UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
ADAMAS CONSTRUCTION AND DEVELOPMENT SERVICES, PLLC	)	**COMPLAINANT'S INITIAL POST-HEARING BRIEF**
	)	
	)	
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)	)	

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INTRODUCTION

Pursuant to 40 C.F.R. § 22.26 and the Presiding Officer's September 21, 2023 Order Scheduling Post-Hearing Submissions, the U.S. Environmental Protection Agency Region 7 (EPA) submits the following Post-Hearing Brief. For the reasons set out below, and based upon the evidence in the record and the testimony presented at hearing, the Court should find Respondents liable for: (I) failing to develop and maintain records as required by 40 C.F.R. § 503.17; and (II) failing to respond to an Information Request issued pursuant to 33 U.S.C. § 1318. Therefore, Respondents should be found liable under 33 U.S.C. § 1319. EPA proposes that a $59,583 penalty be assessed.

SUMMARY OF ARGUMENT

For Count I, the evidence establishes beyond a preponderance that (1) Respondents were "persons," (2) the sewage sludge was classified as Class B bulk sewage sludge, (3) the sewage sludge met the requirements of 40 C.F.R. § 503.13(b)(3), (4) the subject land was agricultural land, (5) Respondents prepared the sewage sludge, (6) Respondents applied the sewage sludge, and (7) Respondents failed to develop and retain the information identified in 40 C.F.R. § 503.17(a)(4).

For Count II, the evidence establishes beyond a preponderance that (1) Respondents were operators, (2) Respondents operated a point source, (3) as operators of a point source, Respondents were required to respond to a Clean Water Act (CWA) Section 308, 33 U.S.C. § 1318, Information Request, and (4) Respondents failed to respond to a CWA Section 308 Information Request issued by the EPA.

In summary, Respondent Nathan Pierce (Respondent Pierce) was the responsible corporate officer of Respondent Adamas Construction and Development Services, PLLC

(Respondent Adamas). Respondents engaged in operating the Lame Deer Publicly Owned Treatment Works (POTW), displaying knowledge and leadership at the facility to representatives of the EPA, Indian Health Service (IHS), and the Northern Cheyenne Utilities Commission (NCUC). Among numerous operator duties performed at the POTW, Respondents engaged in a project, funded by IHS, to prepare and remove sewage sludge from and install new technology in the Lame Deer POTW lagoon. Respondents arranged for that sewage sludge to be transported and land applied to an agricultural field farmed by Tom Robinson.

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 CWA regulations. Respondents assert that hiring subcontractors to assist in the work absolves Respondents of any responsibility to follow federal law. However, 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.[1] Respondents have not and cannot deny that they and their subcontractors (1) prepared and (2) land applied the sewage sludge from the Lame Deer POTW, making themselves subject to biosolids recordkeeping requirements. The regulations at 40 C.F.R. Part 503 are self-implementing, meaning those subject to its requirements are expected to comply with the requirements in the absence of direct EPA oversight. To aid in self-implementation and assist EPA oversight, regulated persons are required to develop and retain records. To enforce the Part 503 requirements, the EPA has the authority to request these records from preparers and appliers of sewage sludge. Without the ability to review such records, the EPA cannot ensure compliance or

[1] *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).

address harm from noncompliance. In this case, the EPA requested information and records, and has never received an adequate response to its request.

Respondents do not assert that EPA failed to issue the Information Request, that they did not receive the Information Request, or that Respondents provided a timely and accurate response to the Information Request. Respondents' Answer to Second Amended Complaint and Request for Hearing ¶ 43. Instead, Respondents' defense is grounded in the argument that they 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 CWA. 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 has shown by a preponderance of the evidence that Respondents are liable for the aforementioned violations and a penalty should therefore be assessed against them.

STATEMENT OF CASE

I. STATUTORY AND REGULATORY FRAMEWORK

The Clean Water Act, 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 CWA provides that "Except 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). Discharges of pollutants are allowed under the authority of a permit issued under the National Pollutant Discharge Elimination System (NPDES). 33 U.S.C. § 1342.

"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)(l) of the CWA, 33 U.S.C. § 1345(d)(l), provides that the EPA shall develop and publish regulations providing guidelines for the disposal of sludge and the utilization of sludge for various purposes. Pursuant to Section 405(d)(l) of the CWA, the EPA promulgated regulations governing the Standards for the Use or Disposal of Sewage Sludge which are set forth at 40 C.F.R. Part 503. These regulations establish recordkeeping and reporting requirements, pollutant limits, and site management practices applicable to any person who prepares sewage sludge or applies sewage sludge to the land. *See* 40 C.F.R. Part 503. 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 Northern Cheyenne Indian Tribe has not applied for or obtained primary authority to administer and enforce the sludge management program on its reservation pursuant to Sections 402(b) or 405(c) of the CWA, 33 U.S.C. §§ 1342(b) or 1345(c), and 40 C.F.R. Part 503. The EPA directly implements the sludge management program on the Northern Cheyenne Indian Reservation.

Pursuant to 40 C.F.R. § 503.7, any person who prepares sewage sludge shall ensure that the applicable requirements are met when the sewage sludge is applied to the land, placed on a surface disposal site, or fired in a sewage sludge incinerator. 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.l0(a).

Pursuant to 40 C.F.R. § 503.17(a)(4), if the pollutant concentrations in 40 C.F.R. § 503.13(b)(3) and the Class B pathogen requirements in 40 C.F.R. § 503.32(b) are met when bulk sewage sludge is applied to agricultural land, forest, a public contact site, or a reclamation site, the person who prepares the bulk sewage sludge and the person who applies the bulk sewage sludge must develop and retain for five years certain information listed in 40 C.F.R. § 503.17(a)(4). Agricultural land is defined as “land on which a food crop, a feed crop, or a fiber crop is grown. This includes range land and land used as pasture.” 40 C.F.R. § 503.11(a).

Pursuant to 40 C.F.R. § 503.9(w), "sewage sludge" is solid, semi-solid, or liquid residue generated during the treatment of domestic sewage in a treatment works. “Bulk sewage sludge” is sewage sludge that is not sold or given away in a bag or other container for application to the land. 40 C.F.R. § 503.11(e). Pursuant 40 C.F.R. §503.9(z), "treatment of sewage sludge" is the preparation of sewage sludge for final use or disposal. Class B sewage sludge is defined as

having the geometric density of fecal coliform less than 2,000,000 Most Probable Number (MPN) per gram of total solids (dry weight basis) or 2,000,000 Colony Forming Units per gram of total solids (dry weight basis). 40 C.F.R. § 503.32(b)(2)(ii).

The phrase “person who prepares sewage sludge” means “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(r). The phrase "apply sewage sludge” or “sewage sludge applied to land" means land application of sewage sludge. 40 C.F.R. § 503.9(a). Pursuant to 40 C.F.R. § 503.11(h), "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.

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 . . . .”

The CWA defines an operator as any person who owns, leases, operates, controls, or supervises a source. 33 U.S.C. § 1316(a)(4). The regulations promulgated under the CWA at 40 C.F.R. § 122.2 define “owner or operator” as “the owner or operator of any ‘facility or activity’ subject to regulation under the NPDES program.” Section 309 of the CWA, 33 U.S.C. § 1319, authorizes administrative, civil, and criminal penalties for violations of §§ 1345 and 1318.

II. PROCEDURAL BACKGROUND

On September 6, 2019, the EPA filed an administrative Complaint against Respondents alleging (1) a failure to develop and maintain records regarding the preparation and application of biosolids, and (2) a failure to respond to an information request. Respondents filed an Answer to the first Complaint on October 16, 2019. The EPA filed a First Amended Complaint on January 2, 2020 and filed a Second Amended Complaint on August 4, 2022. Respondents filed an Answer to the Second Amended Complaint on August 24, 2022.

On November 26, 2019, the EPA filed its Initial Prehearing Exchange. Respondents filed their Initial Prehearing Exchange on January 27, 2020. The EPA filed a Rebuttal Prehearing Exchange on April 3, 2020 and filed supplements to its Prehearing Exchange on October 26, 2020 and June 24, 2022. The EPA filed a Motion for Accelerated Decision on May 1, 2020, and this Court issued an Order on Complainant's Motion for Accelerated Decision and Respondents' Requests for Dismissal and Additional Discovery (Order on AD), dated April 20, 2022.

The hearing in this matter was held on August 22 and 23, 2023. Following the hearing, the Presiding Officer established a schedule for the parties to submit their initial and reply briefs, beginning with Complainant's Post-Hearing Brief to be submitted by November 3, 2023.

III. BURDEN OF PROOF

Under the Rules of Practice, the EPA has the burden of establishing that the violation occurred as set forth in the Complaint and that the relief sought is appropriate. Courts have held that the EPA has the burden of showing that the violation occurred. *In re City of Marshall*, 10 E.A.D. 173, 180 (EAB 2001). Once the EPA establishes a prima facie case, the burden shifts to respondent to present affirmative defenses or additional evidence with respect to the appropriate relief. *Id*. Under the Rules of Practice, 40 C.F.R. § 22.24(b), each relevant fact must be decided

by the Presiding Officer based upon a preponderance of the evidence. Under a preponderance of the evidence standard, the evidence is evaluated to determine its weight and persuasiveness. The proponent must show that, considering the evidence as a whole, the fact sought to be proven is more probable than not.

According to this Court's Order on AD, for Count 1, Complainant has the burden of proving: (1) Respondents were "persons," as that term is defined by 33 U.S.C. § 1362(5) and 40 C.F.R. § 503.9(q); (2) Respondents "applied sewage sludge," as that phrase is defined by 40 C.F.R. §§ 503.9(a) and 503.11(h); (3) the sewage sludge was classified as "Class B sewage sludge" by virtue of meeting the requirements set forth in 40 C.F.R. § 503.32(b)(2)(ii); (4) the requirements of 40 C.F.R. § 503.13(b)(3)[2] were met when the sewage sludge was applied to the land in or near Lame Deer, Montana; (5) the subject land was "agricultural land," "forest," "a public contact site," or "a reclamation site," as those terms are defined in 40 C.F.R. § 503.11; and (6) Respondents failed to develop and retain the information identified in 40 C.F.R. § 503.17(a)(5)(ii). Order on AD at 26. Complainant also asserted in its Complaint that Respondents prepared the sewage sludge and therefore has the burden of proving Respondents were preparers pursuant to 40 C.F.R. § 503.17(a)(4)(i). Complaint ¶ 47.

