

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

IN THE MATTER OF )  
 )  
ADAMAS CONSTRUCTION AND ) RESPONDENT’S INITIAL PRE-  
DEVELOPMENT SERVICES, PLLC ) HEARING EXCHANGE  
 )  
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) )

**RESPONDENT’S INITIAL PREHEARING EXCHANGE**

COMES NOW, the (“Respondent”) NATHAN PIERCE, by and through his attorney, Chris J Gallus, pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. §§ 22.1 to 22.45, and Administrative Law Judge Christine Donelian Coughlin’s Prehearing Order of October 18, 2019, submits this Initial Prehearing Exchange.

**1.(A) WITNESSES**

Erin Kleffner  
Life Scientist  
Enforcement and Compliance Assurance Division, Water Branch  
U.S. Environmental Protection Agency, Region 7  
11201 Renner Boulevard  
Lenexa, Kansas 66219

Ms. Kleffner will testify as a fact witness. Ms. Kleffner has worked in EPA Region 7 for 3 years, primarily specializing in biosolids compliance and enforcement. Her duties include reviewing biosolids annual reports to determine if violations are present, reviewing inspection reports, drafting and reviewing information requests, and calculating penalties for violations found. She will testify regarding her personal, education and employment background, including her training and work experience at EPA. She will also testify regarding her investigation into

this matter, review of evidence, and the factual and evidentiary support for the determination that Respondents have violated the Clean Water Act (CWA) and the regulations promulgated thereunder. Ms. Kleffner will also testify to the facts that support EPA's proposed penalty. Ms. Kleffner may testify regarding Respondents' ability to pay the proposed penalty or the effect of the proposed penalty on their ability to continue to do business, if Respondents raise this statutory factor, which, to date, they have not.

Jodi Bruno  
National Biosolids Coordinator  
Enforcement and Compliance Assurance Division, Water Branch  
U.S. Environmental Protection Agency, Region 7  
11201 Renner Boulevard  
Lenexa, Kansas 66219

Ms. Bruno will testify as a fact witness. Ms. Bruno has worked in EPA Region 7 for 21 years, primarily specializing in water enforcement and related programs. Her duties include providing enforcement and technical expertise and policy interpretation to enforcement staff and other affected staff regarding compliance determinations, appropriate enforcement response, evidentiary requirements, penalty calculations, and other matters related to enforcement response and case development. She will testify regarding her personal, education and employment background, including her training and work experience at EPA. She will testify regarding her specific knowledge of EPA's biosolids program and regulations.

Akash Johnson  
Environmental Engineer  
U.S. Environmental Protection Agency, Region 8  
1595 Wynkoop Street  
Denver, Colorado 80202

Mr. Johnson will testify as a fact witness. Mr. Johnson has worked in EPA Region 8 for 3.5 years, primarily specializing in NPDES inspections and enforcement. His duties include conducting inspections, preparing inspection reports, offering compliance assistance, and providing technical support to enforcement case development. He will testify regarding his personal education and employment background, including his training and work experience at EPA. He will also testify regarding his June 2018 inspection of the Lame Deer WWTF, where biosolids compliance assistance was provided to the Respondents.

Ben-Khaled, Monia  
U.S. Environmental Protection Agency, Region 8  
1595 Wynkoop Street  
Denver, Colorado 80202

Mrs. Ben-Khaled testify as a fact witness. Mrs. Johnson has worked in EPA Region 8, primarily specializing in compliance and enforcement. Her duties include conducting inspections, preparing inspection reports, offering compliance assistance, and providing technical support to enforcement case development. She will testify regarding her personal education and employment background, including her training and work experience at

EPA. She will also testify regarding her June 2018 inspection of the Lame Deer WWTF, where biosolids compliance assistance was provided to the NCUC and the Respondents.

Amy Swanson  
Attorney  
U.S. Environmental Protection Agency, Region 8  
1595 Wynkoop Street  
Denver, Colorado 80202

Mrs. Swanson will testify as a fact witness. Mr. Johnson has works for EPA Region 8. She will also testify regarding her June 2018 inspection of the Lame Deer WWTF, where biosolids compliance assistance was provided to the NCUC and the Respondents.

Emilio Llamozas  
Environmental Engineer  
U.S. Environmental Protection Agency, Region 8  
1595 Wynkoop Street  
Denver, Colorado 80202

Mr. Llamozas will testify as a fact witness. Mr. Llamozas has worked in EPA Region 8 for 16 years, with 8.5 years in NPDES Enforcement. His duties include conducting inspections, preparing inspection reports, offering compliance assistance, and providing technical support to enforcement case development. He will testify regarding his personal education and employment background, including his training and work experience at EPA. He will also testify regarding his June 2018 inspection of the Lame Deer WWTF, where biosolids compliance assistance was provided to the Respondents.

