UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
ADAMAS CONSTRUCTION AND DEVELOPMENT SERVICES, PLLC	)	**COMPLAINANT'S REPLY 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)	)	

1. 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 Reply Post-Hearing Brief. For the reasons set out below, Respondents have not demonstrated in their Initial Post-Hearing Brief that they are not liable for alleged violations of Sections 308 and 405 of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1318 and 1345, and the regulations promulgated thereunder. EPA proposes that a $59,583 penalty be assessed.

2. Complainant's Prima Facie Case

Respondents failed to demonstrate that Complainant did not meet its burden of proof for each element of the case. In their Post-Hearing Brief, Respondents fail to provide evidence that counters Complainant's prima facie case establishing liability. Further, Respondents fail to refute most of the elements in their Post-Hearing Brief.

a. Respondents were operators

At hearing and in its Initial Post-Hearing Brief, Complainant established that Respondents were operators of a point source and required to respond to a CWA Request for Information. In their Initial Post-Hearing Brief, Respondents repeatedly state NCUC had "operational control over the [sludge] project" (p. 4), but provide no argument and no record citations disrupting Respondents' status as self-asserted and de facto operators of the Lame Deer Publicly Owned Treatment Works ("POTW").[1]

b. Lame Deer POTW is a point source

At hearing and in its Initial Post-Hearing Brief, Complainant established the Lame Deer POTW is a point source. In their Initial Post-Hearing Brief, Respondents do not challenge nor provide discussion or countering record citations that the Lame Deer POTW is a CWA point source.

c. EPA requested information

At hearing and in its Initial Post-Hearing Brief, Complainant established the EPA properly requested information pursuant to its authority under Section 308 of the CWA. In their Initial Post-Hearing Brief, Respondents acknowledge that they received EPA's CWA Request for Information. P. 2.

d. Respondents failed to provide information requested by EPA

In their Initial Post-Hearing Brief, Respondents acknowledge that they did not reply with the specific information EPA requested in its Request for Information. Instead, Respondents assert they provided EPA with "guidance . . . on the location of the records" and that such guidance "demonstrates an effort to comply with EPA's information request, aligning with the

[1] *See* Complainant's Initial Post-Hearing Brief, pp. 34-42.

spirit of the regulation." Respondents' Initial Post-Hearing Brief, p. 2. However, Mr. Pierce acknowledged that he never submitted the required information to EPA. TR505: 16-25; TR506: 1-11. Deflection of responsibility is not a defense and does not undercut the record the EPA has established supporting this element of its case.

e. Respondents are persons

At hearing and in its Initial Post-Hearing Brief, Complainant established the Respondents are persons. In their Initial Post-Hearing Brief, Respondents do not challenge that the Respondents are "persons" as defined by the CWA.

f. Respondents prepared sludge

At hearing and in its Initial Post-Hearing Brief, Complainant established the Respondents prepared sludge for land application. In their Initial Post-Hearing Brief, Respondents do not challenge that they prepared the sludge. Respondents neither deny nor counter Complainant's oft-repeated and well supported assertions and evidence that Respondents: (1) assumed responsibility for and directed the preparation of sewage sludge at the Lame Deer POTW, (2) treated the sewage sludge through dewatering, (3) held themselves out to be the preparers of sludge, and (4) expressly assumed responsibility for compliance with 40 C.F.R. Part 503.[2]

Instead, Respondents refer to NCUC's "operational control" over the project and cite to one example demonstrating such control – that NCUC "locked out" Respondents from completing the project. Respondents Initial Post-Hearing Brief, p. 4. At hearing, however, Mr. Pierce testified that the "lock out" occurred *after* the preparation of the sludge and *after* at least some of the sludge had been applied. TR503: 25. Moreover, Respondents' assertion that NCUC

[2] *See* Complainant's Initial Post-Hearing Brief, pp. 20-27.

had some operational control over the project does not negate the extensive record the EPA has established that Respondents' actually prepared the sludge for land application.[3]

g. Respondents applied sludge

At hearing and in its Initial Post-Hearing Brief, Complainant established the Respondents land applied sewage sludge. In their Initial Post-Hearing Brief, Respondents assert that Tom Robinson and Ernie Sprague were the "sole individuals involved in the application of sewage sludge." P. 2. However, Respondents neither deny nor counter Complainant's evidence and testimony that Respondents: (1) told NCUC they were solely responsible for applying the sludge, (2) sought renumeration for applying the sludge, (3) entered into contracts with Messrs. Robinson and Sprague for sludge application with Respondents as contractors and Robinson and Sprague as sub-contractors, and (4) directed the sludge application activities.[4] Admittedly, the record shows that Messrs. Sprague and Robinson were also involved in the land application activities. However, the record establishes, and EPA has met its burden of proof, that Respondents were also land appliers of the sludge.[5]

h. The sewage sludge was both "Class B" and "bulk"

