BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of: Dave Erlanson, Sr., Individual, Swan Valley, Idaho, Respondent.	DOCKET NO. CWA-10-2016-0109 **COMPLAINANT'S MOTION FOR ACCELERATED DECISION**

Pursuant to Sections 22.16(a) and 22.20 of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Complaint or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" ("Part 22 Rules"), the United States Environmental Protection Agency, Region 10 ("Complainant" or "EPA") hereby moves for an accelerated decision on Respondent's liability for the violations alleged in the Complaint and the proposed penalty amount specified in its Rebuttal Prehearing Exchange.

In support of this Motion, Complainant relies on applicable procedural rules in the Part 22 Rules, the pleadings and documents in the record, and the facts and law set forth in the attached Memorandum in Support of this Motion. Prior to filing this Motion, the undersigned contacted

Respondent's counsel to determine whether Respondent would object to granting the relief sought in this motion. Respondent's Counsel stated that he will oppose this Motion.

Dated this 5th day of June, 2017.

Respectfully submitted,

/s/ Endre M. Szalay

ENDRE M. SZALAY
Assistant Regional Counsel
U.S. EPA, Region 10
1200 Sixth Avenue, Suite 900, ORC-113
Seattle, Washington 98101-3140
(206) 553-1037
szalay.endre@epa.gov

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of: Dave Erlanson, Sr., Individual, Swan Valley, Idaho, Respondent.	DOCKET NO. CWA-10-2016-0109 COMPLAINANT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR ACCELERATED DECISION

Pursuant to Sections 22.16(a) and 22.20 of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Complaint or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" ("Part 22 Rules"), the United States Environmental Protection Agency, Region 10 ("Complainant" or "EPA") hereby moves for an accelerated decision as to Respondent's liability for the violations alleged in the Complaint. Because there are no genuine issues of material fact, Complainant is entitled to a determination of Respondent's liability as a matter of law, as well as the penalty proposed and detailed in Complainant's pleadings. Complainant respectfully requests an order granting this motion.

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I. INTRODUCTION

In its Complaint, the EPA alleges that Respondent violated section 301(a) of the Clean Water Act (CWA) by 1) discharging 2) pollutants (suspended solids) 3) from a point source (a suction dredge) 4) into a water of the United States (South Fork Clearwater River) 5) without authorization under a National Pollutant Discharge Elimination System (NPDES) permit. While Respondent's Answer denies all of the above allegations, Respondent's Prehearing Exchange stipulates that he is a "person" within the meaning of the CWA, that the South Fork of the Clearwater River is a "waters of the United States" within the meaning of the CWA, and that he operated a suction dredge in the South Fork of the Clearwater River without a CWA section 402 NPDES permit on the day alleged in the Complaint.

On the items that Respondent does not stipulate, there are no genuine fact issues and the only issue in dispute is a legal one: whether the processing of streambed material on a suction dredge and the release of suspended solids and the resulting turbid plume constitutes a "discharge of a pollutant." Respondent argues that is does not. But, the facts and law relevant to this matter are clear that it does, and therefore Respondent's activity caused a discharge of a pollutant in violation of the CWA.

The Argument below will establish that the EPA regulates under CWA section 402 discharges resulting from the operation of small suction dredges, Respondent operated a suction dredge on the South Fork Clear Water River without a CWA Section 402 NPDES permit, and the EPA's conclusion that such activity results in a regulated discharge of a pollutant is reasonable, within the Agency's discretion, and supported by law. As such, Complainant is entitled to an accelerated decision as to Respondent's liability. Furthermore, because there is no

reasonable dispute regarding the facts relevant to the assessment of a penalty, the Presiding Officer should uphold Complainant's specification of proposed penalty in the amount $6,600 as set forth in its Rebuttal Prehearing Exchange.

II. STATUTORY AND REGULATORY BACKGROUND

The purpose of the CWA, Pub. L. No. 92-500, 86 Stat. 816, codified as amended at 33 U.S.C. §§ 1251-1387, is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). CWA section 301(a), 33 U.S.C. § 1311(a), provides that, except as in compliance with a permit under CWA section 402, certain other permits, and limitations not applicable in this case, "the discharge of any pollutant by any person shall be unlawful."

The relevant terms and elements in CWA section 301(a) are defined in CWA section 502 and by applicable regulations. CWA section 502(5), 33 U.S.C. § 1362(5), defines "person" to include an individual. CWA section 502(12), 33 U.S.C. § 1362(12), defines the term "discharge of a pollutant" as any addition of any pollutant to navigable waters from any point source. CWA section 502(6), 33 U.S.C. § 1362(6), defines "pollutant" to include, *inter alia*, dredged spoil, rock, and sand. CWA section 502(7), 33 U.S.C. § 1362(7), defines "navigable waters" as "waters of the United States." EPA's regulations applicable to the CWA section 402 permit program defines "waters of the United States" to include "waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide" and tributaries to those waters. 40 C.F.R. § 122.2. CWA section 502(14), 33 U.S.C. § 1362(14), defines the term "point source" to include "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit . . . or vessel or other floating craft, from which pollutants

are or may be discharged." These elements, plead together, form a *prima facie* case for the purposes of the instant motion.

