

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

<b>IN THE MATTER OF</b>	)	
	)	
<b>ROGER BARBER, d/b/a</b>	)	<b>DOCKET NO. CWA-05-2005-0004</b>
<b>BARBER TRUCKING,</b>	)	
	)	
<b>RESPONDENT</b>	)	

**ORDER ON COMPLAINANT'S  
MOTION FOR ACCELERATED DECISION ON LIABILITY**

This civil administrative penalty proceeding arises under Section 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g). This proceeding 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"), 40 C.F.R. part 22.

The U.S. Environmental Protection Agency ("EPA"), Region V ("the Region" or "Complainant") filed and served a "Complaint," dated April 28, 2005, on Roger Barber d/b/a Barber Trucking ("Respondent"). The Region alleges violations of Section 405(e) of the CWA, 33 U.S.C. § 1345(e), and 40 C.F.R. part 503, "Standards for the Use or Disposal of Sewage Sludge," and seeks an administrative penalty of \$60,000. Respondent, who is a *pro se* litigant in this matter, has filed his Answer, dated June 1, 2005, and amendments to the Answer.

The Region filed a Motion to Strike Portions of Respondent's Answer and to Deem Factual Allegations Admitted or, in the Alternative, Motion for a More Definite Answer ("Motion for a More Definite Answer"). On July 11, 2005, Respondent submitted his first Response for a More Definite Answer ("First Amended Answer"), which provides amended answers in response to several of the Complaint's allegations.

In a previous order, I ruled that Respondent's answers to a few of the Complaint's allegations were ambiguous and needed to be clarified. *See* Order on Complainant's Motion to Strike Portions of Respondent's Answer and to Deem Factual Allegations Admitted or, in the Alternative, Motion for a More Definite Answer; Order Granting Amendment of the Complaint, at 5 (Aug. 25, 2005) ("Order Granting Motion for a More Definite Answer").<sup>1</sup> Accordingly, I ordered that "unless Respondent files more definite answers to the factual allegations in Paragraphs 38, 50, 69, 73, and 77 – stating whether Respondent admits, denies, or has insufficient knowledge to answer those factual allegations – those allegations will be deemed admitted." *Id.* at 4. On September 9,

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<sup>1</sup> 2005 EPA ALJ LEXIS 45.

2005, Respondent submitted a second Response for a More Definite Answer (“Second Amended Answer”), providing further amended answers in response to the allegations.

On August 25, 2005, the Region filed its “Motion for Accelerated Decision on Liability for Each Violation Alleged in the Complaint” (“Motion for Accelerated Decision”). Respondent filed a one-page Response to Complainant’s Motion for Accelerated Decision, which is dated September 9, 2005. On September 23, 2005, the Region submitted the following: Reply Brief in Support of its Motion for Accelerated Decision on Liability (“Region’s Reply Brief”); Motion to Deem Specific Factual Allegations Admitted, and; Motion to Amend the Complaint Instantly (“Second Motion to Amend the Complaint”), to which was attached the newly amended Complaint (“Second Amended Complaint”).

On October 19, 2005, I issued an Order Granting Complainant’s Second Motion to Amend the Complaint, in response to Complainant’s motion to amend filed September 23, 2005. Respondent has not filed an amended answer to the latter amendment of the Complaint.

### **Standard for Adjudicating a Motion for Accelerated Decision**

Section 22.20(a) of the Rules of Practice authorizes the Administrative Law Judge to “render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.” 40 C.F.R. § 22.20(a).

Motions for accelerated decision under 40 C.F.R. § 22.20(a) are akin to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure (“FRCP”). *See, e.g., BWX Technologies, Inc.*, RCRA (3008) Appeal No. 97-5, 9 E.A.D. 61, 74-75 (EAB 2000); *In the Matter of Belmont Plating Works*, Docket No. RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65 at \*8 (ALJ, Sept. 11, 2002). Rule 56(c) of the FRCP provides that summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law.” Therefore, federal court decisions interpreting Rule 56 provide guidance for adjudicating motions for accelerated decision. *See CWM Chemical Service*, TSCA Appeal 93-1, 6 E.A.D. 1 (EAB 1995).

