

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

<p>In the Matter of:</p> <p>Kent Hoggan, Frostwood 6, LLC, and David Jacobsen,</p> <p style="text-align:center">Respondents</p>	<p>Docket No. CWA-08-2107-0026</p>
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**RESPONDENTS KENT HOGGAN’S AND FROSTWOOD 6, LLC’S OPPOSITION TO  
COMPLAINANT’S MOTION FOR ACCELERATED DECISION ON LIABILITY**

Respondent, Kent Hoggan (“Hoggan”) and Respondent, Frostwood 6, LLC (“Frostwood 6, LLC”) (together, the term “Respondents” refers to Hoggan and Frostwood 6, LLC),<sup>1</sup> respectfully submit their Opposition to the EPA’s Motion for Accelerated Decision on Liability dated March 1, 2019.

**INTRODUCTION**

The Complainant, EPA, has moved for accelerated decision as to liability. As will be shown below, accelerated decision at this juncture is improper for several reasons. The EPA has not presented competent, admissible evidence to support the facts needed for every element of the proposed violations. In addition, there are numerous disputes of material fact that render accelerated decision improper at this point.

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<sup>1</sup> Respondents thus use the same definition of “Respondents” as Complainant does. See Compl. Memo. p. 1, first paragraph (“... as to Respondents Kent Hoggan and Frostwood 6, LLC (together, “Respondents”).”).

## **RESPONDENTS' DISPUTE OF MATERIAL FACTS AND OBJECTIONS TO EVIDENCE**

Respondents' respond to Complainant's Statement of Facts as follows:

### **A. General Objections.**

Respondents generally object to the form of Complainant's statement of facts. Usually for organizational purposes and to facilitate orderly responses, each statement of fact is assigned a separate number. Instead of doing this, Complainant wrote the statement of facts in a long narrative with no separate numbering of the separate statements of fact. This makes the work of Respondents and the Administrator much more difficult.

Respondents therefore will separately number each statement of fact and then provide not only a response but also any evidentiary objections to the statement of fact.

### **B. Respondents Responses to Specific Statements of Fact.**

Respondents respond to the specific statements of fact as follows:

1. "This case concerns activity at a construction site ("Site") and associated storm water discharges. The Site is approximately 4.76 acres in size. Answer ¶ 37. Respondents constructed a housing development at the Site known as "Frostwood F6 Townhomes" at 4285 Cooper Lane, Park City, Utah. CX 15 at 1, 3 Answer & 31 (respecting Frostwood 6, LLC only)." Compl. Memo. SOF p.8.

Evidentiary Objection: The statements lack foundation, in that they are not supported by any admissible evidence. Fed.R.Evid. 601, 602. The EPA's Complaint, ¶ 37, and Respondents' Answer, ¶ 37 does not support the statement "The Site is

approximately 4.76 acres in size.” Respondents object to CX 15, for lack of foundation and because it is a hearsay document not admissible under any exception to the hearsay rule. Fed.R.Evid. 601, 602, 801, 802, 803, 804, 805. The statement “Respondents constructed a housing development at the Site known as “Frostwood F6 Townhomes” at 4285 Cooper Lane, Park City, Utah” lacks foundation, and is a misstatement and mischaracterization of the EPA’s Complaint ¶ 31 and the Answer ¶ 31 (which states only that Frostwood 6, LLC, but not Kent Hoggan, constructed a housing development at the Site known as “Frostwood F6 Townhomes” at 4285 Cooper Lane, Park City, Utah.”

Respondents’ Response: Admitted that this case involves activity at a 4.76 acre construction site which is a housing development known as “Frostwood F6 Townhomes” at 4285 Cooper Lane, Park City, being constructed by the owner of the project, Frostwood 6, LLC (the “Site”). It is denied that Kent Hoggan was ever an owner of the land comprising the Site, or that Kent Hoggan was performing any construction work at the Site. Hoggan Aff. ¶ 6.

2. “Respondents engaged in construction activities that resulted in the disturbance of at least one acre. Answer ¶ 63 (respecting Frostwood 6 LLC only); CX 15 at 1, 3.” Compl. Memo, SOF, p.8-9.

Evidentiary Objection: The statement lacks foundation, in that it is not supported by any admissible evidence. Fed.R.Evid. 601, 602. Compl.’s Complaint ¶ 63 (“Mr. Jacobsen and Frostwood 6 LLC engaged in construction activities that resulted in the disturbance of at least one acre”), and Respondents’ Answer ¶ 63 (admitted), do not support this statement of fact as to Kent Hoggan. It is Complainant’s burden to

prove the factual allegation with admissible evidence, and there is no admissible evidence that Kent Hoggan engaged in construction activities that resulted in the disturbance of at least one acre. Respondents object to CX 15, for lack of foundation and because it is a hearsay document not admissible under any exception to the hearsay rule. Fed.R.Evid. 601, 602, 801, 802, 803, 804, 805.

Respondents' Response: Respondents admit that "Mr. Jacobsen and Frostwood 6 LLC engaged in construction activities that resulted in the disturbance of at least one acre." Answer ¶ 63. It is also admitted that CBM Leasing, who Frostwood 6, LLC contracted with as the initial general contractor for the project (until CBM Leasing absconded with hundreds of thousands of dollars in payments for subcontractors that it was paid and did not pay through to its subcontractors), engaged in construction activities that resulted in the disturbance of at least one acre. Hoggan Aff. ¶ 7. The Respondents deny that Mr. Hoggan engaged in construction activities that resulted in the disturbance of at least one acre, because there is no admissible evidence submitted to the contrary, and because it is factually correct that Mr. Hoggan never engaged in any construction activities on the Site that resulted in the disturbance of at least one acre. Hoggan Aff. ¶ 6.

