 20, 2020, the Court issued an Order to Respondents to Show Cause directing Respondents to serve Complainant with the Prehearing Exchange and exhibits thereto, file a certificate of service with the Court, and respond to the Court demonstrating good cause as to why a default order should not be entered by March 6, 2020. Respondents filed a response to the Order to Show Cause on March 5, 2020. Respondents served Complainants with the Prehearing Exchange and exhibits thereto on March 6, 2020. On March 10, 2020, the Court issued an Order stating that Respondents had shown good cause and ordering the prehearing exchange process to move forward. To date, Respondents have not filed an Answer to Complainant's Amended Complaint.

Complainant emphasizes that many of Respondents' contradictory and erroneous statements and arguments in the Prehearing Exchange are either not supported by the record or are in direct contravention of the evidence at hand and, significantly, Respondents' own prior pleadings submitted to the Court. For instance, Respondents state in the Prehearing Exchange that they are denying all of the allegations in the Complaint in contradiction to the Answer filed on October 16, 2019. In the Answer, Respondents admitted allegations 21, 22, 24, 26, 27, 28, 29, and 30 of the original Complaint. Respondents have not filed a motion for leave to amend the answer and have not provided any specificity for these new denials in accordance with 40 C.F.R. §22.15. Thus, EPA asserts the responses provided in Respondents' Answer should bind the Respondents throughout these proceedings. See In re Chippewa Haz. Waste Remediation and Energy, Inc. 12 E.A.D. 346 (2005 WL 4905111) (Sept. 30, 2005)(an ALJ may rely on a parties' admissions in its answer to establish liability).

Respondents also make misleading and inaccurate statements regarding Complainant's Prehearing Exchange. For example, Respondents, on pages 12-13 of their Prehearing Exchange, include a reference to Tom Robinson that is attributed to EPA, however the reference is not included in Complainant's Prehearing Exchange narrative, nor is it in the document cited by Respondents. Specifically, Respondents claim that a June 21, 2018 email from Adamas to NCUC and Indian Health Services states that "Tom Robinson would [complete the] the land application project without the use of NCUC equipment or staff. CX49, p.27." Complainant's narrative and the email from Adamas clearly state that Adamas not Tom Robinson would complete the Sludge Removal Project without the use of NCUC equipment or staff. CX49, p. 27.

Tom Robinson is not mentioned in this document. Making false representations to the Court should not be viewed lightly.¹

As stated above, Respondents have made broad statements in their Prehearing Exchange denying all allegations in the Complaint although many of these allegations were admitted by Respondents in their Answer. While Complainant maintains that Respondents' prior admissions in the Answer are binding, EPA provides a section by section response to Respondents' Prehearing Exchange and a response to, and evidence supporting, allegations set forth in the Amended Complaint. This is intended to provide a road map for the Court of the overwhelming evidence supporting Complainant's allegations.

Section by Section Response to Respondents' Prehearing Exchange

In this Rebuttal, EPA responds as required by the Court's October 18, 2019, Prehearing Order (p.4) and uses the framework set forth in Respondents' Prehearing Exchange.

1.(A) WITNESSES

Respondents have listed six additional witnesses in their Prehearing Exchange. EPA notes that Respondents listed two witnesses employed by EPA Region 8 that were not listed in Complainant's Prehearing Exchange. Complainant reserves its right to file any motions *in limine*, for any witness testimony that Complainant does not believe relevant to the claims set forth in the Amended Complaint.

Complainant reserves its right to call any of Respondents' witnesses called as part of Respondents' case in chief.

1.(B) EXHIBITS

For the exhibits below, "Complainant's Exhibit" is abbreviated as "CX__." Copies of documents and exhibits that Complainant intends to introduce into evidence at the hearing are herein submitted electronically using the OALJ E-filing system.

For this Rebuttal, Complainant has only included exhibits that were not filed with Complainant's Initial Prehearing Exchange. Exhibits referenced in the Rebuttal, that are not included with this filing, were submitted to the Court on November 26, 2019. The exhibits listed below further support the allegations in the Amended Complaint.

CX#	Description
41	308 Response from Tom Robinson ²

¹ See Montana Rule of Professional Conduct 3.3, "Candor Toward the Tribunal," (a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; and (3) offer evidence that the lawyer knows to be false.

² To date, Complainant has not received a response from Mr. Robinson but continues to pursue a response. If such a response is received, Complainant reserves its right to file another Supplemental Prehearing Exchange in accordance with the Court's October 18, 2019, Order and 40 C.F.R. 22.19.

42	308 Response from D&R Disposal
43	308 Response from NCUC
50	Sewer Operator Application from Respondents that was submitted to State of Montana
51	January 29, 2020, Supplemental 308 Request to Tom Robinson
52	EPA Delegations of Authority
53	Lame Deer NPDES Permit and Statement of Basis
54	July 31, 2019, Settlement Agreement between Adamas and NCUC
55	Undated letter regarding arbitration between Adamas and NCUC
56	October 4, 2018, Letter from Department of Health and Human Services to Adamas

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

Based on Respondents’ Prehearing Exchange, which includes six additional witnesses and 24 exhibits, Complainant estimates it will require approximately 1-1.5 days for cross-examination and rebuttal. Complainant reserves its right to any additional time as required.