The Order on AD also set forth the elements for a prima facie case for Count 2. Complainant must demonstrate: (1) Respondents were owners or operators of the Lame Deer POTW; (2) the Lame Deer POTW was a "point source" as that term is defined by 33 U.S.C. § 1362(14); (3) the EPA requested that Respondents provide certain information pursuant to Section 308 of the CWA, 33 U.S.C. § 1318(a); and (4) Respondents failed to provide such information. Order on AD at 26.

[2] Although this Court's Order on AD cited 40 C.F.R. § 503.13(a)(2)(i), Complainant later amended its Complaint on August 4, 2022 to correct the regulatory citation to 40 C.F.R. § 503.13(b)(3).

Based upon the evidence in the record, the EPA has established the prima facie elements of both Count 1 and Count 2. Respondents were both legal persons at the time of the events giving rise to the present case. Respondents' communications and witness testimony show that Respondents actuated and directed the preparation and application project from the outset, preparing the sewage sludge and hiring subcontractor(s) to aid in the preparation. Communications and testimony also show that Respondents continued to retain control of the project, spearheading the land application portion of the project and hiring subcontractors to assist in project completion. Additionally, testimony and documentary evidence show that the sewage sludge applied by Respondents was Class B due to the source of the sludge and the manner in which it was prepared. The sewage sludge also met the requirements of 40 C.F.R. § 503.13(b)(3) based on the lab results obtained by Respondents. Documents and testimony also show that the land to which the sewage sludge was applied was agricultural land, specifically crop land, at the time of application. Lastly, Respondents failed to proffer to the EPA or this Court, or demonstrate any possession of, the requisite records pursuant to 40 C.F.R. § 503.17(a)(4).

ARGUMENT

I. RESPONDENT NATHAN PIERCE WAS THE RESPONSIBLE CORPORATE OFFICER FOR RESPONDENT ADAMAS CONSTRUCTION & DEVELOPMENT SERVICES, PLLC AND IS INDIVIDUALLY LIABLE UNDER THE CLEAN WATER ACT.

Respondent Pierce was and is the responsible corporate officer (RCO) of Respondent Adamas and therefore is individually liable under the CWA. 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 also 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.

This Court held that it was an undisputed fact that "Respondent Pierce controlled the activities of Respondent Adamas at all times relevant to this action." Order on AD at 11. This Court also held as undisputed that "At all times relevant to this action, Respondent Pierce held himself out to the EPA and Indian Health Service ('IHS') as the primary contact of Respondent Adamas for environmental compliance," and "At all times relevant to this action, Respondent Pierce managed, directed, or made decisions about environmental compliance for Respondent Adamas." Order on AD at 11. As this brief will describe in later sections, Respondent Pierce had the authority to exercise control over Respondent Adamas's activities that led to both (1) a failure to respond to a CWA Section 308 Information Request, and (2) a failure to develop or retain records for the preparation and application project Respondents spearheaded.

II. RESPONDENTS ARE PERSONS WHO PREPARED AND APPLIED BULK SEWAGE SLUDGE THAT MET THE POLLUTANT CONCENTRATIONS IN 40 C.F.R. § 503.13(b)(3) AND THE CLASS B PATHOGEN REQUIREMENTS IN 40 C.F.R. § 503.32(b) TO AGRICULTURAL LAND AND FAILED TO DEVELOP AND RETAIN REQUIRED RECORDS PURSUANT TO 40 C.F.R. § 503.17(a)(4).

A. Respondents were "persons."

Pursuant to Section 502(5) of the CWA, "person" is defined as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state, or any interstate body." 33 U.S.C. § 1362(5). In its first Answer, Respondent Adamas and Respondent Pierce admitted they are "persons" as defined by Section 502(5) of the CWA. Respondents' Answer and Request for Hearing ¶¶ 24, 26. However, Respondent Adamas denied that it was a person in its Answer to Second Amended Complaint and Request for Hearing on the grounds that "Adamas Construction and Development Services was involuntarily dissolved and is no longer in existence and therefore cannot be and does not meet the definition of 'person.'" ¶ 27. However, Respondent Pierce, as an individual, continued to exist and represent both himself and Respondent Adamas after Respondent Adamas's dissolution. *See* CX45 at 13 (Respondents' counsel refers to "my clients"); CX43 at 133 (September 2019 contract between Respondent Adamas and the NCUC, with two signature lines for Respondent Pierce); CX49 at 8 (letter to Senator Steve Daines on behalf of Respondent Adamas and himself).

Respondent Nathan Pierce, as an individual, is a person under the CWA. Respondent Adamas Construction and Development Services, PLLC was a limited liability company that was involuntarily dissolved by the state of Montana on December 1, 2018.[3] Respondent Adamas was formed on September 12, 2016, and remained an active professional limited liability company throughout 2017 and most of 2018, which was for the duration of the events that gave

[3] https://biz.sosmt.gov/search/business

rise to this case. Therefore, Respondent Adamas was a "person" at all relevant times for this case.

B. The sewage sludge was Class B bulk sewage sludge.

The sewage sludge prepared and applied by Respondents was "bulk sewage sludge," as that term is defined in 40 C.F.R. § 503.11(e). EPA's Erin Kleffner testified that it is usual in sewage sludge preparation and application for a relatively large amount of biosolids to be handled in bulk. TR177-78: 20-21. The sewage sludge in this case was prepared in bulk and hauled in bulk. It was at no time sequestered in a bag or other container, and there is no evidence in the record to indicate the sewage sludge was bagged or containerized. This Court found it was an undisputed fact that the amount of sewage sludge prepared and applied was approximately 1 million gallons. Order on AD at 11. Therefore, it was bulk sewage sludge.

According to "A Guide for Land Appliers on the Requirements of the Federal Standards for the Use or Disposal of Sewage Sludge, 40 CFR Part 503,"

> "The Part 503 regulation contains two classes of pathogen reduction: Class A and Class B. Class A pathogen reduction alternatives render the sewage sludge virtually pathogen free after treatment. Class B pathogen reduction alternatives significantly reduce but do not eliminate all pathogens. Land appliers who apply sewage sludge that is certified by the preparer as Class A have no requirements relative to pathogens. If the sewage sludge is Class B, site restrictions must be imposed to allow time for natural processes to further reduce pathogen levels.

CX35 at 27. At hearing, Ms. Kleffner testified, "there's two different types of biosolids. There's Class A and Class B." TR176: 9-10. She specified, "in order to meet Class A, there's two requirements. You must both pass the pathogen test, which has 1,000 NPN dry weight basis limit. And then in addition to that, you also need to process the biosolids within a very specific set of requirements within Part 503. So both of those requirements are required to meet Class A."

The specific requirements for sewage sludge to meet Class A classification can be found at 40 C.F.R. § 503.32(a).

Alternatively, sewage sludge can be classified as Class B. There are three ways to determine if sewage sludge can be classified as Class B. 40 C.F.R. § 503.32(b). First, a geometric mean of seven samples can be taken, and the pathogen concentrations must meet a certain amount. Second, the sewage sludge can be treated with one of the Processes to Significantly Reduce Pathogens, described in Appendix B. Lastly, the sewage sludge can be treated in a process equivalent to one of the Processes to Significantly Reduce Pathogens, as determined by the permitting authority. Ms. Kleffner also testified Class B sludge has to meet less requirements than Class A sludge. TR176-77: 8-12. She testified, "Class B is a little less stringent. . . . Class B can either be determined through sampling, which is what most facilities do. It's a lot easier than trying to meet the other half, which would have been through a treatment regime." TR176-77: 18-11.

Respondents argued in their correspondence with the EPA that the sewage sludge was "exceptional quality" (EQ) sludge and was therefore exempt from any recordkeeping requirements. CX17 at 2. According to "A Guide for Land Appliers on the Requirements of the Federal Standards for the Use or Disposal of Sewage Sludge, 40 CFR Part 503, "sewage sludge that meets the most stringent limits for pollutants, pathogens, and attractiveness is EQ sludge." CX35 at 12. EQ sludge must meet the pollutant ceiling concentrations of 40 C.F.R. §§ 503.13(b)(1) and 503.13(b)(3), one of the pathogen reduction alternatives of 503.32(a), and one of the vector attraction reduction (VAR) options of 40 C.F.R. § 503.33(b)(1)-(8). CX32 at 12.

In this case, there is no evidence the sewage sludge underwent any pathogen treatment process. However, only one sample was taken from the sewage sludge. CX6. Ms. Kleffner, in

her testimony, acknowledged that only one sample was taken, but testified that "based on my best professional judgment and the sample results, I think it was somewhere around 28,000 for fecal coliform. That would make it Class B biosolids." TR177: 3-6. Ms. Kleffner also concluded, "based on the lab results that we received from Mr. Pierce, it would not meet Class A." TR176: 19-20. In order to meet Class A qualifications, it must be demonstrated that the biosolids are processed according to one of the regimes listed under 40 C.F.R. 503.32(a) *and* meet the 1,000 MPN (dry weight basis) for fecal coliform or 3 MPN/4g of Salmonella requirement. According to the submitted lab results, the biosolids were sampled for fecal coliform and were over the 1,000 MPN (dry weight basis) limit and no information was provided or is in the record to show that biosolids were processed in a manner that would meet the Class A requirements. CX6. In addition, the biosolids incorporation that was selected by Respondents was selected to achieve VAR for Class B sludge, and therefore would not have been stringent enough to meet the VAR for EQ anyway. Ultimately, she determined the sewage sludge was "Class B based on the lab results that were initially submitted to us." TR177: 11-12.

