BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of: CHILL TRANSPORTATION LLC, Toppenish, Washington Respondent.	DOCKET NO. CWA-10-2023-0020

MEMORANDUM IN SUPPORT OF COMPLAINANT'S MOTION FOR DEFAULT

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I. INTRODUCTION

This memorandum is filed in support of a motion for default and request for the assessment of civil penalties brought by the Director of the Enforcement and Compliance Assurance Division of the United States Environmental Protection Agency, Region 10 ("Complainant"), in accordance with 40 C.F.R. § 22.17 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits ("Consolidated Rules"), 40 C.F.R. Part 22.

This case concerns Chill Transportation LLC's ("Respondent") ownership and operation of a semi-truck and refrigerated trailer ("Truck") that on August 8, 2021, crashed and overturned on Washington State Route 97 within the external boundaries of the Yakama Indian Reservation, causing the discharge and release of motor/lube oil, or petroleum, from the Truck's motor and lubricating systems, and diesel fuel, or fuel oil, from the trailer's refrigeration fuel tank and from the Truck's saddle fuel tanks into Toppenish Creek, onto the adjoining shoreline of Toppenish Creek, and to wetlands adjacent to Toppenish Creek. According to an infraction report developed by the Washington State Police regarding the incident ("Infraction Report"), the Truck was operating on a dry, flat, and straight portion of Washington State Route 97 when the Truck left the roadway to the right shoulder, striking the guardrail. *See* Exhibit 1. The Truck then went through the guardrail and landed within Toppenish Creek, onto the adjoining shoreline of Toppenish Creek, and into wetlands adjacent to Toppenish Creek. *Id.* The Infraction Report indicated that there was no observed or recorded road evidence indicating the Truck braked, performed any evasive maneuvers, or attempted to correct the Truck's trajectory back to the correct right side highway lane and stated had the Truck remained within the guidelines of the

right highway lane, the crash would have been avoided. *Id.* As a result, the Washington State Police issued the driver of the Truck a traffic violation citation for improper lane usage. *Id.*

The resulting oil spill required representatives from the Confederated Tribes and Bands of the Yakama Nation ("Tribe"), Washington State Department of Ecology ("Ecology"), and U.S. Environmental Protection Agency ("EPA") to respond to the scene to attempt to minimize impacts to the environment. The crash and ensuing spill occurred within the Toppenish National Wildlife Refuge, one of eight refuges in the Mid-Columbia River National Wildlife Refuge Complex and part of the Pacific Flyway for migratory waterfowl.[1] Additionally, Toppenish Creek and its adjacent wetlands support Middle Columbia steelhead,[2] a species listed as threatened under the Endangered Species Act,[3] as well as lamprey, a species of significant cultural importance to the Confederated Tribes and Bands of the Yakama Nation.[4]

Upon review of the Ecology Incident Detail Report prepared by Ecology's On-Scene Coordinator ("Ecology Report"), EPA's Pollution Report prepared by EPA's On-Scene Coordinator ("EPA POLREP"), the Infraction Report, written correspondence from the Tribe's Spill Response Co-Lead, photographs from the responders, and other communication with the responders, Complainant determined that Respondent violated Section 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3), by discharging oil into navigable waters and adjoining shorelines in

[1] *See* Toppenish National Wildlife Refuge, U.S. Fish and Wildlife Service, https://www.fws.gov/refuge/toppenish/ (accessed Aug. 31, 2023).
[2] *See* Abundance and distribution of steelhead (Oncorhynchus mykiss) in Toppenish Creek, Yakama Confederated Tribes, https://dashboard.yakamafish-star.net/sites/default/files/2018-06/2013_Project_199603501YRWPandTopME_Sthd_july_june.pdf?current=/DataQuery/Reports.
[3] *See* 71 FR 833 (Jan. 5, 2006) Endangered and Threatened Species: Final Listing Determinations for 10 Distinct Population Segments of West Coast Steelhead: https://www.federalregister.gov/documents/2006/01/05/06-47/endangered-and-threatened-species-final-listing-determinations-for-10-distinct-population-segments.
[4] *See* Pacific Lamprey Project, Yakama Nation Fisheries, https://yakamafish-nsn.gov/restore/projects/pacific-lamprey-project (accessed Aug. 31, 2023).

harmful quantities, and violated Section 301(a) of the CWA, 33 U.S.C. § 1311(a), by adding pollutants to navigable waters from a point source without a permit. *See* Exhibits 2, 3, 4, and 5.

II. PREFILING COMMUNICATIONS

Complainant's first communication with Respondent occurred via phone call on March 11, 2022, which was followed by a series of email messages attempting to provide context and answer questions about Complainant's forthcoming formal initiation of an administrative enforcement action. *See* Exhibit 6. On March 15, 2022, Complainant provided notice of its intent to file an administrative complaint against Respondent for violations of the CWA and the opportunity to discuss the violations before an administrative complaint would be filed. *See* Exhibit 7. After a couple of brief phone conversations and an email exchange, Complainant and Respondent held a conference call on April 7, 2022. *See* Exhibit 8. During that call, Complainant described the violations and the evidence supporting the violations, explained the administrative enforcement process, and offered Respondent the opportunity to respond or provide additional information for Complainant's consideration. Both parties agreed to provide relevant records for the other party's review, and on April 12, 2022, Complainant sent Respondent an email message containing copies of the Infraction Report and EPA POLREP along with a request for records referenced during the April 7, 2022 call. *See* Exhibit 9. Following Complainant's April 12, 2022 email message, almost one month passed without any communication from Respondent before an email on May 11, 2022 indicated that Respondent had been experiencing personal issues that prevented them from responding. *See* Exhibit 10. Eventually parties participated in a conference call on May 24, 2022, prior to which Complainant provided Respondent with a list of records that are typically required for EPA to initiate an analysis of a Respondent's ability-to-pay a penalty. *See* Exhibit 11. During that May 24, 2022