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

In this section, EPA will respond to the brief allegations made in Respondents’ Prehearing Exchange regarding the Amended Complaint. This section will generally follow the format of the Amended Complaint.

Respondents did not file an Answer to the Amended Complaint. As previously discussed in EPA’s Prehearing Exchange, Respondents did not specifically deny allegations 1-20 of the Complaint and specifically admitted allegations 21, 22, 24, 26, 27, 28, 29, and 30. It appears that Respondents are now attempting to deny allegations in the Complaint through the use of the Prehearing Exchange process. EPA believes it is improper to use the Prehearing Exchange in this manner because it fails to meet the requirements of the Consolidated Rules of Procedure as set forth in 40 C.F.R. §§22.15 and 22.19. Respondents have also failed to provide any factual or legal support for denying the allegations that they previously admitted. Therefore, EPA asserts that these allegations are admitted.

Respondents also make the following statement in their Prehearing Exchange:

Furthermore this matter should be continued or dismissed until the complainant is has[sic] conducted all their investigations and made a proper determination on who exactly is culpable. It the [sic] in the interest of justice for the Complaint [sic] to conduct a proper and complete investigation and not use complaints as fishing expeditions or

require the respondent to prove his innocence contrary to the judicial presumption of innocent until prove [sic] guilty as afforded to all Americans in judicial proceedings.

Respondents' Prehearing Exchange, p.8.

Complainant has identified Adamas and Mr. Pierce as the culpable parties despite Respondents' apparent efforts to thwart EPA's investigation, as demonstrated by the evidence in the record. These statements demonstrate a misunderstanding of EPA's investigatory powers under Section 308 of the CWA, as well as a misunderstanding of the legal standard that applies in civil matters.

Respondents have engaged in a pattern and practice of not responding to EPA starting with the failure to respond to EPA's information request and continuing forward. EPA offered Respondents the opportunity to engage in pre-filing negotiations on March 4, 2019. CX14. The pre-filing letter specifically sets forth the process for negotiations and offers Respondents the opportunity to make ability to pay claims. *Id.* Respondents never responded to the pre-filing letter.

EPA made multiple attempts to collect information from Respondents pursuant to Section 308 of the CWA. *See* CX11; 13; 14; 17; 18; 19; 20; 21; and 44. After the final attempt in July 2019 to obtain information from Respondents, EPA filed the Complaint. It was not until after the Complaint was filed that Respondents provided additional information. *See* CX28 and 29. It is evident from the documents obtained and filed with the Court in EPA's Prehearing Exchange that Respondents had a substantial amount of information in their possession that *to this day*, they still have not submitted to EPA. *See* CX45; 46; 47; 49 and 50. EPA has made multiple attempts to ask Respondents to pursue settlement negotiations. To claim now that EPA has not provided due process misrepresents the record and is blatantly false.

Jurisdiction, Parties, Statutory and Regulatory Framework

In this portion of their Prehearing Exchange, Respondents again make a blanket statement about allegations in the Amended Complaint, denying allegations without the specificity required by 40 C.F.R. §22.15 or filing an Answer to the Amended Complaint. EPA is not certain which "allegations against them" Respondents are specifically denying because the Respondents' Prehearing Exchange does not provide any specific paragraph references to either complaint. Respondents' Answer does not specifically deny allegations related to Jurisdiction, Parties, Statutory and Regulatory Framework (Paragraphs 1-20 of the initial Complaint). Again, an answer to the Amended Complaint has never been filed.³

Complainant also notes that Respondents have provided no evidence to support the blanket denial of all allegations. Failure to provide evidence in support of allegations as part of the prehearing exchange process subverts the Consolidated Rules of Practice. *See In re JHNY, Inc.*, 12 E.A.D. 372, 2005 WL 2902519, (Sept. 30, 2005) (granting default motion by EPA for

³ Respondents noted in their Response to the Order to Show Cause filed on March 5, 2020, that they intend to file a Motion to Dismiss based on subject matter jurisdiction. Not only did Respondents not specifically deny allegations related to jurisdiction in their Answer to the original Complaint, they never filed a response to the Amended Complaint, nor did they provide a basis for denying such allegations in their Prehearing Exchange.

JHNY's failure to provide information in prehearing exchange); *see also* In the Matter of Polo Development, Inc., 2014 WL 3983207 (Aug. 6, 2014)(court did not grant EPA's default motion but noted that, "the Prehearing Exchange does not refer to or include documentation regarding the assertion in the Answers of inability to pay the penalty. Nor does it address a variety of other defenses alleged in the Answers, although they were directed in the Prehearing Order to provide a detailed narrative explanation for the bases of their defenses. This suggests that Respondents are abandoning those arguments. To the extent that Complainant is concerned that it would be prejudiced if Respondents introduce testimony or evidence at the hearing in support of these arguments and defenses, under 40 C.F.R. § 22.19(a), such evidence will not be admitted into evidence unless the strictures of § 22.22(a) are satisfied.")

