BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of: Carl Grissom, Individual, West Richland, Washington, Respondent.	DOCKET NO. CWA-10-2021-0035 **COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS**

I. INTRODUCTION

On February 11, 2021, the U.S. Environmental Protection Agency ("Complainant" or "EPA") filed an administrative complaint ("Complaint") against Carl Grissom ("Respondent"), alleging that Respondent discharged pollutants into the South Fork Clearwater River while operating a suction dredge without a National Pollutant Discharge Elimination System ("NPDES") permit, in violation of Section 301(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1311(a). On March 1, 2021, Respondent filed a Motion to Dismiss, arguing that EPA lacks authority to regulate suction dredge mining under Section 402 of the CWA, 33 U.S.C. § 1342. Pursuant to Section 22.16(b) of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Complaint or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" ("Part 22 Rules"), Complainant submits this Response to Respondent's Motion to Dismiss.

II. STANDARD OF REVIEW

The Part 22 Rules address motions to dismiss at 40 C.F.R. § 22.20:

> 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.

40 C.F.R. § 22.20(a).

The Environmental Appeals Board ("EAB") considers motions to dismiss under Section 22.20(a) to be analogous to motions for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP"). *In the Matter of Asbestos Specialists, Inc.,* TSCA Appeal No. 92-3, 4 E.A.D. 819, 827 (EAB, Oct. 6, 1993). Rule 12(b)(6) of the FRCP provides for dismissal when the complaint fails "to state a claim upon which relief can be granted." It is well established that dismissal is warranted for failure to state a claim when the plaintiff or complainant fails to lay out "direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007); *see also McCulloch v. PNC Bank, Inc*., 298 F.3d 1217, 1220 (11th Cir. 2002). This standard for dismissal further requires that the allegations in the complaint be taken as true and that all inferences be drawn in favor of the plaintiff. *See Twombly*, 550 U.S. at 555; *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Accordingly, to prevail in its Motion to Dismiss, Respondent must show that EPA's allegations, assumed to be true, do not prove a violation of the CWA as charged.[1]

III. ARGUMENT

[1] Respondent also requests dismissal pursuant to FRCP 12(b)(1). However, Respondent contends only that EPA lacks permitting and regulatory authority, not that the Presiding Officer lacks subject matter jurisdiction. EPA's authority to regulate suction dredge mining under CWA Section 402 is unrelated to the Presiding Officer's subject matter jurisdiction. *In re Erlanson*, CWA Appeal No. 20-03, at * 12, n. 19 (EAB, Mar. 5, 2021). Therefore, EPA responds only to the arguments in Respondent's Motion.

The Presiding Officer should deny Respondent's Motion to Dismiss because, when the allegations in the Complaint are taken as true and all inferences are drawn in favor of EPA, EPA adequately alleged that Respondent violated Section 301(a) of the CWA, 33 U.S.C. § 1311(a), by discharging pollutants into the South Fork Clearwater River without a permit issued pursuant to Section 402 of the CWA, 33 U.S.C § 1342. To allege a prima facie violation of CWA Section 301(a), EPA must demonstrate that Respondent (1) is a person; (2) who discharged a pollutant; (3) from a point source; (4) into a navigable water; (5) without an NPDES permit or other authorization under the CWA. *In re Larry Richner*, 10 E.A.D. 617 (EAB 2002). As detailed below, EPA's Complaint included direct allegations respecting each element necessary to sustain recovery under Section 301(a) of the CWA, and Respondent's arguments that EPA lacks authority to regulate suction dredging and therefore bring its claims are without merit.

A. Respondent Is a "Person."

Section 502(5) of the CWA defines "person" to include an individual. 33 U.S.C. § 1362(5). EPA alleged that Respondent is an individual and a "person" as defined in Section 502(5) of the CWA. Complaint ¶ 3.1.

B. Respondent "Discharged a Pollutant."

EPA alleged that Respondent discharged a pollutant within the meaning of Section 502(12) of the CWA, 33 U.S.C. 1362(12), when he operated his suction dredge in the South Fork Clearwater River.[2] Complaint ¶ 3.23. Respondent contends that suction dredging does not result in the discharge of a pollutant, and therefore, EPA cannot demonstrate a violation of the CWA.

[2] Suction dredge mining is a method of placer mining that extracts gold or other heavy metals and minerals from stream bed, or alluvial, deposits using a hydraulic dredging system. The primary pollutant of concern in the discharges from a suction dredge is suspended solids, which result from the agitation of stream water and stream bed material in the dredge while processing the material. General Permit IDG370000, Fact Sheet, at *7-8 (Dec. 13, 2017).

