UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Dr. Daniel J. McGowan,	)	**Docket No. CWA-07-2014-0060**
	)	
	)	
Respondent.	)	**Dated: July 25, 2016**

ORDER ON MOTION FOR ACCELERATED DECISION, MOTIONS TO STRIKE, AND MOTION TO SUPPLEMENT

I. Procedural History

On March 6, 2014, the United States Environmental Protection Agency ("EPA") Director of the Water, Wetlands, and Pesticides Division, Region 7 ("Complainant") filed a Complaint initiating this proceeding. The Complaint alleged that on December 28, 2011, and again on July 18, 2012, Dr. Daniel J. McGowan ("Respondent" or "McGowan") and/or persons acting on his behalf authorized and/or directed the release of fill material from a dam located on his property into Plum Creek without a permit issued under Section 404, 33 U.S.C. § 1344, of the Clean Water Act ("CWA" or "Act"), in violation of Section 301(a), 33 U.S.C. § 1311(a), of the CWA. The Complaint alleged further that on January 18, 2012, prior to the release on July 18, the Army Corps of Engineers had issued Respondent a Cease and Desist letter ordering him to cease discharges of dredged and/or fill material into Plum Creek. The Complaint proposed that he be assessed a civil penalty of up to $177,500, the statutory maximum, for his violations of the Act.

Respondent, through counsel, filed an Answer to the Complaint and thereafter a prehearing order was issued setting deadlines for the parties' prehearing exchanges. Accordingly, on February 12, 2015, Complainant filed its Prehearing Exchange and on March 6, 2015, Respondent filed a Prehearing Exchange. Upon motion granted for leave to amend the Complaint, on March 12, 2015, Complainant filed an Amended Complaint and Notice of Opportunity for Hearing ("Am. Compl."), adding an allegation that Respondent's discharges of sediment from his dam also constituted discharges of dredged material. On April 6, 2015, Respondent filed an Answer to the Amended Complaint ("Am. Answer") denying the allegations and asserting affirmative defenses.

On April 17, 2015, Complainant filed a Motion for Accelerated Decision as to Liability and Motion to Strike Respondent's Defenses (collectively, "Motion for Accelerated Decision"). After receiving an extension of time to file, on May 18, 2015, Respondent filed a Memorandum and Points of Authority in Opposition to the Motion for Accelerated Decision ("Opposition"),

and Objections to Complainant's Evidence in Support of its Motion for Accelerated Decision ("Objections"). On May 28, 2015, the parties submitted a Joint Motion to Supplement Prehearing Exchange. On June 5, 2015, Complainant filed a Rebuttal to Respondent's Opposition ("Rebuttal"). On June 23, 2015, Respondent filed a Motion to Strike declarations attached to the Rebuttal, and Complainant filed a Response thereto on July 6, 2015.

II. Preliminary Procedural Motions

A. Joint Motion to Supplement Prehearing Exchange

The Joint Motion to Supplement Prehearing Exchange is an unopposed request by each of the parties to supplement their respective prehearing exchanges. Complainant seeks to add testimony of a witness, Bruce Dannatt[1] to support its argument that a Respondent's maintenance exemption defense, is merely a pretext for dredging. Complainant explains that it did not name Dannatt as a witness in the original Prehearing Exchange because it was filed prior to the time Respondent first raised the maintenance exemption defense, which was in his Answer to the Amended Complaint. Respondent seeks to add as an exhibit an email from Andy Glidden to Jeff Schuckman with the subject line titled, "Plum Valley Res." This email was previously provided in the Opposition as an attachment to Stephen D. Mossman's Affidavit.

This proceeding is governed by EPA's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"). *See* 40 C.F.R. §§ 22.1–22.45. The Rules of Practice require the parties to submit prehearing exchanges of information that contain the "names of any expert or other witnesses it intends to call at the hearing, together with a brief narrative summary of their expected testimony . . . [and] copies of all documents and exhibits which it intends to introduce into evidence at the hearing." 40 C.F.R. § 22.19(a). Moreover, the Rules of Practice require that a party "promptly supplement or correct the [prehearing] exchange when the party learns that the information exchanged or response provided for is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party." *Id.* at § 22.19(f). A party should file a supplement to their Prehearing Exchange as soon as possible, and at least fifteen days prior to the hearing. *Id.* at § 22.22(a)(1).

The parties' requests are unopposed and are compliant with the Rules of Practice and the Prehearing Order. Therefore the Joint Motion to Supplement Prehearing Exchange is granted.

B. Respondent's Motion to Strike

Respondent moves to strike the Declarations of Barry Harthoorn, Bruce Dannatt, and Dr. Paul Boyd which were attached to Complainant's Rebuttal, on grounds that they are not required to be considered under the Rules of Practice, they have a sandbagging effect, they are prejudicial

[1] The motion refers to the witness as Bruce Danny. However, Complainant in subsequent filings refers to the same witness as Bruce Dannatt. For purposes of this Order, the disparity of the name of this witness is not material, and the witness will be referred to as Bruce Dannatt.

to Respondent, and they contain new material factual information. Specifically, Respondent argues that under 40 C.F.R. §§ 22.16 and 22.20, accelerated decision may be rendered without additional evidence, such as affidavits, and are thus unnecessary. He argues that under Section 22.16, "additional responsive documents" such as the Declarations are only permitted by order of the judge "after Respondent was provided its last opportunity to respond to Complainant's Motion." Motion to Strike at 3.

Respondent argues further that his Opposition was based on materials and evidence in Complainant's Motion for Accelerated Decision, and because the Declarations were filed afterward and contain new facts, Respondent has had no opportunity to refute them. Respondent points out that they appear to be an example of sandbagging, where a party intentionally withholds its best evidence or argument until the opposing party has no adequate opportunity to respond. In support, Respondent points to *Viero v. Bufano*, 925 F. Supp. 1374, 1379–80 (N.D. Ill. 1996). Respondent asserts that the "Declarations were added at a time when it would be difficult for McGowan to properly respond" and he believes they "were improperly added and were used intentionally to obstruct and potentially delay the proceeding." Motion to Strike at 5. Respondent urges that Federal Rules of Civil Procedure ("FRCP") 56 and 6(c)(2) require that affidavits must be served with the motion, to avoid "litigation by ambush" as described in *Tishcon Corp. v. Soundview Communications, Inc.*, No. 1:04-CV-524-JEC, 2005 WL 6038743 (N.D. Ga. Feb. 15, 2005). Respondent asserts that "the prejudicial effect of allowing the . . . declarations to which [he] can no longer respond . . . leaves [him] with no remedy on how to address these new Declarations. . . ." Motion to Strike at 6.

Respondent also argues that the Declarations suggest that the facts of this case are disputed and therefore the Motion for Accelerated Decision should be denied. If the Declarations are not stricken, Respondent urges, he should be given an opportunity to respond.

In response, Complainant argues, *inter alia*, that the Declarations were submitted directly in reply to issues raised in Respondent's Opposition and therefore are not unfairly prejudicial, that administrative pleadings are liberally construed and easily amended, that motions to strike are drastic and harsh remedies, and that Respondent's reliance on sandbagging case law is erroneous. Complainant states that it does not object to providing Respondent an opportunity to respond to the Reply and Declarations.

The Rules of Practice expressly allow a movant, after receiving a response to the motion, to submit a reply with attached affidavit or other evidence. The Rules provide for a motion, a response, and a reply "limited to issues raised in the response," and specify that "[t]he response *or reply* shall be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon." 40 C.F.R. § 22.16(a) and (b) (emphasis added). This is not inconsistent with federal court procedure discussed in *Tishcon* and *Viero.* In *Tishcon*, the court noted that FRCP 6(d) requires affidavits in support of a motion for summary judgment to be submitted with the motion, to prevent new substantive facts from being produced in support of a motion when the opponent has no opportunity to respond. The court declined to consider reply affidavits that were "offered and intended to replace inadequate evidentiary submissions" in support of the motions for summary judgment, and that were not limited to addressing an argument initiated in response to the motions. *Tishcon Corp. v. Soundview Communications, Inc.*, 2006 U.S. Dist.

LEXIS 97309, at **25–26 (N.D. Ga. Feb. 15, 2006). The *Tishcon* court distinguished that situation from cases allowing reply affidavits submitted "specifically, for the limited purpose of responding to matters raised in the responses filed by the opposing parties." *Id.* (citing *Kershner v. Norton*, 2003 U.S. Dist. LEXIS 14117, at *4 (D.D.C. Aug. 14, 2003) ("courts have held that filing an affidavit with a reply is appropriate when the affidavit addresses matters raised in the opposition"); *Shah v. Clark Atlanta Univ., Inc.*, 1999 U.S. Dist. LEXIS 22077 (N.D. Ga. July 21, 1999) (same)). In *Viero*, the court allowed evidence submitted with the reply that addressed an issue raised by the opposing party that was not addressed in the motion. *Viero v. Bufano*, 925 F.2d 1379. Referring to sandbagging[2] and trial by ambush, the court rejected affidavits that could have been offered with the motion, particularly where discovery was closed before the response was due, and the non-movant would have no opportunity to respond. *Id.* at 1380.

