UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219
BEFORE THE ADMINISTRATOR

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

COMPLAINANT'S REPLY TO MOTION FOR ACCELERATED DECISION AS TO LIABILITY

I. Introduction

Respondents continue to present the same argument—when seeking payment they are responsible for all the work completed, but when taking responsibility for actions that violate the Clean Water Act, it is another party's fault. Respondents raise four issues in its Response that will be addressed herein. First, Respondents incorrectly state that the Court lacks subject matter jurisdiction under the Clean Water Act. Second, Respondents argue that they have met the heavy burden to dismiss claims because Respondent Pierce was not the operator of the Lame Deer POTW, despite providing no new evidence supporting their argument. Third, Respondents argue that they should not be held liable for their actions under the Clean Water Act due to the "business model" rule. Finally, Respondents erroneously assert that they provided an adequate response to the Clean Water Act Section 308 information request.

Respondents have not raised any genuine issues of material fact and have not presented any evidence that should prevent the Court from finding that accelerated decision as to Clean Water Act liability is warranted in this matter.

II. The Court Has Subject Matter Jurisdiction Over this Matter and Respondents' Defense Under the Clean Water Act Fails as a Matter of Law

The Court has subject matter jurisdiction over this case under the Clean Water Act. Respondents' argument regarding subject matter jurisdiction appears to rely on statements made in the fact sheet for the newly issued Navigable Waters Protection Rule (85 Fed. Reg. 22250, April 21, 2020). Complainant believes that Respondents have inappropriately characterized this as a subject matter jurisdiction argument. The authority to regulate under the CWA is distinct from the subject matter jurisdiction that defines a tribunal's authority to adjudicate a claim. *In re J. Phillip Adams*, 13 E.A.D. 310, 2007 WL 2285420 at *8 (CWA Appeal 06-06, June 29, 2007); *see also In the Matter of Rober J. Heser, et. al*. 2007 WL 2192943 at * 3 (Docket No. CWA 05-2006-002, Feb. 23, 2007).

The subject matter jurisdiction of the ALJ and the Board for this proceeding is provided by CWA section 309(g)(2)(B), 33 U.S.C. § 1319(g)(2)(B), which establishes administrative penalty assessment authority for, among other things, violations of the section 405 requirements for the disposal of sewage sludge, and by the Consolidated Rules of Practice, promulgated at 40 C.F.R. part 22, which in relevant part specify the administrative adjudicatory process for the assessment of any Class II penalty under CWA section 309(g). 40 C.F.R. §§ 22.1(a)(6), 22.4(c)(1). Therefore, the Court has subject matter jurisdiction under the Clean Water Act to adjudicate this case.

Respondents' argument that EPA lacks CWA jurisdiction fails as a defense to liability. Respondents appear to argue that Complainant has failed to demonstrate a significant nexus to

waters that are navigable and, therefore, Complainant has not proved its case. This is incorrect. First, Respondents' argument ignores that Complainant has demonstrated that Respondents operated a POTW that discharges to Lame Deer Creek, a water of the United States. Respondents did not deny these allegations in their Answer or provide evidence to the contrary in their Prehearing Exchange nor did Respondents dispute that the Lame Deer POTW discharges into Lame Deer Creek, a water of the United States, in their Response. Moreover, Respondents did not deny any of the jurisdictional allegations made in the Complaint or the Amended Complaint. *See* Amended Compl. ¶34; Resp.' Answer. In accordance with Section 405 of the CWA, EPA's preamble to the sewage sludge regulations, and the regulations set forth at 40 C.F.R. Part 503 regulations, the operators of a POTW, preparers of sewage sludge, and land applicators of sewage sludge are all subject to the sewage sludge rules. 33 U.S.C. §1345; CX33; and 40 C.F.R. §§503.9(q); 503.7; 503.9(a); 503.10(a). Respondents have not presented any evidence showing there is a genuine issue of material fact regarding this issue.

