UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Special Interest Auto Works, Inc., and Troy Peterson,	)	**Docket No. CWA-10-2013-0123**
	)	
	)	
Respondents.	)	

ORDER ON RESPONDENTS' AMENDED MOTION FOR ACCELERATED DECISION AND MOTION FOR LEAVE TO CONDUCT DISCOVERY

I. PROCEDURAL HISTORY

The United States Environmental Protection Agency ("EPA"), Director of the Office of Enforcement and Compliance, Region 10 ("Complainant"), initiated this proceeding on July 15, 2013, by filing a Complaint ("Compl.") against Special Interest Auto Works, Inc., and Troy Peterson (collectively, "Respondents," or respectively, "Respondent Special Interest" and "Respondent Peterson"), pursuant to the authority granted in 33 U.S.C. §§ 1318(a) and 1319(a).[1] The Complaint alleges two counts of violation of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387, arising from Respondents' activities at the Special Interest Auto Wrecking facility in Kent, Washington. For these alleged violations, the Complaint seeks the imposition of administrative penalties against Respondents in an amount not to exceed $177,500.[2]

Respondents, through joint counsel, filed an Answer, Affirmative Defenses and Request for Hearing on July 31, 2013. With leave of this Tribunal, Respondents subsequently filed an Amended Answer, Affirmative Defenses and Request for Hearing ("Amended Answer" or "Am.

[1] Complainant proceeds on authority delegated from the EPA Administrator ("Administrator"), to the Regional Administrator for Region 10 of the EPA ("Regional Administrator"), and, in turn, delegated from the Regional Administrator to Complainant. Compl. ¶ 1.1.

[2] In its Rebuttal Prehearing Exchange ("C. Rebut. PHE"), Complainant specifies a proposed penalty of $177,500. C. Rebut. PHE at 9-22.

Answer").[3] In their Amended Answer, Respondents deny violating the CWA, assert a number of defenses to liability and to the imposition of the proposed penalty, and request a hearing or dismissal of the Complaint.

The parties participated in this Tribunal's Alternative Dispute Resolution process from September 1, 2013, through January 6, 2014, on which date I was designated to preside. On January 17, 2014, I issued a Prehearing Order directing the parties to file and serve prehearing exchanges. Consistent therewith, Complainant submitted an Initial Prehearing Exchange ("C. PHE") on February 28, 2014; Respondents submitted their Prehearing Exchange ("R. PHE") on March 21, 2014; and Complainant filed a Rebuttal Prehearing Exchange on April 4, 2014.[4]

On May 2, 2014, Respondents submitted a Motion for Accelerated Decision; Declaration of Troy Peterson in Support of the Motion for Accelerated Decision ("Declaration of Respondent Peterson" or "Peterson Decl."), without signature; and a Motion for Leave to Conduct Discovery ("Disc. Mot."). On May 5, 2014, Respondents submitted an Amended Motion for Accelerated Decision ("Am. AD Mot."), and the final page of the Declaration of Respondent Peterson, bearing his signature.

Complainant filed a Response to the Amended Motion for Accelerated Decision ("AD Mot. Resp."), and a Response to the Motion for Leave to Conduct Discovery ("Disc. Mot. Resp."), on May 19, 2014. Respondents responded by filing a Reply in Support of Respondents' Motion for Accelerated Decision ("AD Mot. Reply"), and a Reply in Support of Motion for Leave to Conduct Discovery ("Disc. Mot. Reply"), on May 29, 2014.

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[3] Filed on August 14, 2013, Respondents' Motion for Leave to File Amended Answer was granted by Order dated January 17, 2014.

[4] In their Prehearing Exchange, Respondents indicate that they would provide evidence relating to their finances relevant to potential penalty calculation "under the terms of a protective order that would protect the confidentiality of Respondents' sensitive proprietary information and private financial worth." R. PHE at 16. In the same Prehearing Exchange, however, Respondents submitted federal tax returns as exhibits (RX 8-9), without following the procedure delineated at 40 C.F.R. § 22.5(d) for filing confidential materials under seal. A staff attorney in the Office of Administrative Law Judges contacted counsel for Respondents via email on May 13, 2015, to advise him that such exhibits had not been submitted under seal in accordance with the procedure in 40 C.F.R. § 22.5(d); that these exhibits, nevertheless, were being maintained under seal to protect the material from public disclosure; and that submission of redacted copies of such exhibits was required. On June 4, 2015, a staff attorney with the Office of Administrative Law Judges further attempted to contact counsel for Respondents regarding the matter by telephone, and was informed by a staff member in his office that counsel for Respondents would be in contact by telephone or email regarding the status of the exhibits. To date, however, this Tribunal has not been contacted by counsel for Respondents regarding filing these exhibits under seal, and has otherwise not received redacted copies of these exhibits.

Both Respondents' Amended Motion for Accelerated Decision, and Respondents' Motion for Leave to Conduct Discovery, are considered and decided in this Order, as set forth below.

II. FACTUAL BACKGROUND

Respondent Special Interest is a corporation registered under the laws of the State of Washington. Compl. ¶ 3.1; Am. Answer ¶ 3.1. Respondent Peterson has been President of Respondent Special Interest since its incorporation. Peterson Decl. ¶¶ 2, 3. Respondents exercise day-to-day operational control of a facility located at 25923 78th Avenue South in Kent, Washington ("Site"), at which Respondents operate Special Interest Auto Wrecking.[5] Compl. ¶¶ 3.2-.4; Am. Answer ¶¶ 3.2-.4. Special Interest Auto Wrecking is engaged in industrial activities that are among those described by Standard Industrial Classification ("SIC") code 5015, which includes battery reclaimers, salvage yards, and automobile recyclers. Compl. ¶ 3.3; Am. Answer ¶ 3.3. Respondents began operations at the Site on August 1, 2008. Am. Answer ¶ 3.8.

On February 24, 2012, EPA conducted an inspection of the Site. Compl. ¶ 3.10; Am. Answer ¶ 3.10. During the inspection, the EPA inspector reviewed potential areas of concern at the Site, described permit requirements, provided materials to Respondents informing them of the permit requirements, and advised the Site manager to look for storm water discharges from the Site during storm events. Compl. ¶ 3.10; Am. Answer ¶ 3.10. The manager was told that permit coverage was required if the Site discharged storm water to the nearby Green River. Compl. ¶ 3.10; Am. Answer ¶ 3.10.

On March 29, 2012, EPA conducted a second inspection of the Site, during which EPA collected at least one sample of storm water discharging from the Site.[6] Compl. ¶ 3.12; Am. Answer ¶¶ 3.12, 3.23. Analysis of the sample collected on March 29, 2012, showed a presence of petroleum, zinc, copper, arsenic, cadmium, and lead. Compl. ¶ 3.13; Am. Answer ¶ 3.13.

On July 3, 2012, EPA sent a Notice of Violation and a copy of the inspection report to Respondents advising them of unpermitted discharges and of the need to obtain permit coverage for their activities. Compl. ¶ 3.14; Am. Answer ¶ 3.14. According to Respondents, they obtained a National Pollutant Discharge Elimination System ("NPDES") permit on or around October 9, 2012. Am. Answer ¶¶ 3.7, 3.8, 3.19, 3.20, 4.2.

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[5] Notably, despite acknowledging that Respondents exercise day-to-day operational control of the Site, Respondents assert that Respondent Special Interest is the operator of the Site, and that Respondent Peterson is merely the President of the corporation and cannot be found to be the owner or operator of the Site in his individual capacity. AD Mot. Reply at 2-3.

[6] Although Respondents acknowledge a storm water discharge from the Site on March 29, 2012, they contest that this discharge reached the Green River, asserting that this discharge "likely infiltrated the native soil a short distance from the site." Am. Answer ¶ 3.23.

III. REQUEST FOR ORAL ARGUMENT

In the caption of their Amended Motion for Accelerated Decision, Respondents request oral argument on the matter. This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 ("Rules of Practice"). The Rules of Practice provide that "[t]he Presiding Officer . . . may permit oral argument on motions in [his/her] discretion." 40 C.F.R. § 22.16(d). This authority is consistent with Rule 78(b) of the Federal Rules of Civil Procedure ("FRCP"), which states that a court "may provide for submitting and determining motions on briefs, without oral hearings." Fed. R. Civ. Pro. 78(b). Rule 78(b) has been construed by some federal courts as recognizing the discretion of a trial court with respect to granting oral argument on motions for summary judgment in particular. *See, e.g., Bratt v. Int'l Bus. Machs. Corp.*, 785 F.2d 352, 363 (1st Cir. 1986) ("[A] district court should have 'wide latitude' in determining whether oral argument is necessary before rendering summary judgment.") (quoting *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 411 (1st Cir. 1985)); *Spark v. Catholic Univ. of America*, 510 F.2d 1277, 1280 (D.C. Cir. 1975) ("We . . . adopt the construction of the Rules which permits the District Court to dispense with oral arguments in appropriate circumstances in the interest of judicial economy . . . .").

In the present matter, Respondents have not advanced arguments supporting their request for an oral argument. The parties have had ample opportunity to assert their arguments and reply to opposing arguments in their written submissions. Further, there is no indication from the parties' submissions regarding the Amended Motion for Accelerated Decision, or from the record, that oral argument is requisite or beneficial to the adjudication of the Amended Motion for Accelerated Decision. Accordingly, exercising the discretion granted by the Rules of Practice with consideration for judicial economy, Respondents' request for oral argument is denied.

IV. AMENDED MOTION FOR ACCELERATED DECISION

The Rules of Practice at 40 C.F.R. § 22.20(a) provide for both motions for accelerated decision and motions to dismiss. In their Amended Motion for Accelerated Decision, Respondents appear to engage both of these devices. *See, e.g.*, Am. AD Mot. at 1 (citing the standard for a motion for accelerated decision under the Rules of Practice); 10 (citing the standard for a motion to dismiss under the Rules of Practice). Accordingly, the applicable standards for adjudicating both types of motions under the Rules of Practice are addressed below.

A. Standard for Adjudicating a Motion to Dismiss

The Rules of Practice at 40 C.F.R. § 22.20(a) provide that the Presiding Officer may dismiss a proceeding, upon motion of the respondent, "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." A motion to dismiss under the Rules of Practice at 40 C.F.R. § 22.20(a) is analogous to a motion to dismiss under Rule 12(b)(6) of the FRCP, such that Rule 12(b)(6) and federal court decisions

construing it provide a source of guidance in analyzing a motion to dismiss under the Rules of Practice. *See, e.g., Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827 (EAB 1993) (finding Rule 12(b)(6) analogous to Section 22.20(a) of the Rules of Practice, and using jurisprudence relating to this rule as guidance); *Commercial Cartage Co.*, 5 E.A.D. 112, 117 n.9 (EAB 1994) (finding that the FRCP are "instructive in analyzing motions to dismiss," and applying the applicable standard under the FRCP to a motion to dismiss under the Rules of Practice).

Rule 12(b)(6) provides for dismissal upon motion when a complaint "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. Pro. 12(b)(6). For a complaint to be found sufficient under review of a Rule 12(b)(6) motion, the factual allegations set forth therein "must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted).

As with a motion to dismiss under Rule 12(b)(6), in considering a motion to dismiss under the Rules of Practice, "all factual allegations in the complaint should be presumed true, and all reasonable inferences therefrom should be made in favor of the complainant." *Commercial Cartage Co.*, 5 E.A.D. at 117. For a complaint to be sufficient under the Rules of Practice, it "must set forth factual allegations that if proven establish a prima facie case against the respondent." *Id.*

B. Standard for Adjudicating a Motion for Accelerated Decision

With regard to accelerated decision, the Rules of Practice provide that:

> 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.