The United States Supreme Court has held that the burden of showing that no genuine issue of material fact exists is on the party moving for summary judgment. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). In considering such a motion, the Tribunal must construe the evidentiary material and reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1985); *Adickes*, 398 U.S. at 158-59; *see also Cone v. Longmont United Hospital Assoc.*, 14 F.3d 526, 528 (10th Cir. 1994). Summary

judgment on a matter is inappropriate when contradictory inferences may be drawn from the evidence. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002).

In assessing materiality for summary judgment purposes, the Supreme Court has determined that a factual dispute is material where, under the governing law, it might affect the outcome of the proceeding. *Anderson*, 477 U.S. at 248; *Adickes*, 398 U.S. at 158-159. The substantive law involved in the proceeding identifies which facts are material. *Id.*

The Supreme Court has found that a factual dispute is genuine if the evidence is such that a reasonable finder of fact could return a verdict in favor of the non-moving party. *Id.* In determining whether a genuine issue of fact exists, the judge must decide whether a finder of fact could reasonably find for the non-moving party under the evidentiary standards in a particular proceeding. *Anderson*, 477 U.S. at 252.

Once the party moving for summary judgment meets its burden of showing the absence of genuine issues of material fact, Rule 56(e) requires the opposing party to offer countering evidentiary material or to file a Rule 56(f) affidavit. Under Rule 56(e), “When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party’s pleading, but the adverse party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” The Supreme Court has found that the non-moving party must present “affirmative evidence” and that it cannot defeat the motion without offering “any significant probative evidence tending to support” its pleadings. *Anderson*, 477 U.S. at 256 (quoting *First Nat’l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968)).

More specifically, the Court has ruled that the mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment, as Rule 56(e) requires the opposing party to go beyond the pleadings. *Celotex Corp. v. Catrett*, 477 U.S. 317 at 322 (1986); *Adickes*, 398 U.S. at 160. Similarly, a simple denial of liability is inadequate to demonstrate that an issue of fact does indeed exist in a matter. *In the Matter of Strong Steel Products*, Docket Nos. RCRA-05-2001-0016, CAA-05-2001-0020, and MM-05-2001-0006, 2002 EPA ALJ LEXIS 57 at \*22 (ALJ, September 9, 2002). A party responding to a motion for accelerated decision must produce some evidence which places the moving party’s evidence in question and raises a question of fact for an adjudicatory hearing. *Id.* at 22-23; see *In re Bickford, Inc.*, Docket No. TSCA-V-C-052-92, 1994 TSCA LEXIS 90 (ALJ, November 28, 1994).

The Supreme Court has noted, however, that there is no requirement that the moving party support its motion with affidavits negating the opposing party’s claim or that the opposing party produce evidence in a form that would be admissible at trial in order to avoid summary judgment. *Celotex*, 477 U.S. at 323-324. The parties may move for summary judgment or successfully defeat summary judgment without supporting affidavits provided that other evidence referenced in Rule 56(c) adequately supports its position. Of course, if the moving party fails to carry its burden to show that it is entitled

to summary judgment under established principles, then no defense is required. *Adickes*, 398 U.S. at 156.

The evidentiary standard of proof in the matter before me, as in all other cases of administrative assessment of civil penalties governed by the Rules of Practice, is a “preponderance of the evidence.” 40 C.F.R. § 22.24. In determining whether or not there is a genuine factual dispute, I, as the judge and finder of fact, must consider whether I could reasonably find for the non-moving party under the “preponderance of the evidence” standard.

Accordingly, a party moving for accelerated decision must establish through the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, the absence of genuine issues of material fact and that it is entitled to judgment as a matter of law by the preponderance of the evidence. On the other hand, a party opposing a properly supported motion for accelerated decision must demonstrate the existence of a genuine issue of material fact by proffering significant probative evidence from which a reasonable presiding officer could find in that party's favor by a preponderance of the evidence. Even if a judge believes that summary judgment is technically proper upon review of the evidence in a case, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. *See Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979).

### **DISCUSSION**

Section 405(e) of the CWA, 33 U.S.C. § 1345(e), provides:

The determination of the manner of disposal or use of sludge is a local determination, except that it shall be unlawful for any person to dispose of 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 [Section 405(d), 33 U.S.C. § 1345(d)], except in accordance with such regulations.