Second, Respondents' argument ignores the purpose of the sewage sludge program. The CWA, as enacted in 1972, addressed sewage sludge use and disposal in only one limited circumstance: when the use or disposal posed a threat to navigable waters. CX33 at 9250. In 1977, Congress amended section 405 to add a new section 405(d) which required EPA to develop regulations containing guidelines for the use and disposal of sewage sludge. *Id.* These guidelines must: (1) identify uses for sludge including disposal; (2) specify factors to be taken into account in determining the methods and practices applicable to each of these identified uses; and (3) identify concentrations of pollutants that would interfere with each use. *Id.*

In 1987, Congress amended section 405 and for the first time set forth a comprehensive program for reducing the potential risks to human health and the environment and maximizing

the beneficial use of sludge. *Id.* Under section 405(d), for each identified use or disposal method, EPA must promulgate regulations that specify acceptable management practices and numerical limitations for sludge that contains these pollutants. *Id.* These regulations must be "adequate to protect human health and the environment from any reasonably anticipated adverse effect of each pollutant." 33 U.S.C. §1345(d)(2)(D). Section 405(e) of the CWA prohibits the disposal of sludge from a POTW for any use for which regulations have been established pursuant to Section 405(d) by any person, except in accordance with such regulations. 33 U.S.C. § 1345(e).

In the preamble to the sewage sludge regulations, EPA explains that, in accordance with Section 405(d) and (e), it promulgated the regulations to protect public health and the environment from the adverse effects of pollutants that may be present in sewage sludge through a number of different routes of exposure. (CX33 at 9248). EPA's analysis was not limited to an assessment of the adverse impacts to surface water because contaminated or improperly handled sludge can result in pollutants in the sludge re-entering the environment and contaminating a number of different media through a variety of exposure routes. *Id*. at 9250.

EPA specifically assessed the human health risks posed by inhalation of pollutants that may be present in sewage sludge, direct ingestion of soil fertilized with sewage sludge, consumption of crops grown on this soil as well as risks to human health through contamination of drinking water or surface water when sludge is disposed of on land. In accordance with this approach, EPA's regulations are designed to protect human health and the environment from the pollutants found in sewage sludge in a variety of exposure routes. *Id*. For instance, the regulations establish numerical land application limits to ensure that the consumption of crops does not pose a risk to human health; vector attraction reduction rules to minimize rodents,

insects, birds and domestic animals on agricultural land; and rules regarding the incineration of sewage sludge to prevent risk from inhalation of pollutants found in sewage sludge. 40 C.F.R. §§503.13, 503.23, 503.25, 503.30, *et. seq*., 503.40, *et.seq*. None of the referenced regulations address the proximity of the land application site to a water of the United States (WOTUS) or the potential impact to surface water because surface water is not the only media or route of exposure considered in the promulgation of the sewage sludge regulations. Similarly, 40 C.F.R. § 503.10(a) states that the sewage sludge rules 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. None of these categories discuss a proximity to a WOTUS.

Complainant has demonstrated that, at all times relevant to this action, Respondents were the operators of a POTW that discharges to a navigable water, the preparers of sewage sludge and the land applicators of sewage sludge. Respondents have provided no evidence in the record that proves otherwise. Respondents failed to conduct the most basic function of these regulations—developing and maintaining records. Therefore, Respondents' defense fails and Complainant is entitled to accelerated decision.

III. Respondent Nathan Pierce is the Operator of the Lame Deer POTW and Individually Liable for Violations of the Clean Water Act

Respondents appear to be making two arguments: (1) that the claim for individual liability against Respondent Nathan Pierce should be dismissed[1], and (2) that there is a genuine issue of material fact that Respondent Nathan Pierce is the operator of the Lame Deer POTW.

[1] Complainant notes that Respondents' motion to dismiss is filed out of time per the October 18, 2019 Prehearing Order which required all dispositive motions to be filed within 30 days of the filing of Complainant's Rebuttal Prehearing Exchange.

Respondents do not appear to be arguing that there is a genuine issue of material fact as to whether Respondent Adamas was the operator of the Lame Deer POTW.

