UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Dave Erlanson, Sr.,	)	Docket No. CWA-10-2016-0109
	)	
Respondent.	)	

ORDER ON COMPLAINANT'S MOTION FOR ACCELERATED DECISION

The Director of the Office of Compliance and Enforcement at the United States Environmental Protection Agency ("EPA" or "Agency"), Region 10 ("Complainant"), initiated this proceeding on June 20, 2016, by filing a Complaint against Dave Erlanson, Sr. ("Respondent"), pursuant to Section 309(g)(2)(B) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act ("Act" or "CWA"), 33 U.S.C. § 1319(g)(2)(B). The Complaint alleges that on July 22, 2015, Respondent unlawfully discharged pollutants from a point source into a navigable water without authorization under a National Pollutant Discharge Elimination System permit, in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a). *See* Compl. ¶¶ 3.1-3.9. On July 18, 2016, Respondent filed an Answer denying the charge and requesting a hearing on the matter. Answer at 1. Complainant now seeks entry of an accelerated decision as to Respondent's liability for the violation alleged in the Complaint and the civil administrative penalty proposed for the charged violation. *See* Complainant's Motion for Accelerated Decision (June 5, 2017) ("Motion"). For the reasons set forth below, the Motion is granted, in part, and denied, in part.

I. RELEVANT PROCEDURAL HISTORY

Pursuant to the Prehearing Order issued on February 24, 2017, the parties engaged in the prehearing exchange of information process. Specifically, Complainant filed its Initial Prehearing Exchange ("Complainant's Initial PHE") on April 7, 2017; Respondent filed its Prehearing Exchange ("Respondent's PHE") on May 8, 2017; and Complainant filed its Rebuttal Prehearing Exchange ("Complainant's Rebuttal PHE") on June 5, 2017.[1]

On June 5, 2017, Complainant also filed the subject Motion and a Memorandum in Support of its Motion for Accelerated Decision ("Memo"). Respondent timely filed its Brief in Opposition to Motion for Accelerated Decision ("Response") on August 2, 2017, to which Respondent attached the Declaration of Dave Erlanson, Sr. ("Erlanson Decl."). Complainant

[1] As part of the prehearing exchange of information process, the parties identified the exhibits they intend to introduce into evidence at a hearing in this matter and provided copies to this Tribunal. The exhibits proposed by Complainant will be cited herein as "CX [proposed exhibit number] at [Bates stamp number]." The exhibits proposed by Respondent will be cited herein as "RX [proposed exhibit number] at [exhibit page number]."

timely filed its Reply in Support of Motion for Accelerated Decision ("Reply") on August 14, 2017.

II. APPLICABLE LAW AND REGULATIONS

A. Substantive Law

Codified at 33 U.S.C. §§ 1251-1388, the CWA was enacted by Congress to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In furtherance of this objective, Section 301(a) of the CWA provides, that "[e]xcept as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [33 U.S.C. §§ 1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). Of particular relevance to this proceeding, Section 402 of the CWA establishes the National Pollutant Discharge Elimination System ("NPDES") permit program, which allows EPA and states qualified by EPA to issue permits for the discharge of pollutants, notwithstanding the prohibition set forth in Section 301(a) of the CWA. 33 U.S.C. § 1342(a)-(b).

For purposes of the relevant provisions of the CWA, the phrase "discharge of a pollutant" is defined by the CWA to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The CWA proceeds to define the term "pollutant" as including, among other meanings, dredged spoil, rock, and sand discharged into water. 33 U.S.C. § 1362(6). In turn, the term "navigable waters" is defined as "waters of the United States." 33 U.S.C. § 1362(7). The term "point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The term "person" is defined to include an individual. 33 U.S.C. § 1362(5). Finally, regulations promulgated to implement the CWA define the phrase "waters of the United States" to include "all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide," and tributaries of those waters. 40 C.F.R. § 232.2.[2]

B. Standard for Adjudicating a Motion for Accelerated Decision

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), set forth at 40 C.F.R. Part 22. Section 22.20(a) of the Rules of Practice authorizes Administrative Law Judges to:

[2] This definition of the phrase "waters of the United States" was in effect on the date of the alleged violation. By final rulemaking on June 29, 2015, the definition was amended, effective on August 28, 2015. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015). Litigation subsequently ensued. An applicability date of February 6, 2020, was then added to the amended definition by final rulemaking on February 6, 2018, thereby suspending for a period of two years the applicability of the amendment. Definition of "Waters of the United States" – Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5,200 (Feb. 6, 2018). Litigation proceeded to ensue over this suspension and is ongoing. None of these developments affect the analysis herein, however.

> render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 C.F.R. § 22.20(a). This standard is analogous to the standard governing motions for summary judgment prescribed by Rule 56 of the Federal Rules of Civil Procedure ("FRCP"), and while the FRCP do not apply here, the Environmental Appeals Board ("EAB") has consistently looked to Rule 56 and its jurisprudence for guidance in adjudicating motions for accelerated decision filed under Section 22.20(a) of the Rules of Practice. *See, e.g.*, *Consumers Scrap Recycling, Inc.*, 11 E.A.D. 269, 285 (EAB 2004); *BWX Techs., Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000); *Clarksburg Casket Co.*, 8 E.A.D. 496, 501-02 (EAB 1999). Federal courts have endorsed this approach. For example, the United States Court of Appeals for the First Circuit described Rule 56 as "the prototype for administrative summary judgment procedures" and the jurisprudence surrounding it as "the most fertile source of information about administrative summary judgment." *Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995) (rejecting the argument that federal court rulings on motions for summary judgment are "inapposite" to administrative proceedings).

As for the particular standard set forth in Rule 56, it directs a federal court to grant summary judgment upon motion by a party "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In construing this standard, the U.S. Supreme Court has held that a factual dispute is material where, under the governing substantive law, it might affect the outcome of the proceeding. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1985). In turn, a factual dispute is genuine if a fact finder could reasonably resolve the dispute in favor of the non-moving party under the evidentiary standards applicable to the particular proceeding. *Id.* at 248, 250-52.

The Supreme Court has held that the party moving for summary judgment bears the burden of showing an absence of a genuine dispute as to any material fact. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). This burden consists of two components: an initial burden of production, which shifts to the non-moving party once it is satisfied by the moving party, and the ultimate burden of persuasion, which always remains with the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986) (Brennan, J., dissenting) (citing 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727 (2d ed. 1983)). To discharge its initial burden of production, the moving party is required to support its assertion that a material fact cannot be genuinely disputed either by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials," or by "showing that the materials cited do not establish the . . . presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). Once the moving party satisfies its initial burden of production, the burden shifts to the non-moving party to show that a

genuine dispute of material fact exists by similarly "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence . . . of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *Id.*

In determining whether a genuine issue of material fact exists for trial, a federal court is required to construe the evidentiary material and reasonable inferences drawn therefrom in a light most favorable to the non-moving party. *See Anderson*, 477 U.S. at 255 ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) ("On summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion."). The court is then required to consider whether a fact finder could reasonably find in favor of the non-moving party under the applicable evidentiary standards. *Anderson*, 477 U.S. at 252-55. Where the evidence viewed in the light most favorable to the non-moving party is such that the fact finder could not reasonably find in favor of the non-moving party, summary judgment is appropriate. *See Adickes*, 398 U.S. at 158-59. Conversely, where conflicting inferences may be drawn from the evidence and a choice among those inferences would amount to fact-finding, summary judgment is inappropriate. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1105 (D.C. Cir. 2002). Even where summary judgment appears technically proper, sound judicial policy and the exercise of judicial discretion may support denial of the motion in order for the case to be more fully developed at hearing. *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979).

The EAB has applied the foregoing principles in adjudicating motions for accelerated decision under Section 22.20(a) of the Rules of Practice, holding that the moving party "assumes the initial burden of production on a claim, and must make out a case for presumptive entitlement to summary judgment in his favor." *BWX Techs.*, 9 E.A.D. at 76. Where the moving party bears the burden of persuasion on an issue, it is entitled to an accelerated decision only if it presents "evidence that is so strong and persuasive that no reasonable [fact finder] is free to disregard it." *Id.* Where the moving party does not bear the burden of persuasion, it has the "lesser burden of 'showing' or 'pointing out' to the reviewing tribunal that there is an absence of evidence in the record to support the nonmoving party's case on that issue." *Id.* Once the moving party has discharged this burden, the burden of production shifts to the non-moving party bearing the burden of persuasion on the issue to identify specific facts from which a finder of fact could reasonably find in its favor on each element of the claim. *Id.*

As noted by the EAB, "neither party can meet its burden of production by resting on mere allegations, assertions, or conclusions of evidence." *BWX Techs.*, 9 E.A.D. at 75. Likewise, a party opposing a properly supported motion for accelerated decision is required to "provide more than a *scintilla* of evidence on a disputed factual issue to show their entitlement to a[n] . . . evidentiary hearing: the evidence must be substantial and probative in light of the appropriate evidentiary standard of the case." *Id.* at 76.