III. STANDARD OF REVIEW FOR ACCELERATED DECISION

The standard of review for a motion for accelerated decision is set forth in Section 22.20 of the Part 22 Rules, which provides:

> 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). This standard is analogous to the summary judgment standard established under Rule 56 of the Federal Rules of Civil Procedure. *See Clarksburg Casket Co.*, 8 E.A.D. 496, 501–02 (EAB 1999).

The Supreme Court has held that a party moving for summary judgment bears the burden of "identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which demonstrate that no genuine issues of material fact exist. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Pepperell Associates*, 1999 EPA ALJ LEXIS 16 (EPA, Feb. 26, 1999). The evidentiary basis for the moving party's motion must be viewed in the light most favorable to the opposing party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

To satisfy this burden, the moving party must present evidence "such that no reasonable decisionmaker could find for the nonmoving party." *Clarksburg Casket Co*, 8 E.A.D. at 502; *see also Anderson*, 477 U.S. at 252. On the other hand, to survive such a motion, the non-moving party must demonstrate to the court that the evidence presents "sufficient disagreement" such that a reasonable fact finder could decide in favor of either party. *Anderson*, 477 U.S. at 251–52;

see also Mayaguez Reg'l Sewage Treatment Plant, 4 E.A.D. 772, 781 (EAB 1993), *aff'd sub nom. Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995). However, to do so, the non-moving party cannot rely on the allegations or denials of its pleading, but rather must establish with affirmative evidence specific facts showing that there is a genuine issue for trial. *Anderson*, 477 U.S. at 256; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (non-moving party must present specific, significant probative evidence, not simply "some metaphysical doubt"); *BWX Technologies, Inc.*, 9 E.A.D. 61, 75 (EAB 2000).

In this case, no question of material fact exists as to whether Respondent violated the CWA. This is an issue of law suitable for a motion for accelerated decision.

IV. FACTUAL BACKGROUND

A. Description of Activity

Placer mining is the mining and extraction of gold or other heavy metals and minerals from stream bed, or alluvial, deposits. Miners dredge the bottom of the stream bed using either hydraulic or mechanical (e.g., bucket dredging) systems to dig through the rock and sand at the bottom of the stream and extract the heavy metals. Suction dredges are the most common hydraulic dredging system and are often used by small and recreational gold placer miners. Small suction dredge mining involves using a high-pressure pump driven by a gasoline powered motor to create suction through a flexible intake hose with a fixed inside diameter, ranging from 2"-12", to excavate streambed sediments down to bedrock. CX – 04, p.75-76; CX – 13, p.875.

While operating, streambed sediments and water are vacuumed through the intake nozzle and processed through a sluice tray mounted on floats. Dense particles, including gold, are trapped in the sluice box tray and removed from the stream material. The residue from the

processing, which consists of the remaining stream water and stream bed material such as rock and sand, is then discharged from suction dredge outlets back into the stream as tailings. *Id.*

Placer mining is one of four primary methods of mining metal ores, in addition to underground mining, pit mining, and *in situ* mining. The environmental consequences of placer mining and its associated issues are varied and complex. Unlike mining operations that move hundreds or thousands of cubic yards of earth per day, placer operations are conducted directly in streambeds and adjacent property, often with serious aesthetic and water quality impacts in the immediate vicinity and sometimes for miles downstream. While mining is often done in remote areas, the wilderness setting itself also leads to broader environmental concern about wildlife habitat and scenic destruction or disturbances. Sometimes, as here, a placer deposit may be located and mined in streams which serve as critical habitat for threatened or endangered aquatic species. In these instances, constant sediment loading downstream caused by mining can disrupt stable stream bottoms, smother breeding areas, and otherwise disturb fish habitat. In other situations, however, mine site streams may be small, flow only intermittently, or be unsupportive of fish life. In these cases, water quality impacts may be reduced. *See* 50 Fed. Reg. 47,982 (Nov. 20, 1985) (EPA, Proposed Effluent Limitation Guidelines for Gold Placer Mining).

