IN RE DAVE ERLANSON, SR.

CWA Appeal No. 20-03

ORDER DISMISSING APPEAL

Decided March 5, 2021

Syllabus

On November 3, 2020, Mr. Dave Erlanson, Sr. ("Respondent") appealed from Administrative Law Judge ("ALJ") Christine Donelian Coughlin's Initial Decision and Order assessing a $6,600 penalty for discharging a pollutant from a point source into navigable waters, the South Fork Clearwater River in Idaho, in violation of Clean Water Act ("CWA") section 301(a), 33 U.S.C. § 1311(a). In an earlier Accelerated Decision on liability, issued in September 2018, the ALJ found Respondent liable for the alleged violation. Respondent filed an appeal with the Environmental Appeals Board ("Board").

Held: Appeal dismissed. The Board holds that Respondent's appeal, which consisted of a two-paragraph conclusory statement that gave no insight into what the issues or legal and factual arguments in controversy on appeal might be, did not comply with the filing and content requirements of Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. § 22.30(a)(1). The Board further finds that, even if we were to further consider this case, the ALJ's determination is well-reasoned and well-supported by the record as to both liability and penalty.

Before Environmental Appeals Judges Aaron P. Avila, Mary Kay Lynch, and Kathie A. Stein.

Opinion of the Board by Judge Stein:

I. *INTRODUCTION*

In October 2020, Administrative Law Judge Christine Donelian Coughlin ("ALJ") issued an Initial Decision and Order ("Initial Decision") assessing a penalty of $6,600 against Mr. Dave Erlanson, Sr. ("Respondent") for discharging a pollutant from a point source into navigable waters, the South Fork Clearwater River in Idaho, in violation of Clean Water Act ("CWA") section 301(a), 33 U.S.C. § 1311(a). In an earlier Accelerated Decision on liability, issued in

September 2018, the ALJ determined that Respondent was liable for the alleged violation. Respondent filed an appeal with the Environmental Appeals Board ("Board"). For the reasons stated below, the Board dismisses the appeal.

II. *HISTORY*

A. *Statutory and Regulatory History*

The CWA's objective "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. § 125l(a). To achieve that objective, the CWA prohibits the discharge of any pollutant into the waters of the United States by any person unless authorized by a CWA permit or other specified CWA provisions. CWA §§ 301(a), 402(a), 33 U.S.C. §§ 1311(a), 1342(a). Section 402(a) of the CWA, 33 U.S.C. § 1342(a), establishes the National Permit Discharge Elimination System ("NPDES"), a permitting program that allows for the lawful discharge of pollutants from a point source pursuant to the receipt of, and in compliance with, a valid NPDES permit. CWA § 402(a), 33 U.S.C. § 1342(a). CWA section 309(g)(l)(A), 33 U.S.C. § 1319(g)(l)(A), authorizes the United States Environmental Protection Agency ("EPA" or "Agency") to assess civil penalties for violations of section 301.

B. *Relevant Factual and Procedural History*

In 2015, Clinton Hughes, a geologist and Certified Mineral Examiner for the U.S. Forest Service ("Forest Service"), observed Respondent operating a small suction dredge in the South Fork Clearwater River ("SFCR") in Idaho. Order on Complainant's Motion for Accelerated Decision 13-14 (ALJ, Sept. 27, 2018) (ALJ dkt. #38) ("Accel. Dec."); Complainant's Exhibit ("CX") 1, at 000002, 000005-6 (Mineral Inspection Report (July 22, 2015)); CX 2 (Declaration of Clinton Hughes (Sept. 20, 2016)). Suction dredging is a form of placer mining that extracts gold or other heavy metals and minerals from existing stream beds or stream deposits. CX 4 at 000075 (Fact Sheet, *The United States Environmental Protection Agency (EPA) Plans To Issue A National Pollutant Discharge Elimination System (NPDES) General Permit To: Small Suction Dredge Miners in Idaho*) ("Fact Sheet"). A suction dredge recovers gold from the stream bed and discharges leftover stream bed materials and stream water into the waterway. *See id.*

The discharge of pollutants into the waters of the United States associated with the operation of a small suction dredge in Idaho must be authorized under

either the general NPDES permit in Idaho for small suction dredging[1] or, where necessary and as specified by the general permit, an individual permit.[2] CX 3 at 000030-34 (*Authorization to Discharge under the National Pollutant Discharge Elimination System for Small Suction Dredge Placer Miners in Idaho, General Permit IDG370000* (Mar. 5, 2013)) ("General Permit"). The General Permit contains a list of waterbodies not covered under the permit (unless certain further requirements are met) due to their designation as critical habitat under the Endangered Species Act ("ESA") and the presence of listed aquatic species.[3] *See id.* at 000031-32. The list of such waterbodies includes the Clearwater River Basin, of which the SFCR is a part, and in which the alleged violation occurred. *See id.* at 000032 (listing the Clearwater River Basin); CX 39 at 001535-36 (Appendix G to the General Permit, listing endangered species critical habitat areas and including the SFCR); *see also* Accel. Dec. at 21 (finding the area of dredging not covered under the General Permit); Initial Decision and Order at 6 (ALJ, Oct. 7, 2020) (ALJ dkt. #80) ("Init. Dec.") (citing ALJ Hearing Transcript at 221-22 (May 14-15, 2019) (ALJ dkt. #70-71) ("ALJ Tr.")). The U.S. EPA, Region 10 ("Region") maintains that Respondent's operations in the SFCR were not authorized under either the General Permit or an individual permit and that he is liable for the CWA violation alleged in the complaint. *See* Complaint ¶¶ 3.1-3.9 (June 20, 2016) (ALJ dkt. #1) ("Compl."); Accel. Dec. at 21.

