UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	**)**	
	)	
Adamas Construction and	**)**	**Docket No. CWA-07-2019-0262**
Development Services, PLLC, and	**)**	
Nathan Pierce,	**)**	
	)	
Respondents.	**)**	

INITIAL DECISION AND ORDER

DATED: March 26, 2025

BEFORE: Administrative Law Judge Christine Donelian Coughlin

APPEARANCES: For Complainant:

Christopher Muehlberger, Esq.
Katherine Kacsur, Esq.
Assistant Regional Counsel
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U.S. Environmental Protection Agency, Region 7
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For Respondents:

Nathan Pierce
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PROCEDURAL BACKGROUND

On September 6, 2019, the Director of the Enforcement and Compliance Assurance Division at the United States Environmental Protection Agency ("EPA" or "Agency"), Region 7 ("Complainant"), initiated this proceeding by filing a Complaint and Notice of Opportunity for Hearing ("Complaint") against Adamas Construction and Development Services, PLLC, and Nathan Pierce ("Respondent Adamas" and "Respondent Pierce," respectively, or "Respondents," collectively), pursuant to Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act ("Act" or "CWA"), 33 U.S.C. § 1319(g). Specifically, as set out in two claims in the Complaint, Complainant charged Respondents with violations arising from their work as a contractor for the Northern Cheyenne Utility Commission in Lame Deer, Montana, in 2018. On October 16, 2019, Respondents filed an Answer and Request for Hearing ("Answer") denying the alleged violations and requesting a hearing on the matter. Ans. at 1-2.

Pursuant to the Prehearing Order issued on October 18, 2019, and subsequent orders related to filing deadlines, the parties engaged in a prehearing exchange of information. While that process was underway, I granted leave to Complainant to amend the Complaint. Order on Complainant's Motion for Leave to Amend the Complaint and on the Parties' Motions for Extensions of Time for Prehearing Exchanges (Jan. 2, 2020), at 3. Deemed to have been filed on January 2, 2020, the Amended Complaint and Notice of Opportunity for Hearing ("Amended Complaint") contained several new legal and factual allegations but left the charged violations unchanged. Respondents did not file an answer to the Amended Complaint.

Thereafter, the parties engaged in motion practice. By Order dated December 14, 2021, I granted a motion filed by Complainant to supplement its prehearing exchange and denied Respondents' motions seeking entry of default against Complainant and an award of attorneys' fees to Respondents. Order on Complainant's Motion to Supplement its Prehearing Exchange and Respondents' Motions for Default and Attorneys' Fees (Dec. 14, 2021), at 3. Then, by Order dated April 20, 2022, I denied Complainant's motion seeking an accelerated decision on liability and Respondents' requests for dismissal of this matter and additional discovery. Order on Complainant's Motion for Accelerated Decision and Respondents' Requests for Dismissal and Additional Discovery (Apr. 20, 2022), at 2.

I subsequently scheduled the hearing in this matter to commence on August 22, 2022. Notice of Hearing Order (May 23, 2022), at 2. On July 25, 2022, the parties filed a Joint Set of Stipulated Facts, Exhibits, and/or Testimony, wherein the parties stipulated to the admissibility of the exhibits proposed by the parties as of that date. The parties also continued their motion practice in the weeks leading up to the hearing, and I ruled upon their requests by Orders dated June 28, 2022; July 11, 2022; July 21, 2022; July 26, 2022; and August 4, 2022. Notably, in the Order dated July 11, 2022, I granted Complainant's motion to compel Respondents to produce documentation in support of any claim of an inability to pay the proposed penalty and directed Respondents to provide Complainant with such documentation by July 29, 2022, lest they be barred from claiming an inability to pay the proposed penalty at the hearing. Respondents

failed to comply. Order on Complainant's Motion for Additional Discovery and Motion to Compel Discovery, or in the Alternative, Motion in Limine (July 11, 2022), at 9. Additionally, in the Order dated August 4, 2022, I granted Complainant's motion for leave to amend the Amended Complaint so as to modify the particular set of requirements that Respondents were charged with violating in Claim 1 and to modify a factual allegation forming the basis of Claim 2. Order on Complainant's Motion for Leave to Amend the Amended Complaint (Aug. 4, 2022), at 6, 7. I deemed the second Amended Complaint and Notice of Opportunity for Hearing ("Second Amended Complaint") to have been filed as of the date of the Order. *Id.* at 7. I also postponed the hearing in order to afford Respondents an opportunity to file an answer to the Second Amended Complaint and prepare to defend against the allegations as amended. *Id.* at 6, 7. Respondents filed an Answer to Second Amended Complaint and Request for Hearing ("Second Amended Answer") on August 24, 2022.

After being postponed on two other occasions, an evidentiary hearing was conducted on August 22-23, 2023, in Billings, Montana. At the hearing, Complainant proffered the testimony of four witnesses: Erin Kleffner, a compliance officer for Region 7 of the EPA; James Courtney, a former employee of the Indian Health Service; Tom Robinson, whose property was involved in the alleged violations and who appeared under subpoena; and Ernie Sprague, the owner and operator of a business called D&R Disposal. Appearing *pro se*, Respondents proffered the testimony of three witnesses: Ernie Sprague; Michelle Pierce, spouse of Respondent Pierce; and Respondent Pierce himself. In addition to this testimony, I admitted into evidence 58 exhibits proffered by Complainant (marked as CX 1-58); 28 exhibits proffered by Respondents (marked as RX 1-28); and two exhibits proffered jointly by the parties (marked as JX 1-2).[1]

Upon this Tribunal's receipt of the official transcript of testimony taken at the hearing, electronic copies were sent to the parties by email, and I issued an Order Scheduling Post-Hearing Submissions on September 21, 2023.[2] Pursuant to that Order, the parties filed post-hearing briefs, with Complainant filing its Initial Post-Hearing Brief ("Complainant's Initial Brief") on November 3, 2023; Respondents filing their Initial Post-Hearing Brief ("Respondents' Initial Brief") on December 1, 2023; Complainant filing its Reply Post-Hearing Brief ("Complainant's Reply Brief") on December 15, 2023; and Respondents filing their Reply to Complaintant's [sic] Post-Hearing Brief ("Respondents' Reply Brief") on January 2, 2024.

LEGAL BACKGROUND

Codified at 33 U.S.C. §§ 1251-1388, the CWA was enacted by Congress to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C.

[1] A number of Complainant and Respondents' exhibits were identical, and some documents appear multiple times throughout the record. When relying upon any such documents in this Initial Decision, I cite to only one set in the interest of efficiency.

[2] Citations to the transcript will be in the following format: "Tr. at [page number]."

§ 1251(a). In furtherance of this objective, Section 301(a) of the CWA prohibits "the discharge of any pollutant by any person," except as in compliance with certain sections of the statute. 33 U.S.C. § 1311(a). The CWA defines the phrase "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The term "pollutant" is defined to mean "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). The term "navigable waters" is defined as "waters of the United States," 33 U.S.C. § 1362(7), and 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). Finally, the term "person" is defined to include "an individual, corporation, partnership, [and] association." 33 U.S.C. § 1362(5).

Section 405 of the Act pertains specifically to the disposal and use of sewage sludge and directs the EPA to develop regulations governing those activities. 33 U.S.C. § 1345(d)(1). The EPA promulgated such regulations at 40 C.F.R. Part 503, wherein it defines the term "sewage sludge" as "solid, semi-solid, or liquid residue generated during the treatment of domestic sewage in a treatment works," 40 C.F.R. § 503.9(w); the term "domestic sewage" as "waste and wastewater from humans or household operations that is discharged to or otherwise enters a treatment works," 40 C.F.R. § 503.9(g); and the term "treatment works" as "either a federally owned, publicly owned, or privately owned device or system used to treat (including recycle and reclaim) either domestic sewage or a combination of domestic sewage and industrial waste of a liquid nature," 40 C.F.R. § 503.9(aa).

When enacting the regulations, the EPA explained that "[treatment works] receive wastewater from industrial facilities, domestic wastes from private residences, and run-off from various sources that must be treated prior to discharge. Treatment results in an effluent that may be discharged and a residual material, sewage sludge." Standards for the Use or Disposal of Sewage Sludge, 58 Fed. Reg. 9248, 9249 (Feb. 19, 1993). The EPA acknowledged the beneficial uses of sewage sludge, explaining that "[s]ewage sludge is a valuable resource. The nutrients and other properties commonly found in sludge make it useful as a fertilizer and a soil conditioner. Sludge has been used for its beneficial qualities on agricultural lands, in forests, for landscaping projects, and to reclaim strip-mined land." *Id.* However, the EPA also cautioned that sewage sludge can contain harmful chemicals and organisms and that, if handled improperly, it "can result in pollutants in the sludge re-entering the environment, and possibly contaminating a number of different media through a variety of exposure routes." *Id.* at 9250. With regard to the composition of sewage sludge, the EPA explained:

> The chemical composition and biological constituents of the sludge depend upon the composition of the wastewater entering the treatment facilities and the subsequent treatment processes. Typically these constituents may include volatile organics, organic solids, nutrients, disease-causing pathogenic organisms

(e.g., bacteria, viruses, and others), heavy metals and inorganic ions, and toxic organic chemicals from industrial wastes, household chemicals, and pesticides.

Id. at 9249. The EPA thus established "specific rules by which parties can safely and beneficially apply . . . sewage sludge to land." *City of Salisbury*, 10 E.A.D. 263, 265 (EAB 2002).

Set out in 40 C.F.R. Part 503, Subpart B, those 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." 40 C.F.R. § 503.10(a). "Any person who prepares sewage sludge shall ensure that the applicable requirements . . . are met when the sewage sludge is applied to the land . . . ." 40 C.F.R. § 503.7. The term "person" is defined in the regulations as "an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof." 40 C.F.R. § 503.9(q). In turn, the "[p]erson 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). Finally, the phrase "[a]pply sewage sludge or sewage sludge applied to the land means land application of sewage sludge," 40 C.F.R. § 503.9(a), which is then defined as "the spraying or spreading of sewage sludge onto the land surface; the injection of sewage sludge below the land surface; or the incorporation of sewage sludge into the soil so that the sewage sludge can either condition the soil or fertilize crops or vegetation grown in the soil," 40 C.F.R. § 503.11(h).

The rules that apply to the sewage sludge itself require that certain standards be met in order for the sewage sludge to be applied to the land. *See* 40 C.F.R. §§ 503.13, 503.15. For example, sewage sludge cannot be applied to the land if it contains concentrations of certain pollutants that exceed the "ceiling concentrations" specified in the regulations. 40 C.F.R. § 503.13(a)(1). Additionally, in order for bulk sewage sludge[3] to be applied to agricultural land, forest, a public contact site, or a reclamation site,[4] it must satisfy one of two pollutant limits: either the concentrations of certain pollutants contained in the sludge cannot exceed limits specified in the regulations (beyond the ceiling concentrations previously discussed) or the

[3] When enacting the regulations, EPA explained that the regulations recognize two categories of sewage sludge applied to the land – "bulk sewage sludge applied to the land" and "sewage sludge sold or given away in a bag or other container for application to the land" – with distinct requirements for each. 58 Fed. Reg. at 9328. The term "bulk sewage sludge" is defined in the regulations simply as "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).

[4] The Part 503 regulations define these categories of land as follows: "agricultural land" is "land on which a food crop, a feed crop, or a fiber crop is grown," 40 C.F.R. § 503.11(a); "forest" is "a tract of land thick with trees and underbrush," 40 C.F.R. § 503.11(g); a "public contact site" is "land with a high potential for contact by the public," such as public parks and golf courses, 40 C.F.R. § 503.11(l); and a "reclamation site" is "drastically disturbed land," such as strip mines and construction sites, "that is reclaimed using sewage sludge," 40 C.F.R. § 503.11(n).

amount of given pollutants in the sludge cannot exceed the cumulative pollutant loading rates identified in the regulations.[5] 40 C.F.R. § 503.13(a)(2).

With regard to the rules that apply to the persons who prepare and apply the sewage sludge to the land, as observed by the Environmental Appeals Board ("EAB" or "Board"), "[r]egulated entities are tasked with a number of responsibilities." *City of Salisbury*, 10 E.A.D. at 267. Those responsibilities include the duty to keep certain records, with the regulations identifying "the information that must be developed, the person who must develop and retain the information, and the period that the information must be retained." 58 Fed. Reg. at 9339. The information required to be developed and maintained "varies depending on which pollutant limits are met and which pathogen and vector attraction reduction requirements are met." *Id.* For example, "[i]f the pollutant concentrations in § 503.13(b)(3) and the Class B pathogen requirements in § 503.32(b) are met when bulk sewage sludge is applied to agricultural land, forest, a public contact site, or a reclamation site," the persons who prepared and applied the sludge are required to develop and retain certain information. 40 C.F.R. § 503.17(a)(4). Particularly relevant to this proceeding, the person who applied the subject sludge is required to develop and retain for five years the following information:

> (A) The following certification statement:
>
> I certify, under penalty of law, that the information that will be used to determine compliance with the management practices in § 503.14, the site restrictions in § 503.32(b)(5), and the vector attraction reduction requirement in (insert either § 503.33(b)(9) or (b)(10) if one of those requirements is met) was prepared for each site on which bulk sewage sludge is applied under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate this information. I am aware that there are significant penalties for false certification including the possibility of fine and imprisonment.
>
> (B) A description of how the management practices in § 503.14 are met for each site on which bulk sewage sludge is applied.
>
> (C) A description of how the site restrictions in § 503.32(b)(5) are met for each site on which the bulk sewage sludge is applied.
>
> (D) When the vector attraction reduction requirement in either § 503.33(b)(9) or (b)(10) is met, a description of how the vector attraction reduction requirement is met.
>
> (E) The date bulk sewage sludge is applied to each site.

[5] The term "cumulative pollutant loading rate" is defined in the regulations as "the maximum amount of an inorganic pollutant that can be applied to an area of land." 40 C.F.R. § 503.11(f).

40 C.F.R. § 503.17(a)(4)(ii).

Section 405(e) of the CWA prohibits any person from disposing of sewage sludge from a publicly owned treatment works or any other treatment works treating domestic sewage "for any use for which regulations have been established" pursuant to the Act except in accordance with those regulations. 33 U.S.C. § 1345(e). Additionally, Section 308 of the CWA provides:

> Whenever required to carry out the objective of this Act, including but not limited to . . . determining whether any person is in violation of any . . . effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance; . . . any requirement established under this section; or . . . carrying out [Section 405]--
>
> (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; and
>
> (B) the Administrator or his authorized representative (including an authorized contractor acting as a representative of the Administrator), upon presentation of his credentials—
>
> (i) shall have a right of entry to, upon, or through any premises in which an effluent source is located or in which any records required to be maintained under clause (A) of this subsection are located, and
>
> (ii) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under clause (A), and sample any effluents which the owner or operator of such source is required to sample under such clause.

33 U.S.C. § 1318(a). Where a person is found to have violated Section 405 or 308 of the Act, Section 309(g)(1) authorizes the Administrator of EPA to assess a civil administrative penalty against that person "after consultation with the State in which the violation occurs." 33 U.S.C. § 1319(g)(1).

FACTUAL BACKGROUND

From September 12, 2016, until it was involuntarily dissolved,[6] Respondent Adamas was a professional limited liability company registered in the State of Montana. *See* 2nd Amended Compl. ¶¶ 25-26; 2nd Amended Ans. ¶¶ 25-26; CX 48. Respondent Pierce and his spouse, Michelle Pierce, were members of Respondent Adamas, and Respondent Pierce served as its operator and general manager. 2nd Amended Compl. ¶ 28; 2nd Amended Ans. ¶ 28; Tr. at 481; CX 46 at 431; *see also* 2nd Amended Compl. ¶¶ 31-32; 2nd Amended Ans. ¶¶ 31-32.

On a number of occasions in 2017 and continuing into 2018, Respondent Adamas performed work for the Northern Cheyenne Utility Commission ("NCUC," "Utility," or "Utilities"[7]). *See, e.g.*, CX 43 at 11-12 (December 4, 2018 letter from Respondent Pierce to the NCUC describing his qualifications for the open General Manager position there, including that his business "has been operating for the betterment of the NCUC since the Boy and Girls club break and assisted in most of the other water and sewer breaks on the Northern Cheyenne reservation since that time"); CX 43 at 6, 43-54, 65-67, 70-72, 99-102, 105-08, 116-127 (invoices, payment vouchers, checks, and other documentation reflecting services rendered by Respondent Adamas for the NCUC in 2017); Tr. 459-61, 467-68 (testimony of Michelle Pierce regarding Respondents' efforts to assist the NCUC with water and sewer line breaks); CX 46 (undated letter signed by Michelle Pierce describing the working relationship between Respondents and the NCUC beginning with the "boys and girls club incident" and continuing over the next 18 months). At all times relevant to this proceeding, the NCUC was a tribal organization that operated wastewater treatment systems within the Northern Cheyenne Indian Reservation, including the Lame Deer Wastewater Treatment Facility ("Facility") located in Lame Deer, Montana,[8] and Sheri Bement acted as the NCUC's General Manager. CX 5 at 1, 3, 5; CX 10 at 3, 4.

Owned by the Northern Cheyenne Tribe and serving the residents of Lame Deer, the Northern Cheyenne Tribal Headquarters, multiple schools, and a number of other entities, the Facility consisted of the following components at least as of 2018: a grinder intended to reduce the size of solids within the wastewater entering the Facility; a lift station into which the influent would flow from the grinder and then be pumped into fermentation pits for removal of

[6] The record contains conflicting evidence concerning the precise date of the dissolution. *See, e.g.*, 2nd Amended Compl. ¶ 26; 2nd Amended Ans. ¶ 26; CX 48; Tr. at 461-62, 481. However, records from the State of Montana reflect that the State considered the business to have been involuntarily dissolved as of September 1, 2018.

[7] At the hearing, Ernie Sprague testified that the Northern Cheyenne Utility Commission is occasionally called simply "Utilities." Tr. at 448.

[8] In the record of this proceeding, the Facility was also referred to as the Lame Deer Publicly Owned Treatment Works or Lame Deer POTW. *See, e.g.*, 2nd Amended Compl. ¶ 33; Tr. at 278; C's Initial and Reply Briefs. Ms. Kleffner testified that she considers the terms "wastewater treatment facility" and "publicly owned treatment works" to be synonymous. Tr. at 57.

settleable solids; and a three-cell lagoon system into which the influent would flow from the fermentation pits and then proceed through each lagoon sequentially before discharging from Cell 3 into Lame Deer Creek. CX 5 at 3, 6; CX 10 at 4; CX 53 at 1. The NCUC held a National Pollutant Discharge Elimination System ("NPDES") permit, issued by the EPA and in effect beginning on March 1, 2018, for such discharges.[9] CX 53; CX 5 at 4; 2nd Amended Compl. ¶ 34; 2nd Amended Ans. ¶ 34.

In 2005, the Facility began undergoing renovations that continued for many years thereafter. CX 53 at 2. Of particular relevance, renovation of Cell 2, including removal and land application of sewage sludge settled in the lagoon, was undertaken in 2018. *See, e.g.*, CX 5 at 6. To fund the project, the NCUC entered into an agreement with the Indian Health Service ("IHS"), an agency with a sanitation facilities construction ("SFC") program that, according to former employee James Courtney, serves to advance the health of American Indians in the United States by providing technical assistance and entering into financial reimbursement agreements with tribes in order to address sanitation deficiencies on tribal lands. Tr. at 275, 276, 278, 281, 310. Terms of the reimbursement agreement related to the sludge removal and application were executed by the IHS and NCUC on May 11, 2018.[10] *See, e.g.*, CX 29 at 4-6; RX

[9] During an inspection conducted by the EPA on June 13-14, 2018, for purposes of evaluating compliance with the Facility's NPDES permit, the inspectors found that the wastewater treatment system at the Facility was not functioning as intended inasmuch as the grinder and lift station were inoperative, such that influent could not be pumped into the fermentation pits and flow into Cell 1 of the lagoon system. CX 5 at 6. Rather, the inspectors observed the influent (together with all solids contained in the wastewater, including "rags, wipes, gloves, and other trash and debris") flowing from the lift station emergency overflows directly into Cell 2, thus bypassing the fermentation pits and Cell 1. *Id.* Respondent Pierce was present at the inspection and informed the inspectors that the grinder and lift station had been out of service for at least several months. *Id.* The record contains additional evidence of longstanding issues at the Facility and other utility systems within the Northern Cheyenne Indian Reservation. *See, e.g.*, CX 10.

[10] The document executed by the IHS and NCUC on May 11, 2018, identifies the project as "IHS Project BI16N39 – Lame Deer Lagoon Renovation. Cell 2 sludge removal" and states that the "NCUC shall complete all work as specified or indicated in the fixed price Documents," with "[t]he work . . . generally described as removal and land application of bio-solids from the Lame Deer wastewater treatment facility to identified agricultural lands." CX 29 at 4. It then identifies the "Fixed Price Documents" as including certain items, *see id.*, some of which appear to be part of a larger document entitled "Fixed Price Construction Agreement Between Northern Cheyenne Utilities Commission (NCUC) and Billings Area Indian Health Service Sanitation Facilities Construction (SFC) for Lame Deer Lagoon Cell 2 Sludge Removal, IHS Project BI 16-N39" ("Fixed Price Agreement"), JX 2 at 2. Respondent Pierce presented a copy of the Fixed Price Agreement for purposes of refreshing Mr. Courtney's recollection at the hearing, identifying it as a publicly available document, and upon his review of it, Mr. Courtney testified that the copy appeared to be the subject reimbursement agreement between the IHS and NCUC. Tr. at 312-13. He later explained that the Fixed Price Agreement is "part of the reimbursement agreement, . . . and it's for establishing prices that will get reimbursed to the utility. So just to make sure, say -- more of a quantity is removed, it establishes prices that could be reimbursed on." Tr. at 345. It also contained a June 13, 2017 report on certain analyses run on samples of sewage sludge collected by the IHS from Cell 2 on June 1 of that year, JX 2 at 29-38, which Mr. Courtney explained as follows:

> [I]t was to establish quantities. So to -- for the utility to have an idea what it's going to cost for what they need to be reimbursed by, it allows an estimate to be made for what the reimbursement would be. It could be higher or it could be lower. But that's – general practice were before work

28 at 1; Tr. at 354-55. On behalf of the IHS, Jim White, the director of the SFC program and Mr. Courtney's supervisor, signed the agreement, CX 3 at 1; CX 29 at 5, 6; Tr. at 275; Mr. Courtney served as the project engineer, CX 3 at 1; Tr. at 320; and George Cummins served as the construction inspector, CX 3 at 1; Tr. at 340, 358.

The NCUC also engaged Respondent Adamas to perform services related to the removal and land application of sewage sludge from Cell 2. An undated document, entitled "NCUC Proposal: Lame Deer Sewer Lagoon Sludge Removal," described plans for the project, including the equipment to be used, the work to be performed, and estimated costs. CX 1. Additionally, it set out anticipated roles for participants in the project, identifying the NCUC as the "prime contractor"; Respondent Adamas as a subcontractor of the NCUC serving as the "Project Manager and Technical consultant"; entities with whom Respondent Adamas would subcontract for "Technical and engineering support" and "sludge transportation"; and the IHS as providing engineering support and information. CX 1 at 1. In an April 20, 2018 letter addressed to Ms. Bement of the NCUC and signed by Respondent Pierce, Respondent Adamas thanked the NCUC for selecting it to serve as the project manager and technical consultant for the project. CX 45 at 33. The letter then stated that work would be completed in compliance with applicable laws; that in the contract between Respondent Adamas and the NCUC, the terms "ADAMAS Construction and Development Services" and "ADAMAS" would include its subcontractors; and that the "reviewing authority" for the project would be the NCUC, the IHS's SFC program, and the Northern Cheyenne Tribal Council. *Id.* Finally, the letter went on to identify the proposed scope of work to be performed during each step of the project, a timeline for the project's completion, and the assignment of tasks within the timeline to such participants as Respondent Pierce, Ms. Bement of the NCUC, and the NCUC generally. *Id.* at 34-36. Among others, James Courtney and Jim White of the IHS were copied on the letter. CX 45 at 35. The NCUC and Respondent Adamas ultimately entered into a contract effective on May 15, 2018, for removal, transportation, and land application of 1,000,000 gallons of sewage sludge from Cell 2 of the Facility at a cost of $239,000. CX 45 at 17-19, 33-35. The contract authorized Respondent Adamas, as the contractor, to engage subcontractors to perform work under the contract, provided that Respondent Adamas "remain responsible for the proper completion" of the contract. CX 45 at 18.

> starts you have an estimate for what the quantities are going to be. I believe that was motivation for the testing.

Tr. at 353.

By agreement of the parties, the Fixed Price Agreement was admitted into evidence as JX 2 with the understanding that it is a publicly available document and that Respondent Pierce would produce the web address for it after the conclusion of the hearing. Tr. at 348, 515-19. However, by email dated August 28, 2023, Respondent Pierce informed staff for this Tribunal that he was mistaken about his ability to locate a web address for the Fixed Price Agreement in its entirety and that he was willing to stipulate that the full document does not have a web address to his current knowledge. Given that the document is not publicly available as Respondent Pierce had represented and that Complainant was not provided with a full copy of it sufficiently in advance of the hearing (it appears that Respondents submitted only an extract of the laboratory analytical report attached to their original Answer and as part of RX 12), I am giving JX 2 little, if any, weight in this Initial Decision.

Subsequently, on May 17, 2018, a pre-construction meeting was held at the offices of the IHS in Billings, Montana.[11] CX 3. In attendance, among others, were Mr. White, Mr. Courtney, and Mr. Cummins of the IHS; Sheri Bement of the NCUC; and Respondent Pierce and Michelle Pierce from Respondent Adamas. CX 3 at 1. As documented by Mr. Courtney in the meeting minutes, he advised the participants at the meeting that the "NCUC is responsible for the sludge removal work and that IHS's relationship isn't with [Respondent Adamas] for this project." CX 3 at 1. He also advised that "soil testing should be considered if the sludge will be applied to land that hasn't been tested in accordance with the EPA 503 requirements and that NCUC is ultimately responsible for following the requirements." *Id.* Finally, he stated that he, Ms. Bement, and Respondent Pierce had visited the Facility the previous day on May 16 and that "the sludge removal plan appeared to be appropriate." *Id.*

By email dated May 24, 2018, and sent on behalf of Respondent Adamas, Respondent Pierce transmitted a document entitled "Site-Specific Safety Plan; Lame Deer, Montana Sewer lagoon sludge removal; #BI-16N39," among other documents, to a number of participants in the project, including Ms. Bement of the NCUC and Mr. Courtney, Mr. White, and Mr. Cummins of the IHS. CX 46 at 37-379. Then, by email dated June 7, 2018, and sent on behalf of Respondent Adamas to Mr. Courtney and Ms. Bement, with others copied, Respondent Pierce provided a revised timeline for the project, with an anticipated starting date of June 11. CX 45 at 39-40.

