BEFORE THE
UNITED STATES ENVIROMENTAL PROTECTION AGENCY

In the Matter of:	)	
	)	
ROBERT M. LOOMIS AND	)	
NANCY M. LOOMIS	)	
Haines, Alaska	)	
	)	
Respondents.	)	
	)	DOCKET NO. CWA-10-2011-0086

RESPONDENTS' MOTION AND MEMORANDUM TO DISMISS EPA'S CWA § 402 CLAIMS

Respondents Robert and Nancy Loomis ("Respondents"), through counsel, pursuant to 40 C.F.R. § 22.16, hereby move to dismiss Count I of the Environmental Protection Agency's (EPA) Complaint, alleging "Unpermitted Storm Water Discharges." As explained below, dismissal of EPA's Clean Water Act (CWA) § 402 claims is warranted for two separate reasons: (a) EPA does not have the authority to bring a CWA § 402 enforcement action because EPA transferred that authority to the State of Alaska, Department of Environmental Conservation (ADEC) prior to instituting this enforcement action; and (b) at all times during the five (5) years prior to EPA's filing of its Complaint, Respondents have not disturbed one (1) acre or greater of land as part of their construction activities. Respondents' motion is supported by the following memorandum and exhibits and affidavit attached thereto.

REEVES AMODIO LLC
500 L STREET, SUITE 300
ANCHORAGE, ALASKA 99501-1990
PHONE (907) 222-7100, FAX (907) 222-7199

REEVES AMODIO LLC
500 L STREET, SUITE 300
ANCHORAGE, ALASKA 99501-1990
PHONE (907) 222-7100, FAX (907) 222-7199

MEMORANDUM

I. Standard For Motion To Dismiss

Respondents' Motion to Dismiss is governed by 40 C.F.R. § 22.20(a), which states:

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law. The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

As will be demonstrated below, there are no genuine issues of fact precluding an order dismissing EPA's CWA § 402 claims.

II. EPA Transferred CWA § 402 Enforcement Authority To ADEC; Thus By Instituting An Enforcement Action Against Respondents, EPA Breached Its Contract With The State of Alaska

Before addressing the merits of EPA's CWA § 402 claims, Respondents will demonstrate that EPA does not have the authority to bring CWA § 402 claims against Respondents, as doing so violates the terms of the *National Pollution Discharge Elimination System Memorandum of Agreement* (MOA) between EPA and ADEC.[1] EPA transferred authority to bring CWA § 402 enforcement actions to ADEC prior to instituting this action against Respondents. Pursuant to the MOA, before EPA could institute an enforcement action against Respondents, EPA was contractually obligated to provide notice to ADEC that ADEC had not taken timely or

[1] *See*, Exhibit A, October 29, 2008 Memorandum of Agreement.

REEVES AMODIO LLC
500 L STREET, SUITE 300
ANCHORAGE, ALASKA 99501-1990
PHONE (907) 222-7100, FAX (907) 222-7199

appropriate enforcement action against Respondents. EPA did not give ADEC such notice, and its claims should be dismissed because EPA's enforcement action has been *ultra vires* since its inception.

A. EPA Transferred Enforcement Authority Over Storm Water Discharges Prior To EPA's Enforcement Action Against Respondents

On October 31, 2008, EPA approved the State of Alaska's application to administer the National Pollutant Discharge Elimination System (NPDES) Program in Alaska.[2] As stated in EPA's approval letter, "Alaska is being approved to administer the NPDES permit program covering point source discharges to State waters..."[3]

The MOA between EPA and ADEC addresses the timing of the transfer of authority from EPA to ADEC. Under the heading "Jurisdiction Over Permits," the MOA states: "[u]pon EPA's approval of the APDES Program and in accordance with the schedule in Appendix B, the DEPARTMENT will assume authority [subject to EPA's oversight and enforcement authority pursuant to the CWA §§402(d) and (i)] for permitting, compliance, and enforcement activities of the APDES program, including administration of the Stormwater Program ..."[4]

Pursuant to Appendix B of the MOA, ADEC assumed primacy over the "Stormwater program" "[n]o later than one (1) year from program approval."[5] Thus, EPA agreed ADEC could assume primacy over the storm water program as early as October 31, 2008 and no later than October 31, 2009.

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[2] *See*, Exhibit B, October 31, 2008 Letter from Elin Miller to Larry Hartig.
[3] *Id.*
[4] *See*, Exhibit A, October 29, 2008 MOA, at p.9, ¶3.03.
[5] *See*, Exhibit A, October 29, 2008 MOA, at Appendix B.