EPA has regulated small suction dredging for decades using NPDES permits. EPA has determined that the nature of small-scale suction dredging lends itself to setting effluent limitations via the NPDES permit process based on the permit writer's best professional judgment. *See* 50 Fed. Reg. 47,982; *see also* 53 Fed. Reg. 18,777 (May 24, 1988) (EPA, Final Effluent Limitation Guidelines for Gold Placer Mining) (determining not to produce effluent limitations guidelines for small-scale suction dredging and instead opting to continue regulating such dredging using NPDES permits).

B. The Idaho Small-scale Suction Dredging General Permit

Pursuant to CWA section 402, 33 U.S.C. § 1342, in 2013 EPA issued the NPDES General Permit No.: IDG370000 ("Idaho Suction Dredge GP") authorizing "owners and operators of placer mining operations in Idaho with small suction dredges . . . to discharge to waters of the United States, *except those sites excluded* from coverage of this NPDES permit, in accordance with effluent limitations." CX – 03, p.27. The permit became effective on May 6, 2013 and is valid until April 30, 2018. *Id.* at p.27, 36.

The Idaho Suction Dredge GP specifically lists the South Fork Clearwater River as a waterbody not covered by the Permit due to the presence of critical habitat areas designated under the Endangered Species Act (ESA) for listed aquatic species including bull trout, Chinook salmon, and steelhead trout. CX – 03, p.31 (Part I.D.4 of the Idaho Suction Dredge GP); CX – 40 (Idaho Suction Dredge GP, Appendix G: Endangered Species Critical Habitat Areas). As described in the Idaho Suction Dredge GP, unless an ESA determination has been made through another process (e.g., United States Forest Service ("Forest Service") Plan of Operations) and the decision is provided with the Notice of Intent for coverage under the Idaho Suction Dredge GP, discharges from suction dredges in the South Fork Clearwater River are prohibited. CX – 03, p.31.

The Idaho Suction Dredge GP also does not authorize discharges from placer mining operations into streams listed as impaired. CX – 03, p.33 (Part I.D.7 of the Idaho Suction Dredge GP). The South Fork Clearwater River is listed as a Clean Water Act Section 303(d)-impaired water for sediment and temperature. CX – 06.

C. The Allegations Against Respondent for Violation of the CWA

Respondent was observed actively dredging on the South Fork Clearwater River in Idaho on July 22, 2015, without authorization under an applicable NPDES permit in violation of CWA section 301(a), 33. U.S.C. § 1311(a). The allegations against Respondent are enumerated in full in ¶¶ 3.1–3.9 of the Complaint.

V. ARGUMENT

A. Complainant is Entitled to Accelerated Decision Because the Evidence Supports the Finding that Respondent is Liable for CWA Violations Alleged in the Complaint

To meet its burden for the purposes of a motion for accelerated decision, EPA must establish each element of a *prima facie* case of CWA liability. Respondent accepted stipulations to at least three of the elements proffered in Complainant's Prehearing Exchange ("CPE"): (1) that he is a "person" as defined by CWA section 502(5); (2) that the South Fork Clearwater River is a "water of the United States," and is therefore a "navigable water" in accordance with CWA section 502(7); (3) that the suction dredge operated by Respondent is a "point source" as defined by Section 502(14) of the CWA[1]; and (4) that he did not obtain a NPDES permit to carry out his suction dredging activities. Respondent's Prehearing Exchange ("RPE") 5, 6, 11, 12.

Given the stipulations above, the elements the EPA must establish for the purposes of the instant motion are whether Respondent caused a "discharge" of a "pollutant." Further distilled, the only issue in dispute is a legal one: whether the processing of streambed material on a suction dredge and the release of suspended solids and the resulting turbid plume constitutes a

[1] Respondent conditioned this stipulation upon whether Respondent's operation of the suction dredge resulted in the "discharge of a pollutant." *See* RPE at 11. This memorandum addresses those elements and the definition of "point source" below.

"discharge of a pollutant," which the CWA defines as "any *addition* of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12) (emphasis added). EPA has offered sufficient evidence to establish the required elements, as explained below. Respondent's challenge to those elements is one of law, and does not raise a question of material fact.

1. The release of streambed materials from Respondent's suction dredge into the South Fork Clearwater River constitutes a "discharge" as defined by CWA section 502(12).

Under CWA section 502(12), 33 U.S.C. § 1362(12), the term "discharge of a pollutant" means any addition of any pollutant to navigable waters from any point source. There is no question of material fact that processed dredged spoil, rock, and sand were released from Respondent's suction dredge into the South Fork Clearwater River, as photographed by Forest Service employee Clint Hughes and described in his report and declaration. CX – 01, pp.02, 05–07; CX – 02, ¶5, p.24. Respondent denies that his suction dredge activity resulted in a discharge and contends that the release of these materials did not constitute an "addition" pursuant to the definition of "discharge" provided by CWA section 502(12). This is a legal argument, not a question of fact.