3. "Construction activities began on approximately January 7, 2016. Answer ¶ 38." Compl. Memo. SOF, p. 9.

Evidentiary Objection: The Complaint ¶ 38 ("CBM Leasing, L.L.C. is an "operator" of the Site as defined by 40 C.F.R. ¶ 122.2 and the Permit"), and the Answer ¶ 38 (admitted) do not support the statement of fact.

Respondents' Response: Admitted. Answer ¶ 40.

4. "Mr. Hoggan is an individual who resides in Utah. Answer ¶ 28." Compl. Memo. SOF, p. 9.

Evidentiary Objection: None.

Respondents' Response: Admitted.

5. "He [Mr. Hoggan] owns Frostwood 6, LLC, Answer ¶ 31, a corporation incorporated in the State of Utah. Answer ¶ 30."). Compl. Memo. SOF, p. 9.

Evidentiary Objection: None.

Respondents' Response: Admitted that Mr. Hoggan owns Frostwood 6, LLC, a Utah limited liability company.

6. "When construction commenced, Mr. Hoggan owned the Site. CX 15 at 1." Compl. Memo. SOF, p. 9.

Evidentiary Objection: The statement lacks foundation and is not supported by any admissible sworn evidence.<sup>2</sup> Fed.R.Evid. 601, 602. Respondents object to CX 15, for lack of foundation and because it is a hearsay document not admissible under any exception to the hearsay rule, and because the EPA has not established the authenticity, reliability, substantiality, materiality and probative value of the

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<sup>2</sup> CX 15 is a perfect example for why the Federal Rules of Evidence requiring foundation and authentication of hearsay documents should be followed. The EPA is relying on this document to claim Mr. Hoggan is the owner of the Project Site. Yet CX 15 is a hearsay document, with no explanation for where it came from. It is not signed by anyone, even though the document form requires a signature. Who knows whether this is the actual original NOI for the project! At a very minimum, the document is highly suspect and should not be admitted, considered or relied upon for any purpose, including in making any factual finding as to whether Mr. Hoggan was ever an owner of the Project Site. If the Administrator is going to consider CX 15 and like documents, it should do so only at the hearing/trial of this matter, after authentication and foundation are properly laid by a witness who can do so. Such documents should never form the basis of an accelerated decision. They simply are not reliable.

document. Fed.R.Evid. 601, 602, 801, 802, 803, 804, 805. It should be noted that CX 15 is not signed by anyone, and serious doubt exists as to whether this document is the actual NOI for the Site.

Respondents' Response: Denied. The factual basis for this denial is that Mr. Hoggan does not and never has owned the Site. Hoggan Aff. ¶ 5-6.

7. "Frostwood 6 LLC was an owner of the Site, Answer ¶ 35, from at least October 2016 onward, see, e.g., CX 19 at 1; CX 21 at 1; CX 28 at 1; CX 29 at 1,3." Compl. Memo, SOF, p.9.

Evidentiary Objection: The statement lacks foundation and is not supported by any admissible sworn evidence. Fed.R.Evid. 601, 602. Respondents object to CX 19, CX 21, CX 28 and CX 29 for lack of foundation and because they are hearsay documents not admissible under any exception to the hearsay rule, and because the EPA has not established the authenticity, reliability, substantiality and probative value of the document(s). Fed.R.Evid. 601, 602, 801, 802, 803, 804, 805.

Respondents' Response: Frostwood 6, LLC is and always has been, the sole owner of the Site. Hoggan Aff. ¶ 5-6; Jacobsen Aff. ¶ 7-8. More particularly, RX 65 through RX 71 represent the loan and purchase/sale closing documents for Frostwood 6, LLC's purchase of the land comprising the Project Site from Summit County Municipal Building Authority on August 25, 2014. Id. In other words, Mr. Hoggan was never in the chain of title for the Project Site land. Hoggan Aff. ¶ 6.

8. "On November 18, 2015, Mr. Hoggan and CBM Leasing, LLC submitted an NOI to DWQ to obtain coverage under the Permit for the Site's storm water discharges. CX 15." Compl. Memo, SOF, p.9.

Evidentiary Objection: The statement lacks foundation and is not supported by any admissible sworn evidence. Fed.R.Evid. 601, 602. Respondents object to CX 15 for lack of foundation and because it is a hearsay documents not admissible under any exception to the hearsay rule, and because the EPA has not established the authenticity, reliability, substantiality and probative value of the document(s).

Fed.R.Evid. 601, 602, 801, 802, 803, 804, 805. It should be noted that CX 15 is not signed by anyone, and serious doubt exists as to whether this document is the actual NOI for the Site.

Respondents' Response: Denied. Respondents are without information and belief as to who prepared and/or filed CX 15, whether it was filed at all, and whether it is a copy of the actual NOI filed for the Project Site. Mr. Hoggan did not prepare it and he did not sign it and he did not file it. Hoggan Aff. ¶ 13. Mr. Jacobsen also did not prepare it and he did not sign it and he did not file it. Jacobsen Aff. ¶ 15. CX 15 has numerous factual errors in it, including listing Kent Hoggan as the owner of the property and project. Mr. Hoggan has never been the owner of the land and project. Hoggan Aff. ¶ 5-6; Jacobsen Aff. ¶ 7.

9. "The permittees designated on the NOI included Mr. Hoggan as the owner and CBM Leasing, LLC as the operator of the Site. CX 15." Compl. Memo, SOF, p.9.

Evidentiary Objection: The statement lacks foundation and is not supported by any admissible sworn evidence. Fed.R.Evid. 601, 602. Respondents object to CX 15 for lack of foundation and because it is a hearsay documents not admissible under any exception to the hearsay rule, and because the EPA has not established the authenticity, reliability, substantiality and probative value of the document(s).

