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EPA--REGION 10

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the matter of:)
) DOCKET NO. CWA 10-2011-0086
)
)
)
ROBERT M. LOOMIS AND)
NANCY LOOMIS) **COMPLAINANT'S INITIAL**
) **PREHEARING EXCHANGE**
)
Haines, Alaska,)
)
)
Respondents.)

Pursuant to the Presiding Officer's Prehearing Order dated August 18, 2011 and Section 22.19 of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits" ("Rules of Practice"), the United States Environmental Protection Agency, Region 10 ("Complainant" or "EPA") hereby submits the following Initial Prehearing Exchange.

I. WITNESSES

Complainant respectfully submits the following list of expert and other witnesses that Complainant intends to call, together with a brief narrative summary of their expected testimony:

1. **Mark Jen** (fact and expert witness): Mr. Jen is an Environmental Scientist in the Aquatic Resources Unit, Office of Ecosystems, Tribal and Public Affairs, EPA Region

COMPLAINANT'S INITIAL
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U.S. ENVIRONMENTAL PROTECTION AGENCY
1200 SIXTH AVENUE, SUITE 900
SEATTLE, WASHINGTON 98101
(206) 553-1037

10, and is based in EPA's Alaska Operations Office in Anchorage, Alaska. Mr. Jen has over 19 years experience in the Clean Water Act programs. Mr. Jen is a credentialed EPA inspector. Mr. Jen earned a Bachelor of Science degree in Biology from the California State University, Los Angeles, and a Master of Environmental Management degree from the Yale School of Forestry and Environmental Studies. Mr. Jen's resume is attached hereto as CX-53. Mr. Jen visited the site on July 8, 2009. Mr. Jen is the Environmental Compliance Officer for this case and as such reviewed the case file in addition to producing an inspection report. Mr. Jen is expected to testify regarding the allegations in the complaint about both the section 404 violations and section 402 stormwater violations. Mr. Jen is expected to testify regarding his observations during his visit to the subject property ("Site"), his review of the evidence in this matter, the factual basis for EPA's determination that Respondents have violated the CWA, and EPA's enforcement response to the violations identified at the site. Mr. Jen is expected to testify regarding the extent of fill material placed in wetlands and the unnamed tributary at the Site, and provide his opinions regarding the deficiencies of the wetland delineation that Respondents' contractor performed. Mr. Jen is expected to testify about his observations of unstable soils and that such soils were visible in wetlands and/or the unnamed tributary at the Site, and about the general disturbance of the Site caused by the construction activities and the lack of erosion controls. Mr. Jen is also expected to testify about an aerial photography analysis EPA conducted to determine the expansion of the fill pad during Respondents' ownership and what such analysis indicates regarding filling over five year period preceding the filing of the complaint in this matter. Mr. Jen is

expected to testify regarding Respondents' good faith efforts to comply, harm caused by the violations, and the nature, circumstances and extent of the violations.

2. **Julie Congdon** (fact witness): Ms. Congdon is a Compliance Officer in the EPA Region 10 NPDES Compliance Unit. Ms. Congdon works in EPA's Regional Office in Seattle, Washington. Ms. Congdon has earned a Masters of Public Administration degree from the University of Washington, and a Bachelor of Science degree in Environmental Studies from the University of California, Santa Cruz. Ms. Congdon also is a Certified Erosion and Sediment Control Lead (CESCL). Ms. Congdon has reviewed the case file in this matter, particularly, the reports and documents related to the construction activity occurring on the Site. Ms. Congdon is expected to testify regarding her review of the evidence in this matter, the factual basis for EPA's determination that Respondents have violated the CWA, and EPA's enforcement response to the violations identified at the subject property. Ms. Congdon is expected to testify regarding the factual basis for what type of costs and expenses the Respondents' delayed and avoided through their noncompliance with the construction stormwater permit. Ms. Congdon is also expected to testify regarding Respondents' good faith efforts to comply, harm caused by the violations, and the nature, circumstances and extent of the violations.

3. **Daniel Marshalonis, Ph.D** (expert witness): Mr. Marshalonis is a Stormwater Technical Coordinator in the Grants and Planning Unit of the Office of Water and Watersheds in EPA Region 10's Seattle, Washington Office. Mr. Marshalonis earned his Doctorate of Philosophy degree in Ecology from the University of South Carolina, Columbia, a Master of Science degree from George Washington University, and a

Bachelor of Arts degree in Biology from the University of Virginia. His resume is attached hereto as CX-48. Prior to coming to work for EPA, Mr. Marshalonis was a consultant working on stormwater modeling, source control identification, toxicology, and risk assessment. Mr. Marshalonis has prepared a report and can testify regarding his opinions regarding the amount of rainfall that would result in a discharge of stormwater from the Site.