Rule 12(b)(6) of the Fed. R. Civ. P. has been used guidance in assessing motions to dismiss. *In the Matter of Agronics, Inc*. 2003 WL 21480370 at *8 (Docket No. CWA 6-1631-99, May 7, 2003). When reviewing a Rule 12(b)(6) motion to dismiss, the Court must accept the material allegations of the pleading as true, and construe them in the light most favorable to the non-movant. *Id.; citing Colle v. Brazos County*, 981 F. 2d 237, 243 (5th Cir. 1993). In addition, the movant must show beyond doubt that the non-movant can prove no facts entitling it to relief. *Id.; citing Electronic Data Systems Corp. v. Computer Assoc. International, Inc.*, 802 F. Supp. 1463, 1465 (N. D. Tex. 1992). It is well established that "[a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the [complainant] can prove no set of facts in support of his [or her] claim which would entitle him [or her] to relief." *In the Matter of Rober J. Heser, et. al*. 2007 WL 2192943 at * 4 (Docket No. CWA 05-2006-002, Feb. 23, 2007). The purpose of notice pleading is to give general notice to the defendant of the nature of plaintiff's claim. *Id.* To prevail, Respondents must show that EPA's allegations, assumed to be true, do not prove a violation of the Clean Water Act. *Id.* Respondents have not met this burden.

As set forth in Complainant's Memorandum in Support of Motion for Accelerated Decision (Complainant's Memorandum), Complainant seeks to hold Respondent Pierce liable for all actions of Respondent Adamas using the responsible corporate officer doctrine, which has been previously used and applied by this Court. *See In the Matter of Mr. C.W. Smith, et. al.*, 2004 WL 1658484, Docket No. CWA-04-2001-1501 (July 15, 2004). Complainant adequately plead the elements of the doctrine in the complaint. *See* Amended Compl. ¶¶29-32.

The Court in *In re C.W. Smith*, indicates that the liability of a party under the responsible corporate officer doctrine depends on the facts of each case. Here, Complainant has set forth that Respondent Pierce directed and controlled all activities of Respondent Adamas; Respondent Pierce held himself out to the EPA and the Indian Health Services as the primary contact of Respondent Adamas for environmental compliance; and Respondent Pierce managed, directed, or made decisions about environmental compliance for Respondent Adamas. Amended Compl. ¶¶29-32. Respondent Pierce did not deny and, in fact, admitted these allegations in the Answer. Resp. Answer ¶¶27-29. Respondent Pierce did not present any evidence in Respondents' Prehearing Exchange disputing these allegations nor did he cite to any additional evidence in the Response that would contradict these claims. Therefore, there is no genuine dispute of material fact that Respondent Pierce can be held personally liable as the responsible corporate officer of Respondent Adamas for violations of the Clean Water Act.

There is no genuine dispute of material fact that Respondents Pierce and Adamas were the operators of the Lame Deer POTW. Respondents never denied this factual allegation in the Answer nor did Respondents provide any evidence in their Prehearing Exchange in support of the contention that they were not the operators of the Lame Deer POTW. Failure of Respondents to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation. 40 C.F.R. § 22.15(d).[2] By failing to provide support or contrary evidence in their Prehearing Exchange, Respondents have not presented any evidence

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

demonstrating that they did not operate the POTW nor have they created a genuine issue of material fact.

In light of Respondent Nathan Pierce's actions at the POTW and the contracts entered into by Respondents to perform extensive operational work at the POTW, Respondents' unsubstantiated statement in the Response that NCUC failed to enter into a contract naming Respondent Nathan Pierce as the Sewer Operator is also of little to no probative value in determining liability. Responsible corporate officer liability under the CWA is predicated on either the performance of or responsibility for or control over performance of the work.[3] As set forth in Complainant's Memorandum, the record is replete with evidence demonstrating that Respondent Nathan Pierce operated the POTW in his role as a corporate officer of Respondent Adamas. Respondent Nathan Pierce held himself out as the "operator" of the Lame Deer POTW in various email correspondence,[4] and went as far as informing the State of Montana that he was the "Contract Project Manager and Wastewater Operator" for the Lame Deer Lagoon and explaining that those specific duties include "service, maintain [and] operate all Waste Water Systems of the NCUC on the Northern Cheyenne Reservation."(CX50).

