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	)	MEMORANDUM AND POINTS OF AUTHORITY IN SUPPORT OF COMPLAINANT'S MOTION FOR ACCELERATED DECISION AS TO LIABILITY
	)	
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)	)	

MEMORANDUM AND POINTS OF AUTHORITY IN SUPPORT OF COMPLAINANT'S MOTION FOR ACCELERATED DECISION AS TO LIABILITY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Regulations

Case Law

In support of its Motion for Accelerated Decision, Complainant, the United States Environmental Protection Agency, Region VII (EPA) states as follows:

I. INTRODUCTION

A. Background

Nathan Pierce (owner of Adamas Construction and Development Services) convinced the Northern Cheyenne Utility Commission (NCUC) that he had the knowledge and skill to serve as the project manager on a number of large projects involving the NCUC's wastewater treatment systems. In an application to the State of Montana requesting to have Mr. Pierce serve as the "Contract Project Manager and Wastewater Operator" for the Lame Deer Lagoon, NCUC stated that it wanted Mr. Pierce to serve in this capacity as it was "unable to find [a] qualified candidate with the knowledge and background of Mr. Pierce." (CX50 at 7).

In addition to serving as the project manager for the Lame Deer Sludge Removal project, the subject of this action, Mr. Pierce served as the primary contractor for Lame Deer Sewer Main Camera and Cleaning project and the Scatter Site Projects. (CX49).[1] Mr. Pierce repeatedly represented to Indian Health Services and NCUC that he and his company had the expertise to complete the sludge removal and land application project in accordance with EPA's 40 C.FR. Part 503 regulations.

When seeking payment for the completion of the sludge removal project, Mr. Pierce argued that he and his company (not NCUC), were solely in charge, and in fact, in privity of

[1] Mr. Pierce was paid $130,250 for the Sewer camera project and $200,000 for Scatter Site Projects. (CX49) He was also paid $95,400 in a settlement for the sludge removal work. (CX54).

contract with Indian Health Services. However, when asked to provide documentation demonstrating that Respondents completed the sludge removal and land application project in accordance with EPA's regulations, Mr. Pierce denied responsibility and pointed the finger at NCUC, Ernie Sprague of D&R Disposal, who hauled the sludge, and Tom Robinson, the farmer that owned the land where the sludge was deposited. (CX9). From a practical standpoint, Respondents were the only ones in a position to develop and maintain the records required by 40 C.F.R. § 503.17 as they acted as the project manager of the Lame Deer Sludge Removal project and the operator of the POTW. As described below, Respondents completed the entire Lame Deer Sludge Removal project including the land application without the use of NCUC equipment or staff. (CX49 at 27).

The evidence overwhelmingly demonstrates that Respondents directed and controlled the land application of sewage sludge, "prepared" the sewage sludge, failed to develop and maintain the records required by EPA's regulations and simply refused to respond to EPA's Information Request.

B. Summary of Argument

The Court should grant EPA an accelerated decision on both counts alleged in the Amended Complaint because the record demonstrates, as a matter of law and beyond any issue of material fact that: (1) Respondents failed to develop and maintain records as required by 40 C.F.R. § 503.17; and (2) that Respondents failed to respond to an Information Request issued pursuant to 33 U.S.C. § 1318. Therefore, Respondents are liable under 33 U.S.C. § 1319.

For Count I, the record establishes that Respondent Pierce is the responsible corporate

officer for Respondent Adamas; (2) Respondents were the preparers of Class B sewage sludge through their actions as the operator of the Lame Deer POTW; (3) Respondents or their Contractors were the land applicators of Class B sewage sludge; and (4) Respondents failed to maintain records required by Section 405 of the CWA and the implementing regulations at 40 C.F.R. Part 503.

With respect to Count II, in addition to establishing that Respondent Pierce is the responsible corporate officer of Respondent Adamas and the operator of the Lame Deer POTW, the record establishes that EPA Region 7 issued an Information request pursuant to Section 308 of the CWA concerning land application records that are required to be developed and maintained in accordance with 40 C.F.R. Part 503; Respondents received such Information Request; and Respondents failed to provide a timely and complete response to such Information Request.

Up until the time this action was filed, Respondents held themselves out to be the responsible parties for operating the Lame Deer POTW, preparing and land applying the sewage sludge, and complying with all applicable Clean Water Act regulations. The only allegation that Respondents deny with specificity is the allegation that they land applied the sewage sludge. In fact, this is Respondents' only defense to all allegations asserted against them. But this denial is immaterial as the Clean Water Act 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.[2]

[2] *United States v. Lambert*, 915 F. Supp. 797, 802, 26 ELR 21116 (S.D.W.Va. Jan. 31, 1996); *United States v. Chuchua*, No. 01cv1479-DMS (AJB) (S.D. Ca. March 10, 2004)

Respondents have not and cannot deny that their subcontractors land applied the sewage sludge from the Lame Deer POTW. In fact, Respondents admit and provide evidence in their Prehearing Exchange demonstrating that they employed subcontractors to assist in the land application of the sewage sludge. The evidence overwhelmingly demonstrates that Respondents controlled and directed the land application of sewage sludge.

Further, Respondents were responsible for developing and maintaining land application records because they "prepared" the sewage sludge. Respondents held themselves out as the preparers of sewage sludge and never denied or presented any evidence to the contrary.

With respect to Count II, Respondents do not assert that EPA failed to issue the Information Request, or that they did not receive the Information Request, or that Respondents provided a timely and accurate response to the Information Request. Instead, Respondents' defense is again grounded in the argument that it did not land apply the sewage sludge and were consequently not required to respond to the Information Request. Respondents are mistaken. As set forth in Section 308 of the CWA, 33 U.S.C. § 1318, EPA has the authority to request information from the owner or operator of any point source whenever it is necessary to carry out the objectives of the Act. Because Respondents were the operators of the POTW, EPA had the authority to request information related to land application of sewage sludge from Respondents and Respondents were required to provide an accurate and timely response. Respondents simply refused to do so.