Complainant's Rebuttal is properly limited in scope to issues first raised in the Opposition, and the Rebuttal relies upon the attached Declarations. In the Opposition (at 12), Respondent argues for the first time that "any increase in sediment downstream of the dam was incidental to normal dam operations." In the Rebuttal (at 1-3), Complainant responds to this argument and in support presents the Declaration of Dr. Boyd, the Corp's Regional Technical Specialist for Sedimentation and Alluvial Processes, who states that the Respondent's alleged discharges were not part of normal dam operations for this area because "[s]treams and rivers in the Niobrara River basin carry large amounts of sand due to the geomorphic conditions in the sandhills of Nebraska . . . [which] requires any reservoir in the basin be managed for sediment frequently." Respondent in the Opposition (at 18) also asserts for the first time that during the July 2012 releases, Respondent's "intended maintenance was cut short by the [U.S. Army Corps of Engineers] prior to the water level in the Reservoir dropping enough for any significant maintenance." In the Rebuttal (at 13), Complainant counters that the water level in the reservoir did not prevent Respondent from maintaining the dam because the reservoir was drained, and in support presents a second Declaration of Mr. Harthoorn,[3] stating there was no longer impounded water behind the dam, and it was nearly full of sand. Complainant also counters that Respondent was aware of the need to repair the dam for almost 10 years prior to the discharges, and in support presents the Declaration of Mr. Dannatt, stating that he is a contractor who provided information about removal of sand from the reservoir, and an estimate, to Will Williams, who works for Respondent and who inquired about removal of sediment above the dam. Also in support, Complainant points to the Boyd Declaration, explaining several options for removing the sediment.

Therefore, the Declarations were appropriately relied upon in the Rebuttal to respond to new arguments made by Respondent, are not an improper attempt to bolster the Motion for Accelerated Decision, and do not require permission to be filed. They are not prejudicial, as the

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[2] Sandbagging occurs when a party withholds evidence until its adversary rests and is likely unable to mount an effective response. 28 Charles Alan Wright & Victor James Gold, *Federal Practice & Procedure*, Evidence § 6164 (1st ed. 2010). Sandbagging is typically forbidden because of the unfairness it presents to the opposing party who has no opportunity to respond to the new evidence presented.

[3] Complainant submitted an earlier declaration of Mr. Harthoorn with the Motion for Accelerated Decision.

Rules of Practice would allow Respondent to file additional responsive documents with permission, requested, for example, in a motion for leave to file a response. 40 C.F.R. § 22.16(a). Nevertheless, I have not relied on any of the three Declarations, and they do not affect my ruling on the Motion for Accelerated Decision. The facts they contain do not raise any genuine issues of fact as to Respondent's liability for the alleged violations. Accordingly, Respondent's Motion to Strike the Declarations is denied as moot.

III. Statutory and Regulatory Background

In 1972 Congress substantially amended the Federal Water Pollution Control Act, now commonly known as the Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251–1387), "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). One of the national goals of the Act is to provide "for the protection and propagation of fish, shellfish, and wildlife" and "for recreation in and on the water." 33 U.S.C. § 1251(a)(2). The main objective of the CWA "incorporated a broad, systemic view of the goal of maintaining and improving water quality: as the House Report on the legislation put it, 'the word integrity' . . . refers to a condition in which the natural structure and function of ecosystems [are] maintained.'" *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 132 (1985). In order to achieve these goals, Section 301 of the Act provides that, except as in compliance with a permit under Section 402 or 404 of the Act, and certain other permits, limitations and standards not applicable in this case, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a).

A "discharge of a pollutant" is defined in the Act as "any addition of any pollutant to navigable waters from any point source . . . ." 33 U.S.C. § 1362(12).

A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, [or] rolling stock . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

"The term 'pollutant' means dredged spoil, solid waste, . . . biological materials, . . . rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6).

The Act defines the term "navigable waters" to mean "the waters of the United States." 33 U.S.C. § 1362(7). The regulations implementing the Act define "waters of the United States" as including:

> All 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.
> All interstate waters including interstate wetlands;
> All other waters such as intrastate lakes, rivers, streams (including intermittent streams), . . . the use, degradation or destruction of which would or could affect interstate or foreign commerce including any such waters:

> Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
> From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
> Which are used or could be used for industrial purposes by industries in interstate commerce.
>
> All impoundments of waters otherwise defined as waters of the United States under this definition;
>
> Tributaries of waters identified in paragraphs (g)(1)–(4) of this section;
> * * * .

40 C.F.R. § 232.2.[4]

Section 402 of the Act establishes the National Pollutant Discharge Elimination System ("NPDES") program, authorizing issuance of permits to regulate discharges of pollutants to navigable waters. Section 404 allows the Secretary of the Army to issue a permit "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a).

The regulations define "dredged material" as "material that is excavated or dredged from waters of the United States." 40 C.F.R. § 232.2. "Discharge of dredged material" is defined as "any addition of dredged material into, including any redeposit of dredged material other than incidental fallback within, the waters of the United States." 40 C.F.R. § 232.2.

"Fill material" is defined as "material placed in waters of the United States where the material has the effect of . . . [r]eplacing any portion of a water of the United States with dry land" or "[c]hanging the bottom elevation of any portion of a water of the United States" and includes "rock, sand, soil [and] clay." *Id*. The definition of "discharge of fill material" is "the addition of any fill material into waters of the United States." *Id*.

IV. Standards for Accelerated Decision

Under the Rules of Practice, the administrative law judge may grant 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 a 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 similar to that of summary judgment under Rule 56 of the FRCP. *Puerto Rico Aqueduct and Sewer Authority v. U.S. 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

[4] The definition quoted is that in effect at all times relevant to this proceeding. On June 29, 2015, the definition was amended. 80 Fed. Reg. 37054. The amendment does not affect the analysis herein.

grown up around Rule 56 is, therefore, the most fertile source of information about administrative summary judgment.").

The role of summary judgment is "to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required." *Wynne v. Tufts University School of Medicine,* 976 F.2d 791, 794 (1st Cir. 1992), *cert. denied*, 507 U.S. 1030 (1993). The party moving for summary judgment bears the initial burden of showing that there is no genuine issue of material fact to be decided with respect to any essential element of the claim, and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330-31 (1986); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250 n.4 (1986). The movant who bears the burden of proof at trial must show that a material fact cannot be genuinely disputed by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the . . . presence of a genuine dispute." FRCP 56(c)(1). Summary judgment should not be granted in favor of the movant "'unless a reasonable juror would be compelled to find its way on the facts needed to rule in its favor on the law,'" and "'if there is a chance that a reasonable factfinder would not accept a moving party's necessary propositions of fact,' summary judgment is inappropriate." *United States v. Donovan*, 661 F.3d 174, 185 (3d Cir. 2011) (quoting *El v. Southeastern Pa. Transp. Auth.,* 479 F.3d 232, 238 (3d Cir. 2007) (footnote omitted)). Under FRCP 56, the use of affidavits is not required to support a motion for summary judgment; reliance on other materials is permissible. 73 Am. Jur. 2d Summary Judgment § 23 (2d ed.); *Celotex Corp. v. Catrett*, 477 U.S. at 323.

Once the movant's burden is met, to defeat summary judgment, the nonmoving party must show that a material fact is genuinely disputed by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence . . . of a genuine dispute." FRCP 56(c)(1). The non-movant must "set out specific facts showing a genuine issue for trial." *Nolen v. FedEx TechConnect Inc.,* 971 F. Supp. 2d 694, 700 (W.D. Tenn. 2013) (quoting *Viergutz v. Lucent Techs., Inc.*, 375 Fed. App'x 482, 485 (6th Cir. 2010)). It must do more than "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586–87 (1986). "There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Liberty Lobby*, 477 U.S. at 249–50; *Newell Recycling Company, Inc.*, 8 E.A.D. 598, 624, 1999 EPA App. LEXIS 28, at *59 (EAB 1999) (countervailing evidence must be sufficiently probative to create a genuine issue of material fact); *BWX Technologies, Inc.*, 9 E.A.D. 61, 76 (EAB 2000) (Respondent must provide "more than a *scintilla* of evidence on a disputed factual issue to show [its] entitlement to a trial or evidentiary hearing; the evidence must be substantial and probative.").

"In determining whether a genuine issue of material fact exists, a court must view the facts in the light most favorable to the non-moving party and make all reasonable inferences in that party's favor." *Gentile v. Nulty*, 769 F. Supp. 2d 573, 577 (S.D.N.Y. 2011); *Liberty Lobby*, 477 U.S. at 255 ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."). "A fact is 'material' for purposes of summary judgment if proof of that fact would establish or refute an essential element of the cause of action or defense." *Bruederle v. Louisville Metro Gov't*, 687 F.3d 771, 776 (6th Cir. 2012). A factual dispute is

"'genuine' if the evidence is such that a reasonable [fact finder] could return a verdict for the nonmoving party." *Liberty Lobby*, 477 U.S. at 248. The judge "must view the evidence presented through the prism of the substantive evidentiary burden." *Id*. at 255. In the present proceeding, the evidentiary standard is a preponderance of the evidence. 40 C.F.R. § 22.24(b).

When conflicting inferences may be drawn from the evidence and a choice among them would amount to fact finding, summary judgment is inappropriate. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1105 (D.C. Cir. 2002). Ultimately, "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Liberty Lobby*, 477 U.S. at 249.

Rule 56 of the FRCP provides that "If a party . . . fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion" or "grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it." FRCP 56(e)(3).