C. The sewage sludge met the concentrations in 40 C.F.R. § 503.13(b)(3).

The sewage sludge prepared and applied by Respondents met the concentrations in 40 C.F.R. § 503.13(b)(3) based on the lab results obtained by Respondents. 40 C.F.R. § 503.17(a)(4) applies if the pollutant concentrations in 40 C.F.R. § 503.13(b)(3) are met. 40 C.F.R. § 503.13(b)(3) contains Table 3, and 40 C.F.R. § 503.13(a)(2)(i) states, "the concentration of each pollutant in the sewage sludge shall not exceed the concentration for the pollutant in Table 3 of § 503.13." Table 3 contains two columns: one titled "Pollutant," and one titled "Monthly average concentration (milligrams per kilogram)." The pollutant column contains a list of eight metals, and the monthly average concentration column contains numerical values.

At hearing, Ms. Kleffner testified that "for all land application projects, a sampling for the metals listed in Table 3 is required as part of that." TR175: 15-17. Additionally, "biosolids cannot be land applied over the amounts listed in Table 3. So in order to verify that the biosolids meet part 503, you would need to retain the sampling for metals in this instance." TR175: 21-24. CX6 is a copy of lab results from Respondents from testing the sewage sludge and the soil for several pollutants, including the eight pollutants from Table 3. The results show that the concentrations of these eight pollutants did not exceed the levels from Table 3. CX6 at 3. Therefore, the lab results show that the ceiling concentrations provided in Table 3 were not exceeded, and therefore concentrations in 40 C.F.R. § 503.13(b)(3) were "met," as required by 40 C.F.R. § 503.17(4).

D. The land the sewage sludge was applied to was agricultural land.

The land to which Respondents applied the sewage sludge was a barley field and therefore agricultural land, as that term is defined in 40 C.F.R. § 503.11(a). Agricultural land includes land on which a food crop, a feed crop, or a fiber crop is grown; range land; and land used as pasture. 40 C.F.R. § 503.11(a).

Several exhibits indicate the land to which sludge was applied was agricultural. First, the contract signed by Respondents and Mr. Robinson describes the land as a barley field. CX7. Second, Mr. Pierce identifies the land as "agricultural lands" in the submission he authored and sent to Senator Steve Daines. CX49 at 8. Third, the contract between IHS and the NCUC describes the land as agricultural lands. CX29 at 4.

At hearing, Mr. Robinson testified that the field was agricultural. TR371: 14-17. He testified that it was a barley field in 2018, and that there is alfalfa growing there currently. TR371: 20-23. Also at hearing, Ms. Kleffner testified that based on several pieces of evidence,

she concluded the land to which Respondents applied sewage sludge was agricultural land. First, she looked at the report shared with her by IHS and concluded, based on the photographs, that the land was agricultural. TR178: 7-12; *see* CX9. Second, Ms. Kleffner based her conclusion on the contract between Respondents and Mr. Robinson, which described the land as a "barley field." TR178: 12-15.

E. Respondents were required to develop and retain records as "preparers" of bulk sewage sludge.

Respondents assumed responsibility for and directed the preparation of sewage sludge at the Lame Deer POTW in Lame Deer, Montana, and were therefore required to develop and maintain records pursuant to 40 C.F.R. § 503.17(a)(4)(i). 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(r). Ms. Kleffner testified, "preparation can be through physical means. It can be dewatering. It can be stabilization. It can be through composting. There are a number of options. But basically, preparation is anything that would change the quality of the biosolids from its initial form." TR59: 15-20.

First, the evidence demonstrates that Respondents "generated" the sewage sludge through their actions as the operator of the Lame Deer POTW. 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. *See* CX5 at 5-6. During the treatment of domestic sewage, the Lame Deer POTW generates sludge. CX5 at 6. Through their actions as the operators of the Lame Deer POTW, Respondents generated the sewage sludge.[4]

[4] *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

Second, the evidence also demonstrates that Respondents "derived a material from sewage sludge." Ms. Kleffner testified that dewatering is a treatment process and thus renders a dewaterer a preparer of sewage sludge. TR242: 15-18; TR100: 11-12. She defined dewatering as "taking excess water out of biosolids to reduce the total solids content." TR59: 24-25. Ms. Kleffner and Mr. Sprague testified that sewage pumping from a treatment pond to a frack tank was a part of sewage sludge preparation. TR112: 4-6; TR430-31: 24-2. This Court found in its Order on AD that it was an undisputed fact that "On or about the week of July 9, 2018, Respondents pumped and dewatered approximately 1,000,000 gallons of sewage sludge from Cell #2 of the Facility." Order on AD at 11. Therefore, this Court has found that Respondents were the preparers of sewage sludge.

Third, Respondents argue that because there were several subcontracts involved in the project, the Respondents were conveniently absolved of any liability, and every other entity remained liable. Respondents' Initial Prehearing Exchange at 10-12. However, the CWA imposes liability on the parties that actually performed the relevant 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) (holding, "Although [Defendant] did not place the fill material on the riverbank and in the River personally, he clearly was responsible for the performance of that work," and was therefore liable for CWA violations); *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 CWA 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

operator of a Publicly Owned Treatment Works (POTW) generates sewage sludge during the treatment of domestic sewage.").

permits and did 'whatever was required to…put that part of the project together.'"); *Sierra Club v. MasTec N. Am.*, No. CIV. 03-1697-HO, 2007 WL 4387428, at *3 (D. Or. Dec. 12, 2007) (finding that CWA "[l]iability is predicated on either performance of the work or control over performance of the work" and holding the Defendant liable for CWA violations because it "cannot avoid liability under the CWA by contracting away its compliance with applicable law.").

Ms. Kleffner testified that there can also be more than one preparer of biosolids and that multiple preparers could be liable for CWA requirements. TR72: 8-16. Additionally, she asserted that contractors can and have been found liable for CWA and Part 503 violations. TR57: 14-5. Ms. Kleffner testified, "I have had a case where a facility contracted out their biosolids operation to a separate company. The company took it. They did some sampling. They further processed the biosolids. So they became a preparer of the biosolids." TR57: 14-5. In describing the NCUC and Respondents' responsibilities, Ms. Kleffner testified, "so NCUC ultimately for – as the owner of the facility would have some requirements under Part 503. But if [Respondents] takes the sludge, changes the quality, that still makes [them] a preparer and a land applier under Part 503." TR131: 13-18. In his testimony, James Courtney from IHS testified that "[NCUC] provided very minimal oversight." TR281: 19-21. In this case, Ms. Kleffner testified, "Based on the agreements and the e-mail traffic and the contract between NCUC and Mr. Pierce, that would tell me that it was contracted out, the land removal or the sludge preparation and land application was contracted out and directed by Mr. Pierce and his company." TR161-62: 24-4. Specifically, Ms. Kleffner concluded Respondents prepared the sewage sludge. "For the preparer part, since Mr. Pierce was the one who dewatered, that -- that's regardless. That's a -- that's a treatment process, so that will always make him a preparer." TR242: 15-18.

For any task that was not physically performed by Respondents, Respondents directed and controlled the task. Ernie Sprague was subcontracted by Respondents to assist in the transportation of the sludge. CX42 at 4. Mr. Sprague "removed the sludge from the tanks. [He] did not put the sludge from the lagoon into the tanks." TR417: 18-20. Mr. Sprague testified that "Mr. Pierce contacted me about the job." TR401: 5-6. "Nathan and his team were on both ends of the job." CX42 at 3. Mr. Sprague told EPA that when he showed up to work on August 8, 2018, he met with Respondent Pierce, who showed him the tanks he wanted offloaded. CX42 at 2; TR405: 16-19. Mr. Sprague also told EPA that Respondent Pierce hired another tanker truck to assist Mr. Sprague, and Respondent Pierce asked Mr. Sprague to assist the other tanker in offloading. CX42 at 3; TR417-419: 21-24.

Respondents assert that IHS played a significant role in the sludge project, suggesting some liability on IHS's part. TR501: 20-23. However, Respondents mischaracterize IHS's role. Although IHS was present for much of the preparation and application, IHS was not the leader of the project and had minimal hands-on involvement. IHS's role in the project primarily observational/consultatory. *See* CX45 at 12. "IHS had a reimbursement agreement with NCUC for completing the work, and therefore oversaw that the work was performed properly." TR281-82: 11-9. Mr. Courtney, who was present at the EPA Region 8 inspection and for many parts of the preparation and application project, testified, "IHS did not prepare or apply any sludge." TR352-53: 25-1. IHS's involvement with biosolids is typically limited to funding projects and providing technical assistance. TR278: 8-13.

IHS became involved with the NCUC at the Lame Deer POTW to fund a project to fix overloaded contaminant levels at the POTW. TR278-79: 20-1. However, because of how the project contracts were arranged, IHS could only disburse payment to the NCUC. CX45 at 13; *see*

TR281-82: 11-9. Mr. Courtney testified, "we [(IHS)] had a reimbursement agreement with the utility for the work to be completed. So my involvement was to see if that work was being completed according to the agreement that we had with the utility." TR282: 5-9. At hearing, Respondent Pierce argued, "IHS and NCUC remained and retained control of the project and the site." TR503: 8-9. Indeed, Mr. Sprague also testified that "I took direction from both Nathan Pierce and George Cummins." TR407: 23-24. George Cummins was, at the time, a representative of IHS, and his role was to inspect work. TR340: 14-15; TR358-59: 22-24. In his inspector/observer role, Mr. Cummins was the person who first signaled the project was "not meeting protocol for safety." TR475: 15-17. Respondents performed calculations and provided estimates of figures for dewatering the sludge to IHS. CX45 at 34. Michelle Pierce wrote, "Nathan and James spent weeks discussing the amounts being removed and how to calculate it." CX46 at 25. Ultimately, Ms. Kleffner concluded, "I think there were lots of different numbers thrown around. So nobody had a good idea of what was actually happening on the site except for Mr. Pierce because he was directing and overseeing. He had -- he had access to all the information necessary to put together the story and the Part 503 regulation requirements." TR243: 13-19. Additionally, Mr. Robinson told IHS inspectors that Mr. Sprague's company hauled the sludge, and that Mr. Pierce performed the sludge removal work. CX9 at 4. At hearing, when Mr. Sprague was asked, "did you participate in the preparation of the sewage sludge prior to it being transported," Mr. Sprague replied "No." TR404: 18-22. Ms. Pierce wrote, "Sheri [Bement] did not come to the site to see what was being pumped, how it was being pumped or what the crew was doing to meet the contract needs." CX46 at 25. Ms. Pierce believed that "Sheri and her team are working against our company from finishing this project so that she can steal the money that was aligated [sic] to this project even though the work was done by Adamas

Construction." CX46 at 25. In summary, Respondents incorrectly point fingers to other entities as the responsible parties, but were the constant with the necessary expertise, control, and leadership to ensure execution of the project, specifically the preparation of the sewage sludge.

