BEFORE THE ENVIRONMENTAL APPEALS BOARD
ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re: Dave Erlanson, Sr., Individual, Docket No. CWA-10-2016-0109	CWA Appeal No. 20-03 **EPA'S RESPONSE TO APPELLANT'S APPEAL**

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I. INTRODUCTION

On November 3, 2020, Dave Erlanson, Sr. ("Appellant") filed an Appeal with the Environmental Appeals Board ("EAB" or the "Board") in the above-captioned matter, involving a violation of Section 301(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1311(a). As discussed in detail below, the Appeal and Appellant's subsequent filings failed to specify whether he disputes the Order on Complainant's Motion for Accelerated Decision (OALJ Docket No. 38), issued by Administrative Law Judge Christine Donelian Coughlin ("ALJ") on September 27, 2018, or the Initial Decision and Order ("Initial Decision") (Docket No. 1), issued on October 7, 2020, or both. Pursuant to Section 22.30(a) of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" ("Part 22 Rules"), and in accordance with the Board's Scheduling Order, dated December 15, 2020, the U.S. Environmental Protection Agency, Region 10 ("EPA" or "Complainant"), submits this Response to Appellant's Appeal. EPA demonstrated that Appellant willfully violated Section 301(a) of the CWA by operating his suction dredge in the South Fork Clearwater River without authorization, causing substantial harm to a sensitive environment and the CWA regulatory scheme. Accordingly, EPA respectfully requests that the EAB dismiss this Appeal for failure to state from which order or ruling it appeals and on what basis. Alternatively, the EAB should affirm the ALJ's Order on Complainant's Motion for Accelerated Decision and her Initial Decision in their entirety and require Appellant to pay the full amount of the civil penalty assessed by the ALJ.

II. ISSUES PRESENTED FOR REVIEW

The Part 22 Rules require that a notice of appeal summarize the order or ruling, or part thereof, appealed from. 40 C.F.R. § 22.30(a)(1)(iii). The notice of appeal must be accompanied by an appellate brief, which must contain, *inter alia*, a statement of the issues presented for review, a statement of the nature of the case and the facts relevant to the issues presented for review, argument on the issues presented, a short conclusion stating the precise relief sought, alternative findings of fact, and alternative conclusions regarding issues of law or discretion. 40 C.F.R. § 22.30(a)(1)(ii)-(iii). Despite the Board's lenience in providing Appellant the opportunity to correct such defects in his initial Appeal, he failed to do so in his response to the Board's Order Vacating Decision to Decline Sua Sponte Review, Docketing Appeal, and Order to Show Cause ("Order to Show Cause") (Docket No. 5), or in any of his additional submissions. Therefore, the issues presented for review remain unclear.

Appellant's submissions to the Board suggest that Appellant bases his entire Appeal on the ALJ's reference to his declaration ("Declaration") in her Order on Complainant's Motion for Accelerated Decision. *See* Docket No. 9 at 8-9.[1] Out of an abundance of caution, EPA interprets Appellant's various submissions and arguments broadly and under a lenient standard of competence. Accordingly, EPA intends to address the following questions:

A. Did the Appeal comply with 40 C.F.R. § 22.30(a) and identify the order or ruling from which it appeals and the bases for appeal?

[1] Appellant's Appellate Brief is not only identical to his Post Hearing Brief, c*ompare* Docket No. 9 *with* OALJ Docket No. 76, it is also largely repeated in Appellant's Motion to Add Post Trial Brief Used as Appellate Brief to Show Cause, Docket No. 11, and Appellant's Motion to Add Brief in Support of Oral Arguments to Show Cause, Docket No. 13. Hereinafter, each citation to the Appellate Brief shall also include by reference Docket Nos. 9, 11, and 13. Also note that several of Appellant's submissions to the Board did not include page numbers. In referring to specific pages in such submissions, EPA uses the PDF page number.

B. Did the ALJ err in finding Appellant liable for a violation of Section 301(a) of the CWA?

C. Did the ALJ err in her penalty assessment?

III. STATUTORY AND REGULATORY BACKGROUND

Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In furtherance of this objective, Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant by any person into navigable waters, except, *inter alia*, as authorized by a permit issued pursuant to Section 402 of the CWA.

Section 502(5) of the CWA defines "person" to include an individual. 33 U.S.C. § 1362(5). Section 502(12) of the CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Section 502(6) of the CWA defines "pollutant" to include, *inter alia*, dredged spoil, rock, and sand. 33 U.S.C. § 1362(6). Section 502(14) of the CWA defines "point source" to include "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit . . . or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Section 502(7) of the CWA defines "navigable waters" as "waters of the United States." 33 U.S.C. § 1362(7). 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.[2] 40 C.F.R. § 122.2.

[2] On June 22, 2020, a new regulatory definition of "waters of the United States" became effective in Idaho. 40 C.F.R. § 120.2 (2020). The new regulatory definition is irrelevant to the violation alleged in the Complaint.

Under Section 309(g) of the CWA, EPA may assess a civil penalty against any person who violates Section 301(a) of the CWA. 33 U.S.C. § 1319(g). In determining the amount of any penalty, EPA must consider "the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require." 33 U.S.C. § 1319(g)(3). The EAB has noted that the CWA "does not . . . 'prescribe a precise formula by which these factors must be computed' nor does it provide any guidance regarding the relative weight to be given to any of them." *Phoenix Constr. Servs.*, 11 E.A.D. 379, 394 (EAB 2004) (quoting *Advanced Elecs., Inc.,* 10 E.A.D. 385, 399 (EAB 2002)). Accordingly, penalty calculations under the CWA are "highly discretionary." *Tull v. United States*, 481 U.S. 412, 426-27 (1987).

IV. FACTUAL AND PROCEDURAL HISTORY

Appellant owns a mining claim on the South Fork Clearwater River and placer mines for gold by operating a small suction dredge. *See* Docket No. 9.01; CX – 10. In placer mining, miners dredge the bottom of the stream bed using either hydraulic or mechanical systems to dig through the rock and sand at the bottom of a stream to extract gold or other heavy metals and minerals from stream bed, or alluvial, deposits. CX – 04 at 75.[3] Small and recreational gold placer miners often use suction dredges, the most common hydraulic dredging system. *Id*. Small suction dredge mining involves using a high-pressure pump to create suction through a flexible intake hose to excavate streambed sediments. *Id*. at 75-76. Once excavated, streambed sediments are vacuumed through the intake nozzle and processed through a sluice tray mounted

[3] The EPA exhibits admitted into evidence were Bates stamped. For simplicity, citations to EPA exhibits will eliminate the preceding zeros contained in the number.

on floats. *Id*. Dense particles, including gold, are trapped in the sluice box tray while all other stream bed material, such as rock and sand, is discharged from suction dredge outlets and into the stream. *Id*.

Pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, EPA issued the National Pollutant Discharge Elimination System ("NPDES") General Permit No. IDG370000 ("General Permit") on May 6, 2013, authorizing owners and operators of small suction dredges in Idaho to discharge to waters of the United States in accordance with effluent limitations, monitoring requirements, and other conditions set forth therein. CX – 03 at 27. The General Permit specifically exempts the South Fork Clearwater River from General Permit coverage due to the presence of critical habitat areas designated under the Endangered Species Act ("ESA") for listed aquatic species including bull trout, Chinook salmon, and steelhead trout. CX – 03 at 31-32 (Part I.D.4 of the General Permit); CX – 39 at 1535 (Appendix G of the General Permit).

On July 22, 2015, Clint Hughes, a geologist and Certified Mineral Examiner for the U.S. Forest Service ("USFS"), observed Appellant actively dredging in the South Fork Clearwater River. CX – 01 at 2, 5-6; CX – 02; TR 50:10 – 52:15. Appellant did not possess a permit pursuant to Section 402 of the CWA. OALJ Docket No. 26, at 6, 12. The USFS provided Mr. Hughes's inspection report (CX – 01) to EPA, and the USFS and EPA began a coordinated investigation of unauthorized discharges on the South Fork Clearwater River. TR. 121:11 – 122:25.

On June 20, 2016, EPA filed a Complaint alleging that Appellant violated Section 301(a) of the CWA by discharging pollutants into a navigable water without an NPDES permit. OALJ Docket No. 1. On June 5, 2017, EPA moved for an accelerated decision as to liability for the violation alleged in the complaint and sought a civil administrative penalty in the amount of

$6,600. OALJ Docket No. 31. Appellant stipulated that (1) he was a "person" as defined by Section 502(5) of the CWA; (2) the South Fork Clearwater River is a "water of the United States," and is therefore a "navigable water" in accordance with Section 502(7) of the CWA; (3) Appellant's suction dredge is a "point source" as defined by Section 502(14) of the CWA;[4] and (4) he did not obtain an NPDES permit to perform his suction dredge activity. OALJ Docket No. 26 at 5, 6, 11, 12. Accordingly, the only issues upon which the parties disagreed were whether Appellant caused a "discharge of a pollutant" and, if so, the appropriate penalty for the violation of Section 301(a) of the CWA.

On September 27, 2018, the ALJ issued an Order on Complainant's Motion for Accelerated Decision. OALJ Docket No. 38. The ALJ found that the facts material to the elements of liability for the alleged violation were not genuinely in dispute, and the evidence demonstrated that Appellant operated his suction dredge and caused suspended solids to be released from the dredge and into the South Fork Clearwater River. *Id*. at 11-16. She also found that, as a matter of law, the release of suspended solids constituted an "addition of any pollutant" and thus a "discharge of a pollutant" within the meaning of the CWA. *Id*. at 16-20. Accordingly, the ALJ granted EPA's Motion for Accelerated Decision as to Appellant's liability. The ALJ denied EPA's Motion for Accelerated Decision as to the civil administrative penalty, reasoning that a genuine issue of material fact existed regarding the degree of harm caused by the violation. *Id*. at 24-25.

On May 14 and 15, 2019, the ALJ presided over an administrative hearing for the sole purpose of determining the appropriate civil administrative penalty for Appellant's violation of

[4] Appellant conditioned this stipulation upon whether Appellant's operation of the suction dredge resulted in the "discharge of a pollutant." OALJ Docket No. 26 at 11.

Section 301(a) of the CWA. During the hearing, EPA presented five witnesses and numerous exhibits demonstrating the harm that Appellant's violation caused to the environment and to the CWA regulatory scheme. Appellant presented no evidence, documentary or testimonial, and chose not to testify. Docket No. 18.10; TR 35:8-12; 401:15-23.

On October 7, 2020, the ALJ issued and served on the parties an Initial Decision and Order assessing a civil monetary penalty in the amount of $6,600. Docket No. 1. On November 12, 2020, after the deadline to file an appeal had passed, the EAB issued an Order Declining to Exercise Sua Sponte Review on the mistaken belief that neither party had filed an appeal. Docket No. 2. On November 23, 2020, Appellant submitted a Motion to Reconsider the EAB's Order Declining to Exercise Sua Sponte Review (Docket No. 8), an Appellate Brief (Docket No. 9), and Appellant's Challenge to the Jurisdiction of the U.S. EPA (Docket No. 10).[5] Later the same day, after discovering that Appellant had mailed an appeal from the Initial Decision and that his filing was received by the EPA mailroom on November 3, 2020, the EAB vacated its Order Declining to Exercise Sua Sponte Review; however, because Appellant failed to comply with the Part 22 Rules governing the content of appeals, the EAB ordered Appellant to show cause as to why his appeal should not be dismissed. Docket No. 5 ("Order to Show Cause"). Specifically, the Board noted that Appellant failed to present any issues for review, argument on those issues, or identify the relief sought. *Id*. at 2.

On November 30, 2020, Appellant submitted a Response to the Order to Show Cause, Docket Nos. 15 – 18.15, and, on December 11, 2020, EPA filed its Reply to Appellant's Response to the EAB's Order to Show Cause, Docket No. 21. On December 15, 2020, the EAB

[5] While Appellant's Challenge to the Jurisdiction of the U.S. EPA includes a Certificate of Service indicating it was mailed to counsel for EPA, EPA has not received this document.

issued a Scheduling Order, acknowledging the filings of each party and allowing EPA until January 8, 2021, to submit any response to Appellant's Appeal. Docket No. 22.

V. STANDARD FOR REVIEW

Appeals from administrative enforcement decisions are governed by the Part 22 Rules. In enforcement proceedings, the Board generally reviews *de novo* both the factual and legal conclusions of the ALJ. *See* 40 C.F.R. § 22.30(f) (providing that, in an enforcement proceeding, the Board "shall adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed . . ."); *see also In re Smith Farm Enterprises, LLC*, 15 E.A.D. 222, 228 (EAB 2011). "In reviewing *de novo* an initial decision in an administrative penalty proceeding, the Board applies the 'preponderance of the evidence' standard established by 40 C.F.R. § 22.24(b)." *Smith Farm*, 15 E.A.D. at 228 (defining standard). Complainant bears the burden of demonstrating that the alleged violation occurred. 40 C.F.R. § 22.24(a). "Although findings of fact are reviewed *de novo*, the Board generally defers to the ALJ's factual findings when those findings rely on witness testimony and when the credibility of the witnesses is a factor in the ALJ's decision making." *Smith Farm*, 15 E.A.D. at 229; *see also In re Ocean State Asbestos Removal, Inc*., 7 E.A.D. 522, 530 (EAB 1998). "This approach recognizes that the ALJ observes first-hand a witness's demeanor during testimony and therefore is best suited to evaluate his or her credibility." *Smith Farm*, 15 E.A.D. at 229. "When an ALJ's credibility determinations are unsupported by the record, however, the Board will not defer to the ALJ and is not bound by any findings of fact derivatively made." *Id*.; *see also In re Bricks, Inc*., 11 E.A.D. 224, 233, 236-39 (EAB 2003).