When the non-moving party has asserted an affirmative defense, the moving party must show that there is an absence of facts present in the record to support the defense. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002) (*quoting BWX Technologies, Inc.*, 9 E.A.D. 61, 78 (EAB 2000)). If the moving party does show an absence of facts supporting the defense, the non-moving party must identify "specific facts" from which a reasonable fact finder could find in its favor by a preponderance of the evidence in order to preserve its defense. *Id.*

For Complainant to meet its initial burden of proof on its motion for accelerated decision, it must show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law with respect to the following elements of liability: (1) Respondent is a "person" (2) who "discharged" a "pollutant" (3) from a "point source," (4) into "waters of the United States," (5) without a permit under Section 404 of the CWA. There is no question that Respondent, an individual, is a person. Other undisputed facts that are immediately evident from the parties' submissions are enumerated below. An analysis of whether Complainant has met its burden of proof on the other elements follows.

V. Undisputed Facts

1. Since the year 2000, Respondent Dr. Daniel J. McGowan has owned property known as the Ponderosa Pine Canyon Ranch ("the Property") in the northeast quarter of Section 32, Township 32 North, Range 22 West, Brown County, Nebraska. Am. Compl. ¶ 15; Am. Answer ¶ 15; Affidavit of Dr. Daniel J. McGowan dated May 15, 2015 ("McGowan Affidavit").

2. Plum Creek flows through the Property. A dam on the Property created a reservoir known as the Ponderosa Pine Canyon Reservoir, which flows through the dam into Plum Creek. McGowan Affidavit.

3. The reservoir contained a large amount of sediment. R PHE at 4; Complainant's Prehearing Exchange ("C PHE") Exhibit 11.

4. Respondent released water that contained sediment from behind the dam into Plum Creek by opening one or more gates on the dam on or about December 28, 2011. Am. Answer; Respondent's Prehearing Exchange ("R PHE") pp. 2–3, 4-5.

5. On January 18, 2012, the United States Army Corps of Engineers Omaha District ("Corps" or "USACE"), issued Respondent a Cease and Desist letter ordering Respondent to cease discharges of dredged and/or fill material into Plum Creek. Am. Compl. ¶ 17; Am. Answer ¶ 17.

6. In January 2012, after receipt of the Cease and Desist letter, Respondent contacted Barbara Friskopp of the Corps' Omaha, Nebraska office, and she agreed that he could keep the dam gate open until he could repair the dam. McGowan Affidavit; Friskopp Declaration ¶ 8; C PHE Exhibit 10; Opposition at 2. He closed the gate or gates on his dam in January 2012. Opposition at 2.

7. Respondent released water that contained sediment from behind the dam into Plum Creek by opening the gates on the dam on or about July 18, 2012. R PHE pp. 2–3, 4-5.

8. On July 20, 2012, the Corps issued another Cease and Desist letter to Respondent. McGowan Affidavit.

VI. Water of the United States

As to whether Plum Creek is a "water of the United States," Complainant asserts that it is a "stream" with "relatively permanent flow" used by travelers for recreational purposes and from which fish could be taken and sold, and is a tributary to an interstate river which is similarly used for recreational purposes and has fishing. In support, Complainant presents a U.S. Geological Survey map and photographs, including aerial photographs, of Plum Creek showing that it has year-around flow and is a tributary to the Niobrara River. C PHE Exhibits 2, 18, 24, 32, 34, 36, 40, 57. Complainant points to designation of the Niobrara River on the National Park Service website as a "National Scenic River" and description as "the premier recreation river in Nebraska." Motion for Accelerated Decision ("Mot.") at 15. Complainant presents evidence to show that the stretch of Plum Creek between the Ponderosa Pine Canyon Reservoir and Niobrara River is a renowned trout-fishing stream, stocked with trout by the Bobcat Wildlife Management Area, and designated by the State of Nebraska as a cold water aquatic life stream. C PHE Exhibit 37, 38, 46. Complainant also presents a Declaration of Andrew Glidden, of the Nebraska Game and Parks Commission, describing types of recreation on that stretch of Plum Creek and its year round flow.

In the Answer to the Amended Complaint, Respondent denies that Plum Creek is a water of the United States. Am. Answer ¶ 25. However, Respondent has not set forth any argument or pointed to any evidence that suggests that Plum Creek does not meet the definition of "water of the United States."

Complainant has met its burden by citing to "particular parts of materials in the record" (FRCP 56(c)(1)) which shows that Plum Creek meets the definition in 40 C.F.R. § 232.2, ". . .

waters such as . . . streams . . . [w]hich are or could be used by interstate or foreign travelers for recreational or other purposes; or [f]rom which fish or shellfish are or could be taken and sold in interstate or foreign commerce." Complainant has also shown that Plum Creek meets the definition as a tributary of the Niobrara River. Respondent has not met his burden to show that a genuine dispute exists. FRCP 56(e)(3). It is concluded that there are no genuine issues of material fact as to whether Plum Creek is a "water of the United States" and Complainant has established this element of liability.

VII. Discharge of a Pollutant

There is no dispute that Respondent released water that contained sediment from behind the dam into Plum Creek by opening gates on the dam. The questions are whether the sediment constitutes a "pollutant" within the meaning of the Act and whether the release constitutes "discharge of a pollutant," that is, "any addition of any pollutant to navigable waters from any point source . . . ." 33 U.S.C. § 1362(12).

A. Parties' Arguments

Complainant points out that in *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 949 (7th Cir. 2004), the Seventh Circuit Court of Appeals found that accumulated sediment released from a pond through a dam and into a creek constituted "dredged spoil," which is expressly listed in the CWA definition of "pollutant." Complainant asserts that the material in the present case similarly was "dredged spoil" as "the sediment, primarily composed of sand, came from Respondent's reservoir, where it had settled to the bottom and was dredged into the River when Respondent opened the gate on his dam," as described in the Declarations of Andrew Glidden (¶ 9) and Mike Murphy (¶ 5). Mot. at 8-9, 10. Therefore, Complainant asserts that the release from the dam was a "discharge of dredged material."

Complainant explains that Respondent failed to remove sediment from the reservoir, which had accumulated in huge amounts, and points to Ms. Friskopp's observation of "huge amounts of sand . . . being flushed out and downstream" in her notes, and photographs from her visits to Respondent's property on July 18 and August 24, 2012. Motion at 9, citing C PHE Exhibits 11 (and photographs 5–9 therein), 21, 41; Friskopp Declaration ¶¶ 3, 4. Complainant points to Mr. Glidden's Declaration and photographs from his visits to the property in January, July, and August 2012, indicating that he observed sand that had been discharged from the dam and which resulted in large amounts of sediment being flushed downstream and settling. Motion at 9 (citing Glidden Declaration ¶¶ 7, 8); C PHE Exhibits 2.2, 2.4, 2.5, 33, 44, 45. Complainant also presents photographs taken by Mr. Harthoorn of the reservoir during the July 2012 discharge, which, Complainant asserts, depict the "dredging" of the reservoir. Motion at 10–11 (citing C PHE Exhibit 57); Harthoorn Declaration.[5]

Complainant also argues that the sediment meets the regulatory definition of "fill material" on the basis that the discharges resulted in the conversion of large portions of Plum

[5] Citations to Harthoorn Declaration refer to his initial Declaration dated April 15, 2015, attached to the Motion.

Creek from water to dry land and changed the creek's bottom elevation. In support, Complainant points to Mr. Harthoorn's references to new sand bars created in Plum Creek, and his photographs of sand filling Plum Creek directly below the dam, of the dam during the discharge, and the depth and clarity of the creek prior to the discharges and after the discharges, with the bottom elevation significantly raised and some areas filled with sand. Harthoorn Declaration; C PHE Exhibit 57. Mr. Harthoorn stated in his Declaration that after Respondent's discharges the "entire area was level with sand . . . [and therefore] you could walk across Plum Creek as [a] result of the heavy load of sand from the dam." Complainant points to Mr. Glidden's photographs showing a sand bar, and his description of the discharges as having "filled the entire stream bed with sand for over a mile and changed the stream's bottom composition from primarily a gravel/cobble to predominantly sand for almost the entire reach down-stream to the confluence with the Niobrara River." Glidden Declaration ¶¶ 7, 8; C PHE Exhibit 3. Complainant also points to Ms. Friskopp's reports and photographs of sand deposits below the dam and throughout Plum Creek. C PHE Exhibit 21 (and photographs 8-10, 17, 18, 20, 22). Finally, Complainant asserts that this evidence is corroborated by investigation reports by the Nebraska Department of Environmental Quality and written complains of downstream property owners.

Complainant asserts that Respondent's dam is a "discernable, confined and discrete conveyance" that conveyed pollutants from the reservoir into a stream and thus met the definition of "point source" in the CWA. Motion at 17. Complainant cites the conclusions in *Greenfield Mills*, 361 F.3d at 947, and *Catskill Mountains Chapter of Trout, Unlimited., Inc. v. City of New York*, 273 F.3d 481, 493 (2d Cir. 2001), that dams which conveyed pollutants from a reservoir to a stream constituted point sources under the Act.

Respondent denies that the sediment that was released from his dam constitutes a discharge of a pollutant, fill material or dredged material, because there was no "addition of any pollutant" where the sediment was present in the water upstream and downstream of the dam, flowing contiguously. While acknowledging that EPA interprets the term "discharge" differently, particularly in reference to a dam, between the permitting programs under Sections 402 and 404 of the Act, he highlights the reasoning in cases under Section 402 of the CWA, *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), *National Wildlife Federation v. Consumers Power*, 862 F.2d 580 (6th Cir. 1988), and *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001), *on reconsideration*, 451 F.3d 77 (2d Cir. 2006). In particular, he emphasizes the Second Circuit's statement that to be an "addition" of a pollutant, "a point source must *introduce* the pollutant into navigable water from the outside world." Opposition at 5-7 (quoting *Catskill Mountains*, 273 F.3d at 491 (citing *National Wildlife Federation v. Gorsuch*, 693 F.2d at 165)). In addition, he emphasizes the Supreme Court's statement in *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council, Inc.*, 133 S. Ct. 710, 713 (2013), that "no pollutants are 'added' to a water body when water is merely transferred between different portions of that water body."

