BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the matter of:	DOCKET NO. CWA 10-2010-0132
DAVID D'AMATO, Anchorage, Alaska	**COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY**
Respondent	

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I. INTRODUCTION

Pursuant to Sections 22.16(a) and 22.20 of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" ("Part 22 Rules"), the United States Environmental Protection Agency, Region 10 ("Complainant" or "EPA") moves for an accelerated decision as to Respondent's liability for the violations alleged in the Complaint. Because there are no genuine issues of material fact and Complainant is entitled to a determination of Respondent's liability as a matter of law, Complainant respectfully requests an order granting this motion.

II. STATUTORY AND REGULATORY BACKGROUND

The Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387, establishes a comprehensive program to restore and maintain the chemical, physical, and biological integrity of the waters of the United States. The "integrity" of the nation's waters is a broad concept referring to "a condition in which the natural structure and function of ecosystems is maintained." H.R. Rep. No. 92-911, 76, *reprinted in* 1A Legislative History of the Clean Water Act, at 763 (1973). To further the broad objectives of the CWA, Congress provided for the regulation of discharges of pollutants through permit requirements. Thus, Section 301(a) of the CWA provides that "[e]xcept as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a).

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A central aspect of the CWA's regulatory permitting scheme is Section 404, under which any "discharge of a pollutant" consisting of dredged or fill material is forbidden unless authorized by a permit issued by the U.S. Army Corps of Engineers ("Corps"). *See generally,* 33 U.S.C. §§ 1311(a), 1344; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985); *United States v. Akers*, 785 F.2d 814, 818 (9th Cir. 1986). The CWA defines "discharge of a pollutant" to be the addition of a pollutant from a "point source" into "navigable waters." 33 U.S.C. § 1362(12). Thus, under Sections 301(a) and 404 of the CWA, the addition of any dredged or fill material "pollutant" from a "point source" into "navigable waters" by any "person" is prohibited unless authorized by a Corps permit.

The CWA defines "pollutant" to include materials such as "dredged spoil, . .biological materials, . . . rock, sand [and] cellar dirt." 33 U.S.C. § 1362(6); *United States v. Pozsgai*, 999 F.2d 719, 724 (3d Cir. 1993); *Rybachek v. United States*, 904 F.2d 1276, 1285 (9th Cir. 1990). EPA and the Corps have promulgated parallel regulations identifying those pollutants that constitute "dredged material" and "fill material" subject to regulation under CWA Section 404 (as opposed to CWA Section 402). In general, "fill material" includes any material that changes the bottom elevation of or replaces with dry land any portion of waters of the United States. *See* 33 C.F.R. § 323.2(e)(1); 40 C.F.R. § 232.2. "Dredged material" includes any material excavated or dredged from waters of the United States. *See* 33 C.F.R. § 323.2(c); 40 C.F.R. § 232.2.

The CWA defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, [or] container . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). "[T]he definition of a point source is to be broadly interpreted," and courts have uniformly held that

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earth-moving equipment, such as dump trucks, bulldozers, excavators, plowing equipment, back hoes, and related heavy machinery, are all point sources. *See, e.g., Peconic Baykeeper, Inc. v. Suffolk County,* 600 F.3d 180, 188 (2d Cir. 2010); *Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114, 118 (2d Cir. 1994); *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983) ("*Avoyelles II*"); *Avoyelles Sportsmen's League v. Alexander*, 473 F. Supp. 525, 532 (W.D. La. 1979) ("*Avoyelles I*").

"Navigable waters" are defined in the CWA as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7); *Leslie Salt Co. v. United States*, 896 F.2d 354, 357 (9th Cir. 1990). "Waters of the United States" include:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; . . .
> (5) Tributaries of waters identified in paragraphs [](1) through (4) . . .; . . .
> (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs [](1) through (6).

33 C.F.R. § 328.3(a); 40 C.F.R. § 230.3(s). The interpretation of this definition has been modified most recently by the Supreme Court in *Rapanos v. U.S.*, 547 U.S. 715 (2006). In *Rapanos*, a divided Court altered somewhat the scope of "waters of the United States." A plurality of the Court concluded that jurisdiction under the CWA should extend only to "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters, and to "wetlands with a continuous surface connection to "such relatively permanent waters." *Id.* at 732-742. Justice Kennedy's concurring opinion offered an alternate test, which requires that a wetland must have an impact on the quality of a downstream navigable-in-fact water to fall under the jurisdiction of the CWA (known as the "significant

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nexus" test). *Id.* at 759. The Environmental Appeals Board has ruled that a showing by EPA that either test is met will establish jurisdiction. *In re Smith Farm Enterprises, LLC*, CWA Appeal No. 08-02 (EAB, March 16, 2011) slip op. at 28-30.

