BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of: Dave Erlanson, Sr., Individual, Swan Valley, Idaho, Respondent.	DOCKET NO. CWA-10-2016-0109 COMPLAINANT'S INITIAL POST-HEARING BRIEF

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INTRODUCTION

Pursuant to Sections 22.26 of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Complaint or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" ("Part 22 Rules") and the Court's Order Scheduling Post-Hearing Submissions, dated June 26, 2019 (Docket No. 72), the U.S. Environmental Protection Agency, Region 10 ("Complainant" or "EPA") submits the following Initial Post-Hearing Brief. For the reasons set forth below, the Presiding Officer, who previously concluded that Respondent violated Section 301(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1311(a) (Docket No. 38), should assess at least the initially proposed penalty of $6,600.

STATEMENT OF THE CASE

Complainant filed its Complaint in this matter on June 20, 2016 (CWA-10-2017-0109, Docket No. 1). In its Complaint, the EPA alleged that Respondent violated Section 301(a) of the CWA, 33 U.S.C. § 1311(a), by discharging sediment from his suction dredge mining operation into the Southfork Clearwater River without authorization under a National Pollutant Discharge Elimination System (NPDES) permit. Respondent filed his Answer on July 14, 2016 (Docket No. *unassigned*). Counsel for Respondent appeared in this matter on September 23, 2016 (Docket No. 10).

Complainant filed its Initial Prehearing Exchange on April 7, 2017 (Docket No. 23), and Respondent filed his Prehearing Exchange on May 8, 2017 (Docket No. 26). On June 5, 2017, Complainant filed its Rebuttal Prehearing Exchange (Docket No. 30), in which Complainant proposed an administrative penalty in the amount of $6,600 and explained its methodology in calculating the proposed penalty.

Complainant initially filed its Motion for Accelerated Decision on June 5, 2017 (Docket No. 31). On September 27, 2018, this Court issued its Order on Complainant's Motion for Accelerated Decision (Docket No. 38). That Order granted Complainant's Motion in part as to Respondent's liability under the CWA, finding no question of material fact as to the factors necessary to prove liability. That Order found a genuine issue of material fact as to the harm of Respondent's activity and an appropriate penalty to be assessed against Respondent for his violation of the CWA and therefore denied the Motion in part, reserving that question for an evidentiary hearing.

Following this Court's Order on Complainant's Motion for Accelerated Decision, Respondent did not file any timely motion seeking interlocutory appeal or reconsideration of the Tribunal's findings. On December 18, 2018, nearly three months following this Court's Order on the Motion for Accelerated Decision, Counsel for Respondent withdrew from this matter citing health issues.

The hearing in this matter was initially set for February 12, 2019, as ordered in the Court's November 15, 2018 Notice of Hearing Order (Docket No. *unassigned*). The Court reset the hearing for May 2019 to allow Respondent time to obtain new counsel after the departure of his prior counsel. *See* Order Rescheduling Hearing, January 31, 2019 (Docket No. *unassigned*). Respondent thereafter elected to represent himself *pro se*.

The hearing in this matter was held May 14 through 15, 2019, in Rigby, Idaho. At the hearing, Complainant presented the testimony of five witnesses:

(1) Clint Hughes, a Geologist, Mineral Examiner, and Mineral Administrator with the United States Forest Service ("Forest Service")—hearing transcript pages 41, line 6 (hereinafter formatted as TR 41:6) through TR 110:20;

(2) Tara Martich, a CWA Enforcement Specialist in EPA Region 10's Enforcement and Compliance Assurance Divison—TR 114:13 through TR 205:12;

(3) Cindi Godsey, Environmental Engineer in EPA Region 10's Water Division—TR 206:7 through TR 257:3;

(4) Dan Kenney, North Zone Fisheries Biologist with the Forest Service—TR 258:7 through TR 401:3; and

(5) David Arthaud, Fishery Biologist with the United States National Marine Fisheries Service ("NMFS")—TR 409:7 through TR 517:2.

At the hearing, Respondent elected not to provide testimony or solicit testimony from other witnesses.

STATUTORY AND REGULATORY BACKGROUND

For violations of CWA Section 301, CWA Section 309(g)(2)(B), 33 U.S.C. § 1319(g)(2)(B), as modified by 40 C.F.R. § 19.4 (Table 1), authorizes the administrative assessment of civil penalties in an amount not to exceed $16,000 per day for each day during which the violation continues. Pursuant to 40 C.F.R. § 22.27(b), the Presiding Officer shall determine the amount of the recommended penalty based on the evidence in the record and in accordance with the criteria set forth in the applicable statute. CWA Section 309(g)(3), 33 U.S.C. § 1319(g)(3), identifies the following penalty criteria for this case: (1) the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, (2) ability to pay, (3) any prior history of such violations, (4) the degree of culpability, (5) economic benefit or savings (if any) resulting from the violation, and (6) such other matters as justice may require. 33 U.S.C. § 1319(g)(3). Section 22.27(b) also provides that the Presiding Officer shall consider any civil penalty guidance issued under the applicable statute. There are

no civil penalty guidelines issued under the CWA, so the penalty must be determined based on the evidence in the record and a direct application of the statutory criteria listed above. 40 C.F.R. § 22.27(b); *In re C.W. Smith*, Docket No. CWA-04-2001-1501, 2004 WL 1658484, at *41 (ALJ Biro, July 15, 2004); *see also Tull v. United States*, 481 U.S. 412, 427 (1987) (describing civil penalties under the CWA as "highly discretionary calculations that take into account multiple factors"). However, as described below, the EPA has two general penalty guidance documents that are instructive in calculating the penalty in this case.