The relevant law holds that the release of material from suction dredging constitutes an "addition" under CWA section 502(12) despite the material's origin in the same water body to which it is released. The United States Court of Appeals for the Ninth Circuit has upheld EPA's interpretation that placer mining, which includes suction dredging, results in the "discharge" of a pollutant. In *Rybachek*, the Ninth Circuit considered a final rule promulgated by EPA regulating placer mining activities in Alaska under the CWA. The court explained: "even if the material discharged originally comes from the streambed itself, such resuspension may be interpreted to

be an addition of a pollutant under the Act." *Rybachek*, 904 F.2d at 1285. This is a well-settled principle.[2] Accordingly, and as noted above, the EPA has regulated discharges from suction dredge operations for decades. *See* 53 Fed. Reg. 18,777 (May 24, 1988) (establishing effluent limitation guidelines for large-scale suction dredges and determining not to produce effluent limitations guidelines for small-scale suction dredging and instead opting to continue regulating such dredging using NPDES permits); 61 Fed. Reg. 64,796 (Dec. 6, 1996) (NPDES General Permit Modifications for medium and small sized suction dredge operations in Alaska); CX – 13 (Fact Sheet, Alaska Suction Dredge GP, providing background information on the EPA's history of suction dredge permits); CX – 03 (Idaho Suction Dredge GP).

In his Prehearing Exchange, Respondent raised two legal arguments to support his argument that he did not cause a discharge of pollutants: 1) the discharge was at most "incidental fallback" and outside EPA's authority to regulate under *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998); and 2) the discharge was not the addition of anything, much less a pollutant under the United State Supreme Court's decisions in *L.A. Cty. Flood Control Dist. v. NRDC, Inc.*, 133 S. Ct. 710, 568 U.S. 78 (2013) and *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 124 S. Ct. 1537 (2004). RPE, p. 5. Both of these legal arguments fail for the reasons described below.

First, in his Prehearing Exchange, Respondent cites *Nat'l Mining Ass'n* as the primary support for his legal argument that his activity did not result in a "discharge" or any "addition" of

[2] *See Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983) (stating that "the word 'addition,' as used in the definition of the term 'discharge,' may reasonably be understood to include 'redeposit'"); *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1506 (11th Cir. 1985) (action of digging up sediment and redepositing it on sea bottom by boat propellers constitutes an addition of pollutants).

a pollutant. RPE, p.5, 6. In *Nat'l Mining Ass'n*, 145 F.3d 1399 (D.C. Cir. 1998), the United States Court of Appeals for the D.C. Circuit struck down the United States Army Corps of Engineers' ("Corps") regulation of "incidental fallback" because it exceeded the Corps' authority under CWA section 404. A common example of incidental fallback can occur in traditional dredging, when a bucket is used to excavate material from the bottom of a river, stream, or wetland. Soils or sediments that may fall from the bucket back into the water are "incidental fallback." The D.C. Circuit held that "the straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it *happens* to fall back. Because incidental fallback represents a net withdrawal, not an addition, of material, it cannot be a discharge." *Nat'l Mining Ass'n*, 145 F.3d at 1404 (emphasis added).

The legal distinction between "incidental fallback" and the discharge at issue here is clarified in the same case upon which Respondent relies to support his legal argument:

> Perhaps the strongest authority for the agencies' position is *Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990). There the Ninth Circuit found that the Act permitted EPA to regulate placer mining, a process in which miners excavate dirt and gravel in and around waterways, and, after extracting the gold, discharge the leftover material back into the water. *Rybachek* held that the material separated from gold and released into the stream constituted a pollutant, and, to the extent that "the material discharged originally comes from the streambed itself, [its] resuspension [in the stream] may be interpreted to be an addition of a pollutant under the Act." *Id.* at 1285. *Rybachek* would help the agencies if the court had held that imperfect extraction, i.e., extraction accompanied by incidental fallback of dirt and gravel, constituted "addition of a pollutant," but instead it identified the regulable discharge as the discrete act of dumping leftover material into the stream after it had been processed.

Nat'l Mining Ass'n, 145 F.3d at 1406. The D.C. Circuit made clear, in analyzing "incidental fallback," that it does not apply to the type of mining at issue in this case. As described in

Rybachek, and clarified in *Nat'l Mining Ass'n*, Respondent engaged in "the discrete act of dumping leftover material into the stream after it had been processed." *Id.*

