BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of: STATE OF ALASKA DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES, Juneau, Alaska, Respondent.	DOCKET NO. CWA-10-2024-0154 **COMPLAINANT'S REBUTTAL PREHEARING EXCHANGE**

Pursuant to 40 C.F.R. § 22.19, the Presiding Officer's October 24, 2024 Prehearing Order, and the Presiding Officer's December 19, 2024 Order granting an extension to the deadline for the State of Alaska Department of Transportation and Public Facilities ("Respondent") to file its prehearing exchange, the U.S. Environmental Protection Agency ("EPA" or "Complainant") submits its Rebuttal Prehearing Exchange.

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I. STATEMENT IN RESPONSE TO RESPONDENT'S PREHEARING EXCHANGE

On December 6, 2024, Complainant submitted all elements required by the Presiding Officer's October 24, 2024 Prehearing Order, including an extremely detailed "narrative statement, and a copy of any documents in support, explaining in detail the factual and/or legal bases for the allegations denied or otherwise not admitted in Respondent's Answer." Respondent's January 17, 2025 Prehearing Exchange fails to provide any information that warrants supplemental statements, exhibits, or additional witnesses from Complainant to support the conclusion that Respondent has violated the Clean Water Act ("CWA") at each of the Locations identified in Table 1 of the Complaint. The bases for Complainant's claims in the Complaint remain well-supported by the voluminous December 6, 2024 Initial Prehearing Exchange.[1] As will be seen below, Complainant directly responds to certain elements of Respondent's January 17, 2025 Prehearing Exchange relevant to the appropriate size of the proposed civil penalty to resolve the claims.

II. SPECIFICATION OF PROPOSED PENALTY

In accordance with 40 C.F.R. § 22.14(a)(4), the Complaint in this matter did not specify a penalty demand in its narrative statement. Rather, Complainant elected to fully consider the information provided through the prehearing exchange process before proposing a specific penalty. Having done so, and in accordance with 40 C.F.R. § 22.19(a)(4) and the Presiding Officer's October 24, 2024 Prehearing Order, Complainant hereby proposes that Respondent be

[1] The volume of support for Complainant's positions in the Initial Prehearing Exchange was so significant that it was partially the basis for Respondent's request for an extension to the deadline for it to file its prehearing exchange. *See* Dkt. 12 (" . . . [I]t has been difficult or impossible to coordinate with relevant agency personnel regarding the production of documents and to jointly analyze the materials disclosed in EPA's prehearing exchange, which amount to over 1,200 pages of documents to review.").

assessed the maximum available administrative civil penalty of $342,218[2] for the violations identified in the Complaint. In accordance with the Presiding Officer's instructions, Complainant sets forth in this section the EPA's authority to assess a civil penalty for violations of the CWA, an explanation of the CWA statutory penalty factors and methodology utilized in calculating the amount of the proposed penalty, and a detailed application of the CWA statutory penalty factors and methodology to the particular facts and circumstances of this matter.

A. CWA Penalty Assessment Authority

Complainant alleges that Respondent violated CWA Section 301(a)[3] when, beginning on or about August 24, 2021, Respondent discharged pollutants from point sources into waters of the United States without authorization under CWA Section 404.[4] *See* Compl. ¶¶ 3.1 – 3.27. Pursuant to CWA Section 309(g)(1)(A),[5] the EPA is authorized to assess a Class II administrative civil penalty against persons that have violated CWA Section 301.[6] CWA Section 309(g)(2)(B)[7] authorizes the assessment of a Class II administrative civil penalty of up to $10,000 per day for each day the violation continues, up to a maximum administrative civil penalty of $125,000. The Debt Collection Improvement Act of 1996,[8] and 40 C.F.R. Part 19, increased the statutory maximum administrative civil penalty amounts to $27,378 per day for violations occurring after November 2, 2015, up to a maximum administrative civil penalty of

[2] Between the filing of the Complaint and this filing, the EPA promulgated a final rule to adjust the level of the maximum and minimum statutory civil monetary penalty amounts under the statutes the EPA administers. As a result, the maximum penalty identified in this filing is slightly higher than the maximum penalty identified in the Complaint. *Compare* 88 Fed. Reg. 89309 (Dec. 27, 2023) with 90 Fed. Reg. 1375 (Jan. 8, 2025).
[3] 33 U.S.C. § 1311(a).
[4] 33 U.S.C. § 1344.
[5] 33 U.S.C. § 1319(g)(1)(A).
[6] 33 U.S.C. § 1311.
[7] 33 U.S.C. § 1319(g)(2)(B).
[8] 31 U.S.C. § 3701.

$342,218.[9] Accordingly, and consistent with the explanation of the proposed penalty provided in ¶¶ 4.1 – 4.21 of the Complaint, Respondent is liable for civil penalties for violations of CWA Section 301(a)[10] in an amount not to exceed $342,218.

B. Summary of CWA Statutory Penalty Factors and Methodology Utilized in Calculating the Proposed Penalty

Pursuant to 40 C.F.R. § 22.27(b), the Presiding Officer shall determine the amount of the recommended penalty based on the evidence in the record and in accordance with the criteria set for the applicable statute. CWA Section 309(g)(3)[11] identifies the following statutory penalty factors applicable to this case:

> [1] the nature, circumstances, extent, and gravity of the violation, or violations, and, with respect to the violator,
> [2] ability to pay,
> [3] any prior history of such violations,
> [4] the degree of culpability,
> [5] economic benefit or savings (if any) resulting from the violation, and
> [6] such other matters as justice may require.

40 C.F.R. § 22.27(b) further states that the Presiding Officer shall consider any civil penalty guidance issued under the applicable statute. As noted in Complainant's Initial Prehearing Exchange, the EPA has no CWA-specific penalty pleading policy.[12] In this circumstance, it is appropriate to calculate a penalty by directly examining each statutory penalty factor.[13]

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[9] *See* 90 Fed. Reg. 1375 (Jan. 8, 2025).
[10] 33 U.S.C. § 1311(a).
[11] 33 U.S.C. § 1319(g)(3).
[12] Because the EPA has no CWA penalty pleading policy, *In re Pepperell Associates*, 9 E.A.D. 83 n.22 (EAB 2000), *aff'd*, 246 F.3d 15 (1st Cir. 2001), the Agency does not argue the application of penalty policy calculations at hearing. *See* EPA, "Issuance of Revised CWA Section 404 Settlement Penalty Policy," https://www.epa.gov/sites/default/files/documents/404pen.pdf (Dec. 21, 2001) at 4 ("This Policy is not intended for use by EPA, violators, courts, or administrative judges in determining penalties at a hearing or trial."); *see also* EPA, "Clean Water Act Distinctions Among Pleading, Negotiating and Litigating Civil Penalties For Enforcement Cases," https://www.epa.gov/sites/default/files/documents/distnc-reich-rpt011989.pdf (Jan. 19, 1989) at 1 ("[EPA] Counsel should support its arguments for the 'litigation amount' based on upon reasoned application of the statutory penalty assessment criteria and citation of precedent, not through arithmetic calculations derived according to the CWA penalty settlement policy.")
[13] *See In re Phoenix Constr. Servs.*, 11 E.A.D. 379, 395 (EAB 2004).