One of the main intents of imposing civil penalties is "to punish culpable individuals and deter future violations, not just to extract compensation or restore the status quo." *Kelly v. U.S. EPA*, 203 F.3d 519, 523 (7th Cir. 2000). To deter future violations, a penalty must capture not only the economic benefit, but also a punitive component "which accounts for the degree of seriousness and/or willfulness of the violations." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York*, 244 F. Supp. 2d 41, 48 (N.D.N.Y. 2003).

ARGUMENT

While CWA Section 309(g)(3) provides the statutory criteria for the assessment of penalties in administrative enforcement matters, this Tribunal and the Environmental Appeals Board have also calculated penalties using as guidance EPA's general civil penalty policies: Policy on Civil Penalties ("GM-21"), and A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties ("GM-22"), both dated February 16, 1984. *See e.g., In re Phoenix Constr. Servs*., *Inc*., 11 E.A.D. 379, 395 (EAB 2004); *In re Polo Development, Inc.*, Dkt. No. CWA-05-2013-0003, Initial Decision and Order, at *12, ALJ (Dec. 1, 2015); *In re Urban Drainage and Flood Control District*, Dkt. No. CWA-VIII-94-20-PII, 1998 WL 422210, at *19, ALJ (June 25, 1998). GM-22 explains that the development of

a penalty is a two-step process. First, the Agency's enforcement case team calculates a preliminary deterrence figure, composed of the economic benefit of noncompliance and the gravity of the violation. The second step is the application of statutory "adjustment factors" to increase or decrease the preliminary deterrence figure to account for specific characteristics of the violator. CX-35 at CX_001442-43; TR 132:19–133:12.

During the hearing on May 14-15, 2019, Tara Martich, the EPA compliance officer for this case, testified regarding how she applied the statutory penalty factors and GM-22 to Respondent's violation to determine that an appropriate penalty to resolve this matter is $6,600. TR 132:15-18, 166:5-8. Complainant introduced numerous exhibits and testimony at hearing, demonstrating that Ms. Martich's penalty analysis was reasonable, and that Respondent's violation could justify a penalty higher than that which Complainant proposed.

I. NATURE, CIRCUMSTANCES, EXTENT, AND GRAVITY OF THE VIOLATION

This Tribunal has equated the "nature, circumstances, extent, and gravity" of the violation, as expressed in CWA Section 309(g)(3), with the "seriousness" of the violation. *Urban Drainage*, 1998 WL 422210, at * 19. The seriousness of a violation depends primarily on (A) the actual or possible harm to the environment resulting from the violation, as well as (B) the importance of the violated requirement to the regulatory scheme. *Id.*; CX-35 at CX_001444; TR 134:14-17. GM-22 provides that this component of the penalty is intended to create a deterrence, and it should be increased until general deterrence is achieved. CX-35 at CX_001457. In this case, testimony and evidence demonstrate that Respondent's illegal discharge caused both a significant environmental harm and a harm to an integral regulatory scheme, establishing the reasonableness of the proposed penalty.

A. Respondent's Violation Caused Significant Environmental Harm.

According to GM-22, the actual or possible harm of a violation is intended to assess whether, and to what extent, Respondent's activity actually resulted or was likely to result in an unpermitted discharge or exposure. CX-35 at CX_001456. In evaluating the actual or possible harm of a violation, GM-22 provides that a penalty calculation should consider the amount of pollutant, toxicity of pollutant, sensitivity of the environment, length of time of a violation, and size of violator. *Id*. at CX_001444; TR 134:18-23. The evidence presented at hearing demonstrates that Respondent's activity resulted in an unpermitted discharge that caused serious, long-lasting environmental harm.

1. The Southfork Clearwater River is a sensitive environment.

The first factor in assessing the seriousness of a violation is the sensitivity of the environment. CX-35 at CX_001444. Respondent's violation occurred in a sensitive environment. In fact, the South Fork Clearwater River and the aquatic species within it are exceptionally sensitive to the very pollutant that Respondent illegally discharged, and the environmental concerns regarding this ecosystem were exacerbated by Respondent's violation. The Southfork Clearwater River is a CWA Section 303(d)-listed impaired waterbody because it does not meet the State of Idaho's water quality standards for sediment and temperature. CX-6; TR 137:8 –138:20. Therefore, Idaho has implemented a plan and mechanism, known as a total maximum daily load (TMDL), to evaluate specific sources of sediment and temperature on the river and limit the discharge of those pollutants. TR 139:23–140:13. The ultimate goal of a TMDL is to restore the waterbody so that it returns to compliance with applicable water quality standards. TR 138:2-7. As described in more detail below, Respondent stymied the progress of

this TMDL by introducing additional sediment into the South Fork Clearwater River. *See* TR 344:22–345:3, 430:10-21.

Additionally, the South Fork Clearwater River, including the stretch of river where Respondent's unauthorized discharge occurred, is designated critical habitat for species listed as threatened under the Endangered Species Act (ESA). The threatened species are Snake River Basin steelhead, Snake River fall Chinook salmon, and bull trout. The South Fork Clearwater River is designated as Essential Fish Habitat under the Magnuson-Stevens Fishery Conservation and Management Act for Coho salmon and fall Chinook Salmon. CX-17 at CX_000977; CX-40; TR 420:14–421:11, 426:1-5. Despite the ESA's goal of conserving ecosystems for endangered and threated species, David Arthaud, a NMFS fisheries biologist, provided expert testimony explaining that populations of threatened species in the South Fork Clearwater River continue to decline, and he characterized their habitat as "degraded" and range as "constricted." ESA, 16 U.S.C. § 1531 *et seq*., Section 2(b); TR 421:14-19, 422:13; *see* CX-17 at CX_000996-1008. Among the primary factors that limit populations of ESA-listed species in the South Fork Clearwater River is sediment. CX-17 at CX_001007; TR 423:23–425:5. Mr. Arthaud testified to the fact that excess sediment from mining activity reduces habitat quality, juvenile rearing, and spawning. *Id*. Mr. Arthaud further explained that the specific stretch of river where Respondent illegally dredged constituted viable habitat for ESA-listed species. TR 455:21–457:3, 487:16-21. Therefore, Respondent's discharge of sediment frustrated the ESA's goal and exacerbated the precise limiting factor threatening resident species. *See* TR 444:2-21.