Complainant is entitled to an accelerated decision pursuant to 40 C.F.R. § 22.20 because Complainant demonstrates that it can prove its prima facie case, there is no genuine

issue of material fact, and Respondents are not entitled to its defenses as a matter of law.

C. Standard for Accelerated Decision

The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to a judgment as a matter of law. 40 C.F.R. § 22.20(a). Motions for accelerated decision under 40 C.F.R. § 22.20(a) are akin to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure (FRCP). *In the Matter of Kent Hoggan, et. al.* 2019 WL 2166249, *6, Docket No. CWA-08-2017-0026 (RJO Biro)(May 8, 2019). As in federal practice, the purpose of such a motion is to pierce the pleadings and assess the proof to see whether there is a genuine issue for trial. A party may not rest upon mere denials of the adverse party's pleadings when opposing such a motion. *In the Matter of Gerald Strubinger, et. al*., 2002 WL 2005525 at *3-4 (Docket No. CWA-3-2001-001) (Aug. 22, 2002); *In re Labarge, Inc.*, Docket No. CWA-VII-91-W-0078 (Feb. 2, 1996).[3] Under FRCP 56, the use of affidavits is not required to support a motion for summary judgment; reliance on other materials is permissible. *In the Matter of Daniel J. McGowan*, 2016 WL 774287 at *7, (Docket No. CWA 07-2014-0060)(July 25, 2016).

The movant has the burden of demonstrating that a material fact cannot be genuinely disputed by "citing to particular parts of materials in the record …." *In Re: Polo Development,*

[3]https://yosemite.epa.gov/oarm/alj/alj_web_docket.nsf/All%20Content%20%20Web/C7B11FE9917E338685257FBC00702418/$File/labarge-inc-cwa-020596.pdf

Inc., 2015 WL 627637 at *6 (Docket No. CWA-05-2013-0003) (Feb. 6, 2015), *quoting* FCRP 56(c)(1). Once the movant has met this burden, the nonmoving party must show that the material fact is genuinely disputed by "citing to particular parts of materials in the record" or show "that the materials cited do not establish the absence … of a genuine dispute." *Id.* The mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment as Rule 56(e) requires the parties to go beyond the pleadings. *In the Matter of Gerald Strubinger*, 2002 WL 2005525 at *4. FRCP 56(e)(3) states that "if a party … fails to properly address another party's assertion of fact … the court may … consider the fact undisputed for purposes of the motion" or "grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it."

There must be timely presentation of a genuine and material factual dispute, similar to FRCP 56, in order to obtain an evidentiary hearing. Otherwise an accelerated decision based on the documentary record is sufficient. *Green Thumb Nursery, Inc.*, FIFRA Appeal No. 95-4a, 6 E.A.D. 782, 793 (Mar. 6, 1997).

D. Statutory and Regulatory Requirements

The Clean Water Act (the "Act" or "CWA") 33 U.S.C. §§ 1251-1388, was enacted by Congress to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Section 301(a) of the Act provides that "[e]xcept as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [33 U.S.C. §§ 1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a).

"Discharge of a pollutant" is "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). "Pollutant" includes, sewage sludge, industrial and municipal waste. 33 U.S.C. § 1362(6). "Navigable waters" is defined as "waters of the United States." 33 U.S.C. § 1362(7). The term "point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). A "person" is defined "an individual, corporation, partnership, [and] association." 33 U.S.C. § 1362(5).

Section 405(d)(1) of the CWA, 33 U.S.C. § 1345(d)(1), provides that the Administrator shall develop and publish regulations providing guidelines for the disposal of sludge and the utilization of sludge for various purposes. Accordingly, the EPA promulgated regulations governing the Standards for the Use or Disposal of Sewage Sludge, 40 C.F.R. Part 503. These regulations establish a self-implementing program that relies on recordkeeping and reporting requirements, pollutant limits and site management practices, and are applicable to any person who prepares and applies sewage sludge to the land. 40 C.F.R. §§ 503.1(a) and (b).

Section 405(e) of the CWA, 33 U.S.C. § 1345(e), prohibits the disposal of sludge from a publicly-owned treatment works or any other treatment works treating domestic sewage sludge for any use for which regulations have been established pursuant to subsection (d) of that Section by any person, except in accordance with such regulations. The regulations at 40 C.F.R. Part 503 Subpart B apply to any person who among other things "prepares sewage sludge" or "applies

sewage sludge to the land." 40 C.F.R. § 503.10(a).

These rules apply to regulated entities regardless of whether those entities have permits for the use or disposal of sewage sludge. (CX33 at 9323). Regulated entities are required to monitor their sludge for contaminant levels, keep records of and report their monitoring findings. 40 C.F.R. §§ 503.13(a) and (b), 503.16, 503.17, and 503.18.

Any person who prepares sewage sludge shall ensure that the applicable requirements in this part are met when the sewage sludge is applied to the land, placed on a surface disposal site, or fired in a sewage sludge incinerator. 40 C.F.R. § 503.7. A "person who prepares sewage sludge is 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." 40 C.F.R. § 503.9. Sewage sludge is defined as *"*solid, semi-solid, or liquid residue generated during the treatment of domestic sewage in a treatment works. 40 C.F.R. § 503.9(w). Sewage sludge includes, but is not limited to, domestic septage; scum or solids removed in primary, secondary, or advanced wastewater treatment processes; and a material derived from sewage sludge. Sewage sludge does not include ash generated during the firing of sewage sludge in a sewage sludge incinerator or grit and screenings generated during preliminary treatment of domestic sewage in a treatment works." *Id*. Entities that generate sewage sludge include publicly-owned treatment works (POTWs). (CX33 at 9325).

