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

IN THE MATTER OF ADAMAS CONSTRUCTION AND DEVELOPMENT SERVICES, PLLC AND NATHAN PIERCE, Respondents	)	**RESPONDENTS' RESPONSE TO COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY AND MEMORANDUM OF LAW** Docket No. CWA-07-2019-0262 Proceedings under Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g)

RESPONDENTS' RESPONSE TO COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY AND MEMORANDUM OF LAW

I. RELIEF REQUESTED

The United States Environmental Protection Agency – Region VII's (the "Complainant") Motion for Accelerated Decision on Liability and Memorandum of Law ("Motion") may only be granted upon a showing of evidence "so strong and persuasive that no reasonable [finder of fact] is free to disregard it." *In re Consumers Scrap Recycling, Inc.*, CAA Appeal No. 02-06, 2004 EPA LEXIS 1 at*40 (EAB 2004). As explained herein by Respondents ADAMAS

CONSTRUCTION AND DEVELOPMENT SERVICES, PLLC AND NATHAN PIERCE (the "Respondents"), the Complainant fails to meet this standard articulated by the Environmental Appeals Board ("EAB"), and its Motion must be denied.

As discussed more fully herein, Complainant has failed to make its required, threshold showing to be entitled to accelerated decision as to liability. Many of Complainant's facts are genuinely disputed by the Respondents or are immaterial to the allegations in the Amended Complaint and the instant Motion.[1] Summary judgment – or here, accelerated decision on liability -- is a drastic remedy, available only where there are no material facts genuinely in dispute and should not be used to short-circuit litigation by deciding disputed facts without permitting parties to reach a trial or a hearing on the merits.

II. PROCEDURAL MATTERS

There are no other motions currently pending, in addition to the Complainant's Motion, currently pending before the Tribunal

Complainant attaches to its Motion statements from, Ernie Sprague, respondent seek to depose Ernie Sprague. Respondents will not restate in this pleading their arguments in support of their motion.

III. LEGAL STANDARD

A. Motions for Accelerated Decision

This proceeding is governed by the Consolidated Rules of Practice Governing the

Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), set forth at 40 C.F.R. Part 22. Section 22.20(a) of the Rules of Practice authorizes the presiding officer to:

> [R]ender 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 [s]he may require, if no genuine issue of material fact exists and a party is entitled to 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 analogous to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP"). *See, e.g., BWX Techs., Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000); *Belmont Plating Works*, Docket No. RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65, at *8 (ALJ, Sept. 11, 2002). Pursuant to Rule 56(a) of the FRCP, a tribunal "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Consequently, federal court rulings on motions for summary judgment provide guidance for adjudicating motions for accelerated decision. *See, e.g., Mayaguez Regional Sewage Treatment Plant*, 4 E.A.D. 772, 780-82 (EAB 1993), *aff'd sub nom., Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir.1994), *cert. denied*, 513 U.S. 1148 (1995). In assessing materiality for summary judgment purposes, the U.S. Supreme Court has held that a factual dispute is material where, under the governing law, it might affect the outcome of the proceeding. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1985). Accordingly, a factual dispute is genuine if a finder of fact could reasonably find in favor of the

non-moving party under the evidentiary standards applicable to the particular proceeding. *Id.* at 248, 252. The Supreme Court has held that the party moving for summary judgment bears the burden of showing that no genuine issue of material fact exists. *Adickes v. S. H. Kress & Co.,* 398 U.S.144, 157 (1970). In considering such a motion, the tribunal must construe the evidentiary material and reasonable inferences drawn therefrom in the light most favorable to the non-moving party.

Summary judgment is inappropriate when contradictory inferences may be drawn from the evidence. *Rogers Corp. v. EPA,* 275 F.3d 1096, 1103 (D.C. Cir. 2002). In support of, or in opposition to, a motion for summary judgment, a party must cite to particular parts of materials in the record, such as documents, affidavits or declarations, and admissions, or show that the materials cited do not establish the absence or presence of a genuine dispute. Fed. R. Civ. P. 56 (c) (1)

The Supreme Court has found that, once the party moving for summary judgment meets its burden of showing the absence of genuine issues of material fact, the non-moving party must present "affirmative evidence" and that it cannot defeat the motion without offering "any significant probative evidence tending to support" its pleadings. *Anderson,* 477 U.S. at 256 (quoting *First Nat'l Bank of Arizona v. Cities Service Co.,* 391 U.S. 253, 290 (1968)). Thus, a party opposing a motion for accelerated decision must produce some evidence that places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing. *See Bickford, Inc.,* EPA Docket No. TSCA-V-C-052-92, 1994 EPA ALJ LEXIS 16, *8 (ALJ, Nov. 28, 1994).

The Supreme Court has noted, however, that there is no requirement that the opposing party produce evidence in a form that would be admissible at trial in order to avoid summary

judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324 (1986). Of course, if the moving party fails to meet its burden to show that it is entitled to summary judgment under established principles, then no defense is required. *Adickes*, 398 U.S. at 156.