REEVES AMODIO LLC
500 L STREET, SUITE 300
ANCHORAGE, ALASKA 99501-1990
PHONE (907) 222-7100, FAX (907) 222-7199

The MOA states that once this transfer of authority occurs, ADEC "is responsible, subject to EPA's oversight and enforcement authority, to take timely and appropriate enforcement action against persons in violation of compliance schedules, effluent limitations, all other permit conditions, a discharger without a permit, and all other APDES Program requirements."[6]

In the event EPA deemed that ADEC failed to properly institute an enforcement action against an alleged violator, EPA agreed that it would only institute an enforcement action after giving ADEC notice that EPA expects ADEC to take action:

> If EPA determines that the DEPARMENT has not taken timely enforcement action against a violator and/or that the enforcement action has not been appropriate, EPA may proceed with any or all enforcement options available under the CWA § 309. EPA generally will not proceed with a federal civil enforcement until the DEPARTMENT has been given at least thirty (30) days' notice to take appropriate enforcement action.[7]

Thus, as of October 31, 2008, ADEC had been approved to administer the NPDES Program in Alaska, and EPA agreed ADEC would assume primacy over the storm water program no later than October 31, 2009. Once this transfer occurred, EPA had agreed that ADEC was responsible to institute enforcement actions against "a discharger without a permit." Moreover, EPA agreed that it would only institute and enforcement action after giving ADEC thirty (30) days notice to take action.

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[6] *See*, Exhibit A, October 29, 2008 MOA, at p.31, at ¶7.01(1) (emphasis added).
[7] *Id.*, at p.32, at ¶7.02(2)(emphasis added).

REEVES AMODIO LLC
500 L STREET, SUITE 300
ANCHORAGE, ALASKA 99501-1990
PHONE (907) 222-7100, FAX (907) 222-7199

B. EPA Has Violated The Terms Of The October 28, 2008 MOA By Usurping ADEC's Enforcement Authority And Instituting This Enforcement Action Against Respondents

EPA's CWA § 402 claims should be dismissed because EPA does not have primacy to bring such claims, and because the enforcement action by EPA based on such claims constitutes a breach of its contract with ADEC. Pursuant to the MOA between ADEC and EPA, ADEC assumed primacy the storm water program as early as October 31, 2008, and no later than October 31, 2009. The record demonstrates that EPA did not institute its enforcement action until after ADEC had assumed primacy for enforcement over alleged storm water discharges.

The Alaska Department of Fish & Game (ADF&G) was the first regulatory agency to inspect Respondents' property, which occurred on October 7, 2008.[8] The National Marine Fisheries Service (NMFS) forwarded ADF&G's inspection files to the U.S. Army Corps of Engineers (USACE) on February 23, 2009.[9]

Consistent with its assumption of enforcement authority, ADEC was the first regulatory agency to inspect Respondents' property for storm water violations, which occurred in early May, 2008.[10] ADEC documented its finding on an "ADEC APDES Inspection Form," which further demonstrates ADEC had assumed the role of lead agency for storm water inspections by this date because ADEC had developed its own APDES inspection forms.[11] ADEC's inspection

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[8] *See*, CX-01. Respondents' references to Complainant's pre-hearing exchange documents are designated as "CX-__" and references to Respondents' pre-hearing exchange documents are designated as "RX-__". As the EPA and administrative law judge are already in possession of these records, additional copies are not appended to this motion.

[9] *See*, CX-03.

[10] *See*, CX-23, at p.1.

[11] *Id.*

REEVES AMODIO LLC
500 L STREET, SUITE 300
ANCHORAGE, ALASKA 99501-1990
PHONE (907) 222-7100, FAX (907) 222-7199

report indicates that "[o]n May 6, 2009, Alaska Department of Environmental conservation (ADEC) received a complaint via Alaska Department of Fish and Game (ADFG) personnel."[12] The report states that "[o]n May 12, 2009 ... the inspection team mobilized at Mr. Loomis's property."[13]

After ADEC had assumed primacy over storm water inspections and enforcement, and had already inspected Respondents' property, Mark Jen, and EPA inspector, conducted an inspection of Respondents' property on behalf of EPA two months later, on July 8, 2009.[14] Mr. Jen filled out a "CWA Section 404 Inspection Report Form," which noted that EPA had conducted no previous inspections of Respondents' property.[15] Mr. Jen's inspection report indicates that he was aware that ADEC had conducted a storm water inspection two months prior.[16]

Mr. Jen's "CWA Section 404 Inspection Report Form" did not indicate that EPA was initiating an enforcement action, or that EPA would be taking any action against Respondents. To the contrary, Mr. Jen checked the box marked "Corps is Lead Agency."[17] Moreover, Mr. Jen did not check the box which stated "EPA is developing case [New Case]," nor did he check the