Fed.R.Evid. 601, 602, 801, 802, 803, 804, 805. It should be noted that CX 15 is not signed by anyone, and serious doubt exists as to whether this document is the actual NOI for the Site.

Respondents' Response: Denied. Respondents incorporate here their response to SOF 8. Mr. Hoggan is not and never has been the owner of the land and project.

Hoggan Aff. ¶ 5-6; Jacobsen Aff. ¶ 708; RX 65-RX 71.

10. "DWQ authorized the Site's coverage under the Permit assigning Site-specific UPDES Permit Tracking No. UTR373147. CX 15." Compl. Memo, SOF, p.9.

Evidentiary Objection: The statement lacks foundation and is not supported by any admissible sworn evidence. Fed.R.Evid. 601, 602. Respondents object to CX 15 for lack of foundation and because it is a hearsay documents not admissible under any exception to the hearsay rule, and because the EPA has not established the authenticity, reliability, substantiality and probative value of the document(s).

Fed.R.Evid. 601, 602, 801, 802, 803, 804, 805.

Respondents' Response: Respondents are without information and belief sufficient to respond to this assertion, and therefore deny the hearsay statement and document.

11. "Site coverage under the Permit expired on November 18, 2016. CX 15 at 1-2; CX 11 at 9." Compl. Memo, SOF, p.9.

Evidentiary Objection: The statement lacks foundation and is not supported by any admissible sworn evidence. Fed.R.Evid. 601, 602. Respondents object to CX 15 and CX 11 for lack of foundation and because they are hearsay documents not admissible under any exception to the hearsay rule, and because the EPA has not

established the authenticity, reliability, substantiality and probative value of the document(s). Fed.R.Evid. 601, 602, 801, 802, 803, 804, 805.

Respondents' Response: Denied. Although CX 11 is inadmissible hearsay, by its express terms (on p.1 thereof), the "permit and the authorization to discharge expire at midnight on June 30, 2019." Thus, Respondents reasonably believed that the Project Site was *always and at all relevant times* under permit for any regulated discharge activities at the Site. Jacobsen Aff. ¶ 15; Hoggan Aff. ¶ 15. Moreover, Frostwood 6, LLC and Mr. Hoggan were relying on CBM Leasing and later Jacobsen to keep the project in compliance under applicable SWP rules. Frostwood 6, LLC and Mr. Hoggan were told by them that the project was in compliance, and they relied on those representations. Jacobsen Aff. ¶ 10-12; Hoggan Aff. ¶ 9-10.

12. "On August 31, 2016, EPA Inspectors conducted an inspection of the Site to determine compliance with the Permit. Answer ¶ 49." Compl. Memo, SOF, p.9.

Evidentiary Objection: None.

Respondents' Response: Admitted.

13. "Mr. Jacobsen identified himself to the inspectors as the operator at the Site. Answer ¶ 49." Compl. Memo, SOF, p.9.

Evidentiary Objection: None.

Respondents' Response: Admitted.

14. "At the time of the inspection, the EPA inspectors identified the following:

(a). No Stormwater Pollution Prevention Plan (SWPPP) or SWPPP map was available onsite (nor was either document provided to inspectors after the inspection). CX 18 at 1-2, 12." Compl. Memo, SOF, p.9

(b). "It was unknown if the NOI had been certified (signed) by the owner and operator, as the signature page was not displayed in the NOI available onsite. CX at 1-2." Compl. Memo, SOF, p.10.

(c). "The NOI listed CBM Leasing, LLC as the operator, but Mr. Jacobsen identified himself to inspectors as the operator. CX 15 at 1." Compl. Memo, SOF, p. 10.

(d). "Self-conducted storm water inspections and corrective actions were not being documented at the Site. CX 18 at 3-4." Compl. Memo, SOF, p.10.

(e). "Mr. Jacobsen identified himself as the person responsible for installing and maintaining Best Management Practices ("BMPs") and conducting storm water inspections at the Site, but indicated he had not received any formal training or certification. CX 18 at 42." Compl. Memo, SOF, p.10.

(f). "Uncontained concrete washout had occurred in the southern area of the Site. CX 18 at 42." Compl. Memo, SOF, p.10.

(g). "A disturbed area at final grade along the northern Site boundary was unstabilized. CX 18 at 38. Mr. Jacobsen indicated this area had remained unstabilized for approximately 14 days and no additional stabilization was

planned for approximately 50 days following inspection. CX 18 at 7.” Compl. Memo, SOF, p.10.

(h). “Storm water and sediment controls were not installed along some perimeter areas downgradient of disturbed soils. CX 18 at 7-8, 38-40, 43.” Compl. Memo, SOF, p.10.

(i). “Storm water and sediment controls which were installed, including straw wattles (also known as “fiber rolls”) and silt fence, needed maintenance or replacement. CX 18 at 7-8, 38-40, 43.” Compl. Memo, SOF, p.10.

(j). “Adequate storm water and sediment controls had not been installed prior to upgradient earth disturbance, and Mr. Jacobsen indicated straw bales and silt fence in the downgradient, northeastern corner of the Site were installed in response to complaints of sediment deposition onto Cooper Lane during snowmelt events in Spring 2016. CX 18 at 8, 39.” Compl. Memo, SOF, p.10.

**Evidentiary Objection:** The statements lack foundation and are not supported by any admissible sworn evidence. Fed.R.Evid. 601, 602. Respondents object to CX 18 for lack of foundation and because it is a hearsay documents not admissible under any exception to the hearsay rule, and because the EPA has not established the authenticity, reliability, substantiality and probative value of the document(s). Fed.R.Evid. 601, 602, 801, 802, 803, 804, 805.