The United States Supreme Court has indicated that "highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties under the Clean Water Act,"[14] and there are different penalty calculation methodologies utilized by federal courts, this Tribunal, and the Environmental Appeals Board. Federal courts calculating penalties under the penalty criteria of CWA Section 309(d)[15]—which is substantially similar to the criteria of CWA Section 309(g)(3)[16]—generally use one of two methods. The first is the "bottom up" method, which starts with the economic benefit of noncompliance, then adjusts upward to reflect the other statutory factors.[17] The second is the "top down" method, which starts with the statutory maximum, then reduces that amount for any statutory factors in mitigation of the penalty.[18] Courts must clearly indicate the weight given to each of the statutory factors and the factual findings that support its conclusions[19] and Respondents then bear the burden of establishing the facts that entitle them to any reduction.[20]

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[14] *See Tull v. United States*, 481 U.S. 412, 427 (1987).
[15] 33 U.S.C. § 1319(d).
[16] 33 U.S.C. § 1319(g)(3).
[17] *See United States v. Smithfield Foods, Inc.,* 191 F.3d 516 (4th Cir. 1999*), cert. denied*, 531 U.S. 813 (2000) (rejecting defendant's argument that the CWA does not allow trebling of the penalty, appeals court affirmed trial court's use of bottom-up method, beginning with economic benefit as lowest possible penalty); *United States v. Mun. Auth. of Union Twp.*, 929 F. Supp. 800, 806, 809 (M.D. Pa. 1996), *aff'd*, 150 F.3d 259 (3d Cir. 1998) (calculating "wrongful profits" earnings the defendant made by not cutting back production volume to come into compliance, multiplied by two for deterrent effect).
[18] *See Atlantic States Legal Foundation v. Tyson Foods*, 897 F.2d 1128, 1142 (11th Cir. 1990) (holding that, on remand, the district court should first determine the maximum fine for which Defendant may be held liable, and, if it chooses not to impose the maximum, it must reduce the fine in accordance with the factors spelled out in CWA Section 309(d), 33 U.S.C. § 1319); *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996), *cert. denied*, 519 U.S. 811 (1997) (holding that trial court's use of top-down approach from *Tyson Foods* was appropriate). *See also Mun. Auth. of Union Twp.*, 150 F.3d 259, 265 (3d Cir. 1998); *Ctr. for Biological Diversity v. Marina Point Dev. Assocs.*, 434 F. Supp. 2d 789, 799 (C.D. Cal. 2006) (finding "the top-down approach offers a more reliable and less speculative method of calculating the penalty"); *Hawaii's Thousand Friends v. City & Cty. of Honolulu*, 821 F. Supp. 1368, 1395 (D. Haw. 1993).
[19] *See Tyson Foods*, 897 F.2d at 1142; *United States v. Gulf Park Water Co., Inc.*, 14 F. Supp. 2d 854, 858-68 (S.D. Miss. 1991); *United States v. Roll Coater*, No. IP 89-828, 1991 U.S. Dist. LEXIS 8790, at *9 (S.D. Ind. Mar. 22, 1991)
[20] *See Roll Coater*, 1991 U.S. Dist. LEXIS 8790, at *9 – 10 (considering seriousness of violation at the penalty phase of the litigation places the issue of environmental harm on the defense); *Nat. Res.Def. Council v. Texaco*, 800 F. Supp. 1, 26 (D. Del. 1992) (defendant did not demonstrate that a large penalty would have an adverse impact on the company), *aff'd in part, rev'd in part on other grounds*, 2 F.3d 493 (3d Cir. 1993).

After considering the various methods for calculating an appropriate penalty, Complainant asserts that the "top down" method is the appropriate approach based on the circumstances of this case. As described below, Complainant is not presenting evidence regarding Respondent's economic benefit of noncompliance, and therefore the "bottom up" method is not appropriate. Complainant's application of the "top down" method is also consistent with the approach taken by this Tribunal in *In re Polo Dev., Inc.*[21] and *In re Smith*,[22] and is consistent with the approach generally adopted within the U.S. Circuit Court of Appeals for the Ninth Circuit "because it aligns with the congressional intent and the plain language of the CWA, and produces results that are more reliable."[23]

In applying the "top down" method, Complainant begins with the maximum statutory penalty and reduces that amount to provide for an appropriate initial amount based on the gravity of the violation at issue (i.e., the nature circumstances, extent, and gravity factor), and then increases or decreases that amount based upon the other statutory factors. In other matters, this Tribunal has also considered two documents developed to guide EPA enforcement staff in the assessment of civil penalties entitled *Policy on Civil Penalties* (the "Penalty Policy"),[24] and *A*

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[21] *In re Polo Dev., Inc.,*2015 EPA ALJ LEXIS 6, at *38.
[22] *In re Smith,* 2004 EPA ALJ LEXIS 128, at *144.
[23] *See United States v. HVI Cat Canyon, Inc.*, No. CV 11-5097, 2023 U.S. Dist. LEXIS 31516, at *95 – 96 (C.D. Cal. 2023) (citing, *e.g., Ctr. for Biological Diversity v. Marina Point Dev. Assocs.*, 434 F.Supp.2d 789, 799 (C.D. Cal. 2006) (finding "that the top-down approach offers a more reliable and less speculative method of calculating the penalty"); *Cal. Sportfishing Prot. All. v. River City Waste Recyclers, LLC*, 205 F.Supp.3d 1128, 1155 (E.D. Cal. 2016) ("Once the court has calculated maximum civil penalties, the court may proceed to adjust downward from this maximum based on statutory factors."); *Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, No. CY-98-3011, 2001 U.S. Dist. LEXIS 3579, at *24 (E.D. Wash. 2001) ("The Court begins with a 'top down' analysis which means that the Court begins with the maximum amount of the penalty and then applies the § 1319(d) factors to determine the appropriate reductions, if any, from the maximum."); *Hawaii's Thousand Friends*, 821 F.Supp. 1368, 1394 – 95 (D. Haw. 1993) (Congressional intent manifested itself in a "clear statutory scheme" that requires a straightforward "two-step process" whereby courts first calculate the maximum penalty, and then look to see if any of the § 309(d) factors warrant a departure from the statutory maximum.)).
[24] *See* Policy on Civil Penalties, at https://www.epa.gov/sites/default/files/documents/epapolicy-civilpenalties021684.pdf.

Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties (the "Penalty Framework"),[25] both dated February 16, 1984. Complainant suggests that the Penalty Framework is an especially a useful resource for this Tribunal to determine an appropriate civil penalty in this matter.

C. Application of Statutory Factors and Methodology

1. Nature, Circumstances, Extent, and Gravity of the Violation

The nature, circumstances, extent, and gravity of the violation reflect the "seriousness" of the violation.[26] The seriousness of a particular violation depends primarily on the actual or potential harm to the environment resulting from the violation, as well as the importance of the violated requirement to the regulatory scheme.[27] In this case, Respondent's actions have transcended "potential" harm, and, as described below, are likely to have caused harm to the environment in several ways. The evidence in this matter establishes that the nature, circumstances, extent, and gravity of Respondent's violations are serious and justify a substantial penalty.

a. Respondent's Activities Likely Caused Environmental Harm

In evaluating the potential for impacts to the environment, it is appropriate to assess the sensitivity of the impacted aquatic resource[28] and the location and nature of the wetlands that

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[25] *See* A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties, at https://www.epa.gov/sites/default/files/documents/penasm-civpen-mem.pdf.
[26] *See In re Urban Drainage & Flood Control*, 1998 EPA ALJ LEXIS 42 at *56.
[27] *See id.*
[28] *See In re Cutler*, 11 E.A.D. 622, 653 (EAB 2004) ("[I]n assessing the gravity or seriousness of any violation, [EPA] customarily considers 'the sensitivity of the environment' at the location where the violation occurred.")

were impacted by Respondent's illegal activities.[29] The evidence in this matter demonstrates that the wetlands where the violations occurred are critically important to the residents of the State of Alaska and that there is a potential for harm to the environment resulting from the violations.

Respondent's unauthorized activities impacted wetlands adjacent to multiple unnamed relatively permanent tributaries that are mapped by the State of Alaska Department of Fish and Game's Anadromous Waters Catalog.[30] In order for a waterbody to be mapped within the Catalog, "[a]nadromous fish must have been seen or collected and identified by a qualified observer," most frequently a fisheries biologist employed by the State of Alaska Department of Fish and Game.[31] Once a waterbody is mapped as containing anadromous fish, the State of Alaska has identified that it should be afforded special protections pursuant to State law.[32] One of the most iconic anadromous fish, salmon are a critical ecological, commercial, recreational, and subsistence resource to the State of Alaska and its residents.[33] The multiple unnamed

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[29] *See In re Phoenix Constr. Servs.*, 11 E.A.D. at 405 ("[i]n an illegally-filled wetlands case, a 'sensitivity of the environment' analysis would almost always necessarily include a consideration of the quality of the wetlands impacted. Consistent with this, numerous courts assessing penalties for section 404 wetlands violations have mentioned the quality of the wetland in the remedy phase of their decisions. *E.g., Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, No. CIV. S-97-0858, 1999 U.S. Dist. LEXIS 21389, at *20, 21 (E.D. Cal. Nov. 8, 1999) (finding the wetlands to be important for supporting endangered species and referring to them as 'rare federal wetlands' in considering an appropriate penalty), aff'd in part & rev'd in part on other grounds, 261 F.3d 810 (9th Cir. 2001), aff'd by an equally divided Court, 537 U.S. 99 (2002) (mem.); *United States v. Banks*, 873 F. Supp. 650, 656, 659 (S.D. Fla. 1995) (considering the importance and scarcity of the type of wetland impacted), aff'd, 115 F.3d 916 (11th Cir. 1997), cert. denied, 522 U.S. 1075 (1999); *United States v. Van Leuzen*, 816 F. Supp. 1171, 1179 (S.D. Tex. 1993) (determining that the filled wetland was 'ecologically of great value' and of a 'unique quality'); *United States v. Key West Towers, Inc.*, 720 F. Supp. 963, 965 (S.D. Fla. 1989) (considering the importance to the ecosystem of the illegally-filled water and wetlands in its analysis of the seriousness of the violation); *see also In re Britton Constr. Co.*, 8 E.A.D. 261, 280 (EAB 1999) (noting that the presiding officer found the filled area to be a relatively small, low-value wetland)."

[30] *See* Exhibit CX- 02 (Jurisdictional Analysis Report); *see also* Anadromous Waters Catalog Alaska Dep't of Fish and Game, https://www.adfg.alaska.gov/sf/SARR/AWC/ (last visited Jan. 21, 2025).

[31] *Id.*

[32] *See* Alaska Stat. § 16.05.871.

[33] *See* Salmon Research in Alaska, NOAA Fisheries, https://www.fisheries.noaa.gov/alaska/science-data/salmon-research-alaska (last visited Jan. 21, 2025).

relatively permanent tributaries that are mapped by the State of Alaska Department of Fish and Game as containing anadromous fish are likely the first freshwater streams for some salmon returning to spawn, and provide important habitat for salmon rearing, migration, and spawning; maintaining high water quality in those waterbodies is important.

Respondent's illegal activities likely suspended sediments and increased turbidity within the tributaries mapped by the State of Alaska as being utilized by anadromous fish. Studies suggest that suspended sediment is associated with "negative effects on the spawning, growth, and reproduction of salmonids" and that it may "affect salmonids by altering their physiology, behavior, and habitat, all of which may lead to physiological stress and reduced survival rates."[34] Additionally, a report by the State of Alaska Department of Fish and Game illustrates that sediment has significant effects on rearing salmonids, including slower growth, less emigration, changes in aggression, activity, and feeding, and reduced carrying capacity.[35]

In addition to likely increasing suspended sediments, Respondent likely reduced the wetlands' ability to affirmatively maintain water quality for those salmonids through their unlawful activities. As stated by the State of Alaska Department of Environmental Conservation, "[w]etlands help maintain water quality by slowly filtering excess nutrients, sediments, and pollutants before water seeps into rivers, streams, and underground aquifers."[36] The wetlands impacted by Respondent's unauthorized activities help to maintain water quality

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[34] *See* Effects of Turbidity and Suspended Solids on Salmonids, Washington State Trans. Comm'n et al., https://www.wsdot.wa.gov/research/reports/fullreports/526.1.pdf (last visited Jan. 21, 2025).
[35] *See* Ecology of Rearing Fish; A Review Report on Southeast Alaska Findings, Alaska Dep't of Fish and Game, https://www.adfg.alaska.gov/fedaidpdfs/FREDF-9-17(26)D-I-B.pdf (last visited Jan. 21, 2025).
[36] *See* Alaska's Wetlands, Alaska Dep't of Env't Conservation, https://dec.alaska.gov/water/wastewater/stormwater/permits-approvals/wetlands/ak-wetlands/ (last visited Jan. 21, 2025).

for waterbodies that support a critical ecological, commercial, recreational, and subsistence resource for the State of Alaska and its residents.