Conflicts among participants in the project arose soon thereafter. According to Respondents, the first conflict materialized during completion of the "scattered site" project, which was being undertaken simultaneously with the sludge removal project and in which Respondent Adamas and the IHS were also involved. *See, e.g.*, CX 46 at 24 (undated letter signed by Michelle Pierce describing how "the strife" between the NCUC and Respondents began "after the contracts with IHS started" and when Ms. Bement hired "a scab crew," including her spouse and other family members, to perform work for the NCUC at a higher hourly rate than that of permanent NCUC employees; how members of the "scab crew" disregarded Respondent Pierce's guidance on using a "trench box" for safety reasons during performance of the "scattered site" project, which he provided after he was notified of the issue by the IHS; and how Ms. Bement responded to Respondent Pierce informing her of this by removing him from the project); CX 56 at 1-2 (October 4, 2018 letter from counsel retained by

[11] This was one of many meetings attended by participants in the project. *See, e.g.*, Tr. at 485-88 (testimony of Respondent Pierce describing various meetings held); CX 43 at 39 (May 21, 2018 invoice from Respondent Adamas to the NCUC for various services, including "[t]echnical consulting on verious [sic] IHS, NC Tribal Government, and NCUC meetings"); CX 45 at 32 (April 21, 2018 email from Respondent Pierce to Ms. Bement of the NCUC in which Respondent Pierce refers to a meeting held on April 20, 2018); CX 46 at 24 (undated letter signed by Michelle Pierce in which she stated that Respondent Adamas was organizing "preconstruction meetings" about various projects being performed by Respondents on behalf of the NCUC, including the sludge removal project); CX 56 at 1 (October 4, 2018 letter from counsel retained by Respondents to an attorney for the Department of Health and Human Services asserting that "[f]or months ADAMAS briefed IHS, EPA, and the Northern Cheyenne Tribal Counsel on the approach and technical specifications required" for the sludge removal, transportation, and application, as well as two other projects being undertaken at the time).

Respondents to an attorney for the Department of Health and Human Services asserting that on or around June 19, 2018, the IHS notified Respondent Pierce of the safety infractions committed by Ms. Bement's spouse and that Respondent Pierce subsequently informed Ms. Bement, who responded by "purporting to 'cancel'" the contract between Respondent Adamas and the NCUC for performance of the project); Tr. at 475-76, 508-09; *see also* CX 56 at 8 (June 20, 2018 email from Mr. Cummins of the IHS to Respondent Adamas advising of the need for a "trench box," as it was considered "pretty unsafe without it," and a reply minutes later from Respondent Pierce, on behalf of Respondent Adamas, with Ms. Bement copied, advising Mr. Cummins that "the NCUC crew has been given that directive several times over the last three days" and recommending that he contact Ms. Bement and "inform[] her or her project manager for the scattered site work"). On behalf of Respondent Adamas, Respondent Pierce memorialized the outcome of subsequent discussions between the NCUC, the IHS, and Respondent Adamas in an email dated June 21, 2018, which he sent to Ms. Bement, Mr. Courtney, and Mr. White, among others. CX 56 at 6. With respect to the sludge removal project specifically, Respondent Pierce wrote as follows:

> As per this afternoons [sic] phone conversation, between NCUC, IHS/SFC & ADAMAS, this email is written confirmation of Adamas Construction agreeing to the following:
>
> * * * *
>
> 2. ADAMAS- Nathan Pierce will be the project manager for the Sludge removal project with the understanding that NO NCUC equipment and or [sic] 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, from the Northern Cheyenne TERO office.

CX 56 at 6. Respondent Pierce followed this email with another sent that day on behalf of Respondent Adamas to Ms. Bement and Mr. Courtney, among others, to which he attached an invoice billing the NCUC for the costs of the sludge removal project, totalling $239,000. CX 45 at 6-8, 29-31.

The initial step of the sludge removal project – described in the April 20, 2018 proposed scope of work as the mobilization of necessary equipment to the Facility and preparation of the site, CX 45 at 34 – was deemed complete by Mr. Courtney as of June 26, 2018, CX 45 at 11-12. The NCUC Foreman, Raymond Pine, also inspected the "electrical work to verify it was competed [sic]." *Id.* at 11. The following day, Ms. Bement sent a letter addressed to Respondent Pierce, stating, in pertinent part:

> This letter is formal notification that as the Northern Cheyenne Utilities Commission (NCUC) contract with Indian Health Service and our subsequent sub-contract with ADAMAS Construction Services, I am officially notifying of the following:

> 1) I am the NCUC representative that you need to direct all work-related questions or requests to. Further, you are not to go directly to Indian Health Service unless it relates to the day to day work that James Courtney, Project Engineer, can respond to. Any extensions of time, change orders, inquiries or requests for payment must go through me.
>
> 2) The project will be monitored on a daily basis by me and in my absence by the NCUC Foreman, Raymond Pine. He has the authority to act on my behalf on any matters on a daily basis if I am unavailable.

RX 15 at 10.

The next phase of the project – described in the April 20, 2018 proposed scope of work as including the operation of a FLUMP dredge in Cell 2 to pump an estimated 1,000,000 gallons of sludge from the lagoon into storage tanks set up at the Facility, in which the sludge would be dewatered,[12] CX 45 at 34 – then commenced. By email dated July 13, 2018, and addressed to Mr. Courtney, with others from the IHS copied, Respondent Pierce advised on behalf of Respondent Adamas that "a significant amount of sludge" had been "pumped and dewatered" two days prior and that more "pumping" of sludge would be occuring that day, with the expectation that transportation and application could begin the following week. CX 4. Respondent Pierce and Mr. Courtney proceeded to communicate on July 16, 2018, regarding the application of the sewage sludge, with Mr. Courtney advising that an individual named Tom Robinson was interested in it being transported and applied to his property. CX 45 at 42.

By the end of July 2018, however, a dispute arose with respect to the amount of sludge that had been removed from the lagoon and the extent to which it was then dewatered. *See,*

[12] Ms. Kleffner explained at the hearing that "dewatering is just what it sounds like. It is taking excess water out of biosolids to reduce the total solids content." Tr. at 59. A compliance officer for Region 7 of the EPA, Ms. Kleffner testified about her considerable experience in this subject matter. *See* Tr. at 47-51. However, she appears to have misspoken about the process of dewatering inasmuch as documentary evidence in the record reflects that it serves to reduce *water content*, not total solids content. For example, a guidance document entitled "Biosolids Generation, Use, and Disposal in the United States," published by the EPA in September 1999, contains a chart describing levels of wastewater treatment and the types of biosolids produced from such treatment, with primary wastewater treatment described as typically involving "gravity sedimentation . . . to remove suspended solids" and the resulting biosolids described as containing between three and seven percent solids. CX 37 at 15. It then states that the water content of such biosolids "can be easily reduced by thickening or dewatering." *Id.* Describing dewatering as one of the "most common types of biosolids treatment processes" for biosolids to undergo, *id.* at 16, the document goes on to explain that "[d]ewatering decreases biosolids volume by reducing the water content of biosolids and increasing the solids concentration," such that liquid biosolids are converted to a "damp cake," *id.* at 21. It then describes various methods of dewatering sewage sludge, such as air drying, which can produce biosolids with a solids content as high as 45 to 90 percent, and mechanical dewatering systems, which can produce biosolids with solids contents ranging from 12 to 45 percent. *Id.* at 21-22. Another guidance document, entitled "Control of Pathogens and Vector Attraction in Sewage Sludge" and published by the EPA in July 2003, similarly notes that sewage sludge can be "concentrated and dewatered to high solids concentrations." CX 38 at 62.

e.g., Tr. at 205, 209-10, 322-23, 338; RX 28; CX 45 at 20-24; CX 46 at 25. Nevertheless, the next phase of the project – described in the April 20, 2018 proposed scope of work as the transport and land application of the sewage sludge, CX 45 at 34-35 – proceeded, with Respondent Adamas and Ernie Sprague of D&R Disposal entering into an agreement on August 8, 2018, for Mr. Sprague to remove the sewage sludge from the tanks at the Facility and transport it to the property of Tom Robinson for application, CX 42 at 4-5. On that same day, Respondent Adamas and Mr. Robinson entered into an agreement for Mr. Robinson to receive and incorporate the sewage sludge into a barley field on his property. CX 7. Transport and application of the sludge began the following day on August 9, 2018. CX 8 at 1; CX 42 at 2; Tr. at 405, 424.

Meanwhile, Mr. Courtney sent a letter to Ms. Bement dated August 13, 2018, with the subject line "Ongoing Issues and Concerns Regarding the Sludge Removal Operation in Lame Deer (BI16-N39)." CX 8. Therein, Mr. Courtney listed several deficiencies with the project, along with corresponding portions of the Fixed Price Agreement that established the requirements deemed deficient. CX 8 at 1, 2-3. Among other issues, Mr. Courtney disputed Respondents' position that "the sludge was concentrated to multiple times the original concentration" and noted that no logs related to the removal, transport, or application of the sewage sludge had been provided to date, in contravention of the Fixed Price Agreement's requirement that daily logs be submitted, which could have substantiated Respondents' claim. *Id.* at 1, 2. In questioning whether the sludge had, in fact, been dewatered, he asserted, "The sludge in the tanks was analyzed and compared to the sludge that was sampled last year[,] and no evidence of dewatering was observed. The total solids concentrations were approximately equal." *Id.* at 2.

Thereafter, in an August 16, 2018 email addressed to Mr. Courtney, with others copied, Respondent Pierce wrote on behalf of Respondent Adamas that he was providing "a copy of our Sludge survey date [sic] performed in July before we began removal of the sludge." CX 45 at 43. He proceeded to explain the view that more sludge was present in Cell 2 than anticipated, stating, "With the lift station being off line [sic] for over 1 year and with cell 1 of the system being offline, directing all solids and trash directly into cell 2, its [sic] reasonable to find more sludge than 1.5 or 1.25 feet initially estimated by IHS reports, dated 12/31/2016 & 6/28/17." *Id.* He then stated his relief that "we have found and have agreed on a [sic] apples to apples comparison of how to estimate the amount of sludge removed from the pond system." *Id.*

On August 24, 2018, however, counsel for the NCUC, Dion Killsback, sent an email addressed to Respondent Pierce, with others copied, in which he advised that the IHS had "recommended to cancel the contract for the sludge removal" and that the NCUC had consequently "cancelled the contract." CX 56 at 9. Noting that a meeting had been held on August 21 "in an attempt to salvage the sludge removal project for Lame Deer Lagoon" and resolve the dispute over the calculation of the amount of sludge removed, he memorialized that the IHS, the NCUC, and Respondent Adamas had "agreed to a settlement of the sludge removal at 600,000 gallons or approximately 2/3 of the overall contract, where ADAMAS Construction will be compensated accordingly." *Id.* He then advised that in order for payment to occur, a number of actions would need to be taken, including completion of the sludge

application and submission of supporting documentation, to the satisfaction of the IHS and the NCUC. *Id.* He closed the letter with the assertion that Respondent Adamas was "no longer a consultant and is no longer a contractor of NCUC" and that "the only work authorized by NCUC for ADAMAS Construction to complete" was "the completion of the application of remaining sludge in your storage facilities." *Id.*

On August 28, 2018, Mr. Courtney and Mr. Cummins of the IHS visited Mr. Robinson's property to view the land application site. CX 9; Tr. at 287. According to Mr. Courtney, their visit was prompted by a complaint made by Tom Robinson that the sewage sludge had been improperly applied, which made tilling difficult.[13] CX 9 at 1; Tr. at 289. Mr. Courtney also documented in his written report of the visit that "[t]he property owner stated to IHS that he withdrew consent for the sludge to be applied but that [Respondent Adamas] continued to dispose of the sludge on his property on 8/29/2018."[14] CX 9 at 4.

Then, on August 29, 2018, Mr. Killsback sent another email addressed to Respondent Pierce, with others copied. RX 19. With "Notice to Cease and Desist" as the subject line, Mr. Killsback wrote, in pertinent part:

> The Northern Cheyenne Utilities Commission is aware that you have applied sludge to property on the Northern Cheyenne Reservation pursuant to your obligations under the agreement during the week of August 20, 2018. You are now directed to cease and desist all further work regarding the sewage sludge removal and application.
>
> ADAMAS Construction contract for sludge removal and application with the NCUC has been terminated. ADAMAS Construction is no longer a contractor/consultant for the NCUC. ADAMAS Construction, its employees and subcontractors are not permitted to be on NCUC properties and are not permitted to be conducting any work.

RX 19; *see also* CX 42 at 3 (written account of Ernie Sprague describing how on August 29, 2018, he was advised "to stop work" by an employee of the NCUC and "locked . . . out of the job site"; how Ms. Bement initially prevented him from returning to retrieve his equipment but ultimately relented at the direction of an attorney with whom she consulted; and how he was approved to resume transporting the sludge to Mr. Robinson's property in October 2018); Tr. at 420-21, 423, 429, 432-34.

[13] When asked at the hearing about the meaning of the term "tilling," Mr. Robinson testified that he tilled the sewage sludge that had been applied to the surface of his property by working it into the soil. Tr. at 388-89.

[14] While being questioned at the hearing, Mr. Robinson denied submitting a complaint about the manner in which the sewage sludge had been applied to his property. Tr. at 373, 374. He also denied having any knowledge about the reason for the project being shut down by the IHS and NCUC. Tr. at 391; *see also* Tr. at 429 (testimony of Ernie Sprague describing how Mr. Robinson expressed confusion to him about the project ending prematurely).

BURDEN OF PROOF

This matter is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice") set forth at 40 C.F.R. Part 22. Pursuant to Section 22.24(a) of the Rules of Practice:

> The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate. Following complainant's establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses.

40 C.F.R. § 22.24(a). In carrying their respective burdens of proof, the parties are subject to a preponderance of the evidence standard. 40 C.F.R. § 22.24(b). To prevail under this standard, a party must demonstrate that the facts the party seeks to establish are more likely than not to be true. *See, e.g., Smith Farm Enterprises, LLC*, 15 E.A.D. 222, 228-29 (EAB 2011) ("A factual determination meets the preponderance of the evidence standard if the fact finder concludes that it is more likely true than not.") (citing *Julie's Limousine & Coachworks, Inc.*, 11 E.A.D. 498, 507 n.20 (EAB 2004); *Lyon Cty. Landfill*, 10 E.A.D. 416, 427 n.10 (EAB 2002), *aff'd*, 2004 U.S. Dist. LEXIS 10651 (D. Minn. June 7, 2004), *aff'd*, 406 F.3d 981 (8th Cir. 2005); *Bullen Cos., Inc.*, 9 E.A.D. 620, 632 (EAB 2001)).

LIABILITY

I. PERSONAL LIABILITY OF RESPONDENT PIERCE

At the outset, I will first address whether Respondent Pierce can be held personally liable for any violations found to have been committed by Respondent Adamas in the course of the events underlying this action.

Complainant seeks to hold Respondent Pierce liable in his capacity as the "responsible corporate officer" of Respondent Adamas, arguing that the doctrine of the "responsible corporate officer" "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." C's Initial Br. at 13 (citing *United States v. Iverson*, 162 F.3d 1015 (9th Cir. 1998)). In the context of the Clean Water Act, Complainant maintains, a person is a "responsible corporate officer" when the individual at least possesses the authority to exercise control over the activity of the corporation causing the unlawful discharge. *Id.* at 13-14 (citing *Iverson*, 162 F.3d at 1025). Complainant then notes that this doctrine has been considered in the administrative context, pointing to a decision issued by my

former esteemed colleague, Chief Administrative Law Judge Susan L. Biro, in which she discussed a series of legal authorities recognizing the legal principles behind holding corporate officers liable for various types of violations, including violations of the CWA, even when purporting to act through a corporate entity. *Id.* at 14 (citing *Smith*, 2004 EPA ALJ LEXIS 128 (July 15, 2004)). While Judge Biro declined to hold an individual respondent in that matter personally liable under such principles, despite the positions of authority that he held in the corporate respondent, her analysis reflects that she would have imposed personal liability had the evidence shown that the individual respondent personally directed, caused, participated in, or controlled the activity at issue. *Id.* at 14 (citing *Smith*, 2004 EPA ALJ LEXIS 128, at *111-13). Complainant then cites my April 20, 2022 Order on Complainant's Motion for Accelerated Decision and Respondents' Requests for Dismissal and Additional Discovery ("AD Order"), in which I noted the absence of any dispute regarding the authority that Respondent Pierce exercised over Respondent Adamas's activities. *Id.* (citing AD Order at 11). Complainant concludes, "Respondent Pierce was and is the responsible corporate officer (RCO) of Respondent Adamas and therefore is individually liable under the CWA." *Id.* at 13.

Respondents, for their part, do not challenge Complainant's position in their briefs. And as noted by Complainant, Respondents do not dispute the allegations that Respondent Pierce held himself out "as the primary contact of Respondent Adamas for environmental compliance" and that he "managed, directed, or made decisions about environmental compliance for Adamas."[15] 2nd Amended Compl. ¶¶ 31, 32; 2nd Amended Ans. ¶¶ 31, 32.

Upon review, I consider Judge Biro's analysis in *Smith* of the legal authorities addressing the personal liability of corporate officers and her reasoning behind declining to impose personal liability on the individual respondent in question to be persuasive, and I adopt it here. *Smith*, 2004 EPA ALJ LEXIS 128, at *104-13 (citing, among other cases, *Franklin v. Birmingham Hide & Tallow Co.*, 1999 U.S. Dist. LEXIS 22489 (N.D. Ala. 1999); *United States v. Gulf Park Water Co.*, 972 F.Supp. 1056, 1063 (S.D. Miss. 1997); and *United States v. Ciampitti*, 583 F.Supp. 483 (D.N.J. 1984)). Unlike in *Smith*, however, I find that the admissions noted above, coupled with the evidence in this matter, sufficiently demonstrate not only that Respondent Pierce served in a position of authority within Respondent Adamas but that he also personally participated in the events underlying the alleged violations, such that the standard for holding him personally liable has been met. For example, the record is replete with correspondence signed and sent by Respondent Pierce on behalf of Respondent Adamas during the planning and execution of the sludge removal project that reflects his personal involvement in those activities. *See, e.g.*, CX 45 at 33-35 (April 20, 2018 letter signed by Respondent Pierce and addressed to Sheri Bement of the NCUC, thanking the NCUC for selecting Respondent Adamas to help with the

[15] Conversely, Respondents deny the allegation in the Second Amended Complaint that Respondent Pierce "controlled the activities" of Respondent Adamas at all times relevant to this action, which deviates from their admission to this allegation in the original Complaint. *Compare* 2nd Amended Compl. ¶ 30 *and* 2nd Amended Ans. ¶ 30, *with* Compl. ¶ 27 *and* Ans. ¶ 27. Respondents do not offer any explanation for this change of position, but the explanation for the denial – that Respondents were merely subcontractors of the NCUC, which controlled the activities of Respondent Adamas at all times relevant to this action – is consistent with Respondents' arguments generally in this matter.

sludge removal project and stating that "[i]t is understood that ADAMAS and Nathan Pierce have been subcontracted by NCUC to be the project manager and technical consultant for this project"); CX 45 at 39-40 (June 7, 2018 email signed by Respondent Pierce and sent to numerous participants in the project, including Ms. Bement and representatives of the IHS, to which Respondent Pierce attached a revised timeline for the project's completion and the assignment of tasks within the timeline, including assigning to Respondent Pierce personally, among other individuals and entities, such responsibilities as "Project Start & Construction Meeting – Begin Mobilization & Site Prep"; "Begin Dredging Operation"; and multiple "Weekly Meeting[s]/Safety"); CX 4 (July 13, 2018 email, signed by Respondent Pierce and addressed to representatives of the IHS, in which he stated that "[w]e pumped and dewatered a significant amount of sludge" two days prior to the email); CX 45 at 42 (July 16, 2018 email correspondence between Respondent Pierce and Mr. Courtney of the IHS, in which Mr. Courtney advised that Tom Robinson was interested in the sewage sludge from the Facility being transported and applied to his property, to which Respondent Pierce responded, "I will call and arrange."). The written account and testimony of Ernie Sprague also show that Respondent Pierce personally directed and performed activities related to the sludge removal project. *See, e.g.*, CX 42 at 3 (written account of Ernie Sprague stating that "[Respondent Pierce] and his team were on both ends of the Job, I saw them taking samples and moving pipe etc."); Tr. at 407 (testimony of Ernie Sprague that he "took directions from both Nathan Pierce and George Cummins"). With his personal involvement in the activities underlying this matter established by a preponderance of the evidence, I find that Respondent Pierce can be held personally liable as a corporate officer of Respondent Adamas for any alleged violation found herein.

II. ALLEGED VIOLATIONS

In the Second Amended Complaint, Complainant charges Respondents with two violations of the CWA, as follows.

A. Claim 1

1. Critical Elements of Liability

Complainant broadly alleges as Claim 1 in the Second Amended Complaint that "Respondents have failed to develop and maintain records required by 40 C.F.R. § 503.17 [the section of the regulations imposing recordkeeping requirements]," in violation of Section 405 of the CWA, 33 U.S.C. § 1345, and the implementing regulations at 40 C.F.R. Part 503. 2nd Amended Compl. ¶¶ 53, 54. Other parts of the Second Amended Complaint, which Complainant incorporates by reference into Claim 1, 2nd Amended Compl. ¶ 52, cite specifically to the records required by 40 C.F.R. § 503.17(a)(4)(ii) to be kept by persons who apply bulk sewage sludge satisfying 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, forest, a public contact site, or a reclamation site, 2nd Amended Compl. ¶¶ 19, 20. The bases of Claim 1 are the allegations in the Second Amended Complaint that "[o]n or about the week of July 9, 2018, Respondents

pumped and dewatered approximately 1,000,000 gallons of Class B sewage sludge" from Cell 2 at the Facility, and that "[o]n or about August 22, 2018, Respondents or their subcontractors applied approximately 1,000,000 gallons of Class B sewage sludge" from Cell 2 at the Facility to land in or near Lame Deer, Montana. 2nd Amended Compl. ¶¶ 38, 39. Other parts of the Second Amended Complaint cite specifically to 40 C.F.R. § 503.32(b)(2)(ii) for the meaning of "Class B sewage sludge" and allege that the subject sewage sludge was "Class B sewage sludge" based upon information provided to the EPA by Respondents. 2nd Amended Compl. ¶¶ 18, 48. Conversely, the Second Amended Complaint alleges that Respondents failed to provide the information required to be developed and maintained by 40 C.F.R. § 503.17(a)(4)(ii).[16] 2nd Amended Compl. ¶ 45. Noting that any person who prepares sewage sludge shall ensure that the applicable requirements of the Part 503 regulations are met when sewage sludge is applied to the land under 40 C.F.R. § 503.7, 2nd Amended Compl. ¶ 13, the Second Amended Complaint then alleges that Respondents were "preparer[s] of sewage sludge," as that term is defined by 40 C.F.R. § 503.9(r); were persons who "prepared sewage sludge" pursuant to 40 C.F.R. § 503.7; and were persons who "applied sewage sludge" pursuant to 40 C.F.R. § 503.10(a), 2nd Amended Compl. ¶¶ 35, 46, 47.

Based upon these allegations and the substantive governing law described above, the elements that must be proven to establish liability for Claim 1 are that on the dates in question:

> (1) The sewage sludge from Cell 2 of the Facility was applied to land consisting of "agricultural land," "forest," "a public contact site," or "a reclamation site," as those terms are defined in 40 C.F.R. § 503.11;
>
> (2) The sewage sludge consisted of "bulk sewage sludge," as that term is defined by 40 C.F.R. § 503.11(e), 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);
>
> (3) Respondents were "persons," as that term is defined by 33 U.S.C. § 1362(5) and 40 C.F.R. § 503.9(q);
>
> (4) Respondents were the "persons who prepared" or "persons who applied" the sewage sludge, as those terms are defined by 40 C.F.R. §§ 503.9(a), (r), 503.11(h); and
>
> (5) Respondents failed to develop and retain for five years the information identified in 40 C.F.R. § 503.17(a)(4)(ii).

[16] The Second Amended Complaint refers to 40 C.F.R. § 503.17(4)(ii), rather than 40 C.F.R. § 503.17(a)(4)(ii), as the provision setting forth the information that Respondents were required to develop and maintain. 2nd Amended Compl. ¶ 45. That citation appears to be a scrivener's error.

2. Discussion

Was the Sewage Sludge from Cell 2 of the Facility Applied to "Agricultural Land"?

The recordkeeping requirements of 40 C.F.R. § 503.17(a)(4)(ii) govern when bulk sewage sludge that has 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) is applied to "agricultural land," "forest," "a public contact site," or "a reclamation site," as those types of property are defined at 40 C.F.R. § 503.11. Complainant contends that the land on which the sewage sludge from Cell 2 of the Facility was applied consisted of "agricultural land." C's Initial Br. at 19-20 (citing CX 7; CX 49 at 8; CX 29 at 4; Tr. at 178, 371). That term 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). In turn, the term "food crops" is defined as "crops consumed by humans," 40 C.F.R. § 503.9(l); the term "feed crops" is defined as "crops produced primarily for consumption by animals," 40 C.F.R. § 503.9(j); and the term "fiber crops" is defined as "crops such as flax and cotton," 40 C.F.R. § 503.9(k).

Respondents have not raised any arguments challenging that Tom Robinson's property was agricultural in nature and, in their Initial Post-Hearing Brief, acknowledge that the sewage sludge was applied to a barley field. *See* Rs' Initial Br. at 3. Indeed, the evidentiary record bears out that barley was being grown on the site at the time of application. *See, e.g.*, CX 7; Tr. at 371. Barley is a cereal grass, the seeds of which are "used especially in malt beverages, breakfast foods, and stock feeds." *Barley*, MERRIAM-WEBSTER DICTIONARY.COM, https://www.merriam-webster.com/dictionary/barley (last visited Oct. 26, 2024). Accordingly, I find that this element has been established.

Was the Sewage Sludge from Cell 2 of the Facility "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)?

The Part 503 regulations define the term "bulk sewage sludge" as "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). As explained in the preamble to the final rulemaking for the regulations, this type of sewage sludge is distinct from "sewage sludge sold or given away in a bag or other container" as follows:

> [R]equirements for sewage sludge applied to the land differ depending on whether the sewage sludge is "bulk sewage sludge" or "sewage sludge sold or given away in a bag or other container." EPA employs these terms of art to distinguish the situations in which bagged sewage sludge is typically applied in small amounts in a single application (e.g., home gardens)—called in today's rule "sewage sludge sold or given away in a bag or other container"—from those in which sewage sludge may be applied in large quantities over wide areas (e.g.,

> agricultural use and reclamation programs)—called "bulk sewage sludge" for this regulation.

CX 33 at 74. The preamble then explains that the "EPA considers one metric ton of sewage sludge to be a small amount, particularly considering the types of land on which the Agency concluded [sewage sludge] that is sold or given away will be applied (i.e., a lawn, a home garden, or a public contract [sic] site.") *Id.* at 83. Here, Respondents have not disputed that approximately 1,000,000 gallons of sewage sludge were removed from Cell 2 of the Facility and applied to Tom Robinson's property. *See, e.g.*, 2nd Amended Compl. ¶¶ 38, 39; 2nd Amended Ans. ¶¶ 38, 39. While the evidentiary record contains conflicting evidence as to the precise amount of sewage sludge applied and the precise dimensions of the application site, *see, e.g.*, Tr. at 243, it confirms that, at a minimum, thousands of gallons of sludge were applied to acres of barley field on Mr. Robinson's property over the course of multiple days, *see, e.g.*, CX 7; CX 41; CX 42; CX 46 at 10; Tr. at 371, 424-25. Therefore, I find that the sewage sludge consisted of "bulk sewage sludge" within the foregoing meaning of the term.