40 C.F.R. § 403.3(q) provides that the term POTW "means a treatment works as defined by section 212 of the Act, which is owned by a State or municipality (as defined by section 502(4) of the Act)." This definition includes any devices and systems used in the storage,

treatment, recycling and reclamation of municipal sewage or industrial wastes of a liquid nature. It also includes sewers, pipes and other conveyances only if they convey wastewater to a POTW Treatment Plant. *Id*. Section 502(4) of the Act defines municipality to mean "a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 1288 of this title." 33 U.S.C. § 1362.

"Land application" means 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 the crops or vegetation grown in the soil. 40 C.F.R. § 503.11(h). The person who applies the bulk sewage sludge shall develop and retain the information in 40 C.F.R. §§ 503.17(a)(5)(ii)(A) through (a)(5)(ii)(G) indefinitely, and retain the information in 40 C.F.R. §§ 503.17(a)(5)(ii)(H) through (a)(5)(ii)(M) for five years. 40 C.F.R. § 503.17(a)(5)(ii).

Section 308 of the CWA, 33 U.S.C. § 1318 (a), provides that "Whenever required to carry out the objective of this chapter, including but not limited to . . . carrying out sections [305, 311, 402, 404 (relating to State permit programs), 405, 405, and 504] of this title –

> (A) the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require. . ."

Section 309 of the Clean Water Act, 33 U.S.C. § 1319, authorizes administrative, civil, and

criminal penalties for violations of §§ 1345 and 1318.

E. Procedural History

The Complaint in this matter was filed on September 6, 2019. The Complaint alleges that the Respondents (1) violated Section 405 of the CWA, 33 U.S.C. § 1345, and EPA's implementing regulations at 40 C.F.R. Part 503 by failing to maintain and develop records regarding biosolids application; and (2) violated Section 308 of the CWA, 33 U.S.C. § 1318, by failing to provide a timely and complete response to EPA's Information Request. The Complaint seeks a penalty of $59,583.

Respondents filed an Answer on October 16, 2019. In their Answer, Respondents did not provide a specific response to the first twenty allegations of the Complaint, admitted many of the allegations, and did not provide a response to the second claim as required by 40 C.F.R. § 22.15.[4]

Complainant's Prehearing Exchange was filed on November 25, 2019. On December 17, 2019, Complainant moved to amend the Complaint to address information provided by Respondents and the Indian Health Services after the Complaint was filed. The amendment also sought to correct minor drafting errors. On January 2, 2020, the Court granted Complainant's

[4] Respondents denied the following allegations in their Answer: (1) Respondents had entered into a contract to land apply sewage sludge generated by NCUC, Resp. Ans. ¶31; (2) Respondents land applied sewage sludge from the Lame Deer treatment lagoon, *Id*. ¶¶32, 39; (3) Indian Health Services visited the land application site after receiving a complaint from the landowner, *Id*. ¶33; (4) Indian Health Services observed that the sludge was improperly applied and that Respondents had refused to provide land application records to the landowner, *Id*. ¶¶34, 35; (5) the Respondents were required to keep records pursuant to 40 C.F.R. § 503.17, *Id*. ¶ 41; (6) EPA had issued information requests to Respondents, *Id*. ¶36 ; and that (7) Respondents had provided an incomplete response to Complainant's information requests *Id.* ¶¶37,38, 43.

Motion to Amend. Respondents did not file an Answer to the Amended Complaint.

On March 6, 2020, Respondents served Complainant with their Prehearing Exchange in response to a Show Cause Order issued by the Court on February 20, 2020. Complainant served its Rebuttal Prehearing Exchange on April 3, 2020.

A hearing date for this matter has not yet been scheduled.

II. ACCELERATED DECISION IS WARRANTED

A. Respondents Failed to Maintain Records as Required by 40 C.F.R. Part 503 of the Clean Water Act (Count I)

The Environmental Appeals Board in *In Re: City of Salisbury, Maryland*, 10 E.A.D. 263 (Jan. 16, 2002), states "the sludge rules reflect, as the NPDES rules do, Congress' interest in establishing a CWA regulatory regime that relies heavily on accurate self-monitoring and reporting of pollutant discharges." The EAB goes on to explain that the "administrative duties of monitoring, record keeping, and certification are under both the sludge and NPDES programs, not to be treated lightly but rather are central to CWA compliance efforts." *Id*. at *5. "Compliance with the 40 C.F.R. Part 503 biosolids regulations is important as 'contaminated or improperly handled sludge can result in pollutants in the sludge re-entering the environment, and possibly contaminating a number of different media through a variety of exposure routes.' " *In re Tri-County Builders Supply*, 2003 WL 21213228 at *9, Docket No. CWA-9-2000-0008 (ALJ Charneski)(May 19, 2003) *quoting City of Salisbury*, 10 E.A.D. 263 at *10.

Any person who prepares sewage sludge must ensure that the requirements of 40 C.F.R. Part 503 are met when the sludge is land applied. 40 C.F.R. § 503.7. A "person who prepares

sewage sludge is 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." 40 C.F.R. § 503.9. Land application occurs when the sewage sludge is sprayed or spread onto the land surface; injected below the land surface or incorporated into the soil so that the sewage sludge can condition the soil or act as a fertilizer. 40 C.F.R. § 503.17. The person land applying the sewage sludge must develop and maintain records regarding the land application of the sewage sludge. 40 C.F.R. § 503.17.

1. Respondent Nathan Pierce is the Responsible Corporate Officer of Respondent Adamas and Is Individually Liable Under the Clean Water Act.