Respondent Nathan Pierce's actions on behalf of Adamas also establish his liability. On behalf of Adamas, Nathan Pierce negotiated and signed the contract for sludge removal and land application with NCUC (CX45 at 19), signed the contract with the subcontractor Tom Robinson (CX7), attended meetings regarding the work to be performed under the contracts (CX19 at 9-10,

[3] *United States v. Lambert*, 915 F. Supp. 797, 802, 26 ELR 21116 (S.D.W.Va. 1996) (owner of property and contractor who performed work liable for illegal dredge and fill; "The CWA imposes liability on the party who actually performed the work and on the party with responsibility for or control over performance of the work."); *In re C.W. Smith, Grady Smith & Smith's Lake Corp*., Docket No. CWA-04-2001-1501 (ALJ Biro July 15, 2004) (owner of corporation that filled wetlands in dry lake bed held not liable for discharges where his brother, who was the co-owner of the corporation, made all of the decisions and ran all of the equipment used for the unauthorized discharges 36-45).

[4] *See* CX44, 45, and 46.

29; CX46 at 23-26), communicated with NCUC and the Indian Health Services on the status of the projects (CX4; 6; 7; 8; 19 at 29; 29; 45 at 6-48; 46 at 2-12, 23-26; and 47 at 6-9) made the decisions regarding the scope of work and how the work would be implemented (*Id*.), was identified as the Adamas Superintendent, Adamas Safety Coordinator and Adamas Project Manager in the Site Safety Plan (CX46 at 68), and acted as the NCUC contractor and lead facility-contact during the EPA Region 8 inspection. (CX5).

In the Response, Respondents attempt to negate their operator status by asserting, without evidentiary support, that they never completed a portion of the work that they had contracted to perform for NCUC. In correspondence from Respondents to Senator Steve Daines, Respondents state that "in exchange for its work on the projects, Adamas agreed to accept as payment $239,000 for IHS number BN-16N39, $130,250 for IHS BN-17-N61, and $200,000 for the scattered site projects." (CX49 at 8). Respondents' use of the past tense when stating "in exchange for its work on the projects" implies that the work had been completed. Reading the plain language of the representations of Respondents, Complainant understood this to mean that Respondents performed the work and were paid for the Scatter Site projects and Sewer Camera Cleaning project. (*See also* CX54 at 6). The remainder of the correspondence to Senator Daines takes issue with Respondents only receiving partial payment for the sludge removal and land application project. (CX49 at 8-11). Even if Respondents' assertions in the Response are true, this does not raise a genuine issue of material fact because of the overwhelming evidence demonstrating that Respondents operated the Lame Deer POTW. The work that Respondents had agreed to perform with respect to the Scatter Sites project and Sewer Cleaning project are simply further evidence of the extensive work that Respondents were performing for NCUC at the Lame Deer POTW.

Further, many of the statements made by Respondents are irrelevant to a determination of liability. For instance, Respondents state that NCUC "should be the Respondeat Superior," (a term unfamiliar to Complainant for purposes of CWA liability) because "NCUC exercised active and pervasive control" over the POTW. Respondents go on to note (without citing to evidence in the record) that Raymond Pines was the Operator of the Lame Deer POTW before the projects began and that NCUC failed to enter into a contract with Respondents. Even if true, Respondents' argument that other parties are also liable does not absolve Respondent Nathan Pierce or Respondent Adamas from liability under the CWA. There can be more than one "operator" of a POTW, as acknowledged in Respondents' Response, and the CWA is a strict liability statute that provides for joint and several liability. *In re Urban Drainage and Flood Control District; Kemp & Hoffman, Inc. and City of Lafayette*, Docket No. CWA-VIII-94-20-PII, 1998 WL 422210; *In re Corporacion para el Desarrollo Economico y Futuro de la Isla Nena*, Docket No. CWA-II-97-61 (ALJ Biro July 15, 1998).[5]

IV. Respondents Cannot Contract Away Liability under the Clean Water Act

While Respondents fail to cite any evidentiary or legal support for their "business model" argument, liability under the CWA is clear. As described by the court in *Sierra Club v. MasTec North America*, a company cannot avoid liability under the CWA by contracting away its compliance with applicable law. 2007 WL 4387428 at *4 (D. Or. 2007). The court found that "[to] the extent Mastec relies on its contractor status to avoid liability for any of the acts for which it was responsible or performed, the motion for summary judgement is granted." *Id.* As set forth in Complainant's Memorandum, Respondents were responsible for or performed all the

