BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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

Pursuant to Section 22.16(b) of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Complaint or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" ("Part 22 Rules"), the United States Environmental Protection Agency, Region 10 ("Complainant" or "EPA") submits this reply brief in support of its motion for an accelerated decision ("Motion") as to Respondent's liability for the violations alleged in the Complaint and the proposed penalty amount specified in its Rebuttal Prehearing Exchange.

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INTRODUCTION

Complainant is entitled to accelerated decision because there is no question of material fact, and the EPA's conclusion that Respondent's suction dredge activity on July 22, 2015 resulted in a discharge of a pollutant in violation of the Clean Water Act ("CWA") is supported by law and EPA's decades-long experience regulating suction dredge placer mining. In Complainant's Memorandum in Support of the Motion ("Compl. Mem."), we set forth in detail the factual and legal basis for EPA's conclusion that Respondent discharged a pollutant from a point source into waters of the United States in violation of the CWA. *See* Compl. Mem. at 4-15. In the Response, Respondent does not challenge the facts at issue—that on July 22, 2015, Respondent operated his motorized suction dredge on the South Fork Clearwater River ("SFCR") without a CWA permit—nor does he introduce specific facts showing that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *BWX Technologies, Inc.*, 9 E.A.D. 61, 75 (EAB 2000).

Instead, the Response raises a number of grievances, only two of which are germane to the instant action and the Motion at hand: (1) Respondent questions whether a photograph of a turbid plume emanating from his suction dredge[1] is sufficient evidence to support the Complaint and the Motion; (2) Respondent repeats two legal arguments in support of the position that the release of suspended solids from his suction dredge and the resulting turbid plume do not constitute a discharge of pollutants regulable under the CWA. *See* Response at 10–12 and 14-15, 17–23, respectively. The first argument inappropriately seeks to impose a new evidentiary

[1] The photographs supporting the Complaint and Motion were taken by Complainant's witness Clint Hughes of the United States Forest Service. They are attached, along with Mr. Hughes accompanying report, to Complainant's Initial Prehearing Exchange as CX-01. For quick reference, the report is attached to this Reply as Exhibit A; the photographs showing the plume(s) of turbid discharge at issue begin on page 5.

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requirement in CWA claims, and falls short of raising any genuine issue of material fact. The latter arguments conflate legal issues arising in dissimilar CWA cases and cannot overcome well-settled legal principles that support Complainant's position that Respondent's suction dredge activity constituted a discharge of pollutants in violation of the CWA. This Reply will clarify these issues and, where such clarification would be redundant, will refer this Court to Compl. Mem. In short, there are no genuine issues of material fact, and Complainant is entitled to accelerated decision as a matter of law.

ARGUMENT

I. There is no genuine issue of material fact regarding Respondent's activities on July 22, 2015

On July 22, 2015, Respondent operated his suction dredge in the South Fork Clearwater River in Idaho without a required CWA Permit. Documentary evidence and a basic understanding of suction dredge placer mining demonstrate that this activity caused a discharge of pollutants in the form of suspended solids that created a turbid plume in the South Fork Clearwater River. *See* Compl. Mem. at 4-6.

Despite these uncontroverted facts, Respondent argues that Complainant has not met its burden under the relevant standard, which is to present evidence "such that no reasonable decisionmaker could find for the nonmoving party." *In re Clarksburg Casket Co.*, 8 E.A.D. 496, 501–02 (EAB 1999). To survive the Motion, Respondent must demonstrate "sufficient disagreement" such that a reasonable trier of fact could decide in favor of either party, and establish with affirmative evidence specific facts showing there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 256 (1986). Respondent does not carry his burden.