There is no dispute that Respondent Nathan Pierce is the responsible corporate officer of Respondent Adamas and, therefore, is individually liable under the Clean Water Act. Respondents admitted that Respondent Pierce (1) is a "person" under the Clean Water Act; (2) controlled the activities of Adamas at all times relevant to this action; (3) held himself out to Indian Health Services and EPA as the primary contact of Adamas for environmental compliance; and (4) managed, directed, or made decisions about environmental compliance for Adamas. Amended Complaint ¶¶ 29-32; Answer ¶¶ 24-29. By these admissions, Respondent Nathan Pierce is individually liable under the Clean Water Act through the responsible corporate officer doctrine ("RCO Doctrine"). 40 C.F.R. § 22.15.

The RCO 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. *United States v. Iverson,* 162 F.3d.

1015 (9th Cir. 1998). Under the CWA, a person is a "responsible corporate officer" if the person has the authority to exercise control over the corporation's activity that is causing the discharges. *Id*. at 1025. There is no requirement that the officer, in fact, exercise such authority or that the corporation expressly vest a duty in the officer to oversee the activity. *Id*.

The RCO doctrine has been examined in administrative cases. *In the Matter of Mr. C.W. Smith, et. al.*, 2004 WL 1658484, Docket No. CWA-04-2001-1501 (July 15, 2004). In *C.W. Smith*, the Court stated that officers can be liable for violations of the CWA "where they participated in or were responsible for the violations, even when the individuals purport to act through a corporate entity." *Id*. at *32, *citing United States v. Gulf Park Water Company,* 972 F.Supp.1056,1063 (S.D. Miss. 1997). Although the Court declined to apply the RCO doctrine under the facts of *C.W. Smith*, the Court acknowledged that it could apply if the evidence demonstrated that the Respondent personally directed, caused, participated or controlled the activity.

In this case, not only has Respondent Pierce admitted that he controlled the activities of Respondent Adamas, the evidence proves that he was personally involved in all aspects of preparing and land applying the sewage sludge. Answer ¶¶24-29; *See* Resp. Prehearing Exchange, p. 12; CX 43, p. 11; CX45 pgs. 5-7, 9-11, 20-24, 37-38, 42-44; CX46, p. 5-12; CX49, p.27. All emails and correspondence (with the exception of documents sent by counsel for Adamas) in the record were sent or signed by Nathan Pierce. *See id*. Respondent Pierce also held himself out as the point of contact for environmental compliance to EPA and Indian Health Services. Respondents' Answer ¶28; *see also id*.

All these facts are undisputed by Respondent Pierce and therefore, there is no genuine issue of material fact and accelerated decision pursuant to 40 C.F.R. § 22.20 is warranted.

2. Respondents prepared the Class B sewage sludge for land application.

A finding in Complainant's favor is warranted because the undisputed evidence demonstrates that Respondents were the preparers of the Class B sewage sludge[5] and Respondents have never denied this allegation or presented any evidence that they did not prepare the sewage sludge. There is no genuine issue of material fact.

The evidence overwhelmingly demonstrates that Respondents were the preparers of the sewage sludge. First, Respondents held themselves out as the preparers of the sewage sludge. In correspondence from Respondents' attorney, Chris Gallus, to the Department of Health and Human Services, Mr. Gallus stated that "my client by EPA definition was the sludge preparer." (CX45 at 16).

Second, the evidence demonstrates that Respondents prepared the sewage sludge through their actions as the operator of the Lame Deer Wastewater Treatment Plant. As stated above, a "person who prepares sewage sludge is 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." 40 C.F.R. § 503.9. The Lame Deer Wastewater Treatment Plant meets the definition of a POTW as it is a lagoon system for the treatment of municipal or industrial waste.

[6]All sewage sludge falls within either a Class A or Class B category. 40 C.F.R. § 503.15. Based on analytical testing, the sewage sludge at issue falls within Class B, meaning that there are reduced levels of pathogens after treatment in a wastewater treatment facility. 40 C.F.R. § 503.32(b). Respondents did not deny this allegation in their Answer and have not provided any additional evidence in their Prehearing Exchange to dispute this allegation.

During the treatment of domestic sewage, the Lame Deer POTW generates sludge.[6] Through their actions as the operators of the Lame Deer POTW, Respondents generated the sewage sludge.[7]

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).

Respondents also exercised control over the Lame Deer Wastewater Treatment Plant by serving as the project manager and technical consultant for the Lame Deer Sludge Removal project (CX4, 6, 7, 8, 19, 29, 45, and 46) and acting as the NCUC contractor and lead facility-contact during the EPA Region 8 inspection. Respondents 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 Respondents were preparing Cell 2 for sludge removal at the time of EPA's inspection. (CX5). Respondents entered into an agreement to serve as the primary contractor for Lame Deer Sewer Main Camera

[6] In a lagoon system such as the Lame Deer POTW, once the initial treatment stages where grit and trash are removed have occurred, wastewater is discharged to the lagoon where wastewater undergoes further treatment. Solids that settle out to the bottom of the lagoon are generated as part of the biological treatment process are defined as biosolids. Biosolids can remain in the bottom of a lagoon for long periods of time until enough has built up for removal. Once removed, further processing such as dewatering is often necessary to facilitate transportation and land application of biosolids. (CX37, CX5)

[7] *In re City of Salisbury, Maryland,* 2000 WL 190658, Docket No. CWA-III-219 (ALJ Biro)(Feb. 8, 2000), aff'd, 10 E.A.D. 263 (EAB 2002) , aff'd, 10 E.A.D. 263 (EAB 2002) (finding that Respondent "in its capacity as owner and operator of a Publicly Owned Treatment Works (POTW) generates sewage sludge during the treatment of domestic sewage.").

and Cleaning project in exchange for $130,250 and the Scatter Site Projects in exchange for $200,000 (CX49). Respondents' scope of work for the sludge removal 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 at 33-35).