Fourth, Respondents also explicitly held themselves out as the preparers of the sewage sludge to the NCUC and IHS. For example, 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. When the project was in its planning stages, Respondents planned, in a detailed step-by-step, the sludge preparation. In Respondents' April 20, 2018 project description, Respondents wrote "Below is our outline of our proposed scope of work, separate [sic] into tasks, for Sludge removal of the cell #2 in the town of Lame Deer, Montana." CX45 at 34. Under "Task 1 – Site Prep and Mobilization," Respondents wrote "transport all personnel and heavy equipment to the jobsite," "conduct all testing and survey work," "prep berm ponds and FLUMP launch area," and "build and install frack settling tank manifolds and layout pipes/hoses." CX45 at 34. Under "Task 2 – Bio-Solid Sludge Removal and Dewatering," Respondents wrote, "Cell #2 will be agitated, and clumps or sludge mounds broken up, to ensure even flow and to prevent blockage of the FLUMP dredge lines," "FLUMP dredge will be launched and begin dredging operations to remove bio-solid sludge from the bottom of Cell #2; estimated 1,000,000/US Gallons (IHS SFC) at a rate of 40 cubic yard per hour," and "once the sludge has reached optimal concentration level the tank will be disconnected . . . . An empty rotation frack tank will be moved into the empty slot to allow for continuous dewatering operations." CX45 at 34.

Fifth, Respondents also gave the impression to the EPA that Respondents were performing the sludge preparation. EPA inspectors at the Lame Deer POTW June 2018

inspection concluded that "[d]uring the inspection, Adamas Construction was preparing Cell 2 for sludge removal." CX5 at 7. During the project, Respondents also claimed to have performed the work. In a July 13, 2018 email to IHS, Respondent Pierce wrote, "We pumped and dewatered a significant amount of sludge on Wednesday. Our average cutter head depth across half the pond started out at 43inches [sic], we are now at an average of 67 inches below the surface of the water."[5] CX4. Respondent also wrote, "We also took a nitrate sample from the application site and delivered it to Energy Labs in Billings." CX4. Lastly, Respondent wrote, "We will be on site today pumping sludge. We should be ready to begin hauling and application next week." CX4. In a July 24, 2018 email to NCUC and IHS representatives, Respondents performed various calculations and projected how they might dewater the sludge to create different concentrations of solids in the sewage sludge. CX42 at 23. In that email, Respondents wrote, "[w]e felt the approval of dewatering equipment was further proof this was always the agreement, after all why approve dewatering equipment, ask where we would discharge decanted water, and view our float map, if you did not expect the dewater before hauling." CX45 at 24.

Sixth, Respondents also agreed to assume responsibility for compliance with the CWA and the regulations at Part 503. In Respondents' April 20, 2018 project description letter, Respondents state, "Work will be completed according to the standards of the Northern Cheyenne Tribal Regulations, U.S. Environmental Protection Agency (EPA) including EPA Part 503." CX45 at 33. The contract between Respondents and NCUC states "All work shall be completed . . . in compliance with all building codes and other applicable laws." CX45 at 18. In a July 30, 2018 email, Respondents assured IHS and NCUC representatives that "Our company will always comply with the rules and regulations necessary to protect the environment and

[5] James Courtney interpreted this email to mean Adamas Construction was in charge of the removal and application project. TR286: 14-16.

waterways of the United states." CX45 at 21. At hearing, Respondent Pierce testified, "I told [NCUC and IHS] that we would follow the 503 regulations." TR496: 21-22.

In summary, this Court has already held that Respondents were the preparers of the sludge because they pumped and dewatered the sludge.[6] Further evidence derived from the hearing confirms that Respondents prepared the sludge. Specifically, Respondents hired subcontractors and had input from other entities but retained control of the preparation of the sewage sludge. Additionally, Respondents explicitly asserted on many occasions that they were the preparers of the sewage sludge, that they engaged in preparation activities, and that they were responsible for complying with Part 503. Therefore, no other conclusion can be drawn other than that Respondents were the preparers of the sewage sludge and were therefore required to develop and retain records pursuant to 40 C.F.R. § 503.17(a)(4).

F. Respondents were required to develop and retain records as "appliers" of bulk sewage sludge.

Respondents assumed responsibility for and directed the application of sewage sludge onto agricultural land in Lame Deer, Montana, and were therefore required to develop and maintain records pursuant to 40 C.F.R. § 503.17(a)(4)(ii).

First, this Court found in its Order on AD that it was an undisputed fact that "On or about August 22, 2018, subcontractors of Respondents applied approximately 1,000,000 gallons of sewage sludge from Cell #2 of the Facility to land application property in or near Lame Deer, Montana." Respondents admit that their subcontractors, Mr. Robinson, and Ernie Sprague (of D&R Disposal), hauled and land applied the sewage sludge from the Lame Deer treatment lagoon. Respondents' Initial Prehearing Exchange at 9-10. Not only is this admission sufficient

[6] Notably, sludge preparation is a typical duty of an operator, which is established in a separate section of this brief.

to satisfy this element, the evidence demonstrates that Respondents controlled and directed the land application of sewage sludge at issue. Respondents assert that because other persons aided in the physical act of land application, Respondents are not responsible or liable for the land application. CX17 at 2. As described in the previous section, persons directing the activities of others, including contractors, can and have been held liable for the acts of their subcontractors under the CWA.

Second, Respondents incorrectly assert that because subcontractors aided in the application project, Respondents are absolved of all liability. In this case, Mr. Robinson aided in the application of sewage sludge to his land. However, Respondents were in charge of the project, and planned the project before an application site had even been secured. *See* CX3; CX45 at 42. On or around July 16, 2018, James Courtney received a call from Mr. Robinson wherein Mr. Robinson expressed interest "in receiving the sludge on his property." CX45 at 42. After the application, Mr. Robinson submitted a complaint to IHS, and Mr. Courtney, accompanied by another IHS inspector, went to Mr. Robinson's property to perform an inspection.[7] CX9. At the inspection, Mr. Robinson told the IHS inspectors that "the sludge did not seem appropriately spread during the application and that this made tilling difficult." CX9 at 1. Mr. Robinson identified Respondents were the appliers of the sewage sludge, and said that he "withdrew consent for the sludge to be applied but that [Respondents][8] continued to dispose of the sludge on his property." CX9 at 4. At hearing, Mr. Robinson's testimony contradicted statements made in the evidentiary record and with other statements made by himself at the hearing. For example, Mr. Robinson denied ever calling Mr. Courtney, even though the record

[7] Mr. Courtney testified that he authored the report found at CX9 and that it is standard to write a report every time one visits the field, such as the report in CX9. TR287-88: 23-4.
[8] Mr. Courtney testified that "subcontractors" meant Respondents. *See* Transcript at 288: 18-20.

memorializes a phone call between Mr. Courtney and Mr. Robinson as the precipitating event that led to application on Mr. Robinson's land. TR373: 12-15; CX45 at 42. Additionally, Mr. Robinson denied ever submitting a complaint to Mr. Courtney, despite there being an inspection report from an inspection performed with Mr. Robinson on Mr. Robinson's land that was produced in the normal course of business. TR373: 16-19; TR374: 18-20; CX9. Mr. Robinson also testified that he did not receive agronomic rate information from Respondents, but on cross-examination testified that he did. TR372: 25-9; TR373: 7-10. Despite the contradictions in the record, it is undisputed that Respondents arranged for sludge application on Mr. Robinson's property under their supervision and direction.

Respondents' June 8, 2018 invoice bills the NCUC for "Supervision" of "Sludge Pumping," "Sludge Application," "cleanup and de-mobe," and "Mobe Setup." CX43 at 28. Ernie Sprague was hired by Respondents to transport the sewage sludge. TR431: 16-18. Respondents first contacted Mr. Sprague. TR401: 5-6. As stated previously, Mr. Sprague testified that he "took directions from both Nathan Pierce and George Cummins." TR407:23-24. Also, as described previously, Mr. Cummins' role was primarily supervisory, and to ensure federal requirements were met so that grant money could be distributed. Although Mr. Sprague testified that Mr. Cummins was "in charge of the project," Mr. Courtney, also an employee of IHS, testified that his coworker's role did not go beyond "just inspecting." TR358: 22-24. Mr. Cummins' role was to inspect to ensure compliance with the conditions of the funding for the project. TR281-82: 24-9. In addition, Mr. Sprague was not present for one of the days of the project, and another company was hired to help haul the sewage sludge that day. TR417: 23-25; TR418: 24-25. Therefore, Mr. Sprague did not have the requisite presence or control to be responsible for all record development and maintenance.