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Respondent attempts to demonstrate disagreement by questioning the reliability of the photographic and testimonial evidence offered in support of Complainant's claim. Clint Hughes, Geologist and Minerals Specialist at the U.S. Forest Service, observed Mr. Erlanson actively dredging, confirmed as much with him, observed the plume of turbid discharge emanating from Mr. Erlanson's dredge, and photographed the activity.[2] Respondent argues that a lack of finite measurements, record of dimensions, measure of dispersal rates, multi-point sampling, comparative sampling, and examination of Respondent's dredge are all reasons to doubt Mr. Hughes' recorded observations, inspection report, and photographs. Response at 11. Respondent's standard is a novel construct and, while the imposition of such a high standard of proof would certainly aid him in this action, does not bind this Court.[3] Instead, the issue is whether there is a question of material fact that Respondent discharged a pollutant into a water of the United States without the requisite permit. Whether photographic evidence alone[4] is enough to provide evidence for a claim is a bedrock principle of law and logic:

> We cannot conceive of a more impartial and truthful witness than the sun, as its light stamps and seals the similitude of the wound on the photograph put before the jury; it would be more accurate than the memory of witnesses, and as the object of all evidence is to show truth, why should not this dumb witness show it?[5]

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[2] Complainant disagrees with Respondent that Clint Hughes is an "apparent amateur" photographer, Response at 11, as all his photos are quite clear. This dispute is immaterial, though, as Mr. Hughes has conducted roughly 400 inspections during his federal career, so despite any questions of photographic capability, there is little doubt that he is a skilled professional inspector.

[3] *See In re Lowell Vos Feedlot*, CWA Appeal No. 10-01, 15 E.A.D. 314, 2011 EPA App. LEXIS 18, at *20 (EAB May 9, 2011) (holding that, in a CWA action such as this, the government can "use any kind of evidence, direct or inferential, to attempt to establish that an unlawful discharge occurred").

[4] Complainant notes that the photographic evidence offered in this case is not presented alone, and is one of multiple lines of evidence supporting the allegations in the Complaint.

[5] *Franklin v. State of Georgia*, 69 Ga. 36 (1882). For a snapshot, if you will, on the use of photographic evidence in the American courtroom, *see* Jennifer Mnookin, The Image of Truth: Photographic Evidence and the Power of Analogy, 10 YALE J. OF LAW AND THE HUMANITIES 2 (1998).

This principle undergirds the evidentiary standard in the CWA administrative enforcement context: that a claim must be proven by a preponderance of the evidence based on *any* admissible evidence, including inferential evidence. The Environmental Appeals Board ("EAB") has heard challenges to the use of photographic evidence couched with arguments that CWA claims must necessarily be accompanied with sampling. *See In re Lowell Vos Feedlot*, 2009 EPA Admin. Enforce. LEXIS 41672 at *14–17 (Resp. Post-hearing Reply Brief, Mar. 4, 2009) (disputing EPA's use of aerial photography to support its claim of an unauthorized discharge). The EAB rejected those arguments. *In re Lowell Vos Feedlot*, 15 E.A.D. at 321–23. Federal courts have also soundly rejected arguments that sampling is required in order demonstrate a discharge of pollutants.[6] Faced with these arguments, this Court should do the same. The CWA "categorically prohibits any discharge of a pollutant from a point source without a permit," and there is no need, let alone requirement, to conduct sampling in order to demonstrate a discharge.[7]

Beyond questioning the sufficiency of Complainant's evidence, Respondent also questions the contents of relevant photographs. Respondent argues that, in the photographs, the "water stream" from the back end of his suction dredge is merely mixing with the "water stream" of another, upstream suction dredge. Response at 12. One need only refer to the evidence at

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[6] *See e.g., Committee to Save Mokelumne River v. East Bay Mun. Util. Dist.,* 13 F.3d 305, 309 (9th Cir. 1993) (rejecting defendant's argument that evidence of increased pollution, e.g., sampling, is required to establish CWA liability, finding that such argument did not create a genuine issue of material fact, and granting summary judgment on the issue of liability for discharge of pollutants in violation of the CWA); *Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 469 F. Supp. 2d 803, 819 (N.D. Cal. Jan. 8, 2007) (citing *Mokelumne River* and *Rybacheck v. EPA*, 904 F.2d 1276 (9th Cir. 1990), in rejecting defendant's argument that plaintiff must conduct sampling of runoff before it reached the discharge locations to prove that sediment was added to waters of the United States); *Reynolds v. Rick's Mushroom Serv.*, 246 F. Supp. 2d 449, 454 (E.D. Pa. Feb. 24, 2003) ("whether a point source discharge creates a net increase in the level of pollution is irrelevant to the liability issue" for discharge of pollutants without a NPDES permit).