Gary Fahlstedt  
Assistant Regional Counsel  
Department of Health and Human Services, Region VIII  
Byron Rogers Federal Building  
1961 Stout Street, Room 08-148  
Denver, CO 80294  
Phone: 303-844-7803

Mr. Fahlstedt is expected to testify as a fact witness. Mr. Fahlstedt will testify regarding certain documents included in this Prehearing Exchange.

Nathan Pierce  
16650 Cottontail Trail  
Shepherd, Montana 59079

Mr. Pierce is a Respondent, individually and as the President of Adamas Construction

and Development Services, PLLC. Mr. Pierce will testify as a fact witness. Mr. Pierce is expected to testify regarding his role and responsibilities as an individual and as the President of Adamas Construction and Development Services, PLLC (Adamas). Mr. Pierce is expected to testify regarding Respondents' contract with the Northern Cheyenne Utilities Commission as the project manager to remove, transport and apply 1,000,000 gallons of sludge from Cell #2 of the Lame Deer Lagoon. Mr. Pierce is expected to testify regarding Respondents' activities related to the removal, transportation, and land application of the sludge from Cell #2 of the Lame Deer Lagoon. Mr. Pierce is expected to testify regarding Respondents' Subcontract with Mr. Robinson. Mr. Pierce is expected to testify regarding certain documents included in this Prehearing Exchange.

Michelle Pierce  
16650 Cottontail Trail  
Shepherd, Montana 59079

Mrs. Pierce is the wife of Nathan Pierce and, as described in Respondents' Answer, an integral part of Adamas Construction and Development Services, PLLC. Mrs. Pierce is expected to testify as a fact witness. Mrs. Pierce will testify regarding her role and responsibilities as an individual and as a member of Adamas Construction and Development Services, PLLC. Mrs. Pierce is expected to testify regarding Respondents' contract with the Northern Cheyenne Utilities Commission as the project manager to remove, transport and apply 1,000,000 gallons of sludge from Cell #2 of the Lame Deer lagoon. Mrs. Pierce is expected to testify regarding Respondents' activities related to the removal, transportation, and land application of the sludge from Cell #2 of the Lame Deer Lagoon. Mrs. Pierce is expected to testify regarding Respondents' Subcontract with Mr. Robinson. Mrs. Pierce is expected to testify regarding certain documents included in this Prehearing Exchange.

Tom Robinson  
34819 Highway 212  
Lame Deer, Montana 59043

Mr. Robinson is the person who subcontracted with Respondents regarding land application. Mr. Robinson also called Indian Health Services after the sludge was mis-applied to his land. Mr. Robinson is expected to testify as a fact witness. Mr. Robinson is expected to testify regarding the subcontract that he entered into with Respondents, his communications with Respondents, and all activities related to the land application of biosolids on his land. Mr. Robinson is expected to testify regarding certain documents included in this Prehearing Exchange.

Representative of the Northern Cheyenne Utilities Commission (NCUC)  
P.O. Box 747  
Lame Deer, Montana 59043

Respondent will work with the Northern Cheyenne Utilities Commission to identify the appropriate fact witness or witnesses. The former manager, Sheri Bement, no longer works at the NCUC, and, therefore, will need to be compelled to testify as a fact witness as she has significant detail about this case and the fact surrounding it. Also former NCUC employees Sean

Badbear and Jace Frank Backbone, both of whom have extensive factual knowledge of event surround this case, they will also testify about document attached to this prehearing exchange. Respondent expects this witness or witnesses will testify regarding NCUC interactions with Respondents and observations of the projects and activities related to the Lame Deer Sludge Removal Project and Respondents' role in the Lame Deer Sludge Removal Project. Respondent expects this witness or witnesses to testify regarding the contract between NCUC and Adamas for the sludge removal project. Respondent also expects this witness or witnesses to testify regarding Respondents' role as operator of the wastewater treatment facility, particularly related to the facts and circumstances of the EPA Region 8 inspection. The NCUC representative will testify regarding certain documents included in this Prehearing Exchange.

James Courtney  
Engineer  
Billings Area Indian Health Service  
2900 4<sup>th</sup> Ave. N. Billings, Montana 59101

Mr. Courtney is expected to testify as a fact witness. Mr. Courtney was the primary Indian Health Services point of contact for Mr. Pierce regarding the land application of biosolids from the Lame Deer Lagoon. Mr. Courtney also conducted a site visit of the land application site after receiving a complaint from the land owner, Tom Robinson, and will testify regarding his observations and interactions with Mr. Robinson, Respondents, and NCUC. Mr. Courtney can testify to the role that Mr. Pierce had with respect to the land application of the biosolids from the Lame Deer Lagoon and to his observations regarding the land application site. Mr. Courtney will testify regarding certain documents included in this Prehearing Exchange.