Consistent with the jurisprudence of Rule 56, the EAB has held that a tribunal adjudicating a motion for accelerated decision is required to consider whether the parties have met their respective burdens in the context of the applicable evidentiary standard. *BWX Techs.*, 9 E.A.D. at 75. As prescribed by Section 22.24(b) of the Rules of Practice, 40 C.F.R. § 22.24(b),

the evidentiary standard that applies here is proof by a preponderance of the evidence. Section 22.24(a) provides that the complainant bears the burdens of presentation and persuasion that a violation occurred as set forth in the complaint and that the relief sought is appropriate, while the respondent bears the burdens of presentation and persuasion for any affirmative defenses.

III. UNDISPUTED FACTS

The following facts have been admitted by Respondent:

(1) Respondent owns a mining claim on the South Fork Clearwater River located in the Nez Perce – Clearwater National Forest of north-central Idaho. Erlanson Decl. ¶ 2. It is a region of numerous mineral resources, including gold. *Id.* ¶ 3.

(2) The South Fork Clearwater River ultimately flows to the Snake River. Erlanson Decl. ¶ 3.

(3) Respondent engages in the business of gold mining on his claim. Erlanson Decl. ¶ 3. His interest in mining is not recreational but professional. *Id.*

(4) On July 22, 2015, Respondent was mining for gold on his claim using an apparatus known as a suction dredge.[3] *See* Erlanson Decl. ¶¶ 10, 23. The particular suction dredge used by Respondent is classified by the State of Idaho as a recreational dredge, not because of the purpose for which it was being operated, but because of its small size, namely, having an intake hose of 5 inches in diameter or less and a motor of 15 horsepower or less. Respondent's PHE at 6.

(5) While operating his suction dredge, Respondent encountered and conversed with Clint Hughes, an employee of the United States Forest Service, who subsequently prepared a Mineral Inspection Form documenting his observations of Respondent's activities. *See* Erlanson Decl. ¶¶ 23, 28; CX 1.

(6) Respondent did not possess an individual NPDES permit authorizing any discharges from his suction dredge into the South Fork Clearwater River on July 22, 2015. *See* Respondent's PHE at 6, 12.

IV. LIABILITY

A. Critical Elements of Liability

In order to prevail on its Motion with regard to liability, Complainant is required to establish that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law as to each element of statutory liability for the charged violation. The Complaint alleges that Respondent discharged pollutants from a point source into a navigable water in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), by operating a suction dredge in

[3] The parties characterize the operation of a suction dredge in slightly differing ways, which are described later in this Order.

the South Fork Clearwater River on July 22, 2015, without authorization under an NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. *See* Compl. ¶¶ 3.1-3.9. In accordance with the substantive law set forth above, this alleged violation can be divided into the following critical elements: that Respondent (1) is a "person"; (2) whose operation of a suction dredge in the South Fork Clearwater River on July 22, 2015, resulted in the "discharge of a pollutant"; (3) from a "point source"; (4) into a "navigable water"; (5) without authorization under any NPDES permit.

B. Discussion

Each of the critical elements is discussed below.

1. Respondent is a "person"

For purposes of the applicable provisions of the CWA, the term "person" is defined to include an individual. 33 U.S.C. § 1362(5). The Complaint alleges that Respondent is an individual and thus a "person" as defined by the CWA. Compl. ¶ 3.1. While Respondent denied this allegation in his Answer, Ans. ¶ 3.1, he subsequently acknowledged in his Prehearing Exchange that he "is a legal person with the meaning of 33 U.S.C. § 502(5) and so stipulates."[4] Respondent's PHE at 6. Accordingly, the first element of liability is deemed to have been established.

2. Respondent's operation of his suction dredge resulted in a "discharge of a pollutant"

a. Arguments of the Parties

The crux of the parties' arguments concerning liability relates to this critical element, as set forth below.

i. Complainant's Motion

Complainant contends that it has offered sufficient evidence to establish that a "discharge of a pollutant" occurred as alleged and that Respondent's only challenge concerning this critical element is one of law, not fact. Memo at 8. Specifically, Complainant maintains that the only issue in dispute is "whether the processing of streambed material on a suction dredge and the release of suspended solids and the resulting turbid plume constitutes a 'discharge of a pollutant'" as defined by the CWA. *Id.* at 7-8.

In advancing its position on this issue, Complainant first offers a description of the operation of a suction dredge. Relying on two "EPA Fact Sheets," the first related to NPDES

[4] I presume that Respondent's reference to Section 502(5) of Title 33 of the United States Code was erroneous and that Respondent intended to refer to 33 U.S.C. § 1362(5).

General Permit No. IDG370000,[5] which authorized small suction dredge miners engaged in placer mining operations in Idaho to discharge to certain waters of the United States ("Idaho Suction Dredge GP"), and the second related to NPDES General Permit No. AKG-37-1000, which authorized medium suction dredge miners engaged in placer mining operations in Alaska to discharge to certain waters of the United States ("Alaska Suction Dredge GP"), Complainant asserts that placer mining consists of the mining and extraction of heavy metals and minerals such as gold from streambed deposits using either hydraulic or mechanical dredging systems. Memo at 4 (citing CX 4 at 75-76; CX 13 at 875). The most common hydraulic system, Complainant continues, is a suction dredge, which involves a high-pressure pump driven by a gasoline-powered motor to create suction through a flexible intake hose. *Id.* (citing CX 4 at 75-76; CX 13 at 875). Complainant asserts that the operation of the suction dredge causes streambed sediments and water to be drawn into the intake hose and processed through a sluice tray mounted on floats, with dense particles such as gold becoming trapped in the sluice box tray and the remaining streambed sediments and water being expelled back into the waterway. *Id.* (citing CX 4 at 75-76; CX 13 at 875).

With respect to whether Respondent's operation of his suction dredge resulted in a "discharge," Complainant first argues that no question of material fact exists that Respondent's suction dredge excavated and processed streambed material from the South Fork Clearwater River and subsequently released processed solid material back into the waterway, as observed by Mr. Hughes, Memo at 8 (citing CX 1 at 2, 5-7; CX 2 at 24, ¶ 5), and acknowledged by Respondent, *id.* at 12-13 (citing Respondent's PHE at 6-8). Complainant then argues that it is a "well-settled principle" that a release of such material is an "addition," even though the material originated from the same waterbody to which it was released, thus rendering the release a "discharge" under the CWA. *Id.* at 8-9 (citing *Rybachek v. EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990); *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1506 (11th Cir. 1985); *Avoyelles Sportsmen's League, Inc., v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983)).

In response to arguments raised by Respondent in his Prehearing Exchange, Complainant contends that EPA's authority to regulate discharges from suction dredges is not undermined by the decision of the United States Court of Appeals for the D.C. Circuit in *National Mining Association v. United States Army Corps of Engineers*, which held in the context of Section 404 of the CWA that "incidental fallback," a situation occurring when material is removed from a waterway and a small portion of it happens to fall back in, is not a "discharge," as it represents a net withdrawal, rather than addition, of material. *See id.* at 9-10 (citing *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1404 (D.C. Cir. 1998)). Complainant maintains, "The D.C. Circuit made clear, in analyzing 'incidental fallback,' that it does not apply to the type of mining at issue in this case," as "Respondent engaged in 'the discrete act of dumping leftover material into the stream after it had been processed.'" *Id.* at 10 (quoting *Nat'l Mining Ass'n*, 145 F.3d at 1406)).

[5] Regulations promulgated to implement the NPDES permit program authorize the issuance of general NPDES permits covering a category of discharges where a number of point sources operating within a specific geographic area 1) involve the same or substantially similar types of operations; 2) discharge the same types of wastes; 3) require the same effluent limitations or operating conditions; 4) require the same or similar monitoring requirements; and 5) are deemed to be more appropriately controlled under a general permit than under individual NPDES permits. 40 C.F.R. § 122.28(a).