Therefore, EPA asserts that the allegations for which Respondents have admitted in their Answer and have not provided any specific information supporting denial have been admitted pursuant to 40 C.F.R. §§22.15 and 22.19.

Support for Allegations in Amended Complaint

The Amended Complaint added Paragraphs 13, 15, and 16. Respondents have never filed an Answer to the Amended Complaint.

The narrative statements below follow the numbering sequence of the Amended Complaint.

1. *This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (CWA), 33 U.S.C. § 1319(g), and in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 (Consolidated Rules of Practice).*

Response: This paragraph informs Respondents that this action is brought under the Clean Water Act and in accordance with the 40 C.F.R. Part 22. Respondents did not provide a specific response to this allegation in their Answer and did not file an Answer to the Amended Complaint. Respondents did not provide any additional support for denying the allegation in their Prehearing Exchange. Therefore, EPA asserts that this is deemed admitted pursuant to 40 C.F.R. §22.15 and 22.19.

2. *This Complaint serves as notice that the United States Environmental Protection Agency (EPA) has reason to believe that Respondents, Adamas Construction and Development Services, PLLC, (Adamas) and Nathan Pierce have violated Section 405 of the CWA, 33 U.S.C. § 1345 and the regulations promulgated thereunder and codified at 40 C.F.R. Part 503.*

Response: This paragraph puts Respondents on notice of the violations of the Clean Water Act EPA alleges in the Complaint. Respondents did not provide a specific response to this allegation in their Answer and did not file an Answer to the Amended Complaint. Respondents did not provide any additional support for denying the allegation in their Prehearing

Exchange. Therefore, EPA asserts this is deemed admitted pursuant to 40 C.F.R. §22.15 and 22.19.

3. *The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of EPA. The Administrator has delegated this authority to the Regional Administrator, EPA Region 7, as the national-program manager for the Biosolids Center, who in turn has delegated it to the Director of Enforcement and Compliance Assurance Division of EPA Region 7 (Complainant).*

Response: This paragraph informs Respondents that the EPA Administrator has delegated the authority to issue complaints to David Cozad as Director of the Enforcement and Compliance Assurance Division. Respondents did not provide a specific response to this allegation in their Answer and did not file an Answer to the Amended Complaint. Respondents did not provide any additional factual basis for denying the allegation in their Prehearing Exchange. Therefore, EPA asserts this is deemed admitted pursuant to 40 C.F.R. §22.15 and 22.19.

- CX2: R7-2-107: Enforcement of the Standards for the Use or Disposal of Sewage Sludge in all EPA Regions
- CX52: R7-2-52A: Class II Administrative Penalty: Initiation of Action; Public Notice; Consultation with State; Negotiation and Signing of Consent Agreement; and Assessing Penalties

4. *Respondents are Adamas, a professional limited liability company, under the laws of the state of Montana, and Nathan Pierce.*

Response: Respondents did not provide a specific response to this allegation in their Answer and did not file an Answer to the Amended Complaint. Respondents did not provide any additional factual basis for denying the allegation in their Prehearing Exchange. Therefore, EPA asserts this is deemed admitted pursuant to 40 C.F.R. §22.15 and 22.19.

- CX48: Montana Secretary of State Listing for Adamas Construction and Development Services, PLLC
- CX24: Adamas Construction and Development Services Website Printout (November 18, 2019)

7. *The Northern Cheyenne Indian Tribe has not applied for or obtained primary authority to administer and enforce the sludge management program pursuant to Sections 402(b) or 405(c) of the CWA, 33 U.S.C. §§ 1342(b) or 1345(c), and 40 C.F.R. Part 503. The EPA directly implements the sludge management program on the Northern Cheyenne Indian Reservation.*

Response: Respondents did not provide a specific response to this allegation in their Answer and did not file an Answer to the Amended Complaint. Respondents did not provide any additional factual basis for denying the allegation in their Prehearing Exchange. Therefore, EPA asserts this is deemed admitted pursuant to 40 C.F.R. §§ 22.15 and 22.19.

Response to Paragraphs 5, 6, 8, 9-23: These paragraphs cite the language in Sections 405 and 308 of the Clean Water Act and EPA’s implementing regulations. For the sake of brevity, Paragraphs 5, 6, 8, 9- 23 of the Amended Complaint are not repeated here. Respondents did not provide a specific response to these allegations in their Answer and did not file an Answer to the Amended Complaint. Respondents did not provide any support for denying these allegations in their Prehearing Exchange. Therefore, EPA asserts the paragraphs are deemed admitted pursuant to 40 C.F.R. §22.15 and 22.19.

Response to Paragraphs 24, 25, 29, 30, 31, 32, and 36: In the Answer, Respondents admitted the allegations in Paragraphs 24-25⁴ and 29-32⁵ and 36⁶. For the sake of brevity, Complainant has not addressed these paragraphs because no additional information supporting denial was submitted. Further, Respondents have not filed leave to amend their Answer and failed to provide any support for denying the allegations in the Prehearing Exchange, therefore, EPA asserts these allegations are deemed admitted pursuant to 40 C.F.R. §22.15 and 22.19.