4. **Lloyd Oatis** (expert witness): Mr. Oatis is employed as a financial analyst for EPA Region 10. His office is located in Seattle, Washington. His resume is attached hereto as CX-47. Mr. Oatis is identified so that he may testify as an expert regarding the economic benefit enjoyed by Respondents as a result of their unauthorized discharges of pollutants to waters of the United States. Mr. Oatis may also testify to his analysis of any evidence Respondents submit concerning economic benefit or an inability to pay the proposed penalty. If Mr. Oatis prepares an expert report in this matter, his report will be submitted as soon as it is available and no later than fifteen days prior to any hearing held in this matter.
5. **Randal P. Vigil** (fact and expert witness): Mr. Vigil is a Project Manager for the U.S. Army Corps of Engineers, Alaska District. Mr. Vigil works in the Juneau Field Office, Juneau, Alaska. Mr. Vigil's resume is attached hereto as CX-54. Mr. Vigil visited the Site on two occasions. Mr. Vigil was the Corps' Project Manager who investigated the original complaints and notices received from the State of Alaska Department of Fish & Game, the National Marine Fisheries Service, and a neighbor concerning unauthorized fill at the Site. Mr. Vigil is expected to testify regarding the U.S. Army Corps of

Engineers' communications with Mr. and Mrs. Loomis regarding their violation of the Clean Water Act. Mr. Vigil is expected to testify about his process of obtaining information about the source and composition of the fill material and who was controlling and directing the activity. Mr. Vigil is expected to testify about the jurisdictional wetland determination he made regarding the filled areas at the Site and his opinions concerning both the wetland determination he made as well as the deficiencies of the wetland delineation conducted by Respondents' contractor. Specifically, Mr. Vigil is expected to testify regarding the type of wetlands and surface waters at the Site, the functions they provide for aquatic and terrestrial species in the area, and the environmental harm that can result from filling those kinds of waters of the United States. Mr. Vigil is expected to testify regarding the lack of any general permit applicable to the filling conducted by Respondents.

6. **Honor Carpenter** (fact witness): Ms. Carpenter is an Inspector and Enforcement Officer with the Alaska Department of Environmental Conservation, and based in the Juneau, Alaska Office. Ms. Carpenter visited Respondents' Site on one occasion to respond to a complaint, and prepared an inspection report. Ms. Carpenter is expected to testify regarding the general disturbance of the Site caused by construction activities, the photographs she took during the inspection, her observations that unstable soils had migrated to surrounding wetlands and the unnamed tributary on the Site. Ms. Carpenter is expected to testify that no erosion controls or other measures to stabilize the Site were in place the day of her inspection. Ms. Carpenter is expected to testify about the

information she provided to Respondents regarding stormwater permitting requirements during her visit.

7. **Kyle Moselle** (fact witness): Mr. Moselle is a Habitat Biologist with the Alaska Department of Fish & Game, and works in the Juneau, Alaska Office. Mr. Moselle earned a Bachelor of Science degree in Marine Biology from the University of Alaska Southeast, and has 60 graduate credits from Oregon State University in Marine Resource Management. Mr. Moselle visited the Site once in 2008 to investigate complaints that filling activity was occurring in an anadromous stream. Mr. Moselle is expected to testify regarding the general condition of the Site he observed during his visit. Mr. Moselle is expected to testify regarding the photographs he took at the Site, and discuss the State of Alaska's "Catalog of Waters Important for Spawning, Rearing or Migration of Anadromous Fishes" and where such cataloged streams exist on the Site. Mr. Moselle can testify concerning the potential impacts to such catalogued streams from activities conducted by Respondents. Mr. Moselle will potentially testify regarding the functions of the wetlands and streams on the Site to aquatic species, and the environmental harm that can result from filling those kinds of waters of the United States.
8. **Kate Kanouse** (fact witness): Ms. Kanouse is a Habitat Biologist with the Alaska Department of Fish & Game, and works in the Juneau, Alaska Office. Ms. Kanouse earned a Bachelor of Science degree from the University of Alaska, Anchorage. Ms. Kanouse visited the Site twice in 2009 and once in 2010 to investigate the extent of activities conducted in an anadromous fish stream and to evaluate the impacts of these activities. Ms. Kanouse is expected to testify regarding the photographs she took during