Complainant also distinguishes the present matter from two decisions of the United States Supreme Court: 1) *South Florida Water Management District v. Miccosukee Tribe*, which held that the transfer of units of polluted water from one portion of a navigable waterway to another portion of the same waterway does not qualify as a discharge of pollutants under the CWA; and 2) *Los Angeles County Flood Control District v. National Resource Defense Council, Inc.*, which held that the flow of water from an improved portion of a navigable waterway to an unimproved portion of the same waterway also does not qualify as a discharge of pollutants under the CWA. Memo at 11 (citing *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95 (2004); *L.A. Cty. Flood Control Dist. v. NRDC, Inc.*, 568 U.S. 78 (2013)). Complainant argues that those holdings do not apply to the circumstances at issue here, as "[w]ater remains water when transferred[,] while latent riverbed materials . . . are transformed into a discharge or addition of pollutants once processed through a suction dredge and released into a water body." *Id.* at 11. Complainant proceeds to cite several cases in support of this distinction. *Id.* at 11-12 (citing *U.S. v. Deaton*, 209 F.3d 331, 335-36 (4th Cir. 2000); *Avoyelles Sportsmen's League, Inc.*, 715 F.2d at 923; *M.C.C. of Florida, Inc.*, 772 F.2d at 1506); *Borden Ranch P'ship v. U.S Army Corps of Eng'rs*, 261 F.3d 810, 814 (9th Cir. 2001); *Duarte Nursery, Inc. v. U.S. Army Corps of Eng'rs*, 2016 U.S. Dist. LEXIS 76037, at *48-49 (E.D. Cal., June 10, 2016)).

Complainant then turns to whether the materials released from Respondent's suction dredge qualify as "pollutants." Complainant first notes that Mr. Hughes observed a turbid plume emanating from Respondent's suction dredge, Memo at 14 (citing CX 1 at 2, 5-7; CX 2 at 24, ¶ 5), and that Respondent does not deny that this turbid plume contained dredged spoil, rock, and sand, *id.* (citing Respondent's PHE at 14). Noting that Section 502(6) of the CWA defines the term "pollutant" to include dredged spoil, rock, and sand, *id.* at 13 (citing 33 U.S.C. § 1362(6)), Complainant argues that the United States Court of Appeals for the Ninth Circuit confirmed in *Rybachek* that the term encompasses the suspended solids contained within processed wastewater resulting from placer mining, *id.* at 13-14 (citing *Rybachek*, 904 F.2d at 1285, 1291)). Respondent's only challenge, Complainant argues, is a legal one, namely, that the dredged spoil, rock, and sand are not "pollutants" for purposes of the CWA because those materials originated in the streambed and were not added to the waterway. *See id.* Complainant maintains that while Respondent has offered to produce documentary and testimonial evidence in support of his legal argument,

> he cannot supplant applicable statutory provisions and case law dictating precisely the opposite. Such testimony and documentary evidence, if offered, would create no question of material fact, and none exists, that Respondent's suction dredge released a "pollutant" as defined in CWA section 502(6) and explained by the Ninth Circuit in *Rybachek*.

Id. at 15.

ii. Respondent's Response

Citing his declaration for support, Respondent characterizes a suction dredge as a floating "vacuum cleaner" that captures "only a portion of the material passing through it, based on

gravity, with the heavier material [such as gold] dropping into and remaining in a collector, . . . while the remaining material simply flows on through the water column." Response at 4-5 (citing Erlanson Decl. ¶¶ 10-11). Respondent emphasizes that water and non-captured material, consisting primarily of gravel, "simply pass[] through the machine to its back end" and return to "within six to ten feet" of where it was drawn into the suction dredge. *Id.* (citing Erlanson Decl. ¶¶ 10-11). Other than the captured material, Respondent maintains, "nothing ever leaves the water column, even briefly." *Id.* (citing Erlanson Decl. ¶¶ 10-11). In short, the operation of a suction dredge "does not add anything to the water nor does it change the use or condition of the land or water, or for that matter, the material not captured[,] other than to remove the captured material." *Id.* at 17.

Turning to his arguments against entry of accelerated decision on liability, Respondent first contends that Complainant fails to sustain its burden of demonstrating the absence of a genuine issue of material fact. Response at 10. In particular, Respondent questions the sufficiency of the evidence proffered by Complainant, noting that it has not produced any evidence that Mr. Hughes examined his suction dredge or performed any measurements or sampling of the alleged plume emanating from it. *Id.* at 11. Rather, Respondent argues, Complainant relies only on photographs taken by Mr. Hughes, "an apparent amateur[,] that show[] water streams from the back ends of two separately owned and operated suction dredges which are mixing, one bing [sic] operated by Respondent, the other by his neighboring claim owner." *Id.* Asserting that the streambed in his claim consists of exposed bedrock, *id.* at 12 (citing Erlanson Decl. ¶ 6), Respondent argues that any turbidity observed could have been generated solely by his neighbor's suction dredge, and "[t]here is no way of telling from the photographs how much turbidity is actually present or which dredge is producing what percentage of the observed turbidity," *id.* at 11-12. In essence, Respondent criticizes EPA for categorically regulating the activity of mining with a suction dredge, without regard for the particular circumstances of a given suction dredge's operation, as it "presume[s] that any discharge into the waters of the United States by such equipment in the course of the activity is the deposit of a pollutant into such waters." *Id.* at 13-14.

Respondent proceeds to argue that his declaration "definitively demonstrates" that the operation of his suction dredge – namely, the intake of water from the waterway, "including sand, rock, gravel, and whatever other pollutants (as defined by the EPA, and the CWA)" are present, the capture of the heavier material, and the movement of the lighter material "without hindrance through the apparatus" back to "within feet of its original location within an extremely brief period of time, never leaving the water column in the process" – "is well within the parameters set down by [applicable] cases." Response at 10-11. In particular, Respondent cites *Miccosukee* and *Los Angeles County Flood Control District* for the notion that a "discharge of a pollutant" occurs within the meaning of the CWA, not with the "mere reshuffling of the position of material from a water to a different location in the same water, even if the water contains pollutants," but rather, with "a genuine addition of a pollutant" to the waterway. *Id.* at 14-16 (citing *Miccosukee*, 541 U.S. at 109-112, and *L.A. Cty. Flood Control Dist.*, 568 U.S. at 83).

Respondent next frames the question of whether a discharge of a pollutant occurred as alleged in this matter in the context of "incidental fallback," as addressed by jurisprudence governing the discharge of dredged or fill material under Section 404 of the CWA. In particular,

Respondent argues that *National Mining Association* supports the principle that what is required for a discharge of a pollutant to have occurred is a genuine addition of a pollutant and not merely the incidental fallback of material to the same location from which it was withdrawn from the waterway. *See* Response at 19 (citing *Nat'l Mining Ass'n*, 145 F.3d at 1403-04). Respondent maintains, "[T]he fact that something that was already there ends up remaining there cannot be considered an addition." *Id.* Respondent then points to *National Association of Home Builders v. U.S. Army Corps of Engineers* for the appropriate standard for determining whether a release of material is "incidental" or an "addition" for purposes of the CWA:

> In determining whether fallback is incidental – i.e., not an addition within the meaning of the Clean Water Act – the volume of material being handled is irrelevant. The difference between incidental fallback and redeposit is better understood in terms of two other factors: (1) the time the material is held before being dropped to earth and (2) the distance between the place where the material is collected and the place where it is dropped.

Id. at 21 (quoting *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 2007 U.S. Dist. LEXIS 6366, at *11-13 (D.D.C. 2007)). Applying that test here, Respondent urges that releases of material from his suction dredge are instantaneous and occur so close to where the material is drawn into the suction dredge that the location is virtually identical, such that the releases "undeniably and unequivocally qualify as incidental fallback." *Id.* at 22.

Finally, Respondent challenges Complainant's reliance on *Rybachek*, which "involved the removal of material from the stream bed, taking it to shore, processing it to remove the gold, and then engaging in a discrete act of throwing the leftover material back into the stream." Response at 19 (citing *Nat'l Mining Ass'n*, 145 F.3d at 1406). Respondent contends that no such discrete act occurs in the operation of a suction dredge, as the materials drawn into the device are not processed in the same manner and the uncollected material simply passes through it without ever being removed from the waterway. *Id.*

iii. Complainant's Reply

In reply, Complainant argues that "[d]ocumentary evidence and a basic understanding of suction dredge placer mining demonstrate that this activity caused a discharge of pollutants in the form of suspended solids that created a turbid plume in the South Fork Clearwater River" and that Respondent fails to carry his burden of "demonstrat[ing] 'sufficient disagreement' such that a reasonable trier of fact could decide in favor of either party, and establish[ing] with affirmative evidence specific facts showing there is a genuine issue for trial." Reply at 2 (citing *Anderson*, 477 U.S. at 248, 256). Noting that Respondent attempts to demonstrate disagreement by questioning the sufficiency of Mr. Hughes's photographs and recorded observations to support Complainant's position, Reply at 3, Complainant counters that Mr. Hughes is "a skilled professional inspector" who has conducted approximately 400 inspections during his federal career and that all of the photographs taken by him in relation to this matter "are quite clear," *id.* at 3 n.2. Further, Complainant argues, applicable legal precedent reflects that allegations of a discharge of pollutants may be proven using "*any* admissible evidence, including inferential evidence," and that sampling is hardly required. *Id.* at 3-4 (citing various legal authorities).