**Respondents’ Response:** Denied. Respondents dispute any and all alleged “findings” of non-compliance on August 31, 2016. Jacobsen Aff. ¶ ^ . Moreover:

Responding to 14(a), CX 13 is a copy of the Project's SWPPP dated March 17, 2015. Jacobsen Aff. ¶ 19; Hoggan Aff. ¶ 18. The copy of the SWPPP was always deliverable to the Site within 10 minutes as required under applicable rules. Jacobsen Aff. ¶ 19(a). Jacobsen offered to go get it and bring it back within 10 minutes, but the EPA inspectors said that was not necessary. Jacobsen Aff. ¶ 19(a).

Responding to 14(b), it is unclear what NOI document this refers to; and the EPA has not proffered what document this refers to. Thus, this statement completely lacks foundation. However, an NOI copy was at the Project Site. Jacobsen Aff. ¶ 19(b).

Responding to 14(c), Jacobsen truthfully told the EPA inspectors that he was the operator of the Site. Jacobsen Aff. ¶ 19(c).

Responding to 14(d), Frostwood 6, LLC, through its manager, Mr. Hoggan, required Jacobsen (and earlier CBM Leasing) to comply with all SWP guidelines. Hoggan Aff. ¶ 9; Jacobsen Aff. ¶ 11. Jacobsen conducted regular, at least weekly, inspections of the Site for EPA and SWPPP compliance, and kept not only all inspection reports, but also kept contemporaneous notes of all corrective action promptly taken, which always was within a week of any asserted item of deficiency. Jacobsen Aff. ¶ 19(d). Later at the request of the EPA, Jacobsen compiled all of the third-party inspection reports (Summit County, Utah DWQ and EPA) and his self-inspection reports onto forms which are embodied in RX 1 through RX 7 Inspection Logs. Jacobsen Aff. 19(d). Jacobsen believes those inspection logs are true and accurate in terms of disclosing all prompt corrective actions taken when items of deficiency were asserted by any inspector. Jacobsen Aff. ¶ 19(d).

Responding to 14(e), Jacobsen told the EPA inspectors that he was the person charged with the responsibility for installing and maintaining Best Management Practices and conducting storm water inspections at the Site, and that he had in fact been doing so. Jacobsen Aff. ¶ 19(e). While Jacobsen had not received formal training in this regard, he had been doing land development and SWP related compliance work for over 30 years and was very experienced in and committed to SWP compliance. Jacobsen Aff. ¶ 19(e).

(f) The uncontained concrete washout asserted in the southern area of the Site was corrected by Jacobsen within a week of August 31, 2016. Jacobsen Aff. ¶ 19(f).

(g) The alleged unstabilized disturbed at final grade along the northern Site Boundary was stabilized by Jacobsen promptly following the inspection. Jacobsen Aff. ¶ 19(g).

(h) The alleged storm water and sediment controls not installed along some perimeter areas were corrected by Jacobsen within a week. Jacobsen Aff. ¶ 19(h).

(i) In a good faith effort to go over-board on preventing any improper storm water runoff, Jacobsen caused straw wattles/fiber rolls and silt fencing to be installed on the Site. Jacobsen Aff. ¶ 19(i). The EPA inspectors thought they needed maintenance or replacement. That maintenance and replacement work was completed within a week. Jacobsen Aff. ¶ 19(i).

(j) In a good faith effort to go over-board on preventing any improper storm water runoff, Jacobsen caused straw wattles/fiber rolls and silt fencing to be installed anywhere Jacobsen observed runoff, including in a timely fashion in the Spring of 2016 to prevent sediment running onto Cooper Lane during a snow melt. Jacobsen Aff. ¶ 19(j).

In all, Jacobsen worked very hard to keep this project compliant with SWP related rules and to promptly correct any inspector reported problems promptly. Jacobsen Aff. ¶ 19. Jacobsen believes he did a better job than is done on most construction projects he's observed. Jacobsen Aff. ¶ 12, 16, 17, 19. Moreover, Mr. Hoggan is committed to EPA and SWP compliance, and over the past 45 years in the land development business, involving tens of thousands of residential lots in four states, Mr. Hoggan has never been fined or penalized by the EPA for SWP compliance violations. Hoggan Aff. ¶ 16-18. Frostwood 6, LLC has spent tens of thousands of dollars complying with SWP rules in an effort to comply to the best of its ability. Hoggan Aff. 18.

Jacobsen within a week corrected each and every item that was claimed to be deficient. Jacobsen Aff. ¶ 19. See Jacobsen's SWPP Inspection Logs # 1 through # 7 (RX 1 through RX 7) (which include and summarize all of his contemporaneous compliance logging and notes). Jacobsen Aff. ¶ 19(d). With respect to such Inspection Logs, Jacobsen certified that he personally prepared the inspection logs and that they are true and correct summaries to the best of his information and belief. *Id.* Moreover, those inspection logs include numerous inspections by Summit

County Inspectors, and in all situations where an Inspector listed an item that was deficient, Jacobsen promptly and with in a week corrected all deficient items. Id.

15. "These observations and associated requested corrective actions were detailed in an Inspection Report Complainant sent to Respondents and Mr. Jacobsen on September 28, 2016. CX 18." Compl. Memo. SOF, p. 10.

Evidentiary Objection: The statement lacks foundation and is not supported by any admissible sworn evidence. Fed.R.Evid. 601, 602. Respondents object to CX 18 for lack of foundation and because it is a hearsay documents not admissible under any exception to the hearsay rule, and because the EPA has not established the authenticity, reliability, substantiality and probative value of the document(s).

Fed.R.Evid. 601, 602, 801, 802, 803, 804, 805.