call, Respondent committed to providing Complainant with all of the records necessary for Complainant to initiate an analysis of Respondent's ability-to-pay a penalty within 2 weeks. *See* Exhibit 12. After failing to receive that submission by that date, Complainant sent multiple email messages to Respondent attempting to schedule a phone call to further discuss the lacking information, eventually receiving confirmation from Respondent to participate in a call on June 21, 2022. *See* Exhibit 13. After Respondent failed to appear for that call without any further communication, the parties rescheduled a call for June 23, 2022. *Id.* During that call, Respondent committed to providing Complainant, no later than June 24, 2022, with all the records necessary for Complainant to initiate an analysis of Respondent's ability-to-pay a penalty. *See* Exhibit 14. After failing to receive a submission by that date, Complainant followed up in emails and phone calls, eventually receiving a new commitment from Respondent that it would be submitting the necessary records by July 1, 2022. *Id.* Once again, Respondent failed to comply with that self-identified deadline, resulting in yet another extension to July 15, 2022 following multiple emails and phone calls. *See* Exhibit 15. Respondent provided a limited subset of necessary records by that date and informed Complainant of its intent to provide the remaining records that day. *Id.* After further follow-up from Complainant, Respondent provided additional limited records on July 21, 2022. *See* Exhibit 16. Thereafter, Complainant contacted Respondent numerous times over the course of several months seeking further record submissions with Respondent only providing brief email updates indicating personal issues[5] were causing delays in submission. *See* Exhibit 17.

[5] Out of an abundance of caution and to protect the privacy of the individual corresponding with Complainant on behalf of Respondent, Complainant has redacted certain portions of exhibits that contain references to medical conditions. Should the Presiding Officer or Respondent wish for Complainant to provide the unredacted versions of those records, Complainant can provide them in a form that protects Respondent's privacy interests.

Following nine (9) months of discussions between Complainant and Respondent regarding Complainant's enforcement action where Respondent repeatedly failed to provide Complainant with the records necessary for Complainant to initiate an analysis of Respondent's ability-to-pay a penalty, on December 14, 2022, Complainant sent a letter to Respondent informing Respondent of Complainant's intent to proceed with the filing of an administrative complaint in February 2023 unless Respondent submitted complete and adequate financial documentation to fully support its inability-to-pay claim by January 31, 2023. *See* Exhibit 18. Respondent provided some limited records in response to Complainant's letter but failed to provide all requested and necessary records. *See* Exhibits 19 and 20.

III. PROCEDURAL HISTORY

On February 14, 2023, Complainant filed an administrative complaint ("Complaint") against Respondent under CWA Section 311(b)(6), 33 U.S.C. § 1321(b)(6), and CWA Section 309(g)(1), 33 U.S.C. § 1319(g)(1). *See* Dkt. 1; Exhibit 21. Complainant copied the same email address used by Respondent throughout the pre-filing communications on that emailed filing as required by the standing order signed by the EPA Region 10 Regional Judicial Officers authorizing the use of email as an Electronic Filing System to file documents with the Regional Hearing Clerk ("Standing Order"). *See* Exhibit 21. On February 15, 2023, the EPA Region 10 Regional Hearing Clerk confirmed receipt of the filing and attached the filed copy of the Complaint in an email message to the parties, including Respondent. *See* Exhibit 22. Additionally, in accordance with CWA Section 309(g)(1), 33 U.S.C. § 1319(g)(1), and 40 C.F.R. § 22.38(b), Complainant provided Ecology with notice of the Complaint and an opportunity to consult. *See* Exhibit 23. Given the spill's location within the external boundaries of the Yakama

Indian Reservation, Complainant also provided notice of the Complaint to the Tribe. *See* Exhibit 24.

The Complaint charged Respondent with violations of CWA Section 311(b)(3), 33 U.S.C. § 1321(b)(3), by discharging oil into navigable waters and adjoining shorelines in harmful quantities, and violations of CWA Section 301(a), 33 U.S.C. § 1311(a), by adding pollutants to navigable waters from a point source without a permit. *See* Complaint ¶¶ 3.12 to 3.28. Complainant did not set forth a specific penalty demand, reserving its right to seek the maximum authorized penalty. *See* 40 C.F.R. § 22.14(a)(4)(ii); Complaint § 4. The Complaint notified Respondent of its right to request a hearing, Complaint ¶ 5.1, and of its obligation to file an answer to the Complaint with the Regional Hearing Clerk within 30 days after service of the Complaint. 40 C.F.R. § 22.15(a), Complaint ¶ 5.2 and § 6.

On June 15, 2023, Respondent was served with a true and correct copy of the Complaint, Part 22 Rules, and Standing Order via personal service. *See* Dkt. 2 and 3; Exhibits 25 and 26. As of the date of this filing, Respondent has not served an answer on Complainant. To the best of Complainant's knowledge, throughout the prefiling period and after filing of the Complaint, Respondent has not been represented by counsel and has engaged in the proceedings *pro se*.

