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BEFORE THE  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

ROBERT M. LOOMIS AND  
NANCY M. LOOMIS  
Haines, Alaska

Respondents.

DOCKET NO. CWA-10-2011-0086

**RESPONDENTS' PRE-HEARING EXCHANGE**

Respondents Robert M. Loomis and Nancy M. Loomis, through counsel, pursuant to the Pre-hearing Order, hereby submit their pre-hearing exchange:

**I. Introduction**

Before addressing the claims made by the Environmental Protection Agency (EPA), Respondents want to note that they admit that they placed approximately .3 acres of fill on previously undisturbed land. Most of this fill was placed in 2005. Respondents have admitted as much since EPA first sent Respondents the request for information initiating EPA's enforcement action.<sup>1</sup> While Respondents deny such fill was placed on wetlands, and note that most of this fill was placed outside the Clean Water Act's (CWA) statute of limitations, the record will reflect that Respondents, without admitting liability, have offered to pay a penalty and donate land to a

<sup>1</sup> See, CX-37, at p.1.

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conservation easement to resolve EPA's claims since EPA first approached Respondents in 2009.<sup>2</sup> Respondents remain willing to settle EPA's claims along these terms.

This is not a dispute involving a recalcitrant violator, or a significant violation of the CWA. At this juncture, EPA is only accusing Respondents of filling .35 acres of wetlands for its CWA § 404 claims.<sup>3</sup> EPA began its enforcement action by making unfounded claims against Respondents, and has only retreated from its unreasonable allegations upon the filing of its Administrative Complaint. In its initial Compliance Order, EPA accused Respondents of: (a) filling 3.3 acres of wetlands; and (b) installing an unauthorized culvert and fill in a stream running through Respondents' property.<sup>4</sup> Tellingly, EPA has now abandoned these claims.<sup>5</sup>

Like its initial Compliance Order, EPA's CWA § 402 claims are based on an exaggerated and faulty premise – *i.e.* that Respondents have disturbed more than an acre of land in the last five (5) years. Had EPA limited its claims to those actions it could reasonably assert were committed by Respondents within the last five (5) years (disturbing .3 acres of land), and proposed a penalty commensurate with penalties uniformly assessed by EPA for such alleged violations, this matter would have been resolved without an administrative hearing.

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<sup>2</sup> See, CX-19, at p.5; *see also*, CX-22, at p.2. Respondents recognize that such communications could not be used by EPA to prove liability pursuant to 40 C.F.R. 22.19 and Federal Rule of Evidence 408. However, as CWA § 309(g)(3) allows the Administrative Judge to consider the "nature, circumstances, extent and gravity of the violation," Respondents' "degree of culpability" and "such other matters as justice may require," Respondents want the Administrative Law Judge to consider the fact they have admitted to filling .3 acres since the inception of the enforcement action, and have attempted to resolve this matter before it elevated to an administrative hearing.

<sup>3</sup> See, Administrative Complaint, at ¶3.5.

<sup>4</sup> See, CX-43, at ¶1.4.

<sup>5</sup> See, Administrative Complaint.

## II. Documents And Exhibits Respondents Will Introduce At The Hearing

Respondents designate all of the exhibits designated in EPA's Pre-hearing Exchange as the exhibits Respondents will introduce at the hearing. Additional documents and other evidence which Respondents will utilize are designated "RX-1" *et seq.*, and are attached to this pleading. Since EPA is in possession of all the documents it produced, Respondents will not present EPA with additional copies. The undersigned has discussed this arrangement with counsel for EPA, who does not object to this procedure.

## III. Factual Information Relevant To The Assessment of A Penalty

Respondents are the owners of property described as SW 1/4m, NE 1/4m, SW Section 28, T. 30 S., R. 59 E, Copper River Meridian, USGS Quad Map Skagway A-2; Latitude 59.241° N; Longitude 135.994° W; ASLS 88-21 Tracts F and G in Haines, Alaska (the "Property").<sup>6</sup> The Property is located at approximately mile 2.5 of the Haines Highway.<sup>7</sup>

Respondents did not acquire title to the Property until 1997, by virtue of a quiet title action against the State of Alaska, when the State approved a survey describing the metes and bounds description of the Property.<sup>8</sup>

As explained below, the placement of fill which EPA questions and which precipitated the Notice of Violation (NOV) against Respondents in fact is the result of a combination of: (a) natural causes; (b) placement of fill occurring before EPA and the CWA existed; (c) placement

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<sup>6</sup> See, CX 46, at ¶1.

<sup>7</sup> See, RX-1, Alaska State Land Survey 88-21.

<sup>8</sup> See, RX-2, Judgment Quieting Title, at ¶6 (ordering that title to the Site would not vest until the survey of the Site was completed); *see also*, RX-1 (showing that ASLS 88-21 was approved on September 30, 1997.)

of fill by others besides Respondents; and (d) limited placement of fill occurring before the five (5) year statute of limitations under the CWA began to run. The record will conclusively establish that Respondents placed no more than .3 acres of fill on previously undisturbed land, and that this limited fill occurred predominantly in 2005. Moreover, the evidence will conclusively establish that in the previous five (5) years, the “construction area” at the Property has been .3 acres at the most.

#### A. History of the Property

The Property lies at the base of a steep mountain slope, adjacent to the Haines Highway.<sup>9</sup> A stream originating high on the mountain slope used to flow directly off the mountain and down through the center of the Property, which is located on the flat river basin below the slope.<sup>10</sup> This stream deposited gravel and sediment into the Property naturally, creating an alluvial fan.<sup>11</sup>

In October 1949, a landslide descended from slope above the Property, causing additional acreage of land at the Property to be filled with natural sediment.<sup>12</sup> A photograph of the Property from October 1949 shows the landslide crossing the highway at the Property.<sup>13</sup>

An aerial photo from 1961 shows that a significant amount of fill already on the Property.<sup>14</sup> The photograph shows a stream running through the gravel pad.<sup>15</sup> Thus, the pad

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<sup>9</sup> See, CX-50, at p.1.

<sup>10</sup> See, CX-50, at p.1 and A-16; see also, CX-56, at p.1; see also, CX-37, at p.4.

<sup>11</sup> See, CX-50, at p.1. Alluvial fans are fan-shaped deposits of water-transported material (alluvium). They typically form at the base of topographic features where there is a marked break in slope.

<sup>12</sup> See, CX-30, Attachment 5.

<sup>13</sup> *Id.*

<sup>14</sup> See, CX-45, Attachment 3; see also, CX-37, at p.5; see also, CX-50, at A-16.

<sup>15</sup> *Id.*

existed in 1961, and the fill which existed in 1961 seems likely to have been moved to the Property naturally, through landslides and natural deposits from the stream. It also may be that third parties others than Respondents placed limited amounts of fill on the Property.