VI. ARGUMENT

A. Appellant Failed to Comply with the Part 22 Rules.

The EAB should dismiss the instant appeal because Appellant failed to comply with the requirements for appeals, as set forth in 40 C.F.R. § 22.30(a)(1). The Part 22 Rules require that Appellant file a notice of appeal and an accompanying appellate brief. 40 C.F.R. § 22.30(a)(1)(ii). The notice of appeal must summarize the order or ruling appealed from and the brief must contain, among other things, (1) a statement of the issues presented for review, (2) a statement of the nature of the case and the facts relevant to the issues presented for review, (3) argument on the issues presented, and (4) a short conclusion stating, among other things, the precise relief sought. 40 C.F.R. § 22.30(a)(1)(ii)-(iii).

As noted in the Board's Order to Show Cause, Appellant's notice of appeal consisted of one paragraph stating:

> 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 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 respondent[']s legal position and the EPA's position.

Docket No. 5. Appellant failed to identify any issues or arguments or otherwise comply with the procedural rules applicable to appeals. *See* 40 C.F.R. § 22.30(a).

The EAB typically requires strict compliance with the procedural rules for appeals and excuses noncompliance only when "special circumstances" exist, *see e.g.*, *In re Gary Dev. Co.*, 6 E.A.D. 526, 529 (EAB 1996); *In re Outboard Marine Corp.*, 6 E.A.D 194, 196 (EAB 1995). In dismissing appeals for failure to comply with the Part 22 Rules, the Board has stated that the requirements "are not procedural niceties that the parties are free to ignore." *In re Polo*

Development, Inc., AIM Georgia, LLC and Joseph Zdrilich, 17 E.A.D. 100, 103 (2016); *see In re Tri-County Builders Supply*, CWA Appeal No. 03-04, at 7 (EAB May 24, 2004). Enforcement of such requirements furthers the purpose of Part 22 by helping to "bring repose and certainty to the administrative enforcement process" and by "ensur[ing] that the Board's resources are reserved for those cases involving both important issues and serious and attentive litigants." *In re Tri-County Builders Supply*, CWA Appeal No. 03-04, at 7 (EAB May 24, 2004). That purpose also dictates that even pro se litigants, while sometimes afforded leniency, are not excused from complying with the procedural rules. *In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 320-21 (EAB 1999); *In re Rybond Inc.*, 6 E.A.D. 614, 626-28 (EAB 1996); *Gary Dev. Co.*, 6 E.A.D. at 530-31; *see also* 40 C.F.R. § 22.5(c)(5).

In this case, the Board afforded Appellant the opportunity to demonstrate why his Appeal should not be dismissed for failure to adhere to procedural requirements. *See* Docket No. 5. Appellant's Response to the Order to Show Cause, dated November 30, 2020, failed to cite any reason for his disregard of the Part 22 Rules and failed to identify any special circumstance that would warrant allowing this Appeal to proceed.

More importantly, despite the Board's leniency, Appellant failed to cure the procedural defects in his Appeal. Specifically, it remains unclear whether Appellant challenges a portion of the liability determination in the ALJ's Order on Complainant's Motion for Accelerated Decision (OALJ Docket No. 38), the ALJ's assessment of a penalty in her Initial Decision (Docket No. 1), or both. Appellant also failed again to identify any issues for review. Appellant submitted an "Appellate Brief" identical to the Post Hearing Brief that he submitted to the ALJ. *Compare* Docket No. 9 *with* OALJ Docket No. 76. Because the Post Hearing Brief was drafted before the

ALJ's Initial Decision and therefore before Appellant knew he would appeal, it necessarily cannot address any issues for review by the Board on appeal.

Appellant also filed numerous other submissions, including a Challenge to the Jurisdiction of the U.S. EPA (Docket No. 10), a Motion to Add Post Trial Brief used as Appellate Brief to Show Cause (Docket No. 11), a Motion to Add Final Post Trial Brief used as Appellate Brief #2 to Show Cause (Docket No. 12), a Motion to Add Brief in Support of Oral Arguments to Show Cause (Docket No. 13), and a Motion to Add Respondent Exhibits 1 through 15 to Show Cause (Docket Nos. 13). None of these submissions cure the defects of Appellant's initial Appeal, nor do these submissions identify the rulings or orders that Appellant challenges and the issues for review.

EPA acknowledges that not every appeal warrants dismissal for failure to strictly adhere to the Part 22 Rules, and the EAB may focus instead on whether the defect affects the efficient, fair, and impartial adjudication of the proceeding. *See, e.g.*, *In re VSS International, Inc.*, CWA Appeal No. 20-02, at 10, n.2 (EAB Dec. 16, 2020) (slip opinion). In *VSS International*, for example, the Board allowed the appeal to proceed despite a procedural defect because the appellant filed a brief with "legal and factual arguments and citations to the record that are readily discernable," because EPA failed to specify what remedy it sought for its procedural argument, and because the 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." *Id.* (quoting 40 C.F.R. § 22.4(a)(2)) (internal quotation marks omitted). Unlike the appellant in *VSS International*, however, Appellant fails to provide "legal and factual arguments and citations to the record that are readily discernable." *VSS International*, at 10, n.2. Instead, Appellant pronounces, in each submission, his opinion on a range of topics, but never identifies the issues

for which he seeks EAB review. Nor does Appellant identify "alternative findings of fact" or "alternative conclusions regarding issues of law or discretion," which are also required by the Part 22 Rules, 40 C.F.R § 22.3(a)(1)(iii), forcing EPA to relitigate every aspect of its case and wasting the Board's time and resources in the process. Finally, Appellant fails to identify any relief sought, leaving EPA and the Board to speculate.

Denying EPA's request to dismiss the Appeal would not ensure the "efficient, fair, and impartial adjudication of issues arising in a proceeding." 40 C.F.R. § 22.4(a)(2). On the contrary, Appellant's failure to conform in any meaningful way to the requirements for appeals in the Part 22 Rules promotes inefficiency and undermines the purposes of the Part 22 Rules to bring certainty to the administrative enforcement process and reserve the Board's resources for cases that involve important issues and serious litigants. *Tri-County Builders Supply*, CWA Appeal No. 03-04, at 7.