I turn now to whether the sewage sludge met the pollutant concentrations in 40 C.F.R. § 503.13(b)(3). As explained in a guidance document entitled "A Guide for Land Appliers on the Requirements of the Federal Standards for the Use or Disposal of Sewage Sludge, 40 CFR Part 503," and published by the EPA in December 1994, the presence of certain pollutants in sewage sludge is a parameter utilized by the Agency for determining its quality and, in turn, the requirements that govern land application of the material.[17] CX 35 at 11. Of particular relevance, the regulations at 40 C.F.R. § 503.13(a)(2) state:

> (2) If bulk sewage sludge is applied to agricultural land, forest, a public contact site, or a reclamation site, either:
>
> (i) The cumulative loading rate for each pollutant shall not exceed the cumulative pollutant loading rate for the pollutant in Table 2 of § 503.13; or

[17] According to the document, the quality of sewage sludge plays "a significant role" in determining the number and stringency of requirements imposed on land application of the material. CX 35 at 11; *see also id.* at 9. It explains that there are three characteristics of sewage sludge that the Agency considers in gauging its quality for regulatory purposes: (1) the presence of pollutants, like arsenic, cadmium, copper, lead, mercury, nickel, selenium, and zinc; (2) the presence of pathogens, like bacteria, viruses, and parasites; and (3) the attractiveness of the sewage sludge to vectors, like rodents, flies, and mosquitoes, that could come into contact with pathogens contained in the material and spread disease. *Id.* at 11, 15. "Given these three variables, there can be a number of possible sewage sludge qualities," *id.* at 15-16; and the quality tends to vary from municipality to municipality, *id.* at 11. "Sewage sludge that meets the most stringent limits **for all three** of the above sewage sludge quality parameters is referred to as **Exceptional Quality (EQ)** sewage sludge." *Id.* at 12. Such sludge "is considered comparable to standard fertilizer products," and therefore, the regulations do not impose any requirements to govern application of it to the land. *Id.* Conversely, "[s]ewage sludge that **does not** meet the most stringent limits **for any or all three** of the sludge quality parameters is referred to as **non-EQ sewage sludge**," and the regulations impose "a larger number and variety of requirements depending upon the degree to which the sludge quality diverges from EQ." *Id.*

(ii) The concentration of each pollutant in the sewage sludge shall not exceed the concentration for the pollutant in Table 3 of § 503.13.

40 C.F.R. § 503.13(a)(2). Table 3 is contained in 40 C.F.R. § 503.13(b)(3), with one column of the table entitled "Pollutant," under which eight metals are identified, and another column of the table entitled "Monthly average concentration (milligrams per kilogram)," under which a numerical value for each of the eight metals is listed. 40 C.F.R. § 503.13(b)(3). Respondents have not raised any argument against a finding that the sewage sludge removed from Cell 2 of the Facility and applied to Tom Robinson's property contained concentrations of the metals below those numerical values, and the results of analyses run by Energy Laboratories on a sample of the sewage sludge collected by Respondents on July 26, 2018 (after the sludge had been removed from Cell 2 but before land application began) bear this out. CX 6 at 3. Accordingly, I find that the sewage sludge met the pollutant concentration limits set forth in 40 C.F.R. § 503.13(b)(3).

Finally, I must consider whether the sewage sludge met the Class B pathogen requirements in 40 C.F.R. § 503.32(b). As noted above, the presence of pathogens is a parameter considered when gauging the quality of sewage sludge. CX 35 at 11. "A Guide for Land Appliers on the Requirements of the Federal Standards for the Use or Disposal of Sewage Sludge, 40 CFR Part 503" explains further as follows:

> The second parameter in determining sewage sludge quality is the presence or absence of pathogens (i.e., disease causing organisms), such as Salmonella bacteria, enteric viruses, and viable helminth ova. The preparer is responsible for monitoring and certifying the sewage sludge for pathogen reduction. . . .
>
> 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.

CX 35 at 26-27.

The regulations identify the means for classifying sewage sludge as "Class A" or "Class B" with respect to pathogens. *See* 40 C.F.R. § 503.32. Complainant alleges that the sewage sludge from Cell 2 at the Facility consisted of "Class B sewage sludge," citing in particular to the requirements set forth at 40 C.F.R. § 503.32(b)(2)(ii). 2nd Amended Compl. ¶¶ 18, 48. That provision states:

> (b) Sewage sludge – Class B. (1)(i) The requirements in either § 503.32(b)(2), (b)(3), or (b)(4) shall be met for a sewage sludge to be classified Class B with respect to pathogens.
>
> * * * *
>
> (2) Class B – Alternative 1.
>
> (i) Seven representative samples of the sewage sludge that is used or disposed shall be collected.
>
> (ii) The geometric mean of the density of fecal coliform in the samples collected in paragraph (b)(2)(i) of this section shall be less than either 2,000,000 Most Probable Number 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). Alternatively, sewage sludge can be classified as "Class B" if it is "treated in one of the Processes to Significantly Reduce Pathogens described in appendix B" of the Part 503 regulations or if it is "treated in a process that is equivalent to a Process to Significantly Reduce Pathogens, as determined by the permitting authority." 40 C.F.R. § 503.32(b)(3), (4). Meanwhile, in order for sewage sludge to be classified as "Class A":

> Either the density of fecal coliform in the sewage sludge shall be less than 1,000 Most Probable Number per gram of total solids (dry weight basis) or the density of Salmonella sp. bacteria in the sewage sludge shall be less than three Most Probably Number per four grams of total solids (dry weight basis) at the time the sewage sludge is used or disposed; at the time the sewage sludge is prepared for sale or give [sic] away in a bag or other container for application to the land; or at the time the sewage sludge or material derived from sewage sludge is prepared to meet the requirements in § 503.10 (b), (c), (e), or (f).

40 C.F.R. § 503.32(a). Additionally, the material is required to undergo one of the pathogen reduction processes identified for "Class A" sewage sludge in the regulations. *Id.*

In the instant proceeding, Complainant acknowledges that rather than the seven representative samples required by 40 C.F.R. § 503.32(b)(2)(i) for classifying sewage sludge as "Class B," only one sample of the sewage sludge from Cell 2 of the Facility seemingly was collected during the sludge removal project. C's Initial Br. at 17 (citing CX 6). Nevertheless, Complainant notes, Ms. Kleffner still "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.'" *Id.* at 17-18 (quoting Tr. at 177). For their part, Respondents maintain in their Second Amended Answer that the sewage sludge was "Exceptional Quality" and that they informed the EPA of this on multiple occasions. 2nd Amended Ans. ¶¶ 38, 39, 48. Indeed, the record reflects that by email dated June 14, 2019, counsel for Respondents

communicated to Ms. Kleffner their view that the sewage sludge met the standards for Exceptional Quality sewage sludge based upon the sampling performed by the IHS in June 2017. CX 17 at 2.

Considering the evidence before me, I am inclined to find for Complainant on this issue. As Ms. Kleffner testified, analyses run on a sample of sewage sludge collected by Respondents on July 26, 2018, after the material had been removed from Cell 2 of the Facility but before land application had begun, reflect that the density of fecal coliform in the sample was 28,000 Most Probable Number per gram of total solids on a dry weight basis, CX 6 at 3, which exceeds the threshold for sewage sludge to be considered "Class A" with respect to pathogens. While Respondents have argued that the sewage sludge was "Exceptional Quality," that claim appears to have been based on sampling performed a year prior to the commencement of the project, and the extract of the laboratory analytical report from that time period fails to support Respondents' position, as it identifies the density of fecal coliform in the sewage sludge as 4,244 Most Probable Number per gram of total solids on a dry weight basis, RX 12 at 28, which also exceeds the "Class A" threshold. Additionally, I was unable to locate evidence in the record showing that the sewage sludge had been subjected to any process for pathogen reduction. Nor have Respondents pointed to any other evidence to substantiate their claim regarding the level of pathogens in the sewage sludge or otherwise pursued the argument in their post-hearing briefs. Accordingly, I find that the preponderance of the evidence establishes that the sewage sludge from Cell 2 at the Facility was "Class B sewage sludge," as argued by Complainant.

Were Respondents "Persons"?

The CWA defines the term "person" as including "an individual, corporation, partnership, [and] association." 33 U.S.C. § 1362(5). In turn, the implementing regulations define the term "person" as "an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof." 40 C.F.R. § 503.9(q). Respondents do not dispute in their Second Amended Answer that Respondent Pierce is a private individual and a "person" as defined by the Act and regulations. 2nd Amended Ans. ¶¶ 28, 29. While Respondents did challenge the characterization of Respondent Adamas as a "person" on the basis that Respondent Adamas had been involuntarily dissolved prior to the commencement of this matter, 2nd Amended Ans. ¶¶ 25, 27, Respondents acknowledge in their Reply Brief the status of both Respondent Pierce and Respondent Adamas as "persons" under the CWA, Rs' Reply Br. at 5. Therefore, I find that Respondents were "persons" for purposes of the CWA at the time of the sludge removal project.

Were Respondents the "Persons who Prepared" or "Persons who Applied" the Sewage Sludge?

a. Arguments of the Parties

1. Complainant's arguments

With respect to whether Respondents "prepared" the sewage sludge, Complainant urges that "Respondents assumed responsibility for and directed the preparation of sewage sludge" at the Facility and were thus subject to the recordkeeping requirements of 40 C.F.R. § 503.17(a)(4). C's Initial Br. at 20. In support of its position, Complainant first points to the definition in the regulations that "[a] person who prepares sewage sludge is 'either the person who generates sewage sludge during the treatment of domestic sludge in a treatment works or the person who derives a material from sewage sludge.'" *Id.* (quoting 40 C.F.R. § 503.9(r)). Complainant also cites to the testimony of Ms. Kleffner, who identified various means of preparing sewage sludge: "'[P]reparation 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.'" *Id.* (quoting Tr. at 59). Against this backdrop, Complainant then argues that six considerations demonstrate that Respondents engaged in this activity.

First, Complainant contends that Respondents "generated" sewage sludge. C's Initial Br. at 20. Complainant argues that the Facility is a publicly owned "treatment works" insofar as it consists of a lagoon system designed to treat municipal or industrial waste and that it generates sewage sludge during the treatment process. *Id.* (citing CX 5 at 5-6). Given that Respondents were operators of the Facility, Complainant argues, Respondents thus generated sewage sludge. *Id.* (citing *City of Salisbury*, 2000 EPA ALJ LEXIS 9, at *6 (Feb. 8, 2000)).

Second, Complainant argues that Respondents "derived a material from sewage sludge." C's Initial Br. at 21. Complainant points to the testimony of Ms. Kleffner characterizing the act of dewatering as a treatment process that removes water from sewage sludge, thus rendering the entity conducting the activity a "preparer." *Id.* (citing Tr. at 59, 100, 242). Complainant also points to the testimony of both Ms. Kleffner and Mr. Sprague that the act of pumping sewage sludge from a treatment lagoon into a tank is a part of the preparation process. *Id.* (citing Tr. at 112, 430-31). Complainant then cites my April 20, 2022 AD Order, in which I noted that Respondents had not disputed the allegation that they pumped and dewatered sewage sludge from Cell 2 of the Facility on or about the week of July 9, 2018. *Id.* (citing AD Order at 11). Therefore, Complainant argues, I have already found that Respondents were "preparers" of sewage sludge. *Id.*

Third, Complainant maintains that Respondents are not absolved from liability as "preparers" by virtue of completing the work on behalf of the NCUC, citing caselaw for the notion that "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." C's

Initial Br. at 21-22 (citing multiple cases). Complainant points to the testimony of Ms. Kleffner that, in her experience as a compliance officer, there can be more than one preparer of biosolids, multiple preparers can be held liable, a contractor can be held liable for violations of the CWA and the regulations set forth at 40 C.F.R. Part 503 specifically, and a contractor can be a preparer. *Id.* at 22 (citing Tr. at 57, 72). It also points to her testimony and that of Mr. Courtney regarding the facts of this matter in particular, namely, that the NCUC contracted with Respondents to perform the preparation of the sludge and that Respondents indeed dewatered it, thus rendering Respondents "preparers," with minimal oversight from the NCUC. *Id.* (citing Tr. at 131, 161-62, 242, 281). Indeed, Complainant notes, Michelle Pierce acknowledged in an undated letter that "'Sheri [Bement of the NCUC] 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'" and that the work was performed by Respondent Adamas. *Id.* at 24 (quoting CX 46 at 25).

Respondents also cannot shift blame to other entities such as the IHS, Complainant urges. *See* C's Initial Br. at 23-25. Complainant argues that while representatives from the IHS were present for much of the preparation and application of the sewage sludge, as well as for the inspection conducted by the EPA on June 13-14, 2018, the role of the IHS was merely "observational" and "consultatory," with "minimal hands-on involvement." *Id.* at 23 (citing CX 45 at 12; Tr. at 278, 281-82, 352-53). Noting that Respondents provided the IHS with estimates of the amount of sewage sludge that had been removed from Cell 2, prompting subsequent discussions about the matter, *id.* at 24 (citing CX 45 at 34; CX 46 at 25), Complainant points to the following conclusion of Ms. Kleffner: "'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 -- had access to all the information necessary to put together the story and the Part 503 regulation requirements.'" *Id.* (quoting Tr. at 243). Thus, Complainant argues, "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." *Id.* at 25.

Fourth, Complainant points to examples of Respondents holding themselves out to the NCUC and the IHS as the preparers of the sewage sludge to the NCUC, including in correspondence from an attorney retained by Respondents and in documentation exchanged during the planning stages of the project. C's Initial Br. at 25 (citing CX 45 at 16, 34).

Fifth, Complainant contends that "Respondents also gave the impression to the EPA that Respondents were performing the sludge preparation," as shown by the EPA inspectors documenting in their report of the June 2018 inspection that Respondent Adamas was preparing to remove sludge from Cell 2 at the time of the inspection. C's Initial Br. at 25-26 (citing CX 5 at 7). As the project proceeded, Complainant argues, Respondents also represented in emails to the representatives of the IHS that they had performed the work of pumping and dewatering sewage sludge from Cell 2. *Id.* at 26 (citing CX 4; CX 42 at 23; CX 45 at 24; Tr. at 286).

Sixth, Complainant argues that Respondents agreed to assume responsibility for compliance with the CWA and the applicable regulations, as shown by correspondence from Respondents as the project was underway, the contract between Respondents and the NCUC, and Respondent Pierce's own testimony at the hearing. C's Initial Br. at 26-27 (citing CX 45 at 18, 21, 33; Tr. at 496).

In sum, Complainant contends, "no other conclusion can be drawn other than that Respondents were the preparers of the sewage sludge" given that I already held that Respondents pumped and dewatered the sludge and that the evidence adduced at the hearing confirms that Respondents retained control of the preparation, performed activities related to the preparation, and took responsibility for compliance with applicable law during completion of the project. C's Initial Br. at 27. Thus, Complainant argues, Respondents "were therefore required to develop and maintain records pursuant to 40 C.F.R. § 503.17(a)(4)(i)." *Id.* at 20.

Turning to whether Respondents "applied" the sewage sludge, Complainant argues that "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). C's Initial Br. at 27. For support, Complainant notes the finding in my AD Order that Respondents had not disputed the allegation that their subcontractors had applied approximately 1,000,000 gallons of sewage sludge from Cell 2 of the Facility to land in or near Lame Deer, Montana, on or about August 22, 2018. C's Initial Br. at 27. Complainant also points to the assertions made by Respondents in their prehearing exchange regarding the transportation and application of the sewage sludge by their subcontractors. *Id.* (citing Rs' Initial Prehearing Exchange at 9-10). Complainant then argues that Respondents are not absolved from liability by virtue of their subcontractors physically performing the work, maintaining that "persons directing the activities of others, including contractors, can and have been held liable for the acts of their subcontractors under the CWA" and that Respondents "controlled and directed the land application." *Id.*

Complainant urges that "the record overwhelmingly demonstrates" the control that Respondents exercised over the application of the sewage sludge. C's Initial Br. at 30. Among other points, Complainant argues that Respondents were in command of the sludge removal project generally, developing plans for it "before an application site had even been secured." *Id.* at 28 (citing CX 3; CX 45 at 42). Complainant highlights Respondents' April 20, 2018 proposal for the project, in which the anticipated application of the sewage sludge is described and a schedule of project milestones identifies Respondent Pierce, among others, as being responsible for the land application. *Id.* at 30 (citing CX 45 at 34, 36). Complainant also points to an invoice submitted by Respondents to the NCUC for the costs of the project, which identifies "Supervision" of the "Sludge Application" as an activity billed by Respondents. *Id.* at 29 (citing CX 43 at 28). Complainant acknowledges that Ernie Sprague, who had been hired by Respondents to transport the sewage sludge from the Facility to Tom Robinson's property for application, testified that he took direction from not only Respondent Pierce but also George Cummins of the IHS and that "Mr. Cummins was 'in charge of the project.'" *Id.* at 29 (citing Tr.

at 407, 438). Complainant argues, however, that the testimony of Mr. Courtney refutes any notion that Mr. Cummins exercised authority over the project inasmuch as Mr. Courtney explained that "his co-worker's role did not go beyond 'just inspecting'" and that the purpose of Mr. Cummins's inspections was to "ensure compliance with the conditions of the funding for the project." *Id.* (citing Tr. at 281-82, 358).

As further support for its position, Complainant points to assertions made during and after completion of the sludge removal project about Respondents applying the sewage sludge. C's Initial Br. at 30-32 (citing CX 4; CX 7 at 1; CX 9 at 1, 2, 4; CX 41 at 1; CX 42 at 2-3; CX 43 at 7, 9; CX 45 at 5, 7, 14; CX 49 at 9, 27). For example, Complainant notes that while the project was underway, Respondent Pierce "wrote an email on July 13, 2018[,] that said, 'We should be ready to begin hauling and application next week.'" *Id.* at 30 (citing CX 4). Complainant also highlights an email from Respondent Pierce to representatives from the NCUC and the IHS on June 21, 2018, in which he documented that he would act as the project manager for the sludge removal project and that Respondents would complete the project without the use of NCUC equipment or staff. *Id.* at 31 (citing CX 49 at 27). Complainant then notes that Respondents and their counsel later emphasized the minimal involvement of the NCUC in correspondence to the IHS and United States Senator Steve Daines after the project had been completed. *Id.* at 31-32 (citing CX 45 at 14; CX 49 at 9).

Additionally, Complainant notes that Respondents were identified as the points of contact for sampling performed while the project was underway, C's Initial Br. at 32 (citing CX 19 at 12); and that Respondents' counsel advised the EPA after completion of the project that Respondents had relayed certain requirements to Mr. Robinson prior to application, *id.* (citing CX 17 at 3). Finally, Complainant reiterates that Respondents agreed to assume responsibility for compliance with the CWA and the applicable regulations, as shown in their proposal for the project and a July 30, 2018 email to representatives of the IHS and the NCUC. C's Initial Br. at 32-33 (citing CX 45 at 21, 33).

In sum, Complainant contends, Respondents controlled and directed the performance of the sludge removal project, including the application of the sludge by Mr. Sprague and Mr. Robinson, and "Respondents explicitly stated they were the appliers of sewage sludge." C's Initial Br. at 33. Accordingly, Complainant maintains, Respondents are responsible for developing and retaining records pursuant to 40 C.F.R. § 503.17(a)(4). *Id.*

2. Respondents' arguments

In response to the legal conclusion in the Second Amended Complaint that Respondents were the "preparers" of the sewage sludge within the meaning of the term as defined in 40 C.F.R. § 503.9(r), 2nd Amended Compl. ¶ 35, Respondents deny the allegation, arguing that they merely fulfilled their contractual duties to serve as a project manager and technical consultant to the NCUC and that they assisted with the project under the NCUC's "direct supervision," 2nd Amended Ans. ¶ 35. For support that the NCUC "remained in control of the project at all times," Respondents cite the June 27, 2018 letter from Sheri Bement of the NCUC

to Respondent Pierce, in which Ms. Bement advised that she or Raymond Pine, foreman for the NCUC, would monitor performance of the project on a daily basis. 2nd Amended Ans. ¶ 33 (citing RX 15 at 10). Nevertheless, Respondents also admit in their Second Amended Answer to having pumped and dewatered the sewage sludge on or about the week of July 9, 2018. 2nd Amended Ans. ¶¶ 35, 38. Respondents urge, however, that such actions constitute "treatment of sewage sludge," as that phrase is defined by 40 C.F.R. § 503.9(z), and that that is distinct from "preparing" the sewage sludge for purposes of the regulations. 2nd Amended Ans. ¶ 35.

In their post-hearing briefs, Respondents continue to deny responsibility for preparation of the sewage sludge on the basis of the NCUC's authority over the project. In particular, Respondents urge that "[t]he issue of control is pivotal" in determining liability under the Act. Rs' Initial Br. at 4; Rs' Reply Br. at 7-8. Respondents then contend that the NCUC "held exclusive operational control over the project," as "demonstrated most explicitly when NCUC exercised its authority to lock out other parties, including [Respondent Pierce] and his associates, from the [F]acility." Rs' Initial Br. at 4; Rs' Reply Br. at 7. Respondents maintain that "[s]uch actions signify a level of control that goes beyond mere contractual oversight." Rs' Initial Br. at 4; Rs' Reply Br. at 7. Indeed, Respondents argue, the command exerted by the NCUC over the sludge removal project was "pervasive" and "sweeping," such that the NCUC is the appropriate entity to bear responsibility for compliance and hold liable for any violations. Rs' Initial Br. at 4; Rs' Reply Br. at 5, 7-8. Conversely, Respondents maintain, their own role "was limited to technical consultancy, not direct operational control." Rs' Reply Br. at 5 (citing RX 27 (August 29, 2018 email from counsel for the NCUC to Respondent Pierce directing Respondents to "cease and desist all further work" on the sludge removal project)). In sum, according to Respondents, even "[i]f they were indeed involved in preparation [of the sewage sludge] . . . , it was under the guidance and authority of the main contractor, NCUC." Rs' Reply Br. at 6.

As for the application of the sewage sludge, Respondents maintain in their Second Amended Answer that they merely served as a project manager and technical consultant to the NCUC, which included hiring subcontractors for the sludge removal project with the NCUC's approval. 2nd Amended Ans. ¶ 37. Respondents deny applying any sewage sludge themselves and insist that the material was applied by Tom Robinson to his own property "at the direction of and with the knowledge and permission of the NCUC." 2nd Amended Ans. ¶¶ 37, 39, 46. Respondents go on to deny the allegation that they were persons who "applied sewage sludge" for purposes of 40 C.F.R. § 503.10(a), urging that Mr. Robinson was the one to perform the work, such that he bore the responsibility of complying with the applicable regulations for land appliers per the EPA's own guidance documents, and that Respondents were not present and did not have any equipment onsite at the time of the application. 2nd Amended Ans. ¶ 46 (citing "A Plain English Guide to the EPA Part 503 Biosolids Rule (1994), https://www.epa.gov/sites/default/files/2018-12/documents/plain-english-guide-part503-biosolids-rule.pdf).

Respondents reiterate their position in their post-hearing briefs, urging that Tom Robinson and Ernie Sprague "[b]oth testified to being the sole individuals involved in the

application of the sewage sludge." Rs' Initial Br. at 2; Rs' Reply Br. at 4 (citing Tr. at 375); *see also* Rs' Reply Br. at 5 (citing Tr. at 375-76; Tr. at 409-409). Respondents argue again, however, that even "[i]f they were indeed involved in . . . application, it was under the guidance and authority of the main contractor, NCUC." Rs' Reply Br. at 6.

b. Analysis and Conclusion

In deciding whether Respondents were the "persons who prepared" the sewage sludge removed from Cell 2 at the Facility for purposes of the Part 503 regulations, I must first look to the definition of the term. As discussed above, the regulations define the "[p]erson who prepares sewage sludge" as "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 EPA expounded on this definition in the preamble to the final rulemaking for the Part 503 regulations. It first explains that "many of the requirements in the regulation apply to the 'person who prepares sewage sludge.' The regulation uses this term to describe the person or entity that effectively controls the quality of the sewage sludge or material derived from sewage sludge that is ultimately used or disposed." CX 33 at 74. The Agency then goes on:

> The preparer could be the person who generates sewage sludge during the treatment of domestic sewage in a treatment works or a person who derives a material derived from sewage sludge. Examples of a person who derives a material from sewage sludge are a treatment works that blends sewage sludge with some other material or a private contractor who receives sewage sludge from a treatment works and then blends the sewage sludge with some other material (e.g., mixes the sewage sludge with a bulking agent). When sewage sludge is part of a material, the person derived the material from sewage sludge. Any time the quality of a sewage sludge is changed, a material is derived from sewage sludge.

Id. at 78. A year after the Agency promulgated the Part 503 regulations, it published a guidance document entitled "A Plain English Guide to the EPA Part 503 Biosolids Rule" that reinforces this explanation:

> The ***preparer*** of biosolids is defined as a person who either ***generates*** biosolids during the treatment of domestic sewage in a treatment works or who ***derives*** a material from biosolids (i.e., changes the quality of the biosolids prepared by a generator). Examples of materials derived from biosolids include biosolids treated by composting, pelletizing, or drying (to kill pathogens and reduce attractiveness to vectors), and mixtures of biosolids with other materials (e.g., biosolids blended with soil or fertilizer, which will usually lower pollutant concentrations).

CX 36 at 38.

Complainant contends that Respondents were "preparers" under both prongs of the foregoing definition. I disagree. Comprised of a system designed to treat wastewater from the residents of Lame Deer, among other entities, the Facility undisputedly falls within the meaning of a "treatment works" that treats "domestic sewage" and generates "sewage sludge," as those terms are defined at 40 C.F.R. § 503.9(g), (w), and (aa). CX 5 at 3, 6; CX 10 at 4; CX 53 at 1. I find below that the NCUC was an "operator" of the Facility at the times relevant to this proceeding. As the Facility's operator, the NCUC can be found to have generated sewage sludge during the treatment of domestic sewage at a treatment works. *See City of Salisbury*, 2000 EPA ALJ LEXIS 9, at *6 (Feb. 8, 2000) ("Respondent, in its capacity as owner and operator of a publicly owned treatment works ('POTW'), generates sewage sludge during the treatment of domestic sewage."), *aff'd*, 10 E.A.D. 263 (EAB 2002). This renders the NCUC a "preparer" for purposes of the Part 503 regulations. Conversely, as discussed in detail below, I find that the record does not sufficiently support the conclusion that Respondents were also "operators" of the Facility. Therefore, Complainant's position that Respondents generated sewage sludge during the treatment of domestic sewage at a treatment works by virtue of being "operators" of the Facility, and were thus "preparers" under the first prong of the definition, fails.