George Cummins  
Construction Inspector  
Lame Deer Service Unit Indian Health Service  
2900 4<sup>th</sup> Ave. N. Billings, Montana 59101

Mr. Cummins is expected to testify as a fact witness. Along with Mr. Courtney, Mr. Cummins conducted a site visit of the land application site after receiving a complaint from the land owner, Tom Robinson. Mr. Cummins will testify regarding his observations and interactions with Mr. Robinson, Respondents, and NCUC. Mr. Cummins can testify to the role that Mr. Pierce had with respect to the land application of the biosolids from the Lame Deer Lagoon and to his observations regarding the land application site. Mr. Cummins will testify regarding certain documents included in this Prehearing Exchange.

Ernie Sprague  
D and R Disposal  
215 Birch Court  
Colstrip, Montana 59323

Mr. Sprague is expected to testify as a fact witness. Mr. Sprague can testify to his involvement in the land application of sludge on Mr. Robinson's land and can testify to his communications with Mr. Pierce and Mr. Robinson. Mr. Sprague is expected to testify regarding certain documents included in this Prehearing Exchange.

Josh Jabalara  
Technical Assistance Provider  
Midwest Assistance Program – Montana Office  
Phone: (406) 694-9871  
Central Office  
303 N Market St., Suite 2  
Maryville, MO 64468  
660-562-2575

Mr. Jabalara is expected to testify as a fact witness. Mr. Jabalara was also a Technical Assistance Provider to NCUC regarding the land application of biosolids from the Lame Deer Lagoon. Mr. Jabalara also conducted a site visits to the lagoon and land application sites. Mr. Jabalara will testify regarding certain documents included in this Prehearing Exchange.

Dion KILLSBACK  
Former NCUC Attorney  
P.O. Box 294  
Busby, MT 59016

Mr. KILLSBACK is expected to testify as a fact witness. Mr. KILLSBACK was the Attorney for NCUC and the legal point of contact for Mr. Pierce regarding the land application of biosolids from the Lame Deer Lagoon. Mr. KILLSBACK can testify to the role that Mr. Pierce had with respect to the land application of the biosolids from the Lame Deer Lagoon and to his observations regarding the land application site. Mr. KILLSBACK will testify regarding certain documents included in this Prehearing Exchange.

Dana Eaglefeathers  
Councilman  
Northern Cheyenne Tribal Nation,  
600 Cheyenne Ave  
Littlewolf Capital Building  
P.O. Box 128  
Lame Deer, Montana 59043

Mr. Eaglefeathers will testify as a fact witness. Mr. Eaglefeathers can testify to the role that Mr. Pierce and NCUC had with respect to the land application of the biosolids from the Lame Deer Lagoon and to his observations regarding the land application site. Mr. Eaglefeathers will testify regarding certain documents included in this Prehearing Exchange.

## **1.(B) EXHIBITS**

For purposes of the list of documents below, “Respondent’s Exhibit” is abbreviated as “RX\_.” Copies of documents and exhibits which Respondent intends to introduce into

evidence at the hearing are herein submitted electronically using the OALJ E-filing system.

RX #	Description
1	Undated NCUC proposal attached to Respondents' Answer.
2	May 18, 2018, Pre-Construction Meeting Minutes.
3	July 13, 2018, Email from Adamas to Indian Health Services to provide an update on the status of the land application project.
4	August 2, 2018, Analytical Summary Report, submitted by Adamas to EPA.
5	August 8, 2018, Subcontract between Adamas and Tom Robinson, the owner of the application site.
6	August 13, 2018, Indian Health Services letter to NCUC expressing concerns with claims that Adamas had made regarding the sludge at Lame Deer Lagoon and expressed concerns that Adamas had failed to provide land application logs.
7	August 28, 2018, Indian Health Services Site Report regarding the land application.
8	September 25, 2018, EPA CWA Section 308 information request for information related to the August 22, 2018, land application of sewage sludge.
9	October 17, 2018, Respondents' response to the EPA's information request. Respondents stated that they needed to obtain information from NCUC and requested an extension to respond and was granted a 30-day extension on October 29, 2018. EPA did not receive a copy of the letter sent to NCUC.
10	April 8, 2019, Email from EPA to Indian Health Services.
11	June 14, 2019, Email from attorney Chris J Gallus to EPA.
12	July 2, 2019, Email with attachments from Respondents to EPA providing some information in response to EPA's request for information
13	July 18, 2019, Email from EPA to Respondents
14	October 15, 2019, Email between EPA and Respondents
15	October 31, 2019, Emails from Respondents to EPA with attachments.
16	EPA guidance document entitled "Land Application of Sewage Sludge", dated December 1994.
17	November 20, 2019, First Email with Attachments from James Courtney at Indian Health Services to EPA.
18	July 31, 2019, letter from U.S. Senator Steve Daines
19	Documentation of Service of the Answer.
20	Letter to Northern Cheyenne TERO from former NCUC Employee Sean BadBear
21	Letter to Northern Cheyenne TERO from former NCUC Employee Frank Backbone
22	[PLACEHOLDER FOR 308 Responses from Tom Robinson]
23	[PLACEHOLDER FOR 308 Responses from D&R Disposal]
24	[PLACEHOLDER FOR 308 Responses from NCUC]

**1. (C) STATEMENT SPECIFYING AMOUNT OF TIME NEEDED BY RESPONDENT TO PRESENT ITS DIRECT CASE AND WHETHER AN INTEPRETER IS NECESSARY**

Respondent estimates that it will require approximately 3 days to present its case in chief. The length of time required for rebuttal testimony and cross-examination of Complainants' witnesses will depend on the number and substance of documents and witnesses disclosed in Complainants' Prehearing Exchange. Respondent also does not anticipate that the services of an interpreter with regard to the testimony of any witnesses will be necessary.