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[12] *Id.*
[13] *Id.*
[14] *See*, CX-19.
[15] *Id.*, at p.1.
[16] *Id.*, at p.5. (Noting that "[o]n May 6, 2009, the Alaska Department of Environmental Conservation (ADEC) conducted a storm water inspection of the site.") Mr. Jen's notation concerning the timing of ADEC's inspection was in error, as the inspection actually occurred on May 12, 2009. *See*, CX-23.
[17] *See*, CX-19, at p.6.

box which stated "EPA follow up [Existing Case]."[18] Under the heading "Recommended Follow Up", Mr. Jen noted that Corps of Engineers will continue to be the lead federal agency under CWA 404."[19]

While the ADEC's May 2008 storm water inspection indicates that the transfer of authority to enforce CWA § 402 claims had already occurred at the time of ADEC's initial inspection, the MOA between EPA and ADEC makes it clear that the transfer would occur no later than October 31, 2009.[20] The MOA between EPA and ADEC further states that "EPA generally will not proceed with a federal civil enforcement until the DEPARTMENT has been given at least thirty (30) days' notice to take appropriate enforcement action."[21]

EPA breached these provisions of the MOA by instituting an enforcement action after the date of transfer. To Respondents' knowledge, EPA never provided ADEC with notice that EPA expected ADEC to take any action against Respondents. Notwithstanding its obligation to notify ADEC of its intent before instituting an enforcement action, EPA (a) sent out requests for information on November 5, 2009;[22] (b) issued a notice of violation to Respondents on January 22, 2010;[23] and (c) filed an administrative complaint against Respondents on June 16, 2011.[24]

The record conclusively establishes that EPA usurped enforcement authority from ADEC by instituting an enforcement action after it had transferred enforcement authority to ADEC and

[18] *Id.*
[19] *Id.*
[20] *See*, Exhibit A, October 29, 2008 MOA at Appendix B.
[21] *Id.*, at p.32, ¶7.02(2).
[22] *See*, CX-31, CX-32 CX-33, CX-34, CX-35 and CX-36.
[23] *See*, CX-42.
[24] *See*, EPA's Complaint.

REEVES AMODIO LLC
500 L STREET, SUITE 300
ANCHORAGE, ALASKA 99501-1990
PHONE (907) 222-7100, FAX (907) 222-7199

REEVES AMODIO LLC
500 L STREET, SUITE 300
ANCHORAGE, ALASKA 99501-1990
PHONE (907) 222-7100, FAX (907) 222-7199

after ADEC had already initiated an investigation of Respondents' property. The only way this action could be defensible was if EPA had sent ADEC notice that it expected ADEC to take action against Respondents, and began its enforcement action thirty (30) days after giving ADEC such notice. The record is devoid of any such notice, thus one can only conclude that EPA's enforcement action was *ultra vires* and constitutes a breach of its MOA with ADEC. Respondents respectfully request that the Administrative Law Judge cure this breach by dismissing EPA's CWA § 402 claims.

A dismissal on these grounds is warranted because (a) it will cure EPA's breach of contract, thereby allowing ADEC to assume primacy over alleged storm water violations in Alaska; and (b) allow Respondents to avoid the potential for duplicative state and federal enforcement actions.

III. Respondents Have Not Disturbed An Area Equal To Or Greater Than One (1) Acre, Thus No Permit Was Required For Respondents' Construction Activities

A. Regardless of Which Construction General Permit Applies, Respondents Were Only Required To Obtain Permit Coverage if They Disturbed One or More Acres

40 C.F.R. § 122.26(a)(9) requires any "storm water discharges associated with small construction activity" to be authorized by a National Pollution Discharge Elimination System (NPDES) permit. 40 C.F.R. § 122.26(b)(15) defines "storm water discharge associated with small construction activity" to include the "discharge of storm water from ... [c]onstruction

REEVES AMODIO LLC
500 L STREET, SUITE 300
ANCHORAGE, ALASKA 99501-1990
PHONE (907) 222-7100, FAX (907) 222-7199

activities ... that result in land disturbance of equal or greater than one acre and less than five acres."[25]

In its Complaint, EPA cites the NPDES Permit for Storm Water Discharges from Construction Activities (CGP) effective July 1, 2003, as the CGP applicable to Respondents' construction activities.[26] Respondents believe the 2008 CGP is the controlling permit, rather than the 2003 CGP. The 2008 CGP states that "[p]ermit eligibility is limited to discharges from 'large' and 'small' construction activities and to 'new projects' and 'unpermitted ongoing projects.'"[27] This distinction is not material, however, because both the 2003 and 2008 CGP set the threshold for requiring a permit as "[c]onstruction activities ... that result in land disturbance of equal or greater than one acre and less than five acres."[28]