40 C.F.R. § 22.20(a). The standard for accelerated decision under 40 C.F.R. § 22.20 is reflective of the standard for summary judgment under Rule 56 of the FRCP, and therefore, jurisprudence relating to Rule 56 provides applicable guidance for motions for accelerated decision. *See P.R. Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995) ("Rule 56 is the prototype for administrative summary judgment procedures, and the jurisprudence that has grown up around Rule 56 is, therefore, the most fertile source of information about administrative summary judgment."). Accordingly, the Environmental Appeals Board ("EAB") has consistently relied upon Rule 56 and jurisprudence regarding summary judgment for guidance in adjudicating motions for accelerated decision under the Rules of Practice. *See, e.g., Consumers Scrap Recycling, Inc.*, 11 E.A.D. 269, 285 (EAB 2004); *BWX Techs., Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000); *Clarksburg Casket Co.*, 8 E.A.D. 496, 501-02 (EAB 1999).

Under Rule 56, summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The governing substantive law determines which facts are material

for summary judgment, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The United States Supreme Court has held that no genuine issue as to any material fact exists where a party bearing the burden of proof in a proceeding "fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In such cases, the party's failure of proof on the essential element "necessarily renders all other facts immaterial." *Id.* at 323.

Rule 56 requires a party asserting that a fact cannot be or is genuinely in dispute to support its assertion by:

> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
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> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1). The party moving for summary judgment bears the initial responsibility of informing the tribunal of the basis for its motion, and identifying materials in the record demonstrating the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323.

In considering a motion for summary judgment, the evidence of the nonmoving party is to be believed, and all justifiable inferences are to be drawn in favor of the nonmoving party. *Anderson*, 477 U.S. at 255. When contradictory inferences may be drawn from the evidence, summary judgment is inappropriate. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002). However, in opposing a properly supported motion for summary judgment, the nonmoving party may not rest upon mere allegations or denials of its pleadings to demonstrate a genuine issue of material fact. *Anderson*, 477 U.S. at 248-49.

Applying the jurisprudence for summary judgment to Respondents' Amended Motion for Accelerated Decision under the Rules of Practice, Respondents, as the party moving for accelerated decision, bear the initial responsibility of informing this Tribunal of the basis for their motion, and identifying materials in the record demonstrating the absence of a genuine issue of material fact. *See Celotex Corp.*, 477 U.S. at 323. However, if Complainant, as the party bearing the ultimate burden of proof in this proceeding pursuant to 40 C.F.R. § 22.24, fails to make a showing sufficient to establish the existence of an element essential to its case against Respondents, accelerated decision for Respondents is appropriate. *See id.* at 322-23.

C. Governing Substantive Law

The CWA, 33 U.S.C. §§ 1251-1387, was enacted, as amended, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In

furtherance of this objective, Section 301(a) of the CWA, provides, that "[e]xcept as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [33 U.S.C. §§ 1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a).

The definition of "discharge of a pollutant" for relevant provisions of the CWA encompasses "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The term "pollutant" is defined by the CWA to include, among other meanings, "industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). In turn, "navigable waters" are defined by the CWA as "the waters of the United States." 33 U.S.C. § 1362(7). Additionally, "point source" is defined by the CWA as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Finally, the term "person" is defined by the CWA as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state, or any interstate body." 33 U.S.C. § 1362(5).

The CWA grants the EPA broad authority to promulgate regulations in furtherance of the statute, authorizing the Administrator "to prescribe such regulations as are necessary to carry out the functions under this Act." 33 U.S.C. § 1361(a).

Additionally, Section 402 of the CWA establishes the National Pollutant Discharge Elimination System ("NPDES") permit program, allowing the EPA and states qualified by the EPA to issue a permit for the discharge of a pollutant, notwithstanding the prohibition in Section 301(a) of the CWA. 33 U.S.C. § 1342(a)-(b). For purposes of administrating the NPDES program, Section 308(a) of the CWA authorizes the Administrator to require the "owner or operator of any point source" to "make such reports" and "provide such other information as he may reasonably require" for carrying out Section 402 of the CWA. 33 U.S.C. § 1318(a). To further implement Section 402 of the CWA, the EPA promulgated regulations at 40 C.F.R. § 122.21 that require "[a]ny person who discharges or proposes to discharge pollutants . . ., except persons covered by general permits under § 122.28, . . . [to] submit a complete application" for an individual NPDES permit. 40 C.F.R. § 122.21(a)(1).

Discharges of industrial storm water are specifically governed by Section 402(p) of the CWA, which provides that a permit is required for a storm water discharge "associated with industrial activity." 33 U.S.C. § 1342(p)(2)(B). Section 402(p) of the CWA further authorizes the EPA to establish regulations setting forth the permit application requirements for such permits. 33 U.S.C. § 1342(p)(4)(A). Exercising this authority, the EPA promulgated regulations requiring "[d]ischargers of storm water associated with industrial activity" to apply for an individual permit or seek coverage under a promulgated storm water general permit. 40 C.F.R. § 122.26(c). Such regulations further specify that "[f]acilities involved in the recycling of materials, including metal scrapyards, battery reclaimers, salvage yards, and automobile junkyards, including but limited to those classified as Standard Industrial Classification 5015 and 5093" are among facilities considered to be engaging in "industrial activity" for purposes of the foregoing regulations. 40 C.F.R. § 122.26(b)(14)(vi).

The regulations applicable to discharges of industrial storm water also establish a timeline for permit application, requiring facilities proposing a new discharge of storm water associated with industrial activity to submit an application "180 days before that facility commences industrial activity which may result in a discharge of storm water associated with that industrial activity." 40 C.F.R. § 122.21(c)(1).

Pertinent to this matter, the State of Washington is authorized by the EPA to administer the NPDES program, as set forth in 33 U.S.C. § 1342(b), and this program is managed by the Washington Department of Ecology. *See* Wash. Rev. Code § 90.48.260; *Ass'n to Protect Hammersley v. Taylor Res.*, 299 F.3d 1007, 1009-10 (9th Cir. 2002). As a part of this program, the Washington Department of Ecology has issued the Industrial Stormwater General Permit ("ISGP"), an NPDES general permit for storm water discharges associated with industrial activity, in accordance with the CWA. *See* Complainant's Proposed Exhibits ("CX") 25-27. The ISGP authorizes permittees with coverage to discharge storm water associated with industrial activities on the condition of compliance with specified requirements. *Id.*

The CWA establishes several enforcement mechanisms for violations in 33 U.S.C. § 1319, including administrative penalties by the EPA. However, such administrative penalties are only authorized for violations of 33 U.S.C. §§ 1311, 1312, 1316, 1317, 1318, 1328, and 1345, and for violations of a permit condition or limitation implementing any of such sections in a permit issued under 33 U.S.C. § 1342. 33 U.S.C. § 1319(g)(1)(A).

D. Alleged Violations in the Complaint

As noted above, the Complaint alleges two counts of violation of the CWA. Count One alleges that at the time they began automobile salvage operations at the Site, Respondents, as operators of the Site, were subject to the requirements to apply for an individual NPDES permit or obtain coverage under a general permit imposed by 40 C.F.R. §§ 122.21(a)(1) and 122.26(c). Compl. ¶¶ 3.17-.19. Count One further alleges that Respondents failed to apply for an individual NPDES permit or properly seek coverage under the ISGP between on or about August 1, 2008, and October 4, 2012, and that such failure constitutes a violation of the requirements promulgated pursuant to 33 U.S.C. § 1318. Compl. ¶¶ 3.20-.21.

In turn, Count Two alleges that Respondents violated 33 U.S.C. § 1311(a) by discharging pollutants in storm water associated with industrial activity from a point source on the Site into the Green River without a permit issued pursuant to 33 U.S.C. § 1342, from August 1, 2008, through October 4, 2012. Compl. ¶¶ 3.23-.28. For this count, the Complaint alleges that each day of storm water discharge constitutes an instance of violation of 33 U.S.C. § 1311. Compl. ¶ 3.28.

E. Discussion

In their Amended Motion for Accelerated Decision, Respondents seek the following: (1) summary dismissal of Count One; (2) summary dismissal of all claims against Respondent

Peterson individually; and (3) a summary ruling that any claims based on threatened or potential discharges are not actionable under the CWA. Am. AD Mot. at 1.

Each of the three requests made by Respondents in their Amended Motion for Accelerated Decision, and the parties' arguments pertaining to these requests, are addressed below. Respondents' request for dismissal of Count One is first considered, given the significant impact this request has on Respondents' remaining requests.

1. Summary Dismissal of Count One

a. *Appropriate Standard*

Respondents' request for summary dismissal of Count One, although contained within their Amended Motion for Accelerated Decision, most closely resembles a motion to dismiss under the Rules of Practice. In seeking dismissal of Count One, Respondents specifically cite the standard for a motion to dismiss under the Rules of Practice at 40 C.F.R. § 22.20(a), indicating that they seek application of this standard to their request for dismissal of Count One. Am. AD Mot. at 10. Additionally, the ground upon which Respondents seek dismissal of Count One, namely, that as a matter of law Complainant lacks statutory authority under the CWA to impose penalties for a failure to apply for a permit, Am. AD Mot. at 9-10; AD Mot. Reply at 5-7, is most consistent with a motion to dismiss under the Rules of Practice. Accordingly, Respondents' request for summary dismissal of Count One is considered under the standard for a motion to dismiss under the Rules of Practice.

Applying the Rules of Practice, to prevail on their request for dismissal of Count One, Respondents must show that the allegations in Count One of the Complaint, if true, do not state a prima facie case or otherwise fail to establish a right to relief. *See supra* p.3-4; *Commercial Cartage Co.*, 5 E.A.D. at 117 (discussing the standard for a motion to dismiss under the Rules of Practice).

b. *Allegations in Count One*

Count One of the Complaint, as discussed above, alleges that Respondents failed to timely apply for an NPDES permit. In support of Count One, Complainant alleges that Respondents are operators of "a regulated industrial facility that discharges stormwater into the waters of the United States," Compl. ¶ 3.7, and therefore were required to apply for an individual NPDES permit or seek coverage under a general permit before beginning industrial activities pursuant to 40 C.F.R §§ 122.21(a)(1) and 122.26(c), Compl. ¶¶ 3.7, 3.17-.19. Complainant further alleges that Respondents' failure to apply for an individual NPDES permit or seek coverage under a general permit before beginning industrial activities, in accordance with 40 C.F.R §§ 122.21(a)(1), 122.21(c)(1), and 122.26(c), constitutes a violation of those regulatory permit application requirements, which, according to Complainant, were promulgated pursuant to 33 U.S.C. § 1318. *See* Compl. ¶¶ 2.14, 3.16-.21. Finally, Complainant argues that Respondents are subject to civil penalties pursuant to 33 U.S.C. § 1319(g) for the charged violation. *See* Compl. ¶ 3.21.

c. *Arguments of the Parties*

In support of their request for dismissal of Count One, Respondents argue that 33 U.S.C. § 1318(a) "is silent with respect to a requirement to apply for a permit," and that none of the other provisions of the CWA for which 33 U.S.C. § 1319 authorizes penalties grant the EPA "authority to impose liability for an alleged failure to apply for an NPDES permit." AD Mot. Reply at 6. While acknowledging regulatory requirements for obtaining a permit under 40 C.F.R. § 122.21(a)(1), AD Mot. Reply at 6, Respondents argue that Complainant lacks statutory authority under the CWA to impose penalties for failure to obtain a permit, and state that this conclusion is supported by the case law in *Service Oil, Inc. v. EPA*, 590 F.3d 545 (8th Cir. 2009), and *National Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011), Am. AD Mot. at 9-10; AD Mot. Reply at 5-7.