The Part 22 Rules specifically authorize the Board to impose "procedural sanctions against a party who without adequate justification fails or refuses to comply with [the Part 22 Rules]" such as "denying any or all relief sought by the party in the proceeding." 40 C.F.R. § 22.4(a)(2). The Board provided Appellant with the opportunity to cure the defects in his Appeal and to comply with the Part 22 Rules. *See* Docket No. 5. Appellant failed to do so. The Board should not condone such blatant disregard for the Part 22 Rules. Accordingly, EPA requests that the Board dismiss this Appeal.

B. The ALJ Did Not Err in Her Liability Determination.

Even if the EAB does not dismiss the Appeal, as requested above, it should affirm the ALJ's Order on Complainant's Motion for Accelerated Decision. First, Appellant's disavowal of his Declaration is late and lacks credibility, and the ALJ did not rely on Appellant's Declaration

to determine CWA liability. Second, EPA demonstrated that no issue of material fact or law exists with respect to the elements of liability for a violation of Section 301(a) of the CWA.

1. Appellant's disavowal of his Declaration is late and lacks credibility, and the ALJ did not rely on Appellant's Declaration to determine CWA liability.

Appellant appears to base his entire Appeal on the ALJ's reference to his Declaration in her Order on Complainant's Motion for Accelerated Decision. *See* Docket No. 9 at 8-9. Appellant included and relied on his Declaration in his Brief in Opposition to Motion for Accelerated Decision. *See e.g.,* OALJ Docket No. 34 at 3, Appendix A. Appellant only later disavowed his Declaration when faced with the inconvenience of its contents during the administrative hearing. TR 530:18 – 537:16. In his Appellate Brief, Appellant claims that his Declaration was drafted without his knowledge and consent, and its submission to the ALJ somehow introduces disputed facts, such that the bases for ALJ's liability determination now "lie in ruin" and the EAB should allow Appellant to "argue his case without restriction." Docket No. 9 at 8-9.

The Board should not entertain the Appeal on this basis. Appellant's claims as to the authenticity of his Declaration are convenient and dubious. Appellant did not make such claims after his Brief in Opposition to Motion for Accelerated Decision, which relied on his Declaration, was filed with the ALJ, OALJ Docket No. 34, nor after the ALJ issued her Order on Complainant's Motion for Accelerated Decision, OALJ Docket No. 38, which cited his Declaration. Rather, Appellant disavowed his Declaration almost two years after it was first submitted to the ALJ and only when it suited him – when EPA requested to enter his Declaration as an exhibit at hearing to impeach statements that Appellant made during cross examination, TR 525: 6 – 540: 19, and now, to provide grounds for appeal. Appellant must not be permitted

to rely on his Declaration when it suits him and disavow it when he no longer thinks it is helpful.[6]

Moreover, even if the veracity of the Declaration could be questioned, which it cannot, the ALJ did not rely on the Declaration to determine Appellant's liability. Although Appellant suggests that the Declaration upends the bases for the ALJ's liability determination, he fails to identify a single fact he now disputes, and the ALJ's citation to the Declaration in her Order on Complainant's Motion for Accelerated Decision was inconsequential.

The ALJ relied on Appellant's Declaration in finding five "undisputed facts":

(1) Respondent owns a mining claim on the South Fork Clearwater River located in the Nez Perce – Clearwater National Forest of north-central Idaho. Erlanson Decl. ¶ 2. It is a region of numerous mineral resources, including gold. *Id*. ¶ 3.
(2) The South Fork Clearwater River ultimately flows into the Snake River. Erlanson Decl. ¶ 3.
(3) Respondent engages in the business of gold mining on his claim. Erlanson Decl. ¶ 3. His interest in mining is not recreational but professional. *Id*.
(4) On July 22, 2015, Respondent was mining for gold on his claim using an apparatus known as a suction dredge. *See* Erlanson Decl. ¶¶ 10, 23. . . .
(5) While operating his suction dredge, Respondent encountered and conversed with Clint Hughes, an employee of the United States Forest Service, who subsequently prepared a Mineral Inspection Form documenting his observations of Respondent's activities. *See* Erlanson Decl. ¶¶ 23, 28; CX 1.

Docket No. 38 at 5. Appellant has failed to specify which of these facts he now disputes, and each "undisputed fact" is supported by other uncontested evidence in the record or is irrelevant to determine Appellant's liability. For example, the ALJ cited the Declaration as proof that Appellant owns a mining claim on the South Fork Clearwater River, a fact unnecessary to prove

[6] EPA contends that Appellant's Motion to Reconsider Sua Sponte Review on the Grounds of Ineffective Assistance of Council is not a part of Appellant's Appeal, and the Board should not consider it. *See* Docket No. 6. To the extent the Board disagrees, Appellant suggests in that Motion that the filing of the Declaration demonstrates that he was denied effective assistance of counsel. Docket No. 6 at 2-3. Appellant's argument is unpersuasive for at least two reasons. First, Appellant fails to request any specific relief based on his claim that he received ineffective assistance. Second, "there is no constitutional or statutory right to effective assistance of counsel on a civil case." *Watson v. Moss*, 619 F.2d 775, 776 (8th Cir. 1981).

Appellant's liability for a violation of the CWA. Moreover, Appellant reiterates and relies on this fact in his appeal. *See* Docket No. 9 at 10; Docket No. 9.01 at 2; Docket No. 10 at 5.

The fact that the South Fork Clearwater River flows into the Snake River is relevant to determine whether the South Fork Clearwater River is a "navigable water," an element of the violation. But Appellant stipulated to the fact that the South Fork Clearwater River is a "water of the United States," and is therefore a "navigable water" in accordance with CWA Section 502(7) of the CWA, OALJ Docket No. 26 at 12, and the ALJ admitted into evidence EPA's jurisdictional analysis, which reached the same conclusion and remains uncontested. CX – 14. Appellant does not dispute that he operated his suction dredge in the South Fork Clearwater River on July 22, 2015, OALJ Docket No. 26 at 6, and the observations of Clint Hughes corroborate this fact. CX – 01; CX – 02; *see also* Docket No. 9.01 at 2. Accordingly, Appellant's disavowal of his Declaration fails to cast doubt on any undisputed fact in the Order on Complainant's Motion for Accelerated Decision.