In the context of proceedings under the Rules of Practice, "a party responding to a motion for accelerated decision must produce some evidence which places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing." *In re Harpoon*, Docket No. TSCA-05-2002-0004, 2003 EPA ALJ LEXIS 52 (August 4, 2003) citing *In the Matter of Strong Steel Products*, Docket Nos. RCRA-05-2001-0016, CAA-05-2001-0020, and MM-05-2001-0006, at 22-23,2002 EPA ALJ LEXIS 57 (September 9, 2002).

The evidentiary standard of proof in this case, as well as all other cases governed by the Rules of Practice, is a "preponderance of the evidence." 40 C.F.R. § 22.24. In determining whether a genuine factual dispute exists, the presiding officer must consider -- as the finder of fact -- whether he or she could reasonably find for the non-moving party under the "preponderance of the evidence" standard. Accordingly, a party moving for accelerated decision must establish by citing to particular parts of materials in the record that no genuine issues of material fact exist and that it is entitled to judgment as a matter of law by the preponderance of the evidence. On the other hand, a party opposing a properly supported motion for accelerated decision must demonstrate the presence of a genuine issue of material fact by proffering probative evidence from which a reasonable presiding officer could find in that party's favor by a preponderance of the evidence.

A motion for summary judgment puts a party – here, the Complainant -- to its proof as to those claims on which it bears the burdens of production and persuasion. For the complainant to prevail on its motion for accelerated decision where there is an affirmative defense, as to which respondent ultimately bears such burdens, the complainant initially must show that there is an

absence of evidence in the record for the affirmative defense. *Rogers Corp.*, 275 F.3d at1103. If the complainant makes this showing, then respondent as the non-movant bearing the ultimate burden of persuasion on its affirmative defense, must meet its countervailing burden of production by identifying "specific facts" from which a reasonable finder could find in its favor by a preponderance of the evidence. *Id.*

While the Tribunal may look to the record in deciding a motion for accelerated decision, the burden of coming forward with the evidence in support of their respective position's rests squarely upon the litigants. *See Northwestern Nat'l Ins. Co. v. Baltes*, 15 F.3d 660, 662-63 (7th Cir. 1994) (noting that judges "are not archaeologists").

Importantly, even if the finder of fact believes that summary judgment – or here, partial accelerated decision as to liability -- is technically proper upon review of the evidence in a case, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial or the hearing. *See Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979).

B. <u>Motions to Strike or Failure to State a Claim</u>

Section 22.20(a) of the Rules of Practice state:

> The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

40 C.F.R. § 22.20(a).

Motions to dismiss under § 22.20(a) of the Rules of Practice are analogous to motions for

dismissal under Rule 12(b)(6) of the FRCP, and case law interpreting that rule provides guidance in addressing a respondent's motion. *See Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827 (EAB 1993). Under the federal rules, a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

To survive a motion to dismiss, the factual allegations in a complaint must be enough to "state a claim for relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (dismissal for failure to state a claim upon which relief may be granted does not require appearance, beyond a doubt, that plaintiff can prove no set of facts that would entitle it to relief). A claim has "facial plausibility" when the factual allegations "allow the court to draw the reasonable inference that the defendant is liable for the conduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). The "plausibility standard" requires the complaint to present "more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citing *Twombly*, 550 U.S. at 557). The allegations must cross "the line between possibility and plausibility of 'entitlement to relief.'" *Id.*

In determining whether a complaint fails to state a claim, only the facts alleged in the complaint are considered, along with attached documents or matters as to which judicial notice may be taken. *Tellabs, Inc. v. Makar Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). However, the allegations in the complaint are to be taken as true, and all inferences are drawn in favor of the plaintiff. *Liphatech Inc.*, Docket No. FIFRA-05-2010-0016, 2010 EPA ALJ LEXIS 27, at *18 (ALJ, Dec. 29, 2010). *See also Twombly*, 550 U.S. at 555; *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

C. Motion to dismiss for Lack of Subject matter Jurisdiction

33 U.S.C. §1251 et seq. (1972) The Clean Water Act (CWA) establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters. The basis of the CWA was enacted in 1948 and was called the Federal Water Pollution Control Act, but the Act was significantly reorganized and expanded in 1972. "Clean Water Act" became the Act's common name with amendments in 1972.

The Federal Water Pollution Control Act , 33 U.S.C.S. § 1251 et seq., called for a two-phase program to limit discharges of effluents. Direct dischargers of toxic wastes were to comply with the best practicable control technology (BPT) by July 1, 1977. 33 U.S.C.S. §§ 1311(b)(1)(A), 1314(b)(1). Between 1983 and 1987, direct dischargers of toxic wastes were to meet the more stringent standards consistent with the best available technology economically achievable (BAT). 33 U.S.C.S. § 1311(b)(2). The statute also mandated that the **EPA** set effluent limitations for publicly owned treatment works (POTW) engaged in the treatment of municipal sewage or industrial wastewater. 33 U.S.C.S. §§ 1311(b)(1)(B)-(C), 1314(d)(1). Such limitations were to result in equal levels of treatment for all toxic discharges, whether issued directly into navigable waters or channeled by a sewage system through a POTW.