IV. GOVERNING LAW

CWA Sections 311(b)(6)(A) and (b)(6)(B), 33 U.S.C. § 1321(b)(6)(A) and (B), provide for the assessment of administrative penalties for violations of CWA Section 311(b)(3), 33 U.S.C. § 1321(b)(3). CWA Section 311(b)(11), 33 U.S.C. § 1321(b)(11), states that civil penalties shall not be assessed under both CWA Section 311(b), 33 U.S.C. § 1321(b), and CWA Section 309, 33 U.S.C. § 1319, for the same discharge. As a result, should civil penalties not be assessed for this action under CWA Section 311(b)(6)(A) and (b)(6)(B) of the CWA, 33 U.S.C.

§ 1321(b)(6)(A) and (B), Complainant proposes the assessment of a civil penalty against Respondent for violations of CWA Section 301 of the CWA, 33 U.S.C. § 1311, pursuant to CWA Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B). Pursuant to the Consolidated Rules, because Respondent has not filed an answer to the Complaint, the Regional Judicial Officer is the Presiding Officer granted the authority to adjudicate all issues, including ruling on motions, to issue an initial decision, and to determine the amount of penalty. 40 C.F.R. § 22.4(b) and (c); § 22.27(a) and (b).

Motions for default are governed by section 22.17 of the Consolidated Rules which provides that:

> "A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint…Default by Respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations."

40 C.F.R. § 22.17(a). A motion for default may seek resolution of all or part of the proceeding, and a movant seeking the assessment of a penalty must specify the penalty and state the legal and factual grounds for the requested relief. *Id.* at § 22.17(b).

The Consolidated Rules state that the Presiding Officer "*shall* issue a default order against the defaulting party as to any or all parts of the proceeding *unless* the record shows *good cause* why a default order should not be issued. *Id*. § 22.17(c) (emphasis added). A good cause determination "has traditionally applied a 'totality of circumstances' test to determine whether a default order should be…entered…" *JHNY, Inc. A/K/A Quin-T Technical Papers and Boards*, 12 E.A.D. 372, 384 (EAB 2005). Several factors are considered under the "totality of circumstances" test, including the alleged procedural omission, namely whether a procedural requirement was indeed violated, whether a particular procedural violation is grounds for a default order, and whether there was a valid excuse or justification for not complying with the

procedural requirement. *Id.* If the Presiding Officer issues a default order that resolves all outstanding issues and claims in the proceeding, the order shall constitute the initial decision and "[t]he relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." 40 C.F.R. § 22.17(c).

Adjudication is the preferred method of resolving administrative enforcement actions and default judgments are generally disfavored. *JHNY, Inc.* 12 E.A.D. 384; *In re Thermal Reduction Co.* 4 E.A.D. 128, 131 (EAB 1992). Nevertheless, the Environmental Appeals Board has not hesitated to affirm default orders in cases where the circumstances clearly indicate that such a remedy is warranted. *See e.g., In re Rocking BS Ranch, Inc.*, CWA Appeal No. 09-04 at 13 (EAB Apr. 21, 2010) (affirming default order where respondent lacked an excuse for failing to file a timely answer); *In re Four Strong Builders, Inc.*, 12 E.A.D. 762, 772 (EAB 2006); *In re B&L Plating, Inc*., 11 E.A.D. 183, 191-192 (EAB 2003); *In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 320-21 (EAB 1999); *In re Rybond, Inc.*, 6 E.A.D. 614, 625-38 (EAB 1996).

In administrative proceedings under the Consolidated Rules, "[a]ny party may appear in person or by…other representative" and such representative "must conform to the standards of conduct and ethics required of practitioners before the courts of the United States. 40 C.F.R. § 22.10. As a general matter, *pro se* respondents are afforded more lenient standards of compliance and competence. *See Rybond*, 6 E.A.D. at 627. However, the fact that a party is not represented by counsel is not an excuse for failure to file an answer to the complaint. *Id.* at 626-27 ("[A] litigant who elects to appear *pro se* takes upon himself or herself the responsibility for complying with the procedural rules and may suffer adverse consequences in the event of noncompliance"); *Jiffy Builders*, 8 E.A.D. at 320 ([P]arties who choose to proceed *pro se*, while

held to a more lenient standard than parties represented by members of bar, are not excused from compliance with the Consolidated Rules of Practice."); *In re House Analysis & Associates & Fred Powell*, 4 E.A.D. 501, 505 (EAB 1993) ("[t]he fact that [respondent], who is apparently not a lawyer, chooses to represent himself….does not excuse respondent from the responsibility of complying with the applicable rules of procedure."). Accordingly, a respondent's lack of representation does not excuse failure to comply with the Consolidated Rules.

V. DEFAULT HAS OCCURRED IN THIS MATTER

Respondent defaulted because it failed to file a timely answer to the Complaint by the deadline required by 40 C.F.R. § 22.15(a). Specifically, 40 C.F.R. § 22.15(a) requires that "any answer to the complaint must be filed with the Regional Hearing Clerk within 30 days after service of the complaint." Accordingly, Respondent's answer was due no later than 30 days after service of the Complaint. Service of the Complaint on Respondent was completed on June 15, 2023. *See* Dkt. 2 and 3; Exhibits 25 and 26. Therefore, the deadline for Respondent to file its answer was July 15, 2023. As of the date of this Motion, Respondent has not filed an answer to the Complaint. Respondent's failure to file a timely answer by July 15, 2023, and ongoing failure to file such answer as of the date of this Motion, entitles Complainant to an Order of Default against Respondent in accordance with 40 C.F.R. § 22.17.