Respondent's position is contrary to that of every federal, state, and administrative tribunal that has addressed the issue.

The release of material from suction dredging constitutes a "discharge of a pollutant" under CWA Section 502(12). The CWA broadly 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. Although the CWA does not define "addition," the Ninth Circuit has upheld EPA's interpretation, which includes the "resuspension" of pollutants, including rock and sand from placer mining, even though the material is discharged to the same waterbody from which it originated. *Rybachek v. EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990).

In *Rybachek*, the Ninth Circuit considered a final rule promulgated by EPA that regulated placer mining activities in Alaska under the CWA. Miners challenged EPA's regulations, arguing placer mining does not cause the "addition" of a pollutant. *Id*. The Ninth Circuit rejected the miners' argument, explaining that "[p]lacer miners excavate the dirt and gravel in and around waterways, extract any gold, and discharge the dirt and other non-gold material into the water." *Id.* "The lighter sand, dirt, and clay particles are left suspended in the wastewater released from the sluice box." *Id.* at 1282. The Ninth Circuit held that "even if the material discharged originally comes from the streambed itself, such resuspension may be interpreted to be an addition of a pollutant under the [CWA]." *Id*. at 1285. The Ninth Circuit reaffirmed *Rybachek* in *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810 (2001), restating that "removing material from a stream bed, sifting out the gold, and returning the material to the stream bed was an 'addition' of a 'pollutant.'" *Id.* at 814.

In the present case, Respondent attempts to rely on the U.S. Supreme Court decisions in *S. Florida. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) and *Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council.,* 568 U.S. 78 (2013), to argue that suction dredge mining does not involve a "discharge of a pollutant." Motion to Dismiss at 4-5. These cases are not applicable to discharges of pollutants from suction dredge operations, and the Presiding Officer should find them inapposite. In *Miccosukee*, the court examined whether an "addition" occurred when a pumping facility transferred water from a canal into a nearby reservoir. 541 U.S. at 100. As Respondent notes, the U.S. Supreme Court compared the water transfer to a soup ladle that "lifts [soup] above the pot, and pours it back into the pot" explaining that "one has not 'added' soup or anything else to the pot." *Id*. at 110. The Court held that the transfer of polluted water between "two parts of the same water body" does not constitute a discharge of pollutants under the CWA. *Id*. Similarly, in *L.A. County,* the Supreme Court held that the flow of water from an improved portion of a navigable waterway to an unimproved portion of the same waterway does not qualify as a "discharge of a pollutant" under the CWA.

However, suction dredging is not analogous to ladling soup, nor transferring water. The analogy might be accurate if Respondent's suction dredge nozzle sucked in only water and discharged that same water back into the South Fork Clearwater River. But dredging in such a manner would prove ineffective for miners interested in recovering gold. Instead, Respondent's dredge intakes stream bed material, including rock, gravel, sand, and silt, along with water; processes the materials through the sluice box; and discards the materials back into the water. Because the processed stream bed materials originated from *below* the water column, Respondent did not merely move water "from one place in the river and then return [it] to nearly

the same spot in the same river," as he suggests. *See* Respondent's Motion to Dismiss at 4. Rather, Respondent resuspends the stream bed material, creating a turbid plume comprised of suspended solids that were not present in the water column before Respondent operated his dredge.

The United States Court of Appeals for the Fourth Circuit addressed this distinction in the context of sidecasting:

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

U.S. v. Deaton, 209 F.3d 331, 335–36 (4th Cir. 2000) (*citing* 33 U.S.C. § 1362 (6), (12)).

Courts that have addressed this issue, including its application to releases from suction dredges, agree unanimously that there can be an addition of a pollutant without an addition of material. The U.S. Supreme Court recently declined to review one such decision. *E. Oregon Mining Ass'n v. Dep't of Envtl. Quality*, 365 Or. 313, 445 P.3d 251 (Or. 2019), *cert denied*, 2020 WL 3146697 (Jun. 15, 2020). In *E. Oregon Mining Ass'n*, the Oregon Supreme Court held that *L.A. County* and *Miccosukee* do not disturb the Ninth Circuit's opinion in *Rybachek*, and that the resuspension of stream bed material by suction dredging constitutes an "addition" of a pollutant subject to regulation under Section 402 of the CWA. 365 Or. at 317-20. More recently, the EAB upheld an ALJ opinion rejecting an argument identical to Respondent's – that discharges

from suction dredging do not constitute a "discharge of a pollutant." *In re Dave Erlanson, Sr.*, CWA Appeal No. 20-03 (EAB, Mar. 5, 2021). In *Erlanson,* the ALJ explained that "[t]he case most pertinent to this matter is *Rybachek*," and that *Miccosukee* and *L.A County* are not analogous because

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

In re Dave Erlanson, Sr., Docket No. CWA-10-2016-0109, Order on Complainant's Motion for Accelerated Decision at *18 (ALJ, Sep. 27, 2018).