Pursuant to Section 405(d) of the CWA, the EPA promulgated “Standards for the Use or Disposal of Sewage Sludge,” at 40 C.F.R. part 503, which includes Subpart B, 40 C.F.R. §§ 503.10-18, governing land application of domestic septage/sewage sludge.

The Region alleges four counts of violations. Count I alleges Violation of Requirement to Comply with Vector Attraction Reduction Requirements for Domestic Septage – 40 C.F.R. § 503.15(d). Count II alleges Failure to Comply with Annual Application Rate Pollution Limits – 40 C.F.R. § 503.12(c), and Failure to Develop and Maintain Information on the Nitrogen Requirement – 40 C.F.R. § 503.17(b)(4). Count III alleges Failure to Develop and Maintain Certification Statement – 40 C.F.R.

§ 503.17(b)(6). Count IV alleges Failure to Develop and Maintain a Description of How the Vector Reduction Attraction Requirements Are Met – 40 C.F.R. § 503.17(b)(8).

When the Region filed its Motion for Accelerated Decision, the Region did not attach any affidavits or other documents in support of the motion. However, in Respondent's Answer and amendments to the Answer, Respondent admits to several allegations. Still Respondent contests some of the allegations, and therefore resolution of the Motion turns on whether Respondent's admissions establish liability.

In response to the allegations, Respondent admits to being a "person" within the meaning of 40 C.F.R. § 503.9(q), and that he owns property ("Property" or "Site") at 16607 Clements Road, Mt. Orab, Ohio. First Amended Answer ¶¶ 16-17. Respondent admits that in his August 13, 2002 response to U.S. EPA's Administrative Order, he stated that the Property or Site at issue in this matter "is 16 acres of dense woods . . . ." *Id.* ¶ 61. Respondent admits that from at least May 2000 through mid-April 2002, he operated a business collecting, with his trucks, liquid or solid material from residential septic tanks. *Id.* ¶ 36. Moreover, Respondent concedes that the collected liquid or solid material constituted domestic septage within the meaning of 40 C.F.R. § 503.9(f) and sewage sludge within the meaning of 40 C.F.R. § 503.9(w). *Id.* ¶ 37.

Respondent admits that in his September 6, 2002 response to EPA's Administrative Order, Respondent stated that he owns two trucks, a newer one holding 1400 gallons, and an older one holding 1200 gallons. *Id.* ¶ 39. Respondent further stated that each such truck load averaged at least 600 gallons of domestic septage/sewage sludge. *Id.* Respondent admits that from May 2000 through mid-April 2002, he was a person who applied domestic septage/sewage sludge to the land within the meaning of 40 C.F.R. § 503.10(a). *Id.* ¶ 43.

### **Respondent's Defense – Ignorance of the Law**

In response to several of the Complaint's allegations that Respondent violated the federal Standards for Use or Disposal of Sewage Sludge, as provided in the Code of Federal Regulations, Respondent contends that he "was following guide lines and instructions supplied by the Brown County Health Department and the Southwestern District of the Ohio EPA which did not include instructions showing this requirement." First Amended Answer ¶¶ 50, 51, 69, 70, 73, 74, 77, 78. Respondent asserts that he "was never told" that "he should be concerned about developing or retaining any information on Nitrogen Requirements," that he "was never told anything about the requirements for a certification statement pursuant to 40 C.F.R. 503.17(b)(6)," and "was never told anything about Vector Attraction Reduction requirements in 503.33(b)(9), (b)(10), (b)(12)."<sup>2</sup> Second Amended Answer ¶¶ 69, 73, 77. It is unclear whether Respondent

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<sup>2</sup> I note that Respondent has provided minutes from meetings of the Brown County Board of Health. See Respondent[s] Initial Prehearing Exchange. Arguably, information discussed in such minutes may provide grounds for mitigating the penalty amount, but a determination of that issue is premature.

asserts this lack of knowledge and information concerning federal requirements as a defense to liability, or only as an argument for mitigating the penalty. Regardless, even if I assume that Respondent is asserting this as a defense to liability, Respondent's contentions do not defeat his liability for violating federal law.

It is well established that, as a general rule, "ignorance of the law is no excuse." See, e.g., *United States v. Int'l Mineral & Chems. Corp.*, 402 U.S. 558, 562-63 (1971). An exception to that rule is that due process requires that parties receive "fair notice" before being deprived of property. *General Elec. Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). "In the absence of notice – for example, where the regulation is not sufficiently clear to warn a party about what is expected of it – an agency may not deprive a party of property by imposing civil or criminal liability." *Id.* at 1328-29.