Complainant then challenges Respondent's claims concerning the contents of the proffered photographs, arguing that the evidence clearly shows that the purported water stream emanating from his suction dredge is, in fact, a cloudy plume of turbid discharge. *Id.* at 4-5. Complainant admonishes, "To find that Respondent's suction dredge was not intaking, processing, and releasing streambed materials – in the form of suspended solids that result in turbid discharge – would require ignoring proffered facts and case law explaining precisely how a suction dredge works, even as described (in very forgiving terms) by Respondent." *Id.* at 5 (citing Erlanson Decl. ¶ 10).

Pointing to *Rybachek* and *Borden Ranch Partnership* for support, Complainant next maintains that it is well-settled in the Ninth Circuit that the release of material from suction dredges constitutes the discharge of pollutants within the meaning of the CWA, even though the material came from the same waterbody to which it was released. Reply at 5-6. As for the cases cited by Respondent, Complainant characterizes them as "inapposite" and Respondent's reliance on them as "attempts to obfuscate the issue." *Id.* at 6.

Specifically, Complainant argues that *Miccosukee* and *Los Angeles County Flood Control District* do not address "the transformation of streambed materials into suspended solids, the agitation of the base of the waterbodies in question, or the processing of water (even devoid of streambed materials) through a mechanized dredge and sluicebox before being discharged – physically altered from that process – back into the waterbody." Reply at 6. Rather, Complainant argues, those decisions involve the mere flow of polluted water between two points in the same waterbody. *Id.* at 6-7. Noting that Respondent's declaration contains a description of the operation of his suction dredge suggesting an analogous flow of material through the dredge, Complainant urges that I assign limited weight to the declaration insofar as it describes the alterations to streambed materials and waterways resulting from the operation of a suction dredge, arguing that it "is of limited evidentiary reliability" given Respondent's financial self-interest in mining his claim and the lack of evidence that Respondent has advanced knowledge of chemical and hydrological processes. *Id.* at 7 n.11 (citing *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997)). Complainant then contends that even if I were "to afford significant weight to Respondent's forgiving description, his dredge still does more than cause water to 'simply flow' through its mouthpiece, suction hose, and sluicebox. The process of suction dredging cannot be reasonably classified as a water transfer, and no reasonable factfinder would find as such." *Id.* at 7-8. Turning to Respondent's characterization of the materials released from his suction dredge as "incidental fallback," Complainant maintains that *National Mining Association*, the primary case upon which Respondent relies for support of his arguments, "both explains the exemption of incidental fallback from CWA section 404 regulation *and* distinguishes that concept from the very activity at issue in this case." Reply at 8 (citing *Nat'l Mining Ass'n*, 145 F.3d at 1406).

b. Analysis

As previously explained, the CWA defines the phrase "discharge of a pollutant" as including "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12), and the term "pollutant" as including dredged spoil, rock, and sand discharged into water, 33 U.S.C. § 1362(6). In considering whether the operation of Respondent's suction

dredge caused a "discharge of a pollutant" falling within these definitions, I will first determine whether any facts material to this critical element of liability – which, as shown by the arguments raised by the parties, include the manner in which a suction dredge operates and the degree to which materials drawn into the device are altered by its operation – are genuinely in dispute.

Looking to the materials cited by Complainant to support its position that the base of a waterway and any materials drawn from it undergo some degree of agitation and transformation as a result of a suction dredge's operation, I note that the EPA Fact Sheets provide a succinct description of this type of mining. *See* CX 4 at 75-76; CX 13 at 875. The EPA Fact Sheet relating to the Idaho Suction Dredge GP states in this regard:

> Placer mining involves the mining and extraction of gold or other heavy metals and minerals primarily from alluvial deposits. These deposits may be in existing stream beds or ancient, often buried, stream deposits, i.e., paleo or fossil placers.
>
> Many placer deposits consist of unconsolidated clay, sand, gravel, cobble and boulders that contain very small amounts of native gold or other precious metals. Most are stream deposits that occur along present stream valleys or on benches or terraces above existing streams. Areas for locating gold are around boulders near the upstream end of pools where the current first starts to slow, in seams and pickets in exposed bedrock around midstream boulders, or on the inside of a river bend at or near the head of a gravel bar where larger materials have accumulated.
>
> Dredging systems are classified as hydraulic or mechanical (including bucket dredging), depending on the methods of digging. Suction dredges, the most common hydraulic dredging system, are popular with small and recreational gold placer miners. Suction dredges consist of a supporting hull with a mining control system, excavating and lifting mechanism, gold recovery circuit, and waste disposal system. All floating dredges are designed to work as a unit to dig, classify, beneficiate ores and dispose of waste. Because suction dredges work the stream bed rather than stream banks, the discharges from suction dredges consist of stream water and bed material.
>
> The primary pollutant of concern in the discharges from a suction dredge is suspended solids. The suspended solids in the effluent discharged from suction dredge outlets result from the agitation of stream water and stream bed material in the dredge. The discharged suspended solids result in a turbidity plume, or cloudiness, in the receiving water.

CX 4 at 75-76.

This description is consistent with that of the Ninth Circuit in *Rybachek*, in which the Ninth Circuit considered the validity of regulations promulgated by EPA under the CWA that affected placer mining. At the outset of its decision, the Ninth Circuit explained that placer mining results in the expulsion of water containing suspended solids:

> Placer mining is one of the four basic methods of mining metal ores; it involves the mining of alluvial or glacial deposits of loose gravel, sand, soil, clay, or mud called "placers." These placers often contain particles of gold and other heavy minerals. Placer miners excavate the gold-bearing material (paydirt) from the placer deposit after removing the surface vegetation and non-gold-bearing gravel (overburden). The gold is then separated from the other materials in the paydirt by a gravity-separation process known as "sluicing."
>
> In the sluicing process, a miner places the ore in an on-site washing plant (usually a sluice box) which has small submerged dams (riffles) attached to its bottom. He causes water to be run over the paydirt in the sluice box; when the heavier materials (including gold) fall, they are caught by the riffles. The lighter sand, dirt, and clay particles are left suspended in the wastewater released from the sluice box.
>
> Placer mining typically is conducted directly in streambeds or on adjacent property. The water usually enters the sluice box through gravity, but may sometimes also enter through the use of pumping equipment. At some point after the process described above, the water in the sluice box is discharged. The discharges from placer mining can have aesthetic and water-quality impacts on waters both in the immediate vicinity and downstream.

Rybachek, 904 F.2d at 1282.

The observations of Mr. Hughes, as recorded in his Mineral Inspection Form ("Report") and subsequent Declaration of Clinton Hughes ("Declaration"), and the photographic evidence that he collected and included in his Report,[6] reflect that Respondent's activities on July 22, 2015, involved the same type of operations described in the EPA Fact Sheets and *Rybachek*. Specifically, in his Report and Declaration, Mr. Hughes explains that at one of the locations along the South Fork Clearwater River that he inspected on July 22, 2015, he observed two men wearing wetsuits, each operating the intake hose of a suction dredge approximately 50 feet apart. CX 1 at 2; CX 2 at 23 ¶¶ 4, 5. According to Mr. Hughes, the first suction dredge had green pontoons and was being operated upstream by another individual, while the second had blue pontoons and was being operated downstream by Respondent. CX 1 at 2; CX 2 at 23 ¶ 5. Mr. Hughes avows in his Declaration that he "could tell" that sediment was being drawn into Respondent's suction dredge and the suction dredge operating in the neighboring claim, as "the motors of both suction dredges were running, water and gravel was [sic] traveling over the sluice boxes on each dredge, and tailings were deposited just past the sluice box while the plumes of finer sediment were extending from the dredges downstream as they were suspended in the water." CX 2 at 24 ¶ 5. He further states that the plume emanating from the upstream dredge extended from that dredge past Respondent's dredge and then merged with the plume emanating from Respondent's dredge. *Id.* Finally, Mr. Hughes states that he observed the combined plume

[6] Mr. Hughes cites to a collection of photographs in his Declaration, but no photographs were attached to that document, and the numbering of the photographs does not appear to correspond to the photographs included in Mr. Hughes's Report. *See* CX 2. Accordingly, the only photographs that I considered in ruling on Complainant's Motion were those included in his Report.

extending approximately 220 feet beyond Respondent's dredge before it traveled around a bend in the waterway and left his field of vision. *Id.*

The photographs included in Mr. Hughes's Report corroborate his written observations, clearly depicting the suction dredges and individuals clad in wetsuits operating the yellow intake hoses, water moving over the top of Respondent's dredge and then dropping back into the waterway, and a plume of murky water emanating from the upstream dredge and traveling past Respondent's dredge. *See* CX 1 at 5-6. It is more difficult to discern such a plume emanating from Respondent's dredge in the photographs, as the photographs show Respondent's dredge in such a manner that relatively little of the waterway downstream is visible, and the Report does not contain any photographs of a combined plume extending beyond Respondent's dredge. However, the detail in which Mr. Hughes describes his observations and his extensive experience as an inspector, as set forth in his Declaration, lend strength to his representations in this regard.