Applying the totality of circumstances test supports a finding that Respondent lacks good cause for its failure to file a timely answer. The primary factors considered under the totality of circumstances test are: (1) whether a procedural requirement was indeed violated; (2) whether the particular procedural violation is proper grounds for default; and (3) whether there was a valid excuse or justification for not complying with the procedural requirement. *JHNY, Inc.*, 12 E.A.D. at 384.

With respect to the first factor, as discussed above, Respondent clearly violated the procedural requirement to file its answer by July 15, 2023 and has still not filed its answer. This failure is consistent with the behavior exhibited by Respondent as Complainant attempted to discuss and resolve the identified violations prior to filing the Complaint. *See supra* Section II Prefiling Communications. Numerous times Respondent agreed to provide additional information for Complainant's consideration by a date certain but failed to do so despite voluminous follow-up requests by Complainant. *See e.g.* Exhibits 13, 14, 15, 17. In fact, over 11 months passed between the initiation of pre-filing communications and the filing of the Complaint, and much of that time was spent providing Respondent with an opportunity to submit records necessary for Complainant to initiate an analysis of Respondent's ability-to-pay a penalty.

The procedural requirement violated – failure to timely answer a complaint or to answer at all – is a significant procedural omission and indicates a general disregard for the procedural requirements of the Consolidated Rules and a lack of seriousness for the enforcement matter at hand. Respondent's failure to answer the Complaint complicates and delays Complainant's ability to enforce violations of the CWA and to seek general and specific deterrence to such violations through the assessment of penalties. Accordingly, there are proper grounds for default resulting from Respondent's ongoing failure to answer the Complaint.

In assessing the final factor of the totality of the circumstances test, Respondent has been aware of Complainant's enforcement action for over 590 days or 19 months, *see* Exhibits 6 and 7, has been aware of Complainant's intent to file the Complaint for over 320 days or 10 months, *see* Exhibit 18, has been aware of Complainant's filing of the Complaint for over 250 days or 8 months, *see infra* § 5 ¶ 6, has been properly served with the Complaint for over 130 days or 4

months, *see* Dkt. 2 and 3; Exhibits 25 and 26, and has been aware of Complainant's intent to file this motion for default for over 100 days, *see* Exhibit 27. During each of these time periods, Respondent has communicated with Complainant yet has failed to provide timely or complete information to Complainant and has failed to answer the Complaint. There is no valid excuse or justification for not complying with the procedural requirement. In the event Respondent files a response to this Motion asserting it had a valid excuse or justification for its failure to file a timely answer, Complainant will consider and address such assertions in its reply. *See* 40 C.F.R. § 22.16(a).

As described previously, on February 14, 2023, pursuant to the Standing Order, Complainant copied Respondent's email address that was utilized throughout the pre-filing communications on the filing of the Complaint. *See* Exhibit 21. That same day and the following day, Respondent sent a series of email messages in direct response to the filing, illustrating that they had received the electronic filing of the Complaint. *See* Exhibit 28. Shortly after that filing, Complainant attempted to serve Respondent with the Complaint utilizing certified mail with return receipt requested in accordance with 40 C.F.R. § 22.5(b)(1)(i). *See* Exhibit 29. Complainant sent multiple email messages to Respondent seeking its cooperation in accepting the mailed package and Respondent refused. *Id.* Shortly thereafter, in March 2023, Complainant hired a process server to aid in personal service of the Complaint on Respondent. *Id.* According to a process server with JPL Process Service, LLC, on March 13, 2023, Respondent spoke with the process server on the phone, understood that Complainant was attempting to serve Respondent with the Complaint, and informed the process server that they should call Respondent back in a couple of days to coordinate a time for delivery of the package containing the Complaint. *See* Exhibit 30. On March 16, 2023 and March 22, 2023, the process

server called Respondent and left voicemail messages requesting a return phone call and attempted to deliver the package at Respondent's address. *Id.* Respondent refused to return those phone calls and the process server was unable to successfully serve the Complaint. *Id.*

On April 12, 2023, Respondent and Complainant spoke on the phone and shortly thereafter, Respondent sent an email message indicating an unwillingness to cooperate with receiving service of the Complaint via certified mail or personal service. *See* Exhibit 30. In response, Complainant proposed that the parties file a joint acknowledgment stating that all future service will be done electronically and acknowledging that Respondent received the complaint and accompanying materials electronically. *Id.* That request was ignored by Respondent, despite Respondent's separate email engagement with Complainant on issues related to Respondent's financial records, indicating that Respondent was receiving the emailed requests from Complainant to cooperate to receive service of the Complaint. *Id.; see e.g.* Exhibit 31.