Next, Respondent's Prehearing Exchange cites to *L.A. County Flood Control District* and *Miccosukee* dealing with the concept of "water transfers" and dam releases to support the flawed legal argument that "the purported discharge was not the addition of anything, much less a pollutant." RPE, p.5; *see also* RPE, p.7, 8. In *Miccosukee*, 541 U.S. 95 (2004), the Supreme Court held that the transfer of units of polluted water between "two parts of the same water body" does not constitute a discharge of pollutants under the CWA (known as the "one ladle of soup" concept). Similarly, in *L.A. County Flood Control District*, 568 U.S. 78 (2013), the Supreme Court held that the flow of water from an improved portion of a navigable waterway to an unimproved portion of the same waterway does not qualify as a "discharge of a pollutant" under the CWA.[3] This "ladle of soup" concept is not analogous to Respondent processing riverbed materials through a machine and rereleasing the processed waste back into to the river. Water remains water when transferred while latent riverbed materials (i.e., dredged spoil, rock, and sand, which are all statutory pollutants as discussed in the section below) are transformed into a discharge or addition of pollutants once processed through a suction dredge and released into a water body. The United States Court of Appeals for the Fourth Circuit has addressed this distinction in the context of sidecasting:

> The idea that there could be an addition of a pollutant without an addition of material seems to us entirely unremarkable, at least when an activity transforms some material from a nonpollutant into a pollutant, as occurred here. In the course of digging a ditch across the Deaton property, the contractor removed earth and vegetable matter from the wetland. Once it was removed, that material became "dredged spoil," a statutory pollutant and a *type* of material that up until then was

[3] *See also Froebel v. Meyer*, 13 F. Supp. 2d 843 (E.D. Wis. 1998), *aff'd*, 217 F.3d 928 (7th Cir. 2000) (holding that sediments continuously passing through a dam do not constitute a discharge).

> not present on the Deaton property. It is of no consequence that what is now dredged spoil was previously present on the same property in the less threatening form of dirt and vegetation in an undisturbed state. What is important is that once that material was excavated from the wetland, its redeposit in that same wetland *added* a pollutant where none had been before.

U.S. v. Deaton, 209 F.3d 331, 335–36 (4th Cir. 2000) (*citing* 33 U.S.C. § 1362 (6), (12)). Other courts have reached the same conclusion. *See Avoyelles Sportsmen's League, Inc.*, 715 F.2d at 923 (stating that "the word 'addition,' as used in the definition of the term 'discharge,' may reasonably be understood to include 'redeposit'"); *M.C.C. of Florida, Inc.*, 772 F.2d at 1506 (action of digging up sediment and redepositing it on sea bottom by boat propellers constitutes an addition of pollutants); *Borden Ranch P'ship v. U.S. Army Corps of Eng'r*, 261 F.3d 810, 814 (9th Cir. 2001) (holding that "once that material was excavated from the wetland, its redeposit in that same wetland added a pollutant where none had been before."); *Duarte Nursery, Inc. v. U.S. Army Corps of Eng'rs*, 2016 U.S. Dist. LEXIS 76037, at *48-49 (E.D. Cal., June 10, 2016) (holding that defendants redeposit of soil constituted a discharge of pollutants and finding *L.A. County Flood Control District* and *Miccosukee* inapposite because they concern the redeposit of water not soil).

As the foregoing demonstrates, EPA's legal authority to regulate discharges from suction dredges is a well-settled legal question and Respondent's arguments to the contrary do not upset that long-standing legal principle. There is no genuine issue of material fact that Respondent's suction dredge activities on July 22, 2015 constitute an "addition" or discharge of pollutants as discussed in *Rybachek*. Suction dredging of the type performed here involves the use of a motor-powered suction pump to excavate streambed sediments through a hose, lift them, process them through a sluice box placed on a floating platform, and then release the processed waste back into the river. Accordingly, Respondent "does not deny that he was operating a small suction

dredge of a type classified by the Idaho Department of Water Quality as a recreational dredge," that his dredge had "a hose of 5 inches in diameter or less and a motor of 15 horsepower or less." RPE, p.6. EPA also agrees with Respondent's description of the outcome of the suction dredging process—that solid material is re-released into the waterbody and can remain suspended for significant distances thereafter. *See* RPE, p.7-8 (stating that the dredging operation pulls in water and streambed material and "drop[s] heavy metals and rocks from the water into a sluice attached to the dredge," and that the "remaining solid material is dispersed back to the stream . . . 30 – 40 feet from where it started though in more extreme cases the lighter matter may go as far as 200 feet."). That characterization is consistent with both the common understanding of suction dredging and Mr. Hughes' observations of the turbid plume extending from Respondent's dredge. *See* CX – 01, p.02; CX – 02, ¶5, p.24. In summation, the question of law regarding whether suction dredge activity causes a "discharge of pollutants" is properly resolved in favor of Complainant, and no question of material fact exists as to whether Respondent's activities resulted in a discharge.

2. The dredged spoil, rock, and sand that Respondent processed and released with his suction dredge are "pollutants" as defined by CWA section 502(6).