Paragraph 26 (Initial Complaint ¶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: Respondents denied this allegation in the Answer. In Respondents’ Prehearing Exchange on page 13, Respondents state, “Adams [sic] or Nathan Pierce do the Sewer Camera and Cleaning project or the scatter site projects and was the basis of the administrative tort complaint filed by Adamas against IHS.” Respondents provided no additional support in their Prehearing Exchange for this denial. EPA included support for this allegation in its Initial Prehearing Exchange and incorporates its response to Paragraph 23 of its Initial Prehearing Exchange herein.

Paragraph 28 (Initial Complaint ¶25) *Respondent Nathan Pierce is a private individual who is the sole member of Adamas.*

Response: Respondents denied this allegation in the Answer to the Initial Complaint and stated that Michelle Pierce, Mr Pierce’s wife, is also a member of Adamas Construction and Development Services, PLLC and is also a responsible corporate officer. Respondents have not provided any additional evidence in their Prehearing Exchange to support the denial of this claim. Complainant incorporates its response from its Initial Prehearing Exchange to Paragraph 25.

Paragraph 33 (New Paragraph) *At all times relevant to this action, Respondents were the “operators” of the Lame Deer Publicly Owned Treatment Works (“POTW”), a “point source” as defined by 33 U.S.C. §502(14) and as referenced in 33 U.S.C. §1318(a)(A).*

⁴ Initial Complaint Paragraphs 21 and 22.

⁵ Initial Complaint Paragraphs 26-29.

⁶ Initial Complaint Paragraph 30.

Response: Respondents did not file an Answer to the Amended Complaint. Further, Respondents did not include any information in their Prehearing Exchange supporting their blanket denial of this allegation. Therefore, EPA asserts that this allegation is deemed admitted pursuant to 40 C.F.R. §22.15.

In their Prehearing Exchange, Respondents admit that they were the sewer operators of the Lame Deer POTW during the time the sludge was prepared. *See* Respondents' Prehearing Exchange, p. 12 "Respondents was named by NUCU [sic] to be the operator of the Lame Deer Wastewater Treatment Plant (LDWWTP) at the time of sludge removal." As a point of clarification, the 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. CX45, pgs.5-7.

Even if Respondents can successfully argue that they were not the operators of the Lame Deer POTW at the time they applied the sewage sludge to the land, they were the operators of the POTW at the time the sludge was prepared. Therefore, they are liable for maintaining records under 40 C.F.R. Part 503.

Respondents submitted an application to the State of Montana to be the certified wastewater operator of the Lame Deer POTW. CX50. The application states that Respondents are the "Contract Project Manager and Wastewater Operator" for the Lame Deer Lagoon and goes on to explain that those specific duties include "service, maintain [and] operate all Waste Water Systems of the NCUC on the Northern Cheyenne Reservation." CX50. In another portion of the application, it states that NCUC wanted Respondents to operate the system because NCUC was "unable to find qualified candidate [sic] with the knowledge and background of Mr. Pierce." CX50, p.7. This portion of the application is signed by Sheri Bement of NCUC. Id.

On April 6, 2018, the State of Montana approved the application as "Applicant Only" and provided study materials, presumably for Respondents to complete the application process. CX50, p.8. The fees to complete the application were never paid to the State. Id. at p.1. Respondents operated the POTW even though the State never formally approved the application.

Respondents also sent a letter to the NCUC board to apply for the General Manager position for the NCUC. CX43, p.11. Respondents' intent was to operate the water and sewer services for the NCUC. CX43, p.11.

Complainant also incorporates its responses from Paragraphs 31 and 32 of its Initial Prehearing Exchange herein.

Paragraph 34 (New Paragraph) *The Lame Deer POTW discharges wastewater into Lame Deer Creek pursuant to an NPDES permit.*

Response: Respondents did not file an Answer to the Amended Complaint. Further, Respondents did not include any information in their Prehearing Exchange supporting their blanket denial of this allegation. Therefore, EPA asserts that this allegation is deemed admitted pursuant to 40 C.F.R. §22.15.

The Region 8 Inspection Report documents that the Lame Deer POTW discharges into Lame Deer Creek pursuant to NPDES Permit No. MT0029630. CX5, p.5.

- CX53: Lame Deer NPDES Permit

Paragraph 35 (New Paragraph) *At all times relevant to this action, Respondents were the “preparers of sewage sludge” as that term is defined in 40 C.F.R. § 503.9 (r).*

Response: Respondents did not file an Answer to the Amended Complaint. Therefore, EPA asserts that this allegation is deemed admitted pursuant to 40 C.F.R. §22.15. In their Prehearing Exchange, Respondents provided documentation in support of this allegation (RX 15) and state that Respondents were the operators of the Lame Deer Waste Water Treatment Plant at the time the sludge was prepared.

As explained in an August 29, 2018, email from Respondents’ attorney to Indian Health Services, “My Client by EPA definition was the sludge preparer.” CX45, p.16. Complainant agrees with this assertion.