As argued by Complainant, the foregoing materials point to a finding that the type of mining conducted by Respondent in the South Fork Clearwater River on July 22, 2015, involves using a suction dredge to excavate materials from the beds of waterways and separate those materials in order to recover gold, which results in the suspension of non-captured materials such as sand and gravel in the water moving through the suction dredge and the appearance of those materials as a plume of increased turbidity after being released from the dredge into the receiving waterway. The recorded observations of Mr. Hughes reflect that Respondent's activity on the day in question generated such a plume, as he documented solid materials moving through Respondent's suction dredge and a plume of finer sediment extending from the dredge downstream, before merging with the plume extending from his neighbor's dredge.

Respondent disputes this outcome in his Response, claiming that solid materials not captured by a suction dredge simply pass through it undisturbed and unprocessed before returning to nearly the same location from which they were removed from the bed of the waterway. However, he has not pointed to anything other than his unsubstantiated declaration to support this position or call into question the materials cited by Complainant showing that solid materials drawn into a suction dredge undergo some degree of agitation and suspension, which generates a plume of suspended solids appearing as increased turbidity dozens of feet downstream. This is problematic for purposes of creating a genuine issue of fact for hearing, as the EAB has cautioned that such bald self-serving statements generally are entitled to little weight. *See, e.g.*, *A.Y. McDonald Indus., Inc.*, 2 E.A.D. 402, 426 (EAB 1987) ("[U]ncorroborated self-serving statements . . . are entitled to little weight."). Complainant's arguments against affording significant weight to Respondent's declaration insofar as it describes the alterations to streambed materials and waterways resulting from the operation of a suction dredge – namely, that Respondent has a financial self-interest in mining his claim and that he has not proffered any evidence that he possesses specialized knowledge of chemical and hydrological processes – are also persuasive. Thus, the uncorroborated claims of Respondent in his declaration hardly satisfy his burden as the non-moving party of providing "substantial and probative" evidence to demonstrate that he is entitled to a hearing on this issue. *See BWX Techs.*, 9 E.A.D. at 76. Moreover, I note that those claims conflict with an earlier statement made by Respondent in his Prehearing Exchange, in which Respondent acknowledges that solid material

not captured by a suction dredge "is dispersed back to the stream bed it came from, as the evidence will show, no further away than 30-40 feet from where it started[,] though in more extreme cases the lighter matter may go as far as 200 feet." Respondent's PHE at 7-8. Indeed, evidence produced by Respondent as part of his Prehearing Exchange substantiates this statement, as well as lends support to Complainant's position on this issue. *See, e.g.*, RX 1 at 4-5 (recognizing that the operation of suction dredges results in increased turbidity, in the form of suspended sediments, that has been observed upwards of 100 feet downstream from dredges).

The other attempts by Respondent to counter Complainant's position also fail to show that a genuine issue exists for hearing. For example, Respondent states in his declaration that the streambed in his mining claim consists of exposed bedrock and that he is able to obtain gold only by removing it from narrow cracks and crevices. Erlanson Decl. ¶ 6. This assertion seemingly suggests that the operation of his suction dredge on his claim in the South Fork Clearwater River draws in few solid materials other than the gold present in cracks in the bedrock,[7] and indeed, Respondent proceeds to argue in his Response that any turbidity observed by Mr. Hughes could have been generated solely by the suction dredge operating in the neighboring claim. Supported only by the unsubstantiated self-serving statements contained in his declaration, however, this argument is insufficient to demonstrate the existence of a genuine dispute as to whether his suction dredge also released suspended solids in the form of a plume of turbid water on the day in question. Furthermore, such a contention conflicts with other statements made by Respondent in his Response acknowledging that his suction dredge "sucks up water from the river[,] including sand, rock, gravel, and . . . other pollutants (as defined by the EPA, and the CWA)." Response at 11.

Respondent further attempts to demonstrate the existence of a genuine dispute by questioning the sufficiency of Mr. Hughes's photographs and recorded observations to support Complainant's position and noting the absence of any measurements or sampling of the plumes that he observed. As I have previously held, however:

> Circumstantial evidence may be relied upon as evidence of a material fact. *See BWX Techs.*, 9 E.A.D. at 78 ("[The respondent's] exclusive reliance upon circumstantial evidence did not, by itself, render its case infirm, for circumstantial evidence can be effectively used to state a proposition of material fact in the absence of direct evidence."). Specifically, within the context of the CWA, discharges may be inferred from circumstantial evidence. *See, e.g., Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 120 (2d Cir. 1994) (finding that the fact finder may infer point source discharges from circumstantial evidence); *Lowell Vos Feedlot*, CWA Appeal No. 10-01, 2011 EPA App. LEXIS 18, at *20 (EAB, May 9, 2011) (holding that the government, in CWA actions, can "use any kind of evidence, direct or inferential, to attempt to establish that an unlawful discharge occurred").

[7] Respondent submitted a report as part of his Prehearing Exchange that explains that "[s]uction dredges operate by excavating streambed sediments down to bedrock, sorting the sediments to remove particles of gold, and re-depositing the streambed sediments back onto the surface substrate." RX 4 at 1. By asserting that the streambed in his claim already is bare bedrock, Respondent thus seems to imply that streambed sediments requiring excavation are not present in his claim.

Special Interest Auto Works, Inc., 2015 EPA ALJ LEXIS 51, at *63-64 (Order on Respondents' Amended Motion for Accelerated Decision). Thus, Respondent's arguments in this regard do little to advance his position that a hearing is warranted.

In accordance with the foregoing discussion, I find that that the facts material to this critical element of liability are not genuinely in dispute. I further find that the cited materials establish that, consistent with general descriptions of mining using a suction dredge, Respondent's operation of his suction dredge in the South Fork Clearwater River on July 22, 2015, caused non-captured solid materials such as sand and gravel to be suspended in the water moving through the dredge and the suspended solids to then be released from the dredge into the river in the form a plume of turbid water extending downstream.

I turn now to the question of whether this release constituted an "addition of any pollutant," and thus a "discharge of a pollutant," within the meaning of the CWA. In considering the parties' arguments on this issue, I find Complainant's position to be compelling. As observed by Complainant, a number of legal authorities have addressed the question of what constitutes an "addition of any pollutant," such that a discharge of pollutants has occurred for purposes of the CWA. The case most pertinent to this matter is *Rybachek*, wherein the Ninth Circuit considered whether placer mining, which includes mining using a suction dredge, results in discharges subject to regulation under the CWA. First noting that the CWA defines the term "pollutant" as including dredged spoil, rock, and sand, the Ninth Circuit held that the term "encompasses the materials segregated from gold in placer mining." *Rybachek*, 904 F.2d at 1285. It then concluded that the release of these materials into a waterway in the form of suspended solids could be construed as an "addition" within the meaning of the CWA, even where the material was drawn from the bed of the same waterway to which it was released. *Id.* at 1285-86 (citing *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1506 (11th Cir. 1985) (holding that the act of digging up sediment and redepositing it on sea bottom by boat propellers constitutes an addition of pollutants), *vacated and remanded on other grounds*, 481 U.S. 1034 (1987), *readopted in part and remanded on other grounds*, 848 F.2d 1133 (11th Circ. 1988), *reh'g granted in other part*, 863 F.2d 802 (11th Cir. 1989); *Avoyelles Sportsmen's League, Inc., v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983) (stating that "the word 'addition,' as used in the definition of the term 'discharge,' may reasonably be understood to include 'redeposit'" of excavated material that need not come from an outside source)).