In response to the arguments of Respondents, Complainant argues that it is authorized by 33 U.S.C. § 1319 to impose penalties for a violation of 33 U.S.C. § 1318, and that a violation of permit application requirements in the regulations at 40 C.F.R §§ 122.21 and 122.26 constitutes a violation of 33 U.S.C. § 1318(a). AD Mot. Resp. at 8-9. Complainant asserts that the permit application requirements in the regulations "fall within the ambit of EPA's information-gathering authority" in 33 U.S.C. § 1318(a) because "permit applications contain[] information necessary for effective administration of the NPDES program." AD Mot. Resp. at 8-9. Further, Complainant argues that the present case is distinguishable from the cases cited by Respondents, *Service Oil* and *National Pork Producers Council*, and that, regardless, such cases are not binding on the present determination. AD Mot. Resp. at 9-11. Finally, Complainant contends that "Respondents' legal argument for dismissing Count 1 of the Complaint is inextricably tied to the disputed issue of material fact as to whether a discharge occurred prior to the time that Respondents obtained permit coverage" and that Respondents' request to dismiss Count One should thus be denied. AD Mot. Resp. at 11-12.

d. *Analysis*

The CWA at 33 U.S.C. § 1319(g)(1) grants the Administrator authority to impose administrative penalties for violations of 33 U.S.C. § 1318. In turn, 33 U.S.C. § 1318(a) authorizes the Administrator to require the "owner or operator of any point source" to "make such reports" and "provide such other information as he may reasonably require" for carrying out 33 U.S.C. § 1342, which encompasses the NPDES program. 33 U.S.C. § 1318(a)(A). As noted by Respondents, nothing in the statutory language of 33 U.S.C. § 1318(a) specifically addresses permit applications, or directly imposes a permit application requirement in furtherance of the NPDES program. However, permit application requirements are imposed by the regulations at 40 C.F.R §§ 122.21(a)(1), 122.21(c)(1), and 122.26(c), and Complainant asserts that these requirements derive statutory authority from the grant of information-gathering authority in 33

U.S.C. § 1318(a).[7] As discussed above, Count One of the Complaint alleges that Respondents violated the permit application requirements within 40 C.F.R §§ 122.21 and 122.26, and seeks the imposition of administrative penalties under 33 U.S.C. § 1319(g)(1) on this basis. As a result, the ability of Complainant to impose administrative penalties for Count One under 33 U.S.C. § 1319(g)(1) rests upon whether a violation of the permit application requirements within 40 C.F.R §§ 122.21 and 122.26 constitutes a violation of 33 U.S.C. § 1318(a).

The question of whether a violation of the EPA's regulatory permit application requirements for industrial storm water discharge constitutes a violation of 33 U.S.C. § 1318(a) is unsettled and has not been decided by the United States Court of Appeals for the Ninth Circuit. *See San Pedro Forklift, Inc.*, CWA Appeal No. 12-02, 2013 EPA App. LEXIS 23, at *93-94 (EAB, Apr. 22, 2013) (noting that this is an unsettled question that has not been addressed by the Ninth Circuit).[8] However, this question was addressed by the United States Court of Appeals for the Eighth Circuit in *Service Oil*, and this jurisprudence is persuasive.

In *Service Oil*, the Eighth Circuit held that failure to timely apply for a permit in violation of the permit application requirements applicable to industrial storm water discharge within 40 C.F.R §§ 122.21 and 122.26 is not a violation of 33 U.S.C. § 1318(a). 590 F.3d at 550. In establishing this holding, the Eighth Circuit reasoned that the failure to comply with 40 C.F.R §§ 122.21 and 122.26:

> cannot be a violation of § 1318(a) because that statute's record-keeping requirements are expressly limited to "the owner or operator of any point source." Before any discharge, there is no point source. Thus, the obvious authority for EPA's permit application regulations was its general rule-making authority under § 1361(a), not its authority in § 1318 to require record-keeping by existing point sources.

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[7] As discussed, Complainant asserts that the regulatory permit application requirements in 40 C.F.R §§ 122.21 and 122.26 were promulgated under 33 U.S.C. § 1318(a). Compl. ¶ 2.14; AD Mot. Resp. at 8-9. However, it is notable that 33 U.S.C. § 1318(a) is not always the source of statutory authority cited by those seeking to enforce such regulatory requirements. *See Desarrollos Altamira I, Inc.*, EPA Docket No. CWA-02-2009-3462, 2010 EPA ALJ LEXIS 22, at *11 (ALJ, Oct. 13, 2010) (Order on Respondent Cidra Excavation, S.E.'s Motion for Partial Accelerated Decision or Dismissal) ("In its Response, Complainant points out that 40 C.F.R. § 122.21, which was promulgated pursuant to Section 402(p)(4)(A) of the CWA, establishes a duty to apply for an NPDES permit on anyone who discharges or proposes to discharge pollutants.").

[8] In *San Pedro Forklift, Inc.*, the EAB declined "to impose a separate penalty" on an industrial storm water discharger without deciding "the unsettled question of whether failure to submit a timely permit application constitutes a violation of [33 U.S.C. § 1318(a)]." 2013 EPA App. LEXIS 23, at *94-95. In so doing, the EAB acknowledged that the federal circuit courts in *Service Oil* and *National Pork Producers Council* "ruled that EPA lacks statutory authority to assess penalties for a failure to apply for an NPDES permit pursuant to section 308(a)." *Id.* at *94.

Id. In reaching this conclusion, the Eighth Circuit determined that deference to the EPA's statutory interpretation was not warranted, as "[t]he plain meaning of § 1318(a) is controlling and resolves the issue." *Id.* (citing *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984)).

As stated above, the Eighth Circuit in *Service Oil* concluded that the regulatory permit application requirements for industrial storm water discharge are empowered by the general rulemaking authority granted the EPA in 33 U.S.C. § 1361(a), rather than 33 U.S.C. § 1318(a). *Id.* at 550-51. In its rationale, the Eighth Circuit noted that "there is no cross reference to § 1318 in § 1311 [which prohibits discharges "except in compliance with . . . [§ 1311] and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title"], only to § 1342," and concluded that "EPA cannot assess monetary penalties under § 1319(g) for a violation of § 1342 until a permit issues." *Id.* The Eighth Circuit concluded that "violation of the permit application regulations is not within the purview of 33 U.S.C. § 1319(g)(1)(A)" and thus "was a statutorily impermissible factor" for consideration in the assessment of a monetary penalty. *Id.* at 551.

The rationale in *Service Oil* was subsequently employed by the United States Court of Appeals for the Fifth Circuit in evaluating whether the EPA has statutory authority to impose liability, and penalties, for a violation of regulatory permit application requirements for concentrated animal feeding operations ("CAFOs") in *National Pork Producers Council.* 635 F.3d 738. In *National Pork Producers Council*, the Fifth Circuit found that although the EPA has authority under the CWA to impose a duty to apply for a permit on *discharging* CAFOs, the EPA does not have statutory authority to seek remedy under 33 U.S.C. § 1319(g) for failing to apply for an NPDES permit.[9] *Id.* at 751-53. In drawing this conclusion, the Fifth Circuit found that the statutory language of 33 U.S.C. § 1319(g), which authorizes the imposition of administrative penalties for violations of certain provisions of the CWA, does not encompass the failure to apply for a permit. *Id.* at 752. Although 33 U.S.C. § 1319(g)(1) provides for the imposition of administrative penalties for violation of numerous listed statutory provisions of the CWA, the Fifth Circuit noted that failure to apply for an NPDES permit is "[n]otably absent from this list." *Id.* Although *National Pork Producers Council* addressed regulatory permit application requirements for CAFOs, rather than the permit application requirements applicable to industrial storm water discharge at issue in both *Service Oil* and the present matter, it nevertheless lends support to the rationale and persuasiveness of *Service Oil.*

[9] In its decision for *National Pork Producers Council,* I note that the Fifth Circuit appears, at times, to conflate the separate concepts of liability and penalty within its discussion of 33 U.S.C. § 1319(g). *See* 635 F.3d at 751-53 (stating, for example, that 33 U.S.C. § 1319(g) "allows the EPA to impose liability"). However, when read as a whole, the Fifth Circuit concluded that although the EPA has the authority to impose a duty to apply for a permit on discharging CAFOs, it lacks statutory authority to seek remedy for violation of this duty under 33 U.S.C. § 1319(g)(1), the statutory provision authorizing the imposition of administrative penalties for violation of various provisions of the CWA. *See id.* at 751-53.

In attempting to distinguish *Service Oil* from Count One, Complainant misconstrues both the legal conclusions and factual findings in *Service Oil*. Complainant argues that in *Service Oil*, "[t]he Eight [sic] Circuit concluded that that [sic] EPA could not seek administrative penalties for a violation of [33 U.S.C. § 1318] prior to the existence of a point source," and erroneously concludes that "the decision in *Service Oil* turned on the enforcement of permit application requirement [sic] prior to the existence of a point source." AD Mot. Resp. at 10. Complainant argues that the present case, involving alleged actual discharge prior to permit coverage, is therefore distinguishable. AD Mot. Resp. at 10. Contrary to the assertions of Complainant, the court in *Service Oil* found that the permit application requirements for industrial storm water discharge within 40 C.F.R §§ 122.21 and 122.26 did not derive statutory authority from 33 U.S.C. § 1318(a), and accordingly, that administrative penalties were not authorized for violation of such regulations under 33 U.S.C. § 1319(g)(1), regardless of enforcement timing. 590 F.3d at 550-51. Furthermore, similar to the facts alleged in the present matter, the respondent in *Service Oil* was found to have discharged pollutants without a permit in violation of 33 U.S.C. § 1311(a).[10] *Id.* at 548. Accordingly, *Service Oil* is not, as Complainant argues, inapposite.

As noted by Complainant, *Service Oil* is not binding authority on the present matter. However, Complainant supplies no legal authority supportive of rejecting the rationale in *Service Oil*. Complainant also does not provide any legal support for its assertion that the permit application requirements applicable to industrial storm water discharge within 40 C.F.R §§ 122.21 and 122.26 are authorized by 33 U.S.C. § 1318(a), and thereby, that administrative penalties are authorized for violation of such regulations under 33 U.S.C. § 1319(g)(1). Notably, Complainant's arguments regarding the statutory authority for Count One are incongruent with the EPA's own rulemaking for the applicable permit application requirements. Although Complainant asserts that the permit application requirements within 40 C.F.R §§ 122.21 and 122.26 were promulgated under 33 U.S.C. § 1318(a), the EPA, in establishing these regulatory requirements, cited the entirety of the CWA as authority, rather than 33 U.S.C. § 1318(a). *See* 44 Fed. Reg. 32,854, 32,899 (June 7, 1979); 55 Fed. Reg. 47,990, 48,062 (Nov. 16, 1990); 60 Fed. Reg. 17950, 17956 (Apr. 7, 1995) (citing the entire CWA, "33 U.S.C. 1251 *et seq.*," as the authority for permit application requirements within 40 C.F.R. Part 122); *see also Service Oil*, 590 F.3d at 549-50 (noting, in reference to the regulatory permit application requirements for storm water discharge, that the "EPA has consistently cited the entire statute as its authority for these regulations"). Furthermore, the regulations specify that the regulatory provisions within 40 C.F.R. Part 122, including the relevant permit application requirements within 40 C.F.R §§ 122.21 and 122.26, implement the NPDES Program "under sections 318, 402, and 405 of the Clean Water Act," codified at 33 U.S.C. §§ 1328, 1342, and 1345, rather than implementing 33 U.S.C. § 1318(a). 40 C.F.R § 122.1.