In its Complaint, EPA alleges that "Respondents discharged storm water to tributaries of the Chilkat River and to wetlands adjacent to these tributaries without an NPDES permit on approximately 97 days during the four years between 2006 and April 30, 2010."[29] By limiting its claims to those beginning in 2006, EPA has implicitly recognized that a five (5) year statute of limitations applies to EPA's CWA § 402 claims.[30] As such, EPA may only bring CWA § 402

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[25] (emphasis added).
[26] *See*, EPA's Complaint, at p.3, ¶2.8.
[27] *See*, Exhibit C, 2008 CGP, at p.2, ¶1.3
[28] *Compare*, Exhibit D, 2003 CGP, at Appendix A (defining "small construction activity") with Exhibit C, 2008 CGP, at Appendix A (containing same definition of "small construction activity.")
[29] EPA's Complaint, at p.7, ¶3.19.
[30] Because the CWA contains no statute of limitations, courts apply the "catch-all" statute of limitations set forth in 28 U.S.C. §2462. *See*, *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1523 (9th Cir. 1987) *Public interest Research Group of New Jersey v. Powell Duffryn Terminal, Inc.*, 913 F.2d 64, 74-75 (3rd Cir. 1990), *cert. denied,* 498 U.S. 1109 (1991). Section 2462 limits

REEVES AMODIO LLC
500 L STREET, SUITE 300
ANCHORAGE, ALASKA 99501-1990
PHONE (907) 222-7100, FAX (907) 222-7199

claims against Respondents which arose on or after June 16, 2006, which is five (5) years prior to EPA filing its Complaint in this matter.

Authority to issue permits pursuant to the 2008 CGP was transferred to the State of Alaska no later than October 31, 2009.[31] On January 31, 2010, the 2008 CGP was replaced by the 2010 Alaska Construction General Permit (ACGP).[32] The threshold requirement for obtaining permit coverage – a disturbance of one or more acres – did not change.[33]

B. Respondents Have Not Disturbed More Than One Acre Since June 16, 2006

As will be demonstrated below, the activities which led to the creation of the pad at issue occurred long before June 16, 2006, and Respondents have not disturbed an acre since June 16, 2006.

i) The Events Which Created The Pad On Respondents' Property Occurred Long Before June 16, 2006

Respondents are the owners of property described as SW 1/4m, NE 1/4m, SW Section 28, T. 30 S., R. 59 E, Copper River Meridian, USGS Quad Map Skagway A-2; Latitude 59.241° N; Longitude 135.994° W; ASLS 88-21 Tracts F and G in Haines, Alaska (the "Property").[34] The Property is located at approximately mile 2.5 of the Haines Highway.[35]

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the time in which an action may be brought to five (5) years from the date on which the claim accrues.

[31] *See*, Exhibit A, October 29, 2008 MOA, at Appendix B.

[32] *See*, Exhibit E, 2011 ACGP Fact Sheet, at p.28.

[33] *Id.*, at p. 18. ("The ACGP authorizes storm water discharges from large and small construction-related activities that result in a total land disturbance of equal to or greater than one acre.")

[34] *See*, CX-46, at ¶1.

[35] *See*, RX-1, Alaska State Land Survey 88-21.

REEVES AMODIO LLC
500 L STREET, SUITE 300
ANCHORAGE, ALASKA 99501-1990
PHONE (907) 222-7100, FAX (907) 222-7199

Respondents did not acquire title to the Property until 1997, by virtue of a quiet title action against the State of Alaska, when the State approved a survey describing the metes and bounds description of the Property.[36]

The Property lies at the base of a steep mountain slope, adjacent to the Haines Highway.[37] A stream originating high on the mountain slope used to flow directly off the mountain and down through the center of the Property, which is located on the flat river basin below the slope.[38] This stream deposited gravel and sediment into the Property naturally, creating an alluvial fan.[39]

In October 1949, a landslide descended from slope above the Property, causing additional acreage of land at the Property to be filled with natural sediment.[40] A photograph of the Property from October 1949 shows the landslide crossing the highway at the Property.[41]

An aerial photo from 1961 shows that a significant amount of fill already on the Property.[42] The photograph shows a stream running through the gravel pad.[43] Thus, the pad existed in 1961, and the fill which existed in 1961 seems likely to have been moved to the