40 C.F.R. § 503.9 (r) defines “preparer of sewage sludge” as “either the person who generates sewage sludge during the treatment of domestic sewage in a treatment works or the person who derives a material from sewage sludge.” Respondents’ actions as described in Complainant’s Initial Prehearing Exchange (Paragraph 32) demonstrate that Respondents were directly and substantially involved in all operations at the Lame Deer POTW including the generation of sewage sludge during the treatment of domestic sewage. Complainant incorporates by reference the response set forth in Paragraph 32 of Complainant’s Initial Prehearing Exchange.

Paragraph 37 (Initial Complaint ¶31) *Respondents Adamas and NCUC entered into a contract for Respondents to land apply sewage sludge generated by NCUC.*

Response: Respondents denied this allegation in their Answer on the basis that Tom Robinson land applied the sewage sludge generated by NCUC. Respondents have not provided any additional information in the Prehearing Exchange indicating that it did not enter into a contract with NCUC for land application of the sewage sludge generated. Instead, Respondents have provided information that supports this allegation. See RX1-5. Complainant also incorporates its response to Paragraph 31 from its Initial Prehearing Exchange.

Paragraph 38 (New Paragraph) *On or about the week of July 9, 2018, Respondents pumped and dewatered approximately 1,000,000 gallons of Class B sewage sludge from Cell #2 of the Lame Deer treatment lagoon.*

Response: Respondents did not file an Answer to the Amended Complaint. Therefore, EPA asserts that this allegation is deemed admitted pursuant to 40 C.F.R. §22.15. Further, Respondents did not include any information in their Prehearing Exchange supporting their blanket denial of this allegation.

According to email correspondence between Respondents, the NCUC, and the Indian Health Services, Respondents pumped and dewatered approximately 1,000,000 gallons of sewage sludge from the Lame Deer treatment lagoon. CX19; 45; 46; 47; 49, pgs. 5, 20-21; CX43, p.7. Respondents also submitted invoices to NCUC requesting payment for pumping and dewatering approximately 1,000,000 gallons of sewage sludge from the Lame Deer treatment lagoon. CX45, p.5-75; CX43, p. 7.

Complainant incorporates its response to Paragraph 39 of this Rebuttal.

Paragraph 39 (Revised Paragraph, Initial Complaint ¶ 32) *On or about August 22, 2018, Respondents or their subcontractors, applied 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.*

Response: This allegation was amended to insert the word “subcontractors.” Respondents’ denied the unamended allegation in its Answer. Respondents did not file an Answer to the Amended Complaint. In its Prehearing Exchange, Respondents attached a copy of the Subcontract that it entered into with Tom Robinson (RX5) and repeatedly state throughout their Prehearing Exchange that Tom Robinson land applied the sewage sludge from the Lame Deer POTW.

EPA obtained information regarding the pumping and dewatering of Class B sewage sludge from Cell #2 of the Lame Deer lagoon through a CWA Section 308 Information Request issued to D&R Disposal. CX31. D&R was a subcontractor to Respondents for the “pumping removal and hauling of biosludge from the frac tanks located at Lame Deer Lagoon” CX42, p.4-5. The subcontract is not signed by either party. CX42 p.4-5. D&R Disposal’s written statement included with the response states that Respondents were present during the hauling and pumping of the sludge. CX42, p.3.

The records provided demonstrate that D&R hauled and offloaded approximately 84,400 gallons of sewage sludge on Tom Robinson’s property from August 9, 2018, through October 7, 2018. CX42, p. 6-7. This information was not provided by Respondents.

EPA cannot explain the discrepancy between the amount of sewage hauled by D&R and the amount intended to be removed from the lagoon pursuant to the contract or the amount from Respondents’ invoices to NCUC and Indian Health Services without additional information from Respondents.

Complainant incorporates herein its response to Paragraph 32 from the Initial Prehearing Exchange.

Paragraph 40 (Initial Complaint ¶ 33) *On or about August 28, 2018, Indian Health Service visited the land application property after receiving a complaint from the landowner regarding the application.*

Response: Respondents denied this claim in the Answer it filed in response to EPA’s initial Complaint. Respondents’ Prehearing Exchange fails to provide any factual or legal bases

for denying this allegation. EPA incorporates by reference its response to Paragraph 33 from Complainant's Initial Prehearing Exchange.

Paragraph 41 (Initial Complaint ¶ 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: Respondents denied this claim in the Answer it filed in response to EPA's initial Complaint. Respondents' Prehearing Exchange fails to provide any factual or legal bases for denying this allegation. EPA incorporates by reference its response to Paragraph 34 from Complainant's Initial Prehearing Exchange.

Paragraph 42 (Initial Complaint ¶ 35) *On August 28, 2018, Indian Health Service observed, as noted in its site report, that the Respondents refused to provide target application rates for the sludge, laboratory tests, and application logs to the landowner.*

Response: Respondents denied this claim in the Answer. Respondents' Prehearing Exchange fails to provide any documentation in support of its denial of this allegation. EPA incorporates by reference its response to Paragraph 35 from Complainant's Initial Prehearing Exchange.