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2. While sediment is not toxic, it is harmful.

GM-22 identifies the toxicity of the pollutant as a relevant factor in assessing the seriousness of a violation. CX-35 at CX_001444. As Ms. Martich testified, the pollutant in this case, sediment, is classified as a conventional pollutant,[1] and the penalty was not upwardly adjusted to account for its toxicity. TR 135:19-25. However, Complainant elicited extensive testimony at hearing that, despite sediment's low toxicity, Respondent's activities adversely impacted the environment.

Mr. Arthaud testified at length regarding the potential adverse environmental impacts associated with suction dredge mining. *See generally,* CX-18 (a 2014 report by Mr. Arthaud summarizing the impacts to salmonid species and their habitat from suction dredging on the South Fork Clearwater River). Specifically, Mr. Arthaud explained that suction dredge mining often causes immediate lethal impacts for fish eggs, larval fish, and aquatic invertebrates that are buried, crushed, or entrained by the mining process. TR 427:5–428:10. Suction dredging also causes the suspension of sediments, which can cause behavioral and physiological changes in fish and invertebrates, depending on the concentration of suspended sediments, commonly referred to as "turbidity," to which they are exposed. TR 428:11–430:9. When sediment falls out of suspension, excess sedimentation deposits can reduce the growth and survival of fish eggs, limit habitat for rearing juvenile ESA-listed species, and reduce photosynthesis in plant life, impacting the production of an entire food web. TR 430:10–434:11. According to Mr. Arthaud's review of scientific literature, just one inch of additional sediment will cause

[1] 33 U.S.C. § 1314(a)(4). While Ms. Martich acknowledged that sediment is not technically a toxic pollutant, she and Mr. Arthaud noted that sediment concentration is a proxy used to measure toxic heavy metals that are included within suspended sediment. TR 136:1-10, 434:2-11.

mortality among various species of mollusks and snails. TR 430:22–431:3. Suction dredge mining can also excavate mercury and other heavy metals that had been previously buried, reactivating toxic pollutants that bioaccumulate in the food web. TR 435:14–437:4. Mr. Arthaud's concerns regarding the adverse environmental impacts of suction dredging are echoed in analyses completed by NMFS and the Forest Service as part of the ESA Section 7 consultation for the Forest Service's and Bureau of Land Management's suction dredge program on the South Fork Clearwater River. CX-17 at CX_001013-32, CX_001058; CX-21 at CX_001147-51.

While many of these potential impacts that Mr. Arthaud described are "sublethal," he explained that sublethal impacts have serious implications for populations of ESA-listed species. Mr. Arthaud described two scientific studies, which he conducted, demonstrating that nursery habitat conditions correlate closely with the number of salmon that survive to adulthood and spawn. CX-19; CX-20; TR 437:21–442:18. In other words, degraded nursery habitat inhibits juvenile salmon growth, which reduces migration survival, and ultimately reduces spawning numbers. *See id.*

The evidence and testimony presented at the hearing demonstrate that Respondent's violation did not cause a mere potential for harm; the witnesses attributed actual adverse impacts to Respondent's dredging on July 22, 2015. Based on the quality of the habitat at Respondent's dredge site, Mr. Arthaud concluded that it was "highly likely" that species were present to experience the direct impacts of Respondent's activity. TR 467:18–46810. Additionally, Mr. Arthaud estimated that the turbid plume caused by Respondent's dredge was 25 to 30 NTUs, resulting in displacement and physiological impacts to nearby fish and invertebrates. TR 459:20–466:7, 311:12–312:5; *see* CX-1C. Fish and invertebrates that are displaced from

their habitat are thereafter "very vulnerable to predation." TR 465:11–466:7. Because Respondent dredged within fifty feet of another dredge operation, TR 70:10-18; CX-1B, in violation of the best management practices in NPDES General Permit No. IDG370000 for Small Suction Dredge Placer Miners in Idaho ("General Permit"), CX-3 at CX_000040, the combined plume had greater turbidity and additive adverse effects. TR 461:2-12.

Dan Kenney, a fisheries biologist for the Forest Service, described his efforts to document the adverse impacts of unauthorized suction dredge mining in the South Fork Clearwater River, including Respondent's activities. *See* CX-37. Through GPS data and photographic comparisons, Mr. Kenney identified the exact dredge hole and pile that Respondent was photographed creating.[2,3] CX-37 at CX_001523; TR 279:25–291:17, 380:2–383:4. Mr. Kenney labeled them Hole #5 and Pile #7. TR 291:7-17. Based on the data that Mr. Kenney collected regarding the size of Hole #5 and Pile #7, Complainant's experts agreed that Respondent eliminated habitat for ESA-listed species and the invertebrates on which they rely. TR 297:14–301:12, 469:12-19. Respondent reduced habitat quality, not only in the footprint of Hole #5 and Pile #7, but also further downstream, because he "destabilized the area," activating fine sediment that was once buried and allowing it to infiltrate interstitial spaces that ESA-listed species use for juvenile sheltering, incubation, and spawning. TR 303:6–304:23.