**2.(A) DOCUMENTATION SHOWING THAT SERVICE OF THE COMPLAINT WAS COMPLETED IN ACCORDANCE WITH SECTION 22.5(b)(1) OF THE RULES OF PRACTICE, 40 C.F.R. § 22.5(b)(1)**

Documentation of service of the Answer can be found in RX19.

**2.(B) A BRIEF NARRATIVE STATEMENT, AND A COPY OF ANY DOCUMENTS IN SUPPORT, EXPLAINING IN DETAIL THE FACTUAL AND/OR LEGAL BASES FOR THE ALLEGATIONS DENIED OR NOT OTHERWISE ADMITTED IN RESPONDENT'S ANSWER**

Respondents' Answer, entitled, "Answer and Request for Hearing," denies all of the allegations at the introduction and the respondent goes on to further explain some of the allegation against them. In the response to the "Introduction," the Respondents states, "The respondent hereby denies all allegations against them, requests a hearing and responds to each allegation below." 40 C.F.R. § 22.15(b), states that the answer "shall clearly and directly admit, deny, or explain each of the factual allegations contained in the complaint with regard to which respondent has any knowledge. Where respondent has no knowledge of a particular factual allegation and so states, the allegation is denied." 40 C.F.R. § 22.15(d) states that "failure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation." Although many paragraphs of the Complaint are not specifically addressed by the Respondents in the Answer, the respondent specifically denies any all allegations against them, the respondent is not knowledgeable of jurisdictional laws EPA and Federal codes. Therefore, Respondent asserts that any material factual allegation not specifically addressed by Respondents be treated as if they were specifically denied and not allow them to be admitted.

After the Complaint was filed, Respondents provided additional information to Complainant that had been provided to others in the EPA in hopes of settling this issue. As a result, Complainant is conducting additional investigation into the claims made by Respondents and continues to receive additional information related to this matter. Therefore, Respondent reserves the right to supplement the prehearing exchange with any additional, relevant information and/or to include such information. Furthermore this matter should be continued or dismissed until the complainant is has conducted all their investigations and made a proper determination on who exactly is culpable. It the in the interest of justice for the Complaint to conduct a proper and



complete investigation and not use complaints as fishing expeditions or require the respondent to prove his innocence contrary to the judicial presumption of innocent until prove guilty as afforded to all Americans in judicial proceedings.

Complainant will set forth its best response based on the information provided to date.

The narrative statement below follows the numbering sequence of the Complaint.

### Jurisdiction, Parties, Statutory and Regulatory Framework

The Respondent clearly states in the introduction of their response “The respondent hereby denies all the allegations against them” Pursuant to 40 C.F.R. § 22.15. The Respondent again hereby denies each, any and all the allegations against them contained in the Complaint pursuant to 40 C.F.R. § 22.15.

### Factual Background

The Complainant claims in emails to the respondent and their complaint this case is based on 2 things, a.) the Respondent failing to respond to a Request for information b.) The respondent failure to maintaining records for all properties they are responsible for applying biosolid sludge to.

The respondent did in fact send a letter, by and through his attorney, on October 17, 2018, to EPA Director, Jeffery Robichaud, in response to the request by the EPA, in that letter the respondent asserts that they expressly reserve the right to dispute any obligation to respond and further alerts the EPA that NCUC as the prime contract holder was responsible for responding to this request for information, also furnished was a copy of a letter sent to NCUC Attorney Dion Killback. RX9 pgs.1-2.

The Subcontractor Agreement attached to Respondents’ Answer<sup>3</sup> states that the Contractor (Adamas) will pay to the said Subcontractor (Tom Robinson), “the sum of Fifteen Thousand Dollars (\$15,000) for application of the sludge removed from the Lame Dear Lagoon and hauled to Tom Robinson’s field and applied at an even rate.” CX7. The subcontract goes on to specify that the Subcontractor (Tom Robinson) will furnish Contractor with logs for each day of application.” Id.