Elsewhere in the Order on Complainant's Motion for Accelerated Decision, the ALJ cited the Declaration in conjunction with Appellant's opposition brief to accurately summarize Appellant's arguments. *See, e.g.*, OALJ Docket No. 38 at 9-10. The ALJ cited to Appellant's Declaration to explain how a suction dredge operates, an issue the parties do not dispute. *See* CX – 4 at 75-76; *see also* CX – 13 at 875. None of the ALJ's citations to the Declaration pertained to issues integral to her liability determination. In fact, the ALJ expressly assigned limited weight to Appellant's Declaration, reasoning that it was, among other things, contradictory and self-serving. OALJ Docket No. 38 at 14-15; *see also* Docket No. 1 at 24 (Appellant's attempt to recant the Declaration "is inconsequential to this decision or my prior determination as to liability.").

Appellant's opposition to accelerated decision – and to liability – was grounded in a legal, not a factual, dispute. Appellant's primary argument regarded whether the operation of a suction dredge results in the "discharge of a pollutant" within the meaning of the CWA, s*ee* OALJ Docket No. 34 at 14-23, an issue that the ALJ decided in the affirmative as a matter of law, OALJ Docket No. 38 at 20. Appellant must not be allowed to manufacture a factual dispute when his legal argument fails. Even if the veracity of Appellant's Declaration could be questioned, the ALJ did not rely on it in finding any undisputed fact, and her determination that Appellant violated the CWA should stand.

2. The ALJ did not err in determining that no issue of material fact or law exists with respect to the elements of liability for a violation of CWA Section 301(a).

Even if the Board reevaluates Appellant's liability, the record indicates that EPA successfully demonstrated that Appellant violated Section 301(a) of the CWA. To prove a *prima facie* violation of Section 301(a) of the CWA, EPA must demonstrate by a preponderance of the evidence that Appellant: (1) is a person that (2) discharged a pollutant (3) from a point source (4) into a navigable water (5) without an NPDES permit or other authorization under the Act. *In re Larry Richner*, 10 E.A.D. 617 (EAB 2002).

i. *Appellant is a "person."*

The ALJ did not err in finding that Appellant is a "person" as defined in CWA Section 502(5), 33 U.S.C. § 1362(5). In so finding, the ALJ relied on Appellant's stipulation that he satisfied the definition, and Appellant's Appeal does not challenge this finding. OALJ Docket No. 26 at 6.

ii. *Appellant "discharged a pollutant."*

As previously noted, the CWA defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12), and the term "pollutant" includes dredged spoil, rock, and sand. 33 U.S.C. § 1362(6). The meaning of the term "discharge of a pollutant" was the sole element of liability to which Appellant did not stipulate. OALJ Docket No. 26. The ALJ did not err in finding that Appellant "discharged a pollutant" as defined in the CWA.

EPA successfully demonstrated that no genuine issue of material fact remained regarding the operation of a recreational suction dredge and whether its operation resulted in the discharge of suspended solids. To demonstrate that Appellant's suction dredge operation discharged suspended solids, EPA relied upon USFS Certified Mineral Examiner Clint Hughes's declaration, in which he described his observation of Appellant's dredge drawing in sediment, and "water and gravel was [*sic*] traveling over the sluice boxes on each dredge, and tailings were deposited just past the sluice box while the plumes of finer sediment were extending from the dredges downstream as they were suspended in the water." CX – 02 at 24 ¶ 5. Mr. Hughes observed a combined plume extending approximately 220 feet behind Appellant's dredge before it left his field of vision. *Id*. Mr. Hughes drafted an Inspection Report based on his observations, which includes photographs of Appellant's dredge in operation. CX – 01 at 2, 5-6. The photographs depict a plume of murky water emanating from an upstream dredge and past Appellant, as well as a plume immediately behind Appellant's dredge. *Id*.; *see also* TR 459:9 – 460:19. Mr. Hughes's observations and the plumes depicted in his photographs are consistent with the descriptions of suction dredge operations in the EPA Fact Sheet for the General Permit. CX – 04 at 75-76; *see also* CX – 13 at 875. Appellant's filings with the ALJ similarly support

the conclusion that his suction dredge operation resulted in increased turbidity caused by the dispersion of uncaptured solid material from the back of his dredge. OALJ Docket No. 26 at 7-8; RX – 01 (acknowledging that the operation of suction dredges results in increased turbidity).

In his Appeal, Appellant does not challenge the factual determination that operating his suction dredge caused increased turbidity. Instead, Appellant again restates his legal argument that the release from his suction dredge did not constitute an "addition of any pollutant," and thus a "discharge of a pollutant," within the meaning of the CWA. Docket No. 9 at 14-15; Docket No. 10 at ¶¶ 8, 17-18, 22. It is well settled, however, that the release of material from a suction dredge constitutes a discharge of pollutants, despite the material's origin in the same waterbody to which it is released. *Rybacheck v. EPA,* 904 F.2d 1276, 1285 (9th Cir. 1990) ("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 Act"); *Borden Ranch Partnership v. United States Army Corps of Engineers,* 261 F.3d 810, 814 (9th Cir. 2001) (holding that "once that material was excavated from the wetland, its redeposit in that same wetland added a pollutant where none had been before"); *see also* OALJ Docket Nos. 31 at 8-13, 35 at 5-9 (analyzing applicable case law related to the discharge of a pollutant from placer mining).

In his submissions to the Board, Appellant ignores the well-settled law and attempts to obfuscate the issue by vaguely referencing inapposite case law regarding "water transfers" and "incidental fallback." Docket No. 9 at 14-15, 18, 22; Docket No. 10 at ¶¶ 8, 17-18, 22 (citing *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95 (2004); *L.A. Cty. Flood Control Dist. v. NRDC, Inc.*, 568 U.S. 78 (2013); *Nat'l Mining Ass'n, v. U.S. Army Corp of Eng'rs,* 145 F.3d 1399 (D.C. Cir. 1998)). But Appellant fails to explain how the facts of the cases he references are analogous to the facts here. Moreover, Appellant can make no such argument

because the cases he references involve the mere transfer of polluted water from one point to another within the same waterbody. The cases do not involve the type of discharge that results from operating a suction dredge, which agitates the streambed, transforms streambed material to suspended solids, and processes the water and sediment through a mechanized dredge and sluice box before discharging them back into the waterbody. Appellant provides no distinguishing fact nor any persuasive reason for the Board to depart from well-established precedent regarding the specific type of discharge at issue. *See Nat'l Mining Ass'n.,* 145 F.3d 1399 at 1406 (distinguishing incidental fallback from discharges caused by placer mining); *U.S. v. Deaton,* 209 F.3d 331, 335-36 (4th Cir. 2000); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983) (stating that "the word 'addition,' as used in the definition of the term 'discharge,' may reasonably be understood to include 'redeposit'"); *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1506 (11th Cir. 1985) (action of digging up sediment and redepositing it on sea bottom by boat propellers constitutes an addition of pollutants).