The adverse impacts resulting from Respondent's violation were long-lasting. Mr. Kenney returned to the site of Respondent's activity in 2016—nearly 14 months after

[2] In fact, Respondent stipulated to the fact that he started the dredge hole labeled as "Hole #5" and the tailing pile labeled as "Pile #7" on CX_001519 of CX-37.

[3] Mr. Kenney's *Investigation of Stream Channel Modification at Unauthorized Suction Dredging Site on the South Fork Clearwater River*, dated October 7 and 8, 2015, actually identifies five dredge holes and seven tailing piles that were created on Respondent's mining claim during the 2015 dredge season. CX-37 at CX_001519; TR 340:16–341:20. Despite evidence of multiple dredge holes and piles, Complainant's assessment of adverse environmental impacts focused only on those caused by Hole #5 and Pile #7, which Respondent was photographed creating.

Respondent's violation—and discovered that approximately 55% of Hole #5 and 63% of Pile #7 remained. TR 315:1-19. Even photographs from Mr. Kenney's 2018 site visit demonstrate that adverse impacts continued three years after Respondent's violation. TR 474:9-20. Complainant's experts agreed that the continued presence of excess sediment would impact ESA-listed species and their habitat for years and perhaps forever. CX-38 at CX_001524; TR 319:15-22, 474:9–475:3. According to Mr. Arthaud, "all successive broods that come into spawn for a number of years will be affected and have lower egg survival and lower early rearing survival than if this had not occurred." TR 474:25–475:3.

Complainant has acknowledged that, compared to the large-scale gold placer mining sector, small-scale individual suction dredging, like Respondent's operation, may appear at first glance to cause only minimal impact. Mr. Kenney explained that stream disruption occurs "at a minor spatial scale." TR 303:1-4. Mr. Kenney clarified, however, that Respondent's disruption is small only when compared to the entire river system. TR 343:20–344:16. At the site-specific level, according to the Forest Service's study of Respondent's dredge site, "the actual impacts of those dredge features is profound." TR 343:20–344:16; CX-37 at CX_001502. Accordingly, while individual-scale suction dredge mining may appear to have minimal impacts when compared to large scale gold mining, the violations at issue in this case significantly and permanently altered the area surrounding the dredge activity, impeded the effectiveness of the TMDL, impacted ESA-listed species, and accordingly warrant a sufficiently deterrent penalty.

3. Respondent discharged a harmful amount of sediment.

GM-22 identifies the amount of the pollutant as a relevant factor in assessing the seriousness of a violation. CX-35 at CX_001444. As discussed in detail in Section III.A., below, EPA lacked information that would have allowed for a specific quantification of

sediment, because Respondent failed to respond to EPA's request for information. TR 135:11-18. Nonetheless, Ms. Martich testified that, based on her review of the photographs in Mr. Hughes' inspection report, she based the conservative penalty assessment on a moderate amount of pollutant. TR 134:24–135:10.

Ms. Martich's determination regarding the amount of the pollutant is supported by evidence in the record. Specifically, Mr. Kenney's post-dredge report provided a means to approximate the amount of sediment that Respondent discharged. The October 8, 2015 report approximated that the volume of Hole #5 was 15.4 cubic meters and Pile #7 was 5 cubic meters. TR 294:11-12, 296:11-13; CX-37 at CX_001519. This means that 15.4 cubic meters of material, including sediment, was removed from Hole #5, but only 5 cubic meters of that material settled in Pile #7.[4] Mr. Arthaud explained that the portion of Respondent's discharge that did not settle in Pile #7 was released and suspended down river as turbidity and sediment. TR 466:20–467:2. Mr. Hughes testified that Respondent's sediment plume extended 220 feet downstream from Respondent's dredge before it left his field of vision. CX-1 at CX_000005-6; CX-2 at CX_000024; TR 67:25–68:19.

GM-22 also provides that any penalty adjustment to account for the concentration of a pollutant need not be linear, "especially if the pollutant can be harmful at low concentrations." CX-35 at CX_001456. Complainant's expert witnesses explained that Respondent discharged a harmful concentration of sediment. Mr. Arthaud estimated the concentration of sediment in Respondent's plume at 25-30 NTUs, enough to cause displacement and physiological impacts in

[4] As explained by Mr. Arthaud, 15.4 cubic meters is actually an underestimate for the volume of sediment removed from Hole #5 due to sediment's "swell factor." When the packed sediment from Hole #5 was excavated and released, it increased in volume by approximately 20%. TR 466:2-17.

fish and invertebrates. TR 459:22–460:1. Moreover, Mr. Arthaud concluded that Respondent's plume was at least partly composed of suspended coarse and fine sand, which is less visible than the silt and clay that was discharged by the adjacent dredge in the photograph in CX-1B, but also more harmful at low concentrations because it quickly blocks interstitial spaces that invertebrates and juvenile ESA-listed species use for shelter. TR 461:13–463:4. Therefore, Ms. Martich's determination that Respondent discharged a moderate amount of pollutant was conservative given its harmful effects.[5]

4. The duration of Respondent's violation was at least one day.

Turning to the next factor of the gravity component, duration of violation, the length of time a violation continues is evaluated because "in most circumstances, the longer a violation continues uncorrected, the greater is the risk of harm." CX-35 at CX_001456. Complainant assessed a penalty of merely one day of violation. TR 142:23–144:4. This is the minimum penalty duration allowed under the CWA. TR 191:21–23. The one-day violation resulted in a lower total penalty than would have been assessed if more days of violation were calculated. TR 143:20–144:3.