1. *Proceedings Before the Administrative Law Judge*

In its complaint, the Region alleged that Respondent unlawfully operated a small suction dredge on the SFCR on July 22, 2015. *See* Compl. ¶¶ 3.1-3.9.

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[1] A small suction dredge—also referred to as a recreational suction dredge—is defined as a dredge with an intake nozzle size of 5 inches in diameter or less and with equipment rated at 15 horsepower or less. Fact Sheet at 000071. Suspended solids are specified as the primary pollutant of concern in the discharges from a small suction dredge. *Id.* at 000076.

[2] NPDES permits may be issued by the EPA or by a State that is authorized to operate an NPDES program. CWA § 402, 33 U.S.C. § 1342. At the time of the violation at issue here, Idaho had not received such authorization. Thus, EPA was the relevant NPDES permitting authority within the State pursuant to CWA § 402(a), 33 U.S.C. § 1342(a).

[3] In order to obtain coverage for a waterbody otherwise excluded by the General Permit due to the presence of endangered species, an ESA determination must be made through a separate process by the Forest Service and submitted to the EPA, along with the operator's Notice of Intent. General Permit at 000031.

Respondent denied most of the allegations in the complaint and requested a hearing. Answer to Complaint (July 18, 2016) (ALJ dkt. #3) ("Answer"). The parties engaged in the prehearing exchange of information between April and June 2017.[4] At the time of the prehearing exchange, Respondent was represented by counsel. *See* Respondent's Attorney's Notice of Appearance (Sept. 23, 2016) (ALJ dkt. #10); Notice of Withdrawal as Representative (Dec. 18, 2018) (ALJ dkt. #48).

In June 2017, the Region filed a motion for accelerated decision on both liability and penalty. Complainant's Motion for Accelerated Decision and Memorandum in Support of its Motion for Accelerated Decision (June 5, 2017) (ALJ dkt. #31) ("Motion"). Counsel for Respondent timely filed a brief opposing the Region's motion along with a document titled: "Declaration of Dave Erlanson, Sr." ("Erlanson Decl." or "Declaration").[5] Respondent's Brief in Opposition to Motion for Accelerated Decision, app. A (Aug. 2, 2017) (ALJ dkt. #34) ("Resp. to Mot."). As relevant here, a violation of CWA § 301(a), 33 U.S.C. § 1311(a), occurs when (1) a person; (2) discharges a pollutant; (3) from a point source; (4) into a navigable water; (5) without authorization under a NPDES permit.

During the prehearing exchange, Respondent, through his counsel, accepted stipulations[6] that Respondent is a "person" as defined by section 502(5) of the CWA and that the SFCR is a "water of the United States" and is therefore a "navigable water" in accordance with section 502(7) of the CWA. Respondent Prehearing Exchange at 6, 12 (May 8, 2017) (ALJ dkt. #26) ("Resp't Prehearing Exchange"). He also acknowledged that he did not have an NPDES permit. *Id.* at 12-13. Further, during the prehearing exchange, Respondent maintained that

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[4] *See* Second Prehearing Order (Feb. 24, 2017) (ALJ dkt. #19); Complainant's Initial Prehearing Exchange (April 7, 2017) (ALJ dkt. #23); Respondent's Prehearing Exchange (May 8, 2017) (ALJ dkt. #26) ("Resp't Prehearing Exchange"); Complainant's Rebuttal Prehearing Exchange (June 5, 2017) (ALJ dkt. #30).

[5] As set forth below in part III.B.2, Respondent later argues that his attorney submitted a fraudulent declaration.

[6] Respondent first denied that he is a person and that the SFCR is a water of the United States in the Answer to the Complaint, then later accepted stipulations proffered by the Region regarding these allegations during the prehearing exchange through his counsel. Answer ¶¶ 3.1-3.2 (denying 3.1-3.2 of the complaint); Resp't Prehearing Exchange at 6, 12. The ALJ acknowledged Respondent's Answer to the Complaint and subsequent stipulations in the prehearing exchange and concluded that there was no genuine issue of material facts as to these elements. Accel. Dec. at 6, 21, 22.

whether a suction dredge is a point source depends on whether the operation resulted in the discharge of a pollutant.[7] *Id.* at 11-12.

The crux of Respondent's argument on liability before the ALJ was that no NPDES permit was required for his suction dredging activity because it did not involve the discharge of a pollutant within the meaning of the CWA. *Id.* at 4-5; Resp. to Mot. at 14, 16. That is, Respondent argued that the discharge of materials from the streambed of the SFCR into the waterway could not be considered an "addition" of a pollutant and therefore, could not be considered a discharge of a pollutant under the CWA.[8] Resp't Prehearing Exchange at 5, 6-11; Resp. to Mot. at 14-16. Respondent additionally argued that the discharge was, at most, "incidental fall-back" and therefore did not require a NPDES permit. Resp't Prehearing Exchange at 5, at 8-9; Resp. to Mot. at 16-23. Respondent also questioned the reliability of the photographic and testimonial evidence offered in support of the Region's claim that his operation of a suction dredge resulted in the discharge of a pollutant. Resp. to Mot. at 10-12. The ALJ concluded there was no genuine issue of material fact on this question and that the record demonstrated that Respondent's operation of a suction dredge released suspended solids into the SFCR. Accel. Dec. at 11-16. The ALJ further held that the release of suspended solids constitutes an "addition of any pollutant" and, thus, a "discharge of a pollutant" as a matter of law. *Id.* at 16-20.