In Respondent's Prehearing Exchange, it includes a "Trip Report," marked "draft" in its heading, developed by Jesse Lindgren, a Habitat Biologist with the State of Alaska Department of Fish and Game.[37] In that report, Mr. Lindgren describes documented fish use in seven unnamed relatively permanent tributaries to Gastineau Channel (called "streams" by Mr. Lindgren) between Glacier Highway and Egan Drive and below Egan Drive, which suggests fish habitat was impacted, at minimum, by discharges at Locations 2, 5, 6, 7, and 8 because fish pass through the culverts under Egan Drive and use the areas between Glacier Highway and Egan Drive in Tributaries E, F, and I (called Streams 3, 4, and 7, respectively, by Mr. Lindgren).[38] Furthermore, Mr. Lindgren acknowledges that several of the "streams" are mapped by the State of Alaska Department of Fish and Game as containing anadromous fish.[39] Additionally, Mr. Lindgren states that most of the "streams" provide at least some "high-quality and tidally influenced fish habitat."[40] Some of that fish habitat is primarily focused downstream of the locations where Respondent unlawfully placed dredged and/or fill material, making the downstream effects of the unauthorized activities referenced above even more significant. Additionally, Mr. Lindgren emphasizes the need for Respondent to "develop an annual sediment

[37] *See* Exhibit RX-03 (ADFG Fish Habitat Report).
[38] Location 2 is within wetlands adjacent to a waterbody that Exhibit CX – 02 (Jurisdictional Analysis Report) calls Tributary I, which Exhibit RX – 03 (ADFG Fish Habitat Report) calls Stream 7. Location 5 is within wetlands adjacent to a waterbody that Exhibit CX – 02 calls Tributary E, which Exhibit RX – 03 calls Stream 3. Locations 6, 7, and 8 are within wetlands adjacent to a waterbody that Exhibit CX – 02 calls Tributary F, which Exhibit RX – 03 calls Stream 4.
[39] *See id.* at page 2.
[40] *See generally id.*

maintenance plan for this area,"[41] illustrating the importance of minimizing impacts such as the ones resulting from Respondent's unauthorized activities from occurring again.

In addition to harming wetlands that provide important water quality benefits to resident and anadromous fish, all of the wetlands that were impacted by Respondent's unauthorized activities are part of the wetlands within the Mendenhall Wetlands State Game Refuge.[42] The Refuge is approximately 4,000 acres and provides "a vital feeding and resting area for both resident birds and migrants traveling to and from their Arctic breeding grounds" and "is enjoyed year-round by residents and visitors alike. Waterfowl hunting, hiking, wildlife viewing and photography, boating, fishing, scientific and educational studies, and sightseeing are popular activities supporting approximately 20,000 user days annually."[43] Respondent's unauthorized discharges of dredged and/or fill material have likely decreased the functions and services that the wetlands within the Refuge provide.[44]

The length of time that a violation continues affects the seriousness of the violation, as the longer a violation continues uncorrected, the greater the risk of harm. Here, while Complainant alleges that Respondent was actively discharging throughout the nine locations identified in Table 1 of the Complaint over the course of only a couple of weeks, the vast majority of the dredged and/or fill material Respondent illegally discharged into waters of the United States remains in place. As a result, the temporal and cumulative impacts of over 1,030

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[41] *Id.* at page 6.
[42] *See* Mendenhall Wetlands – State Game Refuge, Alaska Dep't of Fish and Game, https://www.adfg.alaska.gov/index.cfm?adfg=mendenhallwetlands.main (last visited Jan. 21, 2025).
[43] *Id.*
[44] To support this likely conclusion, the waterbody identified in Exhibit CX – 02 (Jurisdictional Analysis Report) as Tributary I has a new alluvial fan made of sediment and debris that travelled downstream through the culvert identified in Exhibit CX – 02 as Culvert I from the sediment and debris accumulation between Glacier Highway and Egan Drive. This sediment accumulation downstream of Culvert I can be seen in Photos 45 through 47 in Exhibit CX – 02 and the development of the new alluvial fan between March 2021 and September 2023 can be seen in Figure 9 in Exhibit CX – 02.

days of impacts[45] to the critical functions and services provided by the impacted waters make the violation more serious.

In Respondent's Prehearing Exchange, it attempts to minimize the harm to the environment due to the volume of dredged and/or fill material discharged into waters of the United States.[46] Compared to the size of the relatively permanent tributaries impacted by the material discharged into their adjacent wetlands, which continues to remain in place through the filing of the Complaint, the fill volume likely had disproportionately significant temporal and cumulative impacts over the 1,030 days since the dredged and/or fill material was originally discharged.[47]

b. Respondent's Activities Caused Harm to the CWA Regulatory Program

The CWA's fundamental purpose is to "restore and maintain the chemical, physical, and biological integrity of the nation's waters."[48] In order to achieve that objective, one of the most critical aspects of the CWA statutory scheme is the prohibition on discharges of pollutants from a point source into waters of the United States unless expressly authorized and regulated through the issuance of a CWA permit.[49] As federal courts have noted, any unpermitted discharge into waters of the United States is a serious violation which significantly undermines the CWA's regulatory scheme.[50] Further, the Environmental Appeals Board has noted, "even if there is no actual harm to the environment, failure to obtain a [CWA] permit before [discharging pollutants

[45] As of the date of the filing of the Complaint.
[46] *See* Respondent's Prehearing Exchange at page 13.
[47] As of the date of the filing of the Complaint.
[48] 33 U.S.C. § 1251(a).
[49] 33 U.S.C. § 1311(a).
[50] *See e.g. United States v. Pozsgai*, 999 F.2d 719, 725 (3rd Cir. 1993) (noting that "[u]npermitted discharge is the archetypal Clean Water Act violation, and subjects the discharger to strict liability"); *see also v. Banks*, 873 F.Supp. 650, 659 (S.D. Fla. 1995) ("[U]npermitted filling and destruction [of wetlands] constitutes a serious violation of the CWA and should be discouraged as contrary to the public interest.").

into waters of the United States] may cause significant harm to the regulatory program."[51] In fact, the Board has stated that the obtaining of permits and following such conditions as are prescribed therein "is *critical* to the basic purpose of the section 404 program as well as the CWA."[52]

Potential harm to the CWA Section 404 regulatory program is, as the Board as noted, "of particular concern" because "wetland filling activities are typically visible to other members of the community, the perception that an individual is 'getting away with it' and openly flaunting the environmental requirements may set a poor example for the community and encourage other similar violations in the future and/or lead to the acceptance of such activities as commonplace, minor infractions not worthy of attention."[53] The Board has also noted the number of other courts that "have remarked on this general phenomenon."[54]