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[36] *See*, RX-2, Judgment Quieting Title, at ¶6 (ordering that title to the Property would not vest until the survey of the Property was completed); *see also*, RX-1 (showing that ASLS 88-21 was approved on September 30, 1997.)
[37] *See*, CX-50, at p.1.
[38] *See*, CX-50, at p.1 and A-16; *see also*, CX-56, at p.1; *see also*, CX-37, at p.4.
[39] *See*, CX-50, at p.1. Alluvial fans are fan-shaped deposits of water-transported material (alluvium). They typically form at the base of topographic features where there is a marked break in slope.
[40] *See*, CX-30, Attachment 5.
[41] *Id.*
[42] *See*, CX-45, Attachment 3; *see also*, CX-37, at p.5; *see also*, CX-50, at A-16.
[43] *Id.*

REEVES AMODIO LLC
500 L STREET, SUITE 300
ANCHORAGE, ALASKA 99501-1990
PHONE (907) 222-7100, FAX (907) 222-7199

Property naturally, through landslides and natural deposits from the stream. It also may be that third parties others than Respondents placed limited amounts of fill on the Property.

Respondent Robert Loomis' father, Bernard Loomis, purchased property in the area of the Property in 1964.[44] In the course of inspecting the area in 1964, Bernard Loomis noted that the Property had been filled naturally due to gravel deposits originating from the stream running through the Property.[45] Bernard Loomis also noted that it appeared that someone had been placing fill at the Property and spreading out that fill, such that the fill was already approximately 4-6 feet deep near the Haines Highway, tapering off to the south.[46] A September 22, 1966 photograph corroborates Bernard Loomis' testimony, and demonstrates that a significant amount of fill had been placed at the Property by this date.[47]

Respondent Robert Loomis witnessed the Alaska Department of Transportation & Public Facilities (DOT&PF) placing fill from its highway construction project onto the Property between 1965 and 1968.[48] Bernard Loomis also witnessed DOT&PF placing fill on the Property during this timeframe.[49] Bernard Loomis also witnessed the City of Haines placing fill at the Site in the late 1960's or early 1970's.[50] This was a logical place for these governmental entities to place overburden or other fill materials from their construction projects, as large equipment

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[44] *See*, CX-56, at p.1. The legal boundaries of the property claimed by Bernard Loomis were not determined until a quiet title action was resolved in favor of Respondents and a survey was performed. *See*, RX-1 and RX-2.
[45] *See*, CX-56, at p.1.
[46] *Id.*
[47] *See*, CX-22, at p.15.
[48] *See*, CX-46, at ¶5.
[49] *See*, CX-56, at p.1.
[50] *Id.*

REEVES AMODIO LLC
500 L STREET, SUITE 300
ANCHORAGE, ALASKA 99501-1990
PHONE (907) 222-7100, FAX (907) 222-7199

could drive out onto the established pad at the Property and deposit loads on relatively solid ground.

The footprint of the pad on the Property was large enough by 1968 for Bernard Loomis to construct a shop at the Property about 150 feet from the Haines Highway.[51] A 1978 aerial photo demonstrates that the pad existed at the Property, and at least three (3) buildings had been constructed on the pad.[52]

Entities other than Respondents also continued to use the Property as a depository for fill. In 1989 a landslide covered the highway near the Property, and the DOT&PF placed the debris covering the highway onto the Property.[53]

At this juncture, it should be noted that none of the construction activities occurring at the Property prior to October 1, 1994 required the previous owner of the Property to obtain an NPDES permit to discharge storm water.[54]

Respondents acquired title to the Property in 1997, when the State approved Alaska State Land Survey 88-21.[55] A very limited amount of fill has been placed at the Property since Respondents acquired title to the Property.

In 1998, SouthCoast, Inc. placed fill on the Property that had been generated by its services to DOT&PF to pave the highway adjacent to the Property.[56] This fill was placed on

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[51] *Id.*
[52] *See*, CX-45, at Attachment 3.
[53] *See*, CX-29, at pp.1-2.
[54] *See*, 40 C.F.R. § 122.26(a)(" Prior to October 1, 1994, discharges composed entirely of storm water shall not be required to obtain a NPDES permit."
[55] *See*, RX-2, at ¶6; *see also*, RX-1.
[56] *See*, CX-29, at p.2.

existing fill and built the existing pad upward, but did not increase the pad's footprint.[57] An aerial photo from 1998 demonstrates the footprint of the pad at the Property was nearly as large as its present dimensions, and shows that at least three (3) buildings had been constructed on the pad.[58]