By Order dated September 27, 2018, the ALJ granted the Region's motion for accelerated decision as to liability, but denied the motion as to penalty. *Id.* at 1, 25. On December 18, 2018, Respondent's Counsel withdrew as Respondent's representative. Notice of Withdrawal of Representative at 1. Thereafter, Respondent proceeded *pro se*, i.e., without a lawyer, and represented himself.

The ALJ held a hearing on penalty on May 14 and 15, 2019. Init. Dec. at 1. The Region presented five witnesses and numerous exhibits. *Id.* at 1-2. Respondent did not present any evidence (documentary or testimonial) and chose not to testify. *Id.* at 2. He did, however, cross-examine the Region's witnesses. *Id.*

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[7] Respondent's arguments conflate the elements of whether a suction dredge is a point source with whether the operation of suction dredge resulted in the discharge of a pollutant.

[8] The CWA defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source." CWA § 502(12), 33 U.S.C. § 1362(12). The CWA defines "pollutant" as including, among other things, dredged spoil, rock, and sand. *Id.* § 502(6), 33 U.S.C. § 1362(6).

Both parties submitted post-hearing briefs.[9] On October 7, 2020, the ALJ issued and served her Initial Decision and Order, assessing a penalty of $6,600 based on her factual findings, the relevant statutory factors, and EPA penalty policies. Init. Dec. at 43-44. The Initial Decision provided that it would become a final order unless, among other things, "an appeal to the Environmental Appeals Board is taken within 30 days after this Initial Decision is served upon the parties pursuant to 40 C.F.R. § 22.30(a)." *Id*. at 44. The Region had previously served Respondent with a copy of Part 22 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("CROP"), which includes section 22.30, the requirements for filing appeals with the Board. Compl. attach 1 (copy of e-CFR version of 40 C.F.R. Part 22, including 40 C.F.R. § 22.30).

2. *Proceedings Before the Environmental Appeals Board*

On November 3, 2020, Respondent filed a "Request for Appeal" with the Board.[10] The "Request for Appeal" consisted of two paragraphs. The first stated:

> Respondent disagrees with the decision and order handed down by the administrative judge in the matter cited above and seeks an appeal hearing. Respondent sees no reason to re-litigate the matter

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[9] Complainant's Initial Post-Hearing Brief (Aug. 9, 2019) (ALJ dkt. #75); Respondent's Post-Hearing Brief (Sept. 4, 2019) (ALJ dkt. #76) ("Resp't Post-Hearing Br."); Complainant's Reply Post-Hearing Brief (Sept. 20, 2019) (ALJ dkt. #77); Respondent's Reply Post-Hearing Brief (Sept. 30, 2019) (ALJ dkt. #78) ("Resp't Reply Post-Hearing Br.").

[10] The Board issued an order declining to review the case on its own initiative after the time for appeal had passed. Order Declining to Exercise Sua Sponte Review (Nov. 12, 2020); *see also* 40 C.F.R. §§ 22.30(a), (b). The Order stated that no appeal had been filed and that the Initial Decision and Order would become final on November 23, 2020. Order Declining to Exercise Sua Sponte Review at 1. The Board's statement that no appeal had been filed was based on misinformation from the EPA Mailroom, which erroneously informed the Board that no mail had been received relating to this matter. *See* Order Vacating Decision to Decline Sua Sponte Review, Docketing Appeal, and Order to Show Cause 1 (Nov. 20, 2020). On November 17, 2020, shortly after the Board issued its order declining to review the matter, the Board learned that the EPA mailroom had in fact received Respondent's request for appeal on November 3, 2020, within the time allowed for filing an appeal. *Id.* In light of this information, the Board vacated its Order declining sua sponte review and docketed the case. *Id.*

> here in the petition for appeal and even a cursory reading of the record will show any judicially trained mind that an obvious controversy exists between the [R]espondent[']s legal position and the EPA's position.

Request for Appeal 1 (Nov. 3, 2020). That was followed by a one-sentence paragraph, stating that "[t]his request does not foreclose any other remedies available to [R]espondent but only suffices to establish that the [R]espondent is actively seeking to exhaust his administrative remedies." *Id*. Because this document did not appear to satisfy the filing and content requirements for appeals to the Board from an Initial Decision under 40 C.F.R. § 22.30(a)(1), the Board ordered Respondent to show cause by December 3, 2020 as to why his appeal should not be dismissed. *See* Order Vacating Decision to Decline Sua Sponte Review, Docketing Appeal, and Order to Show Cause (Nov. 20, 2020) ("Show Cause Order").

On November 23, after the November 6 deadline for filing an appeal in this case,[11] Respondent filed the following documents with the Board by regular mail: (1) an "appellate brief" and five attachments; (2) a "motion to reconsider sua sponte review on the grounds of ineffective assistance of [counsel] and other grounds"; and (3) a brief challenging the EPA's jurisdiction in this matter. Appellate Brief (Nov. 23, 2020) ("Appellate Br."); Motion to Reconsider Sua Sponte Review on the Grounds of Ineffective Assistance of Counsel and Other Grounds (Nov. 23, 2020); Appellant Challenge to the Jurisdiction of the U.S. EPA (Nov. 23, 2020) ("Appellant Jurisdiction Br.").[12] Respondent's appellate brief included a copy of his post-hearing brief submitted before the ALJ, with two additional pages added at the end titled "Rebuttal of Initial Decision and Order date 10-7-2020." *Compare* Appellate Brief at 1-19 *to* Respondent Post-Hearing Brief (Sept. 4, 2019) (ALJ dkt. #76). The second brief challenged EPA's, the ALJ's, and the Board's jurisdiction. *See* Appellant Jurisdiction Br. at 2, 8, 12.