her visits, the activities occurring on the Site, and the general condition of the Site she observed during her visits. Ms. Kanouse is expected to testify regarding the State of Alaska's "Catalog of Waters Important for Spawning, Rearing or Migration of Anadromous Fishes" and where such cataloged streams exist on the Site. Ms. Kanouse is expected to testify concerning the impacts she observed to such catalogued streams from activities conducted by Respondents.

9. **Peter Speight** (fact witness): Mr. Speight owned and lived on land north of the Site during the years 2006 through 2010. Mr. Speight is expected to testify about his personal observations of the construction activity occurring at the Site from 2006 to 2009. Mr. Speight is expected to testify about his observations of large amount of material being brought to the site and the earthmoving equipment being used to spread the material on the Site by Mr. Loomis and others. Mr. Speight is expected to testify that on May 2, 2009, May 3, 2009 and June 18, 2009, he witnessed and photographed Mr. Loomis using earthmoving equipment and pushing fill material off the construction area into the surrounding vegetated property. Mr. Speight is expected to testify that during those specific days, Mr. Loomis was burning the vegetation to clear the land on which he expanded the fill pad. Mr. Speight can testify about his observations of the growth of the size of the fill pad and earthmoving activities as of 2006. Mr. Speight can testify about when waste asphalt was brought to the Site, his estimate that approximately 2,000 cubic yards was stockpiled on the Site until it was removed in late June of 2009.

10. **Christina Derr** (fact witness): Ms. Derr is a Habitat Biologist with the National Marine Fisheries Service, National Oceanographic and Atmospheric Administration, Department

of Commerce. Ms. Derr's office is in the Juneau, Alaska. Ms. Derr visited the Site along with Alaska Department Fish & Game personnel on October 9, 2008. Ms. Derr is expected to testify regarding her personal observations of the conditions existing on the Site that day. Ms. Derr also is expected to testify regarding the status of the wetlands and unnamed tributaries at the Site as Essential Fish Habitat under the Magnuson-Stevens Fishery Conservation and Management Act.

11. **Richard Chappell** (fact witness): Mr. Chappell is a Habitat Biologist with the Alaska Department of Fish & Game. Mr. Chappell works in the Haines, Alaska office. Mr. Chappell visited the Site twice in 2008. Mr. Chappell is expected to testify regarding his observations of the conditions of the Site during his visits and the photographs he took during his August 5, 2008 visit. Mr. Chappell is expected to testify about measurement of the boundaries of the fill pad he conducted on August 5, 2008 using Global Positioning System ("GPS") coordinates. Mr. Chappell is expected to testify about the areal map of the size of the fill pad he produced using the GPS coordinates that was attached to the Alaska Department of Fish & Game Memorandum dated October 7, 2008.

12. **Roger J. Schnabel** (fact witness): Mr. Schnabel is the President of Southeast Road Builders, Inc. ("SRI"), located in Haines, Alaska. Mr. Schnabel is expected to testify about the arrangement that his company had with the Respondents for bringing fill material from local construction jobs to Respondents' Site. Mr. Schnabel is expected to testify about the quantity of asphalt and other fill material that SRI brought to the Site between July and November 2006 and between May and July in 2008, and about SRI's later efforts to remove the asphalt in June 2009. Mr. Schnabel is expected to testify about

statements made by Mr. Loomis to him about his purpose for the fill material, which was to bring the pad's elevation up to the level of the Haines Highway. Mr. Schnabel is expected to testify about the conditions at the Site, specifically, that the older pad with existing buildings on it was over eight feet below the elevation of the Haines Highway. Mr. Schnabel is expected to testify that on two occasions, between 2006 and 2009, Loomis rented a loader and dozer from SRI to smooth out the material delivered and raise the pad in levels. Mr. Schnabel is expected to testify about the fees that SRI paid to Mr. Loomis for disposal of fill material, and that such material was composed of silt, rock, clay, overburden and waste asphalt. Mr. Schnabel is expected to testify that he observed other people or companies bringing material to the Site during the period of 2006 through 2009. Mr. Schnabel is expected to testify that at one point SRI had a number of truckloads of fill material which covered 40% of the established pad and which was then leveled by Mr. Loomis. Mr. Schnabel is expected to testify that his company dumped 13,110 cubic yards of fill material at the Site in 2006 and it stockpiled 950 cubic yards of asphalt material on the Site from 2008 until 2009. Mr. Schnabel can potentially testify that he warned Respondents that there were wetlands beyond the pad and that there was the potential that permits would be required if impacts went beyond the existing pad.