Third, the record overwhelmingly demonstrates that Respondents controlled and directed the land application of the sewage sludge. Respondents' April 20, 2018 project proposal contains a section titled "Task 3 – Bio-Solid Sludge Transportation and Land Application." CX45 at 34. Under this title, the proposal states, "Transportation tankers and trucks will be used to haul sludge to the application receiving areas to be pumped into frack tanks allowing for storage and onsite demand for land application," as well as "Sludge will be removed from frack tanks and land applied allowed by the EPA 503 regulations and/or allowed by the MTDEQ." CX45 at 34. Lastly, the proposal includes a schedule of project milestones; the milestone "Land Application Complete" is assigned to "Nathan Pierce, Josh with M.A.P.S., Lands, Joe Pachel." CX45 at 36. There is no other evidence in the record of the involvement of "Josh with M.A.P.S." or "Joe Pachel," and it is unclear what "Lands" refers to. On October 4, 2018, after the project was performed, Respondents' counsel wrote a letter to IHS. CX56 at 1. In this letter, counsel said, "For months ADAMAS briefed IHS, EPA, and the Northern Cheyenne Tribal Council on the approach and technical specifications required for the Projects . . . . The proposal developed by ADAMAS was used to award the Contracts, the proposals clearly reference ADAMAS as being considered or involved," and "IHS accepted and used ADAMAS's site safety plans, ADAMAS's AAP, ADAMAS's confined space plan and several other documents to fulfill the submittal portion required, for the award of the Contracts." CX56 at 1.

Fourth, Respondents asserted, on numerous occasions, that they applied the sewage sludge. During the project, Respondents wrote an email on July 13, 2018 that said, "We should be ready to begin hauling and application next week." CX4. Respondents entered into a contract with Mr. Robinson for the application to his land on August 8, 2018. CX7 at 1. The contract says that Mr. Robinson will "receive and apply bio-sludge," "haul it to the barley field," and "prep the

field and till the sludge." CX7 at 1. However, Mr. Robinson did not perform all of these tasks. Mr. Robinson told IHS inspectors and wrote a certified statement to the EPA that Respondents were the ones who applied the sewage sludge and his job was merely to till it in. CX9 at 1, 4; CX41 at 1. Additionally, Mr. Robinson did not haul the sludge to his field; Mr. Sprague did, under Respondents' direction. CX42 at 2-3. Mr. Robinson actually "withdrew consent for the sludge to be applied," but Respondents "continued to dispose of the sludge on his property." CX9 at 2. On August 24, 2018, counsel for the NCUC emailed Respondents and said, "it was understood that ADAMAS Construction would complete the application of the remaining stored sludge; and that ADAMAS Construction would provide documentation of the volume of application to NCUC in order to process payment." CX43 at 9. In the same email, the NCUC's counsel said that in order to process payment, "application of sludge should be completed" and "documentation to support [the] work should also be completed." CX43 at 9.

Additionally, a June 21, 2018 invoice from Respondents to the NCUC bills the NCUC for several items, including "Supervision (Sludge Application)" and "Sludge Application Equipment. CX45 at 7. An email on the same date from Respondents to the NCUC and IHS says, "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.[9] A December 4, 2018 invoice from Respondents to the NCUC bills the NCUC for "Sludge Application 600,000 USG per IHS, NCUC, Adamas agreement to Mr. Robinson Field." CX43 at 7; CX45 at 5. On April 29, 2019, Respondents' counsel emailed a representative from IHS, saying, "NCUC and IHS made only my client, his workforce and

[9] This email also establishes Respondents were in charge of the preparation phase of the project.

equipment responsible for all the work performed under the project and prohibited him from using any NCUC workforce and equipment, on Jun 21st, 2018, making [them] the primary project contractor." CX45 at 14.[10] Respondents' counsel also said, "my client didn't just preform [sic] 'some of the work,' again, on Jun 21st, 2019, NCUC and IHS made only my client, his workforce and equipment responsible for all the work performed under the project and prohibited him from using any NCUC workforce and equipment." CX45 at 14. In a letter to Senator Steve Daines, Respondents wrote that although the original agreement rendered NCUC responsible for the removal and application project, the agreement was amended such that "Adamas was to complete its application of sludge, document the work performed, and then obtain the approval of NCUC and IHS for work performed." CX49 at 9. The letter goes on to say that "Adamas then completed its application of sludge, documented the work performed, and submitted such documentation." CX49 at 9. Respondents assert that, because they were subcontractors of NCUC for the sludge project, it was NCUC's responsibility to comply with the applicable regulations. Respondents' Initial Prehearing Exchange at 11. However, as expressed throughout the record and described in this brief, NCUC provided minimal involvement, oversight, and equipment for the removal and application project.

Fifth, Respondents were listed as the points of contact for the soil and sludge sampling results with Energy Labs. CX19 at 12. On June 17, 2019, Respondents' counsel emailed Ms. Kleffner that the Respondents relayed vector attraction requirements to Mr. Robinson.[11] CX17 at 3.

Sixth, as discussed above, Respondents asserted from the outset that they would assume responsibility for complying with Part 503. For example, Respondents promised in their April

[10] This email also establishes Respondents were in charge of the preparation phase of the project.
[11] This email also establishes Respondents were in charge of the preparation phase of the project.

20, 2018 project proposal that "Work will be completed according ot the standards of the Northern Cheyenne Tribal Regulations, U.S. Environmental Protection Agency (EPA) including EPA Part 503. . . ." CX45 at 33. Additionally, in a July 30, 2018 email to IHS and NCUC, Respondents promised, "Our company will always comply with the rules and regulations necessary to protect the environment and waterways of the United States." CX45 at 21. In that email, Respondents also contemplate the specific requirements of Part 503. CX45 at 21.

In summary, Respondents explicitly stated they were the appliers of sewage sludge, and invoices and other communications affirm that fact. Even though Mr. Robinson and Ernie Sprague were present and aided in parts of the application, they were not in charge of the sludge application project and took directions from Respondents. Evidence in the record and testimony at hearing confirms that Respondents were the appliers of sewage sludge and are therefore responsible for developing and retaining records pursuant to 40 C.F.R. § 503.17(a)(4).

G. Respondents failed to develop and maintain the records they were required to keep as preparers and appliers of bulk sewage sludge.

In their Prehearing Exchange, Respondents admit that they willfully did not respond to EPA's Information Request to avoid revealing any additional violations of the Clean Water Act. Respondents' Initial Prehearing Exchange at 15. The EPA evaluated the information and documentation provided by Respondents throughout 2018 and 2019 and determined that Respondent did not adequately follow the recordkeeping requirements of Part 503. Additionally, counsel for Complainant and Respondent Pierce had the following exchange at hearing:

> Q. So, to date, you have never submitted any records to EPA concerning sludge application management practices as required by Part 503, correct?
> A. Part 503 doesn't apply to me. You haven't proved that it ever did.
> Q. Could you please answer the question? To date, have you ever submitted any sludge application management practices – practice records?
> A. Any sludge management practice records?
> Q. Sorry.

A. No.
Q. Sludge application management practices?
A. No.
Q. And to date, have you ever submitted any records to EPA concerning sludge application site restrictions?
A. No.

TR505-06: 9-2. It is impossible to know the amount and extent of records Respondent may have created in the course of the sludge project. However, Respondents' failure to proffer sufficient information and documentation serves as evidence of their failure to develop and maintain such records.

III. RESPONDENTS WERE OPERATORS OF A POINT SOURCE WHO FAILED TO RESPOND TO A CLEAN WATER ACT INFORMATION REQUEST.

A. Respondents were "operators" of the Lame Deer POTW

At all times relevant to this case, Respondents operated the Lame Deer POTW. According to the CWA, "[t]he term 'owner or operator' means any person who owns, leases, operates, controls, or supervises a source." 33 U.S.C. § 1316(a)(4). An operator of a facility under the CWA is an entity that "has the power or capacity to (i) make timely discovery of discharges, (ii) direct the activities of persons who control the mechanisms causing the pollution, and (iii) prevent and abate damage." *Beartooth All. v. Crown Butte Mines*, 904 F. Supp. 1168, 1175 (D. Mont. 1995) (denying a motion to dismiss two Defendants from potential operator liability based on the argument that performing services for a fee does not render them operators). A person may also be liable under the CWA if it "had sufficient control over the [facility] and knowledge of the alleged unpermitted discharges, even if it did not create the discharges itself." *Puget Soundkeeper All. v. Cruise Terminals of Am., LLC,* 216 F. Supp. 3d 1198, 1214 (W.D. Wash. 2015). There may be multiple liable persons under the CWA. *Id*. at 1223; *see Beartooth All. v. Crown Butte Mines,* 904 F. Supp. 1168 (D. Mont. 1995). The CWA

also "clearly makes violations by 'any person' unlawful, not solely permit-holders." *Assateague Coastkeeper v. Alan & Kristin Hudson Farm*, 727 F. Supp. 2d 433, 442 (D. Md. 2010). To be an operator under the Clean Water Act, a person need only fulfill the duties of the operator and need not be certified as an operator, nor have an official title of operator. TR224-25: 17-3.

First, Respondents claimed to provide comprehensive water treatment services on the Adamas Construction & Development Services, PLLC website. CX24 at 1. This Court held as an undisputed fact that Respondents' website "states that it provides start-to-finish onsite water management services." Order on AD, p. 10.[12] The website also says Respondent Adamas "is a full-service general contractor, construction management firm and official Distributor of BioMicrobes products throughout the State of Montana." CX24 at 4. "Projects include, but are not limited to: Wastewater Treatment Systems," "Wastewater Treatment Plant," "Gray Water Treatment System," "Wastewater Treatment Process," "Potable Water Systems," "Water Treatment Technology," and "Water Treatment Installation." CX24 at 4. The company's mission is "to provide the most effective, most reliable, highest value and most owner-friendly wastewater treatment systems in the industry." CX24 at 4. Although Respondent Adamas was involuntarily dissolved on September 1, 2018, Respondent Pierce continued to present himself and conduct business on behalf of himself and Respondent Adamas, seeking credit and payment for contracts and services performed by Respondent Adamas (described below).

Second, Respondents claimed responsibility, in invoices and receipts, for various, comprehensive work performed for the NCUC over several years. Ms. Kleffner testified:

> "In my experience, an operator basically runs the facility. They do operations and maintenance. That can include the collection system and the wastewater treatment

[12] According to Respondents' website, "We provide from start to finish onsite water management services; including: permit research and path for plan approval, design of system, installation and maintenance of water recycling systems . . . extensive engineering and technical support, on-site field services, and maintenance programs." CX24 at 16.