On November 30, 2020, Respondent filed his response to the Board's Show Cause Order. The response included: (1) a "motion to add post-trial brief used as

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[11] The ALJ's Initial Decision and Order was served on October 7, 2020 by regular and electronic mail. The deadline for filing an appeal where an initial decision is served electronically is 30 days after service. 40 C.F.R. § 22.30(a)(1)(i), .27(c).

[12] Because Respondent's briefs do not contain page numbers, the Board will cite to the physical page numbers of the filing starting with the title page.

appellate brief"; (2) a "motion to add final post trial brief used as appellate brief #2 to 'show cause'"; (3) a "motion to add: Brief in support of oral arguments"; and (4) a document containing fifteen exhibits "to 'show cause.'" Appellant Motion to Add Post-Trial Brief Used as Appellate Brief to Show Cause (Nov. 30, 2020); Appellant Motion to Add Final Post-Trial Brief Used as Appellate Brief #2 to Show Cause (Nov. 30, 2020); Appellant Motion to Add Brief in Support of Oral Arguments to Show Cause (Nov. 30, 2020); Appellant Motion to Add Exhibits 1 through 15 to Show Cause (Nov. 30, 2020). Contrary to the Board's Show Cause Order, and as discussed below, none of these filings provided any explanation for the deficiencies in Respondent's November 3, 2020 "Request for Appeal," specifically his failure to file a notice of appeal and appeal brief in accordance with the content requirements of 40 C.F.R. § 22.30(a)(1).

On December 11, 2020, the Region submitted its reply to Respondent's response to the Show Cause Order. EPA's Reply to Appellant's Response to the Order to Show Cause (Dec. 11, 2020). On December 15, 2020, the Board issued a scheduling order, clarifying that the deadline for any response by the Region to Respondent's appeal briefs that were filed on November 23, 2020 was January 8, 2021. Scheduling Order (Dec. 15, 2020). The Region submitted its response on January 8, 2021. EPA's Response to Appellant's Appeal (Jan. 8, 2021).

III. *ANALYSIS*

A. *Respondent's Appeal Does Not Comply With 40 C.F.R. § 22.30(a)(1)*

Under 40 C.F.R. § 22.30(a)(1), an appeal from an initial decision requires the filing of a notice of appeal and an appellate brief with the Board. *See* 40 C.F.R. § 22.30(a)(1)(ii). The rules specify that a notice of the appeal "shall summarize the order or ruling" that is being appealed and the accompanying appellate brief "shall contain" a statement of the issues presented for review, argument on the issues presented and the relief sought, among other things. *Id.* § 22.30(a)(1)(iii). Rather than identifying his issues and arguments contesting the Initial Decision, Respondent instead filed a conclusory statement expressing general disagreement with the ALJ's determination and stating that he saw "no reason to re-litigate the matter." Request for Appeal at 1. Thereafter, as stated above, the Board issued its Show Cause Order. In response to the Show Cause Order, Respondent filed four

documents.[13] None of the documents confront or explain why Respondent failed to comply with the requirements of section 22.30(a)(1).

In Respondent's motion to reconsider the Board's order declining sua sponte review, he stated that he is "untrained in law and was not aware of the filing requirements," that he injured himself, and that he is able to show ineffective assistance of counsel.[14] Motion to Reconsider Sua Sponte Review on the Grounds of Ineffective Assistance of Counsel and Other Grounds 1-2 (Nov. 23, 2020).[15] These assertions were not raised in Respondent's request for appeal or in response to the Board's Show Cause Order, and in any event, they are insufficient to justify Respondent's failure to comply with 40 C.F.R. § 22.30(a)(1). The record shows that Respondent was aware of, or at least had notice of, section 22.30—the ALJ explicitly referenced it in the Initial Decision and the Region included a copy of the CROP when it served Respondent with the Complaint. Init. Dec. at 44; Compl., attach 1 (copy of e-CFR version of 40 C.F.R. Part 22, including 40 C.F.R. § 22.30(a)(1)). The rules are also readily available on the Board's[16] and ALJ's[17] websites. Additionally, if Respondent needed more time to file an appeal or a brief

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[13] Appellant Motion to Add Post-Trial Brief Used as Appellate Brief to Show Cause (Nov. 30, 2020); Appellant Motion to Add Final Post-Trial brief Used as Appellate Brief #2 to Show Cause (Nov. 30, 2020); Appellant Motion to Add Brief in Support of Oral Arguments to Show Cause (Nov. 30, 2020); Appellant Motion to Add Exhibits 1 through 15 to Show Cause (Nov. 30, 2020).

[14] His allegations of ineffective assistance of counsel do not bear on his failure to comply with 40 C.F.R. § 22.30(a)(1) and, in any event, we address his allegations in part III.B.2, below. *See also*, n.21, below.

[15] On November 20, 2020, Respondent emailed the Board a document titled "Motion to Reconsider Sua Sponte Review on the Grounds of Ineffective Assistance of Counsel and Other Grounds and Extension for Appeal Filing Deadline." Except for the title used in the documents submitted by email and filed by hardcopy, the substance of both the email and the hardcopy document is otherwise identical.