Respondents' Response: Denied. Respondents dispute any and all alleged "findings" of non-compliance on August 31, 2016. Jacobsen Aff. ¶ 19. Moreover, Jacobsen within a week corrected each and every item that was claimed to be deficient. Jacobsen Aff. ¶ 19, 20. See Jacobsen's SWPP Inspection Logs # 1 through # 7 (RX 1 through RX 7). With respect to such Inspection Logs, Jacobsen hereby certifies that he personally prepared the inspection logs and that they are true and correct to the best of his information and belief. Moreover, those inspection logs include numerous inspections by Summit County Inspectors, and in all situations where an Inspector listed an item that was deficient, Jacobsen promptly and with in a week corrected all deficient items.

16. "On October 8, 2016, in response to one of the findings identified in the EPA's September 28, 2016 Inspection Report, CX 18 at 1-2, Mr. Jacobsen emailed

inspectors a copy of a Site SWPPP, dated March 17, 2015, CX 13, but did not address any other findings.” Compl. Memo. SOF, p. 10,11.

Evidentiary Objection: The statement lacks foundation and is not supported by any admissible sworn evidence. Fed.R.Evid. 601, 602. Respondents object to an 10/8/16 email from Mr. Jacobsen (which, to Respondents’ best knowledge and belief has never been provided by the EPA to Respondents), and also to CX 18 and CX 13 for lack of foundation and because they are hearsay documents not admissible under any exception to the hearsay rule, and because the EPA has not established the authenticity, reliability, substantiality and probative value of the document(s). Fed.R.Evid. 601, 602, 801, 802, 803, 804, 805.

Respondents’ Response: CX 13 is a copy of the Project’s SWPP Plan dated March 17, 2015. Hoggan Aff. ¶ 18; Jacobsen Aff. ¶ 19(a). The copy of the SWPPP was always deliverable to the Site within 10 minutes as required under applicable rules. Jacobsen Aff. ¶ 19(a).

17. “The EPA reviewed the SWPPP and identified the following:

(a). The SWPPP did not contain a list of all potential sources of construction site pollutants, as porta-johns and concrete washout were observed onsite. CX 13 at 8; *see also* CX 18 at 42.” Compl. Memo. SOF, p. 11.

(b). “The SWPPP did not contain a map indicating the locations of all surface waters within or in the immediate vicinity of the Site. A stream (later designated as Main Investigation Tributary 1, or MIT1) was observed to the east of the Site, across Cooper Lane, *see, e.g.*, CX 18 at 40; CX 66 at 13, but was

not indicated on any of the SWPPP maps, CX 13 at 26-27, 61.” Compl. Memo. SOF, p. 11.

(c). “The SWPPP did not describe all storm water control measures implemented at the Site. Straw wattles were installed along portions of the eastern Site boundary. CX 18 at 39. Straw wattles were not mentioned in the SWPPP narrative. CX 13 at 10-16. Installation of straw wattles was not indicated on any of the SWPPP maps. CX 13 at 26-27, 61. No design, installation, or maintenance specifications for straw wattles were included in the SWPPP. CX 13.” Compl. Memo. SOF, p. 11.

(d). “The SWPPP did not contain documentation of the expected snow season. CX 13 at 4.” Compl. Memo. SOF, p. 11.

(e). “The SWPPP had not been updated since the start of construction in January 2016 to reflect changes to the Site conditions and storm water controls. CX 13.” Compl. Memo. SOF, p. 11.

Evidentiary Objection: The statements lack foundation and are not supported by any admissible sworn evidence. Fed.R.Evid. 601, 602. Respondents object to CX 18 and CX 13 for lack of foundation and because they are hearsay documents not admissible under any exception to the hearsay rule, and because the EPA has not established the authenticity, reliability, substantiality and probative value of the document(s). Fed.R.Evid. 601, 602, 801, 802, 803, 804, 805.

Respondents’ Response: Denied that the SWPPP was deficient. Respondents have been advised by its SWPPP professional consultants and SWPPP authors, Infinity Consultants, that their SWPPP complied with all SWPPP requirements, and

Respondents relied on their professional advice, which they are entitled to do. Hoggan Aff. ¶ 19; Jacobsen Aff. ¶ 22. Moreover, Respondents should not be penalized for performing even more storm water detention than was set forth in the SWPPP, particularly if asked to install the same by Summit County Inspectors, which is what happened. Jacobsen Aff. ¶ 21.

18. “These observations and associated requested corrective actions were detailed in a Revised Inspection Report Complainant sent to Respondents and Mr. Jacobsen on November 15, 2016. Respondents did not provide any evidence corrective actions had been completed until over a year later, when they submitted evidence of some corrective actions in May 2018, discussed below.” Compl. Memo. SOF, p. 11.

Evidentiary Objection: The statements lack foundation and are not supported by any admissible sworn evidence. Fed.R.Evid. 601, 602. Respondents object to the purported “Revised Inspection Report” dated November 15, 2016 for lack of foundation and because it is a hearsay documents not admissible under any exception to the hearsay rule, and because the EPA has not established the authenticity, reliability, substantiality and probative value of the document(s). Fed.R.Evid. 601, 602, 801, 802, 803, 804, 805.

Respondents’ Response: David Jacobsen promptly corrected any and all items requested of Summit County, State DWQ or EPA inspectors. Jacobsen Aff. ¶ 19, 20.

19. “The Site’s coverage under the Permit expired on November 18, 2016. CX 15. Respondents; construction activities continued at the Site after that date. RX 3

(RESP 46-68); RX 4 (RESP 69-89); RX 5 at 1-4 (RESP 90-93); CX 21; CX 28.” Compl. Memo. SOF, p. 11.

Evidentiary Objection: The statement that “the Site’s coverage under the Permit expired on November 18, 2016” lacks foundation and is not supported by any admissible sworn evidence. Fed.R.Evid. 601, 602. Moreover, CX 13 specifically states that the authorization to discharge extends to June 30, 2019. Respondents object to CX 15, RX 3, RX 4, RX 5, CX 21 and CX 28 for lack of foundation and because they are hearsay documents not admissible under any exception to the hearsay rule, and because the EPA has not established the authenticity, reliability, substantiality and probative value of the document(s). Fed.R.Evid. 601, 602, 801, 802, 803, 804, 805.