Under CWA section 502(6), 33 U.S.C. § 1362(6), the term "pollutant" includes, *inter alia*, dredged spoil, rock, and sand. Respondent denies that the dredged spoil, rock, and sand contained in the turbid plume emanating from Respondent's suction dredge constitute a "pollutant."

The Ninth Circuit has explained that the term "pollutant," under the CWA, encompasses "the materials segregated from gold in placer mining." *Rybachek*, 904 F.2d at 1285. The regulable discharges contained within processed wastewater resulting from the placer mining at

issue in *Rybachek* include, among other things, suspended solids which "[i]n the Clean Water Act, Congress classified . . . as a conventional pollutant." *Id.* at 1291 (citing 33 U.S.C. § 1314(a)(4)). EPA regulates discharges from suction dredging, which is a type of placer mining, and explains in the Technical Fact Sheet supporting the Idaho Suction Dredge GP that:

> The primary pollutant of concern in the discharges from a suction dredge is suspended solids. The suspended solids in the effluent discharged from suction dredge outlets result from the agitation of stream water and stream bed material in the dredge. The discharged suspended solids result in a turbidity plume, or cloudiness, in the receiving water.

CX – 04, pp.76.

Clint Hughes of the Forest Service observed and photographed a plume of turbid discharge being released from Respondent's suction dredge. CX – 01, pp.2, 05–07; CX – 02, ¶5, p.24. Respondent does not dispute that such material was released from his suction dredge. Instead, "Respondent denies that the dredged spoil, rock, and sand contained in the turbid plume discharged from Respondent's suction dredge were pollutants." RPE, p.14, citing Answer ¶¶ 3.6, 3.9. Respondent explains that whether dredged spoil, rock, and sand are "pollutants" for the purposes of the CWA depends on their origin. This is a legal argument, not a question of fact, and is nothing more than a repackaging of the flawed legal arguments Respondent sets out regarding "discharge," as discussed in the section above. Per Respondent's interpretation of relevant case law, only dredged spoil, rock, and sand that are "added" to water are pollutants. RPE at 10–11. Ignoring the fact that a suction dredge subjects riverbed materials to a multi-step process, Respondent creates a distinction between an "added" pollutant and one that is "pick[ed] up from a stream and then put[] . . . back in the stream it came from." *Id.* at 11. The CWA makes no such distinction with respect to these enumerated pollutants, nor does any case law, including those cases cited by Respondent involving water transfers and dam releases.

While Respondent offers to produce testimony and documentary evidence arguing that dredged spoil, rock, and sand drawn from a riverbed using a suction dredge, processed, and then rereleased into a river are not "pollutants" for the purposes of the CWA, he cannot supplant applicable statutory provisions and case law dictating precisely the opposite. Such testimony and documentary evidence, if offered, would create no question of material fact, and none exists, that Respondent's suction dredge released a "pollutant" as defined in CWA section 502(6) and explained by the Ninth Circuit in *Rybachek.* Accelerated decision should be granted on this point.

3. The suction dredge operated by Respondent is a "point source" as defined by CWA section 502(14).

Under CWA section 502(14), 33 U.S.C. § 1362(14), the term "point source" means "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit . . . or vessel or other floating craft, from which pollutants are or may be discharged."

Respondent stipulates that the suction dredge he operated is a "point source" as defined by the CWA. However, Respondent, conditioned this stipulation upon whether his operation of the suction dredge resulted in the "discharge" of a "pollutant." *See* RPE, p.11. Complainant addresses those elements separately. To the extent Respondent would dispute that the suction dredge is a "discernible, confined, and discrete conveyance . . . from which pollutants are or may be discharged," Complainant maintains that there is no question of material fact as to this issue. Courts have held that the "definition of a point source is to be broadly interpreted and embraces the broadest possible definition of any identifiable conveyance from which pollutants might enter

waters of the United States." *Peconic Baykeeper, Inc. v. Suffolk County*, 600 F.3d 180, 188 (2nd Cir. 2010).

The Idaho Suction Dredge GP Technical Fact Sheet includes the following description of suction dredging: "Suction dredges consist of a supporting hull with a mining control system, excavating and lifting mechanism, gold recovery circuit, and waste disposal system." CX – 04, p.75. The waste disposal system of the suction dredge acts as a discrete conveyance or conduit of the suspended solids discharged into waters following the suction dredge's processing of streambed materials. Despite courts' willingness to broadly interpret the definition of "point source," even a narrow interpretation would result in a finding that Respondent's suction dredge falls within definition of that term provided in the CWA section 502(14). There is no question of material fact as to this element of liability.

B. Complainant Calculated an Appropriate Penalty Based on Evidence in the Record and in Accordance with Penalty Criteria Set Forth in the Applicable Statute.