Although Complainant elected to calculate the penalty based on the shortest duration of violation available, there is evidence Respondent was engaged in illegal dredging for more than one day. In Respondent's Notice of Intent to obtain coverage under the General Permit, he documented his intent to dredge on the South Fork Clearwater River from July 20, 2015, through August 15, 2015. CX-12 at CX_000866. Respondent's proposed start date matches the date that

[5] Ms. Martich's penalty analysis did not account for the amount of sediment that was discharged in the creation of dredge holes other than Hole #5, even though Respondent's mining claim exhibited five new dredge holes and seven new tailing piles after the 2015 dredge season. CX-37 at CX_001519; TR 472:4-20, 340:16–341:20.

Mr. Hughes first received reports that dredgers were on the river, and those reports continued for days after his July 22, 2015 inspection. TR 48:3-10. While Mr. Hughes could not testify with complete certainty regarding a start date because he discovered Respondent actively dredging, he testified that dredgers typically dredge for a period of a few days. TR 47:20–48:2. Respondent's activities appeared consistent with this general practice. Respondent admitted to camping along the river, and Mr. Kenney found five dredge holes and seven tailing piles within Respondent's mining claim, more than Respondent could have created in one morning. TR 50:10-14, 78:15-18, 57:13–58:16, 292:3-5; CX-01 at CX_000006-7; CX-37 at CX_001519. In sum, significant circumstantial evidence suggests that Respondent began dredging days before and continued dredging for days after Mr. Hughes' July 22, 2015 inspection.

As noted previously, GM-22 requires consideration of the duration of the violation because it represents the amount of harm caused. CX-35 at CX_001456. In this case, however, the harm did not stop when the violating activity ended. As detailed in Section I.A.2, above, visible impacts continued for at least fourteen months after the July 22, 2015 violation date. TR 315:5-17. Mr. Kenney noted impacts from the dredging were still visible on a September 13, 2016 inspection of the site and that the site will likely never return to its pre-dredged state. *Id.;* TR 317:23–318:16; CX-38 at CX_001524. Other impacts to the ecosystem of the South Fork Clearwater River will last indefinitely. For example, Mr. Arthaud explained that suspended sediment leads to decreased survival of fish eggs, such that a one percent increase in fine sediment can reduce the survival of incubating eggs by sixteen percent. TR 424:2-4.

Although Complainant chose to use a conservative one-day violation in the gravity analysis, available evidence strongly suggests Respondent dredged in the South Fork Clearwater River for more than one day. TR 142:23–144:4. Complainant chose this conservative approach

in the interest of settlement. TR 146:13-17. Additionally, Respondent's dredging activity will continue to have impacts on the South Fork Clearwater River for generations. TR 318:11. Complainant's conservative penalty assessment is reasonable considering the residual duration of the violation. TR 166:9-12.

B. The Violated Regulation Is Integral to the Regulatory Scheme.

Respondent's violation warrants a substantial penalty not just for its adverse environmental impacts, but also for the harm it caused to the regulatory scheme. The CWA's fundamental purpose is to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(a). In order to achieve that objective, one of the most critical aspects of the CWA statutory scheme is the prohibition on discharges of pollutants from a point source into waters of the United States unless expressly authorized and regulated through the issuance of a CWA permit. 33 U.S.C. § 1311(a). As federal courts have noted, any unpermitted discharge into a water of the United States is a serious violation which significantly undermines the CWA's regulatory scheme. *See United States v. Pozsgai*, 999 F.2d 719, 725 (3rd Cir. 1993) (noting that "[u]npermitted discharge is the archetypal Clean Water Act violation, and subjects the discharger to strict liability"). This is consistent with GM-22, which lists "importance to the regulatory scheme" as one of the primary factors to consider in quantifying the gravity of the violation. CX-35 at CX_001444. Further, the Environmental Appeals Board has noted, "even if there is no actual harm to the environment, failure to obtain a [CWA] permit before [discharging pollutants into waters of the United States] may cause significant harm to the regulatory program," which warrants the assessment of a penalty. *Phoenix*, 11 E.A.D. at 400.

In this case, Respondent discharged pollutants into the South Fork Clearwater River without authorization from a CWA Section 402 NPDES permit. Docket No. 38 at 25. At the

time of Respondent's discharge, no suction dredging activity in the South Fork Clearwater River was covered under the General Permit because, during ESA Section 7 consultation, NMFS concluded that small-scale suction dredging would adversely affect ESA-listed salmon and steelhead and their habitat. CX-03 at CX_000031; CX-16; CX-17 at CX_000983-984. Even if Respondent could have obtained coverage under the General Permit, Respondent was not in compliance with even the most basic Best Management Practices listed in the General Permit. Ms. Godsey testified at length regarding the importance of Best Management Practices to water quality in the South Fork Clearwater River, and the unlikelihood that unauthorized dredgers complied with their terms. TR 224:15–228:12; CX-4 at CX_000085-89. For example, the General Permit requires, among other things: "Suction dredge operations shall not operate within 800 feet of another suction dredging operation occurring simultaneously." CX-03 at CX_00040. Mr. Hughes testified that, when he discovered Respondent and another dredger operating simultaneously, "they were very close together . . . I approximated about 50 feet." TR 52:13-15.[6] Even the Idaho Department of Water Resources Recreational Mining Authorization, which Respondent obtained on May 13, 2015 ("Letter Permit," CX-29) and authorizes the operation of mining equipment under less stringent terms than the General Permit, imposes a mixing zone of 100 feet, twice as long as the spacing between Respondent and the other dredger. Similarly, while Respondent's activities took place prior to the completion of ESA consultation, he failed to comply with the mitigation and conservation measures that NMFS identified in its Biological Opinion to minimize the amount or extent of harmful impacts to ESA-listed species and their habitat. *See* CX-17 at CX_000987-991. For example, Mr. Kenney and Mr. Arthaud testified

[6] Regarding this estimate's accuracy, Mr. Hughes later testified that his approximations of distance are informed by a pace count technique that he learned during prior military service. TR 69:11-12.

that Respondent failed to consult with Forest Service biologists to ensure that the location of his proposed mining operation did not present an inordinate potential to harm ESA-listed species; failed to deconstruct tailing piles and fill dredge holes at the end of the dredge season to minimize impacts on habitat and fish migration; and failed to limit his turbidity plume to 150 feet. TR 333:7–340:8, 477:2–478:5. Therefore, Respondent's violation was not merely a paperwork violation; instead, he mined in a manner inconsistent with regulatory programs intended to protect water quality and ESA-listed species.