As addressed by the Eighth Circuit in *Service Oil*, the plain language of 33 U.S.C. § 1318(a) limits the application of the section to "the owner or operator of any point source." This express limiting language speaks directly to the application of 33 U.S.C. § 1318(a), thereby demonstrating the unambiguously expressed intent of Congress, to which the EPA must give

[10] The respondent in *Service Oil* conceded liability for storm water discharges prior to obtaining a permit. 590 F.3d at 549.

effect. *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). In contrast to the limiting language in 33 U.S.C. § 1318(a), the EPA's regulatory permit application requirements require facilities merely proposing a new discharge of storm water associated with industrial activity to submit an application. 40 C.F.R. § 122.21(a)(1) ("Any person who discharges or proposes to discharge pollutants . . . must submit a complete application . . . ."); 40 C.F.R. § 122.21(c)(1) ("Facilities proposing a new discharge of storm water associated with industrial activity shall submit an application 180 days before that facility commences industrial activity which may result in a discharge of storm water associated with that industrial activity."); 40 C.F.R. § 122.26(c)(1) (directing dischargers of storm water associated with industrial activity to submit an NPDES application in accordance with the requirements of 40 C.F.R. § 122.21). Such regulatory language reaches further than the statutory language of 33 U.S.C. § 1318(a) by imposing requirements on those proposing discharges, well before they become owners or operators of a point source within the purview of 33 U.S.C. § 1318(a). Given that the EPA's regulatory permit application requirements appear to exceed the statutory authority of 33 U.S.C. § 1318(a), it follows then that this statute cannot be the source of statutory authority empowering such regulations, and cannot be the basis for imposing administrative penalties under 33 U.S.C. § 1319(g)(1).

Although the permit application requirements for industrial storm water discharge within 40 C.F.R §§ 122.21 and 122.26 are not authorized by 33 U.S.C. § 1318(a), other sources of statutory authority exist for such regulations in the CWA. Both the general rulemaking authority granted in 33 U.S.C. § 1361, and the authority granted in 33 U.S.C. § 1342(p)(4)(A) to establish regulations setting forth the permit application requirements for storm water discharge associated with industrial activity, empower these regulations. *See* 33 U.S.C. § 1361(a) ("The Administrator is authorized to prescribe such regulations as are necessary to carry out the functions under this Act [33 U.S.C §§ 1251 *et seq.*]."); 33 U.S.C. § 1342(p)(4)(A)(" [T]he Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in [33 U.S.C. § 1342(p)(2)(B)]."). However, the administrative penalties sought by the Complainant under 33 U.S.C. § 1319(g)(1) are not authorized for violations of regulatory permit application requirements empowered by either of these statutory sections. Administrative penalties under 33 U.S.C. § 1319(g)(1) are not authorized for violations of 33 U.S.C. § 1361, and are restricted to violation of a permit condition or limitation implementing permit terms for 33 U.S.C. § 1342. 33 U.S.C. § 1319(g)(1)(A). As a result, 33 U.S.C. § 1319(g)(1) does not authorize the imposition of administrative penalties for violation of the permit application requirements applicable to industrial storm water discharge at 40 C.F.R §§ 122.21 and 122.26.

In consideration of the foregoing, I have concluded that Respondents' alleged violations of 40 C.F.R §§ 122.21 and 122.26 cannot, as a matter of law, constitute a violation of 33 U.S.C. § 1318(a). Consequently, the imposition of administrative penalties sought by the Complainant under 33 U.S.C. § 1319(g)(1) is improper. Furthermore, review of 33 U.S.C. § 1319(g) reveals that, within the administrative context, no other relief is available for the violations of 40 C.F.R

§§ 122.21 and 122.26 alleged in Count One.[11] Therefore, as to Count One, Complainant has failed to establish a prima facie case *for which relief may be granted* and dismissal of this count is appropriate. Accordingly, Respondents' request to dismiss Count One of the Complaint is granted.

2. Summary Dismissal of Claims against Respondent Peterson

Respondents request that the claims against Respondent Peterson in Counts One and Two of the Complaint be dismissed on the basis that he cannot be held individually liable. Am. AD Mot. at 5-6. As Count One is dismissed by this Order, the only remaining count against Respondent Peterson is for a violation of 33 U.S.C. § 1311(a) in Count Two. Accordingly, Respondents' request with respect to the liability of Respondent Peterson is evaluated only for Count Two of the Complaint.

a. *Appropriate Standard*

Unlike Respondents' request for dismissal of Count One, Respondents do not engage the standard for a motion to dismiss under the Rules of Practice in their request for dismissal of the claims against Respondent Peterson. Further, as Respondents support their request for dismissal of the claims against Respondent Peterson with materials outside of the pleadings, including the Declaration of Respondent Peterson, *see* Am. AD Mot. at 5; AD Mot. Reply at 2, this request is most appropriately considered under the standard for accelerated decision under the Rules of Practice. *See BWX Techs., Inc.*, 9 E.A.D. at 74 (finding that a motion to dismiss relying on matters outside the pleading is transformed to a motion for accelerated decision under the Rules of Practice). As a result, Respondents' request for dismissal of the claims against Respondent Peterson is appropriately considered under the standard for accelerated decision in the Rules of Practice.

b. *Arguments of the Parties*

Respondents assert that there is no basis for which Respondent Peterson can be found liable as an individual for violations of the CWA. Am. AD Mot. at 5-6; AD Mot. Reply at 2-3. First, Respondents argue that Respondent Peterson does not fall within the definition of "person" under the CWA based upon the definition of "person" within 33 U.S.C. § 1319(c)(6), which encompasses "any responsible corporate officer." Am. AD Mot. at 6; AD Mot. Reply at 2-3. Noting that the Ninth Circuit has construed that phrase as "the person [who] has authority to exercise control over the corporation's activity that is causing the discharges," Am. AD Mot. at 6 (citing *United States v. Iverson*, 162 F.3d 1015, 1025 (9th Cir. 1998)), Respondents assert that Respondent Peterson is not a "responsible corporate officer" under 33 U.S.C. § 1319(c)(6), and therefore cannot be liable under the CWA, Am. AD Mot. at 6; AD Mot. Reply at 2-3.

[11] It is notable that 33 U.S.C. § 1319 provides remedy for violations of certain provisions of the CWA outside of the administrative process, including civil and criminal penalties. *See* 33 U.S.C. § 1319(c)-(d) (providing for civil and criminal penalties). As such remedies are outside of the administrative process, the viability of such relief for the violations alleged in Count One of the Complaint in the present matter are not before this Tribunal for determination.

Specifically, while conceding that "it is clear that [Respondent Peterson] possessed authority over [Respondent Special Interest]'s activities," Respondents maintain that Complainant "cannot demonstrate that he failed to use his authority to assure compliance with laws or regulations" because he "believed that he was assuring compliance because no permit was required." Am. AD Motion at 6.

Additionally, while acknowledging that Respondents "have day-to-day operational control of activities which occur at the Special Interest Auto Wrecking facility site," Am. Answer ¶ 3.2, Respondents assert that Respondent Special Interest is the operator of the Site, and that Respondent Peterson is merely the President of the corporation and cannot be found to be the owner or operator of the Site in his individual capacity, AD Mot. Reply at 2-3. Likewise, Respondents assert that there is no evidence that Respondent Peterson, in his individual capacity, took actions resulting in a discharge to the waters of the United States. AD Mot. Reply at 1. In support of their arguments, Respondents submit the Declaration of Respondent Peterson, in which Respondent Peterson denies personal ownership and control of the Site, and denies personal control over the activities occurring on the Site. Peterson Decl. at 2. Respondent Peterson alleges that Troy Peterson LLC is the owner of the Site, and that since September 2008, Respondent Special Interest has managed operations and conducted all activity on the Site. Peterson Decl. at 1-3. Respondent Peterson acknowledges that he is the managing partner of Troy Peterson LLC and President of Respondent Special Interest, Peterson Decl. at 1, but denies comingling funds of either company with his personal funds, Peterson Decl. at 3.

In response to the arguments of Respondents, Complainant argues that the definition relied upon by Respondents in 33 U.S.C. § 1319(c)(6) does not apply to the alleged violation because the term "responsible corporate officer" is included in the definition of "person" only in the context of criminal violations of the CWA. AD Mot. Resp. at 4, n.10. Complainant further broadly argues that individuals acting in their capacity as employees or officers of a company that owns the subject property, or conducts operations on the property, may be held individually liable for CWA violations. AD Mot. Resp. at 4. Complainant specifically cites to two cases, *United States v. Gulf Park Water Co.*, 972 F. Supp. 1056 (S.D. Miss. 1997) and *Waterer*, EPA Docket No. CWA-10-2003-0007, 2004 EPA ALJ LEXIS 2 (ALJ, Jan. 28, 2004) (Order on Motions), that it alleges support the ability to find individuals liable in such circumstances. AD Mot. Resp. at 4-5.

With regard to the factual basis for finding Respondent Peterson individually liable in association with the alleged violation in Count Two, Complainant argues that undisputed facts in the record supporting Respondent Peterson's individual liability include (1) the admission of Respondents that Respondent Peterson "either owned, leased or otherwise controlled the real property that is the subject of this Complaint and/or otherwise controlled the activities that occurred on such property," Am. Answer ¶ 3.1; (2) the admission of Respondents that they have day-to-day operational control over activities occurring on the Site, Am. Answer ¶ 3.2; (3) Respondent Peterson's complete ownership interest in Respondent Special Interest, Respondents' Proposed Exhibit ("RX") 8, at 4-5; (4) the business license of Respondent Special Interest listing Respondent Peterson as the "governing" person for the corporation, CX 3; (5) the statement of an employee that government regulators were not allowed access to the Site without the presence of Respondent Peterson, CX 5, at 4; (6) the report of EPA investigators that they

had to negotiate entry to the Site with Respondent Peterson, rather than a Site manager, CX 5, at 4; and (7) the Storm Water Pollution Plan (associated with Respondents' ISGP permit coverage), certified as prepared under the direction or supervision of Respondent Peterson, signed by Respondent Peterson, and identifying Respondent Peterson as responsible for implementing Best Management Practices ("BMP"), monthly inspections, and monitoring, RX 3, at 4, 45.[12] AD Mot. Resp. at 5-6. Thus, Complainant maintains, Respondent Peterson "has the requisite authority to exercise control over the corporation's activity that is causing the discharges, thereby establishing the basis for individual liability for violations of the CWA." AD Mot. Resp. at 6.

Respondents, in turn, argue that the cases cited by Complainant are distinguishable from the facts in the present matter. AD Mot. Reply at 3. Specifically, Respondents contend that each of the considerations cited by Complainant in favor of imposing individual liability "do not rise to the level of the facts in the cases cited by EPA and – importantly – are not characterized by fraud or a commingling of assets, as was present in the *Waterer* case and the *Gulf Water* case." AD Mot. Reply at 3. Respondents further assert that "[t]he EPA cannot, as a matter of law, establish in any way that [Respondent] Peterson is the real person of interest when it comes to the corporation's operations." AD Mot. Reply at 3.

c. *Analysis*

The CWA at 33 U.S.C. § 1311(a) prohibits "the discharge of any pollutant by any person" except as in compliance with 33 U.S.C. §§ 1311, 1312, 1316, 1317, 1328, 1342, and 1344. Accordingly, for Respondent Peterson to be liable for a violation of 33 U.S.C. § 1311(a), as alleged in Count Two, he must be a person who discharged a pollutant not otherwise in compliance with the cited provisions of 33 U.S.C. § 1311(a).