[5] Court awarded $75,000 jointly and severally against three defendants for CWA violations after one settled for $40,000 and the other two failed to file an answer to the complaint; EPA had only asked for $35,000 against the remaining two in its default motion, giving them credit for the $40,000 settlement.

work necessary to complete the sludge removal and land application project. Respondents submitted all schedules, site safety plans and required documentation for the Sludge Removal and Land Application project directly to Indian Health Services. (CX49 at 8). Respondents completed the sludge removal and land application project without the use of NCUC equipment or staff. It was Respondents (not NCUC or Ernie Sprague or Tom Robinson) that prepared the lagoons at the POTW for sludge removal, sampled the sludge at the POTW, pumped the sludge from the lagoons at the POTW, mobilized the Site and made the decisions regarding the sludge application site, timing and equipment to be used. *See* Compl. Memo. at 19-26. And when it came to getting paid for this work, Respondents emphatically stated, through counsel, that they didn't just perform "some of the work", but that they were responsible for all of the work performed to complete the projects. (CX45 at 14). As the project manager and technical consultant for the Lame Deer Sludge Removal and land application project, Respondents were responsible for ensuring that the entire project was completed in accordance with EPA's regulations including the requirement to develop and maintain land application records.[6] Respondents cannot escape liability by attempting to shift blame to its subcontractors.

V. Respondents did not respond to the CWA 308 Information Request.

[6] *In re Urban Drainage and Flood Control District; Kemp & Hoffman, Inc. and City of Lafayette*, Docket No. CWA-VIII-94-20-PII, 1998 WL 422210 (ALJ Pearlstein June 25, 1998) (held that contractor who performed work in stream channel for flood control district is strictly liable along with district); *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 both "persons" under the Act because both exercised control over the activities at the site; court rejected manager's argument that he was merely following orders from owner, "He completed paperwork, engineering plans, applied for permits and did 'whatever was required to…put that part of the project together.'"); but see *United States v. Sargent County Water Resources Dist*., 876 F. Supp. 1081, 40 ERC 1710 (D.N.D. 1992) (engineering consultant held not liable for unpermitted work on ditch because consultant did not perform any of the work and had nothing to do with the placement of the excavated material.)

Respondents again argue that liability should fall to any party except them and distort the evidence of record. Complainant has demonstrated that at all times relevant to this action, Respondents were the operators of the Lame Deer POTW, the sludge preparers and the land appliers and, therefore, were required to develop and maintain the records required by 40 CFR Part 503 and provide those records to EPA under CWA Section 308. Complainant's Memorandum describes in detail the records that Respondents should have had in their possession and failed to provide. Compl. Memo at 33-34. EPA's ability to obtain timely and accurate information under the Clean Water Act is central to the administration and enforcement of the Act. *See In re H. Craig Higgins*, (Docket No. CWA-1-I-91-1088), 1992 WL 892833 at *6. Failure to respond in a timely manner to a request for information risks damaging or irreparable environmental consequences. *Id*. Respondents have failed to provide any evidence to the contrary other than to resort to shifting blame and misconstruing the evidence. Therefore, there is no genuine issue of material fact and Complainant is entitled to accelerated decision.

VI. Conclusion

Respondents have not presented any argument or evidence that raise a genuine issue of material fact as to Clean Water Act liability. Therefore, Complainant's Motion for Accelerated Decision should be granted.

RESPECTFULLY SUBMITTED this 8th day of June 2020.

_/s Sara Hertz Wu
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CERTIFICATE OF SERVICE

I certify that the foregoing Complainant's Reply Motion for Accelerated Decision As To Liability, Docket No. CWA-07-2019-0262, has been submitted electronically using the OALJ E-Filing System.

A copy was sent by email to:

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A copy was sent by email to Nathan Pierce at:

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Date: 6/8/2020

/s Sara Hertz Wu_____

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