EPA adequately alleged – and Respondent does not contest – that Respondent operated his suction dredge in the South Fork Clearwater River, and it is well settled that the release of suspended solids from suction dredging constitutes a "discharge of a pollutant" within the meaning of the Section 502(12) and 502(6) of the CWA. Therefore, the Presiding Officer should reject Respondent's argument to the contrary.

C. Respondent Discharged from a "Point Source."

Section 502(14) of the CWA defines the term "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). EPA alleged that Respondent's suction dredge is a point source as defined in Section 502(14) of the CWA. Complaint ¶ 3.21. Respondent does not contest that a suction dredge is a point source.

D. Respondent Discharged into "Navigable Waters."

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 violations, the EPA regulations applicable to the CWA Section 402 permit program defined "waters of the United States" to include "waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide" and tributaries to those waters. 40 C.F.R. § 122.2. EPA's Complaint alleged that the South Fork Clearwater River is a tributary to the Clearwater River, which is a traditionally navigable water. Accordingly, EPA alleged that the South Fork Clearwater River is a "water of the United States" as defined by 40 C.F.R. § 122.2 and a "navigable water" within the meaning of Section 502(7) of the CWA. Complaint ¶ 3.22. Respondent does not argue that EPA lacks CWA jurisdiction over the South Fork Clearwater River.

E. Respondent's Discharge Was Unauthorized.

Section 301(a) of the CWA prohibits the discharge of any pollutant except as in compliance with, *inter alia*, an NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. Pursuant to CWA Section 402, EPA issued NPDES General Permit No.: IDG370000 ("General Permit") in 2013 and reissued the General Permit in 2018. The General Permit authorizes "owners and operators of small suction dredges in Idaho . . . to discharge to waters of the United States, except those sites excluded from coverage of this NPDES permit, in accordance with effluent limitations, monitoring requirements and other conditions set forth herein." The General Permit became effective on June 1, 2018, and expires on May 31, 2023.

EPA alleged that Respondent's discharges were not authorized by the General Permit, an individual NPDES permit, or other authorization under the CWA. Complaint ¶ 3.25. In his

Motion to Dismiss, Respondent does not contend that his discharge was authorized; rather, he argues that (1) suction dredging should be regulated by the U.S. Army Corps of Engineers ("Corps") pursuant to Section 404 of the CWA, and not EPA, and (2) his discharges constitute "incidental fallback" which does not require a permit. Motion to Dismiss at 6-7. Respondent's arguments incorrectly characterize the respective permitting authorities of EPA and the Corps, as well as the definition of "incidental fallback."

1. EPA Is Authorized to Regulate Suction Dredge Mining pursuant to CWA Section 402.

CWA Section 402 provides EPA authority to issue NPDES permits for the discharge of a pollutant from any point source to waters of the United States. 33 U.S.C. § 1342. Respondent argues that EPA lacks authority to regulate suction dredging because it results in the discharge of dredged or fill material, which the Corps, and not EPA, is authorized to permit. Respondent's Motion to Dismiss at 5 (citing Section 402(a)(1), 33 U.S.C. § 1342(a)(1)). Section 402 provides, in part, "[e]xcept as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant . . . ." 33 U.S.C. § 1342(a)(1). Thus, Section 402 carves out an exception to EPA's permitting authority – the authority provided to the Corps pursuant to Section 404 of the CWA to issue permits "for the discharge of dredged or fill material." 33 U.S.C. § 1344(a). However, EPA retains authority to regulate discharges of "pollutants," including dredged spoil, sand, and rock that are not within the specific subset of discharges of "dredged or fill material into the navigable waters at specified disposal sites," which are regulated by the Corps.

Respondent accurately restates the CWA's distribution of permitting authorities and correctly points out that the U.S. Supreme Court has confirmed that the CWA Sections 402 and

404 permitting schemes are mutually exclusive. *See Coeur Alaska, Inc., v. Southeast Alaska Conservation Council*, 557 U.S. 261 (2009). In *Coeur Alaska*, conservation groups challenged the lawfulness of a Corps permit for the discharge of mining waste into a lake, contending that the discharge of such waste fell within the regulatory authority of EPA as a pollutant under Section 402 of the CWA. The Supreme Court rejected the conservation groups' argument, explaining that, if a discharge is classified as "dredged" or "fill" material, then it requires a Section 404 permit from the Corps – not a CWA 402 permit from EPA. *Id*. at 274. Respondent makes no attempt, however, to explain why suction dredge discharges constitute only "dredged" or "fill" material, which should be permitted solely by the Corps, and any attempt would fail.