Respondents admit in their Second Amended Answer to transferring sewage sludge from Cell 2 at the Facility into tanks that Respondents had assembled at the site and dewatering it. 2nd Amended Ans. ¶¶ 35, 38.[18] The question then is whether Respondents can be considered to have either generated sewage sludge or derived a material from sewage sludge – in other words, changed the quality of the sludge generated by the NCUC – by

[18] At no point have Respondents sought to disavow or withdraw these admissions, and guided by legal precedent from the EAB, I find them to be binding. *See, e.g.*, *Chippewa Hazardous Waste Remediation & Energy, Inc.*, 12 E.A.D. 346, 357-58 (EAB 2005). Nevertheless, I note that the record contains conflicting evidence about the extent to which the sewage sludge was, in fact, dewatered. For example, by email dated July 13, 2018, and addressed to James Courtney of the IHS, with others from the IHS copied, Respondent Pierce advised that "a significant amount of sludge" had been "pumped and dewatered" two days prior. CX 4. But in an August 13, 2018 letter addressed to Sheri Bement of the NCUC, Mr. Courtney expressed concerns about the sludge removal project, including his doubts that the sewage sludge had been dewatered as claimed based upon a comparison of the samples taken from Cell 2 at the Facility in 2017 prior to the commencement of the sludge removal project and samples that Mr. Courtney took of the sludge after it had been removed from Cell 2 and stored in tanks by Respondents in July 2018. CX 8. He concluded, "The sludge in the tanks was analyzed and compared to the sludge that was sampled last year[,] and no evidence of dewatering was observed. The total solids concentrations were approximately equal." *Id.* at 2. At the hearing, Mr. Courtney did not offer any testimony on his view of the matter beyond noting that "there was a claim that [the sludge] was concentrated," Tr. at 316, and that he collected samples from the tanks as a means of verifying that claim, Tr. at 321. While Mr. Courtney's method of sampling was initially called into question by Ms. Kleffner of EPA, RX 10, she clarified at the hearing that she misunderstood and that it was indeed a method for determining the total solids content of sewage sludge, although she then asserted that such analysis should be performed by a lab, Tr. at 217. Notably, additional sampling of the sewage sludge in the tanks *was* performed by Respondents and analyzed by Energy Laboratories, with the August 2, 2018 laboratory analytical report reflecting that the total solids content of the sludge was measured by the lab at approximately four percent. CX 6 at 3. Such a figure seems to be well below the concentration that one would expect it to be if the sewage sludge had been dewatered as represented. *See* CX 37 at 15, 21-22 (indicating that the process of dewatering typically increases the solids content of sewage sludge from a range of three to seven percent before dewatering to a range of 12 to 90 percent after dewatering depending on the method of dewatering used).

engaging in such activity. Ms. Kleffner offered her view at the hearing that dewatering is a treatment process that renders the entity performing it a "preparer" and that preparation for purposes of the Part 503 regulations is any act, including dewatering, that changes the quality of the material from its initial form. Tr. 59, 100, 242. The preamble to the final rulemaking for the Part 503 regulations clarifies (in the context of describing which entities are required to obtain a permit for their involvement in the generation, treatment, and/or disposal of sewage sludge[19]) what is required for sewage sludge to undergo a change in quality in the opinion of the EPA:

> EPA considers that sewage sludge has undergone a change in quality if, through processes such as stabilization, composting, digestion, or heat treatment, a

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[19] As explained in the preamble:

> If the treatment works generating the sewage sludge transfers sewage sludge to a person who changes the quality of the sewage sludge, the entity changing the quality is a treatment works treating domestic sewage. That entity is not only subject to part 503 standards but is also required to apply for a permit. If, however, the treatment works generating the sewage sludge provides sewage sludge to a person who does not change the quality, the generating treatment works retains the responsibility for the ultimate use or disposal of the sludge and must ensure the part 503 requirements are met.
>
> Generally, as noted above, facilities other than [publicly owned treatment works] that do not change the quality of sewage sludge would not be required to apply for permits. Among such facilities or operations are contract sludge haulers or land appliers. . . .
>
> Land application may involve any or all of the following parties: The treatment works generating the sewage sludge (or other person who prepares the sewage sludge for application to the land), a distributor of the sewage sludge, a person who applies the sewage sludge to the land, and the owner or leaseholder of the land to which the sewage sludge is applied. . . .
>
> Subpart B of today's regulation applies to a person who applies sewage sludge to the land, to a person who prepares sewage sludge for application to the land, to the sewage sludge applied to the land, and to the land on which sewage sludge is applied. Any person who generates sewage sludge or who changes the quality of sewage sludge and controls the ultimate use or disposal of sewage sludge is a treatment works treating domestic sewage and must apply for a permit containing sewage sludge conditions. . . .
>
> If the treatment works is the party that applies sewage sludge to the land, the treatment works will be issued a permit that spells out the conditions for land application contained in today's rule. If the treatment works uses a commercial sewage sludge applier that does not change the quality of the sewage sludge for land application, the treatment works will still be held accountable under today's rule and through its permit for the commercial applier's compliance with the part 503 standards, since the Agency considers that the treatment works still retains control over the quality of the sewage sludge. In this case, as the generator of sewage sludge, the treatment works cannot limit its responsibility for the use and disposal of the sewage sludge in compliance with the standards merely by transferring the sludge to a commercial applier.

CX 33 at 113.

> change has occurred in pollutant concentrations, pathogen levels, or vector attraction properties of the sewage sludge (on a dry weight basis[20]) sufficient to change its regulatory status under part 503. A sewage sludge also changes in quality if it is blended permanently with bulking agents (such as sawdust or wood chips) or with sewage sludge from another treatment works . . . .

CX 33 at 112.[21] The preamble then goes on to explain that dewatering alone does not necessarily change the quality of sewage sludge or cause the person performing the process to be considered a treatment works treating domestic sewage:

> EPA does not consider dewatering, of itself, to constitute a change in sludge quality. Dewatering increases the solids content of sewage sludge without necessarily changing its dry-weight pollutant concentrations, pathogen levels, or vector attraction properties; in addition, because sewage sludge monitoring information is reported on a dry weight basis, the solids content of the sewage sludge is irrelevant to its quality under part 503. . . . Thus a person who simply dewaters the sewage sludge . . . would not be a treatment works treating domestic sewage.

Id. at 112-13.

"[F]indings and interpretations made by the Administrator in a final rule preamble . . . are authoritative decisions." *Carbon Injection Sys., LLC*, 17 E.A.D. 1, 37 (EAB 2016). Accordingly, the EAB has directed that such determinations are to be treated as controlling precedent absent any distinguishable facts or a change of facts so dramatic that departure from the determinations would be warranted. *Id.* at 39-40. In the instant matter, there is nothing in the record that compels me to distinguish or depart from the foregoing preamble passages, including Ms. Kleffner's testimony on the subject of dewatering, in which she identified the process as a level of treatment and an act that changes the quality of sewage sludge from its initial form. Here, the evidence reflects that Respondents removed the sewage sludge from the treatment system at the Facility, storing the material in tanks that Respondents had transported to the site, and only then did Respondents dewater it. The preamble excerpts make plain that 1) the Agency does not view dewatering by itself, in the manner performed by Respondents, as tantamount to generating sewage sludge during the treatment of domestic sewage in a treatment works or altering the quality of sewage sludge after it has been generated and 2) the Agency considers sewage sludge to have undergone a change in quality,

[20] "Dry weight basis means calculated on the basis of having been dried at 105 degrees Celsius until reaching a constant mass (i.e., essentially 100 percent solids content)." 40 C.F.R. § 503.9(h).

[21] This explanation is consistent with the EPA's guidance in "A Guide for Land Appliers on the Requirements of the Federal Standards for the Use or Disposal of Sewage Sludge, 40 CFR Part 503," which, as discussed above, identifies the three parameters for characterizing the quality of sewage sludge as 1) the level of pollutants it contains, 2) the level of pathogens it contains, and 3) its attractiveness to vectors. CX 35 at 11.

or a material to have been derived from the sewage sludge, only when its pollutant concentrations, pathogen levels, or vector attraction properties are altered as a result of the process to which it is subjected. Determining whether such a change has occurred is critical to understanding who bears responsibility under the regulations for the quality of the sewage sludge and for complying with various requirements governing the land application of the material. It is unclear from the record of this proceeding that Respondents' removal of the sewage sludge from Cell 2 and subsequent dewatering of it affected the pollutant concentrations, pathogen levels, or vector attraction properties of the material. Thus, based on the record before me, I am unable to find that Respondents "generated sewage sludge during the treatment of domestic sewage in a treatment works" or "derived a material from sewage sludge," such that they could be found to be "persons who prepared" sewage sludge within the meaning of Part 503.[22] Rather, the record supports a finding that the NCUC, as the operator of a treatment works treating domestic sewage and generating sewage sludge that was not shown to undergo any subsequent change in quality after Respondents took possession of it, remained in control of the quality of the material and was thus the sole "preparer" for regulatory purposes.[23]

I turn now to whether Respondents were "persons who applied" the sewage sludge removed from Cell 2 at the Facility, such that the Part 503 regulations would govern their activities. As set forth above, the phrase "[a]pply sewage sludge or sewage sludge applied to the land means land application of sewage sludge," 40 C.F.R. § 503.9(a), which is then defined as "the spraying or spreading of sewage sludge onto the land surface; the injection of sewage sludge below the land surface; or the incorporation of sewage sludge into the soil so that the sewage sludge can either condition the soil or fertilize crops or vegetation grown in the soil," 40 C.F.R. § 503.11(h).

Here, it is undisputed that 1) the NCUC and Respondent Adamas entered into a contract effective on May 15, 2018, for Respondent Adamas to remove, transport, and land apply 1,000,000 gallons of sewage sludge from Cell 2 of the Facility, CX 45 at 17-19, 33-35; 2) the contract authorized Respondent Adamas, as the contractor, to engage subcontractors to

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[22] Even Ms. Kleffner seemed to agree at the hearing that the act of transferring the sewage sludge from Cell 2 into tanks was not enough on its own to render Respondents a "preparer." She offered conflicting testimony when asked about "preparation," first answering affirmatively that the pumping of sewage sludge is an act of preparation. Tr. at 112. Upon further questioning, however, she clarified:

> Q: You testified earlier that pumping and dewatering is part of sludge preparation under bio-solids regulations; is that correct?
>
> A: Dewatering is, yes.

Tr. at 153.

[23] Ms. Kleffner acknowledged that the NCUC could be considered a "preparer," testifying that "it was clear . . . that NCUC at most would have been the preparer of the biosolids . . . ." Tr. at 200.

perform work under the contract, provided that Respondent Adamas "remain responsible for the proper completion" of the contract, CX 45 at 18; 3) Respondent Adamas did indeed engage Ernie Sprague of D&R Disposal as a subcontractor to remove the sewage sludge from the tanks into which Respondents had transferred the material and transport it to the property of Tom Robinson, CX 42 at 4-5; 4) Respondent Adamas simultaneously engaged Mr. Robinson as a subcontractor to receive the sewage sludge and incorporate it into the soil on his property in accordance with certain terms outlined in the contract, CX 7; and 5) on or about August 22, 2018, Mr. Sprague and Mr. Robinson applied approximately 1,000,000 gallons of sewage sludge from Cell 2 at the Facility to Mr. Robinson's property in or near Lame Deer, Montana, *see* 2nd Amended Compl. ¶ 39; 2nd Amended Ans. ¶ 39.[24] Specifically, Mr. Sprague was responsible for physically transporting the sewage sludge from the storage tanks at the Facility to Mr. Robinson's property and spreading the material onto the surface of his field, while Mr. Robinson was responsible for physically mixing the material into the soil. Tr. at 371, 374, 393-93, 425-29.

Inasmuch as Mr. Sprague spread the sewage sludge onto Mr. Robinson's property and Mr. Robinson incorporated it into the soil, their actions met the definition for "land application," such that Mr. Sprague and Mr. Robinson were "persons who applied" sewage sludge for purposes of the Part 503 regulations. Complainant argues that notwithstanding the involvement of Mr. Sprague and Mr. Robinson in the process, Respondents were sufficiently in control of the application of the sewage sludge to be considered "appliers" as well. For support, Complainant points to caselaw holding that "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." C's Initial Br. at 21 (citing *United States v. Lambert*, 915 F. Supp. 797, 802-03 (S.D. W.Va 1996); *United States v. Chuchua*, 2004 U.S. Dist. LEXIS 32365, at *19-20 (S.D. Cal. Mar. 10, 2004); *Sierra Club v. MasTec. N. Am.*, 2007 U.S. Dist. LEXIS 92489, at *9 (D. Or. Dec. 12, 2007)).

Caselaw and the evidentiary record of this matter indeed support Complainant's position. As argued by Complainant, legal authorities have found that an entity can be held liable under the CWA for not only its own actions but also the actions of another if the entity was sufficiently responsible for or in control of the performance of the violative acts. *Compare Smith v. Hankinson*, No. 98-0451-P-S, 1999 U.S. Dist. LEXIS 5151, at *24-25 (S.D. Ala. Mar. 31, 1999) (holding that the plaintiff could be held liable for the violation of the CWA because the plaintiff "controlled or directed" the violative activity when he supplied the equipment used to perform it; instructed the equipment's operator; and directed where the activity should occur), *and United States v. Lambert*, 915 F. Supp. 797, 802-03 (S.D. W.Va. Jan. 31, 1996) (holding that the fact that an independent contractor performed the work found to be in violation of the

[24] Respondents did not challenge the factual allegation in the Second Amended Complaint that their subcontractors 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, on or about August 22, 2018, *see* 2nd Amended Compl. ¶ 39; 2nd Amended Ans. ¶ 39, and thus, the allegation is deemed to be admitted, *see* 40 C.F.R. § 22.15(d). However, the evidentiary record reflects that transport and application of the sludge actually began on August 9, 2018, and concluded in October 2018. CX 8 at 1; CX 42 at 2; Tr. at 405, 424.

CWA did not absolve the defendant of liability, even though the defendant had not personally undertaken the work, because "he clearly was responsible for [its] performance" insofar as he owned the property on which the work was performed; paid for the materials, equipment, and performance of the task by the independent contractor; and provided his express approval), *with United States v. Sargent Cnty. Water Res. Dist.*, 876 F. Supp. 1081, 1088-89 (D.N.D. 1992) (holding that the defendant's involvement in the violative activity was "too attenuated for liability to attach" where the defendant was not retained to secure permits; "did not prepare any specifications for the contractor"; "was not involved in the bidding"; "did not administer the contract"; "did not conduct any inspections of the contractor's work during or after construction"; "did not approve payments to the contractor"; and did not provide instructions on the placement or disposal of the materials). Indeed, it is considered "clearly established that liability under the CWA is predicated on either 1) performance of the work, or 2) responsibility for or control over the performance of the work." *Hankinson*, 1999 U.S. Dist. LEXIS at *24 (citing *United States v. Sargent Cnty. Water Res. Dist.*, 876 F. Supp. 1081, 1088 (D.N.D. 1992)). Consequently, the "stated defense . . . that an independent contractor actually performed the work" that caused a violation "is no defense to liability under the CWA." *Lambert*, 915 F. Supp. at 1710.

I note that these principles were recently applied persuasively by Judge Biro in *Great Lakes Dredge & Dock, LLC*, a case alleging violations of the Marine Protection, Research, and Sanctuaries Act of 1972, which Judge Biro likened to the CWA. The respondent in that matter had been awarded a contract ("dredging contract") to perform dredging as part of a project to deepen the Miami Harbor. *Great Lakes Dredge & Dock, LLC*, 2021 EPA ALJ LEXIS 2, at *11, 13 (Feb. 24, 2021) (Order on Complainant's Motion for Partial Accelerated Decision). It then hired subcontractors for purposes of transporting dredged material from the point of dredging to the point of disposal and then releasing the material. *Id.* at *17. The respondent's employees did not accompany the subcontractors during this process and "did not control the moment-to-moment decisions of the [subcontractors'] crews," who "decided what routes to follow" and when to release the dredged material. *Id.* at *17-18. The respondent maintained that many of the alleged violations arose from the actions of the subcontractors rather than the respondent itself, such that the respondent could not be held liable. *Id.* at 31-32.

Citing the principles articulated above, Judge Biro disagreed that the respondent could "escape liability by simply shifting blame to the subcontractor[s]" and held that the appropriate inquiry was the degree of the respondent's responsibility for or control over performance of the work resulting in the alleged violations. *Id.* at *34-37. Discussing in depth the evidence supporting her determination, *id.* at *37-45, Judge Biro proceeded to find that the respondent could be held liable "for violations that occurred due to work actually performed by its . . . subcontractors" because the respondent "exercised ultimate responsibility for or control over that work," *id.* at 46. For example, she looked to the terms of the dredging contract, observing that it charged the respondent with assuring compliance with applicable law and imposed other obligations on the respondent that were "clearly designed to facilitate this . . . compliance." *Id.* at 38-39. She also noted the many tasks that the respondent was required to perform pursuant to the dredging contract, such as furnishing all labor, materials, and equipment and

coordinating the activities of the respondent's own employees and any subcontractors, among others, which she found to demonstrate that the respondent's role in the project was "all-encompassing." *Id.* at *37-38. Additionally, she considered how the transport and release of the dredged material "was but a subcomponent of the overall job for which [the respondent] was hired." *Id.* at *41. Moreover, she found, the respondent was the entity to dredge the material and load it for transit, after which the respondent controlled when the material would be taken to the point of disposal and informed its subcontractors of the procedures to follow. *Id.* Judge Biro also cited the respondent's communications with regulatory authorities during the project as "demonstrat[ing] that it was exercising responsibility for and control over disposal activity." *Id.* at 42. Thus, Judge Biro found the overarching control and responsibility exercised by the respondent, rather than the absence of daily supervision of the subcontractors' activities, to be dispositive.

Applying the same principles that guided Judge Biro to the record before me, I find there to be ample evidence demonstrating that Respondents were sufficiently responsible for and in control of the application of the sewage sludge from Cell 2 of the Facility, despite Mr. Sprague and Mr. Robinson having physically performed the work, such that Respondents are subject to liability as "persons who applied" the material. First, the record clearly reflects the leading role that Respondents played in planning the sludge removal project. As an attorney retained by Respondents represented in a letter dated October 4, 2018, and addressed to an attorney for the Department of Health and Human Services, "[f]or months ADAMAS briefed IHS, EPA, and the Northern Cheyenne Tribal Council on the approach and technical specifications required" for the sludge removal project, including the land application component, and its plans were "accepted and used" by the IHS. CX 56 at 1. Written communications exchanged at the time between participants in the project confirm this assertion. *See, e.g.*, CX 45 at 33-36 (April 20, 2018 letter addressed to Sheri Bement of the NCUC and signed by Respondent Pierce, which proposed the scope of work to be performed during each step of the project, a timeline for the project's completion, and the assignment of tasks within the timeline, including to Respondent Pierce); CX 45 at 32 (April 21, 2018 email transmitting the April 20, 2018 letter to Ms. Bement, with others copied, in which Respondent Pierce identified the name of the companies that would analyze samples taken during the project and the type of equipment that would be used for the land application); CX 45 at 37-38 (emails between James Courtney of the IHS and Respondent Pierce in late April 2018, in which Respondent Pierce provided a "conceptual flow map" for the project; Mr. Courtney responded by saying that it looked "like a solid plan to [him]" and asking for "the current plan for the sludge application"; and Respondent Pierce replied with the expected methods for application); CX 46 at 37-379 (May 24, 2018 email sent by Respondent Pierce to a number of participants in the project, to which he attached a document entitled "Site-Specific Safety Plan, Lame Deer, Montana Sewer lagoon sludge removal; #BI-16N39," among other documents); CX 45 at 39-40 (June 7, 2018 email sent by Respondent Pierce to Mr. Courtney and Ms. Bement, with others copied, providing a revised timeline for the project). This evidence illustrates the control that Respondents exercised during the development of the project and, of particular relevance here, over how the land application would be performed.

Other documentation from the period before Respondents began removing the sewage sludge from Cell 2 of the Facility reflects the responsibility that Respondents assumed for the project as a whole. For example, in the April 20, 2018 letter addressed to Sheri Bement of the NCUC and signed by Respondent Pierce, Respondents assured Ms. Bement that the project would be completed in accordance with applicable law. CX 45 at 33. Respondents also represented:

> It is understood that for this contract, the term "ADAMAS Construction and Development Services" or "ADAMAS" includes all of our Sub-contractors, sub-consultants, engineers and other team member's [sic].
>
> It is understood the [sic] ADAMAS Construction and Development Services and/or our Sub-contractors, consultants, engineers and other team member's [sic], are qualified to handle such materials and dispose of such materials in a manner prescribed by law.

Id. Respondents thus took a measure of responsibility over the performance of the project, including the work of subcontractors. The contract entered into by the NCUC and Respondent Adamas, effective on May 15, 2018, makes its responsibility for the entirety of the project and any work performed by subcontractors clearer still. The contract directed Respondent Adamas to "furnish all of the materials and perform all of the work shown on the Drawings and/or described in the Specifications entitled Exhibit A, as annexed hereto . . . ." CX 45 at 17. A document entitled "Exhibit A" does not appear in the record sequentially with the contract, but I note that the April 20, 2018 letter addressed to Ms. Bement and signed by Respondent Pierce, as well as the attached proposed scope of work to be performed during each step of the project, appears later in the record and was marked with "Exhibit – A" in the lower left corner of those pages. *See* CX 45 at 33-35. Thus, that proposal appears to have been incorporated into the contract and reflects that Respondent Adamas agreed to perform each of the project's components, including the transportation and application of the sewage sludge. Significantly, the contract also authorized Respondent Adamas to engage subcontractors to perform work under the contract but required Respondent Adamas "in all instances [to] remain responsible for the proper completion of this Contract." CX 45 at 18. Additional documentary evidence from this period that reflects the expansive role occupied by Respondents includes 1) the projected timelines for the project, which Respondents transmitted to other project participants and identified either Respondent Pierce or Respondent Adamas as participating in all but one of the 15 project milestones, CX 45 at 32-33, 36, 39-40; 2) an email dated June 21, 2018, and sent by Respondent Pierce to other project participants, in which he memorialized the outcome of discussions between the NCUC, the IHS, and Respondent Adamas, including that "ADAMAS- Nathan Pierce will be the project manager for the sludge removal project with the understanding that NO NCUC equipment or staff will be used for this project," CX 56 at 6; and 3) an invoice dated June 21, 2018, in which Respondent Adamas billed the NCUC for its anticipated performance of the contract, including supervision of the land application of the sewage sludge and equipment used for that task, CX 45 at 7, 30.

Finally, the record demonstrates that Respondents indeed guided the disposition of the sewage sludge after Respondents had removed the material from Cell 2 of the Facility, even if Respondent Pierce was not physically present at the application site each time the material was spread on the surface of the field by Ernie Sprague and tilled into the soil by Tom Robinson, by hiring Mr. Sprague and Mr. Robinson to perform those activities and providing instruction in both the subcontractor agreements and orally before the application began. For example, while the project was underway, Respondents served as a point of contact to the IHS and the NCUC to advise those entities on the project's progress and respond to their inquiries about it. *See, e.g.* CX 45 at 9, 11-12, 20-24, 42. In one of these communications, Respondent Pierce represented to James Courtney of the IHS that he would contact Mr. Robinson to arrange to apply the sewage sludge to his property. CX 45 at 42. Respondent Adamas subsequently engaged Mr. Robinson to receive and incorporate the material into the soil, and in their contract, Respondent Adamas advised Mr. Robinson of the procedures to follow to accomplish the task, including tilling the sludge into the soil within six hours of it being spread on the surface. CX 7 at 1. During his testimony at the hearing, Mr. Robinson confirmed that he indeed tilled the sewage sludge under the direction of Respondent Pierce. Tr. at 388. The contract between Respondent Adamas and Ernie Sprague, and the written account and testimony of Mr. Sprague, similarly reflect that Respondent Pierce guided his activities as, pursuant to their contract, he transferred the sewage sludge from the tanks in which the material was being stored into his own equipment, transported it to Mr. Robinson's property, and applied it. *See, e.g.*, CX 42 at 4 (contract between Respondent Adamas and Mr. Sprague directing him on where to transport and apply the sewage sludge and in what quantities); CX 42 at 2 (written account stating that Respondent Pierce directed Mr. Sprague to the "tanks [Respondent Pierce] wanted off loaded"); Tr. at 407 (testimony that he "took directions from both Nathan Pierce and George Cummins"), 411 (testimony that Respondent Pierce discussed during a group meeting that Mr. Sprague and Mr. Robinson would keep certain records regarding the application), 412 (testimony that site restrictions were discussed during a meeting with Respondent Pierce, George Cummins of the IHS, Mr. Robinson, and Mr. Sprague), 427-28 (testimony that Respondent Pierce facilitated Mr. Sprague's transfer of the sewage sludge from the storage tanks into his equipment for transport by reagitating the material in order to liquify it), 442-43 (testimony that although "[f]or the most part" Respondent Pierce was not present for the application, he did observe Mr. Sprague's activities and "set the speed for the truck").

In sum, I find that the record is replete with evidence that Respondents took responsibility for and led the planning and execution of the sludge removal project, including the transport and land application of the sewage sludge, even though Respondents did not personally perform each phase of the project. Respondents have not pointed to any evidence in rebuttal but urge that even "[i]f they were indeed involved in . . . application, it was under the guidance and authority of the main contractor, NCUC." Rs' Reply Br. at 6. The record certainly reflects that the NCUC exercised authority over the project. For example, in a letter addressed to Respondent Pierce on June 27, 2018, Sheri Bement of the NCUC advised, in pertinent part:

> This letter is formal notification that as the Northern Cheyenne Utilities Commission (NCUC) contract with Indian Health Service and our subsequent sub-contract with ADAMAS Construction Services, I am officially notifying of the following:
>
> 1) I am the NCUC representative that you need to direct all work-related questions or requests to. Further, you are not to go directly to Indian Health Service unless it relates to the day to day work that James Courtney, Project Engineer, can respond to. Any extensions of time, change orders, inquiries or requests for payment must go through me.
>
> 2) The project will be monitored on a daily basis by me and in my absence by the NCUC Foreman, Raymond Pine. He has the authority to act on my behalf on any matters on a daily basis if I am unavailable.

RX 15 at 10. At the hearing, James Courtney of the IHS testified variously that the NCUC provided "very minimal oversight" and "some oversight" for the sludge removal project to ensure that Respondents fulfilled their obligations under their contract, Tr. at 281, 282, while Ernie Sprague testified that the NCUC "overruled" Respondent Pierce "[o]n several instances," Tr. at 438-39. And undoubtedly, the NCUC, as the "person who prepared" the sewage sludge, remained obligated under the regulations to confirm compliance with applicable requirements. *See* 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 . . . ."). However, the oversight exercised by the NCUC does not absolve Respondents of liability for their own role in the project. *See United States v. Chuchua*, No. 01cv1479-DMS (AJB), 2004 U.S. Dist. LEXIS 32365, at *19-20 (S.D. Cal. Mar. 10, 2004) (holding that although the project manager for the violative work was acting under the property owner's direct supervision and "did not have the authority to enforce final decisions," his involvement, consisting of completing paperwork and engineering plans, applying for permits, and taking other actions required to "'put that part of the project together,'" was "sufficiently extensive" to also subject him to liability as a "person" under the statute). Accordingly, I find by a preponderance of the evidence that Respondents are subject to liability as "persons who applied" the sewage sludge from Cell 2 of the Facility.