[7] *Mokelumne River*, 13 F.3d at 309.

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hand to see that such water streams are cloudy plumes of turbid discharge. That such a discharge is a "discharge of a pollutant" is well-explained in Compl. Mem., at page 14.

To find that Respondent was not actively dredging would require disregarding clear photographic evidence, Mr. Hughes' eyewitness observations, and his written report, all of which show the contrary. To find that Respondent's suction dredge was not intaking, processing, and releasing streambed materials—in the form of suspended solids that result in turbid discharge—would require ignoring proffered facts and case law explaining precisely how a suction dredge works,[8] even as described (in very forgiving terms) by Respondent: "The apparatus I use . . . sucks in water and material [] at the nozzles and with the water and non-captured matter, mostly gravel, simply passing through the machine to its back where it is returned to within six to ten feet from where it came . . . ." Decl. of Respondent, at ¶ 10.[9] No reasonable trier of fact would disregard eyewitness observations and clear photographic evidence, nor would one ignore proffered facts and case law in these fundamental ways. Respondent has not carried his burden.

II. As a matter of law, Respondent's July 22, 2015 suction dredge activity resulted in a discharge of pollutants in violation of the CWA

Relevant law holds that the release of material from suction dredging constitutes a discharge of pollutants under CWA section 502(12), despite the material's origin in the same water body to which it is released. *Rybacheck v. EPA*, 904 F.2d 1276 (9th Cir. 1990); *Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001).

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[8] *See* Complainant's Initial Prehearing Exchange, at 11 – 14. For case law making the same point, *see Rybachek v. EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990) (holding "the material discharged [from placer mining] originally comes from the streambed itself, [its] resuspension [in the stream] may be interpreted to be an addition of a pollutant under the Act.").

[9] Respondent also declares that the impact of his dredging is *de minimis* at its worst. Decl. at ¶ 16. There is no exception to CWA section 402 permitting requirements for relative significance of the discharge. *Sierra Club v. Union Oil Co.*, 813 F.2d 1480, 1490–91 (9th Cir. 1986), *rev'd. on other grounds* by *Union Oil Co. v. Sierra Club*, 108 S. Ct. 1102 (1988).

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This is a well-settled legal principle in the Ninth Circuit and elsewhere. Accordingly, EPA has regulated discharges from suction dredge placer mining operations for decades.[10] Respondent's attempts to obfuscate this issue by pointing to inapposite case law regarding "water transfers" and "incidental fallback" cannot overcome the relevant case law on point. *See* Compl. Mem. 8-13.

A. Respondent's Water Transfer Arguments are Inapplicable to This Case

First, Respondent refers this Court to two Supreme Court cases regarding water transfers, *South Florida Water Management District v. Miccosukee Tribe* and *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.* Respondent does not argue that those cases are analogous to this case, but instead offers them because they are cases in which the Court found that there was no addition of a pollutant. Compl. Mem. addresses these inapposite cases at pages 10–11. It bears repeating here that these cases involved initially polluted water which was transferred from one point to another in the same water body, and neither case involved the transformation of streambed materials into suspended solids, the agitation of the base of the waterbodies in question, or the processing of water (even devoid of streambed materials) through a mechanized dredge and sluicebox before being discharged—physically altered from that process—back into the water body. The extent of intervention in *Miccosukee* and *L.A. County* was the water's passage through flood control pumps in the former