Congress, in the Clean Water Act, explicitly directed the Agencies to protect “navigable waters.”

The phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams," "oceans, rivers, [and] lakes," Webster's New International Dictionary 2882 (2d ed.), and does not include channels through which water

flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The EPA's expansive interpretation of that phrase is thus not "based on a permissible construction of the statute." Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694. Pp. 730-739.

While the meaning of "navigable waters" in the CWA is broader than the traditional definition found in The Daniel Ball, 77 U.S. 557, 10 Wall. 557, 19 L. Ed. 999, see Solid Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159, 167, 121 S. Ct. 675, 148 L. Ed. 2d 576 (SWANCC); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133, 106 S. Ct. 455, 88 L. Ed. 2d 419, the CWA authorizes federal jurisdiction only over "waters."

The use of the definite article "the" and the plural number "waters" show plainly that § 1362(7) does not refer to water in general, but more narrowly to water "[a]s found in streams," "oceans, rivers, [and] lakes," Webster's New International Dictionary 2882 (2d ed.). Those terms all connote relatively permanent bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows. Pp. 730-734. Again, the Clean Water Act authorizes federal jurisdiction only over "waters." *33 U.S.C.S. § 1362(7)*.

The Clean Water Act defines "discharge of a pollutant" as any addition of any pollutant to navigable waters from any point source. 33 U.S.C.S. § 1362(12)(A).

On January 23, 2020, the President of the United states and the U.S. Environmental Protection Agency (EPA) and the Department of the Army (Army) finalized the Navigable Waters Protection Rule to clearly define "waters of the United States" (WOTUS). The EPA as announced by Administrator Andrew Wheeler, made significant changes to the aeras that the act applies to reduced governmental overreach.

EPA Administrator Andrew Wheeler said the administration's Navigable Waters Protection Rule (NWPR), the successor to the Obama-era Waters of the United States (WOTUS) rule, would bring a clear guideline to businesses, landowners, and farmers "to support the economy and accelerate critical infrastructure projects." (SEE Respondents Motion to Dismiss X1 "RMDX1")

As stated by the EPA in its own fact sheet, attached to this response, the following waters/features are not jurisdictional under the rule: Water bodies that are not included in the four categories of "waters of the United States", this distinction will provide clarity that where a water or feature is not identified as jurisdictional in the final rule, **it is not a jurisdictional water under the Clean Water Act**. [emphasis added]

"• Groundwater, including groundwater drained through subsurface drainage systems, such as drains in agricultural lands. • Prior converted cropland retains its longstanding exclusion but is defined for the first time in the final rule. The agencies are clarifying that this exclusion will cease to apply when cropland is abandoned (i.e., not used for, or in support of, agricultural purposes in the immediately preceding five years) and has reverted to wetlands. • Artificially irrigated areas, including fields flooded for agricultural production, that would revert to upland should application of irrigation water to that area cease. • Waste treatment systems have been excluded from the definition of "waters of the United States" since 1979 and will continue to be excluded under the final rule. Waste treatment systems are defined for the first time in this rule. A waste treatment system includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to either convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater or stormwater prior to discharge (or eliminating any such discharge)."

[emphasis added]

Most important to this case that has been Exempt from the NWPR is groundwater, including water through tile lines and other subsurface drainage systems; ephemeral steams, swales, gullies, rills, and pools; many farm and roadside ditches;; artificial lakes and ponds such as farm ponds, irrigation ponds, and livestock watering ponds; groundwater recharge structures.

As the EPA bring this case under the CWA, Congress, and the CWA, explicitly directed the Agencies to protect "navigable waters," and as activity alleged included, Waste Treatment Systems that have been excluded from the definition of "waters of the United States" since 1979, and Groundwater, and Prior converted cropland, and Irrigated areas, and Tribal lands and reservations, that are all excluded from the rule, the government has not shown that the property/feature or activities it says that, Pierce, the defendant/s sub-contracted the property owner Tom Robinsion to work on are jurisdictional under the CWA. As such this case should be dismissed.

The Complainant failed to demonstrate the land or feature possesses a "significant nexus" to waters that are navigable.

In fact the property in question is not located on or near a feature or body of water that meets the definition of waters of the united states and is related to a project involving waste water treatment systems that have been excluded from the definition of "waters of the United States" since 1979 and ground water that is exempt and the property was prior converted cropland, that was artificially being irrigated by a wheel irrigation line, there is no way the CWA, which authorizes federal jurisdiction only over "waters" would apply in this case, again the EPA's expansive interpretation of that phrase is thus not "based on a permissible construction of the statute." Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 843, 104 S. Ct.

2778, 81 L. Ed. 2d 694. Pp. 730-739. the complaint lacks subject matter jurisdiction. As such this case/matter/complaint should be dismissed.