Respondent Robert Loomis' father, Bernard Loomis, purchased property in the area of the Property in 1964.<sup>16</sup> In the course of inspecting the area in 1964, Bernard Loomis noted that the Property had been filled naturally due to gravel deposits originating from the stream running through the Property.<sup>17</sup> Bernard Loomis also noted that it appeared that someone had been placing fill at the Property and spreading out that fill, such that the fill was already approximately 4-6 feet deep near the Haines Highway, tapering off to the south.<sup>18</sup> A September 22, 1966 photograph corroborates Bernard Loomis' testimony, and demonstrates that a significant amount of fill had been placed at the Property by this date.<sup>19</sup>

Respondent Robert Loomis witnessed the Alaska Department of Transportation & Public Facilities (DOT&PF) placing fill from its highway construction project onto the Property between 1965 and 1968.<sup>20</sup> Bernard Loomis also witnessed DOT&PF placing fill on the Property during this timeframe.<sup>21</sup> Bernard Loomis also witnessed the City of Haines placing fill at the Site in the late 1960's or early 1970's.<sup>22</sup> This was a logical place for these governmental entities to

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<sup>16</sup> See, CX-56, at p.1. The legal boundaries of the property claimed by Bernard Loomis were not determined until a quiet title action was resolved in favor of Respondents and a survey was performed. See, RX-1 and RX-2.

<sup>17</sup> See, CX-56, at p.1.

<sup>18</sup> *Id.*

<sup>19</sup> See, CX-22, at p.15.

<sup>20</sup> See, CX-46, at ¶5.

<sup>21</sup> See, CX-56, at p.1.

<sup>22</sup> *Id.*

place overburden or other fill materials from their construction projects, as large equipment could drive out onto the established pad at the Property and deposit loads on relatively solid ground.

The footprint of the pad on the Property was large enough by 1968 for Bernard Loomis to construct a shop at the Property about 150 feet from the Haines Highway.<sup>23</sup> It is worth noting that filling the pad in this timeframe required no authorization, as these actions predated the formation of the EPA (1970) and enactment of the CWA (circa 1972).

In the mid 1970's, DOT&PF diverted the stream previously running directly through the Property.<sup>24</sup> DOT&PF diverted the the stream so that it ran westerly along the northern boundary of the Haines Highway along a ditch created by DOT&PF for a distance of 250 linear feet.<sup>25</sup> DOT&PF constructed a culvert so that the stream crossed the Haines Highway to the west of the Property.<sup>26</sup> This stream would later be designated as Stream No. 115-32-10300-2014 by the State of Alaska.<sup>27</sup>

When Bernard Loomis began using the Property, he noted that there was already a culvert crossing Stream No. 115-32-10300-2014 to the south of the fill pad on the Property, which was used by local missionaries to cross the creek so they could access grasslands to the south of the Property for their cattle.<sup>28</sup>

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*; *see also*, CX-50, at p.1.

<sup>26</sup> *Id.*

<sup>27</sup> *See*, CX-1, at p.1.

<sup>28</sup> *See*, CX-56, at p.1.

In the sixties and seventies, Bernard Loomis constructed buildings on the Property. A 1978 aerial photo demonstrates that the pad existed at the Property, and at least three (3) buildings had been constructed on the pad.<sup>29</sup> Sometime before Respondents acquired title to the Property, Bernard Loomis replaced the culvert in Stream No. 115-32-10300-2014 with the 60 inch culvert which now exists at the Property.<sup>30</sup> (This is the same culvert which the Alaska Department of Fish & Game (ADF&G), U.S. Army Corps of Engineers (USACE) and EPA accused Respondents of placing on the Property in 2005 or later).

Entities other than Respondents also continued to use the Property as a depository for fill. In 1989 a landslide covered the highway near the Property, and the DOT&PF placed the debris covering the highway onto the Property.<sup>31</sup>

As noted above, Respondents acquired title to the Property in 1997, when the State approved Alaska State Land Survey 88-21.<sup>32</sup> A very limited amount of fill has been placed at the Property since Respondents acquired title to the Property.

In 1998, SouthCoast, Inc. placed on the Property fill that had been generated by its services to DOT&PF, to pave the highway adjacent to the Property.<sup>33</sup> This fill was placed on existing fill and built the existing pad upward, but did not increase the pad's footprint.<sup>34</sup> An aerial photo from 1998 demonstrates the footprint of the pad at the Property was nearly as large

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<sup>29</sup> See, CX-45, at Attachment 3.

<sup>30</sup> See, CX-56, at p.1.

<sup>31</sup> See, CX-29, at pp.1-2.

<sup>32</sup> See, RX-2, at ¶6; see also, RX-1.

<sup>33</sup> See, CX-29, at p.2.

<sup>34</sup> *Id.*

as its present dimensions, and shows that at least three (3) buildings had been constructed on the pad.<sup>35</sup>

In 2000, another contractor, Klukwan, Inc. placed fill originating from a project it undertook for the City of Haines on the pad at the Property.<sup>36</sup> This fill to the existing pad built the existing pad upward, but did not increase its footprint.<sup>37</sup>

An aerial photo from 2003 demonstrates the pad at the Property is nearly co-extensive with its current footprint.<sup>38</sup> This photo further shows that a trail had been cut in to the south of the property, over Stream No. 115-32-10300-2014, and it shows the 60 inch culvert Bernard Loomis used to replace the original culvert.<sup>39</sup> Thus, the photo conclusively establishes that the culvert and associated fill near Stream No. 115-32-10300-2014 existed in 2003, and corroborates Bernard Loomis' testimony that he replaced the culvert before deeding the Property to Respondents.

In 2004, Southeast Roadbuilders, Inc. (SRI) placed approximately 260 cubic yards of fill on the then-existing pad on the Property, originating from its work on the Piedad Road Highway near the Property.<sup>40</sup> SRI stated that the pad had already been established prior to 2004, and that it only placed fill on the existing pad.<sup>41</sup>

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<sup>35</sup> See, CX-45, at Attachment 3.

<sup>36</sup> See, CX-29, at p.2.

<sup>37</sup> *Id.*

<sup>38</sup> See, CX-45, at Attachment 3.

<sup>39</sup> *Id.*

<sup>40</sup> See, CX-26, at pp.1-2; *see also*, CX-30, at p.2.

<sup>41</sup> *Id.*



An aerial photograph from June 19, 2004 demonstrates that the pad at the Property is nearly co-extensive with its current footprint.<sup>42</sup> The photo further demonstrates that a trail had been cut in to the south of the Property, over Stream No. 115-32-10300-2014 and the 60 inch culvert Bernard Loomis used to replace the original culvert.<sup>43</sup>

In 2005, Respondent Robert Loomis did place a small amount of fill beyond the existing pad in areas he had determined were not wetlands.<sup>44</sup> Respondents' environmental consultants estimate that this area amounts to .15 acres on the west side of the pad, and .07 acres on the east side of the pad, for a total of .22 acres.<sup>45</sup>

SRI placed fill from the Haines School Project onto the existing pad in 2006.<sup>46</sup>

In 2007, Respondent Robert Loomis placed fill on Tract F of the Property in areas he determined were not wetlands in an area of approximately .021 acres.<sup>47</sup> Respondent placed this fill to abate flooding which frequently damaged the pad at the Site.<sup>48</sup>

Respondent SRI placed asphalt fill from the Union Street Road project in May through July of 2008.<sup>49</sup> This fill was placed on the existing pad, and not onto previously undisturbed land.<sup>50</sup> The location of these fill piles is depicted in a hand-made drawing by SRI.<sup>51</sup> The asphalt

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<sup>42</sup> See, CX-01, Attachments, at p.2.