"We must ask ourselves whether the regulated party received, or should have received, notice of the Agency's interpretation in the most obvious way of all: by reading the regulations." *Id.* at 1329. "If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation." *Id.* Moreover, "Regulations affecting only economic interests must be sufficiently definite so that ordinary people exercising common sense know what they mean." *In re Friedman*, CAA Appeal No. 02-07, slip op. at 23 n.21 (EAB, Feb. 18, 2004), 11 E.A.D. \_\_\_\_<sup>3</sup> (quoting *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952)), *aff'd*, No. 2:04-CV-00517-WBS-DAD (E.D. Cal., Feb. 25, 2005) (unpublished). As fair notice is an affirmative defense, Respondent bears the burden of establishing a lack of notice. *Friedman*, slip op. at 25 (citing *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 886 (S.D. Ohio 2003)).

Respondent suggests that his reliance on state and local "guide lines and instructions," excuses noncompliance with the federal regulations. First Amended Answer ¶¶ 50, 51, 69, 70, 73, 74, 77, 78. Section 405 of the federal Clean Water Act, which addresses disposal of sewage sludge, unambiguously provides that the determination of the manner of disposal or use of sludge is a local determination, *except* that persons disposing of sewage sludge from a treatment works must comply with the federal regulations promulgated pursuant to Section 405:

The determination of the manner of disposal or use of sludge is a local determination, *except* that it shall be unlawful for any person to dispose of 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 [Section

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<sup>3</sup> 2004 EPA App. LEXIS 3.

405(d), 33 U.S.C. § 1345(d)], except in accordance with such regulations.

CWA § 405(e), 33 U.S.C. § 1345(e) (emphasis added). A “treatment works” is “either a federally owned, publicly owned, or privately owned device or system used to treat (including recycle or reclaim) either domestic sewage or a combination of domestic sewage and industrial waste of a liquid nature.” 40 C.F.R. § 503.9(aa). More specifically, examples of treatment works include septic tanks, cesspools, and portable toilets. *See* 40 C.F.R. § 503.9(f).

Respondent does not argue that he did not dispose of sludge from a treatment works for which federal regulations have been established pursuant to Section 405(d). Moreover, it is undisputed that the EPA promulgated the Standards for Use or Disposal of Sewage Sludge, at 40 C.F.R. part 503, pursuant to Section 405(d) of the CWA. *See also* 58 Fed. Reg. 9248, 9248 (Feb. 19, 1993) (stating that the Standards for Use or Disposal of Sewage Sludge were promulgated pursuant to Section 405(d)-(e) of the CWA).

Significantly, Respondent makes no argument that the federal regulations with which he is charged with violating are ambiguous or unascertainable. Even assuming *arguendo* that Respondent complied with state and/or local guidelines and instructions, such compliance would not eliminate fair notice of his obligations under the federal regulations. *Accord, Friedman*, slip op. at 25-26 (denying a fair notice challenge where a respondent followed local regulations rather than the more stringent federal regulations).

Accordingly, I conclude, for purposes of liability, that Respondent has not raised any valid defenses to the violations of federal law alleged in the Complaint.<sup>4</sup>

### **Count I: Vector Attraction Reduction Requirements for Domestic Septage**

“Vector attraction” is “the characteristic of sewage sludge that attracts rodents, flies, mosquitos, and other organisms capable of transporting infectious agents.” 40 C.F.R. § 503.31(k). In promulgating the regulations setting Standards for Use and Disposal of Sewage Sludge, the EPA recognized that “[v]irtually all sewage sludge contains . . . significant numbers of pathogens (e.g., bacteria, viruses, protozoa, and eggs of parasitic worms).” 58 Fed. Reg. at 9254. EPA’s regulations include requirements for destroying or reducing those characteristics of sewage sludge that attract birds, insects, rats, and other animals (i.e., “vectors”). *Id.* The EPA recognizes that “vector” exposure to the pathogenic organisms in sludge can cause transfer of pathogens (and consequently spread disease) from these disease vectors to humans. *Id.* Accordingly, the EPA requires