Furthermore, Respondent contends that the sediment released from his dam is not "dredged material" because the dictionary definition of the term "dredge" implies mechanical means of removal, and as the D.C. Circuit has stated, "Congress understood 'discharge of dredged material" to mean open water disposal of material removed during the digging or

deepening of navigable waterways" in *American Mining Congress v. U.S. Army Corps of Engineers*, 951 F. Supp. 267, 273 (D.D.C. 1997), *aff'd sub nom. National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998) (citing S. Rep. No. 92-1236, 92nd Cong., 2d Sess. 141–42 (1972), reprinted in 1972 U.S.C.C.A.N. 3668 (Report of the Conference Committee)). In addition, he argues that sediment that was already present in Plum Creek cannot meet the regulatory definition of "fill material" because it was not "material placed" in the water. Opposition at 10; R PHE at 4.

Respondent argues that the Seventh Circuit's opinion in *Greenfield Mills* was undercut by EPA's Water Transfer Rule, which reaffirmed in an official agency policy that water on both sides of a dam is "one water." Opposition at 13–14 (citing 73 Fed. Reg. 33699 (June 13, 2008)). Respondent urges that the Section 402 context of the Water Transfer Rule is irrelevant, because "it does not matter if the 'pollutant' being passed through a dam is a Section 402 pollutant or Section 404 dredged and fill material" – if the water upstream and downstream of the dam are one water, "there can be no 'discharge' of a pollutant to that water by a passive dam structure." Opposition at 14-15.

Moreover, *Greenfield Mills* is factually distinct from the present case, he argues, as"[i]t appears that the 'muck' present in the [fish hatchery] supply pond . . . was not otherwise present" in the adjacent stream except for the occurrence of the discharge. Opposition at 8. The pond was separated from the river and served a unique purpose, the muck was formed as a result of that purpose, and the pond was completely filled with vegetation and not navigable by canoe, Respondent explains. *Id.* at 11. The sediment in the present case, on the other hand, came from the upstream portion of Plum Creek and merely passed through the dam into the downstream portion. Respondent points out that the Plum Creek Ecological Study Report by New Century Environmental, LLC ("New Century Report") indicates Plum Creek has "constantly a high presence of sand" both upstream and downstream of the dam. *Id.* at 11 (citing Opposition, Exhibit B (Affidavit of Dr. Gutzmer)).[6] He also points out a statement in the Report that "[d]ownstream accumulations of residual sediment piles were sparse to non-existent and the stream exhibited significant sediment removal since observations of sediment build-up by [New Century Environmental, LLC] in September of 2012" and "much of the sediment deposition in Plum Creek below the McGowan dam has been removed by natural flow and fluvial processes in the stream under natural conditions." *Id.* at 12 (quoting R PHE Exhibit 7 p. 45). He argues that "the continuous flow of water from upstream of a dam to downstream" is not a "redeposit" of sediment as referenced in side-casting cases, and that "any increase in sediment downstream of the dam was incidental to normal dam operations, and not new, or even reintroduced, material to Plum Creek." Opposition at 11, 12.

Respondent asserts that allegations that he "sluiced his dam" in December 2011 and July 2012 are "incorrect and contradicted by" his statements and by "the evidence" contained in the New Century Report. Opposition at 9. Respondent states in his Affidavit that Plum Creek has always naturally contained a high amount of sediment both upstream and downstream of the dam, and that on December 28, 2011, he partially opened the gate, and as a result, "the water

[6] The New Century Report was presented as Opposition, Exhibit B (Affidavit of Dr. Gutzmer)) and as R PHE Exhibit 7. For sake of simplicity, it is referenced herein as R PHE Exhibit 7.

level in the lake only dropped approximately two feet" and "[n]o sluicing took place." McGowan Affidavit ¶¶ 8, 13; Opposition at 2. Respondent challenges the admissibility of statements of Will Williams included in the Murphy Declaration, on the basis that they are hearsay. Objections at 3. He dismisses statements of Mr. Glidden and Mr. Harthoorn as "subjective." Opposition at 11. Additionally, he challenges statements in the Glidden Declaration (¶¶ 5, 9, 10, 12, 14) as containing, *inter alia*, expert opinion that 130,000 cubic yards of sediment were discharged, by a person not qualified, and assumptions made without personal knowledge. Objections at 1–2.

In response, Complainant asserts that the discharges were an intentional act in response to an "atypical situation" created by Respondent by allowing sand to accumulate in the reservoir for more than ten years, and that Respondent's evidence does not show that the deposition of sediment was the result of normal operation of the dam or a passive water transfer. Rebuttal at 4. Contrary to the argument in his Opposition, Complainant points to Respondent's email to the Corps acknowledging he never drained the lake previously and that he planned to keep the gates open until the lake is completely drained, his argument that passage of silt through the dam was necessary to relieve pressure on the dam, the difficulties reported to Mike Murphy by Will Williams in opening the dam gate, and Respondent's attorney's admission that the gates were opened in July for purposes of sluicing the reservoir. Rebuttal at 2–3 (citing C PHE Exhibits 10, 25, 26; R PHE § 5). In addition, Complainant presents Dr. Boyd's Declaration, stating that Respondent would need to flush sediment at least annually to maintain water in the reservoir, given the sandy conditions in the river basin. Rebuttal at 3 (citing Boyd Declaration ¶ 3).

Complainant argues that Respondent has presented no evidence that disputes the allegation that he discharged pollutants. Complainant asserts that the photographs from six witnesses, and GIS satellite images from 2010 and 2014 disprove Respondent's assertions minimizing the sediment accumulations and dispute the findings in the New Century Report that downstream accumulations of sediment piles were "sparse to non-existent." R PHE Exhibit 7 p. 45; C PHE Exhibits 2, 11, 21, 33, 44, 45, 36, 56, 57. Complainant points out that this finding was made 11 months after the discharge, and the Report acknowledges that sediment deposition occurred after the July 2012 discharge. Rebuttal at 7.

B. Analysis and Conclusion

To determine which facts are material to the issue of whether Respondent discharged a pollutant within the meaning of the Act, I begin with a discussion of case law and the Water Transfers Rule.

A dam is a "discernible, confined and discrete conveyance" and thus meets the definition of a "point source" provided it is one "from which pollutants are or may be discharged." 33 U.S.C. § 1362(14); *National Wildlife Federation v. Gorsuch*, 693 F.2d n.22 ("The pipes or spillways through which water flows from [a] reservoir through the dam into the downstream river clearly fall within this definition."). Indeed, in accordance with the overall intention of the CWA, courts have held 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) (internal quotations and citations omitted).

The more difficult question is whether material flowing from a dam is a "discharge of a pollutant" or "any addition of any pollutant to navigable waters from any point source" as defined in the Act, 33 U.S.C. § 1362(12). The D.C. Circuit in *National Wildlife Federation v. Gorsuch* held that dam-induced water quality changes (including low dissolved oxygen, temperature changes, and sediment) from the flow through a dam, generally do not constitute the "discharge of a pollutant" under the Act, and thus do not require all dam operators to apply for a permit in order to operate a dam. 693 F.2d 156. In that case, the D.C. Circuit gave substantial deference to EPA's interpretation of "discharge of a pollutant," ruling that dams are not subject to a NPDES permit under Section 402 of the Act, after discussing statutory language, legislative history, policy considerations, purposes of the Act, and state jurisdiction. The court discussed water quality differences upstream and downstream of dams, but noted that generally, "water released from the dam will contain less sediment than upstream water," and there was "no evidence in the record to suggest that increased sediment is a major problem." 693 F.2d at 164. Similarly, the court in *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) accorded substantial deference to EPA's position in applying the terms "discharge" and "addition" of a pollutant. In that case, water and fish were pumped from Lake Michigan into the hydroelectric power generating facility's reservoir and returned to the lake after passing through hydroelectric generators, which pureed some of the fish. The court held that the return of fish to the Lake was not an "addition," and thus the NPDES permit requirement does not apply, because the water and fish were returned to the same water body. The court noted that "any resulting pollution in the form of entrained fish is, as in *Gorsuch*, an inherent result of dam operation." 862 F.2d at 586.

Characterizing those cases as "essentially involv[ing] the recirculation of water," the Second Circuit distinguished them from the situation of a man-made diversion of water, containing suspended sediment, from a reservoir through a tunnel of several miles length to a creek not otherwise receiving water from the reservoir. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491–92 (2nd Cir. 2001), *aff'd in pertinent part on remand*, 451 F.3d 77 (2nd Cir. 2006), *cert. denied*, 549 U.S. 1252 (2007). Considering that the water in the reservoir and in the creek were distinct bodies of water, the court held that such passage of water with suspended sediment through the tunnel constituted the "addition" of a "pollutant" from a "point source" requiring an NPDES permit. Given those facts, the Second Circuit stated that it agreed with the view in *National Wildlife Federation v. Gorsuch* that a "point source must introduce the pollutant into navigable water from the outside world" provided that the latter is construed as "any place outside the particular water body to which pollutants are introduced." *Id.* at 491. In the same vein, in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 112 (2004), the Supreme Court held that phosphorus-laden water pumped from a canal into a reservoir would not require an NPDES permit if the two water bodies are not "meaningfully distinct." Adhering to its view in that case, the Supreme Court held in *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*, 133 S. Ct. 710 (2013), that the flow of water from one portion of a river through a concrete channel to a lower unimproved portion of the same river was not a "discharge of a pollutant." In that context, the Court stated, "[u]nder a common understanding of the meaning of the word

'add,' no pollutants are 'added' to a water body when water is merely transferred between different portions of that water body." 133 S. Ct. at 713.