Respondents’ Response: Respondents believed in good faith that the Permit continued in force and effect through June 30, 2019, based upon CX 13, p. 1. Hoggan Aff. ¶ ^ . Moreover, a new NOI was applied for and put in place in April of 2017 (see SOF 22), and, because Site is in Park City, in the Mountains, there was no construction activity occurring during the intervening months between 11/18/16 and April 2017 because of snow on the ground. Jacobsen Aff. ¶ 23; Hoggan Aff. ¶ 20. No further construction activities were engaged in until after the new NOI was obtained in April of 2017. Jacobsen Aff. ¶ 23; Hoggan Aff. ¶ 20.

20. “On March 7, 2017, EPA filed an Administrative Order for Compliance (Docket No. CWA-08-2017-0007) (Order) directing Frostwood 6 LLC and Mr. Jacobsen to implement corrective actions at the Site within 30 days of receipt of the Order. CX 26.” Compl. Memo. SOF, p. 12.

Evidentiary Objection: None.

Respondents' Response: Admitted that the EPA filed an Administrative Order for Compliance on March 7, 2017 (CX 26), but deny that at such juncture there were any violations or that corrective actions needed to be taken, because the corrective action had been taken. Jacobsen Aff. ¶ 19-20.

21. "Frostwood 6 LLC and Mr. Jacobsen did not comply with the Order.

Respondents and Mr. Jacobsen sent Complainant no evidence of corrective actions implemented in response to the Order until over a year later, when EPA received evidence of some corrective actions in May 2018, mentioned above. CX 49-54."

Compl. Memo. SOF, p. 12.

Evidentiary Objection: The statement lacks foundation and is not supported by any admissible sworn evidence. Fed.R.Evid. 601, 602.

Respondents' Response: Denied, because all of the Site related corrective action had already been promptly taken. Jacobsen Aff. ¶ 19-20. Admitted only that

Respondents submitted the CX 49 – 54 materials to the EPA in or about May 2018 at the EPA's request.

22. "On April 27, 2017, Mr. Jacobsen submitted an NOI to DWQ, erroneously citing the relevant permit as the General Storm Water Permit for Construction Activity Connected with Single Lot Housing Projects, UPDES Permit No. UTRH00000 (Common Plan Permit). Answer ¶ 57; RX 4 at 47 ("4/27/17: Renewed permit online")." Compl. Memo. SOF, p. 12.

Evidentiary Objection: None.

Respondents' Response: Admitted that "On April 27, 2017, Mr. Jacobsen submitted an NOI to DWQ and paid the annual fee. Mr. Jacobsen had submitted a permit application for authorization to discharge under a Common Plan of Development Permit (UTRH80279) which was an incorrect permit authorization for the Site. DWQ corrected the form and the original UPDES Permit No. UTR373147 was renewed by DWQ for a term beginning April 27, 2017." Answer ¶ 57.

23. "The April 27, 2017 NOI identified the permittees as Frostwood 6 LLC, designated as Site owner, and David Jacobsen Construction, designated as Site operator. Answer ¶ 58." Compl. Memo. SOF, p. 12.

Evidentiary Objection: None.

Respondents' Response: Admitted, because that information was correct.

24. "On April 28, 2017, a DWQ inspector conducted a storm water inspection at the Site. Answer ¶ 59. The DWQ Inspector observed corrective actions at the Site pursuant to the EPA's August 31, 2016 inspection had not been completed. CX 30 at 2." Compl. Memo. SOF, p. 12.

Evidentiary Objection: The statement lacks foundation and is not supported by any admissible sworn evidence. Fed.R.Evid. 601, 602. Respondents object to CX 30 for lack of foundation and because it is a hearsay documents not admissible under any exception to the hearsay rule, and because the EPA has not established the authenticity, reliability, substantiality and probative value of the document(s).

Fed.R.Evid. 601, 602, 801, 802, 803, 804, 805.

Respondents' Response: Respondents admit, consistent with Answer ¶ 59, only that "On April 28, 2017, a DWQ Inspector conducted a storm water inspection at the Site

to determine compliance with the Permit.” Respondents deny that the existence of any items that needed to be corrected, because Mr. Jacobsen had already promptly corrected Site related corrective actions. See Answer 60; Jacobsen Aff. ¶ 19-20.

25. “DWQ also identified Site coverage under the Common Plan Permit as incorrect and renewed the original PUDES Permit Tracking No. UTR373147 effective April 27, 2017, through November 18, 2018. CX 29; Answer ¶ 57.” Compl. Memo. SOF, p. 12.

Evidentiary Objection: The statement lacks foundation and is not supported by any admissible sworn evidence. Fed.R.Evid. 601, 602. Respondents object to CX 29 for lack of foundation and because it is a hearsay document not admissible under any exception to the hearsay rule, and because the EPA has not established the authenticity, reliability, substantiality and probative value of the document(s). Fed.R.Evid. 601, 602, 801, 802, 803, 804, 805.

Respondents’ Response: Respondents lack sufficient information and belief to respond to SOF 25, and therefore deny the same.

26. Frostwood 6 LLC also renewed the NOI to extend to May 18, 2019. CX 51 at 33.” Compl. Memo. SOF, p. 12.

Evidentiary Objection: The statement lacks foundation and is not supported by any admissible sworn evidence. Fed.R.Evid. 601, 602. Respondents object to CX 51 for lack of foundation and because it is a hearsay document not admissible under any exception to the hearsay rule, and because the EPA has not established the authenticity, reliability, substantiality and probative value of the document(s). Fed.R.Evid. 601, 602, 801, 802, 803, 804, 805.