In June 2023, Complainant hired a different process server, "Skip N Serve Process Server," to attempt to serve Respondent. According to that process server, during multiple attempts to serve the Complaint, the process server heard activity inside the Respondent's residence, but when the process server knocked, "everything became quiet." *See* Exhibit 32. The process server concluded that "it appears that [Respondent] is being evasive." *Id.* On June 15, 2023, the process server was able to successfully serve Respondent via personal service. *See* Dkt. 2 and 3; Exhibits 25 and 26. Shortly after Complainant successfully served Respondent, Complainant received an email from Respondent suggesting that they were unaware of the service of the Complaint. *See* Exhibit 33. In response, Complainant confirmed with Respondent that service had been completed by Skip N Serve Process Server on behalf of Complainant and

repeated a request for the parties to file a joint acknowledgment stating that all future service would be done electronically and acknowledging that Respondent received the complaint and accompanying materials electronically. *Id.* That request was again ignored by Respondent, despite Respondent's separate email engagement with Complainant on issues related to Respondent's submission of financial records, indicating that Respondent was receiving the requests from Complainant to cooperate to receive service of the Complaint. *Id.; see e.g.*, Exhibit 34.

On July 17, 2023, Complainant sent Respondent a letter explicitly stating an intent to file this motion for default due to Respondent's failure to timely file an answer to the Complaint. *See* Exhibit 27. Respondent and Complainant exchanged emails regarding the letter, confirming that Respondent had received and reviewed that letter. *See* Exhibit 35. Despite knowledge of Complainant's intent to file this motion for default, Respondent failed to file an answer to the Complaint.

Complainant is not aware of any valid excuse or justification for Respondent's failure to comply with the clear procedural requirement to file an answer to the Complaint. Even if such an excuse or justification existed, Respondent's uncooperativeness with Complainant, most notably its arguable evasion of service of the Complaint, despite Complainant's exhaustive efforts for over 19 months to work with Respondent to resolve this matter amicably, should outweigh any such excuse or justification. Respondent has been given more than ample time and opportunity to comply with the procedural requirement, requiring the entry of default.

VI. THE COMPLAINT PLEADS FACTS TO ESTABLISH LIABILITY

The factual allegations in the Complaint provide ample basis to find that Respondent is liable for the violations alleged therein. Therefore, the Presiding Officer should find that default

has occurred and issue a default order consistent with the Proposed Order submitted with this Motion. Specifically, the Complaint sets forth the following facts:

1. Respondent is a "person" under CWA Sections 311(a)(7) and 502(5), 33 U.S.C. §§ 1321(a)(7), 1362(5). *See* Complaint ¶ 3.1;

2. On August 8, 2021, a Truck owned and operated by Respondent crashed and overturned on Washington State Route 97 near Milepost 57 within the external boundaries of the Yakama Indian Reservation, releasing motor/lube oil, or petroleum, from the Truck's motor and lubricating systems, and diesel fuel, or fuel oil, from the trailer's refrigeration fuel tank and from the Truck's saddle fuel tanks into Toppenish Creek, onto the adjoining shoreline of Toppenish Creek, and to wetlands adjacent to Toppenish Creek. *See* Complaint ¶¶ 3.2, 3.5, and 3.7;

3. The Truck is a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14). *See* Complaint ¶ 3.22;

4. Respondent's actions and the consequences of those actions constitute a "discharge of pollutants" within the meaning of CWA Sections 301(a) and 502(12), 33 U.S.C. §§ 1311(a) and 1362(12). *See* Complaint ¶ 3.25;

5. Toppenish Creek and its adjacent wetlands are "navigable waters" because Toppenish Creek is a perennial tributary of the Yakima River, which is a perennial tributary to the Columbia River and the Columbia River is currently used, was used in the past, and may be susceptible to use in interstate or foreign commerce, and is subject to the ebb and flow of the tide. *See* Complaint ¶ 3.10; CWA Section 502(7), 33 U.S.C. § 1362(7);

6. Shortly after the crash, responders from EPA, the Confederated Tribes and Bands of the Yakama Nation, and the Washington State Department of Ecology initiated spill response and cleanup activities, including placement of boom and absorbent pads, oil-contaminated soil

excavation and removal, pumping and removing oil contaminated water using a vacuum truck, and water quality monitoring. *See* Complaint ¶ 3.8;

7. The spill response team observed and documented an oil sheen on the surface of Toppenish Creek and observed and documented oil on the adjoining shoreline of Toppenish Creek and on wetlands adjacent to Toppenish Creek. *See* Complaint ¶ 3.9;

8. Respondent's Truck was an "onshore" facility within the meaning of CWA Section 311(a)(10), 33 U.S.C. § 1321(a)(10). *See* Complaint ¶ 3.12;

9. The discharge resulted in the presence of oil in waters of the United States and adjoining shorelines in sufficient quantities to cause a sheen, sludge, emulsion, or violation of water quality standards and the discharge of oil was in a quantity that may be harmful, within the meaning of CWA Section 311(b)(3), 33 U.S.C. § 1321(b)(3), and 40 C.F.R. § 110.3. *See* Complaint ¶ 3.18;

10. The discharge was not authorized by a permit issued by EPA or the State of Washington pursuant to CWA Section 402, 33 U.S.C. § 1342. *See* Complaint ¶ 3.26;

11. Based on the facts set forth in the Complaint, Complainant has concluded that Respondent violated CWA Section 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3), by discharging oil into navigable waters and adjoining shorelines in harmful quantities, and violated CWA Section 301(a), 33 U.S.C. § 1311(a), by adding pollutants to navigable waters from a point source without a permit.

VII. REQUEST FOR CIVIL PENALTY

"Where the motion [for a default order] requests the assessment of a civil penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual grounds for the requested relief." 40 C.F.R.