The Supreme Court states in *Coeur Alaska* that the Corps' and EPA's prior practices in implementing Sections 402 and 404 of the CWA are entitled deference, so long as their practices represent a reasonable interpretation of the statutory scheme. 557 U.S. at 277-78. EPA and the Corps have long agreed that discharges from suction dredges are subject to regulation under Section 402 of the CWA. In 1986, EPA and the Corps entered into a Memorandum of Agreement ("1986 MOA") to clarify the scope of "fill" materials subject to the Corps' CWA Section 404 permitting authority. 51 Fed. Reg. 8871 (Mar. 14, 1986). The 1986 MOA included criteria to determine when a discharged pollutant is subject to EPA authority pursuant to Section 402 of the CWA:

> [A] pollutant (other than dredged material) will normally be considered by the EPA and the Corps to be subject to section 402 if it is a discharge in liquid, semi-liquid, or suspended form or if it is a discharge of solid material of a homogenous nature normally associated with single industry wastes, and from a fixed conveyance, or if trucked, from a single site and set of known processes. These materials include placer mining wastes, phosphate mining wastes, titanium mining wastes, sand and gravel wastes, fly ash, and drilling muds. As appropriate, EPA and the Corps will identify additional such materials.

Id. Notably, the 1986 MOA explicitly named "placer mining wastes" as a pollutant regulated by EPA.

In 1990, the Corps issued a regulatory guidance letter interpreting the 1986 MOA that provided additional rationale for its determination that EPA regulates placer mining discharges pursuant to CWA Section 402:

> Dredged material is that material which is excavated from the waters of the United States. However, if this material is subsequently processed to remove desired elements, its nature has been changed; it is no longer dredged material. The raw materials associated with placer mining operations are not being excavated simply to change their location as in a normal dredging operation, but rather to obtain materials for processing, and the residue of this processing should be considered waste. Therefore, placer mining waste is no longer dredged material once it has been processed, and its discharge cannot be considered to be a 'discharge of dredged material' subject to regulation under Section 404.

Corps Regulatory Guidance Letter 88-10 (July 28, 1990).

The Corps' regulatory definition of "discharge of dredged material" supports the permitting assignments identified in the 1986 MOA and restated in the Corps' 1990 Regulatory Guidance Letter. The Corps' regulatory definition of "discharge of dredged material" does not include "[d]ischarges of pollutants . . . resulting from the onshore subsequent processing of dredged material . . . ." 33 C.F.R. § 323.2(d)(2)(i). Rather, "[t]hese discharges are subject to [S]ection 402 of the Clean Water Act even though the extraction and deposit of such material may require a permit from the Corps." *Id*. The agencies further reconfirmed EPA's authority to regulate discharges from suction dredging when they revised the regulatory definition of "fill material" to specify that even though "some discharges (such as suspended or settleable solids) can have the associated effect, over time, of raising the bottom elevation of a water due to settling of waterborne pollutants, we do not consider such pollutants to be 'fill material,'" and

"discharges that are subject to an effluent limitation guideline and standard . . . will continue to be regulated under Section 402 of the CWA." 67 Fed. Reg. 31135 (May 9, 2002).

EPA and the Corps have adhered to the distinctions identified in the 1986 MOA throughout their joint exercise of CWA permitting authority. EPA has issued general permits for suction dredging in multiple states for decades. For example, EPA administered permits for suction dredge mining in Alaska from 1994 to 2015. Since 2015, the Alaska Department of Environmental Conservation has been authorized to issue permits pursuant to Section 402 of the CWA for suction dredge mining in Alaska and has acted consistently with EPA practices. Similarly, EPA has administered the General Permit in Idaho since 2013. In reissuing the General Permit in 2018, EPA responded to public comments that asserted some of the same arguments in Respondent's Motion. EPA reaffirmed that the material discharged as a result of suction dredge mining was the "discharge of a pollutant" subject to regulation under section 402 and not incidental fallback, which does not constitute a regulable discharge of dredged material. EPA Response to Comments, Idaho Small Suction Dredge General Permit No IDG370000, at 7 (May 2018).