#### A. Factual and Legal Basis Against Land Applicator Liability

Pursuant to 40 C.F.R. 503.9 (a) *Apply sewage sludge or sewage sludge applied to the land* means land application of sewage sludge, and (q) *Person* is an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof.

the Respondents’ continued argument that they bear no responsibility for the land application of sludge is directly supported by the evidence. First and most notably, NCUC is always the prime contractor for this project and remained in control of the project, as evidenced by the letter from Sheri Bement to Adamas dated June 27, 2018. RX15, pg.10. IHS expressly

told NCUC at the May 18, 2018 preconstruction meeting, NCUC was responsible for all work and compliance with all EPA 503 regulations. RX2 pg.1-3. Adamas with permission and approval of the NCUC board of Directors entered into a contract with Tom Robinson for the land application for the sludge application on Tom Robinson's property. RX5, p.1-2. The contract specifies that "FIRST. The Subcontractor agrees to furnish all material and perform all work necessary to complete the: Receive and apply bio-solid sludge from the frac tanks located at the Lame Deer Lagoons in Lame Deer Montana at an agronomic rate and haul it to the barley field with Pivot line owned or leased by Tom Robinson, in compliance with US 40 EPA 503 regulations. Subcontractor further agrees to prep the field and till the sludge incorporating it into the soil within 6 hour. Subcontractor must sludge apply to a minimum of 50 acres, at a maximum application rate of 22,000 gallons per acre. SECOND. The Subcontractor agrees to promptly begin said work as soon as notified by said Contractors. Estimated begin date is 8/9/18. Subcontractor will furnish Contractor with logs for each day of application." RX5, p.1. Tom Robinson was a subcontractor and a person pursuant to 40 CFR 503.9 (q) and is the person who physically apply sewer sludge to his own land pursuant to 40 C.F.C. 503.9 (a). Tom Robinson and Nathan Pierce or Adamas, were not an association, partnership, corporation, municipality, State or Federal agency, now as Tom Robinson an Agent or employee of Adamas or Nathan Pierce.

Second, the respondent was the only person who attempted to provide accurate sludge concentration estimates before Tom Robinson applied sewer sludge to his own land. In his email dated April 8 2019 to Akash Johnson, James Courtney asks for guidance and point out the respondent brought to his attention the use of a sludge judge was an inaccurate method of determining the solid concentrations of both the Frac tanks and the sewer lagoon ponds. CX15 pg.3. During the course of the project James told NCUC that his way of determining sludge concentration by using a sludge judge was more accurate than the methods of the respondent and NCUC instructed Adamas to go by the estimated amount provided by James. Also on April 8<sup>th</sup> 2019, Erin Kleffner responded to James Courtney via email and agreed with the respondents assessment and stated "A sludge judge should not be used to determine the amount of total solids content of biosolids as sludge judges are used to determine the amount of freeboard left in the lagoon". This clearly demonstrate that if any violation occurred it was at the insistence of James Courtney to NCUC and others that the estimates and accurate information provided by the responded was in the opinion of James Courtney to be wrong, when in fact James Courtney and IHS provide proof their estimations we inaccurate including all the information provide to NCUC and the respondent in the bid packet.

Of particular note is the complainant is aware that Tom Robinson and Ernie Sprague are the parties who applied the land sludge.

The August 28, 2018, Indian Health Services site report states that Tom Robinson submitted a complaint to the Indian Health Services regarding the land application of sludge on his property. CX9. Tom Robinson informed Indian Health Services that the sewage sludge was inappropriately land applied on his property making it difficult for him to till the sludge into his soil. Id. Mr. Robinson told Indian Health Services that Adamas refused to provide Mr. Robinson with sampling results, application logs and target application rates—all things that Adamas had or should have had in his possession. Id.

Its important to note; Tom Robinson was the party responsible for the land application

and also the person responsible for maintaining the land application records, it was possible for Mr. Robinson to do so without additional information from Adamas. For instance, it would have been possible for Mr. Robinson to maintain records regarding the annual application rate of biosolids as calculated, as required by 40 C.F.R. 503.17, as he applied biosolids in the past to his own property without the involvement of Adamas, the bid packet he was aware of and Adamas supplied Tom Robinson with the sludge and soil sample results, the contract between Adamas and Robison also included maximum application rates and required application at an agronomic rate. From a practical perspective, Tom Robinson was the only party in a position to maintain the records required by 40 C.F.R. 503.17., as he was the parties that actually performed the work to apply sludge to the land and signed a subcontract agreement wherein he agreed to supply Adamas with copies of such record.