Respondents' Response: Respondents admit that they at all times have operated under a valid Permit and authorization.

27. "Storm water and snowmelt runoff from the Site flow into the Summit County MS4." Compl. Memo. SOF, p. 12.

Evidentiary Objection: The statement lacks foundation and is not supported by any admissible sworn evidence. Fed.R.Evid. 601, 602.

Respondents' Response: Denied. Respondents dispute that any storm water runoff flows into East Canyon Creek as this is physically impossible. First, when the project was approved by Summit County and Frostwood 6, LLC received permission to connect into the existing storm drain system, Frostwood 6, LLC was told by Summit County, and reasonably relied thereon, that the storm drain system emptied into a detention basin and percolated into the ground there. Hoggan Aff. ¶ 21; Jacobsen Aff. ¶ 24. Second, Mr. Hoggan and Mr. Jacobsen have physically walked the length of every possible outflow of storm water runoff from the project, and in all events, such runoff, which only occurs in the spring snow melt, terminates miles away from East Canyon Creek. Hoggan Aff. ¶ 21; Jacobsen Aff. ¶ 24. Third, Frostwood 6, LLC has been advised by its engineers that no storm water runoff from the Site ever reaches any US Waterway, including East Canyon Creek and its tributaries. Hoggan Aff. ¶ 21; Jacobsen Aff. ¶ 24. Rather, based upon percolation test estimates, those engineers have advised Frostwood 6, LLC that no runoff terminates miles away from East Canyon reek and its tributaries. Hoggan Aff. ¶ 21; Jacobsen Aff. ¶ 24.

28. "Depending on the location of the receiving MS4 inlet, runoff from the Site entering the MS4 flows from the MS4 into one of two nearby unnamed surface

water tributaries of East Canyon Creek, referred to as MIT1 and MIT2.” Compl. Memo. SOF, p. 12, 13.

Evidentiary Objection: The statement lacks foundation and is not supported by any admissible sworn evidence. Fed.R.Evid. 601, 602.

Respondents’ Response: Denied. Respondents respectfully believe that this is impossible. Respondents incorporate here their response to SOF 28.

29. “MIT1 and abutting wetlands are located adjacent east of the Site, across Cooper Lane. CX 66 at 12-13.” Compl. Memo. SOF, p. 13.

Evidentiary Objection: The statement lacks foundation and is not supported by any admissible sworn evidence. Fed.R.Evid. 601, 602. Respondents object to CX 66 for lack of foundation and because it is a hearsay document not admissible under any exception to the hearsay rule, and because the EPA has not established the authenticity, reliability, substantiality and probative value of the document(s). Fed.R.Evid. 601, 602, 801, 802, 803, 804, 805.

Respondents’ Response: Denied. Respondents incorporate here their response to SOF 28.

30. “On September 9, 2009, the U.S. Army Corps of Engineers (USACE) issued a preliminary jurisdictional determination that MIT1 and abutting wetlands were waters of the United States (SPK-2009-01203-UO). CX 9. MIT2 is located north of the Site. CX 66 at 5, 13.” Compl. Memo. SOF, p. 13.

Evidentiary Objection: The statement lacks foundation and is not supported by any admissible sworn evidence. Fed.R.Evid. 601, 602. Respondents object to CX 9 and CX 66 for lack of foundation and because they are hearsay documents not

admissible under any exception to the hearsay rule, and because the EPA has not established the authenticity, reliability, substantiality and probative value of the document(s). Fed.R.Evid. 601, 602, 801, 802, 803, 804, 805.

Respondents' Response: Denied. Respondents incorporate here their response to SOF 28.

31. "Downstream from the points of discharge from the Site, MIT1 and MIT2 converge at MIT3, the first reach of Spring Creek. CX 66 at 12-13." Compl. Memo. SOF, p. 13.

Evidentiary Objection: The statement lacks foundation and is not supported by any admissible sworn evidence. Fed.R.Evid. 601, 602. Respondents object to CX 66 for lack of foundation and because it is a hearsay document not admissible under any exception to the hearsay rule. Fed.R.Evid. 601, 602, 801, 802, 803, 804, 805.

Respondents' Response: Denied. Respondents respectfully maintain that it is impossible for any Site runoff to reach Spring Creek. Respondents incorporate here their response to SOF 28.

32. "Spring Creek then flows sequentially through two impoundments in the Silver Springs residential community. Upon exiting the first impoundment, the Upper Pond, Spring Creek's flow is split into East Conveyance Tributary (ECT) and West Conveyance Tributary (WCT), both of which flow into the second impoundment, the Lower Pond." Compl. Memo. SOF, p. 13.

Evidentiary Objection: The statement lacks foundation and is not supported by any admissible sworn evidence. Fed.R.Evid. 601, 602.

Respondents' Response: Denied. Respondents incorporate here their response to SOF 28.

33. "Below the Lower Pond, Spring Creek continues as MIT4 and MIT5, which flow from the Lower Pond through additional residential developments and the Swaner Nature Preserve (the Preserve), then converge at the north end of the Preserve to form MIT6." Compl. Memo. SOF, p. 13.

Evidentiary Objection: The statement lacks foundation and is not supported by any admissible sworn evidence. Fed.R.Evid. 601, 602.

Respondents' Response: Denied. Respondents incorporate here their response to SOF 28.

34. "MIT6 flows under Interstate 80 and converges with East Canyon Creek approximately 2.5 miles north of the Site. CX 66 at 12. East Canyon Creek flows into East Canyon Reservoir." Compl. Memo. SOF, p. 13.

Evidentiary Objection: The statement lacks foundation and is not supported by any admissible sworn evidence. Fed.R.Evid. 601, 602. Respondents object to CX 66 for lack of foundation and because it is a hearsay document not admissible under any exception to the hearsay rule, and because the EPA has not established the authenticity, reliability, substantiality and probative value of the document(s). Fed.R.Evid. 601, 602, 801, 802, 803, 804, 805.