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<sup>4</sup> As the Motion for Accelerated Decision only requests a judgment as to liability, I need not determine at this time whether Respondent’s alleged compliance with state and local guidelines and instructions establishes mitigating circumstances for purposes of calculating an appropriate penalty amount.

measures for reducing the attraction of vectors to sewage sludge, such as destroying the odor-causing properties of sludge that lure insects and animals. *Id.*

In Count I of the Complaint, the Region alleges a violation of 40 C.F.R. § 503.15(d), which provides, “The vector attraction reduction requirements in 40 C.F.R. § 503.33(b)(9), (b)(10), or (b)(12) shall be met when domestic septage is applied to agricultural land, forest, or a reclamation site.”<sup>5</sup> In Paragraph 49 of the Complaint, the Region alleges,

Specifically, pursuant to 40 C.F.R. § 503.15(d), for each load of domestic septage/sewage sludge that Respondent applied to the Site, Respondent was required to:

- (1) inject the domestic septage/sewage sludge below the surface of the land such that no significant amount of domestic septage/sewage sludge shall be present on the land surface within one hour after the sewage sludge is injected,
- (2) incorporate the domestic septage/sewage sludge into the soil within six hours after application to or placement on the land, or
- (3) raise the pH of the domestic septage to 12 or higher by alkali addition and ensure that the pH remained at 12 or higher for 30 minutes without the addition of more alkali.

The Region further alleges that “For each of the 1,092 truck loads of domestic septage applied to the Site,”<sup>6</sup> Respondent did not: (1) inject the domestic septage/sewage sludge below the surface of the land such that no significant amount of domestic

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<sup>5</sup> Respondent, at minimum, concedes that the Site is a forest. *See* First Amended Answer ¶ 61.

<sup>6</sup> Pursuant to the Second Amended Complaint, the Region reduced the alleged number of truck loads from 1,246 to 1,092 for the period from May 2000 to mid-April 2002. Second Amended Complaint ¶ 50. The Region also amended its general allegations to reflect the reduced number of truck loads and gallons applied to the land, and changed the ending date for application to the land from December 2002 to mid-April 2002. *Id.* ¶¶ 38, 40.

In its Second Motion to Amend the Complaint, the Region also brought to this Tribunal’s attention that the Region miscited one subsection of a regulation in Paragraphs 48 and 49 of the Complaint. Although the Region still had an incorrect cite even in the latter Motion, my Order Granting Complainant’s Second Motion to Amend the Complaint (Oct. 19, 2005) put the parties on notice of the correct cite and that there was no need for further amendment of the Complaint.

septage/sewage sludge shall be present on the land surface within one hour after the sewage sludge is injected, (2) incorporate the domestic septage/sewage sludge into the soil within six hours after application to or placement on the land, or (3) raise the pH of the domestic septage to 12 or higher by alkali addition and ensure that the pH remained at 12 or higher for 30 minutes without the addition of more alkali. Second Amended Complaint ¶ 50.

In his First Amended Answer, Respondent states that he “did apply approximately 1246 truck loads of domestic septage from May 2000 to Mid-April 2002, following rules and specifications supplied to him by the Brown County Health Department and the Southwestern district of the Ohio Environmental Protection Agency, these instructions did not include any of these specifications therefore Respondent did not follow these guidelines.” First Amended Answer ¶ 50. Such response was part of a pattern of responses in the First Amended Answer that Respondent employed, in which he stated that he followed the guidelines supplied to it and that those guidelines did not include instructions showing the requirement the Region alleges he violated, but did not explicitly answer whether the Respondent violated the federal requirements. In a previous order, I ruled that several of Respondents answers, including his answer to the Complaint’s Paragraph 50, were ambiguous and that the Region “is entitled to a clear and direct answer to its factual allegations.” Order Granting Motion for a More Definite Answer at 4. Accordingly, I ruled that unless Respondent files more definite answers – stating whether Respondent admits, denies, or has insufficient knowledge – the allegations would be deemed admitted. *Id.*

In his Second Amended Answer, despite my Order Granting Motion for a More Definite Answer, Respondent *again* does not directly answer whether he complied with the vector attraction requirements. *See* Second Amended Answer ¶ 50. Rather than denying the charge or stating that he had insufficient knowledge, Respondent simply challenges the accuracy of the number of truck loads of sewage sludge dumped, by contending that the number of loads dumped from May 2000 through mid-April 2002 adds up to 1,092 loads instead of 1,246. *Id.* This latest answer contradicts Respondent’s earlier admission that 1,246 loads were dumped during this same time period. First Amended Answer ¶ 50. Nevertheless, the Region has amended its Complaint to indicate 1,092 loads being dumped during that time period. *See* Second Amended Complaint ¶ 50.