These cases involved a regular ongoing operation or a continual flow of water. Where the water upstream and downstream of the dam or alleged point source is essentially the same water body, with a flow that is essentially regular or continuous, there is no "addition" of a pollutant.

Similarly under Section 404 of the Act, when considering whether there is a discharge of dredged or fill material, defined respectively as "any addition of dredged material" and "the addition of any fill material," the word "addition" does not mean a purely passive activity of a continuously flowing body of water. *Froebel v. Meyer*, 217 F.3d 928, 938 (7th Cir. 2000) (silt and sediment that continued to be deposited downstream through an opening in a partially removed dam, from ongoing scouring action of the river water, is not an "addition" of dredged or fill material). "'[D]redged' material is by definition material that comes from the water itself." *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 n. 43 (5th Cir. 1983). And redeposit of dredged material to a water body is specifically included in the definition of "discharge of dredged material." 40 C.F.R. § 232.2. Therefore, a human act must be involved which effectuates the "addition" of dredged material to the same water body. In *Greenfield Mills, Inc. v. Macklin*, the Seventh Circuit held that dredged material discharged to a river from a fishery supply pond formed from the dam on the river, constitutes the "addition" of dredged spoil under the Act. In that case, the discharge occurred by the human action of raising the dam gates, which released water and sediment from the bottom of the pond through the gates and into the river. 361 F.3d at 940-41. The sediment had settled out of the water in the bottom of the pond, and the opening of the dam gates dredged the sediment – the force of the water cutting a channel into the floor of the pond – and added it to the downstream waters. *Id*. at 940–41, nn.11, 17. This construction of the term "discharge of dredged material," issued in a 2004 decision, outweighs any earlier limited understanding of the term in *American Mining Congress v. U.S. Army Corps of Engineers*, 951 F. Supp. 267, 273 (D.D.C. 1997). *See also, United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1506 (11th Cir. 1985) (redeposit of spoil churned up by tugboat propellers constitutes a discharge of a pollutant), *vacated and remanded on other grounds*, 481 U.S. 1034, *readopted in relevant part*, 838 F.2d 1133 (11th Cir. 1988) and 863 F.2d 802 (11th Cir. 1989).

As to "discharge of fill material," defined as "the addition of any fill material into waters of the United States," (40 C.F.R. § 232.2), fill material may include indigenous materials such as river cobble and materials from the riverbed. *United States v. Sinclair Oil Co.*, 767 F. Supp. 200, 204–05 (D. Mont. 1990).

The Water Transfers Rule does not affect the jurisprudence on discharges of dredged or fill material. It was promulgated in response to court decisions such as *Miccosukee Tribe of Indians* and *Catskill Mountains Chapter of Trout Unlimited* indicating that NPDES permits would be required for certain water transfers between two distinct water bodies. The Rule excludes from regulation under the NPDES program water transfers, defined as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." 40 C.F.R. § 122.3. EPA explains in the

preamble to the Rule that "[i]n light of Congress' clearly expressed policy not to unnecessarily interfere with water resource allocation [which is under state jurisdiction] and its discussion of changes in the movement, flow or circulation of any navigable waters as sources of pollutants that would not be subject to regulation under section 402, it is reasonable to interpret 'addition' as not including the mere transfer of navigable waters." National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33697, 33701-02 (June 13, 2008). Similarly, as to "[c]onveyances that remain within the same water of the U.S.," EPA states that they do not constitute water transfers, but "are also not subject to NPDES permitting requirements." *Id.* Thus, specifically in regard to dams, citing to *National Wildlife Federation v. Gorsuch* and *National Wildlife Federation v. Consumers Power,* the preamble notes that "a discharge from a dam does not result in an 'addition' of a pollutant unless the dam itself discharges a pollutant such as grease into the water passing through the dam." *Id.* at n. 3 and p. 33705. However, the preamble points out that "the term 'addition' should be interpreted in accordance with the text of the more specific sections of the statute." *Id.* at 33701. As to discharges of dredged or fill material under Section 404, the preamble makes clear that because Congress defined "pollutant" to include "dredged spoil" which comes from a water body, the Water Transfers Rule "has no effect on the 404 permit program." *Id.* at 33703. Consequently, the rationale underlying the Rule, that there is no "addition" or "discharge of a pollutant" when water is conveyed between or within water bodies, does not apply to dredged or fill material.

I next consider whether particular parts of materials in the record cited in the Motion show that there is no genuine dispute that Respondent discharged a pollutant, or more specifically, that Respondent's release of water and sediment into Plum Creek by opening gates on the dam was "any addition of any pollutant" to Plum Creek "from any point source." 33 U.S.C. § 1362(12). These materials show that sediment and sand that had accumulated in the Reservoir were discharged along with water through the dam gates. Glidden Declaration ¶¶ 5, 7, 8, 9; Murphy Declaration ¶ 5; Friskopp Declaration ¶ 4; C PHE Exhibits C PHE Exhibits 2.2, 2.4, 2.5, 11 (Photographs 5–9), 33, 44, 45. Sand is specifically listed as a pollutant in the CWA, 33 U.S.C. § 1362(6).

Ms. Friskopp and Mr. Glidden stated that they observed "large amounts" of sand being discharged from the dam gates in January and July 2012. Friskopp Declaration ¶ 4; Glidden Declaration ¶ 5. Mr. Harthoorn stated that toward the end of the July discharges, the entire area below the dam was "level with sand" and that the discharge filled his family's swimming area on Plum Creek with "approximately ten feet of sand" so one could walk across the creek that prior to the discharges was 10 feet deep in some places. Harthoorn Declaration ¶¶ 8, 9, 11. Mr. Glidden stated that he observed that the discharges "filled the entire stream bed with sand for over a mile." Glidden Declaration ¶ 8. Numerous photographs presented by Complainant of Plum Creek before and after the dam gates were opened show that large amounts of sand and sand bars had accumulated in and along Plum Creek below the dam after the gates were opened. C PHE Exhibits 2.2–2.5, 11, 21, 33, 41, 44, 56.2, 57; Glidden Declaration ¶ 6. According to Respondent's attorney, a dam gate was opened from December 28, 2011 to January 22, 2012, and from July 18 through 24, 2012. C PHE Exhibit 25 (letter dated October 29, 2012). Respondent admits that since he bought the Property in 2000, he "never drained the lake once," but that the previous owners did so every two years. C PHE Exhibit 10; R PHE Exhibit 6. These exhibits and personal observations stated in the cited Declarations demonstrate that the releases

of sediment and sand were massive and sudden, and continued over several days, resulting from Respondent's action of opening gates of the dam. The releases were not merely regular water quality changes from continuous flow through a dam, or "an inherent result of dam operation." *National Wildlife Federation v. Gorsuch*, 693 F.2d 156; *National Wildlife Federation v. Consumers Power,* 862 F.2d at 586. Water and sediment were not "merely transferred" through the dam, as a passive activity of a continuously flowing body of water. *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*, 133 S. Ct. at 713; *Froebel v. Meyer*, 217 F.3d at 938. Therefore, Complainant need not demonstrate that sand and sediment came from the 'outside world," beyond the navigable waters at issue, as it is not material to this case.

Complainant must show that that the releases constitute a discharge of dredged or fill material within the meaning of those terms in 40 C.F.R. § 232.2. As to "dredged material," the Complainant must show that the sand and sediment were "material . . . dredged from waters of the United States." 40 C.F.R. § 232.2. "Dredged spoil," specifically listed in the Act's definition of "pollutant," is not defined in the statute or regulations. 33 U.S.C. § 1362(6). The common definition of "spoil" includes "earth and rock excavated or dredged." Merriam Webster Dictionary Online, http://www.merriam-webster.con/dictionary/spoil (last visited July 6, 2016). Sediment, or earth, as well as sand, is encompassed by the term "dredged material." *United States v. Deaton,* 209 F.3d 331 (4th Cir. 2000) (side cast dirt from a ditch is dredged spoil). "Dredge," also not defined in the CWA or regulations, is defined in the dictionary not only as "to deepen (as a waterway) with a dredging machine" but also as "to dig, gather or pull out with or *as if with* a dredge." Merriam Webster Dictionary Online, http://www.merriam-webster.com/dictionary/dredge (last visited July 6, 2016) (emphasis added). The *Greenfield Mills* case is an example of dredging without machinery, by pulling out "as if with a dredge." The raising of dam gates dredged the sediment by the force of the water pulling up the sediment that had settled on the bottom, and adding it to the downstream waters. *Id*. at 940–41, nn.11, 17. In that case, the evidence showed that resulting downstream mud deposits extended for several miles, that the force of the water flowing from the opened dam gates cut a channel through the bottom of the pond, and that approximately 100,000 cubic yards of material was discharged. *Id.* at 940–41, 943 and n.11. Thus, Complainant need not show that dredged material was removed by machinery.