§ 22.17(b). The Consolidated Rules authorize the assessment of a penalty in the event of a default. *Id.* at § 22.27(b). Specifically, the Consolidated Rules provide, in pertinent part, "[i]f the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed in the….motion for default…" *Id.* "The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." *Id.* at § 22.27(c).

This Motion specifies the penalties sought and the legal and factual grounds for these penalties. *Id.* at 22.17(b). The requested relief is consistent with the record of this proceeding and the CWA and the Presiding Officer should order the requested relief. *Id.* at 22.17(c). Issuance of a default order and assessment of a civil penalty would resolve all outstanding issues and claims in this proceeding and would therefore constitute an initial decision. *Id.*

A. Statutory Factors for Assessment of Civil Penalties

Based on the foregoing allegations, Respondent violated CWA Section 311(b)(3), 33 U.S.C. § 1321(b)(3), and CWA Section 301(a), 33 U.S.C. § 1311(a). CWA Section 311(b)(11), 33 U.S.C. § 1321(b)(11), states that civil penalties shall not be assessed under both CWA Section 311(b), 33 U.S.C. § 1321(b), and CWA Section 309, 33 U.S.C. § 1319, for the same discharge. Consequently, pursuant to CWA Section 311(b)(6)(A) and (b)(6)(B), 33 U.S.C. § 1321(b)(6)(A) and (B), and 40 C.F.R. Part 19, Respondent is liable for the administrative assessment of civil penalties for violations in an amount not to exceed $22,324 per day for each day during which the violations of CWA Section 311(b)(3), 33 U.S.C. § 1321(b)(3), occurred, up to a maximum of $279,036. However, should Respondent not be held liable for the administrative assessment of civil penalties pursuant to CWA Section 311(b)(6)(A) and (b)(6)(B), 33 U.S.C. § 1321(b)(6)(A) and (B), in the alternative Complainant alleges that Respondent is liable for the administrative

assessment of civil penalties for violations in an amount not to exceed $25,847 per day for each day during which the violations of CWA Section 301(a), 33 U.S.C. § 1311(a), occurred, up to a maximum of $323,081, pursuant to CWA Section 309(g)(2)(B), 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. Part 19.

In determining the amount of penalty for violations of CWA Section 311(b)(3), 33 U.S.C. § 1321(b)(3), CWA Section 311(b)(8), 33 U.S.C. § 1321(b)(8), provides that EPA "shall consider the seriousness of the violation or violations, the economic benefit to the violator, if any, resulting from the violation, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require." In determining the amount of penalty for violations of CWA Section 301(a), 33 U.S.C. § 1311(a), CWA Section 309(g)(3), 33 U.S.C. § 1319(g)(3), states that EPA "shall take into account the nature, circumstances, extent and gravity of the violation or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violations, and such other matters as justice may require." An appropriate penalty is one which reflects consideration of each factor the governing statute requires, and which is supported by an analysis of those factors. *In re B.J. Carney Industries, Inc.*, 7 E.A.D. 171, 219 (EAB 1997).

B. Application of Penalty Factors and Factual Grounds for Requested Penalty

As described above, the statutory maximum penalty for the violation of CWA Section 311(b)(3), 33 U.S.C. § 1321(b)(3), pursuant to CWA Section 311(b)(6)(A) and (b)(6)(B), 33 U.S.C. § 1321(b)(6)(A) and (B), and 40 C.F.R. Part 19, is $22,324. The statutory maximum

penalty for the violation of CWA Section 301(a), 33 U.S.C. § 1311(a), pursuant to CWA Section 309(g)(2)(B), 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. Part 19, is $25,847. Given the application of the statutory penalty factors below, Complainant would be seeking a penalty near the statutory maximum if Respondent's ability to pay a penalty and the economic impact of the penalty on the Respondent were not limiting factors in this case. However, following review of Respondent's limited submission of financial records by Complainant's program analyst, Complainant is proposing a substantially lower penalty than it would have otherwise sought to account for Respondent's limited ability to pay a penalty. *See* Wilder Decl. ¶ 13. As a result, Complainant's requested relief, based on the information available and consideration of the statutory penalty factors set forth in the CWA, is a civil penalty of $2,000. The following provides a narrative description of how this penalty was determined in consideration of the enumerated statutory penalty factors in CWA Section 311(b)(8), 33 U.S.C. § 1321(b)(8), and CWA Section 309(g)(3), 33 U.S.C. § 1319(g)(3). The facts set forth in the Complaint and referenced below are deemed to be admitted because default has occurred. 40 C.F.R. § 22.17(a).