<sup>43</sup> *Id.*

<sup>44</sup> See, CX-50, at p.5, A-7 and A-18.

<sup>45</sup> *Id.*

<sup>46</sup> See, CX-26, at p.1; *see also*, CX-30, at p.2.

<sup>47</sup> See, RX-3, Affidavit of Robert M. Loomis, at ¶6; *see also*, CX-50, at pp.11-12.

<sup>48</sup> *Id.*

<sup>49</sup> See, CX-26, at p.1; *see also*, CX-30, at p.2.

<sup>50</sup> *Id.*

<sup>51</sup> See, CX-26, at p.4.

fill piles are also visible in the pictures taken by Respondents' neighbor in 2009.<sup>52</sup> As explained by SRI, the fill could not have been placed off the existing pad due to the physical limitations of its equipment:

We felt comfortable that all the material received by us and leveled with our rented equipment would stay on the established pad, if for no other reason due to weight of our equipment and stability, *i.e.* if he went beyond the existing pad the dozer or loader would get stuck.<sup>53</sup>

In 2008 Southeast Earthmovers, Inc. placed approximately 240-320 cubic yards of fill onto the existing pad, and not onto previously undisturbed land.<sup>54</sup> This fill was placed on or near the fill previously placed by SRI in 2006.<sup>55</sup>

In February through May of 2009, Respondent Robert Loomis leveled the fill material placed by SRI in 2006 and Southeast Earthmovers, Inc. in 2008 (excluding the asphalt piles).<sup>56</sup> SRI removed the asphalt fill piles in May and June of 2009.<sup>57</sup> Respondent did not place the fill beyond the footprint of the existing pad.<sup>58</sup>

#### **B. Aerial Photography And Google Imagery Demonstrate The Property Was Filled Prior To June 16, 2006**

As noted above, historical documents, photographic evidence, testimony from Bernard Loomis, responses from contractors placing fill at the Site, and testimony from Respondent all demonstrate that the footprint of the existing pad at the Property (other than the .021 acres of

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<sup>52</sup> See, CX-13.

<sup>53</sup> See, CX-26, at p.3.

<sup>54</sup> See, CX-41, at p.1.

<sup>55</sup> See, RX-3, at ¶7.

<sup>56</sup> *Id.*, at ¶9.

<sup>57</sup> *Id.*, at ¶8; *see also*; CX-22, at p.1.

<sup>58</sup> See, RX-3, at ¶9.

“finger fill”) was created prior to June 16, 2006, which is when the statute of limitations for the CWA began to run.<sup>59</sup> Moreover, most of this fill existed prior to Respondents taking ownership of the Property.

Respondents can also establish that the pad on the Property was not expanded significantly since June 16, 2006 through the use of the imaging tools furnished by Google Earth Pro.<sup>60</sup> Respondents’ environmental consultants, Kagel Environmental, LLC (“Kagel Environmental”), used aerial photos of the pad from for the years 1978, 1998, 2003 and 2008, and downloaded the photos into the Photograph Overlay Tool and Ruler Tool for measuring polygons on Google Earth Pro.<sup>61</sup> This exercise demonstrates that the footprint of the pad did not change significantly from 2003 to 2008.<sup>62</sup> This evidence further corroborates Respondent Robert Loomis’ statement that he did not fill any more than .3 acres since 2005.

**C. The “Construction Site” Has Been Less Than 1 Acre At All Times Since June 16, 2006**

For a CWA § 402 claim to exist, EPA must prove that Respondents’ construction activities resulted in a total land disturbance of equal to or greater than one (1) acre.<sup>63</sup> Moreover,

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<sup>59</sup> EPA filed this administrative complaint on June 16, 2011. Because the CWA contains no statute of limitations, courts apply the “catch-all” statute of limitations set forth in 28 U.S.C. §2462. *See, Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1523 (9<sup>th</sup> Cir. 1987) *Public interest Research Group of New Jersey v. Powell Duffryn Terminal, Inc.*, 913 F.2d 64, 74-75 (3<sup>rd</sup> Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991). Section 2462 limits the time in which an action may be brought to five years from the date on which the claim accrues.

<sup>60</sup> *See*, CX-50.

<sup>61</sup> *See*, CX-50, at A-17.

<sup>62</sup> *Id.*

<sup>63</sup> *See*, 2008 NPDES Construction General Permit (CGP), at A-4 (defining a small construction activity as “clearing, grading, and excavating that will disturb equal to or greater than one (1) acre...”).

EPA must prove that such actions occurred within the five (5) year statute of limitations for the CWA.<sup>64</sup> In this section, Respondents will demonstrate at all times since June 16, 2006, the total land disturbance at the Property has been well below one (1) acre.

As noted above, the only contractors placing fill on the Property in the last five years were SRI and Southeast Earthmovers, Inc. SRI began placing fill onto the Property in May of 2004.<sup>65</sup> The fill was always placed on the existing pad.<sup>66</sup> Respondent Robert Loomis leveled out the fill using SRI's equipment, either at the end of the day or week, depending on how much fill was placed on the pad.<sup>67</sup>

In 2005, Respondent Robert Loomis did place a small amount of fill beyond the existing pad in areas he determined were not wetlands.<sup>68</sup> Kagel Environmental estimates that this area amounts to .15 acres on the west side of the pad, and .07 acres on the east side of the pad, for a total of .22 acres.<sup>69</sup> This work was completed in prior to June 16, 2006.<sup>70</sup>

The only work performed on the Property during the five (5) years prior to EPA's Administrative Complaint involved fill from two jobs contracted by SRI, and one Southeast Earthmovers, Inc. SRI placed additional fill from the Haines School Project onto the existing pad in 2006.<sup>71</sup> SRI placed asphalt fill from the Union Street Road project in May through July of

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<sup>64</sup> See, n.59.

<sup>65</sup> See, CX-26, at p.1; *see also*; CX-30, at p.2; *see also*, RX-3, at ¶3.

<sup>66</sup> *Id.*

<sup>67</sup> See, RX-3, at ¶3.

<sup>68</sup> See, RX-3, at ¶4; *see also*, CX-50, at p.5, A-7 and A-18.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> See, CX-26, at pp1-2; *see also*, CX-30, at p.2.