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][8] to the Indian Health Services, Respondents stated they would complete the sludge removal and land application project without the use of NCUC equipment or staff. (CX 49 at 27).

Respondents also 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 at 5-7). In that email Mr. 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 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*.

By failing to respond to the Amended Complaint, Respondents have admitted that they prepared the sewage sludge. The Answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in the complaint to which respondent has any knowledge. 40

[8] Resp. Answer ¶25.

C.F.R. § 22.15(b). Failure of Respondents to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation. 40 C.F.R. § 22.15(d).[9] By failing to provide support or contrary evidence in their Prehearing Exchange, Respondents have not presented any evidence demonstrating that they are not the preparers of sewage sludge. Documents or exhibits not included in the prehearing exchange shall not be admitted into evidence. 40 C.F.R. § 22.19. *In the Matter of Docketmaster, Inc.*, 2012 WL 371965, Docket No. CWA-08-2011-0002(Jan. 25, 2012) (allegations deemed admitted for failure to file an answer to amended complaint and prehearing exchange; motion for default granted).

As stated above, the evidence presented in Complainant's Prehearing Exchange demonstrates that Respondents prepared the sewage sludge and Respondents have presented no evidence to the contrary. "Preparers" of sewage sludge are responsible for maintaining the records in 40 C.F.R. § 503.17. Thus, there is no genuine dispute of material fact and EPA is entitled to an accelerated decision pursuant to 40 C.F.R. § 22.20.

3. Respondents directed the land application of sewage sludge from the Lame Deer treatment lagoon to land in Lame Deer, Montana.

A finding in Complainant's favor is warranted because the evidence set forth in Complainant's Prehearing Exchange clearly demonstrates that Respondents directed the land application of the sewage sludge and that their own subcontractors applied the sewage sludge.

[9] See also *In the Matter of Ronald Palimere et. al.*, 2000 WL 33126605, Docket No. RCRA-III-9005-050 (Dec. 13, 2000)(allegations deemed admitted for failure to file an answer to amended complaint and prehearing exchange; motion for default granted); *In the Matter of Rogers Petro-Chem Inc. et. al.*, 1985 WL 57135, Docket No. V-W-84-R-033 (Feb. 27, 1985) (allegations deemed admitted for failure to file an answer to amended complaint and prehearing exchange; motion for default granted).

Respondents failed to provide any evidence to the contrary in their Prehearing Exchange. There is no genuine issue of material fact that Respondents directed the land application of sewage sludge and that Respondents' subcontractors land applied the sewage sludge.

Respondents deny in the Answer that they land applied the sewage sludge in question. Resp. Ans., ¶ 32. Respondents, however, admit that their subcontractors, Tom Robinson, and D&R Disposal, hauled and land applied the sewage sludge from the Lame Deer treatment lagoon. Resp. Ans., ¶32; (RX5); Resp. Prehearing Exchange, p.9-10. Not only is this admission sufficient to satisfy this element, the evidence in the record demonstrates that Respondents controlled and directed the land application of sewage sludge at issue.

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*, No. 01cv1479-DMS (AJB) (S.D. Ca. March 10, 2004) (owner of the property and project manager of stream alteration work are 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.'"). The record overwhelmingly demonstrates that Respondents exercised control over the land application of the sewage sludge.

First, Respondents entered into a contract with NCUC for the land application and sought payment from NCUC and the Indian Health Services for completion of such land application.

(CX45 at 5,7, and 30). The contract specified 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 at 18). After the August 2018 land application was complete, Respondents continued to represent to NCUC and Indian Health services, as well as to U.S. Senator Steve Daines, that they were responsible for the land application of sludge. *See* December 12, 2018, invoice to NCUC for sludge application (CX45 at 5-7); August 22, 2018, email from Respondents to the Northern Cheyenne Tribe (CX46 at 10-11)[10]; August 26, 2018, email from Respondents to the Northern Cheyenne Tribe, the NCUC and the Indian Health Services,[11] (CX46 at 5-7). In the correspondence to U.S. Senator Steve Daines, dated June 3, 2019, Respondents again state that they entered into an agreement for the land application of sludge and performed the land application. (CX49 at 8-10).

Second, Respondents held themselves out as the parties responsible for the land application in various correspondence to both the NCUC and Indian Health Services, and informed both the NCUC and Indian Health Services that it would comply with 40 C.F.R. Part 503. On April 21, 2018, Respondents proposed a scope of work for the Lame Deer Sludge Removal Project, including a schedule with project milestones. (CX45 at 32). In the email,

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

[11] 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 [Pierce] 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."

Respondents represent to Indian Health Services and NCUC that the "Northern Cheyenne tribal council are [*sic*] 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, Respondents outline the scope of work to NCUC, and make the following representations:

- (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 at 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 at 34). The schedule attached to the email sets forth dates for the completion of all these tasks including a date for Adamas to complete the land application. (CX45 at 36).

Respondents also took responsibility for sampling the sludge. (CX19 at 6; CX45 at 21, 25-28, and 32).

From April 21, 2018, forward, Respondents sent various email updates to NCUC and the Indian Health Services on the status of the project. On April 30, 2018, Adamas represented to Indian Health Services:

- "if we are unable to use the wheel injector we will do application followed by tilling"; and
- per Adamas' policies and procedures "all land application will meet or exceed the requirements of [40 C.F.R.] 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.SC. 1251 et.seq." (CX45 at 37).

On June 21, 2018, Adamas represented to NCUC and Indian Health Services:

- "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 at 27).