In 2000, another contractor, Klukwan, Inc. placed fill originating from a project it undertook for the City of Haines on the pad at the Property.[59] This fill to the existing pad built the existing pad upward, but did not increase its footprint.[60]

An aerial photo from 2003 demonstrates the pad at the Property is nearly co-extensive with its current footprint.[61]

In 2004, Southeast Roadbuilders, Inc. (SRI) placed approximately 260 cubic yards of fill on the then-existing pad on the Property, originating from its work on the Piedad Road Highway near the Property.[62] SRI stated that the pad had already been established prior to 2004, and that it only placed fill on the existing pad.[63]

An aerial photograph from June 19, 2004 demonstrates that the pad at the Property is nearly co-extensive with its current footprint.[64]

In 2005, Respondent Robert Loomis did place a small amount of fill beyond the existing pad in areas he determined were not wetlands.[65] Respondents' environmental consultants

[57] *Id.*
[58] *See*, CX-45, at Attachment 3.
[59] *See*, CX-29, at p.2.
[60] *Id.*
[61] *See*, CX-45, at Attachment 3.
[62] *See*, CX-26, at pp.1-2; *see also*, CX-30, at p.2.
[63] *Id.*
[64] *See*, CX-01, Attachments, at p.2.

REEVES AMODIO LLC
500 L STREET, SUITE 300
ANCHORAGE, ALASKA 99501-1990
PHONE (907) 222-7100, FAX (907) 222-7199

REEVES AMODIO LLC
500 L STREET, SUITE 300
ANCHORAGE, ALASKA 99501-1990
PHONE (907) 222-7100, FAX (907) 222-7199

estimate that this area amounts to .15 acres on the west side of the pad, and .07 acres on the east side of the pad, for a total of .22 acres.[66] Regardless, this work was completed in prior to June 16, 2006.[67] Moreover, EPA is not making CWA § 402 claims for construction activities occurring prior to June 2006.[68]

ii) Since 2006, Respondents' Construction Activities Have Disturbed Less Than One Acre

The discrete construction activities listed below should not be tallied as one total disturbance, as Respondents discrete and separate yearly construction activities in the years 2006-2009 were not part of a "common plan,"[69] and thus should be viewed as individual "construction activities" and separate "disturbances" for which no permit was required. However, even if one combines all of the acreage disturbed by Respondents since 2006 (during separate construction activities), the result is that Respondents still did not meet the one acre threshold to necessitate a NPDES permit.

SRI placed fill from the Haines School Project onto the Property in 2006.[70] This fill was placed on the existing pad, and not onto previously undisturbed land.[71] This fill remained undisturbed until Respondent leveled it in 2009.[72]

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[65] *See*, RX-3, at ¶4; *see also*, CX-50, at p.5, A-7 and A-18.
[66] *Id.*
[67] *Id.*
[68] *See*, Complaint, at p.7, ¶3.19.
[69] *See*, 40 C.F.R. § 122.26(b)(15).
[70] *See*, CX-26, at pp1-2; *see also*, CX-30, at p.2.
[71] *See*, CX-26, at p.1; *see also*, CX-30, at p.2.
[72] *See, RX-3,* Affidavit of Robert M. Loomis, at ¶9.

REEVES AMODIO LLC
500 L STREET, SUITE 300
ANCHORAGE, ALASKA 99501-1990
PHONE (907) 222-7100, FAX (907) 222-7199

In 2007, Respondent Robert Loomis placed fill on Tract F of the Property in areas he determined were not wetlands in an area of approximately .021 acres.[73] Respondent placed this fill to abate flooding which frequently damaged the pad at the Site.[74] Respondents measured the area of this fill with their environmental consultants and determined the acreage of the fill was .022 acres.[75]

SRI placed asphalt fill from the Union Street Road project in May through July of 2008.[76] This fill was placed on the existing pad, and not onto previously undisturbed land.[77]

In 2008 Southeast Earthmovers, Inc. placed approximately 240-320 cubic yards of fill onto the existing pad, and not onto previously undisturbed land.[78] This fill was placed on or near the fill previously placed by SRI in 2006.[79]

The fill and asphalt piles are visible from an aerial photograph dated June 12, 2008, September 24, 2008 and March 21, 2009.[80] The fill asphalt and fill piles are also visible in the pictures taken by Respondents' neighbor in May 2009.[81] The location of these fill piles is also depicted in a hand-made drawing by SRI.[82]

From February through May 2009, Respondent Robert Loomis leased a Caterpillar D-8 from SRI and finished leveling out the pad in Property with the fill placed by SRI and Southeast

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[73] *See, RX-3,* Affidavit of Robert M. Loomis, at ¶6*; see also,* CX-50, at p.5.
[74] *Id.*
[75] *Id.*
[76] *See,* CX-26, at p.1; *see also*, CX-30, at p.2.
[77] *Id.*
[78] *See*, CX-41, at p.3.
[79] *See*, RX-3, at ¶7.
[80] *See*, CX-22.
[81] *See*, CX-13.
[82] *See*, CX-26, at p.5.