Also instructive is the decision of the United States Court of Appeals for the Fourth Circuit in *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000), in which the Fourth Circuit considered the issue in the context of "sidecasting," or the act of depositing material excavated from a wetland in an adjacent area of the same wetland. The owners of the property on which the sidecasting in question occurred argued that the term "addition" requires the introduction of material not previously present – namely, new material or an increase in the amount of a type of material already there – and that because the process of sidecasting does not result in a net increase in the amount of material present in the wetland, it does not "add" a pollutant for purposes of the CWA. *Deaton*, 209 F.3d at 335. The Fourth Circuit rejected this argument, reasoning:

> Contrary to what the Deatons [the property owners] suggest, the statute does not prohibit the addition of material; it prohibits "the addition of any pollutant." The idea that there could be an addition of a pollutant without an addition of material seems to us entirely unremarkable, at least when an activity transforms some material from a nonpollutant into a pollutant, as occurred here. In the course of digging a ditch across the Deaton property, the contractor removed earth and vegetable matter from the wetland. Once it was removed, that material became "dredged spoil," a statutory pollutant and a *type* of material that up until then was not present on the Deaton property. It is of no consequence that what is now dredged spoil was previously present on the same property in the less threatening form of dirt and vegetation in an undisturbed state. What is important is that once that material was excavated from the wetland, its redeposit in that same wetland *added* a pollutant where none had been before. Thus, even under the definition of "addition" (that is, "something added") offered by the Deatons, sidecasting adds a pollutant that was not present before.

Id. at 335-36 (citations omitted). As further support for this conclusion, the Fourth Circuit noted that "seemingly benign substances" like rock, sand, and biological materials are specifically designated as pollutants under the CWA because of the concern of Congress that those materials, once extracted from waters of the United States, could cause harm to the environment upon reintroduction. *Id.* at 336; *see also Greenfield Mills, Inc., v. Macklin*, 361 F.3d 934, 949 (7th Cir. 2004) ("[I]t is logical to believe that soil and vegetation removed from one part of a wetland or waterway and deposited in another could disturb the ecological balance of the affected areas – both the area from which the material was removed and the area on which the material was deposited.")). The Fourth Circuit then reasoned that the potential for harm would be no different if the materials were reintroduced to the same waterway from which they were excavated and that Congress thus could not have intended to prohibit a discharge only when the materials came from outside the waterway. *Deaton*, 209 F.3d at 336.

Finally, the Ninth Circuit considered in *Borden Ranch Partnership* whether "deep ripping," an activity involving the use of metal prongs dragged behind a tractor or bulldozer to agitate and move soil, results in the "addition" of a pollutant within the meaning of the Act when the activity occurs in a wetland. The owner of the property on which the deep ripping occurred argued against such an interpretation, maintaining that deep ripping "simply churns up soil that is already there, placing it back basically where it came from." *Borden Ranch P'ship*, 261 F.3d at 814. Referring to its own precedent in *Rybachek* and the holding of the Fourth Circuit in *Deaton*, the Ninth Circuit rejected the property owner's position:

> These cases recognize that activities that destroy the ecology of a wetland are not immune from the Clean Water Act merely because they do not involve the introduction of material brought in from somewhere else. In this case, the Corps alleges that Tsakopoulos [the property owner] has essentially poked a hole in the bottom of protected wetlands. That is, by ripping up the bottom layer of soil, the water that was trapped can now drain out. While it is true, that in so doing, no new material has been "added," a "pollutant" has certainly been "added." Prior to the deep ripping, the protective layer of soil was intact, holding the wetland in place.

> Afterwards, that soil was wrenched up, moved around, and redeposited somewhere else. We can see no meaningful distinction between this activity and the activities at issue in *Rybachek* and *Deaton*. We therefore conclude that deep ripping, when undertaken in the context at issue here, can constitute a discharge of a pollutant under the Clean Water Act.

Id. at 814-15.

This line of cases makes clear that an activity may be deemed to add pollutants to a waterbody, such that the addition is subject to regulation as a discharge under the CWA, even when no new material is introduced. Rather, the critical issue is whether a "pollutant" has been introduced that was not previously present, which may occur where the waterbody is disturbed from its natural state by the extraction of such materials as plain dirt, rock, and sand, and those materials are then redistributed to other parts of the waterbody, thus transforming the materials into "pollutants" and resulting in the "addition" of those materials as "pollutants" to the waterbody within the meaning of the CWA. Most significantly for purposes of this proceeding, *Rybachek* instructs that this reading of the statute specifically encompasses the activity at issue here, namely, the removal of material from the base of a waterway, separation of any gold-bearing material from non-gold-bearing material, and return of the non-gold-bearing material, in the form of suspended solids, to the waterway.

Respondent fails to provide any persuasive reasoning for departing from this precedent. To advance his position on the question of what constitutes an "addition of any pollutant," Respondent first looks to two decisions of the Supreme Court, *Miccosukee* and *Los Angeles County Flood Control District*. In *Miccosukee*, the Court considered whether the engineered transfer of water contaminated with pollutants as a result of human activities – by removal of the water from a canal, transport of the water through a pump station, and redeposit of the water into a nearby wetland – constituted the "discharge of a pollutant" within the meaning of the CWA. 541 U.S. at 100, 102-103. The Court held that if the canal and wetland were found not to be meaningfully distinct waterbodies, but simply two parts of the same waterbody, such a transfer of water from one part to another would not constitute an "addition" of pollutants. *Id.* at 109, 112. In reaching this conclusion, the Court adopted an analogy of the United States Court of Appeals for the Second Circuit: "As the Second Circuit put it . . ., '[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not "added" soup or anything else to the pot.'" *Id.* at 109-10 (quoting *Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York*, 273 F.3d 481, 492 (2d Cir. 2001)). Expounding on this view, the Court held in *Los Angeles County Flood Control District* that "no discharge of pollutants occurs when [polluted] water, rather than being removed and then returned to a water body, simply flows from one portion of the water body to another." 568 U.S. at 83.

Respondent's reliance on these decisions is misplaced. As argued persuasively by Complainant, the circumstances confronted by the Court in *Miccosukee* and *Los Angeles County Flood Control District* are not analogous to the circumstances at issue here. As described above, the Court addressed the mere transfer of water containing pollutants between different portions of the same waterbody, and neither the waterbodies nor the polluted units of water being transferred underwent any disturbance or alteration. Conversely, in the present matter, the

undisputed facts have shown that the operation of Respondent's suction dredge involves the removal of otherwise latent materials from the bed of the South Fork Clearwater River, the separation of the materials by weight as they travel through the dredge, and the reintroduction of the leftover lighter materials to the waterway in a physically altered form, namely, suspended solids, thereby transforming those materials into "pollutants" and altering the base of the river where the materials are both removed and redeposited. This process can hardly be likened to the simple transfer of water.

Respondent also points to the concept of "incidental fallback," as addressed by jurisprudence governing the discharge of dredged or fill material under Section 404 of the CWA, to argue that an "addition of a pollutant" does not occur as a result of the operation of his suction dredge. For support, Respondent primarily relies on *National Mining Association*, in which the D.C. Circuit considered the authority of the United States Corps of Engineers to regulate incidental fallback as a discharge under the CWA. The D.C. Circuit first characterized incidental fallback as "a practically inescapable by-product" of excavation and dredging activities that occurs when material is removed from a waterway and a portion of it is incidentally redeposited in substantially the same location as the initial removal. *Nat'l Mining Ass'n*, 145 F.3d at 1401, 1403. The D.C. Circuit then proceeded to hold that incidental fallback represents a net withdrawal, rather than addition, of material, which precludes it from being a discharge for purposes of the CWA. *Id.* at 1404. Noting the counterargument that incidental fallback constitutes an "addition of any pollutant" because a material becomes a "pollutant" upon being dredged, the D.C. Circuit reasoned that "[r]egardless of any legal metamorphosis that may occur at the moment of dredging, we fail to see how there can be an addition of *dredged material* when there is no addition of *material*." *Id.* at 1404. Put another way, the D.C. Circuit explained, "[a]lthough the Act includes 'dredged spoil' in its list of pollutants, Congress could not have contemplated that the attempted removal of 100 tons of that substance could constitute an addition simply because only 99 tons of it were actually taken away." *Id.*

Relying on this holding, Respondent urges that any releases from his suction dredge qualify as incidental fallback. As argued persuasively by Complainant, however, the concept of incidental fallback is inapposite here. The D.C. Circuit explicitly stated that its holding should not be construed to suggest that all forms of redeposit are outside of the Corps's authority to regulate under the CWA. *Nat'l Mining Ass'n*, 145 F.3d at 1405. It then proceeded to distinguish incidental fallback from the type of redeposit addressed by *Rybachek* and at issue here:

> Perhaps the strongest authority for the agencies' position is *Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990). There the Ninth Circuit found that the Act permitted EPA to regulate placer mining, a process in which miners excavate dirt and gravel in and around waterways, and, after extracting the gold, discharge the leftover material back into the water. *Rybachek* held that the material separated from gold and released into the stream constituted a pollutant, and, to the extent that "the material discharged originally comes from the streambed itself, [its] resuspension [in the stream] may be interpreted to be an addition of a pollutant under the Act." *Rybachek* would help the agencies if the court had held that imperfect extraction, i.e., extraction accompanied by incidental fallback of dirt and gravel, constituted

> "addition of a pollutant," but instead it identified the regulable discharge as the discrete act of dumping leftover material into the stream after it had been processed.