The Complainant also contends that the property "Could" or "might" have been over applied with sewer sludge from Tom Robinson applying the sludge to his own barley field that was irrigated with a wheel line, however they provide no lab or soil tests or analytical data to support such a claim, as such they fail to provide any support for such a claim that can be independent verified and this court lacks jurisdiction to hear such a claim. Furthermore this puts the court in the awkward position of trying to determine "could be" and "maybe" situations, when the burden is on the Complainant to prove their claim beyond a reasonable doubt, without independent verification and laboratory analysis it is impossible for the complainant to prove that Tom Robinson didn't apply anything more than water on his property.

Subject matter jurisdiction may be challenged at any time, and if it is lacking the case must be dismissed. See Fed. R. Civ. P. 12(h)(3). When challenged by a motion under Rule 12(b)(1), the plaintiff has the burden of establishing jurisdiction. Richmond, Fredericksburg & Potomac R.R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991).

IV. STATUTORY AND REGULATORY BACKGROUND

A. Statutory Overview

33 U.S.C. §1251 et seq. (1972) The Clean Water Act (CWA) establishes the basic structure for

regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters. The basis of the CWA was enacted in 1948 and was called the Federal Water Pollution Control Act, but the Act was significantly reorganized and expanded in 1972. "Clean Water Act" became the Act's common name with amendments in 1972.

The Federal Water Pollution Control Act , 33 U.S.C.S. § 1251 et seq., called for a two-phase program to limit discharges of effluents. Direct dischargers of toxic wastes were to comply with the best practicable control technology (BPT) by July 1, 1977. 33 U.S.C.S. §§ 1311(b)(1)(A), 1314(b)(1). Between 1983 and 1987, direct dischargers of toxic wastes were to meet the more stringent standards consistent with the best available technology economically achievable (BAT). 33 U.S.C.S. § 1311(b)(2). The statute also mandated that the **EPA** set effluent limitations for publicly owned treatment works (POTW) engaged in the treatment of municipal sewage or industrial wastewater. 33 U.S.C.S. §§ 1311(b)(1)(B)-(C), 1314(d)(1). Such limitations were to result in equal levels of treatment for all toxic discharges, whether issued directly into navigable waters or channeled by a sewage system through a POTW.

Congress, in the Clean Water Act, explicitly directed the Agencies to protect “navigable waters.” The phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams," "oceans, rivers, [and] lakes," Webster's New International Dictionary 2882 (2d ed.), and does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The EPA’s expansive interpretation of that phrase is thus not "based on a permissible construction of the statute." Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694. Pp. 730-739.

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United States Army Corps of Eng'rs, 531 U.S. 159, 167, 121 S. Ct. 675, 148 L. Ed. 2d 576 (SWANCC); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133, 106 S. Ct. 455, 88 L. Ed. 2d 419, the CWA authorizes federal jurisdiction only over "waters."

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Water Act. [emphasis added]

"• Groundwater, including groundwater drained through subsurface drainage systems, such as drains in agricultural lands. • Prior converted cropland retains its longstanding exclusion but is defined for the first time in the final rule. The agencies are clarifying that this exclusion will cease to apply when cropland is abandoned (i.e., not used for, or in support of, agricultural purposes in the immediately preceding five years) and has reverted to wetlands. • Artificially irrigated areas, including fields flooded for agricultural production, that would revert to upland should application of irrigation water to that area cease. • Waste treatment systems have been excluded from the definition of "waters of the United States" since 1979 and will continue to be excluded under the final rule. Waste treatment systems are defined for the first time in this rule. A waste treatment system includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to either convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater or stormwater prior to discharge (or eliminating any such discharge)." [emphasis added]

V. THE RESPONDENTS

The record in this proceeding shows that Respondent Nathan Pierce is an officer or member-manager of Adamas.

ADAMAS and Mr. Pierce's "business model" is one of a independent contractor or subcontractor who hires sub-contractors with specialty skills to perform work on projects. The common rule is that a general contractor, which hires an independent contractor, will not be

liable for the negligence of an independent sub-contractor. This is because the general contractor generally does not supervise the details of the independent contractor's work and, as a result, is not in a position to prevent the contractor from working in a negligent manner. An exception exists when a general contractor "retains control" over the work efforts of the independent contractor. At no time during this project did Mr. Pierce or ADAMAS "retain control" over the work efforts of the independent contractors, Tom Robinson or Ernie Sprague. In fact NCUC retained control over most of Mr. Pierce's work efforts. The Complainants' own documents, submitted with their Motion, evidences that NCUC had to submit request for payments and change orders on behalf of ADAMAS and Mr. Pierce. The complainant in their complaint states that they received the initial report, when the landowner contacted HIS to complain that the land application of the Sewer sludge was done improperly, what the Complainant intentionally omits is that the "landowner" was Tom Robinson the person who was contract to apply the sludge to his own land. It hard to understand why a person was contracted for and who did actual physical work of the application of sludge to the land and incorporating it into his own lad with his own tractor, would call to complain that he was doing improperly and that the Complainant somehow place blame on the Respondents.