II. DOCUMENTS AND EXHIBITS

Copies of the following documents and exhibits Complainant may introduce into evidence accompany this Prehearing Exchange. The attached inspection reports contain copies of digital photographs taken during the site visits, and some photographs have markings added by the inspector. In response to the Prehearing Order, page 2-3, No. 1(b), the photographs

submitted are exact copies of the photographs, marked or unmarked, provided by the inspector and received by EPA. Digital replicates of the original, unmarked photographs may be produced upon request.

- CX-01 Memorandum and Attachments from Kyle Moselle, Alaska Department of Fish & Game (ADF&G) to Jackie Timothy, ADF&G (Oct. 7, 2008)
- CX-02 Notice of Violation from Jackie Timothy, ADF&G, to Robert Loomis (Dec. 30, 2008)
- CX-03 Letter from Robert D. Mecum, National Oceanic and Atmospheric Administration (NOAA), to Colonel Kevin J. Wilson, U.S. Army Corps of Engineers (USACE) (Feb. 23, 2008)
- CX-04 Handwritten Letter from Robert Loomis to Jackie Timothy and attached ADF&G General Waterway/Waterbody Application (Jan. 13, 2009)
- CX-05 Notice of Violation from Randal P. Vigil, USACE, to Robert Loomis (Feb 26, 2009)
- CX-06 Memorandum for Record by Randal P. Vigil, USACE (Mar. 05, 2009)
- CX-07 Handwritten Letter from Robert Loomis to USACE (Mar. 6, 2009)
- CX-08 Email and Attachments from Richard Chapell, ADF&G, to Jackie Timothy, ADF&G, Randal P. Vigil, USACE, Erin K. Allee, Alaska Department of Natural Resources (ADNR) (Apr. 29, 2009)
- CX-09 Letter from Randal P. Vigil, USACE, to Robert Loomis (May 1, 2009)
- CX-10 Memorandum for Record and Attachments by Randal P. Vigil, USACE (June 5, 2009)
- CX-11 Email exchange between Peter Speight to Kate Kanouse, ADF&G (June 17, 2009; June 18, 2009)
- CX-12 Email exchange between Randal P. Vigil, USACE, and Peter Speight (June 18, 2009; June 22, 2009)
- CX-13 Email and Attachments from Peter Speight to Randal P. Vigil, USACE (June 24, 2009)

- CX-14 Memorandum for Record by Randal P. Vigil, USACE (June 24, 2009)
- CX-15 Photographs from Peter Speight received by USACE (June 26, 2009)
- CX-16 Two emails between Peter Speight and Randal P. Vigil, USACE (July 1, 2009)
- CX-17 Cease and Desist Order from Michael Rabbe, USACE, to Robert Loomis (July 2, 2009)
- CX-18 Robert Loomis §404 Permit Application and Tolling Agreement received by USACE (July 6, 2009)
- CX-19 CWA §404 Wetland Inspection Report Form re: July 8, 2009 inspection prepared by Mark Jen, U.S. Environmental Protection Agency (EPA), for the Loomis Site (July 29, 2009)
- CX-20 Handwritten Letter and Attachments from Robert Loomis to Randal Vigil, USACE (July 8, 2009)
- CX-21 Email and Attachment from Kate Kanouse, ADF&G, to Randal P. Vigil, USACE (July 14, 2009)
- CX-22 Memorandum for Record by Randal P. Vigil, USACE, Wetland Determination Data Forms, and Attachments (July 17, 2009)
- CX-23 EPA Water Compliance Inspection Report and attached Alaska Department of Environmental Conservation (ADEC) NPDES Construction Stormwater Inspection Report re: May 12, 2009 inspection (July 27, 2009)
- CX-24 Letter from Randal P. Vigil, USACE, to Robert Loomis (Aug. 6, 2009)
- CX-25 Notice of Violation from Randal Vigil, USACE, to Roger Schnabel, Southeast Road Builders (Aug.7, 2009)
- CX-26 Letter and Attachments from Roger J. Schnabel, Southeast Road Builders, to Randal P. Vigil, USACE (Aug. 11, 2009)
- CX-27 Memorandum for Record by Randal P. Vigil, USACE (Aug. 12, 2009)
- CX-28 Letter from Robert D. Mecum, NOAA, to Colonel Kevin J. Wilson, USACE (Aug. 13, 2009)
- CX-29 Letter and Attachments from Robert Loomis to Mark Jen, EPA (Sept. 30, 2009)