On July 16, 2018, Indian Health Services conveyed to Respondents that Tom Robinson, a local farmer, appears to be "interested in receiving the sludge on his property." In response, Mr. Pierce states that he will "call and arrange" and goes on to explain that he 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 at 42). Respondents and Tom Robinson entered into a contract ("Subcontractor Agreement") that states that the Subcontractor will "prep the field and till the sludge." (CX7).[12] The Subcontractor Agreement also states that the Subcontractor will furnish Contractor with logs for each day of application. *Id*. Therefore, Respondents retained the responsibility for maintaining any records related to the project.

As described in the 308 Response provided by Ernie Sprague of D&R Disposal, Respondents directed Mr. Sprague at the location where the sewage sludge was stored and at the land application site. According to D&R's 308 Response, Respondents were "taking samples and moving pipe" at the land application site. (CX42 at 3).

As set forth above, Respondents assumed responsibility for and controlled the land application of sludge from the Lame Deer Wastewater Lagoon by: (1) serving as the contractor

[12] Mr. Robinson had difficulty tilling the sludge into the soil due to the manner in which the sludge was land applied. (CX9 at 1). Mr. Robinson also told Indian Health Services that Respondents refused to provide him with sampling results, application logs and target application rates. *Id*.

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 samples; and (8) controlling the timing of land application and hauling. There is no evidence in the record that any other party, including any subcontractors, had any control over the timing of the land application, the manner in which it would be conducted, or any communication related to the project with NCUC or Indian Health Services.

Land applicators are held accountable for complying with 40 C.F.R. § 503.17. (*See also* CX33). There is no genuine issue of material fact that Respondents directed the land application of the sludge from the Lame Deer Wastewater Lagoon.

4. Respondents failed to develop and maintain records as required by 40 C.F.R. Part 503.

Although Respondents denied this allegation, they have not provided a scintilla of evidence in support of their denial. In fact, in Respondents' Prehearing Exchange, they admit that they did not respond to EPA's Information Request so as not to further incriminate themselves. Resp. Prehearing Exchange at p. 15. Respondents have never stated or presented evidence indicating that they did develop and maintain sludge application records. Respondents' limited response to EPA's Information Requests demonstrates that Respondents failed to develop

and maintain the records required by 40 C.F.R. § 503.17. There is no genuine issue of material fact that Respondents failed to develop and maintain the records required by 40 C.F.R. Part 503.

Respondents' apparent basis for denying this allegation is grounded in their mistaken belief that they were not required to develop and maintain records. The regulations found in Subpart B of 40 C.F.R. Part 503 apply 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. 40 C.F.R. § 503.10(a). 40 C.F.R. § 503.7 states that, "any person who prepares sewage sludge shall ensure that the applicable requirements in this part are met when the sewage sludge is applied to the land, placed on a surface disposal site, or fired in a sewage sludge incinerator." Pursuant to 40 C.F.R. § 503.17 (a)(5)(ii), the person who applies the bulk sewage sludge shall develop information, retain the information in 40 C.F.R. §§ 503.17(a)(5)(ii)(A) through (a)(5)(ii)(G) indefinitely, and retain the information in 40 C.F.R. §§ 503.17(a)(5)(ii)(H) through (a)(5)(ii)(M) for five years. Therefore, both persons who prepare sewage sludge and who land apply sewage sludge are responsible for developing and maintaining the records in 40 C.F.R. § 503.17.

The evidence presented in Complainant's Prehearing Exchange, discussed in detail above, establishes that Respondents subcontracted with NCUC to direct and manage the entire Lame Deer Sludge Removal Project including land application and sewage sludge preparation. Respondents obtained the appropriate equipment, served as the operator of the POTW, directed the lagoon pumping, transportation, determined the timing and location of land application, and directed the land application itself. Respondents also sought payment for the land application and

represented to the Indian Health Services and NCUC that they would complete the land application in accordance with 40 C.F.R. Part 503. Therefore, as the preparers of the sludge and the land applicators of the sludge, Respondents were required to develop and maintain the appropriate land application records.

Respondents' limited response to EPA's Information Request demonstrates that they failed to develop and maintain the records required by 40 C.F.R. § 503.17. 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. (CX11).

On June 14, 2019, after Respondents failed or refused to respond to the EPA's September 28, 2018 information request, EPA again tried to contact Respondents for the requested information, this time through counsel. (CX17). Nine months after the initial information request, Respondents provided an incomplete response to the Section 308 information request on July 2, 2019. (CX18 and 19). The Respondents failed or refused to provide a response that contained the following information required to be developed and maintained 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.

There is no genuine issue of material fact that Respondent failed to develop and maintain records as required by 40 C.F.R. Part 503. Therefore, Complainant is entitled to an Accelerated Decision for this element pursuant to 40 C.F.R. § 22.20.

B. Respondents failed to provide a timely and complete response to EPA's Information Request (Count II)

Clean Water Act Section 308(a) is an information gathering tool that is not oriented exclusively towards permittees: it applies to any owner or operator of a point source, without reference to whether such person has a permit. 33 U.S.C. § 1318(a). The Agency may issue orders pursuant to CWA § 308(a) to aid enforcement, to develop permit limitations and effluent standards, and to generate whatever information it needs to carry out its statutory responsibilities. *In re Simpson Paper Co. and Louisiana-Pacific Corp.,* 3 E.A.D. 541, 549 (CJO 1991). The authority conferred by the section may be exercised by the Agency at any time, and the lawfulness of orders issued pursuant thereto is subject only to a reasonableness standard. *Id.* As stated in *In re City of Salisbury Maryland*,[13]"CWA § 308 (33 U.S.C. § 1318) authorizes the EPA Administrator to request owners or operators of point sources of pollution, such as POTWs, to provide information necessary to carry out the purposes of CWA § 405."