> facility itself. So working on lift stations, fixing pumps, making – adding . . . any chemicals that need to be added. It can also vary. Something as simple as if it's a lagoon system, it can be mowing the berms. So something simple for maintenance. Generally, treatment operators, unless it's contracted out to a lab, will also take samples. And they're usually present for inspections by the state or the federal government."

TR56: 3-15. The NCUC was the owner of the Lame Deer POTW. CX5 at 5. According to Respondents, the NCUC lacked the requisite resources, expertise, and manpower to operate many of its sewer systems. CX46 at 6, 23; CX50 at 7; CX56 at 2; TR280: 8-10. Respondents performed much of the operator duties for the NCUC and subsequently sought payment for their work in multiple invoices spanning multiple years. For example, a July 27, 2017 invoice from Respondent Adamas describes various work/supplies provided by Respondents: "wire for Lame Deer Lift Station electrical Repair," "Tech Assistance Lame Deer Lift station repair to include Electrical Conduit and wire repair with (2) 5hp Pump Clean Out," and "Mowing of Lame Deer Lagoons to include Cutting Cattails." CX43 at 50. A November 24, 2017 receipt of payment from NCUC to Respondent Adamas include "East Side Restoration, Muffin Monster, Life Station."[13] CX43 at 71. Operation of a muffin monster is a typical duty of a POTW operator, as "it's part of the operation and maintenance of the system." TR114: 17-20.

Respondents performed administrative and technical work in addition to physical operation of the NCUC's sewage systems. An April 8, 2018 invoice from Respondent Adamas asks for payment for "Project Management/ Supervision" of "Ashland and Josephine Fire Crow" and "Grinder Motor Replacement," as well as "Lame Deer Lagoon Sample," "Fuel for jetter," "Administrative meetings with Josh and IHS and work on IHS proposals," and "Electrician for grinder motor inspection of electrical hookups per IHS request." CX43 at 85. A May 21, 2018

[13] According to Ms. Kleffner, a muffin monster is a type of equipment that grinds solids before they enter a treatment system. TR114: 17-20.

invoice from Respondent Adamas asks for payment for "technical consulting on verious [sic] IHS, NC Tribal Government, and NCUC meetings," as well as "Verious [sic] project cordinations [sic] to include coordination with PACE to remove 2 separate sewer line obstructions," "Post office main line break. Three Adamas construction employees onsite," and "Project Management/Supervision" for "Verious [sic] projects to include sludge removal, sewer camera and cleaning and scattered site work." CX43 at 39. The sewer camera and cleaning project is described in a proposal, which says that Respondent Adamas will be the project manager and technical consultant for the project. CX46 at 17. However, in an undated letter from Respondent Pierce to IHS, Respondent Pierce describes himself as the "primary contractor in charge of two projects that are in fact federal contracts, Sewer mainline camera and cleaning and the Sludge Removal Projects, ADAMAS ACCEPTED this offer." CX55 at 5.

Third, Respondents or their counsel made numerous assertions that they were responsible for operations of the Lame Deer POTW. In an August 26, 2018 email from Respondent Pierce to several representatives of the Northern Cheyenne and IHS, Respondent Pierce said "I would fall under the NCUC umbrella as the sewer operator." CX46 at 6. To support this assertion, Respondent Pierce said, "The Sludge removal project is not the only outstanding invoices or monies owed our Company by the NCUC." CX46 at 6. Respondent Pierce then lists several projects, including scattered site work, sewer camera and cleaning, work at the post office, "and other projects." CX46 at 6. In an October 4, 2018 letter from Respondents to IHS, Respondent Pierce asserts that "[f]or months ADAMAS briefed IHS, EPA, and the Northern Cheyenne Tribal Council on the approach and technical specifications required for the Projects," and that IHS relied on documents and plans produced by Adamas for the sewer camera and cleaning project and the sludge removal project. CX56 at 1. Based on all of these documents, Ms.

Kleffner testified that "I think in a cumulative sense, though, looking at all of the documents that we had and all of the billing and the information that was listed as completed by [Respondent(s)], that, to me, told me [Respondent(s)] were an operator." TR223-24: 22-1.

Additionally, in a June 21, 2018 email to members of the NCUC and IHS, Respondent Pierce details the sludge removal project and asks for a contract for the "Camera and Cleaning project." CX45 at 6-7. In a June 26, 2018 email, Respondent Pierce relayed the status of the sludge removal project, including hiring an electrician, setting up equipment, and consulting with IHS. CX45 at 11-12. In an April 29, 2019 email, Respondents' counsel said that although the May 18, 2018 pre-construction meeting minutes stated that NCUC was responsible for *all* the work, "then NCUC and IHS made only my client, his workforce and equipment responsible for all the work performed under the project and prohibited him from using any NCUC workforce and equipment, on Jun 21st, 2018, making [them] the primary project contractor." CX45 at 14. Compounding this email is the May 15, 2018 contract between NCUC and Respondents, which states that the contractor (Respondents) "shall furnish all of the materials and perform all of the work" described in the attachments at the Lame Deer POTW. CX45 at 17. The contract also says the contractor (Respondents) "may at its discretion engage sub-contractors to perform work hereunder, provided Contractor shall fully pay said sub-contractor and in all instances remain responsible for the proper completion of this contract." CX45 at 18. In a July 30, 2018 email, Respondent Pierce told NCUC and IHS, "Our company is dedicated to ensuring that this job is complete and that we will make sure that it is done within the rules and regulations that apply to the project." CX45 at 21. In this email, Respondent also assured NCUC and IHS that "Our company will always comply with the rules and regulations necessary to protect the environment and waterways of the United states [sic]." CX45 at 21. Respondent's email continues, "it appears

from the EPA 503 regulations NCUC and their subcontractors are exempt from EPA permit/reporting requirements," demonstrating familiarity with, and an assertion of responsibility for, the Clean Water Act and the regulations at Part 503. CX45 at 21. In an April 20, 2018 letter to NCUC, Respondents described their "compliance with all federal, tribal and state laws during this project as well as quick outline of our project approach." CX45 at 32. In the letter, Respondents describe themselves as "project manager and technical consultant" and explicitly ensure compliance with the EPA Part 503 regulations. Additionally, Respondents display detailed familiarity with the sludge removal and application project, with sections titled "site prep and mobilization," "bio-solid sludge removal and dewatering," "bio-solid sludge transportation and land application," and "clean up and demobilization." CX45 at 34-35. Specific tasks include, for example, "conduct all testing and survey work," "improve and relocate access road," "prep pond berms and FLUMP launch area," "FLUMP dredge will be launched and begin dredging operations to remove bio-solid sludge from the bottom of Cell #2," "an empty rotation frack tank will be moved into the empty slot to allow for continuous dewatering operations," "transportation tankers and trucks will be used to haul sludge to the application receiving areas to be pumped into frack tanks.," and "sludge will be removed from frack tanks and land applied allowed by the EPA 503 regulations." CX45 at 33-35.

Fourth, the NCUC did not have the requisite expertise or equipment to operate the Lame Deer POTW and other sewer systems. Although Sheri Bement was the general manager of the NCUC at the time of the sewage sludge removal and application project, the evidence shows that Sheri Bement lacked the requisite knowledge or expertise to be an operator, or the only operator, of the Lame Deer POTW. James Courtney testified that Ms. Bement was not an engineer or technical specialist. TR280: 8-10. In an August 22, 2018 letter, Respondent Pierce pointed to the

NCUC general manager's "inability to understand the basic concepts of running a construction or utility business" and to her "apathy towards being at the office." CX46 at 9. In that same email, Respondent Pierce asserts, "we have operated on the NC reservation, since the Boys and Girls club break, with honor and to the benefit of NCUC." CX46 at 9. Earlier that day, Respondent Pierce stated "[o]ur company has operated honorably and without haste on all your projects spanning back over 1.5 years." CX46 at 10. Ms. Bement even named Respondent Pierce the temporary sewer operator because neither Ms. Bement nor her employees were able to obtain state certification. CX46 at 6, 23; CX50 at 7. In an undated statement written by Michelle Pierce, the only other member of Respondent Adamas, she stated, "Nathan put together the entire packets for the contracts submitted to IHS to help bring revenue to NCUC and to help the employees get a decent wage. He discussed with them at length what their responsibilities would be for these projects and how they were going to go." CX46 at 23. She also states "[w]e went to several trainings and meetings with Sheri and the NCUC crew. Including going to Denver to help Sheri understand her responsibilities with meeting the EPA requirements for the NUCU [sic] lagoon permit." CX46 at 23. Respondents also claimed that IHS was aware that "at the time that NCUC did not have the technical expertise or equipment contacts to perform this Project without the participation of Adamas." CX49 at 9. Ultimately, "NCUC did not have the technical expertise or equipment contacts" to complete the projects Adamas performed. CX56 at 2.

Fifth, Mr. Nathan Pierce attempted to leverage his operation and knowledge of the NCUC's systems to obtain full-time employment at the NCUC to shift from subcontractors to employees. In December 2018, Mr. Nathan Pierce applied for the role of General Manager of the NCUC. CX43 at 11. In his application, he stated, "The Company owned by my wife and myself, has been operating for the betterment of the NCUC, since the Boys and Girls club break and

assisted in most of the other water and sewer breaks on the Northern Cheyenne reservation since that time." CX43 at 11. He also said, "[h]aving a very detailed understanding of all the community systems located within the Northern Cheyenne Nations boundaries is very important for a GM candidate, as I have worked with many of the systems to repair them, I have a great knowledge of the systems, their current problems, and have a plan to fix them." CX43 at 11. Lastly, he claimed to possess a "Montana DEQ waste water class 1C & 2E operator" license (which, notably, is not required for a person to be considered a legal operator of a facility under the CWA). CX43 at 12. Respondent Pierce went so far as to submit a certification application to the state of Montana to become a certified operator of a wastewater treatment system, but failed to pay the requisite fees. CX 50 at 1-2.