The term "wetlands" is defined in regulation, in pertinent part, as "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 40 C.F.R. § 232.2; 33 C.F.R. § 328.3(b). To aid in the identification and delineation of wetlands meeting this regulatory definition, the Corps developed the *1987 Corps of Engineers Wetlands Delineation Manual* (Tech. Rpt. Y-87-1, Waterways Experiment Station, Environmental Laboratory 1987) ("1987 Corps Manual").[1] The 1987 Corps Manual is the current federal delineation guide used in the Clean Water Act Section 404 regulatory program, and its use in delineating and identifying wetlands has been endorsed by the courts. *See, e.g., Fairbanks N. Star Borough v. United States Army Corps of Engineers*, 543 F.3d 586, 590 (9th Cir. 2008); *United States v. Deaton*, 332 F.3d 698, 713 (4th Cir. 2003) ("We are therefore bound to defer to the [1987 Corps Manual's] interpretation of the regulation . . . , especially since the interpretation deals in a complex scientific field, wetlands ecology and hydrology." (internal citations omitted)). For wetlands, lateral jurisdiction under CWA Section 404 extends to the limit of the wetland. 33 C.F.R § 328.4(c)(2)-(3).

Under the CWA, the "person" who is liable for any CWA violation includes individuals, 33 U.S.C. § 1362(5), and is not limited to the person who physically discharged the pollutants. Rather, any person responsible for or having control over performance of the work is also liable.

[1] The 1987 Corps Manual is available on the internet at: http://el.erdc.usace.army.mil/elpubs/pdf/wlman87.pdf.

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Assateague Coastkeeper v. Alan & Kristin Hudson Farm, 727 F. Supp. 2d 433, 442 (D. Md. 2010) (citing *United States v. Lambert*, 915 F. Supp. 797, 802-03 (S.D. W.Va. 1996)); *United States v. Board of Trustees*, 531 F. Supp. 267, 274 (S.D. Fla. 1981). The CWA's civil enforcement provisions impose strict liability. *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979); *Board of Trustees*, 531 F. Supp. at 274. Thus, to establish liability under CWA Section 309, 33 U.S.C. § 1319, EPA need not prove that the discharge of pollutants was intentional, knowing, or negligent; it need only prove that the unpermitted discharge occurred. *See United States v. Pozsgai*, 999 F.2d 719, 725 (3d Cir. 1993).

III. STANDARD OF REVIEW FOR ACCELERATED DECISION

The standard of review for accelerated decisions is set forth in Section 22.20 of the Part 22 Rules, which states in relevant part:

> (a) General. The Presiding Officer may at any time 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). The standard for reviewing motions for accelerated decision is analogous to summary judgment motions under Federal Rule of Civil Procedure 56. *In re City of Salisbury, Maryland*, 1999 EPA ALJ 44, at *8, Docket No. CWA-III-219 (ALJ Biro July 30, 1999).

The Supreme Court has found that summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Although the initial burden is on the moving party to establish the absence of genuine issues of material fact, the nonmoving party must meet more than a minimal burden in order to prevent entry of

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summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). The Court has also made clear that a motion for summary judgment cannot be defeated by the existence of merely "*some* alleged factual dispute between the parties." *Id.* at 247. Rather, a party opposing a motion for summary judgment must show that there is at least one "genuine" issue of "material fact." *Id.* at 248. A fact is "material" if under the applicable substantive law it could affect the outcome of the lawsuit. *Id.*

As in summary judgment motions, to preclude entry of an accelerated decision, the nonmoving party must demonstrate, through specific evidence, that there remains a genuine issue of triable fact. *Id. See also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt"); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986) (summary judgment is designed to "isolate and dispose of factually unsupported claims or defenses. . .").