As discussed above, the CWA defines "person" as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state, or any interstate body." 33 U.S.C. § 1362(5). The definition of "discharge of a pollutant" for the relevant provision of the CWA encompasses "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The term "pollutant" is defined by the CWA to include "industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). Furthermore, "navigable waters" are defined by the CWA as "the waters of the United States." 33 U.S.C. § 1362(7). Finally, the term "point source" is defined by the CWA as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

In the Complaint, Complainant specifically alleges that Respondent Peterson is a "person," within the definition at 33 U.S.C. § 1362(5), "[a]s an individual." Compl. ¶ 3.1. The Complaint further alleges that Respondents engaged in the "discharge of pollutants" by discharging storm water associated with industrial activity, which was contaminated with such

[12] Although Complainant cited RX 3, at 4, 46, the information cited is, in fact, contained in RX 3, at 4, 45.

pollutants as petroleum, zinc, copper, arsenic, cadmium, and lead, ¶¶ 3.12-.13, 3.23-.24., 3.26, from a point source on the Site, ¶¶ 3.12, 3.25, into the Green River, a water of the United States, ¶¶ 3.5-.6, 3.12, 3.23, 3.26. Finally, the Complaint alleges that Respondents' discharges of storm water associated with industrial activity required a permit under 33 U.S.C. § 1342, but were not authorized by a permit issued pursuant to this section for the relevant period, and thereby were not in compliance with the cited provisions of the CWA at 33 U.S.C. § 1311(a). Compl. ¶¶ 2.8, 3.7-.8, 3.15, 3.27. Therefore, the Complaint alleges that Respondent Peterson is a person who discharged a pollutant not otherwise in compliance with the cited provisions of the CWA at 33 U.S.C. § 1311(a).

Respondents' argument that Respondent Peterson does not fall within the definition of "person" under the CWA, based upon the definition of "person" in 33 U.S.C. § 1319(c)(6), which adds the term "any responsible corporate officer" to the general definition set forth at 33 U.S.C. § 1362(5), is premised upon an incorrect application of that statutory definition. As noted above, Respondents assert that Respondent Peterson is not a "responsible corporate officer" under 33 U.S.C. § 1319(c)(6), and therefore cannot be liable under the CWA. Am. AD Mot. at 6; AD Mot. Reply at 2-3. However, as noted by Complainant, the definition relied upon by Respondents in 33 U.S.C. § 1319(c)(6) does not apply to the current action as the cited definition specifically states that it is "[f]or the purpose of this subsection," meaning 33 U.S.C. § 1319(c), which pertains only to the imposition of criminal penalties.

Instead, the applicable definition of "person" for the alleged violation of 33 U.S.C. § 1311(a) is the aforementioned definition at 33 U.S.C. § 1362(5), which specifically identifies "an individual" within the meaning of "person." *See also United States v. Brittain*, 931 F.2d 1413, 1418 (10th Cir. 1991) (finding that the plain language of 33 U.S.C. § 1311(a) "includes 'individuals' in the definition of 'persons' subject to the Clean Water Act"). Notably, in their Amended Answer, Respondents admit that "[a]s an individual" Respondent Peterson is a "person" within the definition at 33 U.S.C. § 1362(5). Am. Answer ¶ 3.1 (admitting allegations at Compl. ¶ 3.1).

Respondents nevertheless contend that Respondent Peterson is shielded from individual liability by the corporate ownership and operation of the Site and the absence of evidence that he took any actions in his personal capacity, as opposed to his capacity as President of Respondent Special Interest, that resulted in the alleged discharge of pollutants. Contrary to the arguments of Respondents, however, these considerations do not preclude the imposition of individual liability for the alleged violation in Count Two. Respondents offer no legal authority supportive of the position that Respondent Peterson cannot be held individually liable for violation of the CWA while acting as a corporate officer. In contrast, numerous civil cases reflect that individuals may be held liable for violations of the CWA while acting as corporate officers or employees, particularly where such individuals exercised authority over operations or where their acts or omissions led to the violations. *See, e.g., Gulf Park Water Co.*, 972 F. Supp. at 1063 ("Individuals can be liable for violations of the [Clean Water] Act where they participated in or were responsible for the violations, even when the individuals purport to act through a corporate entity."); *City of Newburgh v. Sarna*, 690 F. Supp. 2d 136, 159-63 (S.D.N.Y. 2010) (finding that a corporate officer may be found liable for a violation of the CWA, and is therefore a proper defendant); *Stillwater of Crown Point Homeowner's Ass'n v. Stiglich*, 999 F. Supp. 2d 1111,

1133 (N.D. Ind. 2014) (assigning liability under the CWA to a corporate officer who "held himself out to the agencies as the primary contact for compliance issues"); *Puget Soundkeeper Alliance v. Tacoma Metals, Inc.*, 2008 U.S. Dist. LEXIS 60741, at *33-37 (W.D. Wash. Aug. 5, 2008) (concluding that a defendant corporate officer "failed to show that he is protected from liability because he is a corporate officer and the violations were acts of the corporation."); *Humboldt Baykeeper v. Simpson Timber Co.*, 2006 U.S. Dist. LEXIS 91667, at *11 (N.D. Cal. Dec. 8, 2006)("[C]ourts consistently have held that individuals whose acts or omissions have led to [the] pollution may be held responsible individually, notwithstanding the fact that they may have been acting in their capacity as an employee or officer of a company or entity that owns the property in question or conducts business on it."); *Waterer*, 2004 EPA ALJ LEXIS 2, at *12 (finding a corporate president liable for violations under the CWA "[g]iven his level of responsibility and authority at the facility."). Specifically, as reflected in *Gulf Park Water Company* and *Waterer*, cited by Complainant, a corporate officer may be held liable for violations of 33 U.S.C. § 1311. *Gulf Park Water Co.*, 972 F. Supp. at 1063 (finding a corporate officer liable for violations of 33 U.S.C. § 1311); *Waterer*, 2004 EPA ALJ LEXIS 2, at *12 (finding a president of a corporation liable for violations of 33 U.S.C. § 1311).

Based upon the factors identified above and the record before me, I find accelerated decision in Respondents' favor on the issue at hand to be inappropriate. Although Respondents assert that Respondent Peterson does not individually operate the Site, AD Mot. Reply at 2-3; Peterson Decl. at 2, Respondents admit that they "have day-to-day operational control of activities which occur at the Special Interest Auto Wrecking facility site," Am. Answer ¶ 3.2. Respondents further admit that Respondent Peterson "either owned, leased or otherwise controlled the real property that is the subject of this Complaint and/or otherwise controlled the activities that occurred on such property." Am. Answer ¶ 3.1. Respondents additionally state that they ultimately applied and secured an NPDES permit, and have "continually invested in voluntary upgrades to the facility over each of the preceding five years to minimize any impacts of the activities conducted on site," indicating that Respondent Peterson, as well as Respondent Special Interest engaged in these operational activities. Am. Answer ¶ 3.19. Additionally, in their Amended Motion for Accelerated Decision, Respondents acknowledge that "it is clear that [Respondent Peterson] possessed authority over [Respondent Special Interest]'s activities." Am. AD Mot. at 6. These admissions demonstrate a genuine issue of material fact regarding whether Respondent Peterson possessed sufficient authority over activities on the Site to be found individually liable for the alleged discharges in Count Two.

Furthermore, aside from Respondents' admissions, Complainant identified additional evidence supportive of its position that Respondent Peterson, as an individual, is liable for violations of the CWA stemming from alleged discharges from the Site, including Respondent Peterson's complete ownership interest in Respondent Special Interest, RX 8, at 4-5; the business license of Respondent Special Interest listing Respondent Peterson as the "governing" person for the corporation, CX 3; statements indicating that EPA investigators had to negotiate entry to the Site with Respondent Peterson, rather than a Site manager, CX 5, at 4; and the Storm Water Pollution Plan (associated with Respondents' ISGP permit coverage), certified as prepared under the direction or supervision of Respondent Peterson, signed by Respondent Peterson, and identifying Respondent Peterson as responsible for implementing BMP, monthly inspections, and monitoring, RX 3, at 4, 45. AD Mot. Resp. at 5-6.

Respondents argue that the evidence cited by Complainant is insufficient to establish a basis for individual liability for Respondent Peterson. AD Mot. Reply at 3. In considering Respondents' Amended Motion for Accelerated Decision, Complainant's evidence is to be believed, and all justifiable inferences are to be drawn in favor of Complainant. *See supra* p.4; *Anderson*, 477 U.S. at 255. Considering the evidence cited by Complainant in this light, Complainant has made a showing sufficient to establish the existence of elements essential to Count Two, and has established an issue of material fact regarding whether Respondent Peterson possessed sufficient authority over activities on the Site to be found individually liable for the violation alleged in Count Two.

As Respondents have not demonstrated the absence of a genuine issue of material fact entitling them to judgment as a matter of law with regard to Count Two against Respondent Peterson, the request to dismiss this claim against Respondent Peterson is denied.

3. Summary Ruling on Claims Based on Threatened or Potential Discharge

Respondents request that I "confirm in a summary determination" that any claims of Complainant relating to threatened or potential discharge are not actionable under the CWA. Am. AD Mot. at 9; AD Mot. Reply at 4. As Count One has been dismissed, this request is considered with regard to Count Two, the remaining count against Respondents for violation of 33 U.S.C. § 1311(a).

a. *Appropriate Standard*

In the final remaining request of Respondents' Amended Motion for Accelerated Decision, Respondents do not seek dismissal of claims, but instead request a summary determination. Am. AD Mot. at 9; AD Mot. Reply at 4. Further, in making this request, Respondents do not engage the standard for a motion to dismiss under the Rules of Practice, and reference materials outside of the pleadings, including Complainant's Initial Prehearing Exchange and modeling evidence submitted by Complainant. Am. AD Mot. at 4,7; AD Mot. Reply at 5. As a result, Respondents' request for a summary determination most closely resembles a partial request for accelerated decision, and is appropriately considered under this standard under the Rules of Practice.

b. *Arguments of the Parties*

Respondents argue that the CWA prohibits only the actual discharge of pollutants, and that the EPA's authority under the CWA is limited to such actual discharges. Am. AD Mot. at 6-9; AD Mot. Reply at 4-5. Thus, Respondents contend, in the present case, "[a] CWA violation can only occur if a pollutant is actually added – not threatened to be added – to the Green River from a point source." Am. AD Mot. at 9. In support of their argument, Respondents assert that "courts have unanimously and consistently ruled that the EPA may not regulate on the basis of 'potential to discharge,'" Am. AD Mot. at 9, and cite such jurisprudence as *Service Oil*, 590 F.3d 545; *National Pork Producers Council*, 635 F.3d 738; *National Mining Ass'n v. United States Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998); and *Waterkeeper Alliance, Inc. v.*

EPA, 399 F.3d 486 (2d Cir. 2005), as supportive of their argument. On this premise, Respondents request a summary determination that any claims of Complainant relating to threatened or potential discharge are not actionable under the CWA. Am. AD Mot. at 9; AD Mot. Reply at 4. However, in their request, Respondents fail to identify any specific claims in the Complaint based on threatened or potential discharges.

Rather, Respondents base their request for summary determination for such claims on the proposed evidence described by Complainant in its Initial Prehearing Exchange. Specifically, Respondents note that Complainant characterizes expected witness testimony regarding conditions at the Site as testimony of Site conditions "that created a potential for pollutant-laden stormwater to discharge from the Site to the Green River." Am. AD Mot. at 7 (citing C. PHE at 8). Respondents use this characterization to suggest that the Complainant is alleging violation of the CWA on the basis of threatened or potential discharge. Am. AD Mot. at 7.

Complainant, in response, argues that it is not alleging liability for a potential to discharge. AD Mot. Resp. at 7. Instead, Complainant asserts that the Complaint alleges actual discharges of pollutants to the Green River, and that it seeks to prove those actual discharges at the hearing through evidence including witness testimony and hydrologic modeling. AD Mot. Resp. at 7-8. Complainant argues that Respondents misinterpret the description of expected witness testimony regarding Site conditions in its Initial Prehearing Exchange, and that such evidence regarding the Site conditions will not be offered for the purpose of asserting a claim based upon a threatened or potential discharge, but rather as circumstantial evidence of an actual discharge. AD Mot. Resp. at 7.