The Rules require that a civil penalty be assessed in accordance with the applicable statute and any civil penalty guidance issued in conjunction therewith. 40 C.F.R. § 22.27(b). An Administrative Law Judge (ALJ) may grant accelerated decision on the penalty assessed for an alleged violation "where it is clear that no genuine issues of material fact exist as to the penalty, particularly where the proposed penalty [is] comparatively low." *Wisconsin Plating Works of Racine, Inc.*, 2009 EPA ALJ LEXIS 11, at *20–21 (EPA, July 2, 2009).[4]

[4] Citing *Sam Emani*, 1994 EPA ALJ LEXIS 69 (EPA, Nov. 30 1994). In *Sam Emani*, the ALJ granted EPA's motion for accelerated decision on penalty for $3,105.00 where EPA presented unrebutted evidence and the respondent asserted unsupported ability to pay issues. As summarized by Chief Judge Biro in *Wisconsin Plating*, the ALJ in that case determined that "oral hearing, confronting EPA's witnesses, would be unproductive." 2009 EPA ALJ LEXIS 11, at *21.

The CWA section 309(g)(1)(A), 33 U.S.C. 1319(g)(1)(A), authorizes EPA to assess a civil penalty upon finding a violation of the Act. EPA has calculated a proposed civil penalty of $6,600 in this case, based on the evidence in the record and in accordance with the penalty criteria set forth in the CWA. Complainant's Prehearing Exchange provides the factual information and supporting documentation relevant to the penalty assessment. Complainant's Rebuttal Prehearing Exchange ("CRPE") provides the proposed penalty and describes in detail EPA's authority for assessing penalties, the statutory factors by which EPA assesses penalties, the methodology used to do so, and the application of the factors and methodology to the facts of this case. Complainant's Specification of Proposed Penalty (CPRE, Section II) is hereby incorporated by reference into this Motion for Accelerated Decision.

In his Prehearing Exchange, Respondent raises the following arguments that arguably pertain to penalty: 1) Respondent's discharge was not more than *de minimis* and caused no environmental effects; 2) Respondent was acting in good faith reliance on his right to work on his mining claim; and 3) Respondent may or may not have understood his rights in the context of these regulations with respect to his mining claim. RPE. pp.5–6. In his Prehearing Exchange, Respondent does not provide factual information, supporting documentation, or proposed testimony to support these arguments. RPE, p.13. EPA has provided information and supporting documentation showing that no question of material fact exists as to any of these arguments, described below in turn.

Regarding Respondent's argument that his activities caused no environmental effects, Complainant's specification of proposed penalty provided in its Rebuttal Prehearing Exchange goes into great detail regarding the potential for harm to the environment caused by Respondent's CWA violation. CPRE, pp.7-13. The South Fork Clearwater River is a sensitive

aquatic resource due to the presence of ESA-listed species and their critical habitat and its status as a CWA section 303(d)-listed impaired waterbody for sediment and temperature. CPRE, p.10 (*citing* CX – 17, p.977; CX – 40; CX – 06, p.178, CX – 03, p.38). Suction dredging activity has the well-documented potential to harm the sensitive aquatic resource of the South Fork Clearwater River. CPRE, pp.10-11 (*citing* CX – 18, p.1064.; CX – 17, pp.1013-32, 1058; CX – 21, p.1147-51. Respondent's suction dredge activities on July 22, 2015, resulted in the potential for harm to South Fork Clearwater River. CPRE, pp.11-12 (*citing* CX – 01, pp.02, 5-7; CX – 02, ¶5, p.24.; CX – 37; CX – 38). That determination of a potential for environmental harm, supported by evidence in the record, contradicts Respondent's unsupported assertion to the contrary.

Further, in evaluating the potential for harm, Complainant acknowledged the presence of certain mitigating factors and took those into account in assessing the proposed penalty: that scale of the potential impairment to the aquatic resource resulting from one day of documented discharge of a conventional pollutant from a small-scale suction dredge warrants an appropriate reduction in the size of the proposed penalty. CPRE, pp.12-15. Complainant also took into account the relevant reports provided by Respondent in his Prehearing Exchange and provided: "While some of the conclusions from these reports suggest that actual impacts from small-scale suction dredging may be relatively low depending on circumstances, a conclusion that Complainant does not dispute, they do not support Respondent's assertion that there are no adverse environmental effects." CPRE, pp.15-16, n.32. To the extent Respondent would argue that his individual operation of a suction dredge would not alone adversely affect endangered or threatened species or their habitat, that argument is negated by the fact that the proposed penalty

here is "comparatively low." *See Wisconsin Plating Works of Racine, Inc.*, 2009 EPA ALJ LEXIS 11, at *20.