2008.<sup>72</sup> Southeast Earthmovers, Inc. placed 240-320 yards of fill in the same area.<sup>73</sup> The fill placed by SRI and Southeast Earthmovers, Inc. can be seen in photographs taken by Respondents' neighbor in May 2009.<sup>74</sup> The location of these fill piles is also depicted in a hand-made drawing by SRI.<sup>75</sup> The asphalt piles, which had a relatively small footprint, were removed by SRI, thus the existing pad below these asphalt was not disturbed by leveling or grading.<sup>76</sup> Respondents have nonetheless included the area covered by the asphalt in this calculation of area. The asphalt which was removed in 2009 sat on an area 30 feet by 30 feet, or .02 acres.<sup>77</sup>

Respondent Robert Loomis placed fill on Tract F of the Property in areas he determined were not wetlands to abate flooding which impacted the fill pad – the “finger fill.”<sup>78</sup> Respondents measured the area of finger fill with Kagel Environmental and determined the acreage of the “finger fill” was .021 acres.<sup>79</sup>

From February through May 2009, Respondent Robert Loomis leased a Caterpillar D-8 from SRI and finished leveling out the pad in Property with the fill placed by SRI and Southeast Earthmovers, Inc.<sup>80</sup> On the southeast end of the fill pad Respondent leveled an area totaling 9,250 square feet, or .21 acres.<sup>81</sup>

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<sup>72</sup> *Id.*

<sup>73</sup> *See*, CX-41, at p.1; *see also*, RX-3, at ¶7.

<sup>74</sup> *See*, CX-13.

<sup>75</sup> *See*, CX-26, at p.5.

<sup>76</sup> *Id.*, at p.2.

<sup>77</sup> *See*, RX-3, at ¶8.

<sup>78</sup> RX-3, at ¶6.

<sup>79</sup> *Id.*

<sup>80</sup> *See*, RX-3, at ¶9.

<sup>81</sup> *Id.*

Adding these figures, the total disturbed area since June 16, 2006 is .021 acres (finger fill placed in 2007) + .21 acres (SRI and Southeast Earthmovers, Inc. fill piles leveled in 2009) + .02 acres (SRI asphalt piles) = .251 acres. Thus, the total disturbed area is less than .3 acres.

Respondents did not build a road to perform the work listed above, thus did not disturb any areas other than the area where SRI and Southeast Earthmovers, Inc. placed the fill and where Respondent leveled that fill.<sup>82</sup> Bernard Loomis had built a road on the pad at the Property, thus there was an established road onto the pad from the highway which SRI and Southeast Earthmovers, Inc. used to stockpile the fill.<sup>83</sup> To dump the fill, the contractors turned around on the State's right-of-way at the Haines Highway, and then back down the road that has existed on the Property for decades.<sup>84</sup>

Respondents have demonstrated that they disturbed less than .3 acres since June of 2006. In addition, in their responses to EPA's requests for information, SRI estimated that the area impacted by their activities was .7 acres.<sup>85</sup> However, in its estimate, SRI included areas that were disturbed in 2004 as part of the Piedad Road project, which was completed in May 2004.<sup>86</sup> Thus, even if one includes areas disturbed since 2004, the total acreage of the "construction site" operated by Respondents is less than an acre.

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<sup>82</sup> *Id.*, at ¶10.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *See*, CX-26, at p.2.

<sup>86</sup> *Id.*

The significance of this evidence is that it demonstrates Respondents never undertook any operations on more than one (1) acre in the last 5 years, thereby vitiating any claim by EPA that Respondents violated CWA § 402 by failing to obtain a NPDES permit.

**D. EPA Has Prosecuted Respondents Based On Inaccurate Assumptions and Inadequate Investigation Of the Property**

As will be demonstrated in this section, EPA's enforcement action built a head of steam that was fueled by inaccurate assumptions and an inadequate investigation of the Property. The result was that EPA issued a Notice of Violation (NOV) and Compliance Order premised on meritless claims. The pad at the Property had been visible along the Haines Highway for decades. However, when EPA visited the Property in 2009, it incorrectly assumed it was a recent development. To make matters worse for Respondents, EPA unnecessarily maligned Respondent Robert M. Loomis, both within the agency and publicly.

This is not a case involving a recalcitrant violator or scofflaw. The record will reflect the following facts: (a) Respondent Robert Loomis thought he had a valid permit from the City of Haines to place fill material on his Property; (b) Respondent attempted to obtain State and federal permits each time a regulatory agency suggested he needed a permit for his activities; (c) to resolve the agencies' concerns, Respondent offered to pay money and donate land for a conservation easement when he was initially approached by EPA and USACE; (d) to address what he understood to be EPA's misunderstandings, Respondent hired environmental consultants to prepare a restoration and mitigation plan (at a considerable expense), and flew them to Alaska so that they could meet with EPA to explain and finalize that plan (at a considerable expense). At the last moment, EPA failed to attend the scheduled meeting at which EPA and Respondents'

consultants were to finalize and to discuss the implementation of a restoration and mitigation plan. The only reason this case has elevated to an administrative hearing is that EPA has been unreasonable. If the Administrative Law Judge disagrees, Respondents ask the Administrative Law Judge to find a *de minimis* violation of the CWA and impose a minimal penalty.

When addressing Respondents' culpability, it should be noted that Respondent Robert M. Loomis thought he was authorized to place the limited fill he has moved onto the Property since 2006.<sup>87</sup> In 2006, Respondents obtained a permit from the City of Haines to place fill on his Property, which was valid through 2008.<sup>88</sup>

Respondents first became aware that state and federal authorities were concerned about his Property in October of 2008, when ADF&G inspected Stream No. 115-32-10300-2014 and became aware that the 60 inch culvert had been placed across the stream.<sup>89</sup> In response to a letter to ADF&G, Respondent Robert Loomis explained that the culvert was "installed several years ago (possibly by his father)", and that Respondents had only placed "small amounts of fill" at the Property, but not any fill in Stream No. 115-32-10300-2014.<sup>90</sup>

While Respondents did not place the culvert across Stream No. 115-32-10300-2014, Respondent Robert Loomis nonetheless attempted to "do the right thing," and submitted a permit application to ADF&G, expecting that the pre-existing culvert would be authorized

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<sup>87</sup> See, CX-37, at p.4.

<sup>88</sup> *Id.*

<sup>89</sup> See, CX-1.

<sup>90</sup> See, CX-02.



retroactively.<sup>91</sup> In his permit application, Respondent Robert Loomis explained that he has “every intent on preserving the creek and not harming it in any way.”<sup>92</sup>

Despite the fact that the culvert across Stream No. 115-32-10300-2014 and adjacent fill existed long before Respondents acquired title to the Property, despite the fact that Respondent Robert Loomis specifically denied he installed the culvert and adjacent fill, and despite the fact that simple research of the public record and aerial photography would confirm these facts, the State of Alaska issued a NOV for the unpermitted culvert and fill in Stream No. 115-32-10300-2014, and forwarded that NOV to the U.S. National Oceanic and Atmospheric Administration (NOAA).<sup>93</sup>

Respondents’ interaction with the federal regulatory authorities snowballed from this point. However, the record demonstrates that no federal agency conducted adequate research to reach a determination that grounds for a NOV existed. Agencies accused Respondents of placing fill and a culvert which had been at the Property since before Respondents acquired title to the Property in 1997. The fact that Respondents are not presently facing claims related to the culvert and adjacent fill demonstrates that the USACE’s and EPA’s enforcement action was misguided from its inception.