Paragraph 43 (Initial Complaint ¶ 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 Respondents requesting a response to the information request and notifying Respondents 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: Respondents denied this claim in the Answer it filed in response to EPA's initial Complaint. EPA further adds that Respondents' Prehearing Exchange fails to provide any additional support for denying this allegation. EPA incorporates by reference its response to Paragraph 36 Complainant's Initial Prehearing Exchange.

Paragraph 44 (Initial Complaint ¶ 37) *On June 11, 2019, after Respondents failed or refused to respond to the EPA's September 28, 2018 information request, EPA again issued the March 7, 2019 EPA correspondence to Respondents by electronic mail through the listed counsel.*

Response: Respondents denied this claim in the Answer it filed in response to EPA's initial Complaint. Respondents' Prehearing Exchange fails to provide any factual basis for denying this allegation nor does the Prehearing Exchange include any documentation in support of this denial. EPA incorporates by reference its response to Paragraph 37 in Complainant's Initial Prehearing Exchange.

Paragraph 45 (Initial Complaint ¶ 38) *Respondents provided an incomplete response to the June 11, 2019, Section 308 information request on July 2, 2019. The Respondents failed or refused to*

provide a response that contained the following information Respondents are 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: Respondents denied this claim in the Answer it filed in response to EPA's initial Complaint. Respondents' Prehearing Exchange fails to provide any factual basis for denying this allegation nor does the Prehearing Exchange include any documentation in support of this denial. EPA incorporates by reference its response to Paragraph 38 from Complainant's Initial Prehearing Exchange.

Paragraph 46 (Initial Complaint ¶ 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: Respondents denied this claim in the Answer it filed in response to EPA's initial Complaint. Respondents did not file an answer to the Amended Complaint.

EPA incorporates by reference its response to Paragraph 39 from Complainant's Initial Prehearing Exchange. Complainant incorporates by reference its response to Paragraph 39 of the Rebuttal. Complainant also incorporates its response from Paragraphs 31 and 32 of the Complainant's Initial Prehearing Exchange.

Paragraph 47 (New Paragraph) *At all times relevant to this action, Respondents were persons who "prepared sewage sludge" pursuant to 40 C.F.R. § 503.7.*

Response: Respondents did not file an answer to the Amended Complaint. Respondents did not include any information in their Prehearing Exchange supporting their blanket denial of this allegation. Therefore, EPA asserts that this allegation is deemed admitted pursuant to 40 C.F.R. §22.15. Complainant incorporates by reference its response in Paragraph 32 of the Initial Prehearing Exchange. Complainant incorporates its response to Paragraph 35 of this Rebuttal.

Paragraph 48 (Initial Complaint ¶ 40) *Based on the information provided in response to the Section 308 information request, the sewage sludge applied was Class B sewage sludge.*

Response: Respondents failed to respond to this allegation in the Answer. Respondents did not provide any additional information to support a denial of this allegation in their Prehearing Exchange. Therefore, EPA asserts that this allegation is deemed admitted pursuant to 40 C.F.R. §22.15. Complainant incorporates its response in Paragraph 40 of the Initial Prehearing Exchange.

Paragraph 49 (Initial Complaint ¶ 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: Respondents denied this claim in the Answer it filed in response to EPA's initial Complaint. Respondents' Prehearing Exchange fails to provide any additional support for denying this allegation. EPA incorporates by reference its response to Paragraph 41 from Complainant's Initial Prehearing Exchange.

Paragraph 50 (Initial Complaint ¶ 42) *In this instance, the EPA believes it is highly likely 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 denied this claim in the Answer it filed in response to EPA's initial Complaint. Respondents' Prehearing Exchange fails to provide any factual basis for denying this allegation nor does the Prehearing Exchange include any documentation in support of this denial. EPA incorporates by reference its response to Paragraph 43 from Complainant's Initial Prehearing Exchange.

Paragraph 51 (Initial Complaint ¶ 43) *To date, despite repeated requests pursuant to Section 308 of the CWA, Respondents have not provided records it is required to develop and maintain to EPA.*

Response: Respondents denied this claim in the Answer it filed in response to EPA's initial Complaint. Respondents' Prehearing Exchange fails to provide any factual basis for denying this allegation nor does the Prehearing Exchange include any documentation in support of this denial. In fact, Respondents admit to not providing evidence on page 15 of their Prehearing Exchange.

EPA incorporates by reference its response to this allegation in Complainant's Initial Prehearing Exchange, Paragraph 43.

Factual Background

In this portion of the Prehearing Exchange, Respondents appear to be taking the position that the October 17, 2018, letter to Jeffery Robichaud (RX9, CX12) constitutes a response to EPA's Information Request. First, the letter from Respondents does not provide any information that responds to the questions in EPA's Information Request and specifically requests an extension of time to respond to the Information Request, which EPA granted. CX12 and 13. Respondents provided no information by the deadline set forth in EPA's response. The March 7, 2019, letter from EPA offered to engage Respondents in pre-filing negotiations and reminded them of their obligation to respond to the information request letter. CX14.

Second, reserving the right to dispute any obligation to respond to the Information Request does not, in and of itself, constitute a response to EPA's Information Request.