Respondent has placed no documents into his prehearing information exchange nor outlined any specific testimony at hearing that would dispute any of the complaint's allegations relevant to liability. His Answer contains repeated assertions of a defense to liability, but there has been no evidence put forward to buttress that assertion. Portions of the Answer can be read to deny the presence of wetlands where Respondent's activities took place. These bald denials, however, have not been accompanied with evidence contrary to the facts presented in documents contained in Complainant's Prehearing Exchange.

In this case, no question of material fact exists as to whether Respondent violated the CWA on a continuous and ongoing basis since at least 2005. This is an issue of law suitable for resolution by accelerated decision.

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IV. FACTUAL BACKGROUND

A. Description of Respondent and the Subject Property

At the time of the unpermitted discharges alleged in the Complaint, Respondent David D'Amato, an individual, owned Lot 3 and Tract 2 of Hunter Heights Subdivision in Anchorage, Alaska ("the Site"). Complaint ¶¶ 3.2, 3.5.[3] Tract 2 is approximately 27 acres and its location is shown in CX-1 and CX-2. Lot 3 is a home plot adjacent to Tract 2. Little Rabbit Creek, as well as a number of its tributaries, flow through the Site. Little Rabbit Creek flows downstream into Potter Marsh, Rabbit Creek, and then to Cook Inlet. CX-1, CX-17, page 2.

B. Violations Alleged in the Complaint

Between October 2005 and August 2008, Respondent discharged dredged material into unnamed streams and adjacent wetlands in four different areas of the Site and adjacent property. Each of the four areas is addressed in turn below.

1. Southeastern Area of the Site

In September or October of 2005, Respondent cleared, dredged, and graded approximately 700 linear feet of a previously existing stream diversion channel (identified in CX-02 as "Southern East Channel"). CX-05, CX-06, and CX-09 at Att. 3, photos 27, 30-32. The dredging widened and deepened the Southern East Channel. CX-10 at 3. These actions were conducted with an excavator. CX-06 at 2. As a part of this dredging effort, materials were allowed to fall back into the stream and were deposited into approximately 0.06 acres of wetlands adjacent to the stream diversion channel. CX-09 at Att. 3, photo 39, CX-13, CX-18.

[3] Pursuant to §22.5(d) of the Part 22 Rules, any allegations in the complaint that are not denied or explained in the answer are deemed an admission. Wherever an allegation in the complaint has not been denied or explained in the answer, the complaint will be cited as support.

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This wetland area, described as "Equipment Demonstration Area," was documented as a wetland during EPA's 2008 inspection and wetland determination. CX-10 at 5 and Att. 2, photos 90-91.

Between October 2005 and June 2006, Respondent discharged rock and other excavated materials at the confluence of the Southern East Channel and the South Channel, diverting the flow to the Southern East Channel. CX-09 at 3 and Att. 3, photos 34-36. At some time during the following two years, between June 2006 and July 2008, Respondent again discharged rock and other material at this confluence, this time diverting flow from the Southern East Channel into the South Channel. CX-10 at 5 and Att. 2, photos 78, 80.

Between June 2006 and July 2008, Respondent also discharged rock into 19 unnamed tributaries of the Southern East Channel. CX10 at 3-4, Att. 2, photos 61-68, and Att. 11. During this time Respondent discharged wood chips and rock (a "silt sock") into the Southern East Channel. CX-10 at 4 and photo 55.

Respondent did not have a permit for any of the activities described above. Complaint at ¶ 3.9.

2. Northeastern Area of the Site

In September or October of 2005, Respondent cleared, dredged, and graded approximately 400 linear feet of channel. This channel includes a previously existing stream diversion channel and newly created channel (identified in CX-02 as Northern East Channel). CX-09 at 2 and Att. 3, photos 18-23. These actions were conducted with an excavator. CX-06 at 2. Dredged materials were allowed to fall back into the stream and were sidecast along the eastern banks of the channel into approximately 0.4 acres of wetlands. CX-10 at 3, Att. 2 -

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Photos 29, 33, 36, Att. 4, and Att. 6-8, CX-13, CX-18. The dredging widened, deepened, and lengthened the Northern East Channel. CX-10 at 3.

At approximately the same time, Respondent created a new channel approximately 25 feet long in the northeastern corner of the Site. Sidecast materials from this excavation were placed in approximately .03 acres of wetlands. CX-10 at 3 and Att. 2, photo 23.