- CX-30 Letter and Attachments from Roger J. Schnabel, Southeast Road Builders, Inc. to Michael Szerlog, EPA (Oct. 12, 2009)
- CX-31 CWA §308 Information Request from Edward J. Kowalski, EPA, and Richard B. Parkin, EPA, to Thomas Crandall, South Coast, Inc. (Nov. 5, 2009)
- CX-32 CWA §308 Information Request from Edward J. Kowalski, EPA, and Richard B. Parkin, EPA, to Roger J. Schnabel, Southeast Road Builders Inc. (Nov. 5, 2009)
- CX-33 CWA §308 Information Request from Edward J. Kowalski, EPA, and Richard B. Parkin, EPA, to Jon McGraw, Southeast Earthmovers, Inc. (Nov. 5, 2009)
- CX-34 CWA §308 Information Request from Edward J. Kowalski, EPA, and Richard B. Parkin, EPA, to Robert and Nancy Loomis (Nov. 5, 2009)
- CX-35 CWA §308 Information Request from Edward J. Kowalski, EPA, and Richard B. Parkin, EPA, to Les Katzeck, Klukwan, Inc. (Nov. 5, 2009)
- CX-36 CWA §308 Information Request from Edward J. Kowalski, EPA, and Richard B. Parkin, EPA, to Bill Ballard, Alaska Department of Transportation and Public Facilities (Nov. 5, 2009)
- CX-37 Response to CWA §308 Information Request from Robert Loomis to Mark Jen, EPA (Nov. 10, 2009)
- CX-38 Response to CWA §308 Information Request from Roger J. Schnabel, Southeast Road Builders, to Mark Jen, EPA (Nov. 24, 2009)
- CX-39 Response to CWA §308 Information Request on South Coast, Inc. from Ralph Strong, Klukwan, Inc., to Mark Jen, EPA (Dec. 17, 2009)
- CX-40 Response to CWA §308 Information Request from Bill Ballard, Alaska Dept. of Transportation and Public Facilities, to Mark Jen, EPA (Dec. 29, 2009)
- CX-41 Response to CWA §308 Information Request from Jon McGraw, Southeast Earthmovers Inc., to Mark Jen, EPA (Jan. 15, 2010)
- CX-42 EPA Notice of Violation from Edward J. Kowalski, EPA, to Robert and Nancy Loomis (Jan. 22, 2010)
- CX-43 Letter and attached Compliance Order from Richard B. Parkin, EPA, Edward J. Kowalski, EPA, to Robert Loomis and Nancy Loomis (Apr. 1, 2010)

- CX-44 Email from Randy Vigil to Mark Jen re: Kagel Environmental, LLC wetland delineation (July 23, 2010).
- CX-45 Memorandum and Attachments from Kate Kanouse, ADF&G, to Jackie Timothy, ADF&G (Apr. 26, 2010)
- CX-46 Affidavit of Robert M. Loomis (May 2010)
- CX-47 Resume of Lloyd B. Oatis
- CX-48 Resume of Daniel Marshalonis, Ph.D
- CX-49 Daniel Marshalonis, Ph.D.: *Stormwater Discharges Analyses for the Loomis Property* (Sept. 2011)
- CX-50 Restoration and Mitigation Plan for the Loomis Property, Haines, Alaska (July 19, 2010)
- CX-51 Kagel Environmental, LLC Aerial Photo Analysis Modified by Mark Jen, EPA, and Presented to Respondents at June 17, 2010 meeting in Anchorage, Alaska
- CX-52 Memo from Mark S. Jen, EPA, to Lori Houck Cora, EPA, re: Review of the *Evaluation of Fill; Tract G, Haines, Alaska (2010)*, Kagel Environmental, LLC (Jan. 6, 2011)
- CX-53 Resume of Mark Jen, EPA
- CX-54 Resume of Randal P. Vigil, USACE
- CX-55 Letter and attachment from Robert Loomis to Randal P. Vigil (Aug. 24, 2009)
- CX-56 Affidavit of Bernard J. Loomis (Dec. 4, 2009)
- CX-57 Handwritten Letter and Photo from Robert Loomis, Nancy Loomis to Randal P. Vigil (Aug. 11, 2009)
- CX-58 Stormwater BMP Cost Information