Sixth, Respondents led the EPA inspection at the Lame Deer POTW. Ms. Kleffner testified that presence at inspections is an operator duty. TR56: 14-15. When the EPA inspected the Lame Deer POTW in June 2018, Respondents served as the representative of NCUC and the Lame Deer POTW and demonstrated not just familiarity, but leadership in past, present, and future operations at the Lame Deer POTW. CX5. Respondents were "present and indicated [they] would be able to address many of our inspection questions." CX5 at 5. Respondents, alongside an IHS representative, provided an "overview of NCUC's wastewater operations, monitoring procedures, recent SSOs from collection systems operated by NCUC, and active and planned projects within the Lame Deer collection system and at the lagoon." CX5 at 5. Respondents gave information on annual inspections, as-needed maintenance, and the upcoming renovation and removal project at the Lame Deer POTW. CX5 at 5-6. The discussion focused on the Lame Deer POTW but "encompassed NCUC's operations of four other lagoons on the Northern Cheyenne Indian Reservation." CX5 at 5.

In summary, Respondents and those working on their behalf repeatedly asserted that Respondent Pierce and/or Respondent Adamas operated the Lame Deer POTW and repeatedly sought renumeration for operator work.

B. The Lame Deer POTW is a "point source" as that term is defined by 33 U.S.C. § 1362(14).

The CWA defines a point source as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit … from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The Lame Deer NPDES permit identifies two outfalls from which the facility discharges pollutants from its wastewater treatment facility into Lame Deer Creek. CX58 at 19. As such, it is a point source as that term is defined in the CWA. CX5 at 6; CX58 at 2.[14]

Lame Deer Creek meets the CWA definitions of "navigable waters" and "waters of the United States." "Navigable waters" are defined in Section 502 of the CWA as "the waters of the United States." 33 U.S.C. § 1362(7). The controlling law concerning jurisdictional limits to tributaries at the time of the violation came from the 2006 Supreme Court case, *Rapanos v. United States*. 547 U.S. 715.[15] *Rapanos* provided two tests to determine whether a tributary meets the definition of a "water of the United States." *Id*.

A four-Justice plurality in *Rapanos* interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water," *id*. at 739, that are connected to traditional navigable waters, *id.* at 742.

[14] This Court's Order on Complainant's Motion for Accelerated Decision found undisputed that the Lame Deer POTW discharges wastewater into Lame Deer Creek pursuant to a NPDES permit.

[15] In his testimony, Respondent Pierce indicates that the Navigable Waters Protection Rule is the applicable regulation concerning "waters of the United States" jurisdiction. TR36: 4-10. The Navigable Waters Protection Rule was vacated by the U.S. District Court for the District of Arizona on August 30, 2021. *Pascua Yaqui Tribe v. U.S. Environmental Protection Agency*. 557 F.Supp.3d 949. Regardless, this relatively permanent water was jurisdictional under this vacated regulation.

The NPDES Permit for the Lame Deer POTW describes the path of discharges from the facility:

> "The discharge from the facility enters Lame Deer Creek from cell three of the Lagoon . . . The full length of the mainstem of Lame Deer Creek, approximately 7.5 miles over land . . . flowing into Rosebud Creek just south of the northern boundary of the Reservation. Rosebud Creek is a tributary to the Yellowstone River."

CX58 at 5. This description describes a tributary to the Yellowstone River, a traditional navigable water.

At hearing, Ms. Kleffner testified that the section of Lame Deer Creek into which the POTW discharges was marked by a solid blue line on a United States Geological Survey (USGS) map. TR244: 7-19, citing JX1. According to Ms. Kleffner, the marking indicates the presence of a perennial stream. TR244: 9-10. According to the USGS, 'perennial' refers to a stream that flows throughout the year. Her testimony further asserted that the stretch of Lame Deer Creek from the POTW to Rosebud Creek is a solid blue line on the USGS map, and that Rosebud Creek is a perennial tributary that flows approximately seventy miles into the Yellowstone River, leading her to conclude in her "professional opinion" that Lame Deer Creek is a "jurisdictional water" under the CWA. TR244: 7-19, citing JX1. According to Ms. Kleffner's observations, Lame Deer Creek has "continuously flowing" water, satisfying Justice Scalia's "relatively permanent" jurisdictional test and discharges to a traditionally navigable water.

Ms. Kleffner also testified that, as part of her evidentiary review in this case, she received a 2015 compliance order from the EPA Region 8 issued to the Lame Deer POTW in which Region 8 included, "(t)he Facility discharges into Lame Deer Creek, a perennial stream that has been determined to be a jurisdictional water of the U.S. by the U.S. Army Corps of Engineers . . . Lame Deer Creek is a 'water of the United States.'" TR248: 14-21. Ms. Kleffner further testified

that it is the U.S. Army Corps of Engineers' "responsibility to determine jurisdictional waters." TR249: 2-3.

During the hearing, Respondents asserted that the 2023 Supreme Court case, *Sackett v. Environmental Protection Agency*, should control concerning the jurisdiction of Lame Deer Creek. TR37: 15-25; TR38: 1-2, citing 598 U.S. 651. While Complainant asserts that the applicable law during the time of the violation controls, it is worth noting that *Sackett* expressly holds that the plurality's test as established in *Rapanos* was "correct." (". . . the CWA's use of "waters" encompasses "only those relatively permanent, standing or continuously flowing bodies of water . . ."). 598 U.S. 651 at 671. As described above, the evidence points to Lame Deer Creek is a relatively permanent water under the *Rapanos* and *Sackett* decisions and thus a "water of the United States" under the CWA. As a result, Lame Deer Creek is jurisdictional under all applicable legal regimes.

C. EPA requested that Respondents provide certain information pursuant to Section 308 of the CWA, 33 U.S.C. § 1318(a).

On September 25, 2018, EPA issued an Information Request letter to Mr. Nathan Pierce, Adamas Construction and Development Services, PLLC via United States Postal Service Certified Mail. CX11. Mr. Pierce signed the Certified Mail slip on October 1, 2018. CX11 at 8. At hearing, Ms. Kleffner testified to sending this letter to Respondents. TR 78: 8-10. Additionally, a responsive letter was received from a law firm, stating "we are in receipt of your letter, dated September 25, 2018, asking Mr. Pierce to respond to an enclosed request for information within 30 days." CX12 at 1.

The Information Request letter sent to Respondents on September 25, 2018 cites Section 308(a) of the CWA, 33 U.S.C. § 1318(a), as the underlying authority to request such information. CX11 at 1. Because Respondents were operators of a point source, as established

above, the EPA has the authority to require Respondents to establish and maintain records, as well as have access to and copy any records. 33 U.S.C. § 1318(a).

D. Respondents failed to provide a timely and complete response to EPA's information request.

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 provided a timely and complete response to the Information Request. Respondents refused to provide any information in response to the Information Request until nine months after the request had been issued. The information that was eventually provided was incomplete despite Respondents having additional responsive information in their possession.

The information request letter sent by the EPA requested (1) analytical laboratory results for nine metals, (2) information on whether metals ceiling limits were met or exceeded, (3) information regarding the class of the sewage sludge, (4) information on how vector attraction requirements were met, (5) information on whether pathogen requirements were met, and (6) information on specific land application(s) of biosolids. CX11. Because Respondents prepared and applied the sewage sludge (as described earlier in this brief), Respondents were required to create and maintain all these records per the biosolids recordkeeping requirements found at 40 C.F.R. § 503.17(a)(4).

Ms. Kleffner testified that after sending the Information Request, she "received a letter from a law firm. The date at the top is October 17th, 2018. And it was basically just asking for a 60-day extension to respond to the information request." TR 83: 7-10; CX12. The EPA then granted Respondents an extension, asking for a response on or before November 23, 2018. TR 83: 19-21; CX13. Ms. Kleffner testified that the information that EPA requested from

Respondents was not received before the deadline. TR 83: 22-25. There is no evidence in the record Respondents provided any of the requested information to EPA for the remainder of 2018.

On June 14, 2019, Respondents provided a narrative response via email. CX17. First, Respondents continued to assert that Part 503 did not apply to them, despite continued communications from the EPA indicating that not only did Part 503 apply to Respondents, but that Respondents were in violation of Part 503. CX17 at 1; CX14; CX13. Additionally, in the email, Respondents claimed that Mr. Robinson was the land applier. CX17 at 2. Notably, the email contained an admission that Respondents instructed Mr. Robinson to follow the time-sensitive tillage vector attraction requirements under Part 503. CX17 at 3. The email also (incorrectly) asserted that that the sewage sludge was exceptional quality, with no evidence to support such a determination, and therefore was exempt from Part 503 requirements. CX17 at 2. The email also focused on regulations inapplicable to Respondents' activities and never cited by the EPA. CX17 at 2-3. Specifically, Respondents incorrectly claimed that the annual reporting requirements of 40 C.F.R. § 503.18 did not apply to Respondents or the Lame Deer POTW because the POTW was not actually a POTW, demonstrating a fundamental misunderstanding of the Part 503 program. CX17 at 3. Ms. Kleffner testified that the annual reporting requirements are separate "from having to report records as requested." TR92-93: 23-4. On June 21, 2019, the EPA informed Respondents, via email, that their June 21, 2019 response was incomplete, and informed Respondents that documentation was necessary to verify the veracity of the claims Respondents made. CX18 at 1.

On July 2, 2019, nine months after Respondents had received the September 2018 Information Request, Respondents provided another incomplete response to the Information Request. CX19. In their Prehearing Exchange, Respondents readily admit that they willfully did

not respond to the EPA's Information Request to avoid revealing any additional violations of the Clean Water Act. Respondents' Initial Prehearing Exchange at 15.