Between June 2006 and July 2008, Respondent also discharged rock into six unnamed tributaries of the Northern East Channel. CX10 at 3-4, Att. 2, photos 47-50, and Att. 11.

Between June 2006 and July 2008, Respondent discharged wood chips and rock (a silt sock) into an unnamed stream downstream of the Northern East Channel. CX-09 at Att. 3, photo 11; CX-10 at 2 and Att. 2, photos 17-19.

3. Northern Area of the Site

In September or October of 2005, Respondent used earthmoving equipment to create new channels. Respondent cleared, graded, excavated, and discharged excavated materials into approximately 0.16 acre of wetlands adjacent to an unnamed tributary of Little Rabbit Creek. CX-09 at 2, Att. 3, photos 8-10; CX-10 at 2, Att, 2, photos 11-14, Atts 4 and 6.

4. Central Area of the Site

In September or October of 2005, in the central area of the Site where the North Central Stream crosses from Tract 2 to Lot 3, Respondent used earthmoving equipment to clear, dredge, and grade approximately 200 linear feet of unnamed stream and discharge the dredged material into 0.06 acre of wetlands adjacent to the stream. CX-10 at 6, Att. 2, photos 105-107, Atts. 4-6, 13.

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Between October 2005 and August 2008, Respondent also excavated, placed two culverts at trail crossings, and discharged dredged spoil into two unnamed streams in the central area of the Site. CX-10 at 2, 5, Att. 12, Att. 2 - Photos 1-2, 4, 6-9, 92, 94.

Respondent did not have a Section 404 permit for the discharges of material into the waters on any portion of the Site. Complaint at ¶3.9. On October 21, 2005, the Corps issued a Notice of Violation ("NOV") to Respondent notifying him that the dredge and fill activities on the Site were in violation of Section 301 of the Clean Water Act, 33 U.S.C. § 1311. CX-004. The NOV directed the Respondent to cease further work on the Site until the matter was resolved. *Id.* at 2. At the Corps' request, EPA assumed enforcement responsibilities for the alleged violations.

Heather Dean, EPA's Environmental Scientist, visited the Site in June 2006 and July and August 2008 to make wetland determinations and measure the dimensions of the excavated stream channels. Ms. Dean also studied aerial photographs of the area. Ms. Dean's conclusions regarding the presence of wetlands and the extent of the unpermitted activity on Respondent's property are memorialized in her 2006 Inspection Report, CX-009, 2008 Inspection Report, CX-10, and Jurisdictional Analysis, CX-17. Ms. Dean's Jurisdictional Analysis demonstrates that the streams and channels on Respondent's property have continuous seasonal flow and are tributaries to Little Rabbit Creek, which flows into Potter Marsh. Potter Marsh is drained by Rabbit Creek into Cook Inlet, an embayment of the Pacific Ocean.

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V. ARGUMENT

There can be no genuine dispute that Respondent either conducted or directed the dredging and filling activities that occurred on his property. Dredging and filling activity in the streams and channels at the Site has been documented by inspection reports and ground photographs taken by the Corps in 2005 and by EPA in 2006 and 2008. All of the dredging and filling activities occurred during Respondent's ownership and control of the property, and Respondent has affirmatively admitted that he dredged certain stream channels and placed rock and wood chips into stream channels. Answer at 1-10; CX-005; CX-006. There is no question that Respondent's activities involved the point source discharge of dredged or fill material pollutants into areas subject to CWA jurisdiction. Furthermore, the CWA violations alleged in the complaint are ongoing because the sidecast materials Respondent discharged into waters of the United States remain in place.

A. There Is No Genuine Dispute of Material Fact that Respondent Is Liable for the CWA Violations Alleged in the Complaint

Respondent is liable under CWA Section 301(a) because he is (1) a person who (2) discharged (3) pollutants (4) from a point source (5) into navigable waters (6) without a permit issued under the CWA. *See, e,g., Avoyelles II*, 715 F.2d at 922; *Committee to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 308 (9th Cir. 1993); *Community Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 65 F.Supp.2d 1129, 1155 (E.D. Wash. 1999)). The following six subsections of this brief will address each of these CWA elements in turn.

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1. Respondent is a "person" under the CWA.