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500 L STREET, SUITE 300
ANCHORAGE, ALASKA 99501-1990
PHONE (907) 222-7100, FAX (907) 222-7199

Earthmovers, Inc.[83] On the southeast end of the fill pad Respondent leveled an area totaling 9,250 square feet, or .21 acres.[84] Respondent did not place the fill beyond the footprint of the existing pad.[85]

The asphalt piles, which had a relatively small footprint, were removed by SRI in 2009, thus the existing pad below these asphalt was not disturbed by leveling or grading.[86] Respondents have nonetheless included the area covered by the asphalt in this calculation of the area impacted by construction activities. The asphalt which was removed in 2009 sat on an area 30 feet by 30 feet, or .02 acres.[87]

Adding these figures, the total disturbed area since June 16, 2006 is as follows: (a) .022 acres (fill placed by Respondent in 2007) + (b) .21 acres (fill piles placed by SRI in 2006 and Southeast Earthmovers, Inc. in 2008 and leveled by Respondents in 2009) + (c) .02 acres (asphalt piles removed by SRI in 2009) = .251 acres. Thus, the total disturbed area is less than .3 acres.

Respondents did not build a road to perform the work listed above, thus did not disturb any areas other than the area where SRI and Southeast Earthmovers, Inc. placed the fill and where Respondent leveled that fill.[88] Bernard Loomis had built a road on the pad at the Property, thus there was an established road onto the pad from the highway which SRI and Southeast Earthmovers, Inc. used to stockpile the fill.[89] To dump the fill, the contractors turned around on

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[83] *See*, RX-3, at ¶9.
[84] *Id.*
[85] *Id.*
[86] *See*, CX-26, at p.2.
[87] *See*, RX-3, *at* ¶8.
[88] *Id.*, at ¶10.
[89] *Id.*

the State's right-of-way at the Haines Highway, and then back down the road that has existed on the Property for decades.[90]

Respondents have demonstrated that they disturbed less than .3 acres since June of 2006. In addition, in its responses to EPA's requests for information, SRI estimated that the total area impacted by their activities was .7 acres.[91] However, in its estimate, SRI included areas that were disturbed in 2004 as part of the Piedad Road project, which was completed in May 2004,[92] and leveled by Respondent prior to June 16, 2006.[93] Thus, even if one includes areas disturbed since 2004, the total acreage of the "construction site" is less than one acre.

C. Respondents' Actions Were Not Part of a "Common Plan of Development or Sale"

As demonstrated above, Respondents have not disturbed an area greater than one (1) acre since June 16, 2006. Thus, according to EPA regulations, the only circumstances under which Respondents would be required to obtain permit coverage for disturbing less than an acre is if such disturbance is part of a "common plan for development or sale." 40 C.F.R. § 122.26(b)(15) states:

> Small construction activity also includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres. Small construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility.

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[90] *Id.*
[91] *See*, CX-26, at p.2.
[92] *Id.*
[93] *See*, RX-3, at ¶3.

REEVES AMODIO LLC
500 L STREET, SUITE 300
ANCHORAGE, ALASKA 99501-1990
PHONE (907) 222-7100, FAX (907) 222-7199

According to EPA's guidance documents, "common plan of development or sale is defined as follows:

> 'Part of a larger common plan of development or sale' is a contiguous area where multiple separate and distinct construction activities may be taking place at different times on different schedules under one plan. Thus, if a distinct construction activity has been identified onsite by the time the [NPDES] application would be submitted, that distinct activity should be included as part of a larger plan.[94]

EPA's guidance documents state that physical evidence, in the form of documentation or signage, are necessary to demonstrate a common plan of development:

> The 'plan' in a common plan of development or sale is broadly defined as any announcement or piece of documentation (including a sign, public notice or hearing, sales pitch, advertisement, drawing, permit application, zoning request, computer design, etc.) or physical demarcation (including boundary signs, lot stakes, surveyor markings, etc.) indicating construction activities may occur on a specific plot.[95]

EPA cannot demonstrate that Respondents' disturbance of less than an acre is "part of a larger common plan of development or sale." First, EPA cannot proffer any physical evidence demonstrating a "common plan." Respondents have not filed any documentation, such as permit applications, surveys, drawings, or similar documentation suggesting that Respondents planned on disturbing more than one acre.