Courts have found that EPA's ability to obtain timely and accurate information pursuant to Section 308 of the CWA is central to EPA's enforcement of the CWA and that failure to

[13] *In re City of Salisbury, Maryland*, 2000 WL 190658, Docket No. CWA-III-219 (ALJ Biro)(Feb. 8, 2000), aff'd, 10 E.A.D. 263 (EAB 2002)

timely respond to EPA's Information Requests subjects Respondents to administrative, civil, and even criminal penalties in accordance with Section 309 of the CWA. *United States v. Hartz Construction Co.,* 2000 WL 1220919, at *4-5 (N.D. Ill. 2000) ("The court discerns no reasonable basis…for limiting the EPA's discretion to requesting only that information that is expressly called for by regulation, rather than simply making reasonable requests, as the statute itself provides."); *United States v. R.W. Davis Construction*, Case No. 2:00CV995 (D. Utah, Dec. 6, 2004) (After granting summary judgment to U.S. for failure to respond to a CWA 308 information request, Court ordered $12,250 penalty assessed for 98 days of violation of a 308 order).[14]

Respondents have never disputed this count or provided any basis or evidence to support denying any of the underlying factual allegations in support of this count.

1. Respondents were the operators of the Lame Deer POTW.

As described above, Respondents have not denied this allegation nor have Respondents

[14] *See also United States v. Hartz Construction Co.,* 1999 WL 417388 (N.D. Ill. 1999) (defendant's motion to dismiss claims for failure to respond to § 308 information request denied on grounds that EPA had properly alleged cause of action; rejected argument that EPA could not request information about wetlands fill until it proved it had jurisdiction over wetland; "Hartz's interpretation frustrates the purposes of the CWA and the plain language of the statute. Section 308 provides that 'whenever required to carry out the objective of [the CWA]' the EPA, in 'determining whether any person is in violation' of the Act, 'shall require the owner or operator of any point source to…provide such…information as he may reasonably require.' 33 U.S.C. § 1318(a). The government has alleged that Hartz is a point source as a discharger of pollutants (fill dirt) and Hartz has not disputed this assertion in its motion. Thus, on its face, Section 308 gives EPA jurisdiction to determine whether the point source is in violation of the Act."); *In re H. Craig Higgins*, Docket No. CWA-1-I-91-1088 (RJO DiBiccaro Feb. 14, 1992) (respondent held liable for failure to respond to 308 information request; rejected Respondent's de minimis defense; "EPA's ability to obtain timely and accurate information regarding discharges under the Clean Water Act is central to the administration and enforcement of limits on discharges under the Act. Failure to respond in a timely manner to a request for information risks damaging or irreparable environmental consequences. Reporting requirements under the federal environmental statutes, including Section 308 of the Clean Water Act, are enforceable requirements for which penalties may be assessed. " Slip op. at 13.

presented any information that rebuts the evidence in the record[15] and Complainant has demonstrated that Respondents were the operators of the Lame Deer POTW. The Lame Deer POTW discharges wastewater to Logan Creek via several outfall locations, making it a point source as that term is defined in the CWA.[16] (CX5).

2. EPA issued an Information Request to Respondents, requesting information related to land application.

Respondents' basis for denying this allegation appears to again be grounded in the mistaken belief that they were not required to respond to the Information Request. Respondents do not assert that EPA did not issue the Information Request, but instead argue that they did not land apply the sludge.[17] As set forth in the Amended Complaint and detailed in Complainant's Prehearing Exchange, on September 25, 2018, EPA issued Respondent Adamas a CWA Section 308, information request for information related to the August 22, 2018, land application of sewage sludge. (CX11). EPA requested information that Respondents were required to develop and maintain in accordance with 40 C.F.R. § 503.17. *Id*. The biosolids program relies heavily on accurate self-monitoring and reporting. This information provided by self-reporting is necessary to carry out the objectives of Section 405 of the CWA.

On October 17, 2018, Respondent Adamas stated that it needed to coordinate with NCUC and requested an extension to respond, which was granted on October 29, 2018. (CX12). On

---

[15] Complainant alleged that Respondents were the operators of the lame deer POTW, a point source as that term is defined in the Clean Water Act. Am. Compl. ¶33.

[16] 33 U.S.C. § 1362(14) ("The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm water discharges and return flows from irrigated agriculture.")

17 Resp. Answer ¶36.

March 4, 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. (CX14). Over the course of the next few months, Complainant continued to request that Respondents comply with the information request and state whether the information required to be kept by the 40 C.F.R. Part 503 was in their possession. *See* CX17, 18, 19, 20, 21.

There is no genuine issue of material fact that EPA issued, and Respondents received the information request.

3. Respondents failed to provide a timely and complete response to EPA's Information Request.

Again, Respondents' basis for denying this allegation appears to be grounded in the mistaken belief that they were not responsible for responding to the Information Request. Respondents do not assert that they did provide a timely and complete response to the Information Request. Instead, Respondents assert that they did not land apply the sewage sludge. Resp. Answer ¶38. The evidence presented in Complainant's Prehearing Exchange demonstrates that Respondents failed to provide a timely and accurate response to the Information Request and Respondents failed to present any information that rebuts the evidence of record or explain its basis for denying this allegation in their Prehearing Exchange.

Respondents refused to provide any information in response to the Information Request until 9 months after the request had been issued. The information that was provided was incomplete despite Respondents having additional responsive information in its possession.