[10] The first general permit for suction dredging was issued in Alaska by EPA in 1994, and covered suction dredges with hoses greater than four inches in diameter. In 1997, EPA issued two general permits: one for small suction dredges (those with hoses under four inches in diameter), and one for medium suction dredges (greater than four inches and fewer than eight inches in diameter). There are two general permits for suction dredging in Alaska, Permit No. AKG371000 (effective 2012) and AKG375000 (effective 2015). States also regulate suction dredging through their delegated CWA program, i.e., a state-administered NPDES permit program. In Oregon, for example, the Department of Environmental Quality issued and administered a general permit for the activity called "700-PM General Permit."

and its travel through concrete lined ditches in the latter; both cases dealt with the mere *flow* of water. *See, e.g.*, *L.A. County v. N.R.D.C.*, 568 U.S. 78, 83 (2013) ("no discharge of pollutants occurs when water, rather than being removed and then returned to a water body, *simply flows* from one portion of the water body to another" (emphasis added)). Neither of the cases Respondent cites involved a mechanized process that fundamentally altered a water's physical integrity (by releasing into it agitated streambed materials in the form of turbid discharge), biological integrity (by disturbing the organics in streambed materials and releasing turbid discharge into sensitive downstream salmon spawning habitat), or chemical integrity (by removing elements from the streambed and disbursing others post-processing). *See* 33 U.S.C. § 1362(19) (providing the definition of "pollution").

Respondent does not create a question of material fact here by offering his own explanation of his dredge's process: that a suction dredge is "effectively a vacuum cleaner which . . . only captures heavy materials" and releases the "non-captured material, mostly gravel, simply passing through the machine to its back where it is returned within six to ten feet from where it came . . . ." Decl. of Respondent, at 3. While the Ninth Circuit does not outright dismiss uncorroborated self-serving declarations, a Court may assign proportionate weight based on the source and type of self-serving statements. *Nigro v. Sears, Roebucks and Co.*, 784 F.3d 495, 497–98 (9th Cir. 2015). Were this Court to afford significant weight to Respondent's forgiving description,[11] his dredge still does more than cause water to "simply flow" through its

[11] Complainant urges this Court to assign limited weight to Respondent's declaration insofar as it describes the physical and hydrological changes to streambed materials and waterways caused by suction dredging. Respondent attests to the fact that his interest in mining is not recreational, it is professional. Decl. at ¶ 5. This financial self-interest, along with the lack of evidence that Respondent has advanced knowledge of chemical and hydrological processes, suggests that the declaration is of limited evidentiary reliability. *See F.T.C. v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997) ("A conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact.").

mouthpiece, suction hose, and sluicebox. The process of suction dredging cannot be reasonably classified as a water transfer, and no reasonable factfinder would find as such.

B. Respondent's Discharge Was Not Incidental Fallback

Respondent devotes the remainder of the Response to arguing that this Court should consider the suspended solids discharged from his suction dredge to be mere "incidental fallback" under CWA section 404 jurisprudence, which governs the discharge of dredged or fill material. Compl. Mem. addresses this argument on pages 13–14. Complainant does not here repeat its arguments, save for re-emphasizing that the principal case on "incidental fallback," which is the primary case on which Respondent relies for his arguments—*Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998)—both explains the exemption of incidental fallback from CWA section 404 regulation *and* distinguishes that concept from the very activity at issue in this case. 145 F.3d at 1406; *see* Compl. Mem., at 14. The D.C. Circuit pointed to *Rybachek* as a contrasting example of regulable discharges such as the one at issue here, and returned to relevant CWA section 404 jurisprudence to discuss the separate issue of incidental fallback.

Respondent's characterizations of the dredging process do not avoid the ambit of *Rybachek* or *Borden Ranch*. The Ninth Circuit in *Borden Ranch* discussed *Rybachek* and *Deaton*[12] and held as follows:

> These cases recognize that activities that destroy the ecology of a wetland are not immune from the Clean Water Act merely because they do not involve the introduction of material brought in from somewhere else. In this case, the Corps alleges that Tsakopoulos has essentially poked a hole in the bottom of protected wetlands. That is, by ripping up the bottom layer of soil, the water that was trapped can now drain out. While it is true, that in so doing, no new material has been

[12] In *Borden Ranch*, the Ninth Circuit provides the same quote from *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000) as Complainant provides in the Motion at page 10 to emphasize its position on the type of discharge at issue.