III. HEARING LOCATION AND ESTIMATED DURATION OF PRESENTATION OF COMPLAINANT'S DIRECT CASE

Complainant proposes Juneau, Alaska as the location for the hearing. There is good cause for holding the hearing in Juneau, Alaska. Half of Complainant's proposed witnesses live and work in Juneau, Alaska. Juneau, as compared to Haines, Alaska, is a metropolitan area and will have adequate facilities in which to conduct the hearing and to accommodate out-of-town participants. Respondents do not live in the Haines Borough.

Subject to the length of cross-examination of witnesses, Complainant estimates at this time that it will require two and a half days to present its direct case.

IV. FACTUAL INFORMATION RELEVANT TO ASSESSMENT OF A PENALTY

The Presiding Officer's August 18, 2011 Prehearing Order directs Complainant to specify its proposed penalty in a document to be filed within fifteen days of the filing of Respondent's prehearing information exchange and to include all factual information relevant to the assessment of a penalty in this Initial Prehearing Information Exchange. Accordingly, Complainant hereby presents the legal and factual framework Complainant will employ in proposing a specific penalty amount.

Section 309(g)(2)(B) of the CWA authorizes the assessment of an administrative civil penalty for a Section 301 violation of up to \$10,000 per day of each day the violation continues, with a maximum penalty of \$125,000. Pursuant to the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, the statutory maximum administrative penalty amounts are increased periodically to adjust for inflation. See 61 Fed. Reg. 69360 (December 31, 1996). Through periodic reviews mandated by the Debt Collection Improvement Act, EPA promulgated two Civil Monetary Penalty Inflation Adjustment Rules that affect the civil penalty calculation in this case: the Civil Monetary Penalty Inflation Adjustment Rules published at 69 Fed. Reg. 7121

(February 13, 2004), and 73 Fed. Reg. 75340 (December 11, 2008). In this case, EPA alleges that the violations began to occur in June 2006 and, with regard to unauthorized fill violations are continuing to the present. Therefore, for violations occurring June 2006 through January 12, 2009, an \$11,000 per day penalty may be considered and for the violations that occurred January 12, 2009 to the present, \$16,000 per day penalty amount may be considered with a maximum penalty of \$177,500. See 40 CFR § 19.2 and §19.4, Table 1.

Complainant will propose a specific penalty in this matter that is based on the applicable statutory penalty factors in section 309(g)(3) of the CWA. These factors are “[1] the nature, circumstances, extent, and gravity of the violation, or violations, and, with respect to the violator, [2] ability to pay, [3] any prior history of such violations, [4] the degree of culpability, [5] economic benefit or savings (if any) resulting from the violation, and [6] such other matters as justice may require.” 33 U.S.C. § 1319(g)(3). Factual information relevant to each of these six factors is discussed briefly below.¹

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

The nature, circumstances, extent, and gravity of the violation reflect the “seriousness” of the violation. In re *Urban Drainage and Flood Control District*, et al., Docket No. CWA-VIII-94-20-PII, Initial Decision (June 24, 1998)². The seriousness of a particular violation depends

¹ In re *Britton Construction*, 8 E.A.D. 261, 278 (EAB 1999) (“The statute requires EPA to take into account a number of factors in assessing penalties, such as the extent of the violations and the violator’s culpability, but it prescribes no precise formula by which these factors must be computed.”)

² In analyzing the degree of harm posed by a violation, it is not necessary to establish that the violation caused actual harm in order to justify imposition of a substantial civil penalty; the fact that the violation posed potential harm may be sufficient. *See United States v. Gulf Park Water Company, Inc.*, 14 F. Supp. 2d 854, 860 (S.D. Miss. 1998) (“The United States is not required to establish that environmental harm resulted from the defendants’ discharges or that the public health has been impacted due to the discharges, in order for this Court to find the discharges ‘serious’ Under the law, the United States does not have the burden of quantifying the harm caused to the environment by the defendants.”); *Urban Drainage*, 1998 EPA ALJ Lexis 42, at *65 (“A significant penalty may be imposed on the basis of potential environmental risk without necessarily demonstrating actual adverse effects”)(citing *United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338, 344 (E.D. Va. 1997), *aff’d*, 191 F. 3d 516 (4th Cir. 1999))