Respondent's decision to operate his suction dredge in the South Fork Clearwater River without the required NPDES permit and prior to the completion of the ESA Section 7 consultation is particularly harmful to this regulatory scheme. The Environmental Appeals Board has noted that "the perception that an individual is 'getting away with it' and openly flaunting the environmental requirements may set a poor example for the community and encourage other similar violations in the future and/or lead to the acceptance of such activities as commonplace, minor infractions not worthy of attention." *Phoenix*, 11 E.A.D. at 399. In the years leading up to Respondent's violation, the General Permit was relatively new, and EPA's implementation met widespread noncompliance. TR 145:1-17, 232:24–233:12. To start, suction dredging is an activity that is particularly difficult to regulate based on its portable and temporary nature. TR 235:3-12. Among the mining community, general disregard for the requirements of the General Permit influenced additional miners to forgo permitting, TR 234:2-23, and, in 2014, EPA issued over 300 letters to dredgers who failed to apply for coverage under the General Permit, TR 145:13-17. In 2015, as EPA made substantial efforts to educate and inform the mining community regarding their obligations under the General Permit, TR 145:1-12, 228:13–229:17, Respondent joined miners from the American Mining Rights Associations to openly and

knowingly violate the General Permit, arguing that their dredging activities should not be subject to its terms. TR 71:18–73:6. In sum, Respondent's flagrant disregard for the General Permit frustrated its purpose. As Ms. Godsey testified, "the prime objective of the [General Permit] is to protect water quality" and, if dredgers fail to obtain coverage, "there's no way that EPA can know whether that objective is being met." TR 237:14-20. Similarly, Mr. Arthaud explained that compliance with NMFS's mitigation measures is integral in ensuring that NMFS has adequately supported the survival of ESA-listed species, and Respondent's failure to comply with such measures frustrates the goal of the ESA. TR 476:7–477:1. Therefore, Ms. Martich's penalty assessment is reasonable, and arguably exceptionally conservative, in light of the harm of Respondent's violation to the regulatory scheme.

C. Complainant's Preliminary Deterrence Amount

As noted above, for one day of discharge in violation of CWA Section 301(a), the total maximum allowable penalty under the CWA is $16,000. Based on the factors detailed above, Ms. Martich testified that she reduced the preliminary deterrence amount in this case to $5,500. TR 146:9-17. Among her reasons for the reduction were the size of the violator, the fact that the violation lasted only one day, and her interest in promoting settlement. TR 146: 13-17. She emphasized in her testimony that her penalty assessment was conservative. TR 146:17.

II. ECONOMIC BENEFIT OF THE VIOLATION

The Federal courts and the Environmental Appeals Board have emphasized the importance of determining and penalizing for the economic benefit of noncompliance as a means "to remove or neutralize the economic incentive to violate environmental regulations." *United States v. Municipal Authority of Union Township*, 150 F. 3d 259, 264 (3rd Cir. 1998); *see In re Carney Industries, Inc*., 7 E.A.D. 171, 207-08 (EAB 1997); U.S.C. § 1319(g)(3). GM-22

explains that an economic benefit calculation should include any benefit from delayed costs, avoided costs, and competitive advantage. CX-35 at CX_001447-1454. In this case, EPA did not increase the penalty based on the economic benefit that Respondent obtained through his violation. TR 133:18–134:5.

Despite EPA's decision to exclude Respondent's economic benefit from the penalty calculation, evidence indicates that Respondent financially gained from his violation. First, Respondent's mining is not a recreational activity, but a profession that provides him a source of income. CX-10 at CX_000857 (demonstrating that the purpose of Respondent's dredging activity is "to help pay bills"); TR 152:17-23. Respondent emphasized his financial interest in suction dredging when he characterized the mining claims at which the violations at issue occurred: "The claims are named aptly Payday 2 and Payday 3." TR 36:4-5.

Additionally, Respondent benefited through the avoidance of costs associated with suction dredging without applying for and complying with an individual NPDES permit and the associated regulatory measures that are required to ensure that suction dredge mining is conducted in a manner that will limit impacts to aquatic resources. Courts have concluded that the economic benefit factor should be included in a penalty calculation, even where the exact or full amount cannot be calculated. *United States v. Smithfield Foods, Inc*., 191 F.3d 516, 529 (4th Cir. 1999); *Carney*, 7 EAD at 207-08. Therefore, EPA's decision to exclude any economic benefit, despite the available evidence, resulted in a conservative penalty assessment.

III. ADUSTMENT FACTORS

Following the calculation of a preliminary deterrence amount, CWA Section 309(g)(3) contemplates a range of violator-specific considerations to be made when assessing a penalty for CWA violations. These are referred to as "adjustment factors." There are four adjustment

factors not calculated into the preliminary deterrence amount: (1) degree of culpability, (2) the violator's ability to pay, (3) any history of noncompliance, and (4) other factors as justice may require. *See supra* at 6–7. Of those, GM-22 explicates the degree of culpability into two considerations: both the violator's actual willfulness in carrying out the violation as well as the violator's cooperation. Both of those adjustment factors are relevant to this case, as Respondent acted with extraordinary willfulness and thereafter refused to cooperate.