In reply, Respondents object to Complainant's proposed use of testimony regarding Site conditions as circumstantial evidence of actual discharge, and characterize this evidence as "proof of threatened discharges." AD Mot. Reply at 4. Respondents additionally characterize hydrologic modeling evidence as evidence of "hypothetical discharges," and argue that "there is not a single shred of evidence of an actual discharge from Respondents' facility to the Green River." AD Mot. Reply at 5. Respondents conclude, "[t]here were no witnesses who saw a discharge, no sampling data that establish a discharge occurred, or even an established pathway by which stormwater actually travelled from the facility to the river. The EPA cannot meet its burden, and Respondents' motion should be granted." AD Mot. Reply at 5.

c. *Analysis*

Contrary to the request of Respondents, the remaining claim in the Complaint, Count Two, does not appear to be predicated on threatened or potential discharges, but is instead based upon alleged actual discharges. The Complaint specifically alleges discharges of pollutants from storm water resulting from Respondents' auto salvage activities at the Site and occurring without a permit from August 1, 2008, through October 4, 2012. Compl. ¶¶ 3.11-.13, 3.23-.28. While the Complaint does not specify the number of discharges that allegedly occurred at the Site

during the relevant time period,[13] it does state that "[e]ach day that stormwater was discharged without the required permit constitutes an additional day of violation." Compl. ¶ 3.28. Notably, the Complaint also includes an allegation that one discharge of storm water containing pollutants was witnessed flowing through channels and conduits into the Green River and then sampled during an EPA site inspection on March 29, 2012. Compl. ¶¶ 3.12-.13. These allegations of actual discharges are the basis for the alleged violation of § 1311(a) in Count Two, and this count is otherwise silent regarding threatened or potential discharges.

Further, Respondents' assertion that there is no evidence of actual discharge is inaccurate. In its Initial Prehearing Exchange, Complainant identified two types of evidence to support its allegations that Respondents discharged storm water from the Site into the Green River: (1) proposed witness testimony discussing observed Site conditions and an observed discharge from the Site, supported by investigation reports offered as CX 5 and 6, and (2) proposed expert witness testimony regarding storm water discharges from the Site into the Green River calculated through hydrologic modeling performed by Daniel Marshalonis, Ph.D. ("Marshalonis"), and discussed within a report offered as CX 30. *See* C. PHE at 8 (discussing evidentiary sources for alleged discharges).

As noted by Respondents, Complainant described the expected witness testimony regarding observed Site conditions as testimony regarding Site conditions "that created a potential for pollutant-laden stormwater to discharge from the Site to the Green River." C. PHE at 8. However, as argued by Complainant, this evidence is not offered for the purpose of asserting a claim based upon a threatened or potential discharge, but rather as circumstantial evidence of an actual discharge.

Circumstantial evidence may be relied upon as evidence of a material fact. *See BWX Techs.*, 9 E.A.D. at 78 ("[The respondent's] exclusive reliance upon circumstantial evidence did not, by itself, render its case infirm, for circumstantial evidence can be effectively used to state a proposition of material fact in the absence of direct evidence."). Specifically, within the context of the CWA, discharges may be inferred from circumstantial evidence. *See, e.g.*, *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 120 (2d Cir. 1994) (finding that the fact finder may infer point source discharges from circumstantial evidence); *Lowell Vos Feedlot*, CWA Appeal No. 10-01, 2011 EPA App. LEXIS 18, at *20 (EAB, May 9, 2011) (holding that the government, in CWA actions, can "use any kind of evidence, direct or inferential, to attempt to establish that an unlawful discharge occurred"). Without evaluating the persuasiveness of the proposed testimony, testimonial evidence of Site conditions allowing for the discharge of pollutants through storm water to the Green River could serve as circumstantial evidence of discharge, and could bolster Complainant's alleged direct evidence of a discharge (the proposed testimony regarding an observed discharge). Further, by offering such evidence, Complainant does not transform a claim based upon actual discharges into a claim based upon threatened or potential discharges.

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[13] Complainant subsequently alleged in its Rebuttal Prehearing Exchange that Respondents discharged pollutants into the Green River on 989 days between August 1, 2008, and October 4, 2012, without a permit. C. Rebut. PHE at 10.

Likewise, Respondents' characterization of Complainant's hydrologic modeling evidence as evidence of "hypothetical discharges," AD Mot. Reply at 5, is inaccurate. Review of Marshalonis's report regarding the hydrologic modeling reveals that the modeling is not employed to calculate hypothetical or potential events. *See* CX 30, at 6-8 (summarizing the purpose of modeling and relevant data inputs used in calculation). Nor is the hydrologic modeling evidence prospective. Instead, the hydrologic modeling evidence purports to use local weather, topography, and soil data, as well as estimated land use conditions, *see* CX 30, at 12-26 (discussing in detail the modeling methodology and data inputs used in calculation), to produce calculations "that quantify discharges from the Site during the four year period beginning August 1, 2008 and ending in July 15, 2012," CX 30, at 8. While this evidence is subject to dispute in this matter, including challenges to the data inputs of the modeling, calculation methodology, and validity of conclusions of the modeling, it serves as circumstantial evidence of discharge in support of Complainant's allegations of CWA violation in Count Two. Without evaluating the persuasiveness of such evidence, it is worth noting that hydrologic modeling evidence has been used as circumstantial evidence establishing discharge in other cases brought under the CWA. *See, e.g., San Pedro Forklift, Inc.*, 2013 EPA App. LEXIS 23; *Leed Foundry, Inc.*, Docket Nos. RCRA 03-2004-0061, CWA 03-2004-0061, 2007 EPA ALJ LEXIS 13 (ALJ, Apr. 24, 2007). As with Complainant's proposed testimonial evidence regarding Site conditions, Complainant's use of hydrologic modeling evidence, as circumstantial evidence of discharge, does not support the conclusion that Complainant is asserting a claim based upon threatened or potential discharges in Count Two.

As the party moving for accelerated decision, Respondents bear the initial responsibility of informing the tribunal of a basis for their motion, and identifying materials in the record demonstrating the absence of a genuine issue of material fact. *See supra* p.6; *Celotex Corp.*, 477 U.S. at 323. Respondents have failed to meet this burden with regard to their request for a summary determination finding any claims of Complainant relating to threatened or potential discharge not actionable under the CWA. In support of their motion, they have not identified any claims based on threatened or potential discharges. Furthermore, review of the Complaint and the evidence offered by Complainant in support of its allegations demonstrates that Count Two, the only remaining count of the Complaint, is predicated on allegations of actual discharge, which Complainant seeks to prove through both direct and circumstantial evidence. As a result, there is no basis to issue the requested summary determination on claims relating to threatened or potential discharge. Accordingly, Respondents' request for a summary determination on claims relating to threatened or potential discharge is denied.

Finally, as Complainant alleges actual discharges from the Site, supported by the direct and circumstantial evidence discussed above, and Respondents deny discharges from the Site (or, alternatively, deny the number of discharges from the Site asserted by the Complainant), Am. Answer ¶¶ 3.12, 3.23, the issue of whether actual discharge(s) occurred from the Site reflects a genuine issue of material fact. Thus, to the extent that Respondents seek an accelerated decision based upon the absence of any genuine issue of material fact as to whether actual discharges from the Site to the Green River occurred, that request is also denied.

F. Conclusion

Respondents' Amended Motion for Accelerated Decision is granted as to their request for dismissal of Count One for failure to apply for a permit, and denied as to their requests for dismissal of all claims against Respondent Peterson individually and summary ruling regarding any claims based on threatened or potential discharge.

V. MOTION FOR LEAVE TO CONDUCT DISCOVERY

In their Motion for Leave to Conduct Discovery, Respondents request (1) to depose seven of Complainant's proposed witnesses, Disc. Mot. 3-4, and (2) "leave to submit written discovery," Disc. Mot. at 4-5. Regarding their request for depositions, Respondents seek to depose four of Complainant's proposed expert witnesses (Douglas Beyerlein, P.E.; Lloyd Oatis; Burt Shephard; and Laurie Mann),[14] and three of Complainant's proposed fact witnesses (Kristine Karlson, Tracie Walters, and Sandra Brozusky). Disc. Mot. at 3-4.

In addition to their request for depositions, Respondents request "leave to submit written discovery" for (1) information on the "EPA's issuance (and resolution) of civil penalties to other persons or entities reasonably similarly situated to Respondents"; (2) "instances where EPA has used its 'Predictive Model' to support a complaint for civil penalties pursuant to the Clean Water Act"; and (3) "details as to inputs and calibrations for the Model." Disc. Mot. at 4-5. In making their request for written discovery, Respondents refer to "directed interrogatory and request for production," Disc. Mot. at 2, but do not make clear which device they seek to employ, and otherwise have not submitted proposed interrogatories.

A. Standard for Adjudicating a Motion for Additional Discovery

The Rules of Practice at 40 C.F.R. § 22.19(e) set forth the procedure for a party to move for additional discovery following a prehearing exchange, as well as the conditions necessary for a Presiding Officer to grant such motions. In accordance with the Rules of Practice, the motion for additional discovery must "specify the method of discovery sought, provide the proposed discovery instruments, and describe in detail the nature of the information and/or documents sought." 40 C.F.R. § 22.19(e)(1).

Pursuant to the Rules of Practice, the Presiding Officer may only order additional discovery if it:

> (i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;

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[14] Complainant identified Laurie Mann as both an expert and fact witness in its Initial Prehearing Exchange. C. PHE at 4. However, Respondents only refer to her within her capacity as an expert witness in their request for depositions. *See* Disc. Mot. at 3. Accordingly, for purposes of this Order, she is identified exclusively as an expert witness.

(ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and

(iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

40 C.F.R. § 22.19(e)(1). This standard is notably more restrictive than the standard for discovery under the FRCP. *See Tenn. Valley Authority*, CAA Docket No. 00-6, 2000 EPA App. LEXIS 22, at *5 (EAB, June 29, 2000); *see also* Fed. R. Civ. Pro. 26(b) (setting forth the scope and limitations of discovery under the FRCP).

The Rules of Practice are more restrictive with regard to depositions than other forms of additional discovery, authorizing the Presiding Officer to order depositions only upon an additional finding that:

(i) The information sought cannot reasonably be obtained by alternative methods of discovery; or

(ii) There is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

40 C.F.R. § 22.19(e)(3).

B. Respondents' Arguments

Respondents assert that their discovery request satisfies each of the three requirements of 40 C.F.R. § 22.19(e)(1). Disc. Mot. at 5; Disc. Mot. Reply at 2. With regard to the first requirement in 40 C.F.R. § 22.19(e)(1), Respondents argue that the requested information is in Complainant's possession and "was presumably relied upon by [Complainant] in commencing the enforcement action," and therefore the requested additional discovery "will neither unreasonably delay the proceeding, nor will it unduly burden [Complainant]." Disc. Mot. at 5. Next, Respondents assert that Complainant has refused to provide the requested information through "informal discovery," despite such information being solely in its possession. Disc. Mot. at 5; Disc. Mot. Reply at 2. Finally, Respondents argue that the information sought "directly relates to the question of whether Respondents did in fact discharge pollutants into the waters of the United States," and therefore has significant probative value. Disc. Mot. at 5. Specifically, with regard to the information sought in written discovery relating to civil penalties and use of predictive modeling in other cases, Respondents reason that this information has significant probative value to facts of consequence in this matter because EAB cases have *stare decisis* value, and therefore "are directly relevant to a determination of whether [Complainant] has properly determined liability and assessed penalties against Respondents in this case." Disc. Mot. Reply at 2-3.