Did Respondents develop and retain for five years the information identified in 40 C.F.R. § 503.17(a)(4)(ii)?

When bulk sewage sludge that has 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) is applied to agricultural land, any person who applied the material is required to develop and retain for five years the following information:

> (A) The following certification statement:

> I certify, under penalty of law, that the information that will be used to determine compliance with the management practices in § 503.14, the site restrictions in § 503.32(b)(5), and the vector attraction reduction requirement in (insert either § 503.33(b)(9) or (b)(10) if one of those requirements is met) was prepared for each site on which bulk sewage sludge is applied under my direction and supervision in accordance with the system designed to ensure that qualified personnel properly gather and evaluate this information. I am aware that there are significant penalties for false certification including the possibility of fine and imprisonment.
>
> (B) A description of how the management practices in § 503.14 are met for each site on which bulk sewage sludge is applied.
>
> (C) A description of how the site restrictions in § 503.32(b)(5) are met for each site on which the bulk sewage sludge is applied.
>
> (D) When the vector attraction reduction requirement in either § 503.33(b)(9) or (b)(10) is met, a description of how the vector attraction reduction requirement is met.
>
> (E) The date bulk sewage sludge is applied to each site.

40 C.F.R. § 503.17(a)(4)(ii).

As "persons who applied" the sewage sludge removed from Cell 2 of the Facility, Respondents were thus required to develop and retain for five years each of the foregoing pieces of information. Complainant asserts that "[t]he EPA evaluated the information and documentation provided by Respondents throughout 2018 and 2019 and determined that Respondent [sic] did not adequately follow the recordkeeping requirements of Part 503." C's Initial Br. at 33. Complainant also points to testimony elicited from Respondent Pierce at the hearing, in which he conceded that he had never submitted records concerning management practices or site restrictions to the EPA. *Id.* at 33-34 (quoting Tr. at 505-06). Complainant concludes, "Respondents' failure to proffer sufficient information and documentation serves as evidence to develop and maintain such records." *Id.* at 34. Respondents counter that they did comply with the recordkeeping requirements of 40 C.F.R. § 503.17 insofar as Respondents directed Erin Kleffner to the location of the records upon receipt of the EPA's request for information, as acknowledged by Ms. Kleffner during her testimony. Rs' Initial Br. at 2; Rs' Reply Br. at 4 (citing Tr. at 199-201). Respondents thus argue that their purported knowledge of the location of the required records and efforts to inform the EPA of their whereabouts sufficed for purposes of compliance. Respondents further contend that as the NCUC was the "main contractor" for the sludge removal project, "the responsibility for maintaining [the] records fell primarily on NCUC." Rs' Reply Br. at 6.

I disagree with these lines of argument. The regulations plainly impose recordkeeping requirements directly on "persons who apply" sewage sludge. Respondents have been found

to be among the persons who applied the sewage sludge removed from Cell 2 at the Facility, and therefore, they were obligated to maintain records independent of any other participant in the project. Yet the record reflects that Respondents relied on Ernie Sprague, Tom Robinson, and the NCUC to fulfill their recordkeeping duties in their stead. For example, Respondent Pierce testified at the hearing that he confirmed with Mr. Sprague and Mr. Robinson that they were developing the records required to be kept by the regulations, but that he himself did not collect the information, believing it to be in the possession of the NCUC. Tr. at 489-91. He explained:

> We were also developing out records at NCUC for them and were instructed that they were going to – as they were ultimately responsible for the 503 and they were the NPDES permit holder, they were going to be the ones who were taking care of the records and making sure that those got stored appropriately for the project.

Tr. at 489-90. Mrs. Pierce also testified on the matter, explaining that Respondent Adamas regularly submitted samples and records, consisting of such information as the names of the individuals working on the project and the amount of sewage sludge removed from Cell 2 on a given day, to Sheri Bement of the NCUC. Tr. at 454-55, 465-67. She further testified that the NCUC represented that it would "keep all the results and records," with Ms. Bement making "it very clear that that was their obligation and not ours, and that she was going to take care of that." Tr. at 465. The Pierces' testimony on the matter seemed to be sincere, and I note that upon receipt of the EPA's request for information dated September 25, 2018, counsel retained by Respondents did respond initially by identifying the NCUC as the appropriate source of the information sought. CX 12; Tr. at 501. But a belief that others were fulfilling the recordkeeping requirements simply does not absolve Respondents of liability for failing to comply in their own right as "appliers."

And it is indeed clear from the evidentiary record that Respondents did not wholly comply. When asked about the completeness of the information that Respondents submitted to the EPA in response to the Agency's request for information, Ms. Kleffner testified as follows:

> Q: Ms. Kleffner, in any of the responses that you received from Nathan Pierce or Adamas Construction or the attorneys, did you get the information that you requested in the September 25, 2018 request for information?
>
> A: We only received part of it. We would have gotten what would have been necessary for a preparer, but we were missing a significant amount of information for a land applier.
>
> Q: Can you walk us through what information was missing that you requested?
>
> A: Sure. So we – as a land applier, we were missing site restrictions, verification that vector attraction reduction was achieved through a physical method, and

> then management practices. The most significant thing for management practices were the agronomic rate calculations . . . .[25]

Tr. at 101-02; *see also* Tr. at 232-33. On cross examination, Respondent Pierce acknowledged that he had not provided certain records to the EPA, although he pointed out that he had maintained and provided a copy of the agreement between Respondent Adamas and Tom Robinson, which contained some information required to be kept by 40 C.F.R. § 503.17(a)(4)(ii). Tr. at 505-06. Indeed, Respondents appear to have supplied EPA with the contract as of October 31, 2019. CX 29 at 11-12. And as represented by Respondent Pierce, it does contain information – namely, that Mr. Robinson agreed "to prep the field and till the sludge incorporating it into the soil within 6 hour [sic]" – that aligns with the practices for vector attraction reduction described by 40 C.F.R. § 503.33(b)(10)(i), which is one piece of information required to be developed and maintained under 40 C.F.R. § 503.17(a)(4)(ii). While the contract also lists 22,000 gallons of sewage sludge per acre as the application rate to be used by Mr. Robinson, Ms. Kleffner disputed Respondent Pierce's characterization of that figure at the hearing as the "agronomic rate." *See* Tr. at 195-97, 209-10. And Respondents have not pointed to anything else in their responses to the EPA, or to any other evidence in the record, that would demonstrate that they personally maintained the remainder of the required information, such as documentation of how other management practices set forth at 40 C.F.R. 503.14 and site restrictions set forth at 40 C.F.R. § 503.32(b)(5) were met at the application site.[26]

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[25] Among other management practices described therein, the regulations state that "[b]ulk sewage sludge shall be applied to agricultural land . . . at a whole sludge application rate that is equal or less than the agronomic rate for the bulk sewage sludge . . . ." 40 C.F.R. § 503.14(d). As defined by the regulations:

> Agronomic rate is the whole sludge application rate (dry weight basis) designed:
>
> (1) To provide the amount of nitrogen needed by the food crop, feed crop, fiber crop, cover crop, or vegetation grown on the land; and
>
> (2) To minimize the amount of nitrogen in the sewage sludge that passes below the root zone of the crop or vegetation grown on the land to the ground water.

40 C.F.R. § 503.11(b). Ms. Kleffner elaborated on the matter during her testimony, explaining that a number of factors are considered in calculating the agronomic rate, such as the total solids content, the nitogen content of the soil at the application site, and the types of crops grown there. Tr. at 217.

[26] The management practices described by 40 C.F.R. § 503.14 include the requirements that bulk sewage sludge "not be applied to the land if it is likely to adversely affect a threatened or endangered species listed under section 4 of the Endangered Species Act or its designated critical habitat," 40 C.F.R. § 503.14(a); "not be applied to agricultural land . . . that is flooded, frozen, or snow-covered so that the bulk sewage sludge enters a wetland or other waters of the United States, as defined in 40 C.F.R. § 122.2, except as provided in a permit issued pursuant to section 402 or 404 of the CWA," 40 C.F.R. § 503.14(b); and "not be applied to agricultural land . . . that is 10 meters or less from waters of the United States, as defined in 40 C.F.R. § 122.2, unless otherwise specified by the permitting authority," 40 C.F.R. § 503.14(c). In turn, the site restrictions described by 40 C.F.R. § 503.32(b)(5) include the requirements that "[f]ood crops, feed crops, and fiber crops shall not be harvested for 30 days after application of sewage sludge," 40 C.F.R. § 503.32(b)(5)(iv); "[a]nimals shall not be grazed on the land for 30 days after application of sewage sludge," 40 C.F.R. § 503.32(b)(5)(v); and "[p]ublic access to land with a low potential for

Accordingly, I find by a preponderance of the evidence that Respondents failed to develop and retain information required to be kept for five years by 40 C.F.R. § 503.17(a)(4(ii), such that Respondents are liable for violating Section 405 of the CWA, 33 U.S.C. § 1345, and the implementing regulations at 40 C.F.R. Part 503.

B. Claim 2

1. Critical Elements of Liability

In the Second Amended Complaint, Complainant first notes that Section 308 of the CWA, 33 U.S.C. § 1318, "provides EPA the authority to request and have access to and a copy of any records required under Section 1318(a)(A) of the CWA." 2nd Amended Comp. ¶ 22. Complainant then alleges as Claim 2 that Respondents did not provide complete and timely responses to requests for information sent by EPA on September 25, 2018, and June 11, 2019, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318, in violation of that provision. 2nd Amended Compl. ¶¶ 56, 57. The bases of Claim 2 are the allegations in the Second Amended Complaint that on September 25, 2018, EPA sent a request for information to Respondents related to the land application of sewage sludge on August 22, 2018, to which Respondents provided an untimely and incomplete response lacking certain information that Respondents were required to develop and maintain pursuant to 40 C.F.R. § 503.17(a)(4)(ii) and only after EPA persisted in seeking a response over several months.[27] 2nd Amended Compl. ¶¶ 43-45.

Based upon these allegations and the substantive governing law described above, the elements that must be proven to establish liability for Claim 2 are that on the dates in question:

(1) Respondents were "owners" or "operators" of the Facility;

(2) The Facility was a "point source" as that term is defined by 33 U.S.C. § 1362(14);

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

(4) Respondents failed to provide such information.

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public exposure shall be restricted for 30 days after application of sewage sludge," 40 C.F.R. § 503.32(b)(5)(viii).

[27] In the Second Amended Complaint, Complainant refers to 40 C.F.R. § 503.17(4)(ii), rather than 40 C.F.R. § 503.17(a)(4)(ii), as the provision setting forth the information that Respondents were required to develop and maintain. 2nd Amended Compl. ¶ 45. That citation appears to be a scrivener's error.

2. Discussion

Were Respondents "Operators" of the Facility?

a. Arguments of the Parties

1. Complainant's arguments

Complainant urges that Respondents were "operators" of the Facility at all times relevant to this proceeding. C's Initial Br. at 34-42. In support of its position, Complainant first cites to multiple sources to define the term, including a definition of "owner or operator" appearing in a section of the CWA, C's Initial Br. at 34 (citing 33 U.S.C. § 1316(a)(4)), and caselaw expounding on the meaning of the term "operator" under the Act, *id.* (citing multiple cases). Complainant then points to six considerations that, in its view, prove that Respondents met that definition.

First, Complainant points to a website for Respondent Adamas that describes the business's performance of a wide range of services related to the treatment of wastewater. C's Initial Br. at 35 (citing CX 24 at 4, 16).

Second, Complainant points to the work that Respondents specifically performed for the NCUC, as reflected in invoices and receipts, arguing that this work was "comprehensive" and occurred "over several years." *Id.* Complainant cites Ms. Kleffner's testimony about the type of work that she has seen operators of wastewater treatment facilities perform in her experience as a compliance officer for EPA, including such maintenance as "mowing the berms" and "fixing pumps"; taking samples; participating in inspections carried out by state or federal officials; and operating a "muffin monster."[28] *Id.* at 35-36 (citing Tr. at 56, 114). Complainant then highlights examples of Respondents having performed such duties for the NCUC as shown "in multiple invoices spanning multiple years." *Id.* at 36 (citing CX 43 at 50, 71). Complainant also cites to examples of Respondents having performed "administrative and technical work in addition to physical operation of the NCUC's sewage systems." *Id.* at 36-37 (citing CX 43 at 39, 85).

Third, Complainant points to representations made by Respondents and their counsel regarding the level of responsibility that they exercised over operations at the Facility and the renovation of Cell 2 in particular, including responsibility for compliance with applicable law. C's Initial Br. at 37-39 (citing CX 46 at 6; CX 56 at 1; CX 45 at 6-7, 11-12, 14, 17, 18, 21, 32, 33-35).

Fourth, Complainant cites to testimonial and documentary evidence in the record as demonstrating that the NCUC lacked the requisite expertise or equipment to operate the Facility and, more specifically, that Sheri Bement lacked the requisite knowledge or expertise to

[28] According to Ms. Kleffner, a muffin monster is a typical piece of equipment at wastewater treatment facilities that "grind[s] up solids before it goes into the treatment system." Tr. at 114.

be an operator, or the only operator, of the Facility. C's Initial Br. at 39-40 (citing Tr. at 280; CX 46 at 6, 9, 10, 23; CX 49 at 9; CX 50 at 7; CX 56 at 2). Complainant notes that Ms. Bement even named Respondent Pierce as the "temporary sewer operator" in response to her inability and that of other NCUC employees to obtain state certification for the role themselves. *Id.* (citing CX 46 at 6, 23; CX 50 at 7).

Fifth, Complainant points to representations made by Respondent Pierce in his application for the role of General Manager of the NCUC in December 2018, namely, statements regarding his experience in repairing the wastewater treatment systems on the Northern Cheyenne Indian Reservation and his resulting knowledge of the systems and the issues that they faced, as well as statements regarding his possession of certain wastewater licenses. C's Initial Br. at 40-41(citing CX 43 at 11, 12).

Sixth, Complainant points to the role that Respondent Pierce played during the June 2018 inspection of the Facility, as documented in the inspection report. C's Initial Br. at 41 (citing CX 5 at 5-6). Complainant argues that "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." *Id.* (citing CX 5). Complainant then cites to Ms. Kleffner's testimony regarding an individual's presence at inspections as falling within the duties of an operator. *Id.* (citing Tr. at 56).

In sum, Complainant argues, Respondents and those working on their behalf repeatedly held Respondents out as having operated the Facility and repeatedly sought payment for the associated work. C's Initial Br. at 42. Complainant also points to the testimony of Ms. Kleffner, elicited on cross examination by Respondent Pierce, regarding her view of Respondents' role: "'I think in a cumulative sense . . . 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.'" *Id.* at 38 (quoting Tr. at 223-24). Finally, Complainant urges that Respondents fail to offer any argument or point to any evidence in the record that casts doubt on their status as "self-asserted and de facto operators" of the Facility. C's Reply Br. at 2.

2. Respondents' Arguments

Throughout the present proceeding, Respondents have denied being an operator. In response to the legal conclusion in the Second Amended Complaint that Respondents were the "operators" of the Facility, 2nd Amended Compl. ¶ 33, Respondents argue in their Second Amended Answer that the Facility was operated by the NCUC alone, with Respondents serving merely as consultants and subcontractors to the NCUC, 2nd Amended Ans. ¶ 33. For support, Respondents point to the portions of the inspection report for the June 2018 inspection of the Facility in which the EPA inspectors identified the NCUC, rather than Respondents, as the operator. 2nd Amended Ans. ¶ 33 (citing CX 5 at 3, 5). Respondents acknowledge that they did apply to the State of Montana to become an operator of the wastewater treatment facilities within the Northern Cheyenne Indian Reservation but maintain that they did not complete the

application process, did not enter into any contract with the NCUC to serve as the operator, and were otherwise not named to occupy that role. *Id.*

Respondents continue to challenge Complainant's characterization of their role at the Facility in their post-hearing briefs. As previously noted, Respondents first urge that "[t]he issue of control is pivotal" in determining liability under the Act. Rs' Initial Br. at 4; Rs' Reply Br. at 7-8. Citing caselaw for their "nuanced interpretations of operational roles under the CWA," Rs' Reply Br. at 3 (citing multiple cases), Respondents then argue that the "advisory and managerial" functions that they performed "[do] not equate to operational control as defined under the CWA." Rs' Reply Br. at 6. Rather, Respondents maintain, the NCUC exercised "exclusive operational control," as shown when the NCUC "exercised its authority to lock out other parties, including [Respondent Pierce] and his associates, from the [F]acility." Rs' Initial Br. at 4; Rs' Reply Br. at 7. Respondents further argue that the NCUC "effectively exclude[ed] the Respondents from operational decisions." Rs' Reply Br. at 5 (citing RX 27; Tr. at 410-11). In sum, Respondents contend, Complainant misconstrue the duties that Respondents performed at the Facility, "leading to an overestimation of their direct involvement in the [Facility's] operational aspects." Rs' Reply Br. at 8.

b. Analysis and Conclusion

As noted by Respondents in their Second Amended Answer, the July 20, 2018 report documenting the inspection that EPA conducted at the Facility on June 13-14, 2018, identifies the NCUC as the operator of the Facility at that time. Specifically, the NCUC was named as the entity "meeting [the] definition of 'operator'" in the pertinent field, CX 5 at 3, as well as in the following narrative:

> On Wednesday, June 13, 2018, and Thursday, June 14, 2018, we, U.S. Environmental Protection Agency (EPA) inspectors Akash Johnson and Emilio Llamozas, conducted an announced compliance evaluation inspection of the Lame Deer Wastewater Treatment Facility (WWTF) (the lagoon; the facility; the site), located in Lame Deer, Montana, on the Northern Cheyenne Indian Reservation, to evaluate compliance with the facility's National Pollutant Discharge Elimination System (NPDES) Permit No. MT0029360 (the Permit). The lagoon was owned by the Northern Cheyenne Tribe (the Tribe) and operated by the Northern Cheyenne Utilities Commission (NCUC).

CX 5 at 5. The EPA's characterization of the NCUC as the operator of the Facility, at least as of the time of the inspection, is supported by the fact that the NCUC was the holder of the NPDES permit issued by the EPA and in effect beginning on March 1, 2018, for the discharges from the Facility into Lame Deer Creek. CX 53; 2nd Amended Compl. ¶ 34; 2nd Amended Ans. ¶ 34. By virtue of obtaining the permit, it stands to reason that the NCUC was properly considered to be an operator of the Facility. *See* 40 C.F.R. § 122.21(b) ("When a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit."). Moreover, the NCUC assumed the responsibilities that accompany the role insofar as the

permit states, in pertinent part, that "[t]he Permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the Permittee to achieve compliance with the conditions of this Permit." CX 53 at 35.

Thus, the NCUC was an "operator" of the Facility. The question that I must resolve here is whether Complainant has met its burden of demonstrating by a preponderance of the evidence that Respondents also served as "operators" of the Facility at times relevant to this proceeding. To answer that question, I must first identify the appropriate definition of the term for purposes of the CWA.

The term "operator" is not generally defined in the CWA. *See* 33 U.S.C. § 1362. And while certain sections of the Act define it in the context of those sections, the definitions are largely circular.[29] The regulations implementing the NPDES program also offer little guidance, defining the term simply as "the owner or operator of any 'facility or activity' subject to regulation under the NPDES program." 40 C.F.R. § 122.2.

The parties do not cite to any legal precedent that could guide this Tribunal further on the appropriate definition of an "operator" in the context of a wastewater treatment facility, nor have I found any such mandatory authority. However, both Complainant and Respondents point to a decision from the United States District Court for the District of Montana in *Beartooth Alliance v. Crown Butte Mines*, 904 F.Supp. 1168 (D. Mont. 1995), C's Initial Br. at 34; Rs' Reply Br. at 3, which sets forth a standard for considering an entity's status as an operator under the section of the CWA specifically concerning discharges of oil and hazardous substances from vessels, onshore facilities, and offshore facilities, *Beartooth Alliance*, 904 F.Supp. at 1175. Under that standard, "the amount of involvement and control" at a facility is dispositive, with an entity constituting an operator "where it 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." *Id.* (citing *Apex Oil Co. v. United States*, 530 F.2d 1291, 1293 (8th Cir. 1976), *cert. denied*, 429 U.S. 827 (1976)).

Applying that agreed-upon standard to the considerations invoked by Complainant for characterizing Respondents as an "operator" of the Facility, I am not persuaded that Complainant has met its burden in this proceeding.

First, while, as Complainant observed, a website for Respondent Adamas did represent the business's ability to perform a wide range of services related to the treatment of wastewater, *see* CX 24, I do not consider that fact necessarily to be compelling evidence of the level of involvement and control that Respondents specifically exercised at the Facility.

[29] See 33 U.S.C. § 1316(a)(4) (defining the term "owner or operator" for purposes of the section entitled "National standards of performance" as "any person who owns, leases, operates, controls, or supervises a source"); 33 U.S.C. § 1321(a)(6) (defining the term "owner or operator" for purposes of the section entitled "Oil and hazardous substances liability" as any person "owning" or "operating" a subject vessel, onshore facility, or offshore facility).

As for the work that Respondents did perform for the NCUC, it is clear from the record that Respondents initially undertook some discrete tasks related to the maintenance and repair of the NCUC's systems. For example, in a December 4, 2018 letter to the NCUC in which Respondent Pierce described his qualifications for the open General Manager position there at the time, he explained that he had "worked with many of the systems to repair them" and that his business had "assisted in most . . . water and sewer breaks on the Northern Cheyenne reservation" beginning with the "Boys and Girls club break." CX 43 at 11-12. A series of invoices, payment vouchers, checks, and other documentation provided to EPA by the NCUC reflect that Respondents indeed performed repairs and other services for the NCUC on occasion in 2017. *See, e.g.*, CX 43 at 43-45, 124-27 (showing that the NCUC paid Respondents for "1/3 portion of the shared cost of the Structural Engineering Assessment and Report, For the Boys and Girls Club Northern Cheyenne Nation," for which Respondents billed the NCUC $1,419.55 on June 4, 2017); CX 43 at 49-51, 116-19 (showing that the NCUC paid Respondents for materials and "Tech Assistance" related to the repair of the Facility's lift station, as well as mowing at the Facility, for which Respondents billed the NCUC $3,156 on July 27, 2017); CX 43 at 65-67, 70-72, 99-102, 105-08 (showing that the NCUC paid Respondents for materials and labor related to the "East-side water restoration" and "Muffin Monster motor Lame Deer Lift Station," for which Respondents billed the NCUC $4,676.56 on November 24, 2017). During her testimony, Michelle Pierce confirmed that Respondents completed repairs of broken water and sewer lines for the NCUC at various locations on the Northern Cheyenne Indian Reservation, beginning at the Boys and Girls Club. Tr. 459-61, 467-68. With respect to one such job (which seemingly aligns with the "East-side water restoration" noted on the aforementioned invoice dated November 24, 2017), Mrs. Pierce testified:

> There was a time where you [Respondent Pierce] had to do a main waterline on the east side, which took several days. You did that with the NCUC crews. And basically, they had all walked off on the end of that shift, and you and I and our son, actually, yes, who was 16 at the time stayed until 3:30 in the morning to get their water up and running so that they had water for their Sun Dance.

Tr. at 461.

While the foregoing evidence demonstrates that Respondents possessed the ability to repair damage and maintain the NCUC's systems, it fails to show that Respondents exercised any authority over the systems or equipment being repaired and maintained, or any NCUC employees that may have been involved in the repair and maintenance, let alone to the degree seemingly required to satisfy *Beartooth Alliance*'s standard for being considered an "operator" of the Facility. Rather, it shows that Respondents were occasionally carrying out relatively limited tasks that they were hired by the NCUC to perform not only at the Facility but at other locations around the Northern Cheyenne Indian Reservation, such that Respondents more closely resembled the defendant in *Beartooth Alliance* that the court considered *not* to fit the definition of "operator."

Specifically, in that case, several environmental groups filed an action against a number of mining firms alleging violations of Section 301(a) of the Clean Water Act. *Beartooth Alliance*, No. CV 93-154-BLG-JDS, 1995 U.S. Dist. LEXIS 16850, at *2-3 (D. Mont. May 24, 1995). Citing the Supreme Court's interpretation of the Act as allowing citizens to seek civil penalties in suits brought to enjoin or otherwise abate an ongoing violation, the court held that jurisdiction over the mining firms existed only if they owned or operated a property at the time of the action on which an ongoing violation of the Act was occuring. *Id.* at *5-6 (quoting *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 59 (1987)). One of the mining firms, Noranda Exploration, Inc. ("NEX"), moved for summary judgment on the matter, arguing that it was neither a current owner nor a current operator of the subject property. *Id.* at *6. As the court noted, the uncontroverted facts reflected that NEX was at one time engaged to act as a manager of the property but that it had not conducted any activities at the site since before the suit was filed, with the exception of a landman for NEX performing land title work for the property owner and a geologist for NEX performing 78 hours of work at a different property. *Id.* at *6-8. Thus, the court observed, "the record shows that NEX has provided very limited services to [the property owner] for work that was not even performed at the site." *Id.* at 8. It then held that such services did not render NEX an "operator" of the subject property, concluding, "[R]eason dictates that the performance of services by a separate entity on behalf of the owner or operator of the site, for which the owner or operator is separately billed, does not subject to the particular entity performing the services, NEX in this case, to liability under the Act as an owner or operator." *Id.* at 8-9. For that reason, among others, the court granted NEX's motion and held that it lacked jurisdiction to enjoin or otherwise penalize NEX for any ongoing violation of the Act. *Id.* at 9.

Conversely, the court denied the motion for summary judgment filed by two other defendants, Noranda Minerals Corporation ("NMC") and Noranda, Inc. ("NI"), in which NMC and NI urged that they had also ceased all activities at the subject property before the suit was commenced and thus could not be considered "operators." *Beartooth Alliance*, 904 F.Supp. at 1175. The court rejected this claim, citing evidence that "employees of Noranda subsidiaries had carried out or supervised substantially all mineral property acquisition, exploration, development, engineering, and permitting works" related to the site and that those employees subsequently became employees of the property owner. *Id.* (internal quotation marks omitted). The court further pointed to evidence that "NMC assumed the day-to-day functional operations of managing the project once NEX ceased to be actively involved." *Id.* (internal quotation marks omitted). Finally, the court noted that contrary to claims that the property owner had directed and controlled all activities performed by NMC and NI, "evidence suggest[ed] that the former may not have been ultimately responsible for supervising the operations management of employees at [the subject property]." *Id.* Thus, the court held, "much more [was] involved then [sic] simply the performance of services for a fee." *Id.* at 1176.