Third, identifying NCUC as a contractor and sending a copy of the letter to NCUC is also not a response to EPA's Information Request. As previously stated, EPA made multiple attempts to collect information from Respondents pursuant to Section 308 of the CWA. See CX11; 13; 14; 17; 18; 19; 20; 21; and 44. After the final attempt in July 2019 to obtain information from Respondents, EPA filed a complaint. It was not until after the Complaint was filed that Respondents provided additional information. CX28 and 29. And it is evident from the documents obtained and filed with the Court in Complainant's Prehearing Exchange that Respondents had a substantial amount of information in their possession that *to this day*, they still have not submitted to EPA. See CX45; 46; 47; 29 and 50.

Next, Respondents point to the Subcontractor Agreement that Respondents entered into with Tom Robinson (RX5). As explained in Complainant's Initial Prehearing Exchange, regardless of whether Adamas or Mr. Pierce 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 and Mr. Pierce held themselves out as the parties responsible for the entire Lame Deer Sludge Removal Project and are 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, 26 ELR 21116 (S.D.W.Va. Jan. 31, 1996). United States v. Chuchua, 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.'"). Respondents appear to agree with this assertion, citing the same caselaw in their Prehearing Exchange on page 11.

The evidence is clear that Respondents are liable parties under the Clean Water Act. As set forth in Complainant's Initial Prehearing Exchange, Respondents 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 CFR 503.17. See also CX33.

Respondents are also liable as preparers of sludge under the 40 C.F.R. Part 503. As stated in Paragraphs 13, 35 and 47 of the Amended Complaint, Respondents are the preparers of sewage sludge pursuant to 40 C.F.R. §503.9(r) or 40 C.F.R. §503.7. 40 C.F.R. §503.7 states, “any person who prepares sewage sludge *shall* ensure that the applicable requirements in [40 CFR Part 503] are met when the sewage sludge is applied to the land, placed on a surface disposal site, or fired in a sewage sludge incinerator. (Emphasis added). This includes maintaining records as required by 40 C.F.R. §503.17(a)(5)(ii). See Paragraph 20 of the Amended Complaint. Respondents have not denied these allegations or present any exculpatory evidence in their Prehearing Exchange

A. Factual and Legal Basis for Liability

Respondents make many confusing and contradictory statements in this portion of their Prehearing Exchange. EPA will address these arguments as clearly as possible, focusing on what has been admitted by Respondents and the evidence in support of EPA’s claims.

Although Respondents make many misleading and irrelevant statements in this portion of the Prehearing Exchange⁷, Respondents’ argument appears to be that other parties, primarily NCUC, Ernie Sprague and Tom Robinson, were directly and substantially involved in the land application of the sludge from the Lame Deer POTW and that Respondents were not directly and substantially involved in such land application.

First, even if other parties were involved in the sludge removal and land application project, it does not absolve Respondents of liability.⁸

Second, the notion that Respondents were not “directly and substantially involved” in the land application of sewage sludge from the Lame Deer POTW is directly contradicted by the evidence of record.⁹ In fact, Respondents provided, for the first time, in their Prehearing Exchange an email from NCUC’s counsel to Adamas and Nathan Pierce stating that Respondents land applied sludge the week of August 20, 2018, and directing Respondents to

⁷ For instance, Respondents make many contradictory statements about compliance with 40 CFR Part 503. Respondents argue that were not responsible for complying and later state that they were the only parties who did attempt to comply.

⁸ *Cf. United States v. Lambert*, 915 F. Supp. 797, 802, 26 ELR 21116 (S.D.W.Va. Jan. 31, 1996). United States v. Chuchua, (S.D. Ca. March 10, 2004).

⁹ As set forth in Complainant’s Initial Prehearing Exchange: (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 CX45, 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. CX49, p. 27.

“cease and desist all further work regarding the sewage sludge removal and application. See RX19, Gmail-Notice to Cease and Desist.

Third, Respondents appear to agree with EPA’s assertion and caselaw that the CWA imposes liability on the parties that actually performed the work as well as on the parties with responsibility or control over the performance of the work. See Respondents’ Prehearing Exchange, p. 11. In EPA’s Prehearing Exchange, EPA includes substantial evidence demonstrating Respondents’ involvement in the land application. This evidence has not been rebutted by Respondents. EPA refers the Court to its Initial Prehearing Exchange and the evidence set forth in response to Paragraph 31 and 32, herein.

Finally, as explained in Complainant’s Initial Prehearing Exchange, Respondents entered into a contract with NCUC for land application. See Complainant’s Initial Prehearing Exchange, Response to Paragraph 31. 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. Respondents submitted an invoice to NCUC for payment for the sludge application on Tom Robinson’s property. CX45, p. 5. Respondents also entered into a settlement agreement with NCUC for payment for the sludge removal project at the Lame Deer POTW. CX54. Per the agreement signed by Respondents, NCUC did not pay itself for the sludge application nor did NCUC pay Tom Robinson, but NCUC agreed to pay Adamas directly for the sludge application. CX54.