Regarding their request for depositions of proposed expert and fact witnesses, Respondents assert that the requested depositions "are necessary for Respondents to evaluate this matter, defend themselves, and prepare for any settlement discussions." Disc. Mot. at 4. In

support of their request to depose four of Complainant's proposed expert witnesses, Respondents argue that these sources "have not prepared reports containing the substance of the facts and opinions to which they are expected to testify and a summary of the grounds for each opinion." Disc. Mot. at 3. To the extent that Complainant has provided reports from these proposed expert witnesses, Respondents assert that "[d]epositions are necessitated because the information disclosed in the Prehearing Exchange does not describe how the experts reached the conclusions in their reports with respect to Respondents themselves, and does not explain calibration and use of its hydrologic model." Disc. Mot. Reply at 3. Respondents further contend that they are entitled to "determine if [Complainant] has competent proof upon which expert opinions can be based" and to "sufficient detail to prepare for hearing, including cross examination." Disc. Mot. at 4. Likewise, Respondents argue that depositions of the requested fact witnesses are necessary because the information provided by Complainant in its prehearing exchanges consists of "[v]ague statements," which "do not constitute an adequate 'narrative summary' of the witnesses' testimony" and are "insufficient for Respondents to prepare for hearing or consider settlement discussions." Disc. Mot. Reply at 5.

Respondents further argue that the requested depositions are warranted under 40 C.F.R. § 22.19(e)(3) because the information sought cannot be obtained through other forms of discovery, such as written discovery, noting that "follow-up questions that one might ask in a deposition are not available through written interrogatories." Disc. Mot. Reply at 5. Respondents conclude, "[w]ithout depositions, Respondents will basically be conducting discovery at the hearing itself, rather than determining the foundation for the witnesses' testimony ahead of time. Such approach puts Respondents at a distinct disadvantage in defending themselves at hearing, and would deny Respondents due process." Disc. Mot. Reply at 7.

C. Complainant's Opposition

Complainant opposes all of Respondents' requests in their Motion for Leave to Conduct Discovery. Complainant first argues that each of Respondents' requests do not meet the required criteria in 40 C.F.R. § 22.19(e)(1). Disc. Mot. Resp. at 4, 8-11. Specifically, Complainant asserts that Respondents have not identified any information that they seek to obtain through depositions that was not made available by Complainant in its prehearing exchanges. Disc. Mot. Resp. at 4-7. As a result, Complainant asserts, "depositions in this matter are unnecessary and would unreasonably delay the proceedings." Disc. Mot. Resp. at 1. Likewise, Complainant asserts that the information sought regarding the inputs and calibrations for hydrologic modeling was also provided in Complainant's prehearing exchanges, and therefore is not obtainable through additional discovery. Disc. Mot. Resp. at 4, 10-11. Further, Complainant argues that the information Respondents seek in written discovery relating to civil penalties and use of predictive modeling in other cases has no probative value on a disputed issue of material fact, and therefore is not discoverable material under 40 C.F.R. § 22.19(e)(1). Disc. Mot. Resp. at 8-10.

Complainant additionally argues that Respondents' request for depositions fails to meet the requirements of 40 C.F.R. § 22.19(e)(3), and therefore should not be granted. Disc. Mot. Resp. at 7-8. Complainant asserts that "Respondents have failed to demonstrate that the information they seek cannot be obtained through alternative means," including directed written

interrogatories. Disc. Mot. Resp. at 7-8. Additionally, Complainant argues that Respondents "have not proffered any reason for believing that the evidence they seek may not be preserved for hearing without depositions," and note that the persons Respondents seek to depose will be present to testify at a hearing and will accordingly be available for Respondents to cross examine at that time. Disc. Mot. Resp. at 8.

D. Analysis

1. Depositions

a. Depositions of Expert Witnesses

As previously discussed, Respondents seek to depose four of Complainant's proposed expert witnesses—Douglas Beyerlein, P.E. ("Beyerlein"); Lloyd Oatis ("Oatis"); Burt Shephard ("Shephard"); and Laurie Mann ("Mann") (collectively, "expert witnesses")—on the basis that the information provided by Complainant in its prehearing exchanges "does not describe how the experts reached the conclusions in their reports with respect to Respondents themselves, and does not explain calibration and use of its hydrologic model." Disc. Mot. Reply at 3.[15] Respondents' request for deposition of each of these sources is considered in light of the expected testimony, as well as Respondents' asserted reasoning for seeking deposition.

In its Initial Prehearing Exchange, Complainant identified Beyerlein as an expert witness to provide testimony regarding the Western Washington Hydrology Model ("WWHM"), and the use of this hydrologic model to calculate discharges from the Site into the Green River. C. PHE at 3. Likewise, Complainant identified Oatis as an expert witness to provide testimony regarding "the economic benefit enjoyed by Respondents as a result of their unauthorized discharges of pollutants," C. PHE at 3, which encompasses evidence of economic benefit calculated through economic modeling using the EPA's BEN version 5.4.0 model, *see* C. PHE at 18-20. Accordingly, Complainant proposes to introduce testimony from Beyerlein and Oatis on modeling evidence at hearing.

With regard to Shephard and Mann, Complainant has identified these sources as expert witnesses to provide expected ecological and toxicological testimony on the water quality and uses of the Green River-Duwamish watershed, including testimony regarding the effects of pollutants, such as those identified in sampling of an alleged discharge from the Site, on the Green River-Duwamish watershed. *See* C. PHE at 4; C. Rebut. PHE at 2-4.

Respondents, in seeking to depose Beyerlein and Oatis, argue that the information regarding such expert testimony on modeling provided by Complainant in its prehearing exchanges is insufficient. Disc. Mot. at 3-4; Disc. Mot. Reply at 4-5. Respondents assert that none of the information provided by Complainant regarding modeling in its prehearing

[15] Respondents do not request to depose Marshalonis, Complainant's expert witness who generated the report regarding hydrologic modeling in CX 30. Accordingly, I did not consider a deposition of this source.

exchanges "is tied in any way to the Respondents' site or activities at issue here." Disc. Mot. Reply at 4. Specifically, Respondents assert that the narrative summaries of expected testimony for Beyerlein and Oatis do not provide sufficient information regarding the application of the models to Respondents. Disc. Mot. Reply 4.[16]

Likewise, in support of their request to depose Shephard and Mann, Respondents argue that the information provided by Complainant with regard to the expected testimony of Shephard and Mann is insufficiently detailed to provide for hearing preparation. *See* Disc. Mot. at 3-4; Disc. Mot. Reply at 4-5. Respondents assert that the narrative summary of expected testimony for these sources provides only generalized information and does not adequately address the specific conditions of the Site. *See* Disc. Mot. at 3-4; Disc. Mot. Reply at 4.

Review of Complainant's prehearing exchanges reveals that Complainant provided considerable information regarding the proposed expert testimony, including information on modeling evidence, to be addressed by Beyerlein and Oatis, and ecological and toxicological evidence regarding the Green River-Duwamish watershed, to be addressed by Shephard and Mann. With regard to the hydrologic modeling evidence, Complainant submitted narrative summaries of expected expert testimony for Beyerlein and Marshalonis, a user manual for the WWHM, the detailed report of Marshalonis discussing the application of the hydrologic modeling to the Site, and supplemental information regarding various model inputs. *See* C. PHE at 3; CX 30; CX 39; CX 42-43; CX 49; CX 52-53. Likewise, with regard to the economic modeling, Complainant submitted a narrative summary of expected expert testimony for Oatis, a discussion of the economic modeling calculations, and materials employed in its economic modeling. *See* C. PHE at 3; C. Rebut. PHE at 19-20; CX 51; CX 55. Additionally, with regard to the expected testimony of Shephard and Mann, Complainant submitted narrative summaries of expected testimony from Shephard and Mann, as well as materials for the support of the expected testimony of these sources, including water testing of alleged discharge from the Site. *See* C. PHE at 4; C. Rebut. PHE at 2-4; CX 7; CX 28-29; CX 46; CX 54.

Given the complexity of the expected testimony of the expert witnesses Respondents seek to depose, however, the information provided by Complainant in its prehearing exchanges with regard to such testimony, while significant, does not address the information to be provided by these witnesses with enough specificity for Respondents to adequately prepare for hearing. The information provided regarding the expected expert witness testimony on the modeling evidence and ecological and toxicological evidence, particularly regarding the expected testimony addressing Respondents' activities and finances, does not provide sufficient detail to allow Respondents to meaningfully prepare their defense. Accordingly, the information regarding the expert testimony sought by Respondents through depositions has not been provided by Complainant in its prehearing exchanges. As noted by Respondents, sufficiently detailed information is necessary for Respondents to evaluate the proposed expert testimony and prepare for cross examination. Furthermore, as Respondents in their Prehearing Exchange propose

[16] Interestingly, Respondents also characterize the narrative summary of expected testimony for their own expert economic witness, Robert Fuhrman, as insufficient. Disc. Mot. Reply at 4. Despite such notation, Respondents have not supplemented the narrative summary of this witness's expected testimony.

expert testimony from their own witnesses to rebut the testimony of the expert witnesses they seek to depose, R. PHE at 4-7, it is reasonable that they require sufficiently detailed information for preparing this aspect of their defense.

The information sought by Respondents through the requested depositions of the expert witnesses otherwise meets the requirements for additional discovery set forth in 40 C.F.R. § 22.19(e)(1). The information sought is of significant probative value, as the proposed expert testimony relates directly to disputed issues of material fact relevant to liability and to calculation of the proposed penalty, including the existence and frequency of alleged discharges of pollutants, and the existence and extent of an economic benefit of alleged violation. Further, this information is most reasonably obtained from Complainant, the party proposing the expert testimony, and procuring depositions of these sources will not unreasonably burden Complainant. Finally, contrary to the arguments of Complainant, the requested depositions of the expert witnesses will not unreasonably delay the proceeding, as the delay caused by deposing these known witnesses is limited, and reasonable in light of the complexity of their expected testimony. As a result, the depositions of the expert witnesses sought by Respondents satisfy the discovery requirements of 40 C.F.R. § 22.19(e)(1).

To order the requested depositions of the expert witness under the Rules of Practice, I must additionally find that the information sought cannot reasonably be obtained by alternative methods of discovery, or that there is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing. 40 C.F.R. § 22.19(e)(3). Given the complexity of the information sought from depositions of the expert witnesses, I find that the information sought cannot reasonably be obtained by alternative methods of discovery. As noted by Respondents, other forms of discovery, including written interrogatories, do not provide the capacity available in depositions for responsive "follow-up questions," which are necessitated by the complexity of the information sought from these expert witnesses. Accordingly, the depositions of the expert witnesses sought by Respondents are supported by the additional finding required by 40 C.F.R. § 22.19(e)(3).

As the requested depositions of the expert witnesses satisfy both the criteria for additional discovery under 40 C.F.R. § 22.19(e)(1), and the required additional finding for depositions under 40 C.F.R. § 22.19(e)(3), deposition of these sources is warranted pursuant to the Rules of Practice, and is therefore granted.

b. Depositions of Fact Witnesses

Turning to Respondents' request to depose three of Complainant's proposed fact witnesses, Kristine Karlson ("Karlson"), Tracie Walters ("Walters"), and Sandra Brozusky ("Brozusky") (collectively, "fact witnesses"), such depositions are warranted under 40 C.F.R. § 22.19(e). As previously discussed, Respondents assert that depositions of the fact witnesses are necessary because the information provided by Complainant in its prehearing exchanges with respect to their testimony consisted of only "[v]ague statements regarding the witnesses' 'observations' at the site, without any specifics," which "is insufficient for Respondents to prepare for hearing or consider settlement discussions." Disc. Mot. Reply at 5. As the narrative summaries of the fact witnesses' expected testimony refer simply to their "observations" of the

Site during inspections and do not elaborate as to the substance of those observations, Respondents' claim that the limited summaries preclude their preparation for hearing is persuasive.