Based on that court's reasoning, I am not persuaded by the invoices, payment vouchers, checks, and other documentation from 2017 that Respondents were sufficiently involved and in control of the functioning of the Facility to have been considered "operators." That documentary evidence reflects that, like NEX, Respondents were simply performing services on

occasion, for which Respondents separately billed the NCUC, at a number of sites in addition to the Facility itself. And the record reflects that Respondents were not the only entities hired to conduct such activities on behalf of the NCUC. As Ernie Sprague testified at the hearing, "I think the people at NCUC are in over their head. They call on subcontractors at the spur of the moment. They've called me in the middle of the night to come help them fix projects. And, you know, they grasp for help wherever they can . . . ." Tr. at 437.[30] *Beartooth Alliance* instructs that that type of work alone does not subject the separate entities performing the services to liability as an "operator" under the CWA. Upon questioning by Respondent Pierce at the hearing, Ms. Kleffner even acknowledged that an entity can conduct activities with respect to a wastewater treatment system without being considered an operator. Tr. at 223 ("Q: Can an outside contractor work on a sewer system without being an operator? A: It is possible, yes."). She also acknowledged that an entity's control over a facility in its entirety is crucial to the entity's status as an "operator." Tr. at 252-53. ("Q: Ms. Kleffner, you spoke earlier, and you said that control over the facility was extremely important as to determine between contractor and subcontractor, correct? A: Uh-huh. Yes. Q: Would you agree that control over the entire facilities, including the sewer lagoons and the application site, would be important? A: Yes, depending on what piece we're talking about. For the operator, yes.").

To be sure, the record contains evidence suggesting that at some point Respondents began to play a greater role in the NCUC's operations than separately performing services for a fee, with some reflecting that the NCUC began to rely on Respondents for more than the occasional repair and maintenance of its systems as time went on. For example, a later set of invoices, payment vouchers, checks, and other documentation supplied by the NCUC shows that it paid Respondents for the performance of various tasks – including the "Project Management/Supervision" of "Ashland and Josephine Fire Crow" and the replacement of the motor in a grinder; sampling from the lagoons at the Facility; and "Administrative meetings with Josh and IHS and work on IHS proposals" – for which Respondents billed the NCUC $4,387.50 on April 8, 2018. CX 43 at 83-87. Much is unclear from this documentary evidence, including who Ashland and Josephine Fire Crow were and what work they were performing. Nevertheless, it reflects that Respondents had been entrusted with the direction of their activities and, assuming that they were employees of the NCUC, suggests a measure of authority exercised by Respondents in an aspect of the NCUC's operations by April 2018.

Indeed, in an email dated June 21, 2018, and addressed to Sheri Bement of the NCUC and James Courtney and Jim White of the IHS, among other representatives from those entities, Respondent Pierce memorialized an agreement about another service – referred to as the "sewer and camera cleaning project" – that Respondents would be undertaking on behalf of the NCUC, during which Respondents would also be directing the activities of NCUC employees engaged in the project:

[30] Mr. Sprague was quick to add, "[B]ut by no means when I come and show up and help in the middle of the night am I an operator." Tr. at 437.

> Nathan Pierce will be the Project Manager and responsible for the Lame Deer Sewer and Camera Cleaning Project. ADAMAS agrees to use NCUC employees Jace Frank Backbone, and Loy (last name unknown) at the request of NCUC. NCUC agrees that while NCUC employees are working for ADAMAS they will follow the directives of Nathan Pierce and ADAMAS. If NCUC employees fail to do their Job responsibilities or follow the directives of Nathan Pierce or ADAMAS, they will be sent back to NCUC for disciplinary actions. ADAMAS will not be allowed to use any NCUC equipment for this work, per NCUC's request.

CX 56 at 6. In that same email, Respondent Pierce also referred to reimbursement from the NCUC for "Supervision time" that he spent on the "scattered site" project being performed at the time, as well as "payroll paid [by Respondents] to NCUC employees" for part of that project. *Id.*

In an undated letter, Michelle Pierce described the close relationship that Respondents and the NCUC forged as Respondents continued to perform services for the NCUC and maintained until approximately the end of June 2018 when their relationship began to sour:

> We began working with Sheri Bement after the boys and girls club incident. She called us down to help her crew and utilities company deal with several water and sewer breaks in the Norther [sic] Cheyenne community for over a year and a half. We worked side by said [sic] with her staff in the trenches and teaching them proper techniques, safety, and bring proper tools to do the jobs.
>
> * * * *
>
> Over the year and half [sic] Sheri and the NCUC crew became very close to our company and family. So much so that Sheri called us brother and sister. She ate at our Thanksgiving table along with all of our family and friends. We as a family ate with the NCUC at their Christmas party. We have brought parts and supplies for the crew and jobs as well feeding [sic] the entire crew on multiple occasions. We 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 NUCU [sic] lagoon permit. She even had Nathan [Respondent Pierce] sign to be her sewer operator since none of her crew members including herself could get certified. We did this all with our companies [sic] own money to help Sheri and NCUC become more self-efficient [sic] and to better the Norther [sic] Cheyenne communities. We wanted to help them succeed. 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. The crew were excited about the change [sic] to prove themselves and of course the increase in pay.

> Nathan and I even had dinner with Sheri and Deon [sic] Killsback [counsel for the NCUC] at Applebee's in the heights and discussed this project before they started and what the main goals were for the utilities company, our company and for the Norther [sic] Cheyenne people. Deon [sic] even offered to help expand our company in to Crow reservation and said that we could be changing the sewer and water for all reservations.

CX 46 at 23. This account reflects that Respondents took on a more significant role and, again, exercised some measure of authority, directing activities of the NCUC's employees to the extent that the employees participated in the completion of work performed by Respondents on the NCUC's behalf or lacked an understanding of their job duties. Moreover, it appears that Respondents did some of this work without compensation from the NCUC. Mrs. Pierce also noted how on one occasion Respondents paid the wages of the "scab crew" hired by the NCUC – consisting of Emily Evans, Ms. Bement's sister; Jim Bement, Ms. Bement's husband; and others – as Respondent Pierce had touched on in his June 21, 2018 email. CX 46 at 24; *see also* CX 43 at 14-15 (check dated June 18, 2018, and paid by Respondent Adamas to Emily Evans for the amount of $573.31); CX 43 at 40 (invoice dated June 29, 2018, in which Respondents bill the NCUC for "Over Payment of NCUC Employees BriceHarris [sic], Emily Evens [sic], James Bement. 45 hours total @ 22.50/hr.").

As for the naming of Respondents as the "sewer operator" for the NCUC, which Mrs. Pierce referenced in her account, the record contains a document entitled "Montana Application for Certification as an Operator of a Municipal, Industrial, or On-Site Wastewater Treatment System" ("Application for Certification") that a division of the State of Montana stamped as received on April 6, 2018, and that requests state certification of Respondent Pierce as an operator of the Facility, among other wastewater treatment plants on the Northern Cheyenne Indian Reservation. CX 50 at 2. Attached to the Application for Certification were a number of documents, including a "Temporary Certification Application." CX 50 at 7. Signed by Sheri Bement of the NCUC, that document requests temporary certification for Respondent Pierce while he undertook the process of becoming fully certified and states that temporary certification is subject to approval by the Department of Environmental Quality, with such certification remaining in effect for up to one year from the date of issuance. *Id.* Within the Application for Certification and the attachments, Respondent Pierce's job title with the NCUC is variously identified as "Contract Sewer Operator," "Contract Project Manager and Wastewater Operator," "Asst. Supt.," and "Contract Sewer Operator in Training." *Id.* at 2, 3, 7. His associated duties are listed as "Service, Maintain, [and] Operate all Waste Water systems of the NCUC on the Northern Cheyenne Reservation," including the Facility, for 46 hours per week. CX 50 at 3. And curiously, his dates of employment are listed as beginning in May 2016, CX 50 at 3, a year before any other evidence in the record reflects that Respondents began performing services for the NCUC. *Id.* Respondent Pierce referenced the effort to name him as the "sewer operator" in an August 26, 2018 email sent to representatives of the Northern Cheyenne Tribe and IHS, as well as to Dion Killsback, counsel for the NCUC. Responding to Mr. Killsback's assertion that he did not have an attorney-client relationship with Respondents, Respondent Pierce stated in the email as follows:

> [A]s of April of this year Sheri Bement, [sic] signed and submitted a [sic] application to the State of Montana naming me the Sewer Operator for the reservation systems. This seems . . . I would fall under the NCUC umbrella as the sewer operator. She also represented to EPA Akash Johnson that I was the Sewer Operator. Again, if I mistook you being our representative directly or indirectly, with all these facts, I apologize.

CX 46 at 5-6. Respondent Pierce then proceeded to agree with Mr. Killsback that Respondent Adamas was no longer a consultant of the NCUC at that point and requested that Mr. Killsback "inform the MTDEQ [Montana Department of Environmental Quality] I am no longer the Temporary Sewer Operator for the NCUC," CX 46 at 7, thus suggesting that Respondent Pierce *was* the "Temporary Sewer Operator" of the NCUC's systems, at least for a time.

Respondent Pierce's participation in the June 2018 inspection of the Facility is another example of involvement and control that appears to extend beyond the mere performance of services for a fee, inasmuch as Respondent Pierce presented himself to the EPA inspectors as an authority on the Facility's operation, maintenance, and renovations and a representative authorized to speak on the NCUC's behalf. Specifically, in the report for the inspection, Respondent Pierce was identified as a contractor for the NCUC and a "lead" contact for the Facility, with Respondent Pierce having informed the inspectors that "he would be able to address many of [their] inspection questions" until Ms. Bement of the NCUC, who was identified as the "primary inspection contact" and "[r]esponsible [o]fficial," was able to join the inspection later in the day. CX 5 at 3, 5. The EPA inspectors documented in the report how together Respondent Pierce and James Courtney of the IHS "presented 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." *Id.* at 5. The report then summarizes that information, including the following supplied by Respondent Pierce: that "all manholes within the Lame Deer collection system were inspected for infiltration annually and collection system vacuuming and jetting was [sic] performed on as [sic] as-needed basis, primarily to address blockages"; that "the grinder and lift station [at the Facility] had been out of service for at least several months"; and that because of other equipment at the Facility being in disrepair, "there was no way to control or retain flow within the lagoon system." *Id.* at 5, 6, 7. The report also notes that "[d]uring the inspection, [Respondent Adamas] was preparing Cell 2 for sludge removal." *Id.* at 7.

The foregoing evidence reflects that, at least as of the first half of 2018, Respondents had become more involved in the operations of the NCUC, including at the Facility itself, than separately performing discrete services for a fee and that Respondents were afforded some measure of authority in the course of those activities. Nevertheless, after considering all of the evidence in the record before me, it also seems clear that any authority yielded by Respondents was fleeting, that Respondents were not involved in or lacked control over routine functions at the Facility that seemingly befit an operator, and that Ms. Bement never ceded meaningful command of the NCUC's operations or the Facility itself to Respondents.

First, the Pierces confirmed at the hearing that Respondents never took up the position of "operator" for the NCUC, notwithstanding representations to the contrary. Specifically, when asked by Respondent Pierce about it at the hearing, Mrs. Pierce testified, "They tried to make you the sewer operator and water person, but it was given and taken back within a 24-hour period. So I don't know exactly how that all played out. But she -- basically, Sheri did one of her Tasmanian devil behaviors." Tr. at 457-58; *see also* Tr. at 471. She later elaborated that the idea of naming Respondents as an "operator" of the NCUC's systems was raised impulsively by Sheri Bement in approximately April or May 2018, as follows:

> So what happened is Sheri was told by IHS that she had to have a water operator and a sewer operator on-site. They had just recently fired their water operator, and so they had no water operator and no sewer operator. So Sheri went and did the classes to do the -- to become the water and sewer operator and failed the test and called Nathan and myself and asked if he would be willing to take those tests.
>
> He actually did the class. Never did take the test, but he had applied. And she had written in a contract that he was going to be the operator, and then within 12 to 24 hours later, sent a notification that, nope, she wasn't going to do that or couldn't do that. And then he was no longer the operator of the NCUC.
>
> So it was just -- and it was just like a temporary thing anyway. But it was just one of those, like, "We need it for, this, for IHS, and we needed it immediately today." And so she basically used his name and then took it away.
>
> * * * *
>
> And he never did take the test after that. He was just like, "Well, I'm done helping you at this point. Like I will do the contracting stuff, but I'm not going to intermix them, the business."

Tr. at 463-65.

During his own testimony, Respondent Pierce acknowledged his August 26, 2018 email in which he 1) explained his misunderstanding that he was legally represented by counsel for the NCUC based, in part, on the fact that Ms. Bement had applied for him to be the "sewer operator" of the NCUC's systems and 2) requested that the State of Montana be notified that he was no longer serving in that capacity on a temporary basis. Tr. at 496 (referring to CX 46 at 5-6, 7). However, he maintained that after the Application for Certification was submitted, he stopped pursuing the role and Ms. Bement never, in fact, bestowed it on him:

> So Sheri Bement actually -- the reference to naming me as the operator actually came in front of the EPA Region 8 inspectors. She attempted to hold me out as

> the operator, which I did correct that position. She wanted me to be the operator for the sewer and water system of the . . . Northern Cheyenne Reservation. We had developed out an initial verbal agreement that I would become the temporary operator.
>
> Within a 24-hour period, she came back to me and said that her board of directors did not want that to happen. She also explained to me some of the other, I guess, chaos with her board, I guess, and the tribal council as well. And so I decided at that point that I was no longer interested, and I didn't want to pursue that position, and that I would not operate -- be their operator.
>
> I had gone through the classes, as my wife had mentioned. In the state of Montana you're required to go through classes, and then you are -- you have to take a test to show that you have the skills necessary to meet the operator limits. Depending on the size of the system, the requirements can be extremely, extremely stringent or strict. So there's a lot of different determination there.
>
> Once you pass that test and make application to the state, the state will issue an operator's license and send that to you. I did not complete the application process. I did not complete the test process.

Tr. at 492-93. Respondent Pierce then testified:

> [A]n operator has very specific duties. They have very specific obligations as to the system, as to the recordkeeping requirements, testing, sampling, the reporting for the NPDES permit. I mean, there are a lot of things that an operator has to do. And simply being a subcontractor who works on similar projects does not automatically make one an operator.
>
> At no time did I ever hold myself out to be the operator of the NCUC system or the Northern Cheyenne systems, and I am not an operator. The Northern Cheyenne Utility Commission had a temporary operator that was working there named Raymond Pine. He was their foreman and operator on a temporary basis. He was also somebody that Sheri Bement made me give daily reports to. Unfortunately, Mr. Pine passed away.

Tr. at 494.

The testimony of the Pierces on this issue is self-serving, and the Board has consistently considered such evidence, particularly when it is uncorroborated by other evidence in the record, to be entitled to little weight. *See, e.g.*, *Cent. Paint & Body Shop*, 2 E.A.D. 309, 315 (EAB 1987) ("Self-serving declarations are entitled to little weight."); *A.Y. McDonald Indus., Inc.*, 2 E.A.D. 402, 426 (EAB 1987) ("[U]ncorroborated self-serving statements . . . are entitled to little weight."). It also conflicts with Respondent Pierce's August 26, 2018 email and the section of

the Application for Certification that indicates that he had been engaged full-time in the operation of the NCUC's systems – with his "Specific Duties" listed as "Service, Maintain, Operate all Waste Water systems of the NCUC on the NorthernCheyenne [sic] Reservation" – since May 2016.

Yet it is difficult to give credence to the statements in the Application for Certification given that the starting date of employment (May 2016) and number of years of employment (two) listed therein are at odds with the weight of evidence in the record reflecting that Respondents did not begin to perform services for the NCUC until 2017 with the break at the Boys and Girls Club, only one year prior to the submission of the Application for Certification. Moreover, I found the Pierces' testimony on the issue to be sincere, and it is indeed supported by other evidence in the record. For example, in a June 27, 2018 letter from Ms. Bement to Respondent Pierce, Ms. Bement advised Respondent Pierce that she or "the NCUC Foreman, Raymond Pine," would be monitoring Respondents' performance of the sludge removal project at the Facility on a daily basis, and that Mr. Pine had the authority to act on Ms. Bement's behalf "on any matters on a daily basis" if she was unavailable. RX 15 at 10. Indeed, a day earlier, Respondent Pierce wrote in an email sent to Ms. Bement of the NCUC and Mr. Courtney, Mr. White, Mr. Cummins, and Quentin Allen of the IHS, among others, that he had provided two updates that day to Mr. Pine, who had inspected certain work to be sure it was completed. CX 45 at 11. This is consistent with Respondent Pierce's testimony that he reported to Mr. Pine in Mr. Pine's capacity as the foreman and operator for the NCUC.

With respect to Ms. Bement applying for Respondent Pierce to be the "sewer operator," I note that the Application for Certification outlined certain fees to be paid, *see* CX 50 at 2, and that a staff person from the State of Montana's Operator Certification Program subsequently indicated in an email to EPA staff that "[n]o fees were ever paid and our office has not heard from [Respondent Pierce]," *id.* at 1. This is consistent with the Pierces' testimony that Respondent Pierce did not pursue certification after the initial steps of applying and taking the required course.[31]

Additionally, while Respondent Pierce may have played a role in the June 13-14, 2018 inspection of the Facility, he notably was not identified by the EPA inspectors as an "operator," either in the field of the inspection report for "person/company meeting definition of 'operator'" or elsewhere, or as a "responsible official" in the pertinent field of the report. *See*

[31] It is also worth noting that while Respondent Pierce requested in his August 26, 2018 email that counsel for the NCUC notify the Montana Department of Environmental Quality that he was no longer the "Temporary Sewer Operator," it is unclear from the Application for Certification and attachments that Respondent Pierce ever received temporary certification. *See* CX 50 at 2 (staff left blank the field for "Operator Status," in which Respondent Pierce's status as a certified operator could have been identified by the State of Montana as "temporary," "in training," or "fully certified"); CX 50 at 7 (in a letter dated April 6, 2018, that welcomed Respondent Pierce to the Montana Department of Environmental Quality Water and Wastewater Operator Certification Program, staff advised Respondent Pierce merely that his application had been processed and that his status for full certification was "Applicant Only"). Thus, the State of Montana seemingly never sanctioned Respondent Pierce serving as an operator of the Facility, on a temporary basis or otherwise.

CX 5. This is consistent with Respondent Pierce's testimony that he clarified that he was not the operator of the Facility after Ms. Bement purportedly held him out as such to the EPA inspectors. And while the inspection report reflects that Respondent Pierce was certainly knowledgeable about the Facility and exercised some authority in speaking to the EPA inspectors in the absence of Ms. Bement, it also suggests that he was not involved in recordkeeping at the Facility, a duty that seemingly would fall to an operator, inasmuch as the EPA inspectors documented in the report that they met with Ms. Bement alone in the offices of the NCUC to discuss recordkeeping procedures and that she advised the inspectors that "the primary NCUC wastewater operator would be able to procure the records . . . requested, but would not be available during the inspection." CX 5 at 7. The EPA inspectors wrote that they thus "agreed to request records via email after the inspection"; that such email was directed to Ms. Bement on June 21, 2018; and that EPA had not received a response as of the date of the report on July 20, 2018. *Id.* This documented exchange makes little sense if the "primary NCUC wastewater operator" was, in fact, Respondents. Indeed, Michelle Pierce testified about Respondent Pierce's lack of access to records pertaining to the Facility during the following exchange on cross examination:

> Q: So, in your opinion, would Nathan Pierce possess the requisite knowledge to be an operator of a lagoon?
>
> A: No, because he did not have access to all of their records. In order to be an operator, you have to be able to document and have access to their equipment and things. He did not have that. He was just there to help.

Tr. at 471.

There is also evidence in the record of Respondent Pierce requesting approval to perform an activity related to maintenance at the Facility as part of the sludge removal project. Specifically, in the email dated June 21, 2018, and addressed to Ms. Bement of the NCUC and Mr. Courtney and Mr. White of the IHS, among other representatives from those entities, Respondent Pierce wrote:

> One request that we have, is that we do a change order for the removal or cutting of the Cattails, this is a duty that falls under the regular maintenance requirements for the lagoons, however they have not been cut this year and obstruct the working area of the pond?? We have the equipment on site to perform this task.

CX 56 at 6. Such a request seemingly would be unnecessary if Respondents had been granted meaningful authority over the routine maintenance and operation of the Facility or the NCUC employees charged with those duties.

Notably, Mr. Courtney, who testified about his familiarity with wastewater treatment facilities based upon his educational background and work experience and described the duties

of an "operator" as including testing and reporting for compliance purposes, Tr. at 276-77, also confirmed on cross examination at the hearing that the NCUC controlled the Facility:

> Q: So would you agree that, again, Adamas Construction was recognized as a consultant, but NCUC had control over the facilities?
>
> A: As far as being a utility, they had control over their facilities.

Tr. at 337. Additionally, Mr. Courtney testified that Ms. Bement of the NCUC "was basically head of the utility operations, so water and wastewater on the reservation. She was supervising different personnel that would, say, do checks on the system." Tr. at 280. Ernie Sprague similarly testified that, in his experience in the industry in that region, Ms. Bement was in charge of the Facility and was the authority responsible for granting and denying access to it. Tr. at 432-34, 436-37.

As for Complainant's contention that the NCUC lacked the requisite expertise or equipment to operate the Facility, I agree that the evidentiary record bears this out. However, I do not consider the fact that the NCUC may have been an incompetent operator of its systems to compel the conclusion that Respondents, by virtue of rendering services for the NCUC at the Facility and other locations around the Northern Cheyenne Indian Reservation, somehow supplanted the NCUC as the operator or were rendered a co-operator serving alongside the NCUC without there also being adequate evidence of a considerable degree of involvement and control exercised by Respondents over the Facility.

On balance, therefore, I simply am not convinced that Respondents were ever sufficiently involved in and in control of the overall functioning of the Facility, such that they rose to the level of "operators" under the standard articulated in *Beartooth Alliance*. Rather, it appears from the record that Respondents performed various activities on behalf of the NCUC, culminating in the sewage removal project in the summer of 2018, which resulted in Respondents developing a familiarity with the NCUC's systems and exercising a degree of authority during the course of those activities as time progressed. But it also appears that however much the NCUC came to rely on Respondents for their services, Respondents either were not involved in or lacked meaningful control over routine aspects of the Facility's operations; Ms. Bement retained the ultimate authority over the NCUC's systems, including the Facility; and she exercised that authority over Respondents in various ways, particularly after the rift between Respondents and Ms. Bement began to emerge in June 2018 and she proceeded to terminate the NCUC's relationship with Respondents and deny access to the Facility in August of that year, prior to the EPA sending any requests for information to Respondents. Accordingly, I find that Complainant has not carried its burden of demonstrating by a preponderance of the evidence that Respondents served as an "operator" of the Facility for purposes of the CWA at the times relevant to this proceeding. As this element of liability has not been established, Respondents cannot be found liable for Claim 2 of the Second Amended Complaint.

III. DEFENSES TO LIABILITY

Respondents have raised a number of defenses to liability, as follows.[32]

A. Due Process

In their post-hearing briefs, Respondents broadly object to this proceeding on grounds that Complainant pursued enforcement in a manner that violated their constitutional right to due process. To support their position, Respondents repeatedly invoke the Supreme Court's opinion in *Sackett v. EPA*, 598 U.S. 651 (2023),[33] and question this proceeding's adherence to the principles articulated by the Court, such as "the importance of due process and fair treatment in enforcement actions, including the need for transparency and consistency in the agencies' investigative and enforcement strategies" and "clear and consistent statutory and regulatory boundaries." Rs' Initial Br. at 5.

I find Respondents' arguments in this regard to be unpersuasive. Among other points, Respondents contend that Complainant failed to produce "pivotal witnesses, as initially indicated, cast[ing] significant doubt on the completeness and reliability of the evidence presented." Rs' Reply Br. at 2-3; *see also* Rs' Initial Br. at 2. Complainant counters that it endeavored to obtain evidence from proposed witnesses by various means, including successfully requesting a subpoena to compel the attendance of Tom Robinson and unsuccessfully petitioning to secure written testimony from Sheri Bement, while "Respondents did not even attempt to procure witnesses as was within their power under 40 C.F.R. Part 22." C's Reply Br. at 7.

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[32] While a few of Respondents' arguments stem from actions taken by Complainant at the hearing in this matter, others do not, yet Respondents raise some of them for the first time in their post-hearing briefs. The Rules of Practice require a respondent to state in its answer "[t]he circumstances or arguments which are alleged to constitute the grounds of any defense," 40 C.F.R. § 22.15(b), and the EAB has recognized the "general rule" that "failure to include an [affirmative] defense in the answer constitutes a waiver of that defense," *Lazarus, Inc.*, 7 E.A.D. 318, 331 (EAB 1997) (citing *Charpentier v. Godsil*, 937 F.2d 859, 863 (3rd Cir. 1991), and *Simon v. United States*, 891 F.2d 1154, 1157 (5th Cir. 1990)). However, the EAB has also noted that "the rule of waiver is not automatically applied" and that the Rules of Practice vest the presiding officer with the authority "to determine timeliness on matters of pleading, including the assertion of defenses," among other powers. *Id.* at 331, 334. The EAB advises that "[t]he presiding officer should make such determinations with due regard to issues of delay and prejudice to the opposing party." *Id.* at 334. In applying these principles, the EAB has upheld decisions to entertain a defense raised belatedly by a respondent where the complainant was found not to have been prejudiced or unfairly surprised by the assertion of the defense. *See, e.g.*, *Mayes*, 12 E.A.D. 54, 63-65 (EAB 2005), *aff'd*, 2008 U.S. Dist. LEXIS 700 (E.D. Tenn. Jan. 4, 2008); *Lazarus*, 7 E.A.D. at 329-35. Here, Complainant has not objected to the timeliness of Respondents' arguments, and I do not see evidence of prejudice or unfair surprise resulting from the defenses belatedly raised by Respondents at this point in the proceeding. Therefore, I will consider their merits.

[33] Early in their Initial Brief, Respondents refer to "the recent Supreme Court decision in *Sackett v. EPA*." Rs' Initial Br. at 3. The most recent opinion in that case was issued on May 25, 2023. However, Respondents later cite specifically to a prior opinion of the Court issued on March 21, 2012. Rs' Initial Br. at 9 (citing *Sackett v. EPA*, 566 U.S. 120 (2012)).

I agree with Complainant that Complainant did not violate Respondents' right to due process because it elected not to produce certain proposed witnesses. Respondents do not identify by name the proposed witnesses who are the subject of their grievance, but one such witness is presumably Ms. Bement. In their prehearing exchanges, both Complainant and Respondents had stated their intent to call a representative of the NCUC as a fact witness, with Complainant noting that Ms. Bement was no longer employed there, thus necessitating the identification of a new witness from the NCUC who could 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," C's Initial Prehearing Exchange at 4, and Respondents echoing that Ms. Bement was no longer employed by the NCUC and asserting that she would therefore "need to be compelled to testify as a fact witness as she has significant detail about this case and the fact [sic] surrounding it," Rs' Initial Prehearing Exchange at 4. Complainant later moved to depose Ms. Bement by written questions because she "was heavily involved in the circumstances that underly [sic] this case" but unable to attend the hearing due to physical illness. Complainant's Motion for Additional Discovery (June 23, 2022), at 6. Respondents opposed the motion, and by Order dated July 11, 2022, I denied it on the basis that Complainant had not satisfied the requirements set forth in the Rules of Practice for additional discovery, particularly with respect to the first requirement that the requested discovery neither unreasonably delay the proceeding nor unreasonably burden Respondents. Order on Complainant's Motion for Additional Discovery and Motion to Compel Discovery, or in the Alternative, Motion in Limine (July 11, 2022), at 6. At that time, the hearing was scheduled to begin on August 22, 2022, and I noted my skepticism that a delay to the hearing would not result from allowing a deposition by written questions, which could entail the transmission of multiple sets of written questions from the parties and corresponding answers from Ms. Bement, with whom communications had already been challenging to date, according to Complainant. *Id.* However, the hearing was subsequently postponed for various reasons until August 22, 2023, and in arguing that they were denied due process, Respondents do not explain why they did not, either prior to or during that period of postponement, seek additional discovery themselves or request a subpoena to compel the attendance of Ms. Bement or any other proposed witness at the hearing, as authorized by the Rules of Practice. Each party to a proceeding is responsible for presenting the evidence that it considers necessary to prove its case, and if Respondents felt that the testimony of certain proposed witnesses was "pivotal" for a full elicitation of the facts and development of their defenses, then it behooved Respondents to compel their attendance or obtain their testimony by alternative means. Meanwhile, Complainant presumably proffered the evidence that it felt sufficiently demonstrated that the violations occurred as charged and that the proposed penalty is appropriate, and while Respondents could certainly argue that Complainant did not, in fact, carry its burden, I am unmoved that the choice of testimonial evidence to present is a deprivation of due process. Accordingly, Respondents' argument is rejected.