Appellant's submissions attempt to offer several other cursory reasons that suction dredging should not constitute a "discharge of pollutants." Specifically, Appellant highlights that the South Fork Clearwater River is listed as an impaired water pursuant to Section 303(d) of the CWA, Docket No. 9 at 14-15, and that EPA has interchangeably referred to the pollutant in this matter as "sediment" and "suspended solids," Docket No. 9 at 22. Appellant fails to explain the import of these facts or why the Board should consider them. Moreover, "pollutant" specifically encompasses "the materials segregated from gold in placer mining," including sediment and suspended solids, *Rybachek*, 904 F.2d at 1285, and discharges to impaired waters are not exempt from CWA permit requirements, *see City of Dover v. EPA,* 36 F.Supp. 3d 103, 109-110 (D.D.C. 2014) (explaining that a TMDL "does not, by itself, prohibit any conduct or

require any actions," instead, "each TMDL represents a goal that may be implemented by adjusting pollutant discharge requirements in individual NPDES permits or establishing nonpoint source controls").

iii. Appellant's suction dredge is a "point source."

Section 502(14) of the CWA defines "point source" to mean "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit . . . or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Appellant stipulated that his suction dredge is a "point source" as defined by the CWA. OALJ Docket No. 26 at 11. Appellant conditioned this stipulation upon whether his operation of the suction dredge resulted in the "discharge of a pollutant," *id*.; however, Appellant's stipulation is not necessary to prove liability.

Courts have consistently held that the "definition of a point source is to be broadly interpreted and embraces the broadest possible definition of any identifiable conveyance from which pollutants might enter waters of the United States." *Peconic Baykeeper, Inc. v. Suffolk County*, 600 F.3d 180, 188 (2nd Cir. 2010); *see also Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy,* 305 F.3d 943, 955 (9th Cir. 2002) (quoting *Dague v. City of Burlington,* 935 F.2d 1343, 1354–55 (2nd Cir. 1991)); *Cmty. Ass'n for Restoration of Env't (CARE) v. Sid Koopman Dairy,* 54 F.Supp.2d 976, 980 (E.D. Wash. 1999) (citing *Dague,* 935 F.2d at 1354–55); *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F.Supp.3d 428, 444 (M.D. N.C. 2015) (quoting *Dague,* 935 F.2d at 1354–55). Mr. Hughes observed sediment entering the river from the back of Appellant's dredge and described the turbid plume it caused. CX – 2 at ¶ 5. Additionally, the EPA Fact Sheet for the General Permit describes suction dredges as including a "waste disposal system." CX – 04 at 75. Such waste disposal systems act as a

discrete conveyance or conduit of suspended solids discharged into waters following the suction dredge's processing of streambed materials. Therefore, the ALJ did not err in finding that Appellant's suction dredge is a "point source."

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

Section 502(7) of the CWA defines "navigable waters" as "waters of the United States," 33 U.S.C. § 1362(7). At the time of the violation, "waters of the United States" was defined to include "all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide," and tributaries of those waters. 40 C.F.R. § 122.2. Appellant stipulated that the South Fork Clearwater River is a "water of the United States" and thus a "navigable water." OALJ Docket No. 26 at 12. Additionally, EPA included in its Prehearing Exchange a jurisdictional analysis that concludes that the Southfork Clearwater River is a "water of the United States" because it is a relatively permanent tributary of the Clearwater River, which is a tributary of the Snake River, a traditionally navigable water. CX – 14. Appellant has not challenged that jurisdictional analysis.

Construed liberally, Appellant's recent submissions to the EAB contradict his stipulation. However, Appellant appears to challenge EPA's jurisdiction over his suction dredge operations, not based on the definitions provided by the CWA, but because of the South Fork Clearwater River's location in a "Territory," Docket No. 9 at 10; its "interrupted flow," *id*.; Appellant's private ownership of his mining claim, Docket No. 9 at 12-13; and the implementation of several congressional acts, including the Organic Act of 1897, the Submerged Lands Act of 1953, the Multiple Surface Use Act of 1955, and the Mineral Estate Grant Act of 1872, Docket No. 10 at 5, 8-9. But Appellant fails to explain or cite any precedent to support his claim that any of these

facts exempt his activity from the CWA's prohibition on discharging pollutants into "navigable waters" or that the referenced laws preempt the CWA.

v. Appellant's operation of his suction dredge was not authorized under an NPDES permit.

Appellant's Prehearing Exchange made clear that Appellant "does not argue that he had an NPDES permit." OALJ Docket No. 26 at 12-13. Instead, Appellant contended "that no NPDES permit could be required." OALJ Docket No. 26 at 12-13; *see also* Docket No. 9 at 21 ("Erlanson never received a general permit."). Therefore, the ALJ did not err in finding that Appellant's suction dredge activity was unauthorized.

In his Appeal, Appellant continues to contend that his activity did not require CWA authorization, and he mischaracterizes suction dredging authorization in several ways. First, Appellant suggests that the State of Idaho had exempted his dredge activity from NPDES permitting. Docket No. 9 at 13, 20; Docket No. 10 at 4-5. Nothing in the CWA allows a state to exempt activities from the CWA's prohibition on discharging pollutants to water of the United States. While the Idaho Recreational Mining Authorization ("Idaho Mining Permit") also regulates suction dredge activity in Idaho, such regulation does not substitute for the authorizations required pursuant to Section 301(a) of the CWA. In fact, the Idaho Mining Permit issued to Appellant in 2015 states in bold letters, "The U.S. Environmental Protection Agency (EPA) now requires a NPDES general permit for small scale suction dredging in Idaho." CX - 29. The Idaho Mining Permit encourages permittees to contact EPA regarding its requirements in Idaho and explains "[t]his permit does not serve in lieu of other permits that may be required by federal or other state government agencies or in any way constitute an exemption of other permit requirements." *Id*.

Second, Appellant contends that the General Permit did not clearly state that the South Fork Clearwater River was excluded from General Permit coverage, and therefore no CWA authorization was required. Docket No. 10 at 10-11; Docket No. 9 at 21. Whether the South Fork Clearwater River was excluded from General Permit coverage is irrelevant to whether Appellant violated the CWA because Appellant did not obtain coverage under the General Permit. CX – 11; OALJ Docket No 26 at 12-13. Moreover, the General Permit clearly contained a list of waterbodies "not covered by this [permit] for protection of endangered species," including the "Clearwater River Basin," CX – 03 at 31-32, of which the South Forth Clearwater River is a part. The General Permit also clarified that it does not cover discharges from suction dredges in areas designated as critical habitat under the ESA, and Appendix G lists those portions of the South Fork Clearwater River that had been designated as such. CX – 03 at 31; CX – 39 at 1535-36.