primarily on the actual or potential harm to the environment resulting from the violation, as well as the importance of the violated requirement to the regulatory scheme. *See id.* Complainant believes that the nature, circumstances, extent, and gravity of the violations in this case are significant and justify a substantial penalty. An unpermitted discharge into waters of the United States is a serious violation that significantly undermines the Clean Water Act's regulatory scheme. *See United States v. Pozsgai*, 999 F.2d 719, 725 (3rd Cir. 1993) (noting that “[u]npermitted discharge is the archetypal Clean Water Act violation, and subjects the discharger to strict liability”).

In this case, Respondents violated two separate permit requirements of the Clean Water Act by discharging dredged or fill material into wetlands without a Section 404 permit and by discharging stormwater from construction activity without a Section 402 permit. The evidence in this matter will establish that Respondents allowed excavation and construction companies to bring unwanted fill material to the Site for disposal. Respondents operated or directed the operation of certain heavy earthmoving equipment, such as a backhoe, tracked bulldozers and a wheeled bulldozer, which was used to discharge all or a portion of approximately 13,350 cubic yards of sand, silt, rock, clay, gravel, asphalt, overburden, soils and other material brought to the Site into 0.35 acres of jurisdictional wetlands and other waters of the United States without a permit. Additionally, the evidence in this matter will establish that Respondents cleared and burned vegetation, and graded the stockpiled fill material that disturbed greater than one acre without a permit. Furthermore, the complaint alleged that there were 97 days of unpermitted discharges of stormwater from the Site, and the expert report attached as CX-49 supports that allegation. These unauthorized activities filled wetlands, blocked and redirected a tributary

stream and discharged stormwater carrying sediment to the large wetland complex and stream surrounding the Site. The wetlands and stream on the Site are valuable habitat for anadromous fish and have a high water quality classification based on designated and actual uses. They provide rearing habitat for juvenile salmonids, cutthroat trout and Dolly Varden char, and general habitat for coho salmon. Respondents' unauthorized filling activity blocked a portion of and altered the natural flow of an anadromous fish stream, designated as Stream 115-32-10300-2014, which is documented on the Alaska Department of Fish & Game, "Catalog of Waters Important for Spawning, Rearing or Migration of Anadromous Fishes." The diversion of the braided channel of Stream 115-32-10300-2014 resulted in reduced available rearing fish habitat and restricted fish passage. The Chilkat River tributary wetland complex also provides important nutrients and habitat for a variety of birds and migratory waterfowl. Brown bears and moose utilize these wetlands for food and shelter. Wetlands on the Site have been impacted by Respondents' unauthorized activities such that important ecological functions have been diminished. These functions include flow regulation, base-flow maintenance and fish passage. Although these functions have not been eradicated in the area, they have been impaired by Respondent's unauthorized actions.

Respondent's failure to restore the impacted streams and wetlands, despite an order to do so from EPA in April 2010, has resulted in several of the impacts described above persisting over several years.

B. Respondent's Ability to Pay

Complainant has reviewed publicly available information on Respondents' financial conditions and found no information indicating that Respondents are unable to pay a substantial penalty. Respondents have not provided any information to Complainant regarding their

income, assets, debts, or liabilities. Should such information be included in Respondents' prehearing exchange, Complainant will consider it in proposing a specific penalty amount.

C. Prior History of Violations

Complainant is unaware of Respondents having any prior history of violations of the Act.

D. Degree of Culpability

In other CWA enforcement cases, presiding officers have noted "the respondent's willful disregard of the permit process or Clean Water Act requirements" as supporting the assessment of the maximum penalty allowed by statute. *See, e.g., In re Urban Drainage*, Initial Decision (June 24, 1998). In this case, Respondent's disregard of CWA requirements has manifested itself in their failure to obtain a discharge permit for numerous dredging and filling activities and a construction stormwater permit for the construction activities they were conducting for over four years, despite being warned by SRI that wetlands existed on his property and permits may be needed. Respondents' disregard of the stormwater requirements was further manifested when they were made aware of the permit requirement by Ms. Carpenter with the Alaska Department of Environmental Conservation in May 2009 but failed to apply for coverage for almost another year. On February 26, 2009, the U.S. Army Corps of Engineers issued Mr. Loomis a Notice of Violation regarding the unauthorized fill activities on site. However, after issuance of the Notice, Respondents continued to engage in unauthorized activities at the site, which resulted in the Corps issuing a Cease and Desist Order on July 2, 2009. Respondents' disregard of CWA requirements has further manifested itself in the continuing failure to restore the site as ordered by EPA in April 2010. Respondents' degree of culpability, as evidenced by all of these considerations, warrants a substantial civil penalty.