As noted above, CWA Section 502(5), 33 U.S.C. § 1362(5), defines "person" to include individuals. Thus, Respondent David D'Amato is a "person" under the CWA.

2. Respondent "discharged" materials.

A "discharge" under the CWA involves the physical introduction, or "addition," of materials to waters. *See* 33 U.S.C. § 1362(12) (defining "discharge of a pollutant" to mean "any *addition* of any pollutant"); *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 174-75 (D.C. Cir. 1982). Respondent's dredging of existing streams and channels, with the attendant fallback of dredged materials and placement of sidecast materials, as well as the placement of rocks and wood chips in streams and channels, resulted in the "addition" of materials.

3. The materials discharged by Respondent constituted "pollutants" consisting of "dredged material" and "fill material."

Soil, gravel, and related substances are pollutants under the CWA. *See, e.g., Slagle v. United States*, 809 F. Supp. 704, 707 (D. Minn. 1992) (soil, rock, and organic matter are CWA pollutants). The movement of soil from surrounding areas into waters of the United States, including wetlands, constitutes the discharge of a pollutant under CWA Section 502(12), 33 U.S.C. § 1362(12). *See, e.g., Rybachek*, 904 F.2d at 1285 (dirt and gravel from streambank placed into stream constitutes addition of pollutants); *Avoyelles II*, 715 F.2d at 924-25. Ditching and related filling activities also constitute the discharge of a pollutant under the CWA. *United States v. M.C.C. of Florida*, 772 F.2d 1501 (11th Cir. 1985), *vacated on other grounds*, 481 U.S. 1034 (1987), *readopted in relevant part on remand*, 848 F.2d 1133 (11th Cir. 1988) (displacing

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dredged spoil from the bottom of a waterway onto adjacent sea grass beds is addition of dredged material).

There can be no genuine dispute that Respondent added "pollutants" to the stream channels and the wetlands adjacent to the stream channels. Respondent does not deny that he dredged and graded the channels and streams or that he has placed fill material on portions of his property. In his response to the Corps' NOV, Respondent did not deny the activities alleged in the NOV, although he characterized the dredging and sidecasting of dredged material as "maintenance" work. CX-005. Respondent also admits placing rock and silt sock into tributaries. Answer at 4-7. Where this soil and any other fill material had the effect of replacing the Site's wetland areas with dry land, it constituted "fill material" within the meaning of 33 C.F.R. § 323.2(e)(1) and 40 C.F.R. § 232.2 (definition of "fill material").

4. Respondent's discharges were from a "point source."

As noted above, a point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, [or] container . . . from which pollutants are or may be discharged," 33 U.S.C. § 1362(14), and courts have uniformly held that earth-moving equipment such as the bulldozers, excavators, plowing equipment, backhoes, and related machinery are all point sources. *See Southview Farm*, 34 F.3d at 118; *United States v. Larkins*, 657 F. Supp. 76, 84-85 (W.D. Ky. 1987), *aff'd*, 852 F.2d 189 (6th Cir. 1988); *Avoyelles I*, 473 F. Supp. at 532.

Respondent has affirmatively admitted that an excavator was used in "ditch cleanout." CX-006. Because an excavator is a point source under the CWA, there is no dispute that

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Respondent used a point source to discharge dredged or fill material in the activities he conducted in the channels at the Site.

5. Respondent's discharges were to "navigable waters."

As described more fully in Part II ("Statutory and Regulatory Background") above, jurisdiction under the CWA extends to "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). In addition to the "territorial seas" and traditionally navigable waters, this jurisdiction extends to "relatively permanent" tributaries of traditionally navigable waters and to wetlands adjacent to such waters, and to waters or wetlands with a "significant nexus" to traditionally navigable waters. *In re: Smith Farm Enterprises, LLC,* CWA Appeal No. 08-02 (EAB, March 16, 2011) slip op. at 28-30.

The "navigable waters" at issue in this case is Little Rabbit Creek. EPA's Environmental Scientist, Heather Dean, has evaluated the flow of the tributaries to Little Rabbit Creek and determined that the impacted channels flowed with water during the seasons when water is not generally frozen. CX-17. Ms. Dean also affirmed that Little Rabbit Creek flows into Rabbit Creek and then Cook Inlet, a navigable water. CX-17 at 1. Ms. Dean performed wetland determinations in July and August of 2008 that show dredged material was sidecast into wetlands at northern, northeastern, southeastern, and central locations on the Site. CX10 at 2, 3, 6, Att. 4-8; CX-17 at 7-8.