Whether Respondent dumped 1,092 loads of septage rather than 1,246 loads is not determinative of Respondent’s liability under 40 C.F.R. § 503.15(d), which only requires compliance with one of the vector attraction reduction requirements, and Respondent does not articulate an argument against liability on this basis. Regardless, the Region now concedes to the lesser number of loads dumped: 1,092. Respondent makes no argument that he is not liable if he only dumped 1,092 loads rather than 1,246 loads, and I conclude that the vector attraction reduction requirements are not contingent upon how much domestic septage is applied to the land. *See* 40 C.F.R. §§ 503.15(d), 503.33(b)(9),

(b)(10), and (b)(12). Instead, the regulations are triggered once *any* amount of domestic septage is applied to the land.<sup>7</sup> *See id.*

Respondent's answers do not clearly respond to the allegations that he failed to comply with the vector attraction requirements as mandated by 40 C.F.R. § 503.15(d). In accordance with the Order Granting Motion for a More Definite Answer, I deem such allegations as being admitted, and GRANT accelerated decision on liability in favor of the Region on Count I.

**Count II: Failure to Comply with Annual Application Rate Pollution Limits, and Failure to Develop, and Retain for Five Years, Information on the Nitrogen Requirement for the Vegetation Grown on the Site During a 365 Day Period**

In promulgating the regulations setting Standards for Use and Disposal of Sewage Sludge, the EPA recognized that sewage sludge contains three to five percent nitrogen. 58 Fed. Reg. 9248, 9311 (Feb. 19, 1993). The EPA was concerned about the risks nitrogen poses to human health, such as groundwater contamination leading to “blue baby syndrome,” and harm to the environment. *Id.* at 9276. The EPA determined that limiting the hydraulic loading of septage, based on the nitrogen requirements of crops of vegetations, will adequately protect the public health and the environment. *Id.* at 9308. Furthermore, the EPA determined that septage applied at the appropriate rate will satisfy nitrogen demands for growing crops without adversely affecting surface or ground water because available inorganic nitrogen will be taken up by the crops and organic nitrogen will be released too slowly to cause contamination of surface or ground waters. *Id.*

In Count II, the Region charges Respondent with violation of two requirements, the first of which is failure to comply with the annual application rate pollution limits, in violation of 40 C.F.R. § 503.12(c). The regulations provide that no person shall apply to agricultural land, forest, or a reclamation site domestic septage during a 365 day period if the annual application rate in 40 C.F.R. § 503.13(c) has been reached during that period. Pursuant to 40 C.F.R. § 503.13(c), the annual application rate for domestic septage shall not exceed the annual application rate calculated using the following equation:

$$\text{AAR} = \frac{N}{0.0026}$$

Under that equation, “AAR” represents the annual application rate in gallons per acre per 365 day period, and “N” represents the amount of nitrogen in pounds per acre per 365 day period needed by the crop or vegetation grown on the land (“nitrogen requirement of vegetation”). 40 C.F.R. § 503.13(c).

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<sup>7</sup> Arguably, a determination of the appropriate penalty amount for the violations may be influenced by the amount of domestic septage dumped. This Order only decides liability and does not make a penalty determination.

Respondent admits that the amount of nitrogen required by the vegetation grown on the Site is 30 pounds of nitrogen per acre per year, and that a nitrogen requirement of 30 pounds per acre per year would allow an annual application rate of 11,538 gallons per acre per year. First Amended Answer ¶¶ 59, 60. Furthermore, Respondent admits that in his September 6, 2002, response to EPA's Administrative Order, he admitted to owning two trucks that were used to haul the collected domestic septage/sewage sludge, and that each truck load averaged at least 600 gallons of domestic septage/sewage sludge. First Amended Answer ¶ 64.