Respondents urge that Complainant also denied Respondents due process by shifting its focus in this matter from the application of the sewage sludge to its preparation. Rs' Initial Br. at 5. In essence, Respondents are arguing that Complainant did not provide fair notice of a new

theory of liability that it was pursuing in this matter. Complainant counters that the "initial Complaint clearly laid out" the allegations against Respondents, including that they were both "preparers" and "appliers" of sewage sludge, "thus putting Respondents on notice as to claims raised by Complainant." C's Reply Br. at 7. The issue of whether Respondents were given reasonable notice of any new theory of liability arising from their purported status as "preparers" is mooted by my finding above that Respondents were not, in fact, "persons who prepared sewage sludge" for regulatory purposes. However, I feel compelled to clarify that the original Complaint in this matter did not, in fact, contain any allegations related to Respondents being "preparers" of sewage sludge. Rather, it focused on Respondents' purported status as "appliers" of sewage sludge, alleging that on or about August 22, 2018, Respondent Adamas applied 1,000,000 gallons of Class B sewage sludge from Cell 2 of the Facility to property in or near Lame Deer, Montana, Compl. ¶ 32; that "Respondents were persons 'who applied sewage sludge' pursuant to 40 C.F.R. § 503.10(a)," Compl. ¶ 39; that the regulations at 40 C.F.R. § 503.17(a)(5)(ii) require the person who applies bulk sewage sludge to develop and maintain certain information, Compl. ¶¶ 16, 17; that Respondent failed to produce such information at the request of the EPA, Compl. ¶ 38; and that Respondents generally failed to develop and maintain records required by 40 C.F.R. § 503.17, in violation of Section 405 of the CWA, 33 U.S.C. § 1345, and the implementing regulations at 40 C.F.R. Part 503, Compl. ¶¶ 45, 46.[34]

However, after Complainant filed its Initial Prehearing Exchange, it moved to amend the Complaint, as authorized by the Rules of Practice, to add allegations related to Respondents also being "preparers," among other proposed amendments, while leaving the charged violations unchanged. Complainant's Motion for Leave to Amend the Complaint (Dec. 17, 2019). By Order dated January 2, 2020, I granted the motion and deemed the Amended Complaint to have been filed and served as of the date of the Order. Order on Complainant's Motion for Leave to Amend the Complaint and on the Parties' Motions for Extensions of Time for Prehearing Exchanges (Jan. 2, 2020), at 3. Thus, Respondents had notice as early as that time of Complainant's position that they were "preparers" of the sewage sludge.

Then, in a subsequent motion seeking accelerated decision as to liability ("AD Motion"), Complainant revealed its theory of liability as to Claim 1: that pursuant to 40 C.F.R. § 503.17(a)(5)(ii), a person who applies bulk sewage sludge to the land must develop and retain certain information related to the application, AD Motion at 27; that pursuant to 40 C.F.R. § 503.7, any person who prepares sewage sludge must ensure that applicable requirements are met when the sewage sludge is applied to the land, *id.*; that both the person who prepares the sewage sludge and the person who applies the sewage sludge are thus responsible for compliance with the recordkeeping requirements of 40 C.F.R. § 503.17, *id.*; that Respondents both prepared and applied the sewage sludge in question and, as such, were required to comply with the recordkeeping requirements, *id.* at 18-26, 28; and that Respondents failed to develop and maintain information required to be kept by appliers of sewage sludge under 40 C.F.R.

[34] The paragraphs of the original Complaint were misnumbered, with both paragraph 45 and paragraph 46 erroneously identified as paragraph 46.

§ 503.17(a)(5)(ii), *id.* at 28. From these arguments, it became clear that Complainant was pursuing a finding of liability for Claim 1 based on a failure to develop and retain the records required by 40 C.F.R. § 503.17(a)(5)(ii) and that such a finding could be made under alternate theories of liability, namely, that Respondents were "preparers" or "appliers" of the sewage sludge at issue.

When Complainant later moved to amend the Amended Complaint, it did not signal a change to these alternate theories on which it was proceeding for Claim 1, but it did seek to invoke 40 C.F.R. § 503.17(a)(4)(ii) instead of 40 C.F.R. § 503.17(a)(5)(ii) as the set of recordkeeping requirements with which Respondents were purportedly obligated to comply as "preparers" or "appliers" of the sewage sludge. Complainant's Motion for Leave to Amend the Amended Complaint (July 18, 2022), at 2. Therefore, in my August 4, 2022 Order granting Complainant's motion and deeming the Second Amended Complaint to have been filed and served as of the date of the Order, I postponed the hearing scheduled to begin on August 22, 2022, in order to afford Respondents sufficient opportunity to prepare to defend against the allegations as revised by the Second Amended Complaint. Order on Complainant's Motion for Leave to Amend the Amended Complaint (Aug. 4, 2022), at 6, 7. That postponement ultimately extended for a year until August 23, 2023. With this procedural history, I would be hard-pressed to find that Respondents were not given enough notice of Complainant's theory of liability for Claim 1 and their pursuit of a finding of liability based on a violation of 40 C.F.R. § 503.17(a)(4)(ii), with which Respondents were purportedly required to comply because of their status as either "preparers" or "appliers" of the sewage sludge from Cell 2 at the Facility.[35]

Respondents also invoke due process when arguing that this proceeding oversteps the EPA's regulatory authority. *See* Rs' Initial Br. at 8, 9. In particular, Respondents contend that it encroaches on the judiciary's role of interpreting laws and making judicial determinations. *Id.* at 9. While the Clean Water Act "grant[ed] the EPA significant regulatory powers," Respondents maintain, the Act "does not confer upon it the authority to usurp roles traditionally held by the judiciary." *Id.* at 8. Additionally, Respondents suggest that they were

[35] Conversely, any argument seeking liability on the basis that Respondents were "preparers" and failed to comply as such with other requirements under the regulations, such as those set forth at 40 C.F.R. § 503.17(a)(4)(i), would be problematic. Only when Complainant was presenting its case at hearing did it seemingly argue for the first time, in response to an objection raised by Respondents, that Respondents had failed to comply with not only 40 C.F.R. § 503.17(a)(4)(ii) but also 40 C.F.R. § 503.17(a)(4)(i), which imposes other recordkeeping requirements directly on "preparers." *See* Tr. at 62. During the ensuing discourse, I clarified with counsel for Complainant that the violation alleged in Claim 1 was based on a purported failure to develop and maintain records required to be kept by "appliers" of sewage sludge under 40 C.F.R. § 503.17(a)(4)(ii). Tr. at 66. Yet, even after agreeing with my reading of the Second Amended Complaint, counsel for Complainant continued to point out other obligations imposed by the Part 503 regulations on "preparers" and Respondents' failure to fulfill those requirements. *See* Tr. at 66-67. And in its Initial Post-Hearing Brief, Complainant reiterates that claim, arguing that Respondents were "preparers" and "therefore required to develop and maintain records pursuant to 40 C.F.R. § 503.17(a)(4)(i)." C's Initial Br. at 20. Interestingly, Ms. Kleffner testified later at the hearing that Respondents provided an incomplete response to the EPA's request for information but that their response did, in fact, contain the information that is required to be maintained by a "preparer." *See* Tr. at 101 ("We would have gotten what would have been necessary for a preparer, but we were missing a significant amount of information for a land applier.").

denied the right to judicial review, arguing that "[t]he role of the judiciary in reviewing executive actions is a cornerstone of ensuring due process" and that "[t]he EPA's actions . . . must be subject to judicial review to ensure fairness and legality." *Id.* at 9. In sum, Respondents argue, the "overreach" of this proceeding "not only blurs the lines of constitutional separation of powers but also potentially violates the principles of due process and judicial oversight." *Id.* In response, Complainant argues that "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." C's Reply Br. at 7 (citing 5 U.S.C. §§ 551-559).

Respondents' arguments on this point appear to question the authority of this Tribunal. But as noted by Complainant, this proceeding and my role in it are authorized under multiple statutes. Specifically, in the Clean Water Act, Congress provided for the assessment of administrative penalties for violations of Sections 308 and 405 of the Act but mandated that before a person can be assessed the particular type of administrative penalty at issue here, the person must be afforded an opportunity for a hearing on the record in accordance with 5 U.S.C. § 554, a provision of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-559. 33 U.S.C. § 1319(g). Then, in the APA, Congress bestowed jurisdiction to hold such hearings on federal administrative law judges, in whom it vested numerous powers and responsibilities subject to the procedural rules promulgated by the given federal agency to govern the hearings. 5 U.S.C. § 556. Those powers and responsibilities include initially deciding the case. 5 U.S.C. §§ 554(d), 556(c)(10), 557(b). This proceeding has comported with the foregoing authorities. And to the extent that Respondents wish to appeal my initial decision, they are indeed entitled to administrative and judicial review, as described further below. *See* 5 U.S.C. §§ 557(b), 701-706; 33 U.S.C. § 1319(g)(8); 40 C.F.R. § 22.30. Thus, this challenge is unavailing.

Finally, while not specifically claiming that it was a deprivation of due process, Respondents argue that Complainant improperly coached Ernie Sprague on his testimony by requesting that he highlight certain pieces of evidence and withhold others, thereby "manipulat[ing] the evidence presented at the hearing" and "rais[ing] questions about the integrity of the legal process and the fairness of the proceedings." Rs' Initial Br. at 2. In response, Complainant denies any wrongdoing, describing 1) how its counsel met with Mr. Sprague ahead of the hearing to inform him of the types of questions he would be asked and allow him to review highlighted excerpts of textual evidence that could be the subject of testimony; 2) how counsel asked each witness, including Mr. Sprague, to read such passages into the record of the hearing; 3) how Mr. Sprague initially mischaracterized counsel's prior guidance, asserting that he had been directed not to read certain parts of exhibits; 4) how Mr. Sprague clarified upon further questioning that he was merely guided by counsel to read the highlighted excerpts when asked; and 5) how the parties and I proceeded to address the issue, with me explaining that the parties are allowed to elicit certain testimony during their examination of witnesses but that Mr. Sprague would be invited to share the information that he wished to communicate and with Mr. Sprague indeed being afforded the opportunity to do so. C's Reply Br. at 7-10 (citing Tr. at 405, 412-16, 512-13). In sum, Complainant urges, "[A]s 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." *Id.* at 10. Complainant is correct. As I explained at the hearing when ruling on Respondents' objection to counsel for Complainant engaging in the same practice while questioning Mrs. Pierce on cross examination, the parties understandably wish to emphasize certain pieces of evidence as a means of supporting their respective positions; however, in ruling on disputed issues in this matter, I am not limited to considering merely those portions of the evidentiary record highlighted by the parties. Accordingly, I find that Complainant did not deny Respondents due process by the way it presented its case.

B. Equitable Estoppel

As another defense, Respondents also raise the doctrine of equitable estoppel, as follows:

> The U.S. government, through the Indian Health Services (IHS), has previously communicated to U.S. Senator Steve Daines that Nathan Pierce was not the main contractor and that NCUC held the primary role. This contradictory stance by a government agency introduces an argument for estoppel, suggesting that the government cannot now, through the EPA, inconsistently claim Nathan Pierce had control . . . .

Rs' Initial Br. at 4. Complainant did not respond to this argument in its Reply Brief.

The doctrine of equitable estoppel is applied "to avoid injustice in particular cases." *Heckler v. Cty. Health Servs. of Crawford Cty, Inc.*, 467 U.S. 51, 59 (1984). As a general rule, however, application of the doctrine against the government is disfavored as a matter of public policy. *See id.* at 60 ("When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined."). Indeed, "the Supreme Court has alerted the judiciary that equitable estoppel against the government is an extraordinary remedy." *Bd. of Cty. Comm'rs of Cty. of Adams v. Issac*, 18 F.3d 1492, 1498-99 (10th Cir. 1994) (citing *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 421-22 (1990)). A party asserting the doctrine of equitable estoppel against the government thus bears a commensurately "heavy burden." *Yerger v. Robertson*, 981 F .2d 460, 466 (9th Cir. 1992). Specifically, the party is required to demonstrate not only the traditional elements of estoppel[36] but also "some 'affirmative misconduct' on the part of

[36] The traditional elements of estoppel consist of the following:

> (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

Baccei v. United States, 632 F.3d 1140, 1147 (9th Cir. 2011) (quoting *Morgan v. Gonzales*, 495 F.3d 1084, 1092 (9th

the government." *B.J. Carney Indus.*, 7 E.A.D. 171, 196 (EAB 1997) (quoting *United States v. Hemmen*, 51 F.3d 883, 892 (9th Cir. 1995)).

Respondents have not met that burden here. Respondents do not cite specifically to a particular communication between the IHS and Senator Daines as the basis for their position. However, I note that the record contains an inquiry that Respondent Pierce submitted to Senator Daines on May 31, 2019, in which Respondent Pierce requested assistance because Respondents had yet to be compensated for certain parts of the sludge removal project; a letter addressed to Bryce Redgrave, Acting Area Director of the Billings Area Office of the IHS, and dated June 3, 2019, in which Senator Daines requested that Mr. Redgrave provide information in response to Respondent Pierce's inquiry; and lastly, the response of Mr. Redgrave, dated July 12, 2019. CX 49 at 7-11; RX 18. In that final communication, Mr. Redgrave advised:

> The Indian Health Service (IHS) entered into a project agreement with the Northern Cheyenne Utility Commission (NCUC) to complete the lagoon renovation project. The project agreement was executed by the IHS and NCUC with an effective date of May 11, 2018. The NCUC then entered into a separate contract with ADAMAS on May 15, 2018[,] to perform much of the required work. It is important to note that there is not a contract between the IHS and ADAMAS. The IHS project agreement is solely with NCUC.
>
> During performance of this work, a dispute arose regarding the amount of sludge that ADAMAS had pumped from the lagoon. It is the position of the IHS that the compensation dispute regarding the amount of sludge that was pumped, transported, and applied, is a dispute to be resolved between ADAMAS and NCUC. IHS has no authority to pay ADAMAS directly.

RX 18 at 2. The foregoing excerpt from Mr. Redgrave's letter certainly identifies the parties to the contracts underlying the sludge removal project. But beyond stating that the NCUC engaged Respondent Adamas to perform "much of the required work," it does not touch upon the degree of control exercised by the parties to the contracts while the project was underway, let alone represent that any particular party would be relieved of liability for any violations arising from the project. Thus, it is unclear how the IHS took a stance that contradicted that of the EPA, as claimed by Respondents, or made any affirmative misrepresentations about the project. Accordingly, Respondents' attempt to invoke the doctrine of equitable estoppel is unavailing.

C. Lack of Subject Matter Jurisdiction

Finally, under the heading "Lack of Subject Matter Jurisdiction" in its Initial Brief, Respondents urge that Congress sought to protect "navigable waters" through the Clean Water

Cir. 2007)).

Act and that Complainant failed to demonstrate that Tom Robinson's property is located on or near a waterbody that satisfies the prevailing definition for those jurisdictional waters. Rs' Initial Br. at 5, 6, 8. Indeed, Respondents argue, "applying sludge to a barley field with no nexus to a navigable water" does not satisfy the definition of "discharge of a pollutant" under the CWA, and thus, "the EPA has overreached its authority." Rs' Initial Br. 3. Complainant counters that the presence of "navigable waters" is relevant only to Claim 2 insofar as a critical element of liability for that Claim is that the Facility was a "point source," as that term is defined by 33 U.S.C. § 1362(14), but that the requirements of Section 405 of the Act and the implementing regulations at 40 C.F.R. Part 503 "apply regardless of a nexus between an agricultural field and jurisdictional water." C's Reply Br. at 6.

Upon consideration of Respondents' arguments on this point, I first note that Respondents appear to have confused the meaning of the term "subject matter jurisdiction." As observed by the EAB, "the authority to regulate under the CWA is distinct from the subject matter jurisdiction that defines a tribunal's authority to adjudicate a claim." *Adams*, 13 E.A.D. 310, 319 (EAB 2007). In other words, "[j]urisdiction to adjudicate this matter is not dependent upon a finding of discharge into navigable waters . . . ." *Fulton Fuel Co.*, 2010 EPA App. LEXIS 41, at *29 (Sept. 9, 2010). Rather, as discussed above, the subject matter jurisdiction of this Tribunal to preside over an administrative enforcement proceeding under the CWA stems from Section 309(g) of the CWA, 33 U.S.C. § 1319(g); Section 554 of the APA, 5 U.S.C. § 554; and the Rules of Practice set forth at 40 C.F.R. Part 22, which specify the administrative adjudicatory process for the assessment of penalties.

Here, Respondents appear not to be challenging the authority of this Tribunal to adjudicate this matter (which, as previously discussed, they seem to contend elsewhere in their Initial Brief) but to be arguing that an essential element of a violation of the CWA (namely, the actual or potential "discharge of a pollutant," as that phrase is defined by the Act) is missing from this proceeding, such that the EPA lacked the authority to regulate the activities at issue. However, as argued by Complainant, the Part 503 regulations apply to the land application of sewage sludge regardless of proximity to navigable waters. *See* 40 C.F.R. §§ 503.1(b) (identifying the applicability of the regulations – including to sewage sludge applied to the land, to any person who prepares or applies the sewage sludge to the land, and to the land on which sewage sludge is applied – without reference to navigable waters), 503.10(a) (same). The preamble to the final rulemaking for the Part 503 regulations offers insight into the reasoning behind this:

> 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. Thus, section 405(a) of the Act prohibited the disposal of sludge if it would result in any pollutant from the sludge entering navigable waters unless in accordance with a permit issued by EPA. 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. 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.
>
> In 1987, Congress amended section 405 and for the first time set forth a comprehensive program for reducing the potential environmental risks and maximizing the beneficial use of sludge. Amended section 405(d) established a timetable for the development of the sewage sludge use and disposal guidelines. H. Rep. No. 1004, 99th Cong. 2d Sess., 158 (1986). The basis of the program Congress mandated to protect public health and the environment is the development of technical requirements or standards for sewage sludge use and disposal and the implementation of these standards. In part, through a permit program.
>
> Under section 405(d), EPA must first identify, based on available information, toxic pollutants which may be present in sewage sludge in concentrations which may affect public health and the environment. Next, 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. These regulations must be "adequate to protect human health and the environment from *any* reasonably anticipated adverse effect of each pollutant." Section 405(d)(2)(D).

CX 33 at 3 (emphasis added). In sum, when Congress amended Section 405 to direct the EPA to develop regulations governing the disposal and use of sewage sludge, the EPA saw a "broad mandate to protect public health and the environment," as opposed to one limiting its authority by proximity to navigable waters. CX 33 at 3. Pursuant to this mandate, the EPA proceeded to "assess the potential for pollutants in sewage sludge to affect public health and the environment through a number of different routes of exposure" and "address issues that affect many of the Agency's other major regulatory responsibilities," CX 33 at 1, rather than effects to surface waters alone, because the Agency recognized that "contaminated or improperly handled sludge can result in pollutants in the sludge re-entering the environment, and possibly contaminating a number of different media through a variety of exposure routes," CX 33 at 3. Thus, within the foregoing statutory and regulatory framework, proximity to navigable waters simply was not included as a critical element of liability for the type of violation found in this matter.[37] Accordingly, I reject any claim that a finding of liability for Claim 1 is precluded because Complainant failed to establish that the land on which the subject sewage sludge was applied was sufficiently connected to a navigable water.

[37] To the extent that Respondents object to the exclusion of such an element, "there is a strong presumption against entertaining challenges to the validity of a regulation in an administrative enforcement proceeding," with "[t]he decision to review such challenges '[being] at best discretionary, and a review of a regulation will not be granted absent the most compelling circumstances.'" *B.J. Carney Indus.*, 7 E.A.D. at 194 (quoting *Echevarria*, 5 E.A.D. 626, 634 (EAB 1994)). I see nothing in the record of this proceeding to support a deviation from the general rule counselling against the review of the validity of regulations in this forum.

PENALTY

I. BACKGROUND

As discussed above, I have determined that Respondents, in their capacity as persons who applied to agricultural land bulk sewage sludge satisfying 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), were required to develop and maintain the records identified in 40 C.F.R. § 503.17(a)(4)(ii) but failed to do so, as alleged in Claim 1 of the Second Amended Complaint. I have also determined that Respondents do not have any defenses to liability for this violation of Section 405 of the CWA, 33 U.S.C. § 1345, and the implementing regulations at 40 C.F.R. Part 503. Accordingly, I must now consider the appropriate relief to award in this proceeding.

As previously noted, Section 309(g)(1) of the CWA authorizes the assessment of a civil administrative penalty where, as here, a person is found to have violated Section 405 of the Act. 33 U.S.C. § 1319(g)(1). In turn, Section 309(g)(2)(B) of the CWA specifies the penalty amounts that may be assessed, namely, up to $10,000 per day for each day during which a violation continues and a maximum penalty not to exceed $125,000. 33 U.S.C. § 1319(g)(2)(B). These levels have been increased over time as required by the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note; Pub. L. 101-410, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701 note; Pub. L. No. 104-134, Section 31001(s), and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 28 U.S.C. § 2461 note; Pub. L. 114-74, Section 701. Consequently, penalties of up to $27,378 per day and $342,218 in total may now be assessed for violations occurring after November 2, 2015, where penalties are assessed on or after January 8, 2025. *See* 40 C.F.R. § 19.4.

Where a violation has occurred and the complainant has sought a civil administrative penalty, I must "determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act" and "explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act." 40 C.F.R. § 22.27(b). Section 309(g)(3) of the CWA sets forth such criteria, requiring that any penalty assessed take into consideration "the nature, circumstances, extent and gravity of the violation, or violations, 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).

As observed by the EAB, "[t]he CWA 'prescribes no precise formula by which these factors much be computed' or otherwise evaluated." *San Pedro Forklift, Inc.*, 15 E.A.D. 838, 878 (EAB 2013) (quoting *Britton Constr. Co.*, 8 E.A.D. 261, 278 (EAB 1999)). Moreover, while I am required to "consider any civil penalty guidelines issued under the Act" when calculating a penalty, 40 C.F.R. § 22.27(b), the EPA has not developed guidelines for the assessment of penalties for violations of Section 405 of the CWA specifically or a penalty policy for litigation under the CWA generally. In the absence of such guidelines, "it is appropriate . . . to analyze

directly each of the statutory factors." *Stevenson*, 16 E.A.D. 151, 169 (EAB 2013) (citing *Phoenix*, 11 E.A.D. 379, 395 (EAB 2004)). The EAB has also looked to the methodologies employed by the EPA's general civil penalty policies for guidance. *Id.* at 169 (citing *Smith Farm Enters., LLC*, 15 E.A.D. 222, 282 (EAB 2011); *Phoenix*, 11 E.A.D. at 395). Known as the "Policy on Civil Penalties, EPA General Enforcement Policy #GM-21" (Feb. 16, 1984) ("General Policy") and "A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties, EPA General Enforcement Policy #GM-22" (Feb. 16, 1984) ("Penalty Framework"), these policies are available on the EPA's website[38] and set forth "[a]n outline of the general process of the assessment of penalties." General Policy at 1.

In sum, penalty calculations under the CWA are "highly discretionary." *Tull v. United States*, 481 U.S. 412, 426-27 (1987). That being said, if the assessed penalty differs from the penalty proposed by Complainant, I must "set forth in the initial decision the specific reasons for the increase or decrease." 40 C.F.R. § 22.27(b).

II. APPROPRIATENESS OF THE PROPOSED PENALTY FOR CLAIM 1

In the Second Amended Complaint, Complainant proposes that a total penalty of $59,583 be assessed for the violations alleged in Claims 1 and 2. 2nd Amended Compl. ¶ 59. Only in its Initial Post-Hearing Brief does Complainant divide this total amount between the two Claims and enumerate the particular penalty proposed for each, with the proposed penalty for the violation alleged in Claim 1 identified as $15,717. C's Initial Br. at 53.

As noted above, the Rules of Practice dictate that Complainant bears the burden of presentation and persuasion as to the appropriateness of this proposed penalty. *See* 40 C.F.R. § 22.24(a). The EAB has held that where, as here, a statute identifies specific factors that the EPA "shall" consider in its assessment of a penalty, a complainant is required to present evidence demonstrating that it considered each of those factors, and that the proposed penalty is supported by its analysis, in order to make a prima facie case that the proposed penalty is appropriate.[39] *See, e.g.*, *CDT Landfill Corp.*, 11 E.A.D. 88, 120-22 (EAB 2003). "The depth of

[38] The General Policy and the Penalty Framework have been compiled into a single document that is available at https://www.epa.gov/sites/default/files/documents/epapolicy-civilpenalties021684.pdf.

[39] This holding was premised on "the Board's understanding that this type of analysis is routinely performed in enforcement cases and is required under the Agency's general penalty policy and the program-specific penalty guidelines." *New Waterbury, Ltd.*, 5 E.A.D. 529, 538 n.18 (EAB 1994). In particular, the EAB referred to the Penalty Framework, *see id.*, which provides, in pertinent part:

> [I]t is essential that each case file contain a complete description of how each penalty was developed. This description should cover how the preliminary deterrence amount [consisting of the economic benefit and gravity components] was calculated and any adjustments made to the preliminary deterrence amount. It should also describe the facts and reasons which support such adjustments. Only through such complete documentation can enforcement attorneys, program staff and their managers learn from each others' experience and promote the fairness required by the [General Policy].

consideration will vary in each case, but so long as each factor is touched upon and the penalty is supported by the analysis[,] a prima facie case can be made." *New Waterbury*, 5 E.A.D. at 538.

Complainant has not met this burden in the present matter. Complainant reported in the Second Amended Complaint that the proposed penalty is based upon the statutory factors, 2nd Amended Compl. ¶ 60, and it addressed each of the statutory factors in other filings, relating ones relevant to this proceeding to evidence in the record, *see, e.g.*, C's Initial Prehearing Exchange at 19-21; C's Initial Br. at 50-53. However, Complainant has not demonstrated that the proposed penalty is supported by its analysis inasmuch as Complainant does not explain the methodology it employed to calculate the proposed penalty based upon the statutory factors or identify a specific amount that it attributed to each applicable factor, such that I would be able to reproduce its calculation. Rather, Complainant states simply that "a penalty of $15,717 was calculated for failure to maintain records," so "less than the single day statutory maximum," to account for Respondents having "maintained a portion of the records required per Part 503" and "the fact that the original land application project was a one-time project that did not extend over several months." C's Initial Br. at 53. These statements do little to clarify how Complainant arrived at the proposed penalty of $15,717 for Claim 1. Without a more detailed or itemized analysis, I find that Complainant has not made its prima facie case that the penalty proposed for Claim 1 is appropriate.