Complainant argues that this concern is significantly amplified when the entity "openly flaunting" CWA Section 404 permitting requirements is a governmental entity, such as Respondent. According to the U.S. Fish and Wildlife Service, the State of Alaska encompasses an area of 403,247,700 acres, including offshore areas; the total acreage of wetlands is 174,683,900 acres, or 43.3 percent of Alaska's surface area.[55] Given that much of the State of

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[51] *See In re Phoenix Constr. Servs.*, 11 E.A.D. at 400.
[52] *Id.* at 399 (emphasis in original).
[53] *Id.*
[54] *Id. See Van Leuzen*, 816 F. Supp. 1171, 1179, 1180, 1182 (S.D. Tex. 1993) (finding that "the open, notorious, and willful violations at the Site have damaged the federal wetlands permit program in the area" and requiring defendant, at least in part to rectify the damage to the program, to erect a large billboard along the highway notifying passersby that he has been required to pay a fine and to remove, at his expense, the illegal fill that he had placed without a permit); *Kelly v. EPA*, 203 F.3d 519, 523 (7th Cir. 2000) (affirming EPA's position that deterrence was appropriate in the case where a hundred of defendant's neighbors had signed a petition saying they supported defendant's activities); *see also Buxton v. United States*, 961 F. Supp. 6, 10 (D.D.C. 1997) (finding that the "run-of-the-mill nature" of the draining and filling of the wetland and the relatively small acreage of impacted land does not lessen the seriousness of the actions as an "accumulation of similar CWA violations, taken as a whole, point to a serious environmental problem in need of attention").
[55] *See* Status of Alaska's Wetlands, U.S. Fish and Wildlife Serv., page 3, https://www.fws.gov/sites/default/files/documents/Status-of-Alaska-Wetlands_0.pdf (last visited Jan. 21, 2025).

Alaska's surface area is wetlands, many residents of the State could potentially have the chance to discharge into wetlands for a variety of development opportunities. The EPA recognizes that so long as there is compliance with the CWA Section 404(b)(1) guidelines,[56] certain of those discharges of dredged and/or fill material into waters of the United States are lawful. However, to maintain the integrity of the CWA Section 404 regulatory program and to ensure that Alaskan and non-Alaskan residents alike comply with the requirements of that program, there must be consequences associated with the unlawful behavior by their State government.

As previously acknowledged by this Tribunal, "unfortunately" this Tribunal cannot order restoration or mitigation to remedy the harms caused by Respondent's unlawful behavior.[57] As a result, the damage that has been caused by Respondent to the CWA Section 404 regulatory program "can only be considered in terms of an enhancement to the penalty assessment."[58] Complainant can reduce the total administrative civil penalty in a settlement for violators that will, under an enforceable agreement, restore the original wetland impacted by the unlawful behavior.[59] Respondent declined that option prior to Complainant filing the Complaint in this matter, further justifying a larger administrative civil penalty than what would be available in the settlement context where the impacted wetlands were restored.

c. Complainant's Proposed Initial Gravity Amount is Reasonable and Just

As noted above, for violations of CWA Section 301(a),[60] the total maximum allowable administrative civil penalty under the CWA is $27,378 per violation per day up to a maximum

[56] *See* 40 C.F.R. Part 230. These are the regulations established by the EPA that constitute the substantive environmental criteria used in evaluating activities regulated under CWA Section 404, 33 U.S.C. § 1344.
[57] *See In re Smith*, 2004 EPA ALJ LEXIS at *147.
[58] *Id.*
[59] *See* EPA, "Issuance of Revised CWA Section 404 Settlement Penalty Policy," https://www.epa.gov/sites/default/files/documents/404pen.pdf (Dec. 21, 2001) at 12.
[60] 33 U.S.C. § 1311(a).

allowable administrative civil penalty of $342,218.[61] As described in Complaint ¶ 4.3, Complainant alleges over 1,030 days of violations as of the date of the Complaint filing because the unlawfully discharged dredged and/or fill material has remained in waters of the United States. Multiple federal circuit courts have confirmed that "[e]ach day the pollutant remains in the wetlands without a permit constitutes an additional day of violation" under the CWA.[62] As a result, Complainant could have initiated a civil judicial action in the U.S. District Court for the District of Alaska and sought substantially higher than the administrative civil penalty maximum identified in CWA Section 309(g)(2)(B),[63] for the alleged CWA violations.[64]

Even if this Tribunal were to reject the theory that each day the pollutant remains in the wetlands without a permit constitutes an additional day of violation under the CWA, the maximum civil penalty available to Complainant in this case would still exceed the administrative civil penalty maximum. As alleged in the Complaint ¶¶ 3.12 – 3.14 and acknowledged by Respondent in Exhibit CX – 08 (Respondent's Response to Complainant's Information Request), activities involving discharges of dredged and/or fill material occurred on three separate days at Locations 1, 2, 5, 6, 7, 8, and 9 identified in Table 1 of the Complaint, and on two separate days at Locations 3 and 4 identified in Table 1 of the Complaint. As a result, the Complaint alleges that Respondent actively discharged dredged and/or fill material into waters of

[61] Per CWA Section 309(g)(2)(B), 33 U.S.C. § 1319(g)(2)(B) and 40 C.F.R. Part 19.
[62] *See Sasser v. Adm'r, EPA*, 990 F.2d 127, 129 (4th Cir. 1993); *see also Benham v. Ozark Materials River Rock, LLC*, 885 F.3d 1267, 1275 (10th Cir. 2018) ("[W]e affirm the district court's conclusion that the roadway and filling of wetlands in Saline Creek constitute a continuing violation of the CWA."); *United States v. Cumberland Farms*, 647 F. Supp. 1166, 1183-84 (D. Mass.1986), *aff'd*, 826 F.2d 1151 (1st Cir.1987) (holding that the defendant violated the [CWA] for each day it allowed the illegal fill material to remain there).
[63] 33 U.S.C. § 1319(g)(2)(B)
[64] In the civil judicial enforcement context, the applicable statutory penalty provision is CWA Section 309(d), 33 U.S.C. § 1319(d), which authorizes the United States to seek civil penalties up to $25,000 per day for each violation. That penalty total has been adjusted to $68,445 per day for each violation, consistent with the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and 40 C.F.R. Part 19. As a result, the civil judicial statutory maximum penalty for 1,030 days of CWA violations would be over $70 million.

the United States without authorization on 25 separate "active discharge occasions" at the nine locations.[65] Therefore, the maximum penalty available to the United States under that theory would be $684,450,[66] which is more than double the total maximum allowable administrative civil penalty of $342,218.