Since the inception of this matter, the Complainant has misunderstood this business model, including its repeated allegations that the Respondents, particularly Mr. Pierce and not NCUC, was the main Contractor for the Sewer lagoon sludge removal project, rather than a sub-contractor. The Respondents have consistently described to the Complainant and provided the Complainant with documentation that Indian Health Services (IHS) Contracted with NCUC and not ADAMAS and IHS even stated in a letter, dated July 12th 2019, to US Senator Steve Daines, (RX18) that the IHS contract for sludge removal, Sewer Camera and cleaning project

and Scattered site project, was with NCUC and ADAMAS did not have privity of contract. Despite making the verbal and implied in fact contracts with ADAMAS the IHS breached these contracts and did not pay ADAMAS. The complainant misleads the court by stating ADAMAS with the main contractor of the 3 above mentioned projects.

The Respondents also have been frustrated by the Complainant's continued failure to recognize and understand that Contractors are not employers and are generally not liable for the action of their subcontractors especially when they are not aware of or were never informed of potential problems surrounding the contract or a subcontractor alleged negligence.

VI. Analysis

Regulators sometimes can carry their zeal too far. That is the situation here where the Complainant has and continues to fail to understand the structure and the operation of Mr. Pierce's businesses and the difference between independent contractors and employers. Instead, the Complainant, throughout this proceeding and in its instant Motion, tries to weave a narrative that is disingenuous and attempts to create a lot of smoke where there is no fire. As set forth below, Respondents assert that genuine disputes as to material facts exist throughout Complainant's Motion. Respondents produce below some evidence that places the Complainant's evidence in question and raises a question of fact for the hearing.

A. Respondent Nathan Pierce is Not an "Operator" of the Sewer at the Lame Deer Facilities

A genuine issue of material fact exists as to whether Respondent Nathan Pierce is or was

an "operator" of the Lame Deer (LD), Montana sewer treatment Facilities, the Complainant attempts to take another "bite" out of the "litigation apple" by continuing to assert erroneously that Mr. Pierce and not NCUC should be found *personally* liable for any of the alleged violations. The Complainant as fails to state a claim for relief that can be granted if Mr. Pierce is found to be personally liable for the alleged violation.

It is NCUC and not the Respondent who is or should be the Respondeat Superior in this matter and in the Complaint because NCUC did at all times, exercised active and pervasive control over the overall operations of the Facilities and maintained the ultimate authority or the right to exercise control over the day-to-day operations of such Facilities, including managing resources and personnel to achieve compliance with EPA regulatory requirements. This control included the termination of the contract with Mr. Pierce and ADAMAS for the project and continued to complete the project after the termination of Mr. Pierce and ADAMAS using the same sub-contractors and equipment that were contracted originally by Mr. Pierce.

NCUC did name Raymond Pine as the Operator for the LD sewer treatment facility before the projects began and failed to enter into a contract with Mr. Pierce to be the operator of the LD facility. Although Mr. Pierce made his application to the state of Montana to become the operator, however he was never given a contract from NCUC to do the work to be an operator. Ms. Bement the general manager of the NCUC did make comments to EPA officials that Mr. Pierce was the operator however the NCUC failed to enter into a contract or employment agreement with ADAMAS or Mr. Pierce and therefor Mr. Pierce was not the operator.

Respondents apologize in advance to the Presiding Officer that Mr. Pierce's status as an "operator" of the LD Sewer Facilities is being argued at this time, rather than being left to development at the hearing. However, because the Complainant takes on the issue in its Motion,

attempting to portray Mr. Pierce as the "Wizard of Oz," the Respondents are compelled to the object and to respond in kind. Those portions of the First Amended Complaint asserting that Mr. Pierce *personally* violated the EPA's regulations are without foundation and should be dismissed as a matter of law. These allegations cannot state a claim upon which relief can be granted, because the Complainant has failed to prove all of the material elements necessary to establish *personal* liability as to Mr. Pierce or ADAMAS.

In the alternative, if it is determined that Complainant has met its burden to plead in the First Amended Complaint all of the elements necessary to establish a prima facie case that Mr. Pierce is *personally* responsible for the alleged violations as an "operator" of the Facilities, then genuine issues of material fact remain and that portion of the Complainant's Motion as to Mr. Pierce should be denied by the Presiding Officer.

Complainant does not allege in its Complaint the predicate facts necessary to reach its bald legal conclusion that Mr. Pierce is an "operator" under MTDEQ's regulations and is *personally* liable for the alleged violations. The Complaint fails to allege the critical elements of their claim.

As set forth more fully above, motions for partial accelerated decision under the Rules of Practice are analogous to motions to dismiss under Rule 12(b)(6) of the FRCP. *See e.g., In re Bug Bam Products, LLC v. Flash Sales, Inc.,* Docket No. FIFRA-09-2009-0013, 210 WL 1816755, at *2 (ALJ, April 23, 2010). Dismissal is warranted for failure to state a claim when the plaintiff fails to lay out allegations respecting all the material elements necessary to sustain recovery under its legal theory. *Id.* (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007).

Allegations that are conclusions of law and unwarranted deductions of fact are not admitted as true. *Id.* (citing *Associated Builders, Inc.*

v. Alabama Power Co., 505 F.2d 97, 100 (5th Cir. 1974)).