III. APPLICATION OF THE STATUTORY PENALTY FACTORS

Apart from Complainant's burden of demonstrating the appropriateness of its proposed penalty, I am responsible for initially deciding the amount of penalty to assess based on a weighing of the evidence in the record. To that end, I will now apply the statutory penalty factors to the facts of this matter.

At the outset, I note that certain factors are not at issue. First, Complainant explains in its prehearing exchange and Initial Post-Hearing Brief that it is not seeking to recover any economic benefit resulting from Respondents' noncompliance. C's Initial Prehearing Exchange at 20-21; C's Initial Br. at 50. Complainant asserts that it was unable to determine whether the sewage sludge from Cell 2 at the Facility had been improperly applied to Tom Robinson's property based on the information available to it but that a substantial economic benefit could result from such violative conduct. C's Initial Prehearing Exchange at 20-21; C's Initial Br. at 50. Conversely, Complainant acknowledges, "[t]he economic benefit associated with the failure to generate and maintain records . . . is typically minimal." C's Initial Prehearing Exchange at 20. Even if some economic benefit had accrued to Respondents as a result of their failure to develop and maintain the records required to be kept by 40 C.F.R. § 503.17(a)(4)(ii), the evidentiary record does not contain information from which I could compute that benefit. Accordingly, I will not consider this factor further.

Penalty Framework at 27.

Second, Complainant explains in its prehearing exchange and Initial Post-Hearing Brief that it is unaware of any prior enforcement actions against Respondents. C's Initial Prehearing Exchange at 16; C's Initial Br. at 50. Indeed, the record does not contain any evidence of prior violations committed by Respondents. Therefore, I also will not consider this factor further.

Third, Complainant points out that Respondents never produced information in support of any claim that they lacked the ability to pay the proposed penalty, despite having been afforded multiple opportunities to do so. C's Initial Prehearing Exchange at 21; C's Rebuttal Prehearing Exchange at 18; C's Initial Br. at 50. As noted above, this failure prompted Complainant to move to compel Respondents to submit documents relevant to the issue or, in the alternative, bar Respondents from raising the argument going forward, a motion that I granted. Order on Complainant's Motion for Additional Discovery and Motion to Compel Discovery, or in the Alternative, Motion in Limine (July 11, 2022), at 9. Specifically, I directed Respondents to provide Complainant with documentation in support of any claim of an inability to pay the proposed penalty by a certain date, lest they be barred from raising the argument at hearing. Respondents failed to comply and, to date, have not pursued the claim or produced any information in support. Thus, this factor does not require further consideration.

Finally, with regard to any "other matters as justice may require," Complainant maintains that it is "unaware of any matters that require a penalty reduction." C's Initial Prehearing Exchange at 21. The EAB has described this particular factor as "extraordinary" in nature and intended to be "sparingly wielded, coming into play only where application of the other adjustment factors has not resulted in a 'fair and just' penalty." *Service Oil, Inc.*, 14 E.A.D. 133, 156 (EAB 2008) (citing multiple sources), *vacated on other grounds by Service Oil, Inc. v. EPA*, 590 F.3d 545 (8th Cir. 2009). Here, I do not see any matters that warrant an adjustment of the penalty under this factor that are not otherwise addressed under other criteria below. Accordingly, I do not consider this factor to merit further discussion.

I turn now to the remaining statutory factors: the nature, circumstances, extent, and gravity of the violation and Respondents' degree of culpability. *See* 33 U.S.C. § 1319(g)(3). Consistent with the General Policy and Penalty Framework, I will begin my analysis with the nature, circumstances, extent, and gravity of Respondents' noncompliance. After quantifying that factor, I will then consider whether Respondents' degree of culpability warrants an upward or downward adjustment of the figure. *See San Pedro Forklift*, 15 E.A.D. at 882 (citing Penalty Framework at 17).

A. Nature, Circumstances, Extent, and Gravity of Violation

As observed by the EAB, the Penalty Framework identifies a number of factors to consider in assessing together the nature, circumstances, extent, and gravity (hereinafter, the "gravity") of a given violation. *San Pedro Forklift*, 15 E.A.D. at 881 (citing Penalty Framework at 13-16). Those factors include the actual or potential harm caused by the violative activity; the importance of the requirements at issue to achieving the goals of the CWA; and where the

violation involves a recordkeeping or reporting requirement, the availability of the information from another source. Penalty Framework at 14-15. For purposes of evaluating the actual or possible harm caused by the violative activity, the Penalty Framework identifies additional considerations, namely, the amount and toxicity of the pollutant discharged, the sensitivity of the environment where the violation occurred, and the length of time that the violation continued. *Id.* at 15.

As previously noted, Complainant did not specify the dollar figure it attributed to the gravity of the violation alleged in Claim 1. But Complainant did state that it considers the gravity to be "severe." C's Initial Prehearing Exchange at 20. For support, Complainant argues that "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." *Id.* Because of the self-implementing nature of the Part 503 regulations, Complainant maintains, the Agency relies heavily on the recordkeeping requirements to ascertain if sewage sludge is land applied in accordance with the regulations, such that human health and the environment are protected. *Id.* at 19; *see also* C's Initial Br. at 50-51 (citing Tr. at 75, 104). Complainant argues that this is particularly true given that the Agency's Biosolids Center, located in Lenexa, Kansas, "is responsible for EPA sewage sludge administrative enforcement for the entire country" and that "[i]t is impossible" for the Biosolids Center to perform timely site visits in response to all complaints regarding improper application. C's Initial Br. at 51. When recordkeeping requirements are not met, "EPA's abilities to protect human health and the environment are hampered." *Id.* at 50 (citing Tr. at 75, 104). In the instant matter, Complainant urges, the EPA and potentially affected persons "will never know whether Respondents' actions caused harm" due to the absence of records, but such harm can be detrimental to both wildlife and humans. *Id.* at 51 (citing Tr. at 52-53). In sum, Complainant argues, Respondents' violation of the recordkeeping requirements "carries a significant gravity due to the fact that the failure to maintain records is severely detrimental to the Part 503 implementing regulations." *Id.* at 53. In their briefs, Respondents do not offer any arguments in rebuttal.

Upon consideration, I agree, in part, with Complainant about the severity of the violation. The Penalty Framework counsels that "[t]he violation of any recordkeeping . . . requirement is a very serious matter," Penalty Framework at 14-15, and Complainant's arguments about the particular importance of recordkeeping under the Part 503 regulations given their self-implementing nature and the constrained ability of the Agency to inspect land application sites to verify compliance are persuasive. Ms. Kleffner spoke to this consideration at the hearing, testifying about the EPA's reliance on recordkeeping by preparers and appliers of sewage sludge to ensure compliance with the regulations. Tr. at 74-75. She later elaborated with respect to the records that 40 C.F.R. § 503.17(a)(4)(ii) specifically requires to be developed and maintained, namely, a description of how the site restrictions in 40 C.F.R. § 503.32(b)(5) were met; a description of how any applicable vector attraction reduction requirements were met; and a description of how the management practices in 40 C.F.R. § 503.14 were met:

Q: Why is it important that EPA receive site restriction information from biosolids

preparers or appliers?

A: Site restrictions are based on public – not public contact, but contact with the site in general. So site restrictions have a couple different requirements in it. Like if you are going to graze cattle on a site, you need to make sure that it's within a certain amount of time after the land application. If you're growing certain foods or turf grasses, that also needs to be within a certain amount of time after land application. So site restrictions basically keep people and animals away from biosolids for a period of time to ensure that there's no effect from that.

Q: Let's talk about vector attraction. What is that and why is it important for EPA to receive that information?

A: Vector attraction reduction is what is necessary to reduce the attractiveness of biosolids to wildlife and other potentially disease-carrying organisms. So that would mean that you're keeping away any type of bugs or wild animals. If you have an instance where it's – the biosolids are really attractive to wildlife, they will get into the biosolids, and then it has the potential to make its way off site and potentially have contact with other animals or humans.

Q: You testified that management practices helps to – EPA to discern whether or not sewage sludge was overapplied. Is that correct?

A: Yes.

Q: What else is important about management practices for purposes of the biosolids regulations?

A: Purposes of management practices is to make sure that the biosolids stay on the site that they were intended to be land applied on. So management practices include making sure that you apply biosolids a certain amount of distance away from a water body, that they're not overapplied, that they're not applied to land that's flooded or frozen. So it's just ensuring that biosolids stay where they are supposed to be on-site.

Q: How does a failure to submit the biosolids recordkeeping information impact EPA's ability to do its job?

A: So if we don't have the information, it is pretty much impossible for us to determine if a violation is present or if Part 503 has been followed.

Q: How could the agency's inability to do its job in that respect have impacts on human health or the environment?

> A: So there's no way – there would be no way for us to determine if management practices were followed. We would be unsure if humans have come in contact with it or if the biosolids have washed off into a water body. There's just no way to determine if the biosolids are doing their job in the way that this regulation was designed to do.

Tr. at 102-04. Finally, Ms. Kleffner described the harm to both wildlife and humans that could result from exposure to improperly applied sewage sludge, including serious illness resulting from pathogens and metals contained in the sludge. Tr. at 52-53.

Undisputed by Respondents, the foregoing characterization of the recordkeeping requirements as critical to achieving the goals of the Part 503 regulatory program is compelling, which, in turn, supports a finding that the gravity of the offense was significant in this matter. However, upon review, the record also appears to contain evidence that mitigates the gravity. First, as acknowledged by Complainant and discussed above, Respondents did maintain at least one piece of information required to be kept by 40 C.F.R. § 503.17(a)(4)(ii), namely, the contract entered into by Respondent Adamas and Tom Robinson that described a practice for vector attraction reduction to be followed.

Additionally, the Penalty Framework explains with respect to violations of recordkeeping requirements that "if the involved requirement is the only source of information, the violation is far more serious. By contrast, if the Agency has another readily available and cheap source for the necessary information, a smaller penalty may be appropriate." Penalty Framework at 15. As an example, the Penalty Framework describes a customer of a violator who purchased all of the violator's illegally produced substances and who, unlike the violator, kept copies of the required records. *Id.* Here, multiple entities were required to comply with the subject recordkeeping requirement given that, as discussed above, their actions with respect to the sewage sludge from Cell 2 at the Facility rendered them "persons who prepared" or "persons who applied" the material. Sure enough, the EPA ultimately sought information from not only Respondents but also Tom Robinson, Ernie Sprague, and the NCUC. *See* CX 11 (September 25, 2018 request for information sent to Respondent Adamas by way of Respondent Pierce); CX 30 (November 14, 2019 request for information sent to Tom Robinson); CX 31 (November 14, 2019 request for information sent to D&R Disposal); CX 32 (November 14, 2019 request for information sent to the NCUC). And as Ms. Kleffner acknowledged at the hearing, Mr. Sprague did indeed respond with pertinent information, even if one item was later deemed inaccurate by the EPA:

> So we received some of the management practices, some of the site restrictions. He did have a location in hauling logs. Mr. Sprague did have an agronomic rate calculation that was included in his response; however, Mr. Sprague's agronomic rate calculation was based off of a septage constant for the state of Montana, which is not accurate in this instance . . . .

Tr. at 201; *see also* CX 42 (November 26, 2019 written response from Mr. Sprague to the

request for information sent to D&R Disposal).[40] Thus, the circumstances here appear to fit those described by the Penalty Framework as meriting a smaller penalty.

Moreover, the information provided by Mr. Sprague in his written response to the EPA's request for information suggests that the potential harm posed by the violation in this matter may have been lessened by the nature of Mr. Robinson's property and the management practices and site restrictions observed during the application of the sewage sludge. For example, Mr. Sprague explained that the land application site was not within 500 feet of any occupied building; within 150 feet of any surface water or wetlands; within 100 feet of any state, federal, county, or city-maintained road; or within 100 feet of a drinking water supply source. CX 42 at 2. He further explained that no threatened or endangered species lived on the property. *Id.* Additionally, he represented that he was directed to adhere to certain procedures, such as refraining from applying the sewage sludge during inclement weather and taking steps to prevent Mr. Robinson's cattle from accessing the application site. *Id.* While questioning Mr. Robinson, Respondent Pierce elicited testimony from him that confirmed the remoteness of his property and the low probability of anyone being directly exposed to any improperly applied sewage sludge:

Q: Mr. Robinson, is your field open to the public or easily accessible?

A: No.

Q: You live in a very rural area of Montana; is that correct?

A: Yes.

[40] Arguably, Mr. Sprague and Mr. Robinson were in the best position to document at least the dates on which the sewage sludge was applied given that the application seemingly continued without Respondents' involvement after the contract between the NCUC and Respondent Adamas was terminated. CX 56 at 13 (September 14, 2018 letter from counsel retained by Respondents to a representative of the IHS and Dion Killsback, counsel for the NCUC, asserting that Mr. Killsback's email on August 29, 2018, in which he directed Respondents to cease and desist all further work, prevented Respondent Adamas from completing the sludge removal project); CX 42 at 3 (written account of Ernie Sprague explaining that he was advised on August 29, 2018, "to stop work" by an employee of the NCUC and "locked . . . out of the job site," but that he was then given "the green light" to resume transporting and applying the sludge on Mr. Robinson's property in October 2018). And undisputed evidence in the record reflects that Mr. Sprague and Mr. Robinson agreed to develop and provide such information. Specifically, the contract between Respondent Adamas and Mr. Robinson states that Mr. Robinson "will furnish [Respondent Adamas] with logs for each day of application," CX 7 at 1, although Mr. Robinson acknowledged at the hearing that he had created the records but never given them to anyone, Tr. at 375-76. Similarly, the contract between Respondent Adamas and Mr. Sprague states that Mr. Sprague "will furnish [Respondent Adamas] with logs for each day of hauling and pumping." CX 42 at 4. Mr. Sprague confirmed their role in recordkeeping at the hearing, testifying that he and Mr. Robinson agreed during a "group meeting" with Respondent Pierce and George Cummins of the IHS to keep certain "dump records," which would then be collected not by Respondents but by Mr. Cummins. Tr. at 411-12. Mr. Sprague described a "dump record" as containing an explanation of "what you're hauling, what time you hauled it, what time you offloaded it, and where you offloaded it." Tr. at 412.

Q: What's the population of Lame Deer?

A: Oh, a couple thousand, I think, maybe.

Q: Okay. And your property actually lies outside the town of Lame Deer?

A: Yes.

Q: Okay. So there's a long dirt road that had to be traveled in order to get even to your field—

A: Yes.

Q: —that goes through multiple other fields; is that correct?

A: Yes.

Q: Okay. So, realistically, the public or anybody else couldn't have gained access to your site?

A: No.

Tr. at 384-85. Complainant did not challenge these points.

Accordingly, I find that the seriousness of the violation in this matter was mitigated by the particular considerations described above. Consistent with this finding, and in consideration of the range of penalties authorized under the CWA, I conclude that it is appropriate to quantify the gravity of the assessed penalty as $7,500.

B. Respondents' Degree of Culpability

"Civil penalties under the Clean Water Act are intended 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) (emphasis added). Thus, this penalty factor serves to measure the level of a violator's culpability, which can be defined as fault or blameworthiness. *See Phoenix*, 11 E.A.D. at 418. The Penalty Framework identifies the following factors as relevant to the assessment of a violator's culpability: 1) how much control the violator had over the events constituting the violation; 2) the foreseeability of the events constituting the violation; 3) whether the violator took reasonable precautions against the events constituting the violation; 4) whether the violator knew or should have known of the hazards associated with the conduct; 5) the level of sophistication within the industry in dealing with compliance issues; and 6) whether the violator knew of the legal requirement that was violated. Penalty Framework at 18.

Here, again, Complainant did not specify the dollar figure it attributed to Respondents' degree of culpability. Complainant urges, however, that "Respondents' culpability for the violations is high." C's Initial Prehearing Exchange at 21. For support, Complainant points to three considerations: 1) that "Respondents held themselves out to be in charge of the sludge removal and application project," C's Initial Br. at 52 (citing CX 45 at 34); 2) that "Respondents purported to be experts in the wastewater industry," *id.* (citing CX 24); and 3) that "Respondents repeatedly assured NCUC and other parties that they were aware of EPA biosolids regulations and were solely responsible for complying with those regulations," *id.* (citing CX 45 at 21, 33).

Upon consideration, I find that Respondents acted negligently in failing to develop and maintain the records required to be kept by 40 C.F.R. § 503.17(a)(4)(ii). As argued by Complainant, the record reflects that Respondents touted their expertise in the wastewater industry. *See, e.g.*, CX 24 (website for Respondent Adamas describing the business's ability to perform a wide range of services related to the treatment of wastewater); CX 43 at 11-12 (December 4, 2018 letter from Respondent Pierce to the NCUC describing his qualifications for the open General Manager position there, including his experience repairing the water and sewer systems operated within the Northern Cheyenne Indian Reservation and his holding of certain certifications and licenses related to wastewater systems). While it is unclear the extent to which Respondents had previously engaged in the land application of sewage sludge specifically, Respondents also undoubtedly represented to participants in the sludge removal project their familiarity with the Part 503 regulations and their commitment to complying with applicable law. *See, e.g.*, CX 45 at 21, 32, 33, 35, 37; Tr. at 496.

Yet, in this proceeding, Respondents have argued against being faulted for any failure to comply with recordkeeping requirements because their role in the project was limited to that of a technical consultant, such that their duties did not extend to recordkeeping, while Ernie Sprague and Tom Robinson were the ones who performed the physical application of the sewage sludge and the NCUC was the entity that exercised primary control over the project's completion. I am unmoved by this effort to shift blame to other participants in the project. As found above, Respondents were sufficiently responsible for the application of the sewage sludge to be held liable as "appliers" for regulatory purposes, and given their proclaimed level of sophistication in the industry, I find here that Respondents should have known of their obligations and exercised greater care in developing and maintaining records independent of the other participants.

Instead, as previously discussed, Respondents relied on Mr. Sprague, Mr. Robinson, and the NCUC to perform those duties. While Respondents' belief that the recordkeeping duties were being fulfilled by others may have been sincerely held, such reliance was nevertheless flawed. First, Mr. Sprague denied being directed to develop any records other than "dump records," which he described as containing an explanation of "what you're hauling, what time you hauled it, what time you offloaded it, and where you offloaded it." Tr. at 411-12; *see also* Tr. at 505 (Respondent Pierce acknowledging Mr. Sprague's testimony on the subject). While Mr. Robinson acknowledged his August 8, 2018 contract with Respondent Adamas, in which he

agreed to receive and incorporate the sewage sludge into the soil on his property "in compliance with US 40 EPA 503 regulations," Tr. at 386-87 (citing RX 5), he likewise denied receiving any direction from Respondent Pierce about the applicable recordkeeping requirements, Tr. at 384; *see also* Tr. at 504-05 (Respondent Pierce acknowledging Mr. Robinson's testimony on the subject). Even if Mr. Sprague and Mr. Robinson had agreed to create and provide the records specifically required to be kept by 40 C.F.R. § 503.17(a)(4)(ii), it is unclear from the evidentiary record whether they were given all of the information necessary to comply. *See, e.g.*, Tr. at 173, 202-03. Moreover, while the sludge removal project was underway, James Courtney disputed the claim that Respondents were indeed providing documentation to the NCUC for the NCUC to maintain. *See, e.g.*, CX 8 at 1, 2; CX 9 at 1; Tr. at 288-89. And finally, putting faith in the NCUC to keep records that Respondents were, in fact, required to develop and maintain independently as "appliers" of the sewage sludge seems misplaced seeing as how their relationship deteriorated as the sludge removal project proceeded and Respondents considered the NCUC to have neglected its duties in other ways. *See, e.g.*, CX 19 at 1 (July 2, 2019 response from Respondents to the EPA's request for information, in which Respondents asserted that the NCUC had claimed it would collect samples of the sewage sludge; that the IHS informed the NCUC of its responsibilities for complying with the Part 503 regulations; and that Respondents subsequently "attempted to make a good faith effort to comply with the requirements after learning of NCUC's failure to comply, see attached lab results"). These points undercut any claim by Respondents of having properly assigned their recordkeeping duties to others, such that their culpability might have been lessened.

At the same time, while I consider Respondents to have been negligent in failing to maintain the required records themselves, I disagree with any contention that Respondents assumed sole responsibility for ensuring that the sludge removal project was completed in accordance with the Part 503 regulations. As previously discussed, the NCUC, as the "person who prepared" the sewage sludge, remained obligated under the regulations to confirm compliance with applicable requirements. *See* 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 . . . ."). The rationale behind this mandate to preparers of sewage sludge can be found in the preamble to the final rulemaking for the regulations:

> Subpart B of today's regulation applies to a person who applies sewage sludge to the land, to a person who prepares sewage sludge for application to the land, to the sewage sludge applied to the land, and to the land on which sewage sludge is applied. Any person who generates sewage sludge or who changes the quality of sewage sludge and controls the ultimate use or disposal of sewage sludge is a treatment works treating domestic sewage and must apply for a permit containing sewage sludge conditions. . . .
>
> If the treatment works is the party that applies sewage sludge to the land, the treatment works will be issued a permit that spells out the conditions for land application contained in today's rule. If the treatment works uses a commercial

> sewage sludge applier that does not change the quality of the sewage sludge for land application, the treatment works will still be held accountable under today's rule and through its permit for the commercial applier's compliance with the part 503 standards, since the Agency considers that the treatment works still retains control over the quality of the sewage sludge. In this case, as the generator of sewage sludge, the treatment works cannot limit its responsibility for the use and disposal of the sewage sludge in compliance with the standards merely by transferring the sludge to a commercial applier.

CX 33 at 113. This passage reflects that the EPA had determined:

> [W]hen Congress amended section 405(e) to extend the obligation to comply with the sludge standards to each person using or disposing of sewage sludge, Congress did not intend to limit or transfer the responsibility of the generating POTW for ensuring compliance with the standards except insofar as the generating POTW sends the sewage sludge to another treatment works treating domestic sewage. In other words, a treatment works generating sewage sludge retains its duty to comply with the sewage sludge use and disposal standards except where it transfers its sludge to another treatment works treating domestic sewage that is itself subject to permitting requirements under section 405(f) of the CWA. . . .
>
> EPA expects that although the treatment works generating the sewage sludge does not actually apply the sewage sludge to the land, the treatment works generating the sewage sludge will exert sufficient control over the land applier to enable the applier to comply with the part 503 standards. For this reason, § 503.12 requires the treatment works to provide the applier with the information necessary to comply with the standards.

Id. at 114. Consistent with this guidance, the NCUC could not transfer its responsibilities as a preparer of the sewage sludge – and in particular, its duty to ensure that the sludge removal project complied with the Part 503 regulations – by transferring the material to Respondents, absent a finding that Respondents also acted as "persons who prepared" the sewage sludge for regulatory purposes, which, as previously discussed, was not shown in this case.[41] Indeed, as documented by James Courtney of the IHS, participants in the sludge removal project were

[41] Moreover, as the preamble makes clear, the NCUC also bore the responsibility of providing Respondents with the information they needed in order to comply with the requirements that applied directly to them as "persons who applied" the sewage sludge. *See, e.g.*, 40 C.F.R. § 503.12(f) ("When a person who prepares bulk sewage sludge provides the bulk sewage sludge to a person who applies the bulk sewage sludge to the land, the person who prepares the bulk sewage sludge shall provide the person who applies the sewage sludge notice and necessary information to comply with the requirements in this subpart."). Likewise, Respondents were required by the regulations to procure such information from the NCUC. *See* 40 C.F.R. § 503.12(e)(1) ("The person who applies sewage sludge to the land shall obtain information needed to comply with the requirements in this subpart.").

advised during a pre-construction meeting held on May 17, 2018, that the "NCUC is ultimately responsible for following the [Part 503] requirements."[42] CX 3 at 1.

Still, I do not consider Respondents to be less culpable on account of the degree of responsibility that the NCUC retained as the "person who prepared" the sewage sludge, as that did not relieve Respondents of their duty to comply independently with the requirements set forth at 40 C.F.R. § 503.17(a)(4)(ii) that govern the "person who applied" the sewage sludge. The preamble to the final rulemaking for the regulations makes clear that, notwithstanding the responsibilities of the "preparer" of sewage sludge, "[t]he applier would . . . also be governed directly by the part 503 standards." CX 33 at 113. In accordance with the foregoing discussion, and in recognition of Respondents' relative culpability, I consider it appropriate to increase the penalty by three percent of the valuation of the gravity of Respondents' noncompliance, or $225, to a total of $7,725.

ORDER

1. Respondents are liable for violating the Clean Water Act as set forth above.

2. For this violation, Respondents are hereby assessed a civil penalty of **$7,725**.

3. Payment of the full amount of this civil penalty shall be made within **30 days** after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below:

   Payment shall be made by submitting a certified or cashier's check[43] in the requisite amount, payable to "Treasurer, United States of America," and mailed to:

   U.S. Environmental Protection Agency
   Fines and Penalties
   Cincinnati Finance Center
   P.O. Box 979077
   St. Louis, MO 63197-9000

[42] At the hearing, Respondent Pierce testified regarding his understanding of the meeting, asserting that Mr. Courtney "reiterated the 503 requirements for NCUC" and "memorialized in his meeting notes that he had told them they were ultimately responsible for the 503 requirements and to follow and make sure that those were followed." Tr. at 488. For his part, Mr. Courtney testified simply that the NCUC was required to comply in order to receive reimbursement from the IHS pursuant to their May 11, 2018 agreement. Tr. at 362.

[43] Respondents may also pay by one of the electronic methods described at the following webpage: https://www.epa.gov/financial/additional-instructions-making-payments-epa.

A transmittal letter identifying the subject case and EPA docket number (CWA-07-2019-0262), as well as the name and address of Respondents, must accompany the check.

If Respondents fail to pay the penalty within the prescribed statutory period after entry of this Initial Decision, interest on the penalty may be assessed. *See* 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

4. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order **45 days** after its service upon the parties and without further proceedings unless: (1) a party moves to reopen the hearing within **20 days** after service of this Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals Board is taken within **30 days** after this Initial Decision is served upon the parties pursuant to 40 C.F.R. § 22.30(a); or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, under 40 C.F.R. § 22.30(b).

SO ORDERED.

Christine Donelian Coughlin
Administrative Law Judge

Dated: March 26, 2025
Washington, D.C.

In the Matter of Adamas Construction and Development Services, PLLC, and Nathan Pierce, Respondents
Docket No. CWA-07-2019-0262

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Initial Decision and Order**, dated March 26, 2025, and issued by Administrative Law Judge Christine Donelian Coughlin, was sent this day to the following parties in the manner indicated below.

Pamela Taylor
Paralegal Specialist

Original by OALJ E-Filing System to:
U.S. Environmental Protection Agency
Office of Administrative Law Judges
https://yosemite.epa.gov/OA/EAB/EAB-ALJ_Upload.nsf

Copy by Electronic Mail to:
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For Respondents

Dated: March 26, 2025
Washington, D.C.