Significantly, Respondent admits that during the following periods, he applied the truck loads of collected domestic septage/sewage sludge to the Site in at least the following amounts:

- a. May 1999 through April 2000: 196,800 gallons
- b. May 2000 through April 2001: 232,200 gallons, and
- c. May 2001 through mid-April 2002: 423,200 gallons<sup>8</sup>

First Amended Answer ¶ 65. Even more significant, Respondent admits that he applied domestic septage/sewage sludge to the Site in at least the following annual application rates:

- a. May 1999 through April 2000: 35,781 gallons per acre per year  
(196,800 gallons per year ÷ 5.5 acres),
- b. May 2000 through April 2001: 42,218 gallons per acre per year  
(232,200 gallons per year ÷ 5.5 acres), and
- c. May 2001 through April 2001: 78,581<sup>9</sup> gallons per acre per year

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<sup>8</sup> Pursuant to the Second Amended Complaint, the Region alleges a slightly lesser number of gallons of domestic septage/sewage applied by Respondent to the Site during May 2001 through mid-April 2002 (423,000 gallons instead of 423,200 gallons). *See* Second Amended Complaint ¶ 65. Respondent has already admitted to the higher number of gallons applied. First Amended Answer ¶ 65. Even so, as discussed *infra* note 9, even if using the lesser number of 423,000 gallons, Respondent would still have applied domestic septage/sewage in excess of the annual application rate of 11,538 gallons per acre per year. Accordingly, the Region's reduction to its alleged number of gallons does not alter Respondent's liability on Count II.

<sup>9</sup> Pursuant to the Second Amended Complaint, the Region alleges a lesser number of gallons per acre per year applied by Respondent to the Site from May 2001 through mid-April 2002 (76,909 gallons instead of 78,581 gallons). *See* Second Amended Complaint ¶ 66. Respondent has already admitted to the higher number. First Amended Answer ¶ 66. Nevertheless, even when using the lesser number of 76,909 gallons per acre per year dumped from May 2001 through mid-April 2002, Respondent would still be in

(423,200 gallons per year ÷ 5.5 acres)

First Amended Answer ¶ 66. Accordingly, Respondent's admissions establish that he applied domestic septage/sewage to the Site in excess of the allowable amount of 11,538 gallons per acre per year, and therefore Respondent is liable under 40 C.F.R. § 503.12(c) for failure to comply with the annual application rate pollution limits.

Also in Count II, the Region charges that, in violation of 40 C.F.R. § 503.17(b)(4), at the time Respondent was applying domestic septage to the Site, Respondent did not develop, and retain for five years, information on the nitrogen requirement for the vegetation grown on the Site during a 365 day period. Complaint ¶ 69. In the Order Granting Motion for a More Definite Answer, at 4, I ruled that Respondent's answer to the latter allegation was ambiguous, and that that unless Respondent files more definite answers – stating whether Respondent admits, denies, or has insufficient knowledge – the allegation would be deemed admitted.

In his Second Amended Answer, Respondent states that he “was never told” that he “should be concerned about developing or retaining any information on Nitrogen Requirements.” Second Amended Answer ¶ 69. Arguably, when taking into account that Respondent is a *pro se* litigant in this matter, the latter statement may be read as Respondent claiming insufficient knowledge to answer the allegation. Moreover, at the time the Region filed its motion, it did not attach any documents in support of its bare allegations. Finally, even if a judge believes that summary judgment is technically proper upon review of the evidence in a case, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. *See Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979). Accordingly, there is sufficient basis to find a dispute of material fact regarding whether Respondent violated 40 C.F.R. § 503.17(b)(4).

I GRANT accelerated decision with regards to liability for violating 40 C.F.R. § 503.12(c) (failure to comply with the annual application rate pollution limits), but DENY accelerated decision with regards to 40 C.F.R. § 503.17(b)(4) (failure to develop, and retain for five years, information on the nitrogen requirement for the vegetation grown on the Site during a 365 day period).

**Count III: Failure to Develop and Maintain Certification Statement, Pursuant to 40 C.F.R. § 503.17(b)(6)**

Pursuant to 40 C.F.R. § 503.17(b)(6), when domestic septage is applied to agricultural land, forest, or a reclamation site, the person who applies the domestic septage shall develop, and retain for five years, the following certification statement:

I certify, under penalty of law, that the information that will

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excess of the allowable amount of 11,538 gallons per acre per year. In other words, the Region's amendment is immaterial to Respondent's liability on this point.

be used to determine compliance with the pathogen requirements (insert either § 503.32(c)(1) or § 503.32(c)(2)) and the vector attraction reduction requirement in [insert § 503.33(b)(9), 503.33(b)(10), or § 503.33(b)(12) ] was prepared 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.