No adjustment to the proposed penalty is necessary based on Respondent's ability to pay or history of violations. This is because no information, evidence, or testimony appears to warrant an upward adjustment or mitigation to Respondent's penalty with regard to either of those factors. Respondent has asserted no claim that he is unable to pay the proposed penalty and, following Complainant's motion to compel additional discovery on this factor, this Court observed that "it appears that Respondent is not asserting an inability to pay the proposed penalty." Docket No. 56, at 4.

Complainant also does not propose any upward adjustment on the basis of "other matters as justice may require." The Environmental Appeals Board has noted that application of this factor "should be far from routine, since application of the other adjustment factors normally produces a penalty that is fair and just." *Spang & Co.*, 6 E.A.D. 226, 250 (1995); *see Phoenix*, 11 E.A.D. at 415–16 (holding that the facts of the case were insufficient to justify a penalty reduction, and that the Presiding Officer did not error or abuse her discretion in not discussing the facts in greater detail in her consideration of the justice factor). No evidence or testimony in the record warrants the use of the justice factor to reduce the penalty amount because the application of the other penalty factors to this matter will produce a penalty that is fair and just.

Based on the below analysis of Respondent's noncooperation and culpability, and as reflected in the GM-22 and CWA Section 309(g)(3), an upward adjustment to the preliminary deterrence amount of at least 20% is warranted in this case.

A. Respondent's Cooperation

The first adjustment factor applicable to this case is Respondent's attitude, cooperativeness, and good faith efforts in reporting or remedying violations. *Phoenix*, 11 E.A.D. at 418; CX-35 at CX_001460. Relevant to this factor, Complainant issued Respondent a Notice of Violation and Request for Information pursuant to CWA Section 308, 33 U.S.C. 1318, in pursuit of the enforcement action following Respondent's violation. CX-27. In his response, Respondent failed to provide any of the requested information. TR 128:21. Instead, Respondent argued the request was in error and recommended that EPA withdraw the request. CX-28. This exchange is demonstrative of Respondent's attitude and noncooperation in remedying the alleged violation.

Though Respondent's noncooperation may justify an additional increase in the initial gravity amount of 10 percent, Ms. Martich testified at the hearing that EPA elected not to impose an upward adjustment to the preliminary deterrence amount for Respondent's noncooperation in order to craft a conservative penalty figure. TR 149:14–20.

B. Respondent's Degree of Culpability

The penalty amount calculated based on the gravity of Respondent's violation must be upwardly adjusted based on Respondent's culpability in causing the violation in this case. The culpability factor is generally described as a measure of Respondent's "blameworthiness." *See e.g., Phoenix*, 11 E.A.D. at 418, n.87; *Polo Development*, CWA-05-2013-0003, Initial Decision

and Order, at 17. Assessment of a culpability adjustment is consistent with the punitive component of civil penalties. *Kelly,* 203 F.3d at 523.

GM-22 describes several factors to consider when assessing culpability: (1) how much control the violator had over the events constituting the violation; (2) the foreseeability of the events constituting the violation; (3) whether the violator took reasonable precautions against the events constituting the violation; (4) whether the violator knew or should have known of the hazards associated with the conduct; (5) the level of sophistication within the industry in dealing with compliance issues; and (6) whether the violator in fact knew of the legal requirement which was violated. CX–35 at CX_001459. This approach has been adopted by the Environmental Appeals Board as well as this Tribunal. *See e.g.*, *Phoenix*, 11 E.A.D. at 418; *Polo Development*, CWA-05-2013-0003, Initial Decision and Order, at 17; *Urban Drainage*, 1998 WL 422210, at *22–23.

Turning to each of the factors enumerated above, factor (1) is satisfied by the fact that Respondent was responsible for operating his suction dredge and, accordingly, causing the discharges at issue. Respondent stipulated to his operation of the suction dredge during the hearing, and no evidence was presented nor was it implied that others operated his dredge at any point. TR 382:25–383:4.

Regarding factors (2) and (6), above, there is no question that the events constituting the violation—a discharge of a pollutant to a water without a permit—were foreseeable to Respondent, and that he knew of the legal requirements he violated. Respondent knew that he was required to obtain permit authorization prior to operating his dredge and discharging pollutants in the South Fork Clearwater River. As Ms. Martich testified—and as shown in Respondent's Joint Application for Permit Coverage, CX-10—Respondent considers himself a

professional suction dredger and has obtained permit authorizations in five states over the course of twenty years. TR 152:19; CX-10 at CX_000859. Respondent signed and dated that form attesting to his experience dredging just one year prior to his violation. CX-10 at CX_000860. Last, Ms. Godsey testified that one of the states in which Respondent attested to obtaining permit coverage during the past two decades, Alaska, has had a CWA NPDES permit for suction dredge operations in place for the entirety of Respondent's attested period of professionally dredging. TR 213:3-24. Accordingly, if Respondent's signed permit application was correct, then he has obtained NPDES permit coverage for suction dredging in the past. This experience and permit coverage undoubtedly availed Respondent of the nature of suction dredging, namely the fact that it causes a discharge of pollutants as reflected in the Idaho and other permits, lest permit authorization would not be required. Factor (2) and (6) are satisfied.

Turning to factor (3), whether Respondent took reasonable precautions against the events constituting the violation, this must be resolved in the negative. The only arguable precaution Respondent took against the event constituting the violation was applying for permit authorization in the first instance. This would assist Respondent's case on culpability if only he had heeded the responses by relevant regulatory entities to his application. He did not. First, the United States Army Corps of Engineers ("Corps") informed Respondent in 2014 that his proposed dredging was in critical habitat for ESA-listed species. CX-09 at CX_000855. Later that same year, and nine months prior to his violation, EPA informed him by written letter of the same. CX-08 at CX_000853. As Ms. Martich testified: "EPA was very explicit in this letter, letting Mr. Erlanson know that dredging in the South Fork of the Clearwater River was not available under EPA's general permit." TR 157:3–6. Respondent's failure to heed these

responses and, instead, his choice to wholly ignore multiple regulatory warnings are evidence of Respondent's lack of reasonable precautions taken against the events constituting the violation.