At hearing and in its Initial Post-Hearing Brief, Complainant established that the sewage sludge was Class B sludge and was bulk sludge. In their Initial Post-Hearing Brief, Respondents do not challenge that the sludge in the present case is "Class B" or "bulk" sludge.

i. The provisions of 40 C.F.R. § 503.13(b)(3) were met

At hearing and in its Initial Post-Hearing Brief, Complainant established that the sludge met the requirements of 40 C.F.R. § 503.13(b)(3). In their Initial Post-Hearing Brief,

[3] *See* Complainant's Initial Post-Hearing Brief, pp. 20-27.
[4] *See* Complainant's Initial Post-Hearing Brief, pp. 27-33.
[5] *See* Complainant's Initial Post-Hearing Brief, pp. 27-33.

Respondents do not attempt to refute that 40 C.F.R. § 503.13(b)(3) is the relevant regulatory provision subjecting Respondents to the recordkeeping requirements found in 40 C.F.R. 503.17. Instead, Respondents merely assert that they did not apply sludge. P. 2. This assertion, as discussed above, is not supported by the record.

j. The area of application was agricultural land

At hearing and in its Initial Post-Hearing Brief, Complainant established that the area of application was agricultural land. In their Initial Post-Hearing Brief, Respondents state the land was a barley field, which aligns with Complainant's assertion that the land was agricultural land as outlined in 40 C.F.R. § 503.17. P. 3.

k. Respondents failed to develop and retain information identified and required in 40 C.F.R. § 503.17(a)(4)

At hearing and in its Initial Post-Hearing Brief, Complainant established that Respondents failed to develop and retain information identified and required by 40 C.F.R. § 503.17(a)(4). Respondents do not refute in their Initial Post-Hearing Brief, nor in any other filing before this Court, that they developed and retained information pursuant to the biosolids recordkeeping requirements found at 40 C.F.R. § 503.17. Mr. Pierce even acknowledged that he never submitted the required information to EPA. TR505: 16-25; TR506: 1-11. Additionally, Respondents have repeatedly asserted that it was other parties' responsibilities to develop and retain the required information. However, at hearing, Mr. Pierce did not deny that, as the contractor, he failed to direct his sub-contractors to develop and retain the required information. TR504: 22-25; TR505: 1-8. As a result, EPA has met its burden to establish by a preponderance of the evidence that Respondents failed to develop and retain the required information at hearing and in its Initial Post-Hearing Brief.

3. Waters of the United States

At hearing and in its Initial Post-Hearing Brief, Complainant established that the EPA has jurisdiction under the CWA because Lame Deer Creek is a water of the United States. In their Post-Hearing Brief, Respondents argue that a barley field with no nexus to a navigable water fails to give rise to EPA jurisdiction under the CWA. However, Respondents are mistaken. The requirements of CWA Section 405(e), 33 U.S.C. § 1345(e) and 40 C.F.R. § 503.17 apply regardless of a nexus between an agricultural field and jurisdictional water. The relevance of the definition of a water of the United States in this case is the applicability of CWA Section 308's information gathering authorities to the Respondents because the Lame Deer POTW is a point source.

At the hearing and in its Initial Post-Hearing Brief, Complainant met its burden to establish that the relevant water at issue in this case – the section of Lame Deer Creek into which the Lame Deer POTW discharges thus establishing the POTW as a point source – is a relatively permanent water that connects to a traditional navigable water and is therefore, a "water of the United States" pursuant to 33 U.S.C. § 1362(7).[6]

Respondents overall misstate and appear to misunderstand CWA jurisdiction. For example, Respondents continue to assert that the 2020 Navigable Waters Protection Rule ("NWPR") defines jurisdictional waters under the CWA. However, the 2020 NWPR was vacated by U.S. District Courts in 2021[7] and has no bearing on this or any other case.

[6] *See* Complainant's Initial Post-Hearing Brief, pp. 42-44

[7] *Pascua Yaqui Tribe v. U.S. Environmental Protection Agency*. 557 F.Supp.3d 949 (D. Ariz. 2021); *Navajo Nation v. Regan*, 563 F. Supp. 3d 1164 (D.N.M. 2021).