Complainant proposes that this Tribunal borrow from the methodology used in *Urban Drainage & Flood Control District*, based on the Penalty Framework, where the gravity of violations of CWA Section 301(a),[67] can reasonably be classified for certain categories of violations, as minor, moderate, or major, and the maximum statutory penalty can be reduced based on the respective ranges for the initial gravity amount.[68] Considering the high risk to the CWA Section 404 regulatory program associated with the activities, Complainant believes that the violation at issue in this case should be classified as "major" with an associated initial gravity amount ranging between $451,737 and $684,450.[69] In terms of dollars, given the relatively small volume of fill, an initial gravity amount on the low end of the range for a "major" violation is appropriate and justifiable. Therefore, Complainant proposes an initial gravity amount of $451,737. The initial gravity amount proposed would serve as a deterrent without being disproportionate to the seriousness of the violations.

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[65] Complainant calculates those total "active discharge occasions" as follows: allegations in Paragraph 3.12 of the Complaint constitute seven locations (1, 2, 5, 6, 7, 8, and 9) where three days of discharge occurred at each, totaling 21 "active discharge occasions." Allegations in Paragraphs 3.13 – 3.14 of the Complaint each constitute two locations (3 and 4) where two days of discharge occurred at each, totaling four "active discharge occasions." Combining those "active discharge occasions" results in 25 total.

[66] Calculated by multiplying the maximum allowable administrative civil penalty under the CWA of $27,378 per violation per day by 25 "active discharge occasions."

[67] 33 U.S.C. § 1311(a).

[68] *See Urban Drainage*, 1998 EPA ALJ LEXIS 42, at *65-66.

[69] This is the "upper third" of the range from $0 – $684,450 (total maximum civil administrative penalty, applying the conservative assumption of only 25 "active discharge occasions described above) consistent with the approach by this Tribunal in *Urban Drainage.*

2. Respondent's Economic Benefit

The Federal courts as well as the Environmental Appeals Board have emphasized the importance of the economic benefit factor, even where the exact or full amount cannot be calculated, and have provided that a partial amount or reasonable approximation is sufficient to include in a penalty assessment.[70] Respondent's noncompliance with the CWA likely resulted in an economic benefit stemming from avoided costs associated with obtaining a CWA Section 404 permit from the U.S. Army Corps of Engineers ("Corps"). However, in its Prehearing Exchange, Respondent failed to provide specific estimates for economic benefit.[71]

Notwithstanding the information above, Complainant asserts that the deterrence factor associated with the gravity of the violation is the most relevant factor to consider. Accordingly, because the gravity-based penalty amount of $451,737 sufficiently exceeds any possible economic benefit realized by Respondent, and in the interest of approaching the issue of penalty in a fair and equitable matter, Complainant proposes to assess no increase in the penalty for the economic benefit factor.

3. Respondent's Ability to Pay

Respondent has presented no information indicating that Respondent is unable to pay a penalty up to the statutory maximum penalty for this violation.[72]

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[70] *See Smithfield Foods, Inc.*, 191 F.3d 516, 529 (4th Cir. 1999), *cert. denied*, 531 U.S. 813 (2000); *In re B.J. Carney*, 7 E.A.D. 171, 207-08 (EAB 1997), *on remand*, 1998 EPA ALJ LEXIS 112, *appeal dismissed*, 192 F.3d 917 (9th Cir. 1999).

[71] *See* Respondent's Initial Prehearing Exchange at page 17.

[72] On pages 15 – 16 of Respondent's Initial Prehearing Exchange, it argues that "the public will be adversely affected by any penalty or remediation work coming out of DOT&PF's limited budget will be paid for by reducing the scope and extent of maintenance activities for other roads and highways in Southeast Alaska." While Complainant acknowledges that Respondent may not have a budget specifically devoted to paying civil penalties for violating federal law, Respondent's annual budget is in the tens of millions of dollars, making it difficult to argue that it has a true inability-to-pay the civil penalty Complainant proposes.

4. Respondent's Prior History of Violations

The most significant and relevant prior violations by Respondent involved, among other things, unauthorized discharges of dredged and/or fill material to waters of the United States at ten locations on the Kenai Peninsula following two large floods, one in 2005 and one in 2006.[73] Those violations resulted in a Consent Decree that was entered between the United States and Respondent on September 21, 2010, in the U.S. District Court for the District of Alaska that resulted in total costs to Respondent of nearly $1 million.[74] That case involved substantially similar allegations involving the Respondent's failure to obtain necessary CWA permitting from the Corps prior to discharging dredged and/or fill material into waters of the United States. While slightly over a decade passed between entry of the Consent Decree resolving those violations and the violations at issue in this case, the substantially similar nature of the claims and the substantial cost incurred by Respondent to resolve the previous matter should have served to deter Respondent from performing similarly unlawful activities.

Respondent's Prehearing Exchange states that Complainant's reference to the 2010 violations is "illegal," citing Federal Rule of Evidence 408 and 40 C.F.R. § 22.22.[75] Respondent's argument is meritless. Through CWA Section 309(g)(3),[76] Congress explicitly directed the EPA to consider "any prior history of such violations" when determining the appropriate amount of a penalty.

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[73] *See* Alaska Department of Transportation and Public Facilities to Pay Nearly $1 Million for Alleged Clean Water Act Violations, U.S. Dep't of Justice, https://www.justice.gov/opa/pr/alaska-department-transportation-and-public-facilities-pay-nearly-1-million-alleged-clean#:~:text=WASHINGTON%E2%80%94The%20Alaska%20Department%20of,Environmental%20Protection%20Agency%20announced%20today (last visited Jan. 21, 2025).
[74] *Id. See also* Exhibit CX – 10 (2010 Consent Decree).
[75] *See* Respondent's Prehearing Exchange at 16.
[76] 33 U.S.C. § 1319(g)(3).

Respondent fails to recognize that Complainant is pointing to the violations at issue that were resolved in the 2010 Consent Decree, not the settlement itself, as a basis to conclude that Respondent has a prior history of violations. In that case, the United States Department of Justice filed a complaint in the U.S. District Court for the District of Alaska explicitly alleging unauthorized discharges of dredged and/or fill material at ten distinct locations on the Kenai Peninsula. That complaint, and the Consent Decree resolving those violations, are public documents and are not protected by Federal Rule of Evidence 408. Additionally, this Tribunal has explicitly considered prior CWA violations resolved through a Consent Decree as evidence that a Respondent is a "repeat offender" for new but similar violations alleged in administrative litigation.[77] Reference to Respondent's similar past violations is appropriate in this case and required by the CWA.

Complainant recognizes that the unlawful activities that resulted in the 2010 Consent Decree with the United States occurred in a different geographic region of the State of Alaska and recognizes that some time had passed between that settlement and the unlawful activities subject to this matter. However, the presence of past violations of a similar nature warrants an upward adjustment in the total administrative civil penalty in this case. According to the Penalty Framework, for a "similar" past violation, as is the case here, there is "discretion to raise the penalty amount up to 35 percent for the first repeat violation."[78] In an effort to exhibit reasonableness to this Tribunal, the Complainant proposes that this Tribunal increase the initial

[77] *See In re Mahoning Valley Sanitary Dist.*, 1996 EPA ALJ LEXIS 4, at 22 – 23; *see also e.g. In re Ketchikan Pulp Co.*, 1995 EPA ALJ LEXIS 12, at *53 (this Tribunal found it appropriate to consider Respondent's previous Consent Decree resolving similar CWA violations as part of the "extensive history of prior violations" by Respondent).