In the first instance of “shooting first and asking questions later,” USACE issued a NOV accusing Robert Loomis of placing the 60 inch culvert and .057 acres of fill in or adjacent to

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<sup>91</sup> See, CX-04.

<sup>92</sup> *Id.*

<sup>93</sup> See, CX-03.

Stream No. 115-32-10300-2014.<sup>94</sup> Seemingly, a federal agency should establish who owned the property and committed the acts giving rise to the NOV before issuing a NOV. However, USACE's NOV asked the very question which USACE should have resolved before it issued a NOV: "Did you own the property when the work was performed?"<sup>95</sup>

While Respondents did not place the culvert across Stream No. 115-32-10300-2014, Respondent Robert Loomis again attempted to "do the right thing," and submitted what he thought was a letter to initiate a permit application to USACE for the culvert.<sup>96</sup> On May 1, 2009, USACE indicated to Respondent Robert Loomis that it would accept an application for an After-the-fact (ATF) permit.<sup>97</sup>

However, on June 1, 2009, USACE conducted an inspection of the Property.<sup>98</sup> Without verifying how long the pad, culvert and associated fill had existed at the Property, USACE assumed Respondents placed the fill and concluded in an internal memorandum that "the total impacted area in waters of the United States, including wetlands by unauthorized work us approximately 3.3 acres."<sup>99</sup>

At that time, Randy Vigil of USACE was corresponding with one of Respondents' neighbors – Peter Speight – perhaps to obtain "evidence" USACE could use against Respondents.<sup>100</sup> Mr. Speight, whose claims are not credible in light of aerial photography,

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<sup>94</sup> See, CX-05.

<sup>95</sup> *Id.*

<sup>96</sup> See, CX-07.

<sup>97</sup> See, CX-09.

<sup>98</sup> See, CX-10.

<sup>99</sup> *Id.*

<sup>100</sup> See, CX-12.

claimed that the pad “looks like it has doubled in size from our vantage point.”<sup>101</sup> Mr. Speight supplied USACE with photographs of the Property taken in 2009 (which establish that Respondents were simply placing fill on the existing pad, and that the construction site was less than one (1) acre.)<sup>102</sup> With no basis, Mr. Speight falsely reported to USACE that “Loomis plans to drain the wetlands...let the wetland grasses die...and fill it in...”<sup>103</sup>

On June 30, 2009, Respondent Robert Loomis again attempted to do the right thing, and complied with USACE’s request that he submit an ATF permit.<sup>104</sup> Loomis again noted in his application that the “fill has been placed on land continuing from 1963 by the State of Alaska & others.”<sup>105</sup>

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<sup>101</sup> *Id.*

<sup>102</sup> *See*, CX-13.

<sup>103</sup> *See*, CX-16, at p.1. In an e-mail forwarded to USACE by ADF&G, MR. Speight claimed that “Loomis has a history of being a very nasty person...so be aware...we are at risk.” CX-11. While his claims are completely unsubstantiated, Mr. Speight clearly has a grudge against Respondents which colored his allegations. USACE and EPA accepted Mr. Speight at his word, and Mr. Speight’s allegations formed the basis of USACE’s NOV and EPA’s NOV and Compliance Order. For instance, Mr. Speight estimated in 2009 that “[o]ver the last 3 years, I would estimate 40 to 50 thousand cu. yards of fill have been trucked in by SE Roadbuilders.” CX-12. Mr. Speight claimed in 2009 that “for the last 3 to 4 years”... “[i]t looks like [the fill] has doubled in size.” *Id.* As demonstrated above, these allegations are simply false. However, USACE and EPA accepted Mr. Speight at his word, and never fact-checked his claims. Thus USACE and EPA accused Respondents of placing 44,000 cubic yards of fill at the site and filling 2.7 acres. *See*, CX-17, CX-28 and CX-43. EPA seemingly does not deem Mr. Speight’s allegations meritorious at this juncture, as EPA is only accusing Respondents of placing .35 acres of new fill. However, EPA should have verified Mr. Speight’s allegations before using them as the basis of their allegations against Respondents.

<sup>104</sup> *See*, CX-18.

<sup>105</sup> *Id.* It should be noted that Mr. Loomis attempted to cooperate with the regulating authorities at all times, and even signed a tolling agreement in favor of USACE. *Id.* As the tolling agreement was never signed by USACE, it did not operate to toll the claims against Respondents.

Again, USACE did not investigate the history of the Property to determine who had actually created the pad and placed the culvert. Rather, on July 2, 2009, USACE issued a Cease and Desist Order to Respondent Robert Loomis.<sup>106</sup> The Cease and Desist Order wrongfully accused Mr. Loomis of “discharging approximately 44,000 cubic yards of silt, sand, gravel, rock and asphalt into approximately 2.7 acres of wetlands” and “the installation of one (1) approximately 20-foot long by 60 inch diameter culvert and road crossing...”<sup>107</sup> (EPA has recognized that these allegations lack merit, as these claims are not included in EPA’s administrative complaint.)<sup>108</sup>

USACE then involved EPA in its investigation. After his inspection of the Property, Mark Jen of EPA prepared an inspection report which contained inaccurate conclusions which led to unfounded allegations by EPA as well. Mr. Jen noted:

Based on a June 3, 2009 site visit, the Corps estimates the site to contain approximately 44,000 cubic yards of silt, sand, gravel, rock and asphalt in approximately 2.7 acres of waters of the United States. The unauthorized fill area comprises an area of approximately 340-ft W x 350-ft L x 10-ft H. This is the work that the Corps believes was done within the past 5 years.<sup>109</sup>

This conclusion demonstrates that EPA and USACE were particularly sloppy in investigating the Property and making allegations against Respondents. Each successive document, prepared by agency after agency, relied on what had been written before, with no investigation into the

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<sup>106</sup> See, CX-17.

<sup>107</sup> *Id.*

<sup>108</sup> See, Administrative Complaint.

<sup>109</sup> CX-19, at p.2.

veracity of the allegations. Misstatements were repeated and took on a life of their own. No matter how many times these misstatement were repeated, they were never accurate.

Moreover, all this time USACE and EPA were in possession of the initial 2008 memorandum prepared by ADF&G and forwarded to NOAA, which contained a “[b]ackground image from Quickbird satellite June 19, 2004.”<sup>110</sup> This satellite photo clearly shows that the pad existed in its current dimensions more than five (5) years prior to the July 18, 2009 inspection.<sup>111</sup>

Mr. Jen concluded that the “access gravel driveway comes to a culvert (60 inch diameter x 20-ft L) which Mr. Loomis installed over a catalogued unnamed anadromous fish stream (No. 115-32-10300-2014).”<sup>112</sup> Mr. Loomis had already told ADF&G that his father had installed the culvert,<sup>113</sup> and mere review of the record would have absolved Mr. Jen of this misconception. (EPA no longer deems this allegation accurate, as it is does not make claims for the unauthorized culvert in its administrative complaint.)<sup>114</sup>

At this juncture, it must be noted that even as USACE and EPA made unfounded accusations against him, Respondent Robert Loomis attempted to do the right thing to resolve the allegations before an enforcement action ensued. Mr. Jen’s inspection log notes:

Mr. Loomis asked the Corps if it was possible to pay an in-lieu fee for the retention of fill material. Based on a conversation with the ADFG, he would be willing to set aside a conservation easement on his property to retain the fill material and culvert.<sup>115</sup>

<sup>110</sup> See, CX -1, Attachments, at p.2.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> CX-02, at p.1.