On June 14, 2019, EPA re-issued the March 4, 2019, EPA correspondence to Respondents by electronic mail through the listed counsel. (CX17). On July 2, 2019, nine months after Respondents had received the September 2018 Information Request, Respondents provided an incomplete response to the Information Request. (CX18 and 19). This information had been in Respondents' possession at the time of the September 28, 2018, Information Request, but Respondents had simply refused to provide it.[18] This alone demonstrates that Respondents failed to provide a timely and accurate response to EPA's Information Request over a 9-month period.

In the limited response provided on July 2, 2019, Respondents again failed to include a response that contained the information required by 40 C.F.R. § 503.17(a)(5)(ii). On July 8 and 18, 2019, Complainant again asked Respondents for a response to this particular portion of the CWA Section 308 Information Request. (CX20 and 21). Complainant also pointed out that Respondents could specifically state they did not have the documents and this statement would be responsive to the Information Request. (CX21). Respondents never responded to the emails.

In Respondents' Answer, Respondents state that they provided a copy of target application rates to Tom Robinson. This is another example of information, responsive to the Information Request, that Respondents had in their possession, but simply refused to provide to EPA.[19]

[18] These documents include an Analytical Summary Report of soil and sludge samples for the Lame Deer Sludge Removal Project, dated August 2, 2018, sent to Respondents from Energy Laboratories (CX19 at 12-28) and emails from Adamas to Indian Health Services dated June and July 2018. (CX19 at 28-31).

[19] Mr. Robinson told the IHS inspector that he never received this information. (CX9).

After the Complaint was filed, EPA received additional information from Indian Health Services, the NCUC, and D&R Disposal that contained documents from Respondents that would have been responsive to parts of the Information Request. (CX42, 43, 45-50, and 54-56). The Information Request required Respondents to provide information related to whether the vector attraction reduction requirements were met (CX11, question 5) and specific information related to the land application location site, application rates, dates of application, and whether site restrictions were met. (CX11, question 7).

While it is evident that Respondents failed to maintain all of the records required by 40 Part CFR 503, many of the documents provided by the Indian Health Services including invoices (CX45 at 5), and emails from Respondents to NCUC and the Indian Health Services discussing dewatering calculations, amount of sludge removed and land application methods as well as timelines (CX45 at. 20, 32, 33 and 43) would have partially answered questions 5 and 7 of the CWA Information Request.[20] Respondents, however, refused to provide this information to EPA and have not provided a complete and accurate response to the Information Request.

In their Prehearing Exchange, Respondents readily admit that they willfully did not respond to EPA's Information Request to avoid revealing any additional violations of the Clean Water Act. Resp. Prehearing Exchange at p. 15. There is no genuine issue of material fact that Respondents did not respond to the CWA Section 308 Information Request, which is a violation of the CWA. 33 U.S.C. § 1319. Therefore, Complainant is entitled to accelerated decision pursuant to 40 C.F.R. § 22.20(a).

[20] See CX45

III. RESPONDENTS' DEFENSES

Respondents have not submitted any information into the record that explains the denials of fact set forth in their Answer to the original Complaint.[21] Failure to specifically admit, deny, or explain each of the factual allegation contained in the complaint constitutes an admission of the allegation. 40 C.F.R. §22.15(d). Further, Respondents have not asserted any affirmative defenses. Respondents' defenses seem to focus on the fact that other people are also responsible under the CWA and that Respondents' subcontractors land applied the sludge.

When requesting payment for work Respondents argue they are solely in charge, and in fact, in privity of contract with Indian Health Services, superseding NCUC, but when faced with liability for their actions, Respondents argue that they were not in charge, not involved, and that others should take the blame for their actions. Respondents were in fact paid for the work that they claimed others did.

As described in detail above, there is no genuine issue of material fact that Respondents were the operators of the POTW at all times relevant to this action, Respondents prepared the sludge; Respondents land applied the sludge and directed its application; Respondents failed to develop and maintain records; and Respondents received and did not respond to a lawfully issued CWA Section 308 information request.

IV. CONCLUSION

The CWA requires preparers and land applicators of biosolids material to develop and

21 Docket No. CWA-07-2019-0262, Index #2, (Oct. 16, 2019).

maintain records. The CWA requires owners and operators of point sources to establish and maintain records and provide information to the Administrator upon request. As demonstrated above, Complainant has demonstrated that there is no genuine issue of material fact and Complainant is entitled to judgment as a matter of law. Not only does Complainant's evidence support this conclusion, Respondents have failed to respond to material allegations in the Amended Complaint and failed to put forth any evidence in the record that raises a genuine issue of material fact.

Therefore, EPA respectfully requests the Court grants an Accelerated Decision holding Respondents liable under 33 U.S.C. § 1319 for the following reasons: Respondents failed to develop and maintain records as required by 40 C.F.R. Part 503 and failed to respond to an Information Request issued pursuant to 33 U.S.C. § 1318.

Respectfully submitted,

_____

Sara Hertz Wu
Office of Regional Counsel
Senior Counsel
U.S. Environmental Protection Agency
11201 Renner Boulevard
Lenexa, Kansas 66219
913-551-7316

Elizabeth Huston
Office of Regional Counsel
Senior Counsel
U.S. Environmental Protection Agency
11201 Renner Boulevard

Lenexa, Kansas 66219
913-551-7525

CERTIFICATE OF SERVICE

I certify that the foregoing Complainant's Memorandum and Points of Authority In Support Of Complainant's Motion For Accelerated Decision As To Liability, 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:

chrisjgalluslaw@gmail.com

A copy was sent by email to Nathan Pierce at:

adamas.mt.406@gmail.com.

Date: 5/1/2020

/s Sara Hertz Wu_____
Sara Hertz Wu
Senior Counsel
11201 Renner Boulevard
Lenexa, Kansas 66209
(913) 551-7316 (Telephone)
(913) 551-9525 (Fax)
email: hertzwu.sara@epa.gov