[78] *See* A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties, at https://www.epa.gov/sites/default/files/documents/penasm-civpen-mem.pdf, at page 22.

gravity amount with an adjustment factor of 5 percent, resulting in a total adjusted penalty of $474,323.[79]

Complainant adds that even if this Tribunal concludes that these past violations should not serve as a basis to increase the administrative civil penalty in this action, this is not a reasonable basis for adjusting downwards the proposed penalty.[80]

5. Respondent's Culpability

The Tribunal must adjust the penalty to consider the degree of Respondent's culpability, which the Environmental Appeals Board and this Tribunal have generally described as Respondent's "blameworthiness."[81] The Environmental Appeals Board and this Tribunal have considered several factors when assessing the Respondent's culpability (or "degree of willfulness and/or negligence"): how much control the violator had over the events constituting the violation; the foreseeability of the events constituting the violation; whether the violator took reasonable precautions against the events constituting the violation; whether the violator knew or should have known of the hazards associated with the conduct; the level of sophistication within the industry in dealing with compliance issues; and whether the violator in fact knew of the legal requirement it violated.[82]

There is no reasonable dispute that Respondent was responsible for the unlawful activities, as it explicitly articulated that its representatives authorized and performed the

[79] Calculated by multiplying the original gravity-based penalty amount of $451,737 by 1.05.
[80] *See In re Serv. Oil, Inc.*, 2007 EPA ALJ LEXIS 21, at *165 – 67.
[81] *See e.g., In re Phoenix Constr. Servs.*, 11 E.A.D. at 418, n.87 (EAB 2004); *Polo Dev.*, 2015 EPA ALJ LEXIS 6, at *46.
[82] *See e.g.*, *In re Phoenix Constr. Servs.*, 11 E.A.D. at 418 (EAB 2004); *Polo Dev.*, 2015 EPA ALJ LEXIS 6, at *46 – 47; *In re Urban Drainage*, 1998 EPA ALJ Lexis 42, at *171 – 72.

activities subject to this action.[83] Therefore, it had full control over the events constituting the violations.

To be clear, the violations alleged by Complainant do not include any activities performed by Alaska Electric Light and Power ("AEL&P"), as photographs provided Exhibit CX – 01 (Discharge Report) demonstrate Respondent had already unlawfully discharged in areas where AEL&P subsequently added more fill, i.e. Locations 2, 7, and 8.[84] In 2022, the EPA documented the initial discharges by ADOT&PF at these locations prior to the AEL&P activities that the Respondent presumes occurred "during mid-late January 2023."[85]

Respondent has a history of applying for and receiving CWA Section 404 permits from the Corps. Respondent could, and should, have foreseen that it was required to obtain CWA Section 404 authorization from the Corps prior to performing the unlawful activities. Given the volume of work that Respondent performs involving earthwork throughout the State of Alaska and given that according to the State of Alaska Department of Natural Resources, the State of Alaska "has the greatest surface water resources of any state in the United States,"[86] Respondent frequently works within or near waters of the United States. As a result, it has experience

[83] *See* Exhibit CX – 08 (Respondent's Response to Complainant's Information Request)
[84] The 2022 condition of Location 2 is documented in Photos 6 through 9 in Exhibit CX – 01 (Discharge Report), which can be compared to the 2023 conditions post AEL&P work shown in pages 25 and 26 of Exhibit RX – 07 (DOT&PF Report on AEL&P Work). The condition of Location 7 in 2021 is documented in Exhibit CX – 01 Photos 34 and 35 and the 2022 condition of Location 7 is documented in Exhibit CX – 01 Photos 36 through 38 and Photos 110 and 111, which can be compared to the 2023 conditions post AEL&P work shown in page 10 of Exhibit RX – 07. The condition of Location 8 in 2021 is documented in Photo 40 in Exhibit CX – 01 and the 2022 condition is documented in Exhibit CX – 01 Photos 41 and 42 and Exhibit CX – 02 (Jurisdictional Analysis Report) Photos 104 and 105, which can be compared to the 2023 conditions post AEL&P work in Exhibit RX – 07 page 12.
[85] *See* Exhibit RX – 07 (DOT&PF Report on AEL&P Work) at page 1.
[86] *See* Alaska Hydrologic Survey, Alaska Dep't of Natural Res., https://dnr.alaska.gov/mlw/water/hydro/ (last visited Jan. 21, 2025).

obtaining permits under CWA Section 404, even explicitly identifying the program in its "Alaska Storm Water Pollution Prevention Plan Guide."[87]

Respondent also acknowledged its extensive experience working with the Corps on permitting in written correspondence to Complainant.[88] In that same written correspondence to Complainant, Respondent also acknowledged that it "failed to secure proper permitting at some of the sites," "did not obtain any federal permits for the work," that Respondent would "work to avoid internal communication failures on future projects," and that this was an "error."[89]

Additionally, Respondent has access to sophisticated legal counsel, environmental consultants, and contractors and other resources to ensure adherence to the CWA. Furthermore, Respondent has many staff state-wide, with almost 100 personnel employed alone by the Southcoast Region, the area covered by the locations identified within this Complaint.[90] Respondent has sufficient expertise and resources to meet the CWA's requirements.

Respondent's Prehearing Exchange makes numerous references to the unauthorized work being performed in response to storm events in southeast Alaska in December 2020.[91] While

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[87] *See* Alaska Storm Water Pollution Prevention Plan Guide, Alaska Dep't of Transp. and Pub. Facilities, https://dot.alaska.gov/stwddes/desenviron/assets/pdf/swppp/english/2021/swppp_guide_2021.pdf at page 1-1.

[88] *See* Exhibit CX – 08 (Respondent's Response to Complainant's Information Request).