Regardless of whether NCUC contracted Adamas to do, a small piece of the sewage sludge removal and land application process, NCUC was always contractually and otherwise the party responsible for the entire Lame Deer Sludge Removal Project and is liable as such. The CWA imposes liability on the parties that actually performed the work as well as on the parties with responsibility for or control over the performance of work. United States v. Lambert, 915 F. Supp. 797, 802, (S.D.W.Va. Jan. 31, 1996). United States v. Chuchua, 2004 U.S. Dist. Lexis 32365 (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.’”). As set forth above, NCUC and Tom Robinson assumed responsibility for and controlled the land application of sludge from the Lame Deer Wastewater Lagoon by: (1) serving as the contractor and applicator for the project; (2) Tom Robinson was the person coordination and controlling the timing of the land application and whether it would in fact take place with IHS and Ernie Sprague as noted by the complainants prehearing exchange, that IHS reached out to Nathan Pierce to let him know Tom Robinson still wanted the sewer sludge; (3) Tom Robinson in his contract assumes responsibility that the land application would be conducted in a manner consistent with EPA’s biosolid regulations and was the person who actually performed the work; (4) Tom Robinson in his contract agrees to furnish daily application log and as the applier has the retaining responsibility for the maintenance of land application records; and (5) Tom Robinson and Ernie Sprague were working together outside of and independent from Nathan pierce to controlling the timing of land application and hauling.

Nathan Piercer and Adamas construction does not and did not have the equipment to haul the sludge to the property where it was applied and did not have the equipment and are not parties that actually performed the work to apply the sludge to the property. In fact, the EPA in their own filings admit having knowledge that Tom Robison assumed responsibility that the land application would be conducted pursuant to EPA regulations, by attaching the subcontract between him and Adamas to their exhibits. They also admit in their prehearing exchange of having knowledge that Ernie Sprague, with D&R disposal “based on statements made during a November 11, 2019, conversation with EPA representatives, Ernie Sprague, of D & R Disposal, the contractor that hauled the sludge to Tom Robinson’s property, less than 100,000 gallons of sludge was applied to Tom Robinson’s property” was the person who haled and dumped the

sludge onto the property. Clearly the complainant is aware that the respondent was not the person who actually performed the sludge application work and that Ernie Sprague and Tom Robinson are the persons who actually performed the work of applying the sludge to the land Pursuant to 40 C.F.R. Adamas and Nathan Pierce (1) communicating directly with Indian Health Services on the status of the land application; and (2) preparing the sludge for land application by dewatering the lagoon, removing sludge and taking soil samples; is in no way applying sludge to the land. At all times during this project NCUC was the prime contractor and the party with responsibility for or control over the performance of work, and had the ultimate responsibility to comply with the EPA 503 regulation as they were instructed several time by Indian Health Service and EPA.

This evidence demonstrates that NCUC, Tom Robinson and Ernie Sprague and NOT the Respondents, were directly and substantially involved, actually performed the work and directed the land application of the sludge from the Lame Deer Wastewater Lagoon. Land applicators are held accountable for complying with 40 C.F.R. 503.17. and NCUC, Tom Robinson and Ernie Sprague and the land applicators

B. Factual and Legal Basis Against Liability by Nathan Pierce and ADAMAS

The Respondents is NOT liable as the NCUC was the primary contractor and told by EPA and IHS that NCUC was ultimately responsible for Complying with the EPA 503 Regulation, also NCUC as the prime contractor and Tom Robinson as a Independent sub-contractor are the parties responsible for land application, at the time of the land application

Respondents was named by NUCU to be the operator of the Lame Deer Wastewater Treatment Plant (LDWWTP) at the time of the sludge removal, however by the time the land application began Sheri Bement named Raymond Pine as the sewer operator for the LDWWTP and Bement sent a letter to Adamas dated, June 27, 2018 . RX15, pg. 10. In that letter Bement clearly states that either herself or Raymond Pine would monitor the project on a daily basis and the “*any extension of time, change orders, inquiries or request for payments, must go through me.*”, Adamas and Nathan Piercer were at all time under the control and direction of Sheri Bement and NCUC as evidence by the June 27 2018, letter.

As a point of clarification, the Respondents explain that they are the Facility’s operator in an August 26, 2018, email from Adamas to the Northern Cheyenne Tribe, the NCUC and the Indian Health Services, However as early as June 27<sup>th</sup> 2018 as indicated in RX15 pg. 10.

As the Complainant adequately points out in their exhibit CX46, pgs. 5-7. In that email Pierce asserts most importantly, “As for Adamas Construction not being a consultant of NCUC anymore we happily agree with this point and respectful[ly] request you inform the MTDEQ I am no longer the Temporary Sewer Operator for the NCUC.” *Id.* NCUC has defaulted on many payments to Adamas and breached several contract provisions as early as June of 2018, Adamas and Nathan Pierce were no longer the operators by the time Bement sent the June 2018, letter.