1. Seriousness of the Violation or Violations/Nature, Circumstances, Extent, and Gravity of the Violations

Responders from the Tribes, Ecology, and EPA each agreed that Respondent's Truck crash resulted in significant volumes of motor/lube oil, or petroleum, discharging from the Truck's motor and lubricating systems, and diesel fuel, or fuel oil, discharging from the trailer's refrigeration fuel tank and from the Truck's saddle fuel tanks into Toppenish Creek, onto the adjoining shoreline of Toppenish Creek, and to wetlands adjacent to Toppenish Creek. According to responders to the scene the Tribe, at the time of the crash the Truck had two saddle fuel tanks with a maximum capacity of 100-gallons each, a refrigerated trailer with a refrigeration unit diesel fuel tank of approximately 45 gallons located and fixed under the trailer

bottom, and the tractor would have likely contained approximately 15 gallons of other petroleum products. *See* Exhibit 4. According to the responder to the scene from Ecology, there was an estimated release of forty-five gallons of diesel fuel, or fuel oil, to the adjoining shoreline of Toppenish Creek, an estimated release of ten gallons of lube/motor oil, or petroleum, to the adjoining shoreline of Toppenish Creek, and an estimated release of one gallon of lube/motor oil, or petroleum, into Toppenish Creek and to wetlands adjacent to Toppenish Creek. *See* Exhibit 3. EPA's responder to the scene estimated maximum of 150-160 gallons of diesel fuel, or fuel oil, was released from the Truck fuel tanks into Toppenish Creek, the adjoining shoreline of Toppenish Creek, and wetlands adjacent to Toppenish Creek. *See* Exhibit 2. EPA's responder also reported that oil sheen and mousse (an emulsified mixture of water and oil) were observed on the water between the Toppenish Creek bank adjacent to Highway 97 and the overturned trailer, that absorbent pads were deployed in this area, and that an absorbent boom had been placed to isolate the oil-impacted water within Toppenish Creek. *Id.* The responder to the scene from EPA estimated that fifty-four (54) cubic yards of oil-contaminated soil was removed and disposed of from the adjoining shoreline of Toppenish Creek and wetlands adjacent to Toppenish Creek and that that a coffer dam had to be built while oil-contaminated soil was being excavated to contain the oil and approximately 300 gallons of oil-contaminated water and "oil mousse" had to be removed from behind the dam. *Id.*

This discharge event was particularly significant and impactful given its location within the Toppenish National Wildlife Refuge, one of eight refuges in the Mid-Columbia River National Wildlife Refuge Complex and part of the Pacific Flyway for migratory waterfowl.[6]

[6] *See* Toppenish National Wildlife Refuge, U.S. Fish and Wildlife Service, https://www.fws.gov/refuge/toppenish/ (accessed Aug. 31, 2023).

Additionally, Toppenish Creek and its adjacent wetlands support Middle Columbia steelhead,[7] a species listed as threatened under the Endangered Species Act,[8] as well as lamprey, a species of significant cultural importance to the Confederated Tribes and Bands of the Yakama Nation.[9] Given the ecological and cultural importance of the impacted waterbodies, and the sensitive nature of the species that use it, the violation created a risk for major environmental impacts and therefore was a serious violation.

Due to circumstances out of the control of the Respondent, including an appropriate response by the responders to the scene from EPA, the Tribe, and Ecology, and the nature of how the Truck landed following the crash, the total volume of oil that flowed downstream was significantly reduced. However, this does not minimize the seriousness of the violation due to the risk for major environmental impacts associated with the violation.

2. Any Other Penalty for the Same Incident

Ecology also investigated the incident resulting in the violations and has informed Complainant that it is seeking an administrative penalty of $1,400 for state law-based violations arising out of the same incident. *See* Exhibit 36. Complainant understands that Respondent and Ecology have a tentative agreement for an extended payment plan that would require the $1,400 penalty to be paid at a $50 monthly payment for just over two (2) years.[10] While Ecology's penalty arises out of the same incident, the penalty resolving the state law-based violations do not resolve the federal CWA claims and collecting penalties for federal CWA violations is

[7] *See* Abundance and distribution of steelhead (Oncorhynchus mykiss) in Toppenish Creek, Yakama Confederated Tribes, https://dashboard.yakamafish-star.net/sites/default/files/2018-06/2013_Project_199603501YRWPandTopME_Sthd_july_june.pdf?current=/DataQuery/Reports.
[8] *See* 71 FR 833 (Jan. 5, 2006) Endangered and Threatened Species: Final Listing Determinations for 10 Distinct Population Segments of West Coast Steelhead: https://www.federalregister.gov/documents/2006/01/05/06-47/endangered-and-threatened-species-final-listing-determinations-for-10-distinct-population-segments.
[9] *See* Pacific Lamprey Project, Yakama Nation Fisheries, https://yakamafish-nsn.gov/restore/projects/pacific-lamprey-project (accessed Aug. 31, 2023).
[10] According to communications between representatives of EPA and Ecology.

critical to maintaining the integrity of the CWA. Complainant's requested civil penalty takes this Ecology penalty into account. *See* Wilder Decl. ¶ 12.

3. Nature, Extent, and Degree of Success of Any Efforts of the Violator to Minimize or Mitigate the Effects of the Discharge

To the best of Complainant's knowledge, Respondent failed to notify the National Response Center following the incident, as required by CWA Section 311(b)(5), 33 U.S.C. § 1321(b)(5), and 40 C.F.R. § 110.6. The responders to the scene from the Tribe contacted the National Response Center, which ensured that appropriate federal resources could be devoted to spill response and mitigation activities. Complainant is not aware of any efforts of Respondent to minimize or mitigate the effects of the discharge.