<sup>114</sup> See, Administrative Complaint.

<sup>115</sup> See, CX-19, at p.5.

Mr. Vigil's internal memorandum likewise noted that "Mr. Loomis indicated that he would be willing to remove some fill along the toe-of-slope of his fill that is not level with the bulk of his development, and he expressed a willingness to conserve a portion of his property, as measures to resolve this violation."<sup>116</sup> Since his initial interactions with USACE and EPA, Respondent Robert Loomis has expressed his willingness to pay money and to remove a limited amount of fill, and donate property to resolve claims he did not even commit. However, USACE and EPA did not take him up on that offer, and instead continued to make unfounded allegations against Respondent.

EPA's initial inspection notes reflect that Mr. Jen not only made wrongful and inaccurate allegations against Respondents, but also compounded Respondents' problems with the regulatory agencies by making unwarranted personal attacks against Respondent Robert Loomis. In his inspection report Mr. Jen stated that "Mr. Loomis was not truthful to me when he stated that he did not know about the storm water construction requirements."<sup>117</sup> Mr. Jen reached this conclusion because ADEC had conducted a storm water inspection of the Property, and by Mr. Jen's logic "[t]herefore, Mr. Loomis is aware of the NPDES storm water requirements prior to my inspection."<sup>118</sup> At this point it should be noted that Respondent Robert Loomis is a truck driver, not a construction worker, not an attorney and not a storm water regulator. It does not follow that because Mr. Loomis met with an ADEC representative, he understood the requirements of the NPDES Construction General Permit (CGP). To wit, on July 8, 2009, shortly

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<sup>116</sup> See, CX-22, at p.2.

<sup>117</sup> See, CX-19, at p.5.

<sup>118</sup> *Id.*

after meeting with Mr. Jen and Mr. Vigil, Mr. Loomis sent a letter to Mr. Vigil of USACE containing a stabilization plan for the Property.<sup>119</sup> He requested that USACE “add it to my permit submittal dated 6/30/09.”<sup>120</sup> Granted, if a NPDES permit was required for the Property, Respondent had submitted a stabilization plan to the wrong agency. However, this action demonstrates that Respondent was again attempting to do the right thing, but did not understand the different jurisdictional and regulatory authority of ADEC, USACE and EPA. Thus, Mr. Jen’s claim that Respondent was “not truthful” was an unwarranted personal attack on Mr. Loomis.

On August 6, 2009, USACE sent Mr. Loomis a letter denying Respondents’ ATF permit application.<sup>121</sup> In this letter, USACE made the following allegations:

In our February 26, 2009 Notice of Violation we informed you that no further unauthorized work was to be performed in areas subject to Corps of Engineers (Corps) jurisdiction. Based upon information available to us and our site-visits conducted on June 3 and July 8, 2009, we have determined that you disregarded our instruction and continued to conduct work at the site.<sup>122</sup>

However, USACE’s February 26, 2009 NOV addressed only the alleged unauthorized “discharge of approximately 460 cubic yards of rock and soil material, including the installation of (1) approximately 20-foot culvert, into approximately 0.057 acres of wetlands and an unnamed stream occurring on the property.”<sup>123</sup> The NOV did not accuse Respondents of creating the pad at the Property, nor did it direct Respondents to do no further work on the existing pad.

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<sup>119</sup> See, CX-20, at p.1.

<sup>120</sup> *Id.*, at p.2.

<sup>121</sup> See, CX-24.

<sup>122</sup> *Id.*

<sup>123</sup> See, CX-05.

In May and June 2009, the only work performed by Respondents at the Property was to remove the asphalt piles from the southwest corner of the existing pad, and to level off the fill left by SRI in 2006 and Southeast Earthmovers, Inc in 2008.<sup>124</sup> Respondents did not perform any work in the vicinity of the culvert or Stream No. 115-32-10300-2014, thus did not disregard the USACE's February 26, 2009 NOV.

On November 5, 2009, EPA sent Respondents a request for information which continued to allege that Respondents had constructed the entirety of the pad at the Property and placed the culvert and crossing at Stream No. 115-32-10300-2014.<sup>125</sup> In response, Respondents again stated that "[a]ll fill that was placed in Tract G was placed on fill that was already in place, except for .3 tenths of an acre."<sup>126</sup>

EPA issued a Notice of Violation for storm water issues (*i.e.* only CWA § 402 claims) on January 22, 2010.<sup>127</sup> As noted in the EPA's *Expedited Settlement Offer Program for Storm Water (Construction)*, dated August 21, 2003, EPA normally grants alleged first-time offenders accused of filling less than five acres the opportunity to partake in the EPA's ESO program. Respondents were not granted this opportunity to resolve the EPA's CWA § 402 claims.

On April 1, 2010, EPA issued an Administrative Compliance Order.<sup>128</sup> In the Compliance Order, EPA persisted in making claims it knew or should have known lacked merit, notwithstanding the fact that Respondents (and others, including SRI) had submitted sufficient

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<sup>124</sup> See, RX-3.

<sup>125</sup> See, CX-34, at p.1.

<sup>126</sup> See, CX-37, at p.1.

<sup>127</sup> See, CX-42.

<sup>128</sup> See, CX-43.



documentary and photographic evidence to establish the pad and culvert had existed at the Property long before 2005. Despite the fact that EPA possessed definitive evidence to the contrary, the Compliance Order asserted that “in or about July, 2005... Respondents ... place[d] (a) approximately 44,000 cubic yards of fill material onto approximately 2.7 acres of wetlands to expand an existing foundation pad; and (b) approximately 65 cubic yards of fill material into 0.6 acres of wetlands and a State of Alaska catalogued unnamed anadromous tributary (115-32-10300-2014) to construct a 20 foot long x 60 inch wide diameter culvert and road crossing. The total impacts to wetlands and waters of the United States are 3.3 acres.”<sup>129</sup> (EPA no longer deems these allegations accurate, as EPA is now only accusing Respondents of placing .35 acres of fill at the Property in its administrative complaint.)<sup>130</sup>

Not only did EPA issue a Compliance Order predicated on false assumptions, it took the unnecessary step of maligning Respondent Robert Loomis publicly in his local newspaper. In statements to the Chilkat Valley News, Mr. Jen of EPA stated that Mr. Loomis “was a repeat violator, in a sense.”<sup>131</sup> This statement was false and defamatory, as EPA’s pre-hearing disclosures admit that “Complainant is unaware of Respondents having any prior history of violations of the Act.”<sup>132</sup> Mr. Jen further accused Mr. Loomis of a “knowing, flagrant and very aggressive” violation.<sup>133</sup> Mr. Jen made these allegations at the same time EPA had issued an overly aggressive Compliance Order, which alleged violations that EPA has since conceded were

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<sup>129</sup> *Id.*, at ¶1.4.