[16] The rules can be found on the Board's website at the following web address: https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/General+Information/Regulations+Governing+Appeals?OpenDocument

[17] The rules can be found on the ALJ's website at the following web address: https://www.epa.gov/alj/rules-practice-proceedings-administrative-law-judges

due to injury or for other reasons, he could have asked for an extension in advance of the due date, which he did not do.[18]

Respondent's briefs filed after the expiration of the appeal deadline do not cure the failure to comply with 40 C.F.R. § 22.30(a)(1). The Board's Show Cause Order was not an invitation to file a more compelling appellate brief. Rather, the order provided Respondent with an opportunity to explain why his "Request for Appeal" did not comply with the filing and content requirements of 40 C.F.R. § 22.30(a)(1). Show Cause Order at 2. Respondent failed to do so.

While the Board recognizes Respondent is now proceeding *pro se*, a party's lack of legal representation or sophistication does not excuse a failure to comply with regulatory requirements. *See In re Robert Wallin,* 10 E.A.D. 18, 38 n.16 (EAB 2001) (declining to relax a *pro se* litigant's burden of production); *In re Jiffy Builders, Inc*., 8 E.A.D. 315, 320-21 (EAB 1999) (stating that parties who choose to proceed *pro se* are not excused from compliance with the CROP.); *In re Rybond, Inc.,* 6 E.A.D. 614, 626-27 (EAB 1996) (same). While the Board endeavors to construe filings by *pro se* litigants liberally, and does not expect such filings to contain sophisticated legal arguments or to employ precise technical or legal terms, the Board nevertheless expects filings to provide sufficient specificity to apprise the Board of the issues being raised and to articulate supportable reasons for allegations of error. *See In re Sutter Power Plant*, 8 E.A.D. 680, 687-88 (EAB 1999) (discussing threshold for *pro se* litigants in the context of a permit appeal under 40 C.F.R. part 124); *In re To Your Rescue! Services*, FIFRA Appeal No. 04-08, at 3 (EAB Sept. 30, 2005) (Final Order) ("[T]he Board endeavors to construe objections by *pro se* litigants liberally so as to fairly identify the substance of the arguments being raised.").

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[18] Respondent did not file, in advance of the due date, a motion for extension of time to submit his appellate briefs. 40 C.F.R. § 22.30(e)(3) (stating that any motion for an extension of time shall be filed sufficiently in advance of the due date so as to allow other parties reasonable opportunity to respond and to allow the Board reasonable opportunity to issue an order). The Board has granted well-grounded requests for extensions of time filed before but not after the due date, and strictly construes its filing deadlines. *See In re Tri-County Builders Supply*, CWA 03-04, at 5 (EAB May 24, 2004) (Order Dismissing Appeal) ("The Board typically requires strict compliance with the time limits set forth in the rules of practice governing penalty appeals.") (citing *In re Roger Antkiewicz & Pest Elimination Prod. of Am., Inc*., 8 E.A.D. 218, 220 n.2 (EAB 1999)).

Respondent's November 3rd Request for Appeal did not contain any appellate brief or any legal or factual arguments outlining specific issues or objections or basis for his challenges to the ALJ's Initial Decision. Request for Appeal at 1. It instead rested entirely on the conclusory statement that a controversy existed between the parties, giving the Board no insight into what the issues and arguments in controversy on appeal might be. *Id.* Respondent's failure to comply in any meaningful way with the requirements of 22.30(a)(1) because he saw "no reason to re-litigate the matter," disregards the importance of the procedural requirements. The filing requirements specified in 40 C.F.R. § 22.30 are not merely procedural niceties that parties are free to ignore. *In re Four Strong Builders, Inc.,* 12 E.A.D. 762, 772 (EAB 2006); *In re Tri-County Builders Supply*, CWA 03-04, at 7 (EAB May 24, 2004) (Order Dismissing Appeal); *see also In re Louisiana-Pacific Corp*., 2 E.A.D. 800, 802 (CJO 1989) (dismissing appeal where Respondent failed to articulate an explanation for its objections). Rather, they serve an important role in helping to bring repose and certainty to the administrative enforcement process as well as efficient use of the Board's resources and processing of appeals. *Tri-County Builders*, CWA 03-04, at 7; *see also Four Strong Builders,* 12 E.A.D. at 772.

Appeals that lack the identification of legal or factual issues and arguments that do not contain the specificity necessary to adjudicate a dispute impede the Board's ability to adjudicate appeals efficiently and fairly. Part 22 is explicit, "[i]n exercising its duties and responsibilities under these Consolidated Rules of Practice, the Environmental Appeals Board may do all acts and take all measures as are necessary for the efficient, fair and impartial adjudication of issues arising in a proceeding," including denying all relief to a party who, without adequate justification, fails or refuses to comply with the CROP or with an order of the Environmental Appeals Board. 40 C.F.R. § 22.4(a)(2). Under these circumstances, because of the failure to comply with section 22.30(a)(1), the Board dismisses Respondent's appeal.

B. *The ALJ's Determinations on Liability and Penalty are Supported By the Record*

While a dismissal for failure to meet the filing requirements of section 22.30(a)(1) ends the Board's inquiry, under the unusual combination of circumstances presented here the Board, on its own initiative, reviewed the record in order to further explain a few points for the benefit of all parties. And, as we explain below, even if we were to further consider this case, the Board would find that the ALJ's determination is well-reasoned and well-supported by the record as

to both liability and penalty. Accordingly, we address below a few points belatedly asserted by Respondent.