[94] Exhibit F, *NPDES Storm Water Program Question and Answer Document Volume I*, March 1992, page 16.
[95] Exhibit G, Region 6 Compliance Assurance and Enforcement, *Storm Water – Common Plan of Development or Sale*, at p.2.

REEVES AMODIO LLC
500 L STREET, SUITE 300
ANCHORAGE, ALASKA 99501-1990
PHONE (907) 222-7100, FAX (907) 222-7199

REEVES AMODIO LLC
500 L STREET, SUITE 300
ANCHORAGE, ALASKA 99501-1990
PHONE (907) 222-7100, FAX (907) 222-7199

To the extent there is any physical evidence demonstrating Respondents' intentions, such evidence demonstrates that Respondents did not intend to disturb more than an acre. In January 2009, while applying for an after-the-fact permit to authorize the culvert over Stream No. 115-32-10300-2014 , Respondent stated that "the fill will not be extending any further to the south, west or east."[96] (Respondents could not expand the pad to the north as their Property abuts the Haines Highway to the north.) In the same filing, Respondent acknowledged that "I will never be able to access my land south of, or riverside, to put fill on."[97]

The fact remains that the pad of which the EPA complains was not created pursuant to a common plan. Rather, the pad was originally created as part of a natural process, due to a stream depositing gravel and sediment into the Property naturally, creating an alluvial fan.[98] The pad was filled in the 1960's, 1970's and 1980's by governmental entities such as the State of Alaska and City of Haines, who used the using the Property as a depository for fill.[99] These actions were not part of a common plan, but rather were discrete and sporadic actions taken independently from one another. Thus, when Respondents took title to the Property in 1997, there was not common plan, and the pad on the Property already existed.

Finally, U.S. Army Corps of Engineers (USACE) and EPA and both taken the position that there has been no common plan or purpose to Respondents' limited construction activities. EPA's inspection report notes that the "Corps indicated that he cannot consider an After the Fact

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[96] CX-04, at p.1.
[97] *Id.*, at p.3
[98] *See*, CX-50, at p.1. Alluvial fans are fan-shaped deposits of water-transported material (alluvium). They typically form at the base of topographic features where there is a marked break in slope.
[99] *See*, CX-56, at p.1; *see also*, CX-29, at pp.1-2.

(ATF) permit without a project purpose."[100] Likewise, Mark Jen of EPA made statements indicating he did not think there was a common plan for Respondents' activities. An article in the *Chilkat Valley News* states that "[Mark] Jen [of EPA] characterized the fill at the site as inessential. 'He didn't really have a purpose and a need for the fill. He couldn't tell us what the purpose and need were.'"[101]

CONCLUSION

As demonstrated above, EPA's CWA § 402 claims should be dismissed for two separate reasons: (a) EPA does not have the authority to bring a CWA § 402 enforcement action because EPA transferred that authority to ADEC prior to instituting this enforcement action; and (b) at all times during the five (5) years prior to EPA's filing of its Complaint, Respondents have not disturbed one (1) acre or greater as part of their construction activities. Respondents therefore respectfully request that the administrative law judge Dismiss Count I of EPA's Complaint.

Dated this 5th day of December, 2011.

REEVES AMODIO LLC
Attorneys for Respondents

By: _____
Brian J. Stibitz
ABA 0106043

REEVES AMODIO LLC
500 L STREET, SUITE 300
ANCHORAGE, ALASKA 99501-1990
PHONE (907) 222-7100, FAX (907) 222-7199

[100] CX-19, at p.5.
[101] RX-4, at p.3.

REEVES AMODIO LLC
500 L STREET, SUITE 300
ANCHORAGE, ALASKA 99501-1990
PHONE (907) 222-7100, FAX (907) 222-7199

CERTIFICATE OF SERVICE

I certify that the foregoing Respondents Pre-Hearing Exchange was filed and sent to the following persons, in the manner specified, on the date below:

Original and one copy:

Regional Hearing Clerk
U. S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Suite 900, Mail Stop ORC-158
Seattle, Washington 98101

One copy to:

The Honorable Barbara A. Gunning
EPA Office of Administrative Judges
1099 14th Street, NW, Suite 350, Franklin Court
Washington, DC 2005

A true and correct copy by U.S. Mail to:

Lori Cora, Assistant Regional Counsel
EPA, Region 10
1200 6th Ave. Suite 900
Seattle, Washington 98101

Dated: 12.05.2011

Gloria H. Ethier