Id. at 1406 (citations omitted). Also problematic for Respondent's position is that solid materials not captured by suction dredges have been shown to disperse dozens of feet after expulsion from the dredges, a fact that Respondent acknowledged at least in his Prehearing Exchange. *See* Respondent's PHE at 7-8 (stating that solid material not captured by a suction dredge "is dispersed back to the stream bed it came from, as the evidence will show, no further away than 30-40 feet from where it started[,] though in more extreme cases the lighter matter may go as far as 200 feet"). The redeposit of a material such a distance from the point of removal does not appear to be "fallback" as described by the D.C. Circuit. *Nat'l Mining Ass'n*, 145 F.3d at 1401 ("Redeposit occurs when material removed from the water is returned to it; when redeposit takes place in substantially the same spot as the initial removal, the parties refer to it as 'fallback.'").

Based on the foregoing discussion, I find that as a matter of law, Respondent's operation of his suction dredge in the South Fork Clearwater River on July 22, 2015, resulted in the "addition of a pollutant" to the waterway in the form of suspended solids appearing as a plume of turbid water that dispersed the solid materials downstream, such that a "discharge of a pollutant" occurred within the meaning of the CWA. Accordingly, Complainant is deemed to have met its burden of establishing this critical element of liability.

3. Respondent's suction dredge constituted a "point source"

For purposes of the applicable provisions of the CWA, the term "point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The Complaint alleges that the suction dredge operated by Respondent fell within that definition. Compl. ¶ 3.7. While Respondent denied this allegation in his Answer, Ans. ¶ 3.7, he appears to acknowledge in his Prehearing Exchange that his suction dredge constituted a "point source" insofar as the operation of his suction dredge is found to have resulted in the "discharge of a pollutant." *See* Respondent's PHE at 11. Further, Respondent does not challenge Complainant's position on this element of liability as argued in its request for entry of accelerated decision. In particular, Complainant argues that the EPA Fact Sheet related to the Idaho Suction Dredge GP describes suction dredges as containing a disposal system, among other components, and that this system "acts as a discrete conveyance or conduit of the suspended solids discharged into waters following the suction dredge's processing of streambed materials," which easily falls within the definition of the term "point source." Memo at 16 (citing CX 4 at 75). Given the broad definition of the term "point source," the proposed evidence concerning the structure of the suction dredge and its release of materials, and the absence of any challenge from Respondent on this element of liability, I find that Complainant has sufficiently established that Respondent's suction dredge constituted a "point source" within the meaning of the CWA.

4. The South Fork Clearwater River is a "navigable water"

For purposes of the applicable provisions of the CWA, the term "navigable waters" is defined as "waters of the United States," 33 U.S.C. § 1362(7), and the phrase "waters of the United States," in turn, is defined to include "all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide," and tributaries of those waters, 40 C.F.R. § 232.2. The Complaint alleges that the South Fork Clearwater River flows to the Snake River, which then flows to the Columbia River and eventually the Pacific Ocean, and thus satisfies the foregoing definitions. Compl. ¶ 3.2. While Respondent denied this allegation in his Answer, Ans. ¶ 3.2, he subsequently acknowledged in his declaration that the South Fork Clearwater River flows to the Snake River, Erlanson Decl. ¶ 3, and he accepted a stipulation proffered by Complainant as to the status of the South Fork Clearwater River as a "water of the United States" and "navigable water," Respondent's PHE at 12. Accordingly, this element of liability is deemed to have been established.

5. Respondent's operation of his suction dredge was not authorized under any NPDES permit

As reflected in Undisputed Fact 6 above, Respondent acknowledges that he did not possess an individual NPDES permit authorizing discharges from his suction dredge into the South Fork Clearwater River on July 22, 2015. Further, the record contains uncontested evidence showing that Respondent's activity that day was not covered under the Idaho Suction Dredge GP as it was not eligible for coverage.

In particular, the Idaho Suction Dredge GP, which was in effect beginning May 6, 2013, and expired on April 30, 2018, authorized "[o]wners and operators of placer mining operations in Idaho with small suction dredges . . . to discharge to waters of the United States, *except for those sites excluded from coverage of this NPDES permit*." CX 3 at 27 (emphasis added). The Idaho Suction Dredge GP proceeded to identify the Clearwater River Basin as a waterbody excluded from coverage due to the presence of critical habitat areas designated under the Endangered Species Act ("ESA") for listed aquatic species, unless an ESA determination had been made through a separate process and the decision was submitted alongside a Notice of Intent for coverage under the Idaho Suction Dredge GP. CX 3 at 31-32; CX 39 at 1528, 1535-36. Consistent with this exclusion, EPA notified Respondent by letter dated October 3, 2014, that the South Fork Clearwater River contained critical habitat areas for bull trout, steelhead, and Chinook salmon, such that an ESA determination was required before discharges from small suction dredges could be covered under the Idaho Suction Dredge GP. CX 8 at 853-54. While Respondent submitted to EPA a Notice of Intent, dated May 17, 2015, to obtain coverage under the Idaho Suction Dredge GP for the operation of his suction dredge in the South Fork Clearwater River (among other waterbodies), CX 12, EPA advised him by letter dated August 7, 2015, that such operation was not eligible for coverage at that time because Respondent failed to supply an ESA determination with the Notice of Intent, CX 11 at 864.

This proposed evidence sufficiently demonstrates that the discharge of pollutants to the South Fork Clearwater River from Respondent's suction dredge on July 22, 2015, was not

authorized under the Idaho Suction Dredge GP in effect at that time, and Respondent did not offer any argument or evidence to rebut it. Given the absence of coverage for the discharge of pollutants from Respondent's suction dredge on July 22, 2015, under this permit or any individual NPDES permit, I find that this element of liability has been established.

C. Conclusion

In accordance with the foregoing discussion, I find that no genuine issue of material fact exists and Complainant is entitled to judgment as a matter of law with respect to the following critical elements of statutory liability: (1) Respondent is a "person," as that term is defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5); (2) his operation of a suction dredge in the South Fork Clearwater River on July 22, 2015, resulted in the "discharge of a pollutant" within the meaning of Section 502(12) and (6) of the CWA, 33 U.S.C. § 1362(12) and (6); (3) the suction dredge constituted a "point source" of the given pollutants, as that term is defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14); (4) the South Fork Clearwater River is a "navigable water," as that term is defined by Section 502(7) of the CWA, 33 U.S.C. § 1362(7); and (5) Respondent's operation of the suction dredge was not authorized under any NPDES permit. Such activity constitutes a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a). Accordingly, Complainant will be granted an accelerated decision finding Respondent liable for the violation charged in the Complaint.

V. PENALTY

As liability has been established, I turn now to Complainant's arguments in favor of accelerated decision as to the appropriate relief to award in this proceeding. The CWA authorizes the Administrator of EPA, upon finding that a person has violated Section 301 of the statute, to assess a civil administrative penalty in an amount not to exceed $16,000 per day for each day during which the violation, up to a maximum of $187,500, for violations occurring after December 6, 2013, through November 2, 2015. 33 U.S.C. § 1319(g)(1)(A), (g)(2)(B); 40 C.F.R. § 19.4.[8] In determining the appropriate amount of penalty to impose, the CWA requires the Administrator to consider the following factors: the nature, circumstances, extent, and gravity of the violation; the violator's ability to pay, prior history of such violations, degree of culpability, and economic benefit or savings resulting from the violation; and "such other matters as justice may require." 33 U.S.C. § 1319(g)(3). As observed by the EAB, however, "[t]he Act does not . . . 'prescribe a precise formula by which these factors must be computed' nor does it provide any guidance regarding the relative weight to be given to any of them." *Phoenix Constr. Servs.*, 11 E.A.D. 379, 394 (EAB 2004) (quoting *Advanced Elecs., Inc.*, 10 E.A.D. 385, 399 (EAB 2002)); *see also Tull v. United States*, 481 U.S. 412, 426-27 (1987) (recognizing that the determination of penalties under the CWA is "highly discretionary"). The Rules of Practice, in turn, require this Tribunal to determine the appropriate amount of penalty to assess based on the evidentiary record and in accordance with any penalty criteria set forth in the applicable statute, and to consider any civil penalty guidelines issued under the applicable statute in making its determination. 40 C.F.R. § 22.7(b).