1. *The ALJ's and the Board's Subject Matter Jurisdiction*

Section 309(g), 33 U.S.C. § 1319(g), of the CWA, which establishes EPA administrative penalty assessment authority for, among other things, violations of the section CWA section 301, and the CROP, promulgated at 40 C.F.R. part 22 provide the ALJ and Board with subject matter jurisdiction for this proceeding.[19] In relevant part, the CROP specifies the administrative adjudicatory process for the assessment of penalty under CWA section 309(g). *See* 40 C.F.R. §§ 22.1(a)(6), .4. The CROP authorizes the ALJ to conduct and adjudicate hearings regarding the assessment of penalties arising under various federal environmental laws, including the CWA violation assessed here. *Id.* §§ 22.1 (listing scope of review), .4(c) (explaining powers and duties of presiding officers). And the CROP provides that the Board is to rule on appeals from the initial decision, rulings, and orders of a Presiding Officer, such as an ALJ. *Id*. § 22.4(a) (explaining powers and duties of the Board). Pursuant to the CROP, a respondent waives its right to judicial review unless it exhausts its administrative remedies by appealing to the Board. *Id.* § 22.27(d). Thus, both the ALJ and the Board have jurisdiction in this matter.[20]

2. *Respondent's Claim that the Declaration Filed by Respondent's Former Counsel Was Fraudulent*

In the copy of his post-hearing brief filed with the Board, Respondent asserts, without factual support, that his former counsel submitted a fraudulent declaration before the ALJ and that this merits reversal of the ALJ's Accelerated Decision regarding liability. *See* Appellate Br. at 7-8. The Declaration was attached to Respondent's "Brief in Opposition to Motion for Accelerated Decision" filed on Respondent's behalf on August 2, 2017. *See* Resp. to Mot. attach. A. Respondent did not object to the Declaration until the second day of the hearing on penalty held on May 15, 2019, nearly twenty-one months after its submission and

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[19] Respondent also challenges the EPA's permitting and regulatory authority. Appellant Jurisdiction Br. at 8. Because Respondent's challenges to the EPA's authority do not relate to the Board's subject matter jurisdiction, we address these arguments in part III.B.3 and n.24, n.26, below, regarding liability.

[20] Following an appeal to, and decision by, the Board, a party may seek judicial review in the appropriate federal court. *See* Administrative Procedure Act, 5 U.S.C. § 704 (providing a right of judicial review of "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court * * * .").

eight months after issuance of the Accelerated Decision. *See* Init. Dec. at 24. The ALJ rejected Respondent's belated attempt to recant his duly submitted Declaration and declined to alter her liability finding on that basis.[21] *Id*. at 24-25.

Moreover, Respondent does not explain how excluding the Declaration would have materially altered the ALJ's liability determination. In fact, the statements in the Declaration that the ALJ relied upon in the Accelerated Decision can be readily confirmed independently in the record. The Accelerated Decision relies on the following undisputed facts in the Declaration:

> (1) Respondent owns a mining claim on the [SFCR] 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.
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> (2) The [SFCR] ultimately flows to the Snake River. [*Id.*] ¶ 3.
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> (3) Respondent engages in the business of gold mining on his claim. [*Id.*] ¶ 3. His interest in mining is not recreational but professional. *Id.*
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> (4) On July 22, 2015, Respondent was mining for gold on his claim using an apparatus known as a suction dredge. *See* [*id.*] ¶¶ 10, 23.
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> (5) While operating his suction dredge, Respondent encountered and conversed with Clinton Hughes, an employee of the United States Forest Service, who subsequently prepared a Mineral Inspection Form documenting his observations of Respondent's activities. *See* [*id.*] ¶¶ 23, 28.

Accel. Dec. at 5. The record supports the accuracy of the statements relied upon by the ALJ even absent the Declaration. *See, e.g.,* CX 1 at 000002, 000005-6 (Clinton Hughes's Inspection Report documenting his encounter with Respondent on July 22, 2015); CX 2 (Clinton Hughes's declaration regarding his encounter with Respondent); ALJ Tr. at 46-52, 57-60 (Clinton Hughes's testimony regarding his encounter with Respondent); ALJ Tr. at 35 (Respondent stating on July 22, 2015, he was using a recreational suction dredge); ALJ Tr. at 36 (Respondent stating that he conducted this activity on his mining claim in the SFCR); Answer ¶ 4.8

[21] The ALJ held that Respondent is bound by his attorney's actions. *See* Init. Dec. at 24-25; *see also In re Burrell*, 15 E.A.D. 679, 688-90 (EAB 2012) (stating that a party "cannot avoid the consequences of the acts or omissions of its freely selected agent").

(Respondent admitting that he received gold as economic benefit from dredging); Resp't Prehearing Exchange at 12 (Respondent accepting Region's stipulation that the SFCR is a navigable water);[22] CX 14 (Region's jurisdictional analysis for the SFCR, which was uncontested by Respondent); Resp't Post-Hearing Br. at 7 (Respondent listing Clinton Hughes's testimony as a "non-disputed fact").