> "added," a "pollutant" has certainly been "added." Prior to the deep ripping, the protective layer of soil was intact, holding the wetland in place. Afterwards, that soil was wrenched up, moved around, and redeposited somewhere else. We can see no meaningful distinction between this activity and the activities at issue in *Rybachek* and *Deaton*. We therefore conclude that deep ripping, when undertaken in the context at issue here, can constitute a discharge of a pollutant under the Clean Water Act.

261 F.3d 810, 814 (9th Cir. 2001). The deep ripping at issue in *Borden Ranch* was a process "in which four- to seven-foot long metal prongs are dragged through the soil behind a tractor or a bulldozer. The ripper gouges through the restrictive layer, disgorging soil that is then dragged behind the ripper." *Id.* at 812. By this description, the soil, water, and pollutants in *Borden Ranch* were never removed from the water column.

Even should the Court accept Respondent's repeated characterizations of the suction dredging process as never causing the processed streambed materials and turbid discharge to leave the water column—a characterization which is at odds with the fact that a suction dredge's sluicebox sits on floating pontoons—that would not render a different outcome.

The question of law that Respondent raises in his Response regarding incidental fallback is the same as that which the Ninth Circuit resolved in *Borden Ranch* in a footnote following its holding, right down to case law Respondent offers here:

> *National Mining Assoc. v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998), upon which Tsakopoulos heavily relies, does not persuade us to the contrary. That case distinguished "regulable redeposits" from "incidental fallback." *Id.* at 1405. Here, the deep ripping does not involve mere incidental fallback, but constitutes environmental damage sufficient to constitute a regulable redeposit.

261 F.3d 810, n.2 (9th Cir. 2001). Respondent has not met his burden to create sufficient disagreement such that a reasonable trier of fact could decide in favor of either party on the issue of Respondent's discharge, nor has he established with affirmative evidence specific facts showing there is a genuine issue for trial.

III. Complainant is Entitled to Accelerated Decision as to Penalty

Respondent does not address penalty in his Response. Complainant refers the Court to Compl. Mem. at 16–20 to support its Motion as it applies to penalty.

Although he does not address penalty directly, Respondent repeatedly refers to his adherence to a separate permit obtained for his mining operations from the Idaho Department of Water Resources (the "Letter Permit"). Complainant addresses these arguments and the Letter Permit in detail in the specification of proposed penalty in the Rebuttal Prehearing Exchange, at page 24–25.[13]

Based on the foregoing, Respondent has raised no question of material fact on the issue of penalty nor disputed the reasoning and legal justification supporting Complainant's specification of proposed penalty, and accelerated decision is appropriate in the context of the calculated penalty.

CONCLUSION

In opposing the Motion, Respondent sets forth unsubstantiated attacks on the photographic and documentary evidence offered in support of the Complaint, and has presented inapposite legal arguments applicable to water transfers and incidental fallback, neither of which are present in this case. Because Respondent has not met his burden to establish with affirmative evidence specific facts showing there is a genuine issue for trial, nor has he created "sufficient disagreement" in the available facts, it is appropriate for this Court to grant Complainant's Motion for Accelerated Decision as to liability and penalty for the reasons set forth therein.

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[13] To the extent these arguments could be characterized to affect liability, Complainant emphasizes that "[a]n unpermitted discharge is the archetypal Clean Water Act violation, and subjects the discharger to strict liability." *In re Pamela Long*, 2010 EPA Admin. Enforce. LEXIS 36923 at *11 (June 4, 2010), *citing United States v. Pozsgai*, 999 F.2d 719, 725 (3d Cir. 1993).

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Dated this 14th day of August, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **REPLY IN SUPPORT OF MOTION FOR ACCELERATED DECISION**, dated August 14, 2017, was filed electronically with the Clerk of the Office of Administrative Law Judges using the ALJ e-filing system, which sends a Notice of Electronic Filing to Respondent.

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

Dated this 14th day of August, 2017.

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