<sup>130</sup> *See*, Administrative Complaint, at ¶3.5.

<sup>131</sup> *See*, RX-4, “EPA Lowers Boom on Site of Highway Fill,” Chilkat Valley News, Volume XL, Number 15, April 15, 2010, at p.1.

<sup>132</sup> EPA’s Pre-hearing Exchange, at p.18.

<sup>133</sup> *See*, RX-4, at p.1.

not founded. EPA's basis for issuing the Compliance Order was as follows: "We're hoping this sends a message to the community that ...if you have wetlands or fisheries value on your land, make sure you have the proper permits..."<sup>134</sup>

Even though EPA issued a Compliance Order making unfounded allegations that Respondents placed the culvert and impacted 3.3 acres of wetlands, Respondents nonetheless again attempted to do the right thing, and hired an environmental consultant to address the allegations contained in the Compliance Order and to prepare a restoration and mitigation plan.<sup>135</sup> Thereafter, EPA demanded a meeting on September 2, 2010 to meet with Respondents' consultants at the Property to review the plan to restore the Site.<sup>136</sup> To satisfy EPA's requests, Respondents paid for their consultants to fly from Idaho to Haines, Alaska.<sup>137</sup> However, EPA failed to attend the September 2, 2010 meeting EPA itself had demanded, citing a cancelled flight.<sup>138</sup> However, Respondents confirmed with Wings of Alaska that its regularly scheduled flights from Juneau to Haines (excluding Flight 033) did in fact operate on September 2, 2010.<sup>139</sup> Moreover, Respondents' consultant called Mr. Jen on September 2, 2010 and offered to stay in Haines another day to facilitate the meeting.<sup>140</sup> Mr. Jen still would not agree to travel to Haines

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<sup>134</sup> *Id.*, at p.3.

<sup>135</sup> *See*, CX-50.

<sup>136</sup> *See*, RX-5, September 2, 2010 e-mail from Kagel Environmental. Respondents are producing this document merely to demonstrate unreasonableness of EPA's actions, and do not waive any privileges which may be applicable to the communications in this document.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> RX-6, November 9, 2010 Letter from Wings of Alaska.

<sup>140</sup> RX-5.

to attend a meeting which EPA demanded because Mr. Vigil of USACE could not attend.<sup>141</sup> EPA's failure to attend the meeting caused Mr. Loomis to waste a substantial sum of money, which should be taken into account when EPA considers Respondents' penalty. Moreover, through no fault of Respondents, they were never able to conduct a meeting to address their restoration and mitigation plan.

EPA thereafter filed the Administrative Complaint initiating this matter.

#### IV. Potential Witnesses

##### A. Fact Witnesses

##### 1. Robert M. Loomis

Mr. Loomis will testify that he has filled no more than .3 acres of previously undisturbed land, most of which occurred in 2005. Mr. Loomis will testify that the pad and culvert existed at the Property prior to his acquiring ownership. Mr. Loomis will testify that he attempted to obtain the permits suggested by ADF&G, USACE and EPA, even though he now understands he was not legally obligated to do so. Mr. Loomis will testify that he did not disturb more than one acre of land in the last five years. Mr. Loomis will also attest to the factual allegations made in this pre-hearing exchange.

##### 2. Marvin Smith

Mr. Smith is a former DOT&PF employee. Respondents expect that Mr. Smith would testify that DOT&PF used the Property to place fill beginning in the 1960's. Respondents believe Mr. Smith resides in the Haines, Alaska area.

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<sup>141</sup> *Id.*

**3. Roger Schnabel**

Mr. Schnabel is the president of SRI. Respondents expect that Mr. Schnabel will testify that he is a lifelong resident of Haines, Alaska, and that a gravel pad has existed at the Property for as long as he can remember. Respondents expect Mr. Schnabel will testify that since 2004, SRI has only placed fill on the existing pad. Respondents expect Mr. Schnabel will testify that the construction area since 2004 has always been smaller than one (1) acre. Respondents believe Mr. Schnabel resides in the Haines, Alaska area.

**4. Spencer Overturf**

Mr. Overturf was an employee of Southeast Earthmovers, Inc. in 2008. Respondents expect that Mr. Overturf will testify that when Southeast Earthmovers, Inc. placed fill on the Property in 2008, it only placed fill on the existing pad and did not expand the footprint of the pad. Respondents believe Mr. Overturf resides in the Haines, Alaska area.

**5. Jon McGraw**

Mr. McGraw is the president of Southeast Earthmovers, Inc. Respondents expect that Mr. McGraw will testify that when Southeast Earthmovers, Inc. placed fill on the Property in 2008, it only placed fill on the existing pad and did not expand the footprint of the land. Respondents believe Mr. McGraw resides in the Haines, Alaska area.

**6. Sean Barclay**

Mr. Barclay was an employee of Southeast Earthmovers, Inc. in 2008. Respondents expect that Mr. Barclay will testify that when Southeast Earthmovers, Inc. placed fill on the

Property in 2008, it only placed fill on the existing pad and did not expand the footprint of the land. Respondents believe Mr. Barclay resides in the Haines, Alaska area.

**7. Bernard Loomis**

Mr. Loomis will testify that when he purchased the Property in the early 1960's, a pad already existed there. Mr. Loomis will testify that he witnessed DOT&PF, the City of Haines, and others placing fill on the Property in the 1960's and 1970's. Mr. Loomis will testify that the DOT&PF diverted Stream No. 115-32-10300-2014 in the mid-1970's. Mr. Loomis will testify that a culvert existed across Stream No. 115-32-10300-2014 when he purchased the Property, and that he replaced the culvert before deeding the Property to Respondents.

**8. Terry Sele**

Mr. Sele is employed by SRI, and lives in Haines, Alaska. Respondents expect Mr. Sele will testify that the pad has existed on the Property for decades, and that SRI only placed fill on the existing pad.

**9. Stanley Jones**

Mr. Jones is the owner of a golf course in the vicinity of the Property. Respondents expect Mr. Jones will testify that, due to the process of glacial rebound, the land in the vicinity of the Property has morphed from wetlands to uplands.

**10. Robert Venerables**

Mr. Venerables was the Haines City Manager at the times relevant to this dispute. Respondents expect that Mr. Venerables would testify that the City of Haines permitted Respondents to place fill on the Property, as the placement of fill on top of existing fill requires

no permits from EPA and USACE. Respondents believe Mr. Venerables resides in the Haines, Alaska area.

**11. Ralph Strong**

Mr. Strong President of Klukwan, Inc., a company located in the vicinity of Haines, Alaska. Respondents expect that Mr. Strong would testify that he drives by the Property nearly every day, and has done so for decades. Respondents further expect Mr. Strong will testify that the fill pad at the Prperty has been there for decades.