In addition, although the ALJ cited to the Declaration in her assessment of how a suction dredge operates, a disputed fact at the time, her assessment was ultimately based on, and supported by, other evidence in the record that is not currently disputed by Respondent. *See* Accel. Dec. at 12-16. Under these circumstances, the record independently supports the ALJ's conclusions even if we were to consider the liability determination without the Declaration Respondent claims was fraudulent. *See, e.g.*, *In re VSS Int'l, Inc.*, 18 EAD 372, 389-90 (EAB 2020) (rejecting VSS's claim that a document it had submitted in response to a formal agency information request was incorrect because VSS provided no specific evidence to overcome the facts it originally provided to the Agency).

3. *The Region's Prima Facie Case of Liability and the ALJ's Liability Determination*

The record supports a finding that the Region established a prima facie case and that the ALJ did not err in her liability determination. As relevant here, a violation of CWA section 301(a), 33 U.S.C. § 1311(a), occurs when (1) a person; (2) discharges a pollutant; (3) from a point source; (4) into a navigable water; (5) without authorization under a NPDES permit.

The record reflects that the Region addressed each element and established its prima facie case for Respondent's liability. In particular, the Region proffered that: (1) Respondent is an individual, and thus, a person as defined by the CWA, Compl. ¶ 3.1; Complainant's Initial Prehearing Exchange at 11 (April 7, 2017) (ALJ dkt. #23) ("Region Prehearing Exchange"); (2) Respondent operated a suction dredge, as witnessed by Clinton Hughes, and such operation resulted in a discharge of a pollutant pursuant to the CWA and various caselaw, Compl. ¶ 3.6, 3.8; Region Prehearing Exchange at 11-15; (3) the suction dredge's waste disposal system constitutes a discrete conveyance and/or conduit and is thus a point source pursuant to the CWA, Compl. ¶ 3.7; Region Prehearing Exchange at 15-16; (4) the SFCR flows to the Snake River, which flows to the Columbia River, and eventually the

[22] Although Respondent now claims that the SFCR is not navigable due to boulders that interrupt its flow, he has not contested that the SFCR flows to the Snake River. Appellate Br. at 9.

Pacific Ocean, and is thus a navigable water, Compl. ¶ 3.2; Region Prehearing Exchange at 16-17; *see also* CX 14 at 000909-912; and (5) Respondent was not authorized under the requisite NPDES permit, Compl. ¶ 3.4, 3.9; Region Prehearing Exchange 17-18; CX 11 (EPA Letter to David Erlanson (Aug. 7, 2015)). As noted in Part II.B.1, above, Respondent accepted stipulations that he is a person and that the SFCR is a navigable water. Resp't Prehearing Exchange at 6, 12. He also acknowledged that he did not have a NPDES permit and conditioned whether a suction dredge is a point source on whether its operation resulted in the discharge of a pollutant. *Id.* at 11-13. And with respect to the principal dispute of whether Respondent's operation resulted in the discharge of a pollutant within the meaning of the CWA, the Region offered sufficient evidence and established the required elements of a prima facie case. Motion at 8-15; Complainant's Reply in Support of Motion for Accelerated Decision at 2-9 (Aug. 14, 2017) (ALJ dkt. #35).

The ALJ addressed each element of liability and the arguments presented by the parties in her Accelerated Decision[23] and found that no genuine issue of material fact existed as to whether Respondent violated the CWA and that the Region was entitled to judgment on liability as a matter of law.[24] *See* Accel. Dec.

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[23] Respondent now claims that his due process rights were violated because he was found "guilty" without a trial. Appellate Br. at 11. Under the CROP, a Presiding Officer, here an ALJ, may at any time render an accelerated decision 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.

[24] In his various filings before the Board, Respondent asserts numerous arguments that were not included in the briefings prior to issuance of the Accelerated Decision on liability, and are thus deemed waived in the liability context. *See* Init. Dec. at 23 (ALJ rejecting Respondent's arguments on liability in her Initial Decision regarding penalty). A party's right of appeal is limited to issues timely raised before the ALJ and issues concerning subject matter jurisdiction. 40 C.F.R. § 22.30(c); *see In re Veldhuis,* 11 E.A.D. 194, 219-20 (EAB 2003) (stating issues not raised before the ALJ are waived on appeal), *pet. for review voluntarily dismissed*, No. 03-74235 (9th Cir. Mar. 8, 2004); *In re Woodcrest Mfg., Inc.*, 7 E.A.D. 757, 764 (EAB 1998) (citing *In re Lin*, 5 E.A.D. 595, 598 (EAB 1994)), *aff'd*, 114 F. Supp. 2d 775 (N.D. Ind. 1999). The Board addressed subject matter jurisdiction in part III.B.1, above. Respondent's assertions that the SFCR is not a navigable water of the United States because of boulders in the river and its alleged interrupted flow go to the merits of the claim, rather than this tribunal's subject matter jurisdiction. *See* Appellate Br. at 9; *see In re Fulton Fuel Co*., CWA Appeal No. 10-03, at 18-19 (EAB Sept. 9, 2010) (Final Decision and Order) (citing *In re Adams*, 13 E.A.D.