[8] The amounts stated herein are those shown in Table 1, 40 C.F.R. § 19.4, reflecting the statutory penalty amounts adjusted pursuant to Section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 (note), as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701 (note).

In the present matter, Complainant proposes the assessment of a penalty in the amount of $6,600 for the charged violation, Complainant's Rebuttal PHE at 5, and proceeds to describe in its Rebuttal Prehearing Exchange how it applied the statutory factors, civil penalty guidelines, and particular methodology it adopted in reaching that figure, *id.* at 8-28. Complainant then urges in its motion that accelerated decision as to this calculation is warranted given how well it supported the calculation in its prehearing exchange materials, how the proposed penalty is relatively low, and how Respondent failed to provide evidence or explanation in support of his counterarguments. *See* Memo at 25. Respondent does not respond to this contention in his Response, focusing instead on his challenges to liability.

Upon consideration, I am inclined to disagree with Complainant that entry of accelerated decision as to penalty is appropriate here. As a preliminary matter, I note that Respondent states in his Prehearing Exchange under the heading "Factual Information and Supporting Documentation Relevant to Assessment of a Penalty," as well as in a concurrently-filed Motion for Leave to File a Revised or Supplemental Prehearing Exchange ("Motion for Leave to File out of Time"), that he encountered "unforeseen difficulty in obtaining documents and contacting potential witnesses needed to adequately and completely prepare Respondent's Initial Exchange," but that he was reluctant to request an extension of the filing deadline for this document given the extensions he had already sought in this proceeding due to illness. Respondent's PHE at 13; Motion for Leave to File out of Time at 1. Respondent proceeded to request leave to revise or supplement his Prehearing Exchange upon receipt of the information required to complete the document, most notably the final section relating to penalty. Motion for Leave to File out of Time at 1-2. By Order dated May 9, 2017, I granted Respondent's request, noting that supplementation was warranted given the purported incompleteness of his Prehearing Exchange and directing Respondent to file any revised or supplemental prehearing exchange on or before May 22, 2017.

The record reflects that Respondent neither availed himself of the opportunity to file a revised or supplemental prehearing exchange by the deadline set by the Order dated May 9, 2017, nor sought additional leave to revise or supplement his Prehearing Exchange at any point during the protracted period of time that elapsed between that deadline and the issuance of this Order.[9] Nevertheless, his Prehearing Exchange is not devoid of argument or evidence related to the determination of the appropriate penalty to assess in this matter. As observed by Complainant, Respondent raises a number of issues in his Prehearing Exchange that he identifies as being relevant to the assessment of a penalty: 1) that the alleged discharge was trivial and caused no adverse environmental effects; 2) that Respondent acted in good faith reliance on his right to work his mining claim; and 3) that Respondent may or may not have understood his rights with respect to his claim. Respondent's PHE at 5. Contrary to Complainant's claims, however, at least the first of these arguments is substantiated by proposed evidence in the record, as Respondent produced a number of documents as part of his Prehearing Exchange, including published reports addressing the impacts associated with the operation of suction dredges, seemingly in support of his position. *See* RX 1-7.

[9] This Tribunal sincerely regrets the delay in issuance of this Order, which resulted from increasingly limited staff and resources.

In its Rebuttal Prehearing Exchange, Complainant acknowledges the relevance of these materials to the assessment of a penalty in this matter:

> While Complainant disputes [Respondent's characterization of the discharge as *de minimus* and causing no adverse environmental effects] . . . Complainant acknowledges that there are mitigating factors regarding the seriousness of the violation in terms of the actual and/or potential environmental impacts from Respondent's discharge and has taken that into account in the proposed penalty. Additionally, Complainant took into account the reports identified in Respondent's Prehearing Exchange that discuss the environmental impacts associated with suction dredging.

Complainant's Rebuttal PHE at 15. While Complainant concedes that these reports reflect that actual impacts from small-scale suction dredging operations "may be relatively low depending on circumstances," it proceeds to dispute that they support Respondent's contention that the operation of his suction dredge on the day in question did not adversely impact the environment of the South Fork Clearwater River to any measurable degree. *Id.* Under the standard of adjudication for a motion for accelerated decision, however, I am compelled to view the evidentiary material and all reasonable inferences drawn therefrom in the light most favorable to Respondent. *See Anderson*, 477 U.S. at 255; *Diebold*, 369 U.S. at 655. Further, Respondent may demonstrate that a genuine issue of material fact exists for hearing by proffering *some* material, relevant, and probative evidence calling into question Complainant's position. *See BWX Techs.*, 9 E.A.D. at 75 (holding that a party opposing a properly supported motion for accelerated decision is required to provide "more than a *scintilla* of evidence" on a disputed factual issue to demonstrate the party's entitlement to an evidentiary hearing). Here, Respondent appears to have met this burden and minimally shown the existence of some genuine issue of material fact bearing on the determination of the appropriate penalty to assess. Indeed, in moving for accelerated decision, Complainant indirectly acknowledges this conflict by asserting that "[t]o the extent Respondent would argue that his individual operation of a suction dredge would not alone adversely affect endangered or threatened species or their habitat, that argument is negated by the fact that the proposed penalty here is comparatively low." *See* Memo at 18-19 (internal quotations omitted).

Based on the foregoing discussion, I am compelled to find that a genuine issue of material fact exists, namely, the degree of harm caused by the violation, that has the potential to impact the assessment of a penalty in this matter. Notwithstanding Complainant's claim that it adequately accounted for this dispute in its calculation of the proposed penalty, I find that affording Respondent the opportunity to develop the issue in the context of an evidentiary hearing, including examining whether Complainant appropriately considered it in its calculation, is warranted. Further development of issues bearing on the assessment of a penalty in this matter seems especially prudent given the highly discretionary nature of determining penalties under the CWA.[10] Accordingly, Complainant's request for accelerated decision as to the appropriate relief to award in this proceeding will be denied.

[10] As previously noted, even if accelerated decision appears to be technically proper upon review of the evidentiary material in the record of a proceeding, sound judicial policy and the exercise of judicial discretion support a denial of accelerated decision in order for a case to be developed more fully at hearing. *See Roberts*, 610 F.2d at 536; *see*

VI. ORDER

(1) Complainant's Motion for Accelerated Decision is hereby **GRANTED** as to Respondent's liability for the violation charged in the Complaint. Respondent is hereby found liable for a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), as alleged.

(2) Complainant's Motion for Accelerated Decision is hereby **DENIED** as to the civil administrative penalty proposed for the violation.

(3) Within 14 days of the issuance of this Order, the parties shall engage in a settlement conference and attempt in good faith to reach an amicable resolution of this matter. Complainant shall file a status report as to the status of settlement discussions within 21 days of the issuance of this Order.

(4) In the absence of a fully-executed consent agreement and final order resolving this matter, a hearing will be held to take evidence and argument on the issue of the appropriate penalty, if any, to be imposed against Respondent for the violation found herein. Within 21 days of the issuance of this Order, each party shall file a statement identifying any periods of unavailability for a hearing during the months of January, February, and March of 2019, and an estimate of the amount of time needed to present the party's direct case. An order scheduling the hearing will be issued shortly thereafter.

Christine Donelian Coughlin
Administrative Law Judge

Date: September 27, 2018
Washington, D.C.

also Anderson, 477 U.S. at 255 ("[T]he trial court may . . . deny summary judgment in a case where there is a reason to believe that the better course would be to proceed to a full trial.").

In the Matter of *Dave Erlanson, Sr.*, Respondent
Docket No. CWA-10-2016-0109

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on Complainant's Motion for Accelerated Decision**, dated September 27, 2018, and issued by Administrative Law Judge Christine Donelian Coughlin, was sent this day to the following parties in the manner indicated below.

Jennifer Almase

Jennifer Almase
Attorney-Advisor

Original and One Copy by Hand Delivery to:
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Dated: September 27, 2018
Washington, D.C.