4. Respondent's Ability to Pay/Economic Impact of the Penalty on the Violator

As described above, Complainant went to great lengths to allow Respondent the opportunity to submit the records necessary for Complainant to analyze Respondent's ability to pay a civil penalty. *See supra* § II. While Respondent has provided Complainant with some records helping Complainant to generally understand Respondent's ability to pay a penalty and the economic impact of a penalty on the violator, Complainant still has reason to believe that Respondent can pay the proposed civil penalty. *See* Wilder Decl. ¶ 10 – 13. While Complainant has the burden to illustrate that it has *considered* all the statutory factors in proposing a civil penalty, it is not required to establish that "the respondent can, in fact, pay a penalty, but whether a penalty is *appropriate*." *See In re New Waterbury*, 5 E.A.D. 529, 539 (EAB 1994). In *New Waterbury*, the Environmental Appeals Board rejected the respondent's claim that, at a penalty hearing, that Complainant must, as part of its *prima facie* case, "introduce specific evidence to show that a respondent has the ability to pay a penalty." *Id.* at 541. Rather, Complainant needs only to "produce some evidence regarding the respondent's general financial status from which it

can be inferred that the respondent's ability to pay should not affect the penalty amount." *Id.* Where, as in this case, Complainant does not have enough information to fully understand Respondent's financial condition, "a respondent's ability to pay may be presumed until it is put at issue by a respondent." *Id.*

Respondent has provided Complainant with some financial records but has failed to meet its burden that it has an inability-to-pay any penalty. *See* Wilder Decl. ¶ 5. However, to exhibit reasonableness, Complainant has proposed a penalty that is substantially lower than what it would propose had ability to pay a penalty and the economic impact of the penalty on the Respondent were not limiting factors in this case. In other words, despite the lack of a complete record illustrating Respondent's inability-to-pay, Complainant has still meaningfully considered the records provided by Respondent to develop a penalty that will not cause Respondent undue financial hardship. *Id.* at ¶ 10 – 13.

Respondent's financial records provided to EPA indicate the existence of a $20,000 loan from someone in the family of the President of the Respondent. *See id*. at ¶ 6 – 9; Exhibit 39. According to those submissions, re-payment of $1,000/month was deferred that apparently would be re-started when net income was positive. *See* Exhibit 37. Respondent's financial statements indicate an apparently improved financial condition as the combined income statement indicates family loan repayments of $750, $1,000, and $250 were made in March, April, and June 2023 respectively (total of $2,000 in six months of 2023 or $2,000 over a 4-month period within the first six months of 2023). *See* Exhibit 38. While Respondent has not provided any loan documents to EPA, it appears that Respondent had flexibility to initiate any repayment of these family loan(s) and that lack of repayment was not inhibiting Respondent from making the routine payments for ordinary and necessary business expenses to maintain

Respondent's routine transportation services to customers. *See* Wilder Decl. ¶ 4. Given the apparent flexibility with repayment of this family loan, and Respondent's recent $2,000 in payments towards that loan, Complainant has concluded that Respondent has the ability to pay this amount towards a CWA penalty without undue financial hardship.

5. Respondent's History of Prior Violations

To the best of Complainant's knowledge, Respondent was created in January 2021 when it filed articles of incorporation with the California Secretary of State's office and has no prior CWA violations.

6. Respondent's Degree of Culpability

According to the Infraction Report developed by the Washington State Police following the Truck crash, the Truck was operating on a dry, flat, and straight portion of Washington State Route 97 when the Truck left the roadway to the right shoulder, striking and going through the guardrail. *See* Exhibit 1. The Infraction Report indicated that there was no observed or recorded road evidence indicating the Truck braked, performed any evasive maneuvers, or attempted to correct the Truck's trajectory back to the correct right highway lane. *Id.* According to the Infraction Report, had the Truck remained within the guidelines of the right highway lane, the crash would have been avoided. *Id.* As a result, the Washington State Police issued the driver of the Truck a traffic violation citation for improper lane usage. *Id.* Additionally, the Infraction Report indicates that the Truck driver provided contradictory justifications for the crash.

Based on the totality of known circumstances, the evidence indicates this crash, and resulting oil spill, was avoidable had Respondent's driver retained appropriate control of the Truck and maintained the Truck's north-bound position in the correct highway lane. Respondent is a transportation-focused company so highway and driving safety are of paramount importance

to Respondent's daily operations and directly under the control of the driver of the Truck. The evidence suggests there may have been a prolonged loss of attention regarding the Truck's proximity to the roadside and guardrail which, in combination with the Washington State Police traffic citation, indicates a high level of culpability.

7. Respondent's Economic Benefit

For purposes of this motion for default, Complainant is not alleging that Respondent received an economic benefit associated with the violations.

8. Other Matters as Justice May Require

There are no facts justifying the use of this factor to adjust the penalty amount.

VIII. CONCLUSION

For the reasons detailed in this Memorandum, Complainant respectfully requests that the Presiding Officer issue a default order finding:

- that Respondent committed default by not filing a timely answer;
- that the default in this case constitutes an admission by Respondent of all facts alleged in the Complaint, and a waiver by Respondent of a right to a hearing regarding such factual allegations; and
- that consistent with the record of proceeding and Clean Water Act, Respondent is liable to pay a civil penalty of $2,000, due and payable in full by Respondent thirty (30) days after the default order becomes final pursuant to 40 C.F.R. § 22.17(c) in accordance with 40 C.F.R. § 22.17(d).

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The Consolidated Rules authorize the Presiding Officer to order Complainant's requested relief. 40 C.F.R. § 22.17(c).

Respectfully Submitted,

PATRICK JOHNSON Digitally signed by PATRICK JOHNSON Date: 2023.11.07 06:19:42 -09'00'

Dated: November 7, 2023

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