**12. Lynn Bennett**

**Dick Boyce  
Dave Olrude  
George Meacock  
Don and Karen Hess  
David Lamb  
Smitty Katzeek  
Shane Horton  
Dean Smith  
Scott Smith  
John Wiggins  
Scott Hanson  
Don Turner Sr.  
Don Turner Jr.  
Jim Schnabel  
John Schnabel  
Lawrence Willard  
Don & Joe Hotch  
Larry Katzeek  
John Katzeek  
Les Katzeek  
Ron Martin  
Phillip Wilde  
Dave Peters  
Dick Flagel  
Kenny Waldow  
Ira Henry  
Don Phillips**

Bill Thomas  
Cliff Thomas  
Tim Hannon  
Jesse Loomis  
Mark Loomis  
John Floreski  
Emily Zimbrick  
Lando Peters  
Ran Heppler

These potential witnesses are residents of the City of Haines or the surrounding areas, who can attest to their observations of the Property, and that the pad on the Property has existed for decades prior to EPA's enforcement action against Respondents.

**B. Expert Witnesses**

**1. Ray Kagel<sup>142</sup> and Susan Kagel<sup>143</sup>  
Kagel Environmental, LLC**

The Kagels will testify as to the facts contained in their expert report, the *Restoration and Mitigation Plan for the Loomis Property, Haines Alaska*.<sup>144</sup> The Kagels will testify that the undisturbed land Respondents did fill was not wetlands. The Kagels will also testify that no sediments were discharged into the receiving waters adjacent to the Property.<sup>145</sup>

**2. Alan Busacca, Ph.D.<sup>146</sup>**

Dr. Busacca is a soils scientist who will testify that the Respondents did not fill wetlands.

**3. Don Reichmuth, Ph.D.<sup>147</sup>**

<sup>142</sup> See, RX-7, Ray Kagel's CV.

<sup>143</sup> See, RX-8, Susan Kagel's CV.

<sup>144</sup> See, CX-50.

<sup>145</sup> See, RX-9, Alpenglow Environmental Solutions, LLC Stormwater Analysis.

<sup>146</sup> See, RX-10, Dr. Busacca's CV.

Dr. Reichmuth is a hydrogeomorphologist who will testify that the Respondents did not fill wetlands.

**4. Robert H. Fuhrman<sup>148</sup>**

Mr. Fuhrman will provide expert testimony regarding EPA's proposed civil penalty in this case, including the amount of economic benefit that Respondents allegedly obtained due to alleged noncompliance.

**V. Statement Regarding Place And Time Of Hearing**

Respondents respectfully request that the hearing take place in Haines, Alaska. Respondents' defense of EPA's claims will rely heavily upon the testimony of residents of Haines Alaska, who will testify that the pad at the Property has been there for decades, and has been overtly visible because of its location immediately adjacent to the Haines Highway. Many of these witnesses are senior citizens, and travelling to a different forum would be unduly burdensome. Moreover, holding the hearing in Haines would enable the Administrative Law Judge to physically inspect the Property to verify that the Property does not in fact contain wetlands. As such, any hearing should be held sometime during the months of May through September. Respondents anticipate they will require five (5) days to present their case.

**VI. Statement Regarding Affirmative Defenses**

Respondents' affirmative defense number one states that "EPA's claims are barred by the applicable statute of limitations." Respondents' affirmative defense number two states that "EPA's claims are barred by the doctrines of waiver and laches." These are valid defenses

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<sup>147</sup> See, RX-11, Dr. Reichmuth's CV.

<sup>148</sup> See, RX-12, Mr. Fuhrman's CV.



because, as explained in Section III (above), the fill placed at Respondents' Property has been there for decades, and the majority of the .3 acres of fill placed by Respondents was placed before CWA's statute of limitations began to run on June 16, 2006. Moreover, while EPA complains that Respondents have failed to remove the unauthorized fill and restore the Property, as ordered in EPA's Compliance Order,<sup>149</sup> the record will reflect that the only reason this has not occurred is EPA's delay in considering Respondents' restoration and mitigation plan, and EPA's failure to attend the meeting at which the parties intended to discuss the implementation of a restoration and mitigation plan.

Affirmative defense number three states that "Respondents were not required to obtain a permit for the operations on their property." As explained in Section II (above), Respondents did not commit the acts of which EPA complains. At most, Respondents filled .3 acres of fill, which was not placed in wetlands, thus no permit was required for the purposes of avoiding a CWA § 404 claim. Moreover, at all times since June 16, 2006, the construction area of the Site has been less than one (1) acre, thus no permit was required for the purposes of avoiding a CWA § 402 claim.

Affirmative defense number four states that "[t]o the extent Respondents' operations required a permit, they were covered by one or more nationwide permits." One applicable Nationwide Permit (NWP) is No. 3 – "Maintenance." This NWP allows for the repair, rehabilitation or replacement of any previously authorized, currently serviceable structure or fill authorized by 33 C.F.R. 330.3, which in turn permits the fill of wetlands occurring prior to the

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<sup>149</sup> See, Administrative Complaint, at ¶3.7.

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phase-in date of July 25, 1975. As explained above, the fill placed at the Property was permitted pursuant to 33 C.F.R. 330.3. NWP No. 3 also allows for the placement of fill necessary to conduct maintenance activities. As such, Respondents' activities constitute maintenance of pre-existing, permitted fill.

NWP No. 45 allows for the repair of uplands caused by storms, floods or other discrete events. As explained above, landslides and flooding are common occurrences in the vicinity of the Site. As such, Respondents activities to repair the existing pad at the Property in response to flooding may qualify for NWP No. 45.

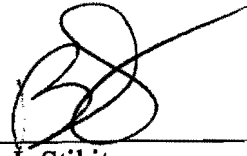
Respondents reserve the right to supplement this disclosure upon researching other applicable NWPs.

REEVES AMODIO LLC  
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Dated this 3<sup>rd</sup> day of November, 2011.

REEVES AMODIO LLC  
Attorneys for Respondents

By:



\_\_\_\_\_  
Brian J. Stibitz  
ABA 0106043

CERTIFICATE OF SERVICE

I certify that the foregoing Respondents Pre-Hearing Exchange was filed and sent to the following persons, in the manner specified, on the date below:

Original and one copy:

Regional Hearing Clerk  
U. S. Environmental Protection Agency, Region 10  
1200 Sixth Avenue, Suite 900, Mail Stop ORC-158  
Seattle, Washington 98101

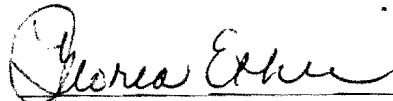
One copy to:

The Honorable Barbara A. Gunning  
EPA Office of Administrative Judges  
1099 14<sup>th</sup> Street, NW, Suite 350, Franklin Court  
Washington, DC 2005

A true and correct copy by U.S. Mail to:

Lori Cora, Assistant Regional Counsel  
EPA, Region 10  
1200 6<sup>th</sup> Ave. Suite 900  
Seattle, Washington 98101

Dated: 11.03.2011

  
Gloria H. Ethier

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