In this case, even assuming that all of the allegations in the Complaint are true, such assumed facts still do not establish that Mr. Pierce is *personally* liable. Complainant has not alleged facts sufficient to "pierce the subcontractor or corporate veil" as to Mr. pierce under the MTDEQ's or EPA regulations. Moreover, as in the case of *Southern Timber Prod., Inc. D/B/A Southern Pine Wood Preserving Co., and Brax Batson* ("*Southern Timber II*"), 3 E.A.D. 880 (EAB 1992), the Complainant did not plead any of the factors set forth by the EAB in *Southern Timber II* that rise to the level of "active and pervasive" control by Mr. Pierce personally as opposed to his role as a subcontractor of NCUC. The Complainant merely asserts in its Complaint that Mr. Pierce is an "operator" and then names him in each of alleged violations without setting forth anything further to show how he exercised "active and pervasive control" of the LD sewer Facilities in his personal, rather than subcontractor or as a corporate officer, capacity. This leaves it up to the Respondents and the Presiding Officer to make unnecessary deductions of fact from the Complaint.

Complainant does not allege in its Complaint sufficient facts to establish its legal conclusions as to Mr. Pierce. Complainant could have, but did not, more carefully draft its Complaint. Absent these predicate facts, the Complaint fails to plead the elements necessary to obtain relief as to Mr. Pierce. Therefore, Complainant has not met its burden to plead a prima facie case with respect to Mr. Pierce as an "operator" of the LD sewer Facilities under MTDEQ's or EPA regulations and, therefore, has failed to state a claim with respect to Mr. Pierce's *personal* liability for the alleged violations.

At no time was Mr. Pierce personally liable as an "operator" because he did not:

> [E]xercised active and pervasive control over the overall operation of the Facilities and maintained the ultimate authority or the right to exercise control over the day-to-day operations of such Facilities, including managing resources and personnel to achieve compliance with MTDEQ regulatory requirements.

The Respondents do not want to engage in an extended law school colloquy with the Complainant over the difference between a contractor and employer or a subcontractor and employee. However, in a contractor/subcontractor environment, Contractors are expected to use appropriate care and diligence when acting on behalf of the person/s or companies contracting them, however they are generally not liable for the action or alleged violation of their subcontractor when the issue of violation was not brought to the Contractor attention in a timely manner to allow them to attempt to remedy the deficiency. Further, under the "business judgment rule," a corporate officer may not held liable for business decisions made in good faith and with reasonable care that turn out to harm the corporation's interests. As Mr. Pierce is an officer of ADAMAS he too should also be afforded these same protections. Typically, the courts will defer to erroneous business judgments, provided that the officers or directors did not show gross negligence in their review and decision- making process. Without the business judgment rule in place, many individuals would be unwilling to serve as officers and directors, and individuals, such as Mr. Pierce, might be reluctant to take commercial risks as small businesses.

In this case, despite the necessary detailed textual and factual evaluation of the underlying MTDEQ and EPA regulations, the Complainant essentially wants the Tribunal to impose strict liability on Mr. Pierce as a corporate officer based on essentially ad hoc judicial assessments of how blameworthy he should be for having subcontracted other individuals or

companies that were neglectful in allowing the alleged violations, if proven, to occur. This appears to be the same criteria used by the Complainant in its exercise of prosecutorial discretion at the outset of this case. At both stages, there is a real peril, not to mention a lack of inherent stability and predictability, in this kind of regime particularly for those that are small businesses with limited resources.

MTDEQ's regulations define "operator" to mean "the person in direct responsible charge of the operation of a water treatment plant, water distribution system, or wastewater treatment plant." MCA § 37-42-102.

As in *Southern Timber II,* where the EAB conducted a review of the case law, considered a host of factors, and concluded that "operator" status could be found where an officer exercises "active and pervasive control over the overall operation of the facility." *Southern Timber II* at 895-96 (citing cases).

Here, Complainant must establish that Mr. Pierce is an *operator* of the *LD sewer facility*, before individual liability for the alleged violations in the Complaint can attach to him.[7] However, in relying on *Southern Timber II,* a condition precedent is for the Complainant first to establish the entire universe of "operational" duties and activities associated with the Project under the MTDEQ or EPA regulations in order to know whether the fraction attributed to Mr. Pierce as a corporate officer is large enough to be considered "active and pervasive control over the overall operation" at the Facilities. *In the Matter of Carbon Injection Systems, et al.,* Docket No. RCRA-05-2011-009, at 30 (currently on appeal to the EAB on other grounds). Complainant in its Motion wholly fails to "inventory" such "operational duties" associated with the Project or operator duties at the Facilities and then apply them to Mr. Pierce. In fact at all times relevant to the contract NCUC and Sheri Bement exercises "active and pervasive control over the overall

operation of the facility." To include termination of the contract with ADAMAS and denying them access to the site to recover equipment.

This issue simply requires further development at the hearing. MTDEQ's definition of "operator" includes the phrase "direct responsible charge of the operation" Although MTDEQ's regulations implies at least some *continuous* level of activity as opposed to some other irregular or infrequent action with respect to the LD Sewer Facilities.