Respondents' Response: Respondents admit only that the Site is at least 2.5 miles South of East Canyon Creek. Respondents incorporate here their response to SOF 28.

35. “East Canyon Reservoir is a jurisdictional traditional navigable water, CX 5, and is utilized heavily for year-round water-related recreation, including swimming, fishing, boating, sailboarding, wildlife viewing, an camping, *id.* at 1: CX 59: CX 61.” Compl. Memo. SOF, p. 13.

Evidentiary Objection: The statement lacks foundation and is not supported by any admissible sworn evidence. Fed.R.Evid. 601, 602. Respondents object to CX 5, CX 59 and CX 61 for lack of foundation and because they are hearsay documents not admissible under any exception to the hearsay rule, and because the EPA has not established the authenticity, reliability, substantiality and probative value of the document(s). Fed.R.Evid. 601, 602, 801, 802, 803, 804, 805.

Respondents’ Response: Respondents admit that East Canyon Reservoir, which is probably 30 miles from the Site, is a “traditional navigable water.”

## ARGUMENT

A. Accelerated Decision is Improper Because Complainant Has Not Met Its Burden of Proof. The EPA has two burdens as the complainant in an administrative action. Part 22.24 states: “The complainant has the burdens of presentation (prima facie case) and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate.” In order to establish a prima facie case against the Respondents, the EPA must present undisputed facts supported by evidence sufficient to establish each element of the violation to be charged.

Here, the EPA has failed to present competent, admissible evidence to support each element of the alleged violation. In Part 22 proceedings, the Federal Rules of Evidence are used as guidance. Consistent with the Federal Rules of

Evidence, admissible evidence in a Part 22 proceeding must at a minimum be supported by foundation that renders the evidence reliable and of probative value. With respect, with no sworn affidavit testimony to lay foundation for factual assertions and documents, the alleged facts in the EPA's Statement of Fact are nothing more than argument of legal counsel.

Moreover, *every* document referenced by Complainant is a hearsay document for which no exception to the hearsay rule exists. While the hearsay rule purportedly is not applicable to administrative hearings, the documents and evidence still must meet basic foundation requirements to establish authenticity and well as the substantial and probative value of the evidence.

Respondents strenuously maintain that this foundational admissibility analysis and inquiry is essential, and cannot properly be done at this juncture, and can only properly be done at the trial of this matter. The EPA must bring the witnesses its named on its witness list to establish the authenticity, substantiality and probative value of the documentary evidence, subject to Respondents' cross-examination. Without that, and with Respondents' objection to admissibility, a genuine dispute of fact exists as to the authenticity, substantiality and probative value of each and every document that the EPA has proffered in its Motion. That dispute of fact renders accelerated decision improper at this juncture.

With the EPA's complete failure to meet minimal foundational requirements for their statements of fact, the EPA has failed to meet its burden of proof to establish liability on accelerated decision.

A. Accelerated Decision is Improper Given Several Disputes of Material Fact.

In addition to the EPA's complete failure to present competent evidence to support its allegations of facts, there are several material disputes of fact that render accelerated decision on liability improper at this juncture. More particularly, there are material disputes of material fact as to:

1. Whether Kent Hoggan was ever an owner of the land/project. SOF 1, 6.
2. Whether Kent Hoggan performed any construction work at the Site. SOF 2.
3. Whether Kent Hoggan engaged in any construction activities that resulted in the disturbance of at least one acre. SOF 2.
4. Whether Frostwood 6, LLC owned the land/project at all times. SOF 7.
5. Whether CX 15 is authentic.
6. Who signed CX 15 (See SOF 14(b) "It was unknown if the NOI had been certified (signed) by the owner and operator, as the signature page was not displayed in the NOI available onsite").
7. Whether CX 15 includes accurate information.
8. Who submitted CX 15. SOF 8.
9. What the Utah DWQ did or did not do at relevant times. SOF 10, SOF 19.
10. Whether the Project was under Permit at all given times (the evidence is conflicting in this regard, see CX 13, which expressly states that the Permit runs to June 30, 2019—this alone creates an issue of fact as to whether the Project always was under appropriate permitting). SOF 11.
11. What the EPA inspectors did or did not do at relevant times. SOF 12.
13. Whether Frostwood 6, LLC and Jacobsen promptly corrected any deficiencies after notice. SOF 13-18, 20-21, 24. See Jacobsen Affidavit (Mr. Jacobsen states that every time any deficiency was noted by a Utah DWQ or EPA inspector, he immediately rectified the problem in the field within a week.
14. Whether the Project's SWPPP was adequate or deficient. SOF 17.
15. Whether storm water and snowmelt runoff from the Site flow into any US Waterway.

With so many disputes of material fact, it is not proper to enter any accelerated decision as to liability. See Rule 22.20(a) (accelerated decision may only be entered "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law"). The Administrator should so rule and give Respondents their day in court.

## SUMMARY

For the foregoing reasons, Respondents respectfully request that  
Complainants' motion be denied.

Dated this 21<sup>th</sup> day of March, 2019.



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David W. Steffensen,  
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CERTIFICATE OF SERVICE

I certify that the foregoing RESPONDENTS KENT HOGGAN'S AND FROSTWOOD 6, LLC'S OPPOSITION TO COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY in Docket No. CWA-08-2017-0026, dated March 21, 2019, was sent this day in the following manner to the addressees listed below:

Copy by email to:

Counsel for Complainant:

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Copy by U.S. mail to:

Office of the Hearing Clerk:

Mary Angeles  
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Office of Administrative Law Judges  
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Presiding Judge:

The Honorable Susan L. Biro  
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Date: March 21, 2019