The complainant states in their prehearing exchange “In addition to Adamas’ statements that it was the sewer operator, Respondents exercised control over the Lame Deer Wastewater Treatment Plant in the following ways: (1) Adamas served as the project manager and technical consultant for the Lame Deer Sludge Removal Project CX4, 6, 7, 8, 19, 29, 45, 46; (2) EPA’s

Region 8 inspection notes that Adamas is the NCUC contractor and was the lead facility-contact during that inspection. Adamas did in fact provided EPA with information regarding the proposal for inspection of manholes, the status of the collection system cleaning, and issues with the grinder, gate valves and lift stations. The EPA inspection also noted that Adamas was preparing Cell #2 for sludge removal at the time of EPA's inspection. CX5; (3) Adamas entered into an agreement to serve as the primary contractor for Lame Deer Sewer Main Camera and Cleaning project in exchange for \$130,250 and the Scatter Site Projects in exchange for \$200,000 CX49; (4) Adamas' scope of work for the Lagoon project included site prep and mobilization, Bio-Solid Sludge Removal and Dewatering, Bio-Solid Sludge Transportation and Land Application and Clean up and Demobilization CX 45, pgs. 33-35; and (5) according to a June 21, 2018, email from Adamas to NCUC and the Indian Health Services and reiterated in a letter from Michelle Pierce [Member of Adamas] to the Indian Health Services it was determined that Respondents would complete the sludge removal and Tom Robinson would land application project without the use of NCUC equipment or staff. CX 49, p. 27."

It is important to note this was a significant breach of contract by the NCUC, hurting Adamas and Nathan Pierce. As noted by the May 18, 2018 Pre-Construction meeting minutes, signed by James Courtney, at bullet point number 2, "I reiterated NCUC is responsible for all of the sludge removal work and IHS's relationship isn't with Adamas PPLC for this project" he goes on to state at bullet point Id. IHS and NCUC also breached the agreement to allow Adams or Nathan Pierce do the Sewer Camera and Cleaning project or the scatter site projects and was the basis of the administrative tort complaint filed by Adamas against IHS.

All of the complaints request and complaints have been regarding information related to land application of biosolids and not information as an operator who prepared sludge, Respondents are liable under 40 C.F.R. §503. This argument should not be allow by the complainant. Example below of complainant request of application information.

*32. Respondent provided an incomplete response to the June 11, 2019, Section 308 information request on July 2, 2019. The Respondent failed or refused to provide a response that contained the following information Respondent is required to develop and maintain by 40 C.F.R. § 503.17(5)(ii)*

- a. The street address or legal description of the location;*
- b. The date(s) upon which the location was used for the land application of biosolids;*
- c. The number of acres upon which biosolids were land applied;*
- d. The number of loads applied;*
- e. A description of how the site restrictions of 40 C.F.R. § 503.32(b)(5) were met; and*
- f. The annual application rate of biosolids as calculated.*

### Findings of Violation

Claim 1: Failure to Develop and Maintain Records

Respondents “denies or disputes these findings of violations.” As explained above, the evidence established that Respondents subcontracted with Tom Robinson for the land application. Robinson and not the Respondent had or obtained the appropriate equipment, determined the timing of land application and conducted the actual work related to the application of land sludge. Therefore, pursuant to the regulations, Tom Robison required to maintain the appropriate land application records. Respondent incorporates its responses Paragraphs 31 and 32.

#### Claim 2: Failure to Provide Records

The respondent has demonstrated by the evidence above they had no obligation to provide recoded and this claim should be dismissed.

#### **2.(C) ALL FACTUAL INFORMATION AND SUPPORTING DOCUMENTATION RELEVANT TO THE ASSESSMENT OF A PENALTY, AND A COPY, OR A STATEMENT OF THE INTERNET ADDRESS (URL), OF ANY POLICY OR GUIDANCE INTENDED TO BE RELIED ON BY COMPLAINANT IN CALCULATING A PROPOSED PENALTY**

Section 309(g)(3) of the Clean Water Act, 33 U.S.C. § 1319(g)(3) provides that in determining the amount of a civil penalty, the EPA shall take into account the nature circumstances, extent and gravity of the violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and other such matters as justice may require. The supporting documentation has been included as exhibits to this prehearing exchange and will be presented through witness testimony. Additional support against the proposed penalty will also be presented through witness testimony.

#### **2.(D) A COPY, OR A STATEMENT OF THE INTERNET ADDRESS (URL), OF ANY EPA GUIDANCE DOCUMENTS AND/OR POLICIES, INCLUDING ANY UPDATES OR REVISIONS TO SUCH GUIDANCE AND/OR POLICIES, AND ANY PREAMBLES TO REGULATIONS THAT COMPLAINANT HAS RELIED UPON WITH REGARD TO THE ALLEGATIONS SET FORTH IN THE COMPLAINT**

Respondent has also included several guidance documents in its Exhibit list (Section 1. B) and may cite to those documents in subsequent briefings, in questioning witnesses, or arguing the proposed penalty.