It is well established that to determine the common meaning of a term, a court may utilize its own understanding of the term, as well as dictionaries and scientific authorities. *See, e.g. Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1352 (Fed. Cir. 2002) ("To determine a term's common meaning, a court may consult 'dictionaries, scientific authorities, and other reliable information sources.'").

As found in, *Shell Oil Co. v. Meyer,* 705 N.E. 2d 962 (Ind. 1998) for the proposition that there can be more than one "operator," with one person "controlling" the day-to-day activities associated with the Sewer Treatment Facilities and another person "responsible" for those activities. The court in Meyer did consult dictionary definitions in reaching is findings. However, *Meyer* is distinguishable from this proceeding. In *Meyer,* the question was whether two major oil companies – Shell Oil and Union 76 – were "operators" under Indiana's UST regulations. *Meyer* did not turn on the question of whether the "corporate veil" would be pierced to hold a corporate officer of those companies personally liable as someone who "controls" or who is "responsible" for the daily operation of the USTs.

Ultimately, the question before the Tribunal as to whether Mr. Pierce is liable individually as an "operator" turns on (1) what constituted the daily operation of the LD sewer

Facilities; (2) who did these things, (3) in what capacity was that person acting, and (4) who is responsible for that person's actions in that capacity. Simply, while Mr. Pierce, as an officer for the Respondents ADAMAS, retained the practical ability (and legal obligation) to determine how the Facilities were and are operated, the issue here is whether Mr. Pierce had the requisite contact with the "daily operation" at the Facilities to support personal liability under the Complaint. Complainant simply has failed to meet its burden in its Motion.

Genuine disputes as to material facts as to Mr. Pierce include:

(1) The Respondents' use of another company or sub-contractor. Notwithstanding Respondents' objection as to relevance, Complainant fails to connect how the use of subcontractors and working as a subcontractor for NCUC demonstrates that Mr. Pierce *personally* exercised active and pervasive control over the LD Sewer Facilities.

(2) NCUC and not Mr. Pierce *personally* retained authority for overseeing the projects described and was the main contractor that had the ultimate responsibility and record management responsibility for environmental compliance at all the Facilities.

The documents and evidence cited by the Complainant do not support its assertion that Mr. Pierce personally exercised active and pervasive control at the LD Sewer facilities. In fact, the evidence cited by the Complainant shows just the opposite, the emails sent from IHS to NCUC detail NCUC's responsibilities under the contract and continually refer to ADAMAS and Mr. Pierce as the subcontractor. As evidenced by the pre-construction meeting minutes, (RX2) IHS stated, NCUC was responsible for the Sludge Removal work and that IHS did not have a contractual relationship with ADAMAS.

(3) IHS and NCUC made several implied in fact contracts with Mr. Pierce and Adamas, with respect to the contracts referenced by the complainant in their motion, however NCUC and IHS breached those contracts on several occasion. The Respondent was never allowed to start the Sewer Camera and Cleaning project and was never paid for any work related to that project. As evidenced by the email exchanges cited as evidence by the Complainant in their complaint (CX49), the Scattered Sites project was taken over by NCUC and Adamas did not work on those projects and was never paid for those projects, the Complainant is intentionally misleading the court to draft a false narrative not supported by evidence or is omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement. The respondent asks the court to pay special attention to this, as the Complainant attempted to accuse the respondent of make misleading statements, when the Respondent innocently misstated in a filing that, "Tom Robinson still wanted the Job" rather than "still wanted the sludge", and made the court aware of the penalty for making false or misleading statements.

B. A Genuine Dispute of Material Fact Exists as to Whether Mr. Pierce or ADAMAS applied sewer sludge to land

Respondents do not concede that they applied or directed the application of sludge. The respondent subcontract Tom Robinson to do the land application portion of the contract as evidenced in the Respondents exhibited (RX5).

A genuine dispute of material fact exists because 40 CFR § 503.11(h), clearly defines

Land application as, “the spraying or spreading of sewage sludge onto the land surface; the injection of sewage sludge below the land surface; or the incorporation of sewage sludge into the soil so that the sewage sludge can either condition the soil or fertilize crops or vegetation grown in the soil”.

At all times relevant to the contract Tom Robinson and Ernie Sprague are the people who physically did the land application and not ADAMAS or Nathan Pierce. The Respondent did not have the equipment or manpower to apply the sewer sludge to the land that is why they subcontracted those responsibilities to other persons. From a practical and legal standpoint, Tom Robinson and Ernie Sprague, rather than the Respondents were the only ones in a position to develop and maintain the records required by 40 C.F.R. § 503.17 as they were the persons who did the work of spraying or spreading of sewage sludge onto the land surface and Tom Robinson used his tractor for the incorporation of sewage sludge into the soil so that the sewage sludge can either condition the soil or fertilize crops or vegetation grown in the soil. The courts should reject the Complainant’s motions and it the very least this issue should be developed further at the hearing.