Additionally, Appellant's contention that his activity was lawful because coverage under the General Permit was not available for suction dredging in the South Fork Clearwater River, Docket No. 9 at 21; Docket No. 10 at 4, exemplifies his continued mischaracterization of CWA requirements. General permits issued pursuant to the CWA authorize otherwise unlawful discharges to waters of the United States only for those activities covered by the general permit. Where coverage is not available under a general permit, it remains unlawful to discharge pollutants into a navigable water without other CWA authorization.

In sum, Appellant submitted various documents to the Board, each of which introduces a range of baseless arguments that Appellant attempts to relate to the ALJ's liability determination. However, none of Appellant's arguments identify a genuine issue of material fact that undermines the ALJ's accelerated decision on liability. Nor does Appellant present a legal

argument that demonstrates that EPA failed to prove a *prima facie* violation of Section 301(a) of the CWA. Accordingly, the ALJ did not err in concluding that Appellant violated Section 301(a) of the CWA by operating his suction dredge in the South Fork Clearwater River without an NPDES permit, and the Board should affirm her Order on Complainant's Motion for Accelerated Decision.

C. The ALJ Did Not Err in Her Penalty Assessment.

The EAB should affirm the ALJ's Initial Decision because evidence and testimony presented at hearing demonstrate that a penalty in the amount of $6,600 is appropriate based on the statutory penalty factors and Appellant's violation.

In assessing a civil administrative penalty under the CWA, EPA must consider: (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). The Part 22 Rules provide that the Presiding Officer shall also consider any civil penalty guidance issued under the applicable statute. 40 C.F.R. § 22.27(b). While EPA has never issued civil penalty guidance under the CWA, the EAB and administrative law judges have considered 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., Phoenix Constr. Servs., Inc.,* 11 E.A.D. at 395. According to GM-22, an assessment of the "nature, circumstances, extent, and gravity" of the violation shall incorporate the actual or possible harm to the environment resulting from the

violation and the importance of the violated requirement to the CWA's regulatory scheme. CX - 35 at 1444.

In accordance with the Part 22 Rules, after determining that Appellant violated the law, the ALJ determined that the appropriate civil penalty was $6,600, based on the evidence in the record, and in accordance with the statutory penalty factors set forth in the CWA, as well as GM-21 and GM-22. Docket No. 1. Generally, the ALJ reasoned that Appellant's unauthorized discharge caused serious harm, not only to the environment but also to the CWA regulatory scheme, and that Appellant's culpability warranted an upward penalty adjustment. *Id*. at 41, 43. EPA presented testimony and evidence at hearing that support the ALJ's penalty assessment.

During the administrative hearing, EPA presented evidence and testimony demonstrating that Appellant's violation caused significant environmental harm. The South Fork Clearwater River is a sensitive environment, which does not meet Idaho's water quality standards for sediment and temperature, CX – 6; TR 137:8 –140:13, 344:22–345:3, 430:10-21, and it is designated critical habitat for species listed as threatened under the ESA, CX – 17 at 977; CX - 39; TR 420:14–421:11, 426:1-5. David Arthaud, a National Marine Fisheries Service fisheries biologist, explained that populations of threatened species in the South Fork Clearwater River continue to decline primarily due to excess sediment levels. CX – 17 at 1004-1008; TR 423:23–425:5. Mr. Arthaud testified at length regarding the potential adverse environmental impacts associated with suction dredging, including behavioral and physiological changes caused by suspended sediment, TR 428:11 – 430:9; the reduction of fish egg growth caused by sedimentation, TR 430:10 – 434:11; and the reactivation of toxic pollutants in the food web, TR 435:14 – 437:4. *See also* CX – 18; CX – 17 at 1004-1011; CX – 21 at 1147-51. Mr. Arthaud also testified regarding the actual harm caused by Appellant's violation, estimating that the

turbid plume from Appellant's dredge activity likely displaced and physiologically impacted nearby fish and invertebrates. TR 455:16–475:3; *see* CX-1C. Additionally, Dan Kenney, a fisheries biologist for the U.S. Forest Service, described his efforts to quantify the impacts of unauthorized suction dredging, including Appellant's operation at issue in this case. *See* CX - 37; CX – 38. Mr. Kenney measured and photographed the holes and tailings piles for several years after Appellant created them, and he concluded that the impacts of Appellant's dredging were long-lasting, causing a reduction in habitat quality for years. TR 311:12–312:5, 315:1-19, 474:9-20; CX – 38 ("the site is unlikely to ever return to the pre-dredging state").

EPA also demonstrated that Appellant's violation warrants a substantial penalty because it was harmful to the regulatory scheme of the CWA. As the 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, Appellant received explicit and advance notice of the permit requirements from several federal agencies on numerous occasions and elected to ignore them. *See* CX – 08; CX – 09; CX – 11.

Further, even though Appellant could not have obtained coverage under the General Permit, its Best Management Practices ("BMPs") are instructive, and Appellant failed to operate his dredge in compliance with even the most basic BMPs. *See* CX – 03 at 39-42. Cindi Godsey, an environmental engineer in EPA Region 10's NPDES Permitting Section, testified at length regarding the importance of BMPs 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 – 04 at 85-89. Testimony of Mr. Hughes and Mr. Kenney demonstrated that Appellant, in fact, failed to adhere to the BMPs, which were implemented to ensure the survival of listed species.

TR 52:11-15, 67:25 – 68:24, 333:7–340:8, 476:7–478:5. Appellant's failure to comply with BMPs frustrates the purpose of the General Permit and further demonstrates harm to the regulatory scheme.

Finally, the preliminary deterrence amount in this case warrants upward adjustment to account for Appellant's culpability and lack of cooperation. The evidence presented at hearing demonstrates that several governmental agencies repeatedly advised Appellant that suction dredging in the South Fork Clearwater River was unauthorized, but Appellant dredged anyway. CX – 09 at 855; CX – 08 at 853; CX – 11; TR 149:3 - 157:10. Additionally, EPA issued Appellant a Notice of Violation and Request for Information pursuant to Section 308 of the CWA, 33 U.S.C. 1318, and in his response, Appellant failed to provide any of the information requested. CX – 27; TR 128:21 – 129:3. Instead, Appellant argued the request was in error and recommended that EPA withdraw it. CX – 28. This exchange demonstrates Appellant's recalcitrance and consistent lack of cooperation toward resolving the violation.

Based on the foregoing, EPA contends that the nature, circumstances, extent and gravity of the violation, and Appellant's degree of willfulness warrant the assessment of a penalty of at least $6,600, which the ALJ assessed in her Initial Decision. Docket No. 1.