Respondents admit that the subcontract between Adamas and Tom Robinson required that all documents regarding land application be submitted to Adamas. CX7; RX5. Respondents state "Tom Robinson was the only party in position to maintain the records required by 40 C.F.R. 503.17, as he was the parties [*sic*] that actually performed the work to apply sludge to the land and signed a subcontract agreement wherein he agreed to supply Adamas with copies of such records.” Respondents’ Prehearing Exchange, p. 11. By their own admission, Respondents should have copies of the land application records. If they did have such records, they failed to provide those records to Complainant and failed to comply with Section 308 of the CWA.¹⁰

B. Factual and Legal Basis Against Liability by Nathan Pierce and Adamas

This section of Respondents’ Prehearing Exchange appears to primarily be a regurgitation of Respondents’ arguments asserting that NCUC and Tom Robinson are liable parties. However, in this section, Respondents do admit to being the operator of the Lame Deer Waste Water Treatment Plant and that they assumed control of the Waste Water Treatment Plant. Respondents assumed control of the Lame Deer Waste Water Treatment Plant on or before April 2, 2018. CX50, p. 6. It is unclear if Respondents are trying to deny that they were the sewer operator at the time of sludge application, despite an August 26, 2018, email from Adamas to the Northern Cheyenne Tribe, the NCUC, and the Indian Health Services stating the contrary. See CX46, pgs 5-7. Further, Respondents have made multiple representations stating they are the

¹⁰ Respondents requested arbitration with Indian Health Services for payment of the work, including payment for land application. CX54, 55, and 56.

main contractor to Indian Health Services. *See* CX55, p.5 (Indian Health Services and NCUC offered to make Pierce and Adamas the primary contractor in charge of two projects including sewer mainline camera and cleaning and the Sludge Removal Projects and Adamas accepted); see also CX56.

Regardless of assertions to the contrary, the fact that Respondents were the operator of the Lame Deer Waste Water Treatment Plant at the time the sludge was removed from the POTW lagoons subjects Respondents to the requirements of 40 C.F.R. Part 503 and authorizes EPA to request information from Respondents pursuant to Section 308 of the CWA.

2.(C) and 2.(D)

Respondents appear to have cut and paste information, unchanged, from EPA's Prehearing Exchange.

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

Respondents have not provided any evidence showing why the penalty should be reduced other than claiming that they are not responsible for any violations. EPA has put forth substantial evidence demonstrating that Respondents are both liable for failing to maintain records and failing to respond to an information request pursuant to the Clean Water Act. Respondents *admit* that they did not submit information because they didn't want to reveal any additional violations of the Clean Water Act. *See* Respondents' Prehearing Exchange at p. 15. Rather than proving exculpatory, this, in fact bolsters EPA's case that Respondents blatantly ignored EPA's repeated attempts to gather information.

When the statutes and regulations are willfully not complied with, EPA cannot ensure the important goals of the Clean Water Act. *See* Respondents' Prehearing Exchange at p.15.

Economic Benefit

Respondents appear to have cut and paste information, unchanged, from EPA's Prehearing Exchange.

Ability to Pay

Respondents have never provided EPA with any information regarding ability to pay. As demonstrated by EPA's Offer to Engage in Prefiling Negotiations (CX14), EPA invited Respondents to submit such information. Further, Respondents did not submit any supporting information regarding ability to pay as part of their Prehearing Exchange. Respondents have been paid a substantial for their work completed under the NCUC contract for the Lame Deer Project. CX54.

Prior History

EPA's Initial Prehearing Exchange provided support for the status of Respondents' operation of the Lame Deer WWTP and the fact that the EPA Inspection revealed several potential permit violations as documented in the R8 EPA Inspection. CX5. Respondents state that EPA is "attempting to prejudice and mislead the court with this statement." EPA did not assess any penalty for prior history and is not taking an action against Respondents for any claims related to those violations.

Culpability

As stated above, Respondents admitted that they willfully did not comply with EPA's requests for information. *See* Respondents' Prehearing Exchange at p. 15. Respondents did not provide any evidence to support that the culpability portion of the penalty should be reduced.

Conclusion

Respondents did not provide evidence in their Prehearing Exchange that supports their claim that they are not liable under the Clean Water Act for the violations alleged in the Amended Complaint. Regardless of whether other parties were involved in the land application, Respondents are liable under the Clean Water Act because, as the evidence shows, they clearly had responsibility for, or control over, the performance of the land application- a fact that Respondents have not denied. Respondents are responsible for maintaining records and providing those to EPA as the "preparer" of the sewage sludge and as the operator of the WWTP, another fact that Respondents have not denied. Finally, EPA has the authority under Clean Water Act Section 308 to issue Information Requests to operators of point sources before establishing jurisdiction. Respondents admit to willfully failing to respond to this request.

Complainant respectfully reserves its right to file dispositive motions in accordance with the Court's October 18, 2019, Prehearing Order for the Court's consideration.

RESPECTFULLY SUBMITTED this 3rd day of April 2020.

/s Sara Hertz Wu

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CERTIFICATE OF SERVICE

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

A copy was sent by email to:

Attorney for Respondents Adamas Construction and Development Services PLLC and Nathan Pierce:

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Date: 4/3/2020

/s Sara Hertz Wu _____

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