C. Genuine Disputes of Material Fact Exist That Respondents Failed to Provide a response for information

The Complainant at all times relevant to these proceeding and in their request for information from the respondent, made the request for records related to the land application of sewer sludge, at no time did the complainant request from the respondent for documents or record related to the preparation of sewer sludge. The complaint in their complaint does not mention or evidence any request for information related to sludge preparation, however in their motion the Complainant attempts to confuse these issues and the court should reject such

attempts to “change” the main issues at question by the complainant.

The Complainant, until pointed out by the Respondents at the settlement conference, misunderstood and continues to maintain that Mr. Pierce did not respond to request for information from EPA, despite Mr. Pierce pointing out his attorney did respond to EPA region VII, and Complainant said they would look into it as the Complainant was unaware of the letter before filing their complaint. The Complainant then contorts and distorts the operations of the LD Sewer operations and Mr. Pierce’s status as a subcontractor and the LD Sewer Operator in its Motion to cover its pleading defects in the Complaint.

Respondents dispute whether they have failed to provide a complete response. When the EPA sent their request for information to ADAMAS and Mr. Pierce, the respondent sent a response informing the EPA that NCUC was the main contractor and where the EPA could find the information they requested. When the respondents were told by EPA that NCUC failed to get provide them with the records or the EPA failed to contact them with request for information, the respondent sent all the information they had available including lab tests, (RX 4), contracts, emails and other documentation. As evidenced in the contract between Tom Robinson and ADAMAS and cited by the complainant, Tom Robinson agreed to provide ADAMAS with the necessary records and logs required by EPA regulations, as Tom Robinson was person along with Ernie Sprague who physically did the land application of the sewer sludge using their own equipment and resources.

40 CFR § 503.17 - Recordkeeping (ii), clearly states, “**The person** who applies the bulk sewage sludge shall develop the following information and shall retain the information for five years”. 40 CFR § 503.11(h), clearly defines Land application as, “the spraying or spreading of sewage sludge onto the land surface; the injection of sewage sludge below the land surface; or

the incorporation of sewage sludge into the soil so that the sewage sludge can either condition the soil or fertilize crops or vegetation grown in the soil".

At all times relevant to the contract Tom Robinson and Ernie Sprague are the people who physically did the land application and not ADAMAS or Nathan Pierce. The Respondent did not have the equipment or manpower to apply the sewer sludge to the land that is why they subcontracted those responsibilities to other persons. From a practical a legal standpoint, Tom Robinson and Ernie Sprague, rather than the Respondents were the only ones in a position to develop and maintain the records required by 40 C.F.R. § 503.17 as they were the persons who did the work of spraying or spreading of sewage sludge onto the land surface and Tom Robinson used his tractor for the incorporation of sewage sludge into the soil so that the sewage sludge can either condition the soil or fertilize crops or vegetation grown in the soil.

The Complainant just recently submitted new evidence and statements from Ernie Sprague and Tom Robinson and the Respondents request the opportunity to depose them both. Complainant intends to call Ernie Sprague and Tom Robinson to testify at the hearing. The Presiding Officer should deny the Complainant's Motion in order for the issue to be more fully developed at the hearing.

D. The Complainant Has Failed to Show the Absence of Evidence in its Motion for the Affirmative Defenses Asserted or Can be Asserted by the Respondents

The Complainant has failed to show in its Motion that there is an absence of evidence in the record for affirmative defenses. *Rogers Corp.*, 275 F.3d at1103. If the Complainant made

this requisite showing, then Respondents as the non-movants bear the ultimate burden of persuasion on its affirmative defense, must meet its countervailing burden of production by identifying "specific facts" from which a reasonable finder could find in their favor by a preponderance of the evidence. *Id.* Because the Complainant has not met its burden in the Motion, Respondents' affirmative defenses must be left undisturbed for the hearing.

VII. CONCLUSION

For the foregoing reasons, Complainant's Motion should be denied. Issues of liability require hearing and resolution by the Presiding Officer. Even if liability is decided on an accelerated basis for some or all of the counts in the Complaint, the amount of any civil penalty must be resolved by the hearing as opposed to a motion for accelerated decision. *See In re John A. Biewer Co. of Toledo, Inc*., RCRA (3008) Appeal Nos. 10-01 & 10- 02,2013 EPA App. LEXIS 13 at *15 (EAB 2013) (accelerated decision not appropriate as to amount of penalty where disputes of fact remained).

RESPECTFULLY SUBMITTED this 28th day of May 2020.

/s/ Nathan Pierce
Nathan Pierce
Respondent
16550 Cottontail TR
Shepherd, Montana 59079
Email: adams.mt.406@gmail.com

CERTIFICATE OF SERVICE

I certify that the foregoing Respondent's **RESPONSE TO COMPLAINANT'S**

MOTION FOR ACCELERATED DECISION ON LIABILITY AND MEMORANDUM OF LAW, 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 Complainant:
Sara Hertz Wu, Senior Counsel
Elizabeth Huston, Senior Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219
Email: hertzwu.sara@epa.gov
Telephone: (913) 551-7316

/s/ Nathan Pierce
Nathan Pierce
Respondent
16550 Cottontail TR
Shepherd, Montana 59079
Email: adams.mt.406@gmail.com