As detailed in Section I.B, above, the evidence also demonstrates that Respondent failed to take reasonable precautions associated with the activity of suction dredging itself. This demonstrates that Respondent not only failed to obtain permit authorization for his suction dredging, but he also failed to operate his dredge in a manner that multiple agencies have determined necessary to protect water quality and ESA-listed species, further satisfying factor (3) of the culpability inquiry.

Factor (4) asks whether Respondent knew or should have known of the hazards associated with his conduct. As a preliminary matter, and as described above, Respondent's Joint Application for Permit Coverage, CX-10, indicates he has obtained permit authorizations in five states over the past two decades—lending not only to Respondent's awareness of the legal requirements associated with the activity, but also to his knowledge of best management practices necessary to avoid the environmental harms caused by suction dredging. Respondent, again, describes himself as a professional suction dredger. Beyond this evidence of his awareness, Respondent received multiple clear descriptions of the potential hazards of his activity in the months and year leading up to his violation. In the February 2014 letter to Respondent, the Corps informed Respondent that the area in which he dredged is designated as critical habitat for the protection of species listed under the ESA. The Corps recommended Respondent follow up with various agencies to ensure his compliance with the ESA. CX-9 at CX_000855. The EPA later reiterated the presence of those species to Respondent in October 2014, and additionally informed Respondent that his Letter Permit did not substitute as or supplant the need for NPDES coverage. CX-08 at CX_000853.

Factor (5) of the culpability inquiry looks to the level of sophistication in the industry in dealing with compliance issues. The industry here, suction dredge mining, involves an individually operated facility, the dredge, and sophistication is dependent on the operator. Here, Respondent has attested to the fact that he is a professional suction dredge miner with twenty years of experience, as opposed to a hobbyist. CX-10 at CX_000859. While the evidence is scant as to a generalized degree of sophistication in the field of suction dredging, the best management practices imposed by the General Permit and described by Ms. Godsey in her testimony are informative. Ms. Godsey, who wrote the permit, describes the BMPs as requiring dredgers to avoid dredging in certain areas; to maintain certain distances from other active dredgers; to discontinue dredging if their turbid discharge plumes reaches a certain length; to avoid undercutting streambanks; to not release mercury; to safely store fuels to avoid spills; to avoid transferring invasive species between waterbodies; and to use screens to avoid fish kills. *See* TR 224:11–228:5. These BMPs are not logistically demanding, they do not force technology, and they do not require the employment of an environmental consultant. Factor (5), therefore, should be considered in this context. The level of sophistication in dealing with compliance issues associated with suction dredging is not excessive, and compliance with a permit requires minimal sophistication. This is further informed by outreach attempts carried out by EPA generally, and Ms. Godsey and her team specifically. Ms. Godsey testified that she began outreach to suction dredging groups as early as 2010, and engaging in outreach in venues as geographically convenient to Respondent as Idaho Falls, Idaho. TR 228:13–230:22. In this light, the resolution of factor (5) bolsters Respondent's culpability for his unauthorized discharge.

With factors (1)–(6) of the prescribed culpability inquiry weighing against Respondent, the question becomes: What is Respondent's degree of culpability? Here, the GM-22 framework describes three levels of upward adjustment for the various adjustment factors: 0-20% for usual circumstances, 21-30% for unusual circumstances, and beyond 30% for extraordinary circumstances. CX-35 at CX_001458. In her testimony, which is informed by 15 years of experience developing CWA enforcement cases, Ms. Martich described Respondent's culpability in this matter as extraordinary. TR 165: 24–166:4. Ms. Martich stated, in relevant part, "I have not come across another case . . . where the entity was notified several times by different agencies of their legal requirement to obtain permit coverage and yet proceeded with the activity of discharging without a permit." *Id.* Nonetheless, she applied only a 20% upward adjustment to the gravity amount so as to craft a conservative penalty amount in the interest of efficiency and with a goal of settlement. TR 202:11–203:16.

Based on the foregoing, and consistent with the suggested approach set forth in GM-22, Complainant proposes an increase of at least 20% to the initial gravity amount of $5,500 to account for Respondent's culpability, for a total penalty of $6,600, though Complainant acknowledges that an upward adjustment of greater than 20% may be warranted, in the Court's sound discretion, by the evidence and testimony available in this case. This is the minimum reasonable adjustment under the circumstances and as shown by the evidence and testimony presented to the Court.

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CONCLUSION

Based on the foregoing, EPA contends that the nature, circumstances, extent and gravity of the violation is substantial and Respondent is culpable for violating the CWA, warranting the assessment of a penalty of at least $6,600, within the sound discretion of this Court.

Dated this 9th day of August, 2019.

Respectfully submitted,

/s/ J. Matthew Moore

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **COMPLAINANT'S INITIAL POST-HEARING BRIEF**, dated August 9, 2019, was filed electronically with the Clerk of the Office of Administrative Law Judges using the ALJ e-filing system, which sends a Notice of Electronic Filing to Respondent.

The undersigned also certifies that on this date she served the foregoing **COMPLAINANT'S INITIAL POST-HEARING BRIEF**, via regular US Mail, postage prepaid, on Respondent Dave Erlanson, Sr., at P.O. Box 46, Swan Valley, Idaho 83449.

Dated this 9th day of August, 2019.

/s/ Shannon K. Connery
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