The Rules of Practice do not set a standard for the degree of specificity required for a summary of expected testimony but rather direct parties merely to provide as part of their prehearing exchanges "a brief narrative summary" of the expected testimony of each proposed witness. 40 C.F.R. § 22.19(a)(2)(i). As observed by the EAB, however, the purpose of the prehearing exchange is to afford the parties a meaningful opportunity to prepare for hearing, *JHNY, Inc.*, 12 E.A.D. 372, 382 (EAB 2005), and such purpose can be achieved only if the prehearing exchange imparts sufficient information concerning, among other things, the testimony of each proposed witness. Here, the narrative summaries provided by Complainant inform Respondents of the general nature and context of the expected testimony of each fact witness, but do not provide details regarding the substance of the expected testimony, specifically with regard to actual observations of the Site. Although review of the remainder of Complainant's prehearing exchanges reveals that Complainant provided inspection reports that reflect the fact witnesses' observations of the Site by way of written summaries, photographs, and sampling field notes, *see* CX 5; CX 6; CX 57, this information is not an adequate substitute for direct information from the fact witnesses regarding their actual observations of the Site. Such direct information is required for Respondents to have a meaningful opportunity to prepare for a hearing.

In considering the depositions of the fact witnesses requested by Respondents under the Rules of Practice, these depositions satisfy the requirements imposed on additional discovery in 40 C.F.R. § 22.19(e)(1). First, the information sought by Respondents from the requested depositions of the fact witnesses, namely detailed information regarding their observations of the Site, has significant probative value on disputed issues of material fact relevant to liability, including, among other things, the existence of storm water discharges from the Site and whether storm water from the Site entered into the Green River. Further, the information sought by Respondents from the requested depositions of the fact witnesses is most reasonably obtained from Complainant, the party proposing the testimony of these witnesses, and Complainant has not voluntarily made these witnesses available for deposition. Finally, the record does not reflect that the requested depositions of the fact witnesses will unreasonably delay the proceeding or unreasonably burden Complainant. As with the depositions of the expert witnesses, any delay caused by deposing these witnesses is limited, and such delay is reasonable given the need for Respondents to obtain information from the fact witnesses in order to have a meaningful opportunity to prepare for hearing. Likewise, the fact witnesses are known to Complainant, and the record does not reflect that deposition of these witnesses will unreasonably burden Complainant.

The depositions of the fact witnesses also satisfy the additional requirements imposed by the Rules of Practice on depositions in 40 C.F.R. § 22.19(e)(3). As with the depositions of the expert witnesses, the information sought by Respondents through the depositions of the fact witnesses is not reasonably obtained through other forms of discovery. Other forms of discovery, including written interrogatories, do not allow for responsive "follow-up questions," necessary to elicit detailed information regarding the fact witnesses' observations. Accordingly,

Respondents' request for depositions of the fact witnesses is supported by the additional finding required by 40 C.F.R. § 22.19(e)(3). As Respondents' request for depositions of the fact witnesses is warranted under the Rules of Practice, this request is granted.

2. Written Discovery

Respondents' requests for written discovery do not meet the criteria required by 40 C.F.R. § 22.19(e)(1). As a preliminary matter, Respondents, in requesting such written discovery, do not articulate with sufficient specificity which method of discovery is sought. Respondents reference both a directed interrogatory and request for production, Disc. Mot. at 2, but do not identify which of these forms of written discovery they seek to employ for each of the three categories of information they wish to obtain. Further, Respondents do not provide any proposed written interrogatories, as required for use of this device pursuant to 40 C.F.R. § 22.19(e)(1).

In addition, Respondents' broad request for information relating to civil penalties and use of predictive modeling in other cases does not satisfy the requirements of 40 C.F.R. § 22.19(e)(1) in that such information is not most reasonably obtained from Complainant and has no probative value on a disputed issue of material fact. First, in arguing that information relating to civil penalties and use of predictive modeling in other cases is relevant to the present proceeding because EAB cases have *stare decisis* value, Respondents appear to limit their discovery request to such information contained only in determinations rendered by the EAB, which are publically available on the EAB's website.[17] To the extent that Respondents also seek information regarding civil penalties and the use of predictive modeling in cases resolved at earlier stages in the administrative process and not reviewed by the EAB, that information may be obtained from EPA websites as well.[18] Thus, Respondents' request for information relating to civil penalties and use of predictive modeling in other cases does not satisfy the requirement of 40 C.F.R. § 22.19(e)(1)(ii) that the non-moving party be the most reasonable source of the information sought.

As for the probative value of information relating to civil penalties and use of predictive modeling in other cases, "[t]he phrase 'probative value' denotes the tendency of a piece of information to prove *a fact* that is of consequence in the case." *Chautauqua Hardware Corp.*, 3 E.A.D. 616, 622 (CJO 1991) (Order on Interlocutory Review). While Respondents argue here that "information regarding other penalty cases and other cases in which its predictive model has been used" are "directly relevant to a determination of whether [Complainant] has properly determined liability and assessed penalties against Respondents in this case" because of the precedential value of EAB decisions, Disc. Mot. Reply at 2-3, they fail to explain how their

[17] Published decisions, unpublished final orders, and significant unpublished interlocutory orders from the EAB are available on the EAB's website at http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Board+Decisions?OpenPage.

[18] For example, orders and initial decisions issued by the Office of Administrative Law Judges are available at http://www.epa.gov/oalj/orders.htm, and significant civil cases and settlements are available at http://www2.epa.gov/enforcement/cases-and-settlements.

request is distinguishable from the request denied by the Chief Judicial Officer, a predecessor to the EAB, in *Chautauqua Hardware Corporation.* The respondent in that matter sought "settlement agreements, final orders, and accompanying opinions or other documents that explain the terms and rationale of the resolution of the administrative litigation" in 21 cases brought under the same section of the Emergency Planning and Community Right-to-Know Act ("EPCRA") at issue in *Chautauqua Hardware Corporation* as a means of eliciting information bearing on the appropriateness of the proposed penalty. 3 E.A.D. at 626-27. The Chief Judicial Officer ruled that the materials requested "cannot be used to prove a fact bearing on that issue" because "[w]hat has happened in other cases can have no bearing on any factual issues in this case." *Id.* at 627. Thus, the Chief Judicial Officer held, "the information about other EPCRA cases does not have 'significant probative value.'" *Id.* Since the issuance of *Chautauqua Hardware Corporation*, the EAB has "consistently held, in a number of statutory contexts, that 'penalty assessments are sufficiently fact- and circumstance-dependent that the resolution of one case cannot determine the fate of another.'" *Chem Lab Prods., Inc.*, 10 E.A.D. 711, 728 (EAB 2002) (quoting *Newell Recycling Co.*, 8 E.A.D. 598, 642 (EAB 1999)). Applying this reasoning to the present matter, I also find that the requested information relating to civil penalties and use of predictive modeling in other cases does not have a tendency to prove a fact bearing on Respondents' liability for the alleged violations or the appropriateness of the proposed penalty in this proceeding, and that it thus lacks "significant probative value" on a disputed issue of material fact, such that it is not discoverable under 40 C.F.R. § 22.19(e)(1)(iii).

Turning to Respondents' request for written discovery on the "details as to inputs and calibrations for the Model," this request also does not meet the criteria of 40 C.F.R. § 22.19(e)(1). First, Respondents' request regarding such information lacks the specificity necessary to identify materials encompassed within the request. As previously noted, Complainant submitted evidence of both hydrologic and economic modeling in its prehearing exchanges. *See* C. PHE at 2-3, 10; C. Rebut. PHE at 7-8, 19. Respondents' broad request for written discovery does not identify the model about which they are seeking additional information, and further does not more specifically identify the "details" that Respondents seek. Respondents' vague and unspecified request for written discovery on the "details as to inputs and calibrations for the Model" does not satisfy the requirement imposed by 40 C.F.R. § 22.19(e)(1) that the motion for additional discovery "describe in detail the nature of the information and/or documents sought."

Given Respondents' lack of specificity in their request for "details as to inputs and calibrations for the Model," it is also impossible to discern whether such information has already been provided voluntarily by Complainant through its prehearing information exchange. As previously discussed, Complainant has provided significant information regarding its hydrologic modeling, including a narrative summary of expected expert testimony from Beyerlein and Marshalonis addressing hydrologic modeling, a user manual for the WWHM, the detailed report of Marshalonis discussing the application of the hydrologic modeling to the Site, and supplemental information regarding various model inputs. *See* C. PHE at 3; CX 30; CX 39; CX 42-43; CX 49; CX 52-53. Likewise, Complainant submitted substantial information regarding its economic modeling, including a discussion of the economic modeling calculations, and materials employed in its economic modeling. *See* C. Rebut. PHE at 19-20; CX 51; CX 55. Accordingly, it is unclear from Respondents' request if the information sought through written

discovery regarding modeling is information that Complainant has refused to provide voluntarily, as required by 40 C.F.R. § 22.19(e)(1)(ii).

As Respondents' requests for written discovery do not meet the criteria required by 40 C.F.R. § 22.19(e)(1), they are not permissible under the Rules of Practice, and are denied.

E. Conclusion

Respondents' Motion for Leave to Conduct Discovery is granted with regard to their request to depose Beyerlein, Oatis, Shephard, Mann, Karlson, Walters, and Brozusky, but is denied with regard to their request for written discovery, for the reasons stated above.

VI. ORDER

1. Respondents' request for oral argument on their Amended Motion for Accelerated Decision is hereby **DENIED**.

2. Respondents' Amended Motion for Accelerated Decision is hereby **GRANTED IN PART**, and **DENIED IN PART**, as follows:

A. Respondents' request for dismissal of Count One of the Complaint is **GRANTED**. Count One of the Complaint is **DISMISSED**.

B. Respondents' request for dismissal of all claims against Respondent Peterson individually is **DENIED**.

C. Respondents' request for summary ruling regarding any claims based on threatened or potential discharge is **DENIED**.

3. Respondents' Motion for Leave to Conduct Discovery is hereby **GRANTED IN PART**, and **DENIED IN PART**, as follows:

A. Respondents' requests to depose Beyerlein, Oatis, Shephard, Mann, Karlson, Walters, and Brozusky are **GRANTED**.

B. The parties shall select a time, date, and location for the aforementioned depositions that is mutually agreeable to the parties and the deponents. Respondents shall submit a written report stating the agreed upon selection of time, date, and location for the depositions no later than **30 days following the date of this Order**.

C. Respondents' requests for written discovery are **DENIED**.

4. The parties shall engage in a settlement conference and, without mentioning any specific terms of settlement, shall report on this conference and the status of settlement in a Joint Status Report filed no later than **30 days following the date of this Order**.

5. The parties shall conclude all discovery matters and file a Joint Status Report stating revised estimates for the number of days of hearing needed to present each party's case-in-chief **no later than 60 days following the date of this Order**.

SO ORDERED.

Christine Donelian Coughlin
Administrative Law Judge

Dated: October 13, 2015
Washington, D.C.

In the Matter of Special Interest Auto Works, Inc., and Troy Peterson Respondents
Docket No. CWA-10-2013-0123

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order On Respondent's Amended Motion For Accelerated Decision And Motion For Leave To Conduct Discovery** dated October 13, 2015, was sent this day in following manner to the addresses listed below:

Sybil Anderson
Office of Administrative Law Judges
U.S. Environmental Protection Agency
(202)564-6261

Dated: **October 13, 2015**

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