The Region alleges that at the time Respondent was applying domestic septage to the Site, he did not develop, and retain for five years, the certification statement required pursuant to 40 C.F.R. § 503.17(b)(6). Complaint ¶ 73.

In the Order Granting Motion for a More Definite Answer, at 4, I ruled that Respondent’s answer to the latter allegation was ambiguous, and that that unless Respondent files more definite answers – stating whether Respondent admits, denies, or has insufficient knowledge – the allegation would be deemed admitted. In his Second Amended Answer, Respondent states, “I was never told anything about the requirements for a certification statement pursuant to 40 C.F.R. 503.17(b)(6).” Second Amended Answer ¶ 73. Arguably, when taking into account that Respondent is a *pro se* litigant in this matter, the latter statement may be read as Respondent claiming insufficient knowledge to answer the allegation. Moreover, at the time the Region filed its motion, it did not attach any documents in support of its bare allegations. Finally, even if a judge believes that summary judgment is technically proper upon review of the evidence in a case, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. *See Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979). Accordingly, there is sufficient basis to find a dispute of material fact regarding whether Respondent violated 40 C.F.R. § 503.17(b)(6).

I DENY accelerated decision on Count III.

#### **Count IV: Failure to Develop and Maintain a Description of How the Vector Reduction Attraction Reduction Requirements Are Met**

Pursuant to 40 C.F.R. § 503.17(b)(8), when domestic septage is applied to agricultural land, forest, or a reclamation site, the person who applies the domestic septage shall develop, and retain for five years, a description of how the vector attraction reduction requirements in 40 C.F.R. § 503.33(b)(9), (b)(10), or (b)(12), are met. The Region alleges that at the time Respondent was applying domestic septage to the Site, he did not develop, and retain for five years, a description of how the vector attraction reduction requirements in § 503.33(b)(9), (b)(10), or (b)(12) were met. Complaint ¶ 77.

In the Order Granting Motion for a More Definite Answer, at 4, I ruled that Respondent’s answer to the latter allegation was ambiguous, and that that unless

Respondent files more definite answers – stating whether Respondent admits, denies, or has insufficient knowledge – the allegation would be deemed admitted. In his Second Amended Answer Respondent states, “I was never told anything about Vector Attraction Reduction requirements in 40 C.F.R. 503.33(b)(9), (b)(10), (b)(12).” Second Amended Answer ¶ 77.

Arguably, when taking into account that Respondent is a *pro se* litigant in this matter, the latter statement may be read as Respondent claiming insufficient knowledge to answer the allegation. Moreover, at the time the Region filed its motion, it did not attach any documents in support of its bare allegations. Finally, even if a judge believes that summary judgment is technically proper upon review of the evidence in a case, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. *See Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979). Accordingly, there is sufficient basis to find a dispute of material fact regarding whether Respondent violated 40 C.F.R. § 503.17(b)(8).

I DENY accelerated decision on Count IV.

### **Conclusion**

To summarize, I rule on the Region’s Motion for Accelerated Decision on Liability as follows:

Count I: GRANTED

Count II: GRANTED with regards to violating 40 C.F.R. § 503.12(c) (failure to comply with the annual application rate pollution limits), but DENIED with regards to 40 C.F.R. § 503.17(b)(4) (failure to develop, and retain for five years, information on the nitrogen requirement for the vegetation grown on the Site during a 365 day period)

Count III: DENIED

Count IV: DENIED

The Region’s September 23, 2005 Motion to Deem Specific Factual Allegations Admitted is deemed moot.

Remaining to be heard at the evidentiary hearing is the issue of the appropriate penalty amount with regards to all counts, and the issue of liability with regards to: that portion of Count II dealing with 40 C.F.R. § 503.17(b)(4); Count III, and; Count IV. For the counts on which I have denied accelerated decision, such denial does not decide the ultimate truth of the matter, but represents a threshold determination that an evidentiary hearing is necessary.

Dated: December 7, 2005  
Washington, D.C.

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Barbara A. Gunning  
Administrative Law Judge