The wetlands at issue in this case are adjacent to relatively permanent tributaries of Little Rabbit Creek, which flows into Rabbit Creek and Cook Inlet. As a result, these wetlands are "adjacent" to navigable waters and are "waters of the United States."

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6. Respondent did not obtain a CWA Section 404 permit authorizing his discharges.

Respondent did not apply for or obtain a Section 404 permit before commencing the activities described herein. The Corps notified Respondent on February 4, 2005, that some of his land may contain wetlands and that federal regulations require a Section 404 permit for construction or development in those areas. CX-03. Despite this notice from the Corps, Respondent commenced the dredging and excavation of numerous channels on his property in September and October 2005, without first obtaining a Section 404 permit from the Corps. *See* CX-04 at 1 ("We have reviewed our records and concluded that a DA (Department of the Army) permit was not obtained.").

In his Answer, Respondent asserts that he was not obligated to obtain a permit for the activities he undertook in 2005 because he was conducting "maintenance activities" on "grandfathered" "drainage ditches." Answer at 2. Section 404(f)(1) of the Clean Water Act, 33 U.S.C. § 1344(f)(1), does provide exemptions from the permitting requirements for certain activities, including maintenance of drainage ditches. Section 404(f)(2), however, contains a "recapture" provision, which withholds the exemption from the permit requirements for otherwise exempt activities under certain conditions:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section. 33 U.S.C. § 1344(f)(2)

A 404(f) exemption is an affirmative defense, and Respondent bears the burden of establishing both that he qualifies for one of the Section 404(f)(1) exemptions *and* that his actions are not recaptured by 404(f)(2). *In re Adams*, 13 E.A.D. 310, 321 (EAB

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2007). To date, Respondent has presented no evidence that his actions qualified for a 404(f)(1) exemption nor that his actions were not recaptured by 404(f)(2). In the absence of such evidence, Respondent's unsubstantiated assertion that his activities did not require a permit should not preclude an award of an accelerated decision on liability for Complainant.

In addition, several of the violations included in the Complaint and presented with evidence in Section IV.B. above concern activities that have no applicable Section 404(f)(1) exemptions. Examples include Respondent's construction of new ditches, lengthening of existing channels, and discharge of rock into multiple unnamed tributaries. Each of those activities, which were discharges of pollutants from a point source into waters of the United States, required a Section 404 permit issued by the Corps. Respondent did not obtain permits before commencing these activities.

B. There Is No Genuine Issue of Material Fact that Respondent's Violations Have Been Ongoing and Continuous Since at Least October 2005

Courts have held that each day that dredged or fill material remains in a wetland without authorization by a Section 404 permit constitutes an additional day of violation, subjecting the discharging to additional civil penalties. *Sasser v. Administrator*, 990 F.2d 127, 129 (4th Cir. 1993); *United States v. Ciampitti*, 669 F. Supp. 684, 700 (D.N.J. 1987); *United States v. Cumberland Farms,* 647 F. Supp. 1166, 1183-84 (D. Mass. 1986) (noting "[a] day of violation constitutes not only a day in which [defendant] was actually using a bulldozer or backhoe in the wetland area, but also every day [defendant] allowed illegal fill material to remain" in the wetland), *aff'd,* 826 F.2d 1151 (1st Cir. 1987), *cert. denied,* 484 U.S. 1061 (1988).

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Respondent's answer admits to dredging in stream channels and to the placement of rocks and silt socks into stream channels. Answer at 1-10. Photographs taken during Complainant's visit to the Site in 2008 show that sidecast materials in wetlands were still in place, as was rock placed in tributary channels. *See, e.g.,* CX-10 at 1-5, and Att. 2 Photos 23, 29, 33, 42, 66. As a result, there can be no genuine dispute that Respondent's CWA violations have been ongoing and continuous since at least October 2005.

VI. CONCLUSION

For all of the foregoing reasons, Complainant requests that the Presiding Officer find Respondent liable for the CWA violations at the Site that have been ongoing since at least October 2005.

Respectfully submitted this 4th day of August 2011.

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