E. Economic Benefit

Respondents enjoyed an economic benefit as a result of the activities described above. This economic benefit includes the avoided costs associated with not obtaining and complying with the construction general permit for storm water discharges, which are: 1) failure to obtain an NPDES permit; 2) failure to develop an adequate Stormwater Pollution Prevention Plan (SWPPP); 3) failure to implement stormwater controls or BMPs; and 4) failure to inspect and maintain BMPs. The economic benefit to Respondents also includes avoided costs associated with not obtaining and complying with the requirements of a Section 404 permit and the Alaska Department of Environmental Conservation 401 Water Quality Certification, and the disposal fees Respondents' received from at least one local contractor for accepting material used as unauthorized fill. Information available to EPA regarding general costs of obtaining construction general permit coverage, installing and maintaining sediment best management practices, silt fencing and erosion controls is attached as CX-58. Evidence of disposal fees Respondents received for fill material is found at CX-26, CX-30, and CX-38.

F. Other Matters as Justice May Require

Deterrence is perhaps the most important rationale behind a program of recovering civil penalties for violations of environmental laws. Civil penalties both encourage the violator to comply with the law in the future and discourage others who are similarly situated from engaging in the same outlawed activities. In this case, Complainant believes that deterring others must be an important factor in the assessment of the penalty. It is vital that Respondents and other landowners intending to develop wetland properties in the Haines, Alaska area do so only after obtaining CWA permits authorizing discharge of dredged or fill material into waters of the United States.

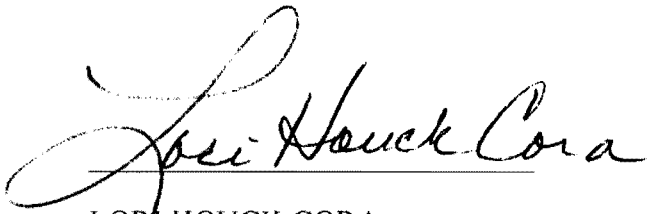
V. PAPERWORK REDUCTION ACT

The Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq.*, has no applicability to this proceeding. Complainant has not alleged a failure to comply with any “collection of information” within the meaning of 44 U.S.C. § 3512, and no Office of Management and Budget control numbers are required for any of the documents at issue in this matter.

VI. RESERVATIONS

Complainant reserves the right to call all witnesses named or called at hearing by Respondents and to introduce as evidence at hearing any exhibit identified in Respondents’ prehearing information exchange. Complainant further reserves the right to submit the names of additional witnesses and to submit additional exhibits prior to the hearing of this matter, upon timely notice to the Presiding Officer and to Respondents.

RESPECTFULLY SUBMITTED this 7th day of October, 2011.



LORI HOUCK CORA
Assistant Regional Counsel
Region 10

CERTIFICATE OF SERVICE

In the Matter of Robert M. Loomis and Nancy Loomis, Docket No. CWA-10-2011-0086, I hereby certify that a copy of COMPLAINANT'S INITIAL PREHEARING EXCHANGE, with copies of exhibits, was sent to the following persons in the manner specified on the date below:

Original and true and correct copy, by hand delivery:

Carol Kennedy
Regional Hearing Clerk
U.S. Environmental Protection Agency
1200 Sixth Avenue, Mail Stop ORC-158
Seattle, Washington 98101

A true and correct copy of each document, by EPA Pouch Mail:

The Honorable Barbara A. Gunning
EPA Office of Administrative Law Judges
Mail Code 1900L
1200 Pennsylvania Ave., NW
Washington, D.C. 20460-2001

A true and correct copy, by UPS Next Day Service:

Brian J. Stibitz, Esq.
Reeves Amodio LLC
500 L Street, Suite 300
Anchorage, Alaska 99501-1990

DATED this 7th day of October 2011

Signature: Sharon Eng
Print Name: Sharon Eng
EPA Region 10