4. EPA's Adjudicative Authorities

In their Initial Post-Hearing Brief, Respondents make several broad claims that Complainant "overreached" (pp. 3, 5, 7, 9), denied Respondents due process (pp. 5, 9), denied Respondents' Constitutional right to judicial review (pp. 8, 9) and violated the Constitution's separation of powers (p. 9). In response to these assertions, Complainant asserts it has at all times in this proceeding complied with any and all litigation authorities outlined in 40 C.F.R Part 22 and the Administrative Procedure Act of 1946. 5 U.S.C. §§ 551–559.

The record clearly establishes that Complainant repeatedly reached out to Respondents to gather the requested information and discuss potential consequences for noncompliance well in advance of filing a Complaint. *See, e.g.*, CX11, CX13, CX14, CX17, CX20, CX21, CX25. Further, EPA's initial Complaint clearly laid out EPA's allegations (including that Respondent was both a preparer and applier of sludge), thus putting Respondents on notice as to claims raised by Complainant. Finally, with respect to Respondents' assertions that EPA failed to produce witnesses at hearing, Complainant reiterates that it contacted witnesses, issued a subpoena, and petitioned the Court (unsuccessfully) for written testimony from Sheri Bement. Conversely, Respondents did not even attempt to procure witnesses as was within their power under 40 C.F.R. Part 22.

5. Witness Coaching

In their post-hearing brief, Respondents accuse counsel for Complainant of inappropriately coaching a witness, Ernie Sprague. Respondents' Initial Post-Hearing Brief, pp. 2-3. Such an accusation is unfounded. Throughout the several years of administrative litigation proceedings in this matter, counsel for Complainant have demonstrated a dedication to the fairness and legitimacy of all proceedings, especially in consideration of Respondents' pro se

status. When a potential mention of coaching arose at the hearing, Mr. Sprague clarified that he was asked to read highlighted excerpts of documentary evidence (TR413: 14-23). Additionally, Judge Coughlin established that (1) it is acceptable for counsel to elicit specific and limited testimony from witnesses and (2) both Complainant and Respondents utilized this practice at hearing. TR513: 11-17.

On August 21, 2023, counsel for Complainant (Chris Muehlberger, Kate Kacsur, and Sarah Moreno) met with Ernie Sprague at the Billings Public Library. The purpose of the meeting was to show Mr. Sprague the kinds of questions he would be asked at the hearing, to have him review highlighted portions of textual evidence he may be asked to testify to, and to answer any questions he may have about hearing procedure.

At the hearing on August 22-23, 2023, Counsel for Complainant asked each witness to recite highlighted excerpts of documents or communications for the record.[8] Mr. Pierce also utilized the same practice. (*see, e.g.,* TR332: 9-10). During the second day of the hearing, counsel for Complainant asked Mr. Sprague to read certain excerpts of CX42, which was a letter authored by Mr. Sprague and sent to EPA.[9] TR405: 4-15. Mr. Sprague later stated he was "told not to read" certain parts of CX42. TR412: 18-19. Regarding the un-highlighted portions of the letter, Mr. Sprague immediately clarified, "I was told I wasn't going to be discussing it [by the EPA]." CX412: 22-23. He went on to say, "when we met on Monday, I was told I was not to read anything other than the highlighted [text]." TR413: 11-13. Counsel for Complainant, Kate

[8] (TR76-77: 10-10 (Erin Kleffner reading highlighted portions of a report written by IHS); TR84-85: 21-12 (Erin Kleffner reading a highlighted portion of a letter from EPA to Respondents); TR284: 9-16 (James Courtney readin a highlighted excerpt of a letter authored by Respondents); TR373: 1-3 (Tom Robinson reading a highlighted portion of a contract between himself and Respondents); TR474: 6-12 (Michelle Pierce reading a portion of her written statement)

[9] The full transcript of the hearing can be found at: https://yosemite.epa.gov/oarm/alj/alj_web_docket.nsf/Filings-and-Attachments/EC29AFD359CA40BE85258A310055832F/$File/Adamas%20Hearing%20Trans%208-22%20to%208-23-23%20(condensed).pdf

Kacsur, stated, “I would like to make just a point of clarification, your Honor. Chris [Muehlberger] and I made clear that we were going to ask Mr. Sprague to read highlighted portions, but we did not at any point say we did not want him to read the non-highlighted portions.” TR413: 14-19. Mr. Pierce then asked, “Is that your understanding, Mr. Sprague?” (TR 413: 20-21), to which Mr. Sprague responded, “Yeah. They said that I was only to read the highlighted portions.” TR413: 22-23.