at 6 (determining that Respondent is a "person" pursuant to the CWA); *id*. at 6-20 (determining that Respondent's actions resulted in a "discharge of a pollutant" and discussing her analysis at length); *id*. at 20 (determining that Respondent's suction dredge constituted a "point source"); *id*. at 21 (determining that the SFCR is a navigable water);[25] *id*. (determining that Respondent was not authorized to discharge pollutants by any NPDES permit).[26] As to whether Respondent's actions resulted in the discharge of a pollutant, the ALJ found that, based on the evidence in the record, Respondent's operation of a suction dredge resulted in the discharge of suspended solids into the SFCR in the form of a plume of turbid water. *Id.* at 16. The ALJ further found that the suction dredge's release of suspended solids, even if it came from the streambed of the waterway itself, resulted in an "addition of a pollutant" and therefore, a "discharge of a pollutant" pursuant to the CWA. *Id.* at 16-20. As noted by the ALJ, the case most pertinent to this matter is *Rybachek v. EPA*, a Ninth Circuit case which addresses the type of mining at issue here and where the Court found that "even if the material discharged originally comes from the streambed itself, such resuspension may be interpreted to be an addition of a pollutant under the [CWA.]" *Id*. at 16; *Rybachek v. EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990). The ALJ also found that the nature of Respondent's activities here to be distinguishable from "incidental fallback." Accel. Dec. at 19-20. The Board

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310, 319 (EAB 2007)). In any event, while Respondent denied that his actions occurred in a navigable water in the answer to the complaint, Respondent subsequently accepted the Region's stipulation that the SFCR is a navigable water during the prehearing exchange and did not present evidence in the record to dispute that the SFCR is a navigable water before the ALJ. Answer ¶ 3.2; Resp't Prehearing Exchange at 12. The Board finds no merit in Respondent's arguments and further finds these arguments waived.

[25] At the time of the violation, "waters of the United States" was defined to include, *inter alia*, "waters which are currently used, 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 to those waters. 40 C.F.R. § 122.2; 40 C.F.R. § 232.2.

[26] Respondent asserts several belated arguments that he is exempt from EPA's NPDES permitting authority by the State of Idaho and federal laws. Appellant Jurisdiction Br. at 3-6, 8-9. As these arguments were not raised before the ALJ regarding liability, they are deemed waived. *See* n.24, above. As noted in footnote 2, above, at the time of the violation at issue here, EPA was the relevant NPDES permitting authority within the State pursuant to CWA § 402(a), 33 U.S.C. § 1342(a). Further, with respect to enforcing CWA violations, the CWA authorizes EPA to bring an enforcement action against any person in violation of, *inter alia*, section 301. CWA § 309(g)(1)(A), 33 U.S.C § 1319(g)(1)(A).

finds that the ALJ conducted a thorough analysis of the factual and legal issues and did not err in her liability determination.

4. *The ALJ's Penalty Determination*

The Board finds that the ALJ did not err in her assessment of the penalty amount. The statutory penalty factors for a CWA violation include "the nature, circumstances, extent, and gravity of the violation"; the violator's "ability to pay, any prior history of such violations the degree of culpability, economic benefit or savings (if any) resulting from the violation[;] and such other matters as justice may require." CWA § 309(g)(3), 33 U.S.C.§ 1319(g)(3). Pursuant to the CROP, the Presiding Officer, here the ALJ, shall determine the amount of the recommended civil penalty based on the evidence in the record, in accordance with any statutory penalty criteria, and any civil penalty guidelines.[27] 40 C.F.R § 22.27(b). The CWA does not prescribe a precise formula to compute the relevant penalty factors and judges are afforded significant discretion in setting penalties. *In re Phoenix Constr. Serv., Inc.*, 11 E.A.D. 379, 394 (EAB 2004). For a violation assessed under CWA § 309(g)(2)(B) occuring after December 6, 2013, through November 2, 2015, the EPA is authorized to assess an administrative civil penalty in an amount not to exceed $16,000 per day for each day during which the violation continues, and up to a maximum of $187,500. CWA § 309(g)(3), (g)(2)(B), 33 U.S.C. § 1319(g)(3), (g)(2)(B); 40 C.F.R. § 19.4. Based on the factors detailed above, the Region calculated and sought a total penalty of $6,600. Init. Dec. at 30-31.

In determining the penalty, the ALJ fully explained her factual findings based on the record, including hearing testimony, and set forth how her factual findings applied to the relevant penalty factors. *Id*. at 22, 25-43. The ALJ found the penalty sought by the Region to be appropriate based on the record, statutory criteria, and relevant penalty guidance. *See id.* at 4, 33-43; 40 C.F.R § 22.27(b). The ALJ's Initial Decision assessing penalty is well-supported by the record.

IV. CONCLUSION

For the foregoing reasons, the Board dismisses the appeal. Accordingly, Respondent is ordered to pay the full amount of the civil penalty assessed by the

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[27] The Agency has not developed a penalty policy specific to the CWA. *In re City of Marshall,* 10 E.A.D. 173, 189 n.28 (EAB 2001). However, in assessing penalties under the CWA, the agency often relies on EPA's two general penalty policies: (1) U.S. EPA, *EPA General Enforcement Policy #GM-21, Policy on Civil Penalties* (Feb. 16, 1984) and (2) U.S. EPA, *EPA General Enforcement Policy #GM-22, A Framework for Statute-Specific Approaches to Penalty Assessments* (Feb. 16, 1984). *Id.*

ALJ, $6,600, within thirty (30) days of receipt of this Order. Payment shall be made by submitting a certified or cashier's check in the requisite amount, payable to "Treasurer, United States of America," and mailed to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

A transmittal letter identifying the subject case and EPA docket number (CWA-10-2016-0109), as well as the Respondent's name and address, must accompany the check. Respondent may also pay by one of the electronic methods described at the following webpage: https://www.epa.gov/financial/additional-instructions-making-payments-epa. If Respondent fails to pay the penalty within the prescribed statutory period after entry of this Order, interest on the penalty may be assessed. *See* 31 U.S.C. § 3717; 40 C.F.R. § 13.11.