EPA and the Corps agree that processed waste discharged as a result of suction dredging is a pollutant that requires a permit issued pursuant to Section 402 of the CWA, and the agencies' statutory interpretation is reasonable, in part, because EPA is better suited to address the type of environmental harm caused by suction dredging. For example, in determining the extent to allow suction dredging in a water body, especially an impaired water body like the South Fork Clearwater River, EPA is required to consider the total maximum daily load of sediment, which includes factors such as the type of sediment, the number of authorized miners, the extent to which the waterbody is already impaired, and the river's flow rate. *See* 40 C.F.R. § 130.7.

These considerations involve water quality, a concern that is particular to EPA's mission. The agencies' prior practices in implementing Sections 402 and 404 of the CWA represent "a reasonable interpretation of the statutory scheme" entitled to deference. *See Coeur Alaska* , 557 U.S. at 277-78.

2. Discharges from Suction Dredging Are Not "Incidental Fallback."

Respondent relies on the D.C. Circuit's opinion in *Nat'l Mining Assoc. v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1403 (D.C. Cir. 1998), to argue that EPA lacks the authority to regulate suction dredging because the discharge from his operation constitutes "incidental fallback." *See* Respondent's Motion to Dismiss at 5. Respondent's interpretation of *Nat'l Mining Assoc*. is misleading, and the Presiding Officer should reject the argument.

As a threshold matter, incidental fallback is any incidental addition, including redeposit, of dredged material associated with any activity that does not have or would not have the effect of destroying or degrading waters of the United States, and therefore would not require CWA Section 404 authorization. 33 C.F.R. § 323.2(d); *Nat'l Mining Assoc*., 145 F.3d at 1403. Because EPA alleged that Respondent's discharge required a permit issued under CWA Section 402 – not CWA Section 404 – the incidental fallback exception is inapplicable.

Even if the incidental fallback exception were applicable to CWA Section 402 permitting requirements, Respondent's discharges do not constitute incidental fallback. Incidental fallback occurs, for example, when a bucket used to excavate material from the bottom of a river is raised and soils or sediments fall from the bucket back into the water. *Nat'l Mining Assoc*., 145 F.3d at 1403. In *Nat'l Mining Assoc.,* the D.C. Circuit explicitly addressed the legal distinction between "incidental fallback" and placer mining discharges, stating that its holding should not be construed to suggest that all forms of redeposit are outside the scope of CWA regulations.

Relying on *Rybachek*, the court explained that incidental fallback is "imperfect extraction, i.e., extraction accompanied by incidental fall back of dirt and gravel," while placer mining involves "the discrete act of dumping leftover material into the stream after it had been processed." 145 F.3d at 1406.

The ALJ and the EAB came to the same conclusion in *Erlanson* in response to identical attempts to evade CWA regulation. There, the ALJ relied on *Nat'l Mining Assoc*. in recognizing the distinction between incidental fallback and discharges resulting from suction dredging. Docket No. CWA-10-2016-0109, Order on Complainant's Motion for Accelerated Decision, at *19-20, *aff'd*, CWA Appeal No. 20-03 (EAB, Mar. 5, 2021). Additionally, the ALJ reasoned, and the EAB agreed, that suction dredges create turbid plumes emanating many feet from the dredge's outlet, and "[t]he redeposit of a material such a distance from the point of removal does not appear to be 'fallback' as described by the D.C. Circuit." *Id*. at *20 (citing *Nat'l Mining Assoc*., 145 F.3d at 1401).

Here, like in *Erlanson*, rather than redepositing streambed material "in virtually the same spot it was removed from," as Respondent suggests, he excavates and remobilizes sand, silt, and fine materials that had previously settled to the river bottom; processes the material through the suction dredge's sluice box; and discharges it from the dredge outlet, creating a turbid plume of suspended sediment that oftentimes travels hundreds of feet. Such redistribution of stream bed material is not analogous to "imperfect extraction," as the D.C. Circuit described incidental fallback in *Nat'l Mining Assoc*.

Accordingly, the Presiding Officer should reject Respondent's baseless argument and find that EPA adequately alleged that Respondent was required – and failed to obtain – a permit issued pursuant to Section 402 of the CWA.

IV. CONCLUSION

For the foregoing reasons, the Presiding Officer should deny Respondent's Motion to Dismiss.

Dated this 16th day of March, 2021.

Respectfully submitted,

JOHN MOORE

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **EPA'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS,** dated March 16, 2021, was filed electronically with the Regional Hearing Clerk via email to:

Teresa Young, Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 10
R10_RHC@epa.gov

Pursuant to the Region 10, Regional Judicial Officers' Standing Order, dated June 3, 2020, the undersigned also certifies that on this date he served the foregoing **EPA'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS** on Respondent via email at paulbunt@goldrush.com and Carl@opticom.com

Dated this 16th day of March 2021.

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