As stated above, Complainant has pointed to evidence in its exhibits showing that a large volume of sediment and sand was discharged from the opening of the dam gates. Photographs referenced by Complainant depicting the reservoir before and while the dam gates were initially opened show that the reservoir was filled with sand. C PHE Exhibit 11 (photographs 5–9, 17–19, 27–30). Complainant's photographs depicting the reservoir from July 20, 2012 and later, show a channel of water behind the dam, with embankments of sand on the sides of the channel, indicating that sand or sediment was pulled out from the reservoir when the dam gates were opened. C PHE Exhibits 21 (photographs 5, 6, 7), 57 (photographs labeled 100_1528, 100_1532). Consistent with these photographs, Mr. Glidden stated that the flushing of water while the gates were open "wash[ed] away sand from both sides of the reservoir basin." Glidden Declaration ¶ 9. Therefore Complainant has shown that sand or sediment was pulled out as if with a dredge, and thus "dredged," from the reservoir. The reservoir, as an impoundment of Plum Creek, is a "water of the United States" or "navigable water." 40 C.F.R. § 232.2.

Consequently, Complainant has shown that the sediment or sand that was released through the dam gates constitutes "material . . . dredged from waters of the United States" under 40 C.F.R. § 232.2. The factual distinction Respondent urges of the muck in *Greenfield Mills* originating from a pond that was separate from the river has no bearing on this conclusion. Complainant has carried its initial burden of citing to materials in the record showing there is no genuine dispute that the discharge of dredged material to a navigable water by the act of opening dam gates, is an "addition" of dredged spoil into waters of the United States and thus a "discharge of dredged material" within the meaning of 40 C.F.R. § 232.2, and discharge of a pollutant from a point source under the Act. *Greenfield Mills*, 361 F.3d at 948–49. It is not necessary at this point to analyze whether Complainant has shown that there was a "discharge of fill material" within the meaning of the regulations.

The next step of the analysis is whether Respondent has raised a genuine issue of material fact as to whether he discharged a pollutant. Respondent cites to the New Century Report in support of his denial that he "sluiced his dam"[7] and assertion that Plum Creek has "constantly a high presence of sand" upstream and downstream of the dam, but he does not cite to any particular section or page of the Report. The Report notes observations in June 2013 that "sand seemed to move constantly within the stream bed," and that the creek bottom was "primarily unconsolidated and mobile sand" at points upstream and downstream of the dam, consistent with a report of the Nebraska Game and Parks Commission in 1977 that the stream bottom is primarily sand. R PHE Exhibit 7 pp. 2, 9, 18–20, 27. The Report also concluded from their data that "sand deposition and predominance occurred significantly in . . . Plum Creek above the McGowan Dam [and] [t]his was attributed to natural deposition events, as well as existing agricultural effects." However, those observations and conclusions do not raise any question as to whether Respondent's opening of the dam gates constitutes discharges of a pollutant under the Act, where the New Century Report recognized "sediment deposition in Plum Creek below the McGowan dam" and sluicing of the dam, specifically stating:

> Before the low level [dam] discharge outlet was opened, the reservoir was nearly full of sand with open water only within 100 feet from the dam. Since the outlet was opened, sand has moved through this outlet and more open water had returned . . . . This plug of sediment removed from the reservoir probably was mobilized soon after opening the low level discharge and was flushed to the Niobrara River . . . .
> * * * *
> The predominance of sand substrate was likely due, in part, to past sluicing activities; however a percentage of such was also a result of natural deposition.

R PHE Exhibit 7 pp. 21–22, 27, 45.

Respondent's own self-serving and conclusory statements in his Affidavit that "[n]o sluicing took place," and that the water level in the reservoir dropped approximately two feet (McGowan Affidavit ¶¶ 8, 13), without any more factual or evidentiary support, does not raise a

[7] The term "sluicing" is defined as "a deliberate attempt to have the river carry accumulated sediment downstream." *National Wildlife Federation v. Gorsuch*, 693 F.2d at 164.

genuine issue of fact. Indeed, while he asserts that no sluicing took place with regard to the December 2011 discharge, he does not make this assertion with regard to the July 2012 discharge. McGowan Affidavit ¶¶ 8, 12; C PHE Exhibit 50. He has not set out specific facts, or sufficient probative evidence, such that a reasonable fact finder could return a verdict that he did not discharge a pollutant. *Liberty Lobby*, 477 U.S. at 248–50; *Newell Recycling Company, Inc.*, 8 E.A.D. at 624. Respondent's evidentiary objections to certain statements in the Glidden Declaration and the initial Harthoorn Declaration do not affect the conclusions herein, as the statements which are referenced in the discussion above document their personal observations and corroborate what is depicted in photographs presented by Complainant.

VIII. Permit Under CWA Section 404

The final element of a Section 301 violation is that Respondent had no permit under Section 404 of the Act. Respondent denies this element in the Answer to the Amended Complaint. However, Complainant points out that the Cease and Desist letters issued on January 18 and July 20, 2012, expressly state that Respondent had not applied for or obtained a permit. These letters were issued by the Corps, which is responsible for issuing such permits. Respondent has not alleged or cited to any evidence that he had a permit or had applied for one, but asserts that there was no need for a Section 404 permit. Opposition at 13. There is no genuine issue of fact material to whether Respondent had a permit.

IX. Respondent's Affirmative Defenses

To prevail on its Motion for Accelerated Decision, Complainant must show an absence of facts present in the case file to support Respondent's affirmative defenses. If it makes such showing, then to defeat the motion, Respondent must identify "specific facts" from which a reasonable fact finder could find in his favor by a preponderance of the evidence in order to preserve the defense. Of the six "Affirmative Defenses" listed in the Amended Answer, three are allegations challenging the elements of liability, which were resolved above, and one is an assertion as to the proposed penalty. The remaining two are:

> 1. The release of sediment behind the dam structure was necessary and prudent to avoid the potential loss of the structure; and
>
> 2. The release of sediment behind the dam structure was subject to the dam maintenance exemption, 33 U.S.C. § 1344(f)(1)(B), and is not recaptured by 33 U.S.C. § 1344(f)(2).

Complainant also addresses two additional defenses Respondent asserted in his Prehearing Exchange. One is that the sediment discharged is not a pollutant under the Water Transfers Rule, which, as concluded above, does not apply to dredged or fill material, and therefore fails as a defense. The other is that the Corps authorized Respondent's actions. This defense, and the two Affirmative Defenses enumerated above, are addressed below.

A. Potential Loss of the Dam Structure

Complainant argues that Respondent's claim that discharges were made to save the dam is merely a pretext to defend dredging the reservoir without a permit. Motion at 22–23. Complainant points out that Respondent admitted that he never drained the reservoir in all the years he owned the Property despite knowing that the prior owners removed sediment every two years, and that he had options for removing the sediment, by excavation or by obtaining a Section 404 permit or an emergency permit under 33 C.F.R. § 325.2(e)(4). Motion at 22 and n. 8 (citing C PHE Exhibit 10). Complainant argues that Respondent did not provide evidence that he made repairs to the dam, and did not show that discharging for the purpose of avoiding loss of the dam is a legal defense to liability, as the CWA is a strict liability statute.

Respondent maintains that he acted prudently to relieve stress on the dam structure due to the large amount of silt in the reservoir, which was "due primarily to flooding during the previous year," and that it "presented a threat to the dam." Opposition at 15. He asserts that he patched holes on the upstream side of the dam face with cement in the summer of 2011, and partially opened a dam gate on December 28, 2011 to prevent excess pressure from ice build-up around the patched area. McGowan Affidavit ¶¶ 7, 8; Opposition at 2, 15. He asserts that the release in July 2012 was "to make further repairs possible, including filling in a washed out area along dam supports and inspecting the cement patches . . . to determine if additional concrete effacement was needed" and "to fix the eroding shoreline threatening his house." Opposition at 3, 15; McGowan Affidavit ¶ 12. He asserts further that because of the Cease and Desist letter, he "was forced to close the dam gates before the Reservoir reached an appropriate water level to utilize heavy machinery necessary to conduct the dam maintenance." *Id.* He points to previous dam inspection reports and the New Century Report showing the need for maintenance and repairs on the dam. Opposition at 15.

Complainant counters that Respondent does not cite to any legal authority providing any exemption based on avoiding potential loss of the dam structure, and that he did not present probative evidence suggesting that the discharges were necessary to avoid loss of the dam. Rebuttal at 17.

Section 404(f) of the CWA lists the discharges of dredged or fill material that are not prohibited under the Act. The maintenance exemption of Section 404(f)(1)(B) is discussed below. None of the other exemptions are relevant to the facts of this case.

Respondent's argument resembles a defense of necessity, to the extent that he implies that loss of the dam structure could result in harm from catastrophic flooding. To assert a necessity defense, Respondent must show that he "act[ed] to prevent 'an imminent harm which no available options could similarly prevent.'" *United States v. Nolan*, 700 F.2d 479, 484 (9th Cir. 1983) (quoting *United States v. May*, 622 F.2d 1000, 1008 (9th Cir. 1980), *cert. denied*, 449 U.S. 984 (1980)), *cert. denied*, 462 U.S. 1123 (1983). He must establish that "he reasonably anticipated the existence of a direct causal relationship between his conduct and the harm to be averted" and that there was no "reasonable, legal alternative to violating the law." *United States v. Dorrell*, 758 F.2d 427, 431 (9th Cir. 1985) (quoting *United States v. Bailey*, 444 U.S. 394, 410 (1980)).