#### **2.(E) A DETAILED EXPLANATION OF THE FACTORS CONSIDERED AND METHODOLOGY UTILIZED IN CALCULATING THE AMOUNT OF THE PROPOSED PENALTY, IN ACCORDANCE WITH THE CRITERIA SET FORTH IN THE PARTICULAR STATUTE AUTHORIZING THIS PROCEEDING AND AS REFERENCED IN THE RELIEF SECTION OF THE COMPLAINT**

#### **Nature, Circumstances, Gravity, and Extent of Violations**

The EPA Biosolids Program is a self-implementing program that relies on recordkeeping and reporting requirements and information requests to ascertain if biosolids are land applied in accordance with the 40 C.F.R. Part 503 regulations. In this case, Respondents were involved in

the removal and but not the land application of biosolids from the Lame Deer Wastewater Lagoon. 40 C.F.R. Part 503 requires person who land apply sewage sludge to generate and maintain records to demonstrate the land-applied biosolids have met regulatory requirements for metals concentrations, pathogen reduction, and vector attraction reduction along with several other management practices including application of biosolids at agronomic rate when land applied. 40 C.F.R. §503.17(a)(5)(ii). Tom Robinson and not the Respondent apply land sludge to his own land and was responsible to develop the record request. The respondent did not create any violations and should not be fined any amount.

The respondent was the only person who attempted to comply with the EPA regulation even when he was not require by law to do so.

Following the regulations ensures that the goals of Congress are achieved in practice and is protective of human health and the environment. When the regulations are not followed, EPA cannot ensure that the important goals of CWA Section 405, 33 U.S.C. 1345 and the 40 C.F.R. 503 regulations are met.

The EPA is aware of information that directly contradicts their claims that, In August 2018, Respondents land applied approximately 1,000,000 gallons of sewage sludge to TOM Robinsons property his property, the landowner that contacted Indian Health Services and told them he was failing to abide by his contract with he respondent and EPA rules and did not contact the respondent but instead contacted HIS and that it was Robinson and not the respondent the failed to follow the regulations.

The extent of the violations and their gravity by the respondent is nonexistent. Tom Robinson and not the Respondents assumed the responsibility of disposing up to one million gallons of human waste and in turn, took on the regulatory responsibility of generating and maintaining the records required to show how the waste was disposed. Moreover, it can also be concluded that Respondents' failure to respond to the CWA 308 information request was done in an effort to avoid self-implication of other potential violations. Regardless, the violations thwart the EPA's ability to ensure human health and the environment is protected.

### **Economic Benefit**

EPA's proposed penalty, at this time, does not include an alleged economic benefit to Respondents resulting from the failure to develop and maintain records or failure to respond to an information request. The economic benefit associated with the failure to generate and maintain records and the failure to respond to the information request is typically minimal. If records become available demonstrating the biosolids were improperly applied, or should not have been land applied at all, then the economic benefit can become substantial. Therefore, the EPA reserves it right to pursue this statutory factor if more information becomes available.

### **Ability to Pay**

The Respondents attorney did in fact raised inability to pay as a defense, during the pretrial settlement discussion. Respondents council explained that due to the action of IHS and NCUC the respondent's business was insolvent and was actively seeking payments owed.

The Presiding Officer's Prehearing Order requires the Respondents to provide

documentation in its prehearing exchange to support such a claim. The Respondents provide such a defense and will include supporting information.

### **Prior History**

To EPA's knowledge, Respondents have no prior history with respect to CWA violations, directly. It should be noted; however, that Respondents are subcontractors of NCUC and assumed control of the Lame Deer Wastewater Treatment Plant and held themselves out to be contacts of the Wastewater Treatment Plant during the EPA Region 8 inspection. During Region 8's inspection of Lame Deer Lagoon, several potential permit violations were found. Those permit violations occurred and began long before the respondent was involved with NCUC, as demonstrated by the Complainants' prehearing exhibits. The complainant is attempting to prejudice and mislead the court with this statement.

### **Culpability**

As presented above, Respondents were subcontractors to NCUC prior to the land application event and 40 C.F.R. Part 503 requirements were discussed with NCUC on several occasions by both Indian Health Services and EPA Region 8. Emails and other documents from Respondents demonstrate that Respondents knew of the 40 C.F.R. Part 503 requirements and represented to the tribe and the Indian Health Services that Respondents would comply with EPA's Part 503 regulations. In fact the respondent was the only person who attempted to comply with EPA's 503 regulations.

Respondents' culpability for the violations Nonexistent and the respondent is not culpable.

### **Other Matters as Justice May Require**

Respondent is presently unaware of any matters that require a penalty reduction.

### **Conclusion**

Mr. Pierce and Adamas' interactions with NCUC and Indian Health Services, show he was the only person who made a good-faith effort to comply with both 40 C.F.R. Part 503 and Section 308 of the CWA. For all the foregoing reasons, the Respondent request that all .

### **RESERVATIONS**

Respondent reserves the right to call all witnesses named now and in the future by Complainant. Respondent further reserves the right to submit the names of additional witnesses and to submit additional exhibits prior to the hearing of this matter, upon timely notice to the Court and to Complainant.

RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of January 2020.



/s Chris J Gallus  
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CERTIFICATE OF SERVICE

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

A copy was sent by email and postal mail to:

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/s Chris J Gallus \_\_\_\_\_

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