In response to this dialogue, Judge Coughlin told Mr. Sprague, “Both sides are going to be able to draw whatever testimony that they want from you. And it's very clear to me that there's a good bit you want to share. And as the judge, I want to hear it.” TR414: 16-20. She went on to say,

> “But out of courtesy to the parties and the testimony that they want to elicit, right now I just want you to answer the questions that they’re asking you, and then maybe I’ll follow up or just give you the opportunity to open-endedly share whatever maybe wasn’t drawn out . . . from their questions. Okay? So you have the chance to share what you think is important as it relates to this case . . . but we need to do this in an orderly fashion. So just hang tight for a little bit and compose your thoughts. And you’ve got things written down, so I’m assuming you won’t forget what you want to share. But right now, just respond to the questions by Ms. Kacsur, and we’ll get there eventually.” TR414-15: 23-22.

Ms. Kacsur then asked Mr. Sprague, “Mr. Sprague, I’d like to invite you to read the part of your statement that you would like to read.” TR415-16: 25-2. Mr. Sprague then read from and explained the part of his written statement that he presumably wanted to share. TR416: 4-14.

At the closing of the hearing, Mr. Muehlberger, counsel for Complainant, asked Judge Coughlin if he could also address Mr. Sprague’s earlier statement regarding limitations of his testimony. TR512: 4-12. Mr. Pierce then voiced a concern that the matter could not be discussed without Mr. Sprague present. TR512: 17-20. Judge Coughlin then told Mr. Muehlberger, “what I was interpreting you to want to say was simply to present your position with respect to what you

were going to focus on with the witness," and allowed Mr. Muehlberger to speak. TR512: 22-25. Mr. Muehlberger proceeded,

> "I just want to make sure that the record is clear that EPA in no way told any witness that they are prevented from saying anything that is in the record or speaking to or reading anything that is in the record. In fact, EPA made it very clear that, at the beginning of our meeting, that we were not telling them what they could or could not say during testimony."

TR513: 2-9. Judge Coughlin responded, "I think it suffices." TR513: 10-11. The judge went on to say:

> "I understand that parties will have a particular focus of what they want to draw out in a witness. And with regard to Mr. Sprague, since he was identified, I believe, as somebody both sides were going to call, you know, I . . . assumed, and I think what played out, is that you both drew out everything you wanted, and Mr. Sprague got a lot off his chest of some things that he wanted to be sure to share with the tribunal, too."

TR513: 11-20.[10]

In summary, as recognized by the Tribunal, counsel for Complainant utilized a common examination practice – also utilized by Respondents – of eliciting specific testimony from witnesses. At the hearing, this Court promptly addressed the issue and informed the witness that counsel for Complainant's actions were common and acceptable in a hearing setting.

6. Motion to Dismiss

In their Post-Hearing Brief Conclusion, Respondents "request the dismissal of all allegations against the Respondents. . . ." P. 10. Complainant asserts that the deadlines for dispositive motions have long-since passed in this case (*see* April 19, 2023 Order Rescheduling

[10] Judge Coughlin also addressed Respondents' concerns about information being selectively read aloud during the cross-examination of Michelle Pierce. *See* TR473. Judge Coughlin told Respondents, "I mean, I'm going to have all of it, obviously. I realize that there are certain points that the parties want to emphasize, but that's not what I'm limited to." TR473: 15-18 She also advised Respondents, "when you have the opportunity to redirect . . . if you want to point out some of those other areas that you think might provide some context, you're welcome to." TR473: 20-24.

Hearing) and the Respondents are barred from making such a motion at this stage of the proceedings without an accompanying motion to file out of time.

7. Conclusion

As established through Complainant's evidence and briefing, Respondents failed to disrupt any of the prima facie elements in the present case and failed to provide any bases to mitigate the penalty sought by Complainant. Thus, the Court should find for Complainant and assess the proposed penalty.

CERTIFICATE OF SERVICE

I certify that the foregoing Complainant's Reply 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: December 15, 2023

Chris Muehlberger
Assistant Regional Counsel
11201 Renner Boulevard
Lenexa, Kansas 66209
(913) 551-7623
muehlberger.christopher@epa.gov