Respondent has not made such a showing. The New Century Report states that according to Mr. Williams, "flows from the 2010 flood nearly overtopped the dam and there was some concern that the dam may breach." PHE Exhibit 7 at 21. The Report also states that the "overall condition of the dam is marginal at best" with slaking concrete, exposed reinforcement steel, and a gap of several inches length, but does not include findings suggestive of any risk of breach, past or present. *Id.* Previous dam inspection reports from June 2003 show that similar conditions existed eight years prior to the discharges at issue, and that in 2008 the dam "still appears in fair shape." R PHE Exhibits 4, 5. Respondent does not show that he reasonably anticipated that the discharges would avert a breach of the dam, or that he had no legal alternative to discharging without a permit. He had the option of applying for a Section 404 permit to legally discharge sediment from the reservoir. Therefore a claim that the discharges were necessary to avoid potential loss of the dam does not defeat the Motion for Accelerated Decision.

B. Authorization of the Discharges by the Corps

Respondent asserts that he consulted with Ms. Friskopp of the Corps in January 2012 and then followed up each month with her until July 2012, when she told him that sluicing would be a local matter and he can open the gates on the dam. R PHE p. 5; McGowan Declaration. Ms. Friskopp states in her Declaration that he called on January 26, 2012, and told her he feared his dam would fail due to sediment build-up in the reservoir and asked if he would keep the dam gate open until he could fix his dam. Friskopp Declaration ¶ 8. Complainant asserts that the first phone call occurred 28 days after Respondent opened the gates, and after he closed the gates, which occurred, according to Respondent's attorney, on January 22, 2012. Motion at 24 (citing C PHE Exhibit 25). Therefore, it had no bearing on his decision to open the gate in December and keep it open until January 22.

Furthermore, Complainant argues that because the CWA is a strict liability statute, Respondent's belief that he was authorized to discharge is irrelevant, citing *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979) ("The regulatory provisions of the [CWA] were written without regard to intentionality, . . . making the person responsible for the discharge of any pollutant strictly liable. . . .").

Respondent contends that following receipt of the letter of January 18, 2012, he contacted Ms. Friskopp who told him he could leave the gate open, and that "[s]hortly thereafter, he closed the dam gate. Opposition at 2. He maintains that "the reservoir was not sluiced at that time." Opposition at 17. Respondent argues that he opened the dam gates in July 2012 in "good faith reliance" on statements of Ms. Friskopp, representing that no permit was necessary, that he could keep his gate open, that opening the gates on his dam was a "local matter" which did not necessitate a Section 404 permit, and that he should develop a release schedule. Opposition at 13.

When Respondent received the Cease and Desist letter and contacted Ms. Friskopp, he already had opened one or more gates on the dam, and the discharge had been ongoing for three weeks. McGowan Affidavit; Friskopp Declaration ¶ 8; C PHE Exhibit 10; Opposition at 2. Her

agreement that he could keep the dam gate open until he could repair the dam was not an authorization for him to open gates on the dam and discharge, nor was it a retroactive authorization for discharges from the dam.

As to the discharge in July 2012, Mr. McGowan and Ms. Friskopp disagree on what was communicated. Mr. McGowan states in his Affidavit that she informed him that EPA considered the sluicing to be a local matter, and when he asked if that meant he could open his gates, she "indicated" that he could, but Ms. Friskopp denies that she told Mr. McGowan that EPA considered the alleged sluicing to be a local matter and that he could open the gates on his dam. McGowan Affidavit ¶ 11; Friskopp Declaration ¶ 9. Taking as true the facts asserted by Respondent, any claim that he relied on her indication to him that he could open the gates is not a defense to liability unless it meets the criteria for equitable estoppel.[8] The elements of a defense of equitable estoppel as it applies to the Government are that it "reasonably relied upon its adversary's actions to its detriment," and that the Government "engaged in some affirmative misconduct." *BWX Technologies, Inc.*, 9 E.A.D. 61, 80 (EAB 2000) (citing *United States v. Hemmen*, 51 F.3d 883, 892 (9th Cir. 1995). "When equitable estoppel is asserted against the government, . . . a party bears an especially heavy burden" to establish the defense. *Id.* "At a minimum, the [government] official must intentionally or recklessly mislead the estoppel claimant." *United States v. Marine Shale Processors*, 81 F.3d 1329, 1350 (5th Cir. 1996). This burden is reasonable, as a government official may be asked to render advice premised on information provided by the respondent which may or may not completely or accurately reflect the objective facts. Respondent has not asserted or presented any facts suggesting that Ms. Friskopp engaged in affirmative misconduct, or that she intentionally or recklessly misled him. He has not identified "specific facts" from which a reasonable fact finder could find in his favor in order to preserve the defense for a hearing, and consequently this defense does not defeat Complainant's Motion.

C. The Maintenance Exemption

1. Argument of the parties

Complainant argues that Respondent's claim of the maintenance exemption undermines the purpose and intent of the Section 404(f) exemptions, and that legislative history shows that Congress intended the exemption to be a narrow one, for activities "that cause little or no adverse effects" on the receiving stream. Motion at 28 (citing, *inter alia, United States v. Heubner*, 752 F.2d 1235, 1240 (7th Cir. 1985) and *Greenfield Mills*, 361 F.3d at 934). Complainant points to evidence in its Prehearing Exchange and in the Declarations showing the magnitude of the adverse effects from Respondent's discharges, devastating effects on fish populations, photographs of accumulated sediment nearly three years later, destruction of the Harthoorns' recreational swimming area, and the creek being much shallower than before the discharges. Motion at 28–29 (citing Glidden Declaration ¶¶ 10, 13, 14; Harthoorn Declaration ¶¶ 4–6, 8; Murphy Declaration ¶¶ 6–7; C PHE Exhibits 2.2, 2.5, 3, 33, 44, 45, 56.2, 57). Complainant asserts that there is nothing in Respondent's Prehearing Exchange that shows little or no adverse effects.

[8] Neither party refers to the term equitable estoppel.

In addition, Complainant argues that Respondent has failed to submit any evidence that maintenance was performed on the dam, or that his discharges were necessary for, or proportional to, any maintenance needed for the dam, and suggests that this defense is an after-the-fact pretext for dredging without a permit. Complainant points out that the defense was not raised in Respondent's original Answer, that Respondent's attorney wrote in a letter to the Corps that the dam gates were opened "for the purpose of sluicing the reservoir," that Respondent, prior to the discharges, had looked into the costs of removing sediment from the reservoir, and that Respondent's response to EPA's questions did not include any evidence that he performed any maintenance between the time the gates were opened. Motion at 31 (citing C PHE Exhibit 50, 56.1). Complainant argues that there is no evidence that dredging approximately 130,000 cubic yards of sediment was proportional to maintenance work needed on the dam, and Respondent could have had a sluicing schedule under a permit arranged with the Corps, or could have removed the sediment using machinery, without discharging to navigable waters.

Complainant also argues that Respondent has not met its burden in claiming the maintenance exemption, to present evidence that his discharges were not recaptured by Section 404(f)(2) of the Act, which provides that exemptions do not apply where the discharges are "incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject," and "the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced" by the discharges.

Respondent maintains that his actions fit within the exemption in that he released water from the dam because he needed to lower the water to inspect and patch the damaged portions of the dam, but that his "intended maintenance was cut short by the USACE prior to the water level dropping enough for any significant maintenance, other than an inspection of the partially exposed concrete." Opposition at 18. He argues that if Congress meant for the exemption to be narrower, it would have done so, and that courts construed the exemptions narrowly where the defendants brought areas of land into new use or made improvements beyond restoration of the dam structure. Respondent dismisses Complainant's evidence of adverse effects as "subjective observations by laymen landowners and dubious claims by a wildlife biologist that there are far less trout in Plum Creek than there have been historically." *Id.* at 19. He points to an email of Mr. Glidden stating that after the July 2012 release, he observed no dead or stressed fish, and points to findings in the New Century Report that there was a "relative abundance of fish in the Plum Creek" and "the effect of opening the low level discharge appeared limited and extended only up to the first upstream meander of the reservoir. *Id.* (citing Affidavit of Stephen D. Mossman and R PHE Exhibit 7 pp. 41, 44). Respondent again challenges the assertion of 130,000 cubic yards of sediment displaced as an unqualified estimate. As to allegations that he looked into costs of mechanical removal of sediment, Respondent alleges that statements of Mr. Williams are inadmissible hearsay and must be excluded. Opposition at 16.

Respondent distinguishes *Greenfield Mills* by the facts in that case showing intent to dredge the pond, no intent or effort to repair the dam timely during the discharge, and repairs being done later without lowering the water level. In contrast, Respondent asserts that "there is no real dispute" that water had to be released to maintain his dam, as it "cannot be patched and

repaired while submerged under water," and that he maintained communication with the Corps. Opposition at 20, 21.

Moreover, Respondent asserts that his actions were not recaptured under Section 404(f)(2) because it does not apply. There is no allegation that the purpose of Respondent's releases were to bring Plum Creek into a "use to which it was not previously subject," and there is no evidence that the flow or circulation of the waters of Plum Creek has been impaired; rather, Complainant has alleged that the reach of the creek has increased.

2. Analysis and Conclusion

The maintenance exemption in the CWA, Section 404(f)(1)(B), allows discharges of dredged or fill material without a Section 404 permit "for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures, such as . . . dams." 33 U.S.C. § 1344(f)(1)(B). The regulations further define the term maintenance as follows: "Maintenance does not include any modification that changes the character, scope, or size of the original fill design." 40 C.F.R. § 232.3(c)(2).[9] The regulations also provide that "Emergency reconstruction must occur within a reasonable period of time after damage occurs in order to qualify for this exemption." 40 C.F.R. § 232.3(c)(2).