Appellant does not explicitly challenge the ALJ's Initial Decision and the penalty determination included therein; however, EPA interprets Appellant's submissions broadly and thus addresses Appellant's suggestion that the harm caused by his suction dredge operation was insignificant because (1) the South Fork Clearwater River is already impaired, Docket No. 9 at 16; (2) certain studies have suggested the harm caused by suction dredging is minimal, *id*. at 17; and (3) the impact of sediment pollution is somehow related to particle size and the flow rate of

the River, *id*. at 17-18. Appellant's arguments are not persuasive, and EPA addresses each one in turn.

First, the South Fork Clearwater River is an impaired waterbody pursuant to Section 303(d) of the CWA. Specifically, the South Fork Clearwater River is impaired for sediment. CX – 06 at 178. Appellant discharged sediment into a waterbody that is impaired for the same pollutant, exacerbating the environmental harm. TR 137:8–140:21, 430:10-21, 473:11-20. According to GM-21 and GM-22, the sensitivity of the environment is an aggravating factor in assessing the environmental harm caused by the violation. CX – 35 at 1444, 1456. Therefore, the South Fork Clearwater's impaired status weighs in favor of a higher, not a lower penalty as Appellant suggests.

Second, Appellant requests that the Board consider scientific reports that he did not provide to EPA during the prehearing exchange or afterward, Docket No. 9 at 17, despite the ALJ providing Appellant ample opportunity to introduce evidence and testimony regarding the environmental impacts of his violation.[7] The Part 22 Rules dictate the manner in which new evidence is introduced into the record, requiring litigants to file a motion to reopen the hearing with the Presiding Officer within 20 days after service of an initial decision, stating, *inter alia*, the grounds upon which relief is sought. 40 C.F.R. § 22.28(a)(1). In this case, Appellant failed to make such request to the Presiding Officer. In fact, Appellant attempted to introduce the same exhibits into evidence during the administrative hearing and his post-hearing briefs, but the ALJ

[7] *See* OALJ Docket No. 19 at 3 (Second Prehearing Order requiring Appellant to submit, *inter alia*, "all factual information Respondent considers relevant to the assessment of a penalty and any supporting documentation"); OALJ Docket No. 56 at Section V.1 (Order on Motion to Compel Additional Discovery and Compliance with Second Prehearing Order, allowing Appellant to cure deficiencies in his Prehearing Exchange so that he be allowed to provide testimony at hearing); TR 7:19–14:4 (the Presiding Officer explaining to Appellant his opportunity to introduce evidence and testimony at the administrative hearing); TR 517:6-8, 536:4-25 (Appellant deciding to provide no testimony and no exhibits during the hearing).

denied those attempts, citing the Appellant's numerous opportunities to submit the exhibits in advance of the hearing. Docket No. 1 at 22-23 (citing 40 C.F.R. § 22.22(a)). Appellant does not argue that the ALJ's decision to exclude such exhibits was in error. Because Appellant failed to introduce the referenced studies before the administrative hearing, neither EPA, nor the ALJ, were afforded the opportunity to assess their credibility, and consideration of new evidence at this late stage would be inappropriate.

Finally, Appellant failed to demonstrate that the degree of environmental harm caused by his violation is dependent on the size of the sediment particles he discharged and the flow rate of the receiving water. *See* Docket No. 8 at 17-18. Appellant did not even attempt to explain why or how sediment particle size should have influenced the ALJ's penalty determination. Moreover, EPA's experts demonstrated that Appellant's discharge of sediment resulted in environmental harm from both smaller particles that remain suspended in the water column and by larger particles that ultimately settle to the river bottom. Regarding smaller sediment particles that remain suspended, Mr. Arthaud explained that turbidity causes behavioral and physiological changes in fish and invertebrates at levels as low as 20 Nephelometric Turbidity Units ("NTUs"). TR 429:8–430:4. Mr. Arthaud estimated that the turbid plume caused by Appellant's dredge was approximately 25 to 30 NTUs. TR 459:20–460:9. As for larger particles that fall from suspension sooner, Mr. Arthaud explained that sedimentation covers fish eggs, reducing their growth and survival rate, limits habitat for rearing juvenile salmon, and reduces photosynthesis. TR 430:10–434:11. Finally, Appellant's activities caused long lasting detrimental environmental effects – the stretch of the South Fork Clearwater River that Appellant dredged exhibited excess sediment until at least 2018, three years after Appellant's violation. CX – 37; CX – 38; TR 474:9-20.

Appellant's various submissions fail to demonstrate that his suction dredge activity caused insignificant adverse environmental impacts. Appellant does not appear to challenge the ALJ's determinations regarding harm to the regulatory scheme and the willfulness of the violation. Therefore, the ALJ did not err in assessing a civil penalty in the amount of $6,600, and the Board should affirm her Initial Decision.

VII. CONCLUSION

Based on the foregoing, EPA contends that Appellant failed to comply with the procedural requirements of 40 C.F.R. § 22.30 and that allowing this Appeal to proceed is contrary to a core purpose of the Part 22 Rules. Accordingly, EPA respectfully requests that the Board dismiss this Appeal. Should the Board deny EPA's request to dismiss the Appeal, EPA respectfully requests that the Board affirm the Order of Complainant's Motion for Accelerated Decision, OALJ Docket No. 38, and the Initial Decision and Order, Docket No. 1.

Dated this 8th day of January 2021.

Respectfully submitted,

/s/ J. Matthew Moore

J. MATTHEW MOORE
Assistant Regional Counsel
U.S. EPA, Region 10
1200 Sixth Avenue, Suite 155
Seattle, Washington 98101-3140
(206) 553-6266
Moore.johnm@epa.gov

CAITLIN SODEN
Assistant Regional Counsel
U.S. EPA, Region 10
1200 Sixth Avenue, Suite 155
Seattle, Washington 98101-3140
(206) 553-6635
Soden.caitlin@epa.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **EPA'S RESPONSE TO APPELLANT'S APPEAL,** dated January 8, 2021, was filed electronically with the Environmental Appeals Board's electronic filing system.

The undersigned also certifies that on this date she served the foregoing **EPA'S RESPONSE TO APPELLANT'S APPEAL** on Appellant via email at tapawingoinc@msn.com and on the Region 10 Regional Hearing Clerk via email at R10_RHC@epa.gov.

Dated this 8th day of January 2021.

/s/ Shannon K. Connery
SHANNON K. CONNERY
Paralegal Specialist
U.S. EPA, Region 10
1200 Sixth Avenue, Suite 155, M/S 11-C07
Seattle, WA 98101
(206) 553-1965