[89] *Id.* Complainant notes that in its Prehearing Exchange, Respondent suggests that statements made by Respondent in response to a Notice of Violation issued by the Corps and in response to an information request issued pursuant to CWA Section 308, 33 U.S.C. § 1318, are "inadmissible." *See* Respondent's Prehearing Exchange at page 16. While Respondent's statement is brief and without any detail or legal support, Complainant seeks to point out that this Tribunal routinely considers as admissible evidence Respondent's responses to information requests issued pursuant to CWA Section 308, 33 U.S.C. § 1318. *See e.g. In re City of Salisbury*, 2000 EPA ALJ LEXIS 9, at *8 – 9. Additionally, as can be seen in Exhibit CX – 07 (Complainant's CWA Section 308 Information Request), the EPA's information request in this case explicitly informed Respondent that "[t]he information provided in response to this Information Request may be used by EPA in administrative, civil, or criminal proceedings." This Tribunal also consistently considers as admissible evidence Respondent's response to Notices of Violations issued by the Corps. *See e.g. In re Otter*, 2001 EPA ALJ LEXIS 17, at *9 – 10. As a result, there is no legitimate basis to argue that the information provided by Respondent as referenced in Complainant's Initial Prehearing Exchange should be considered "inadmissible."

[90] *See* Southcoast Region, Alaska Dep't of Transp., https://dot.alaska.gov/stwdmno/mno_sr.shtml (last visited Jan. 21, 2025).

[91] *See e.g.* Respondent's Prehearing Exchange at page 14.

this reason for the work may be true, the illegal activities occurred over eight months after the storm events occurred. This length of time was more than adequate for Respondent to engage in the proper CWA Section 404 permitting processes prior to performing the work.

During this time, the Respondent apparently had the time to "rent specialized vacuum trucks equipped with jetting equipment that had to be shipped to Juneau from the Lower 48 which took several months"[92] and to go through the process of hiring contractors to perform parts of the illegal activities.[93] During this timeframe, there is no reason why Respondent could not have engaged in the permitting processes required of all entities seeking CWA Section 404 authorization prior to discharging dredged and/or fill material into waters of the United States.

Furthermore, Respondent could have performed lawful dredging and hauled away material without discharging that material into waters of the United States, as they apparently did with approximately 820 cubic yards of soil/rocks and vegetation dredged from the waterbody identified in Exhibit CX – 02 (Jurisdictional Analysis Report) as Tributary S, on September 8 and 9, 2021, where the Respondent indicates the dredged material was placed in a dump truck and hauled to Honsinger Pond for permanent disposal.[94]

According to the Penalty Framework, in circumstances a violator has control over the events constituting the violation, the events constituting the violations were foreseeable, the violator is sophisticated dealing with compliance issues, and/or where the violator in fact knew of the legal requirement that was violated, there is "absolute discretion" to adjust the penalty up by 20 percent of the gravity component. Consistent with the Penalty Framework, Complainant

[92] *See* Exhibit RX – 01 (DOT&PF Background Summary) at page 3.
[93] *See* Exhibit CX – 08 (Respondent's Response to Complainant's Information Request).
[94] *See* CX - 08 (Respondent's Response to Complainant's Information Request).

proposes a 20 percent increase to the gravity amount of $474,323[95] to account for Respondent's culpability, for a total proposed administrative penalty of $569,187.

Finally, in assessing culpability, the Environmental Appeals Board has also considered the violator's attitude, cooperativeness, and good faith efforts in reporting or remedying violations.[96] In this regard, Respondent has not yet removed the unauthorized material from waters of the United States. Respondent argues in its Prehearing Exchange that the "EPA largely caused the problem that it now complains of" because the "Notice of Violation ordered [Respondent] to cease and desist all ongoing work along the Glacier Highway."[97] Respondent is incorrect; the Corps, not the EPA, issued the Notice of Violation.[98] Additionally, the Notice of Violation did not function as an "order," much less contain language ordering Respondent to "cease and desist all ongoing work along the Glacier Highway."[99] The reason the unauthorized dredged and/or fill material remains in place is solely the result of Respondent's unwillingness to agree to remove the material as part of an enforceable agreement on consent.

While Respondent's noncooperation may justify an additional increase in the initial gravity amount, Complainant proposes no increase for noncooperation because, in its discretion, the 20 percent increase for its willfulness in violating the CWA is sufficient to account for Respondent's culpability in this matter.

6. Other Matters as Justice May Require

The Environmental Appeals Board has noted that application of the justice factor "should be far from routine, since application of the other adjustment factors normally produces a penalty

[95] The original gravity-based penalty amount of $451,737 increased by 5 percent above due to a history of prior violations.
[96] *See In re Phoenix Constr. Servs.*, 11 E.A.D. at 418.
[97] *See* Respondent's Prehearing Exchange at page 9.
[98] *See* Exhibit CX – 05 (Corps Notice of Violation).
[99] *Id.*

that is fair and just."[100] Complainant asserts that there are no facts justifying the use of this factor to reduce the penalty amount and that Complainant's application of the other penalty factors to this matter have resulted in a proposed penalty that is fair and just.

III. CONCLUSION

Given that the total appropriate calculated civil penalty exceeds the statutory maximum administrative civil penalty amount, Complainant proposes a penalty in this matter in the amount of $342,218, the statutory maximum administrative civil penalty amount. This is the appropriate penalty to assess against Respondent, in light of the CWA Section 309(g),[101] statutory penalty factors, for discharging dredged and/or fill material into wetlands adjacent to multiple relatively permanent tributaries providing migration, rearing, and spawning habitat for anadromous fish without authorization required by CWA Section 404[102] in violation of CWA Section 301(a).[103]

Dated this 31st day of January 2025.

Respectfully submitted,

U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 10:

PATRICK JOHNSON Digitally signed by PATRICK JOHNSON Date: 2025.01.31 06:23:44 -09'00'

January 31, 2025
DATE

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[100] *See In re Spang & Co.*, 6 E.A.D. 226, 250 (EAB 1995). *See In re Phoenix Const. Servs.*, 11 E.A.D. at 415 – 16 (holding that the facts of the case were insufficient to justify a penalty reduction, and that the Presiding Officer did not error or abuse her discretion in not discussing the facts in greater detail in her consideration of the justice factor).
[101] 33 U.S.C. § 1319(g).
[102] 33 U.S.C. § 1344.
[103] 33 U.S.C. § 1311(a).

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)	DOCKET NO.
	)	CWA-10-2024-0154
STATE OF ALASKA DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES,	)	**CERTIFICATE OF SERVICE**
Juneau, Alaska	)	
Respondent.	)	

The undersigned certifies that the original COMPLAINANT'S REBUTTAL PREHEARING EXCHANGE in the above-captioned action was filed with the OALJ E-Filing System to:

Mary Angeles, Headquarters Hearing Clerk
Office of Administrative Law Judges
U.S. Environmental Protection Agency
https://yosemite.epa.gov/OA/EAB/EAB-ALJ_Upload.nsf

Further the undersigned certifies that a true and correct copy of the original COMPLAINANT'S REBUTTAL PREHEARING EXCHANGE was served on Respondent State of Alaska Department of Transportation and Public Facilities via email to:

Brian E. Gregg, Assistant Attorney General
State of Alaska Department of Law
brian.gregg@alaska.gov
ayla.lisenbee@alaska.gov

Dated this 31st day of January, 2025.

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