Reading the statute and regulations together, it is clear that discharges must be for performing maintenance, and not primarily for other purposes. The Seventh Circuit examined legislative history and case law addressing these provisions, and concluded that "the maintenance exemption should be construed so that only dredging that is reasonably necessary to the proposed maintenance is exempt from the permit requirement" as "a requirement of necessity or proportionality comports with the legislative history of the statute." *Greenfield Mills*, 361 F.3d at 951, 952. As to the exemptions generally, it explained, "Congress intended that Section 1344(f) exempt from the permit process only 'narrowly defined activities . . . that cause little or no adverse effects either individually or cumulatively [and which do not] convert more extensive areas of water into dry land or impede circulation or reduce the reach and size of the water body.'" *Id.* (quoting *United States v. Huebner*, 752 F.2d 1235, 1240-41 (7th Cir. 1985) (quoting S. Rep. 1236, 92nd Cong. 2d Sess. 99 (1972), U.S. Code Cong. & Admin. News 1972, p. 3668, *reprinted in* Environmental Policy Division of the Congressional Reference Service, 3 Legislative History of the Water Pollution Control Act Amendments of 1972 at 420) (Comm. Print 1973)). The Third Circuit similarly concluded that, "[r]ead together, the two parts of Section 404(f) provide a narrow exemption for . . . activities that have little or no adverse effect on waters of the U.S." *United States v. Brace*, 41 F.3d 117, 124 (3d Cir. 1994). As to the exemption applying "for the purpose of maintenance," "reviewing courts have consistently looked beyond the stated or subjective intentions and determined the effect or 'objective' purpose of the activity conducted." *United States v. Sargent County Water Res.*, 876 F. Supp. 1090, 1101 (D.N.D. 1994).

[9] There is no issue here as to whether there was any change in the "character, scope or size of the original fill design."

Complainant has cited to documents in the case file suggesting Respondent's discharges were not for the purpose of maintenance of the dam. A letter, dated February 6, 2015, from Respondent's attorney states that Respondent partially opened gates on the dam in December 11, 2011 "to prevent excess ice build-up around the patched area," as Dr. McGowan also stated in his Affidavit. C PHE Exhibit 50; McGowan Affidavit ¶ 8. He had performed the maintenance, patching holes on the upstream side of the dam face, in the summer of 2011. McGowan Affidavit ¶ 7. Even looking at the evidence in light most favorable to Respondent, the discharge in December and January, several months later, was not for the purpose of performing maintenance. As he stated, it was for the purpose of relieving pressure build-up behind the dam. C PHE Exhibits 10, 50; McGowan Affidavit ¶ 8; R PHE Exhibit 6. This purpose is consistent with his expressed concern about the retaining wall beneath his house being washed out from the heavy rains in Spring 2011, "leaving about ten feet between the washout area and the foundation of the house." McGowan Affidavit ¶ 6; C PHE Exhibit 50.

As to the July 2012 discharges, Respondent states that he opened the gates for the purpose of:

> lowering the water level . . . to fill in the washed out area along the dam supports, and to inspect the cement patches in the dam to determine if additional concrete effacement was needed. Additionally, I sought to fix the eroding shoreline by building a retaining wall. . . . I was forced to close the dam gates before the Reservoir reached an appropriate water level to utilize heavy machinery to conduct the dam maintenance.

McGowan Affidavit ¶ 12; C PHE Exhibit 50. These statements are very general. He does not present any specific facts about filling in the area along the dam supports, about the location of the cement patches, or about what he planned to do with the heavy machinery. These are not specific facts from which a reasonable fact finder could find in his favor, by a preponderance of the evidence that his purpose for the discharges was to conduct dam maintenance. He also states another purpose than dam maintenance, that is, to build a retaining wall, to "fix the eroding shoreline threatening his house." *Id.; see also* R PHE Exhibit 6 ("[T]he embankment on the north side of my house has given way and will need to be reinforced . . . I would hope to do this once the lake is completely drained."). He does not assert that building this retaining wall constitutes any type of dam maintenance. The Dam Inspection checklist from August 2008, almost four years prior to the discharges, recommends to make repairs as needed, but does not indicate any particular repairs needed in July 2012. R PHE Exhibit 5. It also notes that its hazard classification is "low." *Id.*

In addition, Respondent does not explain or provide facts as to how the discharge was reasonably necessary to perform maintenance activities, except to state bluntly that the dam could not be patched and repaired while submerged under water. He does not provide any information as to how the dredging was necessary for filling in the area along the dam supports.

Complainant has also shown evidence that the discharges had more than a little effect on Plum Creek. Harthoorn Declaration ¶¶ 8, 9, 11; Glidden Declaration ¶¶ 6, 8; Murphy Declaration ¶¶ 6, 7; C PHE Exhibits 2.2–2.5, 11, 21, 33, 41, 44, 56.2, 57. Complainant presented

evidence of the negative effects of the discharges on the fish populations in Plum Creek, observed by Mr. Glidden, a Fish and Wildlife Biologist with the Nebraska Game and Parks Commission. In his investigation report, he recorded not finding any fish downstream of the dam on July 23, 2012, opining that they may have perished by being flushed by the discharges to the warm Niobrara River. C PHE Exhibit 3. He recorded the number of fish found in his stream survey in the fall of 2014, characterizing it as "far less than the typical number of trout found in Plum Creek prior to the 2012 discharges." Glidden Declaration ¶ 14.

The New Century Report presented by Respondent records observations made in May to June 2013, almost a year after the discharges, and therefore do not negate the effects on Plum Creek that occurred from December 2011 until May 2013. While New Century's report of a relative abundance of fish appears to contradict Mr. Glidden's findings, it is only one aspect of the effects on Plum Creek and is based on observations made many months after the discharge, and thus does not raise any genuine issue of fact as to whether the discharges had little or no adverse effects on Plum Creek.

It is concluded that Respondent has not identified "specific facts" from which a reasonable fact finder could find that his discharges were exempt from the permit requirement under the maintenance exemption of Section 404(f) of the Act.

X. Conclusion on Motion for Accelerated Decision

Complainant has shown that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law that beginning on December 28, 2011 and July 18 2012, Respondent released dredged material from the dam on his Property into Plum Creek, and thereby "discharged" a "pollutant" from a "point source," into "waters of the United States," without a permit under Section 404 of the CWA. Complainant made its initial showing as to the affirmative defenses, and Respondent failed to carry his burden on his affirmative defenses to defeat the Motion for Accelerated Decision. Accordingly, it is concluded that Respondent is liable for violating Section 301 of the CWA as alleged in the Complaint, and the Motion is granted.

XI. Motion to Strike

The final determination is whether the affirmative defenses should be stricken. As motions to strike are not referenced in the Rules of Practice, I look to the Federal Rules of Civil Procedure, which provide that a "court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." FRCP 12(f). A court "has considerable discretion in striking" such matters. *Delta Consulting Group, Inc. v. R. Randle Constr., Inc.*, 554 F.3d 1133, 1141 (7th Cir. 2009). Motions to strike serve to optimize the efficiency of a subsequent hearing by "avoid[ing] the expenditure of time and money that must arise from litigating spurious issues." *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev'd on other grounds*, 510 U.S. 517 (1994). However, as motions to strike are contrary to general policies that pleadings are to be liberally construed and a party should have an opportunity to present its case at hearing, motions to strike are disfavored and should be granted

only when the defense is clearly insufficient. *Acevedo v. City of Los Angeles*, 2014 U.S. Dist. LEXIS 170192, *18 (C.D. Cal. Nov. 13, 2014).

The facts Respondent presented in support of his affirmative defenses, that the release was necessary to avoid loss of the dam structure, that the Corps authorized Respondent's actions, and that the discharges were for the purpose of dam maintenance, could potentially have some bearing on one or more of the factors in assessing a penalty for the violations. The Water Transfers Rule, presented as an argument as to whether Respondent discharged a pollutant under the Act, was found herein not applicable to a determination of liability, but it cannot be determined at this point that this argument could not have some relevance in assessing a penalty for the violations. The CWA provides, at 33 U.S.C. § 1319(g)(3), that in determining the amount of penalty, the "nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require" shall be taken into account. Complainant's request to strike Respondent's defenses is denied.

ORDER

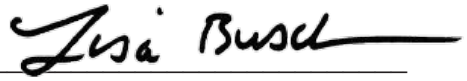
1. The Joint Motion to Supplement Prehearing Exchange is **GRANTED**.

2. Respondent's Motion to Strike is hereby **DENIED as moot**.

3. Complainant's Motion for Accelerated Decision is hereby **GRANTED**. It is concluded that Respondent is liable for violating Section 301 of the CWA as alleged in the Complaint.

4. Complainant's Motion to Strike Respondent's Defenses is hereby **DENIED**.

5. Issues as to the penalty remain controverted. The parties shall make good faith efforts to reach a settlement of this matter with regard to a penalty. Complainant shall file a status report on or before **August 26, 2016**, to report on the status of settlement negotiations. In the event that settlement is not reached by that date, a hearing will be scheduled in this matter on issues as to a penalty assessment in this matter.



M. Lisa Buschmann
Administrative Law Judge

In the M*atter* of *Dr. Daniel J. McGowan*, Respondent.
Docket No. CWA-07-2014-0060

Certificate of Service

I hereby certify that copies of the foregoing **Order on Motion for Accelerated Decision, Motions to Strike, and Motion to Supplement**, dated July 25, 2016, were sent to the following in the manner indicated.

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Paralegal

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Dated: July 25, 2016
Washington, D.C.