Finally, Complainant also provided detailed analysis regarding the risk to the CWA regulatory program because Respondent's discharges occurred without any CWA permits or meaningful oversight by the EPA. CPRE, pp.16-20. As the Environmental Appeals Board has noted, "even if there is no actual harm to the environment, failure to obtain a [CWA] permit before [discharging pollutants into waters of the United States] may cause significant harm to the regulatory program." *Phoenix*, 11 E.A.D. at 400.

Respondent's other arguments that, in carrying out the suction dredging activity giving rise to this case, he was "acting in good faith reliance on his right to work his vested mining claim" and a question exists whether he understood his rights in this situation, RPE, p.5, are examined in detail in the Complainant's specification of proposed penalty; specifically, in considering Respondent's culpability or blameworthiness for the CWA violation. CRPE, pp.23-27. The information provided in Complainant's Prehearing Exchanges, demonstrates that the EPA, the Corps, and the Idaho Department of Water Resources provided Respondent with notice that his suction dredge operation required CWA authorization and that his actions were indeed willful. *Id.*; *see* CX – 08 (EPA letter to D. Erlanson, October 3, 2014); CX – 09 (Corps letter to D. Erlanson, February 11, 2014); CX – 29 ("Letter Permit" from the Idaho Department of Water Resources providing clear notification in bold font that EPA requires NPDES permit coverage for small scale suction dredging in Idaho); CX – 11 (EPA letter to D. Erlanson, August 7, 2015). Respondent obtained no such coverage because the Idaho Suction Dredge GP was not available

for the South Fork Clearwater River at the time and it is undisputed that Respondent did not have an individual NPDES permit. That fact, supported by evidence in the record, negates any argument that Respondent's reliance on working his mining claim should downwardly affect the calculated penalty and belies arguments of ignorance of these requirements. No question of material fact exists as to these purported issues. Further, the EPA's general penalty framework guidance, which is instructive in this matter, states that "lack of knowledge of the legal requirement, should never be used as a basis to reduce the penalty. To do so would encourage ignorance of the law. Rather, knowledge of the law should serve only to enhance the penalty."[5]

Respondent has not provided evidence or explanation in support of his arguments related to the penalty determination. Given Complainant's well-supported assessment of a comparatively low penalty and the fact that Respondent has raised no question of material fact on the issue of penalty, the standard for a motion for accelerated decision on the penalty is satisfied. *Bonanza Valley Aviation, Inc.*, 1998 EPA ALJ LEXIS 70 (EPA, Nov. 20, 1998) (granting accelerated decision and assessing $4,000 penalty where respondent provided no evidence or explanation in support of its arguments).

VI. CONCLUSION

The Motion for Accelerated Decision should be granted as to liability because EPA has established the necessary elements of a CWA violation and Respondent has failed to raise any question of material fact. Additionally, the Motion should be granted as to penalty because EPA

[5] EPA, A Framework for Statute-Specific Approaches to Penalty Assessment: Implementing EPA's Policy on Civil Penalties #GM-22, p.18, February 1984, *available at* https://www.epa.gov/sites/production/files/documents/penasm-civpen-mem.pdf

calculated the proposed penalty based on the evidence in the record and in accordance with the penalty criteria set forth in the statute.

Dated this 5th day of June, 2017.

Respectfully submitted,

/s/ Endre M. Szalay

ENDRE M. SZALAY
Assistant Regional Counsel
U.S. EPA, Region 10
1200 Sixth Avenue, Suite 900, ORC-113
Seattle, Washington 98101-3140
(206) 553-1037
szalay.endre@epa.gov

/s/ William M. McLaren

WILLIAM M. McLAREN
Assistant Regional Counsel
U.S. EPA, Region 10
1200 Sixth Avenue, Suite 900, ORC-113
Seattle, Washington 98101-3140
(206) 553-1037
mclaren.william@epa.gov

COUNSEL FOR COMPLAINANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **MOTION FOR ACCELERATED DECISION**, dated June 5, 2017, was filed electronically with the Clerk of the Office of Administrative Law Judges using the ALJ e-filing system, which sends a Notice of Electronic Filing to Respondent.

The undersigned also certifies that on this date she served the foregoing **MOTION FOR ACCELERATED DECISION**, via regular US Mail, postage prepaid, on Mark Pollot, Attorney for Respondent Dave Erlanson, Sr., at 772 E. Lava Falls St., Meridian, Idaho 83646 and via email at conresctr@cableone.net.

Dated this 5th day of June, 2017.

/s/ Shannon K. Connery
Shannon Kaye Connery
Paralegal Specialist
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
1200 Sixth Avenue, Suite 900, M/S ORC-113
Seattle, WA 98101
(206) 553-1037