Specifically, Respondents sent to the EPA (1) pre-construction meeting minutes, (2) an analytical summary report from Energy Laboratories, (3) an email from Respondents dated June 28, 2018 providing an update on the sewage sludge removal and application project, and (4) a July 13, 2018 email from Respondents providing an update on the sewage sludge removal and application project. CX19. In its July 2, 2019 response, Respondents claimed the NCUC was responsible for all of the work and for complying with Part 503 and that IHS performed sampling. CX19 at 1. Missing was the following information required under 40 C.F.R. § 503.17: (1) repeated sampling results, as a total of seven samples are required pursuant to 40 C.F.R. § 503.32(b)(2)(i), (2) information on whether the samples met the ceiling limits, (3) information and documentation regarding the class of sewage sludge, (4) complete information on the vector attraction requirements, (5) information on whether pathogen requirements were met, and (6) any information regarding application of sewage sludge (e.g., address(es), date(s), acreage, etc.). The EPA informed Respondents information was still missing on July 18, 2019. CX21. The EPA received no response to this email.

The information provided by Respondents on June 14, 2019, and the documents provided on July 2, 2019, had been in Respondents' possession at the time of the original September 28, 2018, Information Request, but Respondents had simply refused to provide them because the information would implicate themselves. For example, in Respondents' Answer, Respondents state that they provided a copy of target application rates to Mr. Robinson.[16] After the Complaint was filed, EPA received additional information from IHS, the NCUC, and Ernie Sprague that

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

contained documents from Respondents that would have been responsive to parts of the Information Request. *See* 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 the records required by 40 Part CFR 503, many of the documents provided by IHS including invoices (CX45 at 5) and emails from Respondents to NCUC and IHS discussing dewatering calculations, amount of sludge removed and land application methods, as well as timelines (CX45 at 20, 32, 33 and 43) that would have partially answered questions 5 and 7 of the CWA Information Request. Respondents, however, refused to provide this information to EPA and have to date not provided a complete and accurate response to the Information Request.

Based on the information and documents obtained by other parties from Respondents, Respondents clearly had responsive information and documentation in their possession. However, Respondents failed to provide a timely and complete response to EPA's Information Request over a for a nine-month period, and when Respondents did finally provide an incomplete response, it did not include all relevant information and documentation in their possession.

IV. THE PRESIDING OFFICER SHOULD ASSESS THE FULL PROPOSED PENALTY OF $59,583.

Once liability is established, the Presiding Officer is obligated to assess a penalty for the unauthorized activity. *See Atlantic States Legal Foundation v. Tyson Foods*, 897 F.2d 1128, 1142 (11th Cir. 1990); *Chesapeake Bay Foundation v. Gwaltney of Smithfield*, 890 F.2d 690, 697 (4th

Cir. 1989). As discussed above, liability for the violations has been established. Therefore, for the reasons set out below, the Presiding Officer should assess the full proposed penalty of $59,583.

For violations of CWA Sections 405, 33 U.S.C. § 1345, Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), authorizes the administrative assessment of civil penalties in an amount not to exceed $10,000 per day for each day during which the violation continues, up to a maximum total penalty of $125,000. Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule of 2019, as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. § 2461 note; Pub. L. 101-410), amended by the Debt Collection Improvement Act of 1996 and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (28 U.S.C. § 2461 note; Pub. L.114-74, Section 701), and pursuant to EPA's implementing regulations at 40 C.F.R. Part 19, civil administrative penalties may be assessed in the following amounts for violations after November 2, 2015, up to $21,933 per day for each day during which a violation continues; and for penalties assessed on or after January 15, 2019, up to a maximum total penalty of $274,159.

The amount of the proposed penalty is appropriate under the statutory penalty factors set forth in section 309(g)(2) of the CWA. 33 U.S.C. § 1319(g)(3). Specifically, section 309(g)(3) of the CWA provides, in pertinent part:

> "In determining the amount of any penalty assessed under this subsection, the Administrator . . . shall take into account the nature, circumstances, extent and gravity of the violation . . ., and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require . . . ."

33 U.S.C. § 1319(g)(3). One of the main intents of imposing civil penalties is "to punish culpable individuals and deter future violations, not just to extract compensation or restore the

status quo." *Kelly v. EPA*, 203 F.3d 519, 523 (7th Cir. 2000). In determining the appropriate penalty amount, the presiding officer must depend on the specific facts of the case. *See In re Pleasant Hills Authority* at § 4, Docket No. CWA-III-210 (ALJ McGuire Nov. 19, 1999).

Three of the statutory penalty factors do not apply here: EPA is unaware of any previous enforcement actions against Respondent that would make prior history of violations relevant. EPA is not asserting that Respondents enjoyed an economic benefit resulting from the alleged noncompliance because Respondents' violations effectively thwarted EPA's ability to determine if or how much overapplication of sewage sludge occurred. And Respondent made no claim nor proffered evidence in support of an inability to pay the proposed penalty.[17] As a result, these statutory penalty factors are not at issue. The statutory penalty factors that remain at issue are: (1) the nature, circumstances, and extent of the violation; (2) the gravity of the violation; (3) Respondent's degree of culpability; and (4) other matters that justice may require.

A. Respondent's failure to submit required biosolids records impedes EPA's ability to protect human health and the environment.

In determining the nature, extent, and gravity of a violation, the court factors, among other things, the importance of the regulatory requirements in achieving the goals of the CWA. *In the Matter of C&S Enterprise, L.L.C.*, CWA-07-2018-0095 at 43, *citing San Pedro Forklift*, 15 E.A.D. 838, 880 (EAB 2013). Complainant's witness, Erin Kleffner, testified extensively that EPA's abilities to protect human health and the environment are hampered when preparers and appliers of biosolids fail to submit required records. TR75: 2-9; 13-19; TR104: 9-12; 16-22. Because the biosolids regulations are self-implementing, EPA relies on preparers and appliers to

[17] On July 11, 2022, this court granted EPA's Motion for Production of Documents compelling Respondents to submit inability to pay documentation by July 29, 2022 or forfeit Respondent's ability to make an inability to pay claim. To date, Respondents have not submitted to EPA inability to pay documentation.

determine their compliance. TR75: 7-9. Without the records, EPA has no way to determine the potential extent of harm to human health and the environment. TR75: 15-19; TR104: 18-20.

This case originated as a complaint that Respondents overapplied sewage sludge on agricultural land in Montana. CX9. The sewage sludge preparation and land application activities occurred almost 900 miles from EPA Biosolids Center in Lenexa, Kansas. The Biosolids Center is responsible for EPA sewage sludge administrative enforcement for the entire country. It is impossible for EPA to timely perform site visits in response to all overapplication complaints. As a result, EPA relies heavily on preparers and land appliers meeting the regulatory requirement to maintain records and comply with their statutory obligation to provide those records in response to CWA 308 information request to protect human health and the environment. However, EPA and potentially affected persons will never know whether Respondents' actions caused harm. According to Ms. Kleffner, improper preparation or application of biosolids can be "detrimental to wildlife and humans both." TR52: 18-19. "In terms of wildlife, it has the capacity to change behavior, reproductive growth . . . . It can even result in death for some wildlife." TR52: 18-21. For humans, it can lead to cancer of Alzheimer-like symptoms, affecting memory and cognitive function. TR52: 22-25. Additionally, biosolids can carry pathogens such as e. coli and salmonella, which can make humans and wildlife sick. TR53: 1-4.

B. Respondent's actions make them culpable for violating the CWA.

In her Initial Ruling for *In the Matter of C&S Enterprise, L.L.C.,* Judge Susan Biro cited, among others, factors in determining a Respondent's culpability,

- How much control the violator had over the events constituting the violation,
- The level of sophistication within the industry in dealing with compliance issues, and
- Whether the violator in fact knew of the legal requirement which was violated.

CWA-07-2018-0095 at 45, *citing Henry Stevenson*, 16 E.A.D. 151, 177 (EAB 2013). As described above, the evidence clearly establishes Respondents' culpability because: (1) Respondents held themselves out to be in charge of the sludge removal and application project. *See, e.g.,* CX45 at 34.; (2) Respondents purported to be experts in the wastewater industry. CX24.; and (3) Respondents repeatedly assured NCUC and other parties that they were aware of EPA biosolids regulations and were solely responsible for complying with those regulations. CX45 at 21, 33. Further, and importantly, Respondent Pierce acknowledged that he intentionally withheld biosolids records from EPA to avoid "self-implication of other potential [CWA] violations," further evidencing his knowledge of the regulations and intent to flout them. Respondents' Initial Prehearing Exchange at 15.

EPA issued a September 2018 Information Request (CX11) followed by a second Request on March 4, 2019 (CX14), followed by multiple entreaties to obtain the required biosolids records. Some information was only received July 2, 2019, approximately nine months after the original request was issued. The information that was provided had been in Respondents' possession at the time of the initial request and, significantly, did not include all the requested information. For the two information requests that had a delayed or no response, EPA assessed one day each of the statutory maximum of $21,933, totaling $43,866. Given that 346 days transpired between Respondents' receipt of the CWA 308 Information Request and the filing of the complaint, two days of statutory maximum penalties represents an extremely conservative approach to EPA's penalty assessment.

Additional penalties were calculated for failure to maintain records. Of the information Respondent submitted, no management practices (including agronomic rate) were included and have never been supplied by the Respondent. This is of particular importance since the original

complaint received was due to improper land application and potential overapplication of biosolids. Since Respondent only maintained a portion of the records required per Part 503, a penalty of $15,717 was calculated for failure to maintain records. This portion of the penalty is less than the single day statutory maximum of $21,933 due to the fact that original land application project was a one-time project that did not extend over several months. However, this portion of the penalty still carries a significant gravity due to the fact that the failure to maintain records is severely detrimental to the Part 503 implementing regulations, as described above.

CONCLUSION

EPA proves herein by a preponderance of the evidence that Respondents were required by law to create, maintain, and submit biosolids records to EPA and that Respondents failed to do so. Respondent's failure to comply with the CWA warrants an assessment of a proposed penalty of $59,583.

CERTIFICATE OF SERVICE

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

A copy was sent by email to:

Nathan Pierce, Owner, Adamas Construction and Development Services PLLC:

Nathan Pierce
Adamas Construction and Development Services PLLC
adamas.mt.406@gmail.com

Date: November 3, 2023

KATHERINE KACSUR

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