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IN THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:     )  
                                  )  
DAVE ERLANSON, SR.     ) Docket No. CWA-10-2016-0109  
                                  )

Courtroom 4  
Jefferson County Courthouse  
210 Courthouse Way  
Rigby, Idaho

Tuesday,  
May 14, 2019

The parties met, pursuant to notice of the  
Court, at 9:00 a.m.  
BEFORE: HONORABLE CHRISTINE D. COUGHLIN  
Administrative Law Judge

APPEARANCES:  
For the Agency:  
WILLIAM McLAREN, Esquire  
MATTHEW MOORE, Esquire  
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For the Respondent:  
DAVE ERLANSON, SR., Pro se  
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Swan Valley, Idaho 83449

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WITNESSES:     DIRECT CROSS REDIRECT RE CROSS DIRE

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1 let me know, if you will, what witnesses you're  
2 planning to call to testify today. I'll begin with  
3 the Complainant.  
4 MR. McLAREN: Good morning, Your Honor.  
5 JUDGE COUGHLIN: Good morning.  
6 MR. McLAREN: My name is Will McLaren. I'm  
7 counsel for the Complainant.  
8 JUDGE COUGHLIN: Okay.  
9 MR. McLAREN: I'm joined by Matt Moore, also  
10 counsel for the Complainant.  
11 JUDGE COUGHLIN: Matt Moore?  
12 MR. MOORE: Correct.  
13 JUDGE COUGHLIN: Okay. All right.  
14 MR. McLAREN: And then we're joined behind  
15 us by Shannon Connery, paralegal with the Office of  
16 Regional Counsel --  
17 JUDGE COUGHLIN: Okay.  
18 MR. McLAREN: -- for Region 10.  
19 JUDGE COUGHLIN: And who are your witnesses?  
20 MR. McLAREN: The first witness will be  
21 Clint Hughes.  
22 JUDGE COUGHLIN: Okay.  
23 MR. McLAREN: He'll be a fact witness. The  
24 second witness will be Tara Martich, also a fact  
25 witness. The third witness will be Cindi Godsey.

PROCEEDINGS

(9:00 a.m.)

1  
2  
3 JUDGE COUGHLIN: Okay. Good morning,  
4 everyone. I'm Christine Coughlin. I'm an  
5 administrative law judge with the Environmental  
6 Protection Agency, and I've been designated to preside  
7 over this matter in litigation. I want to also  
8 identify Michael Wright, who is one of the senior  
9 attorney advisors in our office and accompanying me to  
10 this hearing.

11 I'm going to begin just by introducing a few  
12 kind of preliminary points for the case to open it up,  
13 and then I'll ask the parties to identify themselves  
14 for the record. And I think there are some  
15 preliminary matters we'll need to discuss, and we'll  
16 go from there.

17 This is a matter involving Dave Erlanson,  
18 Sr., Docket No. CWA-10-2016-0109. Today's date is  
19 May 14, 2019. We are here in the Jefferson County  
20 Magistrate and District Court in Rigby, Idaho. And  
21 the hearing was scheduled to begin at 9:00, and I  
22 believe it's just a couple of minutes past the hour,  
23 so we're more or less on time.

24 At this point, I'd just like the parties to  
25 identify themselves for the record, and then simply

1 She'll provide some fact testimony as well as some  
2 expert testimony. The fourth witness will be Dan  
3 Kenney, also an expert witness. And the fifth witness  
4 will be Dave Arthaud, also an expert.  
5 JUDGE COUGHLIN: Okay. All right. Thank  
6 you.  
7 And the Respondent is David Erlanson, Sr.,  
8 appearing in proceeding pro se. Is that you, sir?  
9 MR. ERLANSON: Yes, it is, Your Honor.  
10 JUDGE COUGHLIN: All right. Welcome. And  
11 do you have witnesses you're planning to call to  
12 testify in addition to yourself, I assume?  
13 MR. ERLANSON: In my opening statement, Your  
14 Honor, you'll hear that I am not going to enter a  
15 defense in this proceeding.  
16 JUDGE COUGHLIN: Okay.  
17 MR. ERLANSON: I'm going to basically go on  
18 the paperwork that has been presented to this Court.  
19 JUDGE COUGHLIN: Do you not wish to testify?  
20 MR. ERLANSON: I do not intend to take the  
21 stand on my behalf, Your Honor.  
22 JUDGE COUGHLIN: Okay. You just want to  
23 listen to what the Complainant is --  
24 MR. ERLANSON: Yeah. I would like to cross-  
25 examine a couple of their witnesses with a few

1 questions. But other than that, I don't intend to  
2 waste the Court's time or these gentlemen's time. My  
3 opening statement will state that.

4 JUDGE COUGHLIN: Okay. All right. Well,  
5 it's entirely up to you. In a moment, I do want to  
6 just go over some procedures, just so that you're  
7 fully informed.

8 MR. ERLANSON: Sure.

9 JUDGE COUGHLIN: It's up to you to decide.  
10 I'm not here to sway you one way or the other. But  
11 it's important to me that you're fully informed. So I  
12 just want to take a little bit of time to go over  
13 that. I think inevitably it will evolve because I  
14 understand there are some new exhibits that you are  
15 seeking to introduce.

16 MR. ERLANSON: Yes.

17 JUDGE COUGHLIN: So I think we're going to  
18 get into some of these discussions anyway. And then  
19 if you want to reconsider, you're welcome to because  
20 I'm going to begin with the Complainant anyway.

21 MR. ERLANSON: Correct.

22 JUDGE COUGHLIN: They have the burden. And  
23 as you know, the issue of liability has already been  
24 decided at my level --

25 MR. ERLANSON: Yes.

1 JUDGE COUGHLIN: -- through the order that I  
2 issued on accelerated decision. But I left open the  
3 question with regard to penalty and the  
4 appropriateness of any penalty because I thought that  
5 there might be some issue with respect to the penalty  
6 factors, and in particular harm, based on some of the  
7 arguments that had been made prehearing, I believe by  
8 your attorney at the time. And so it seemed to me the  
9 fairest thing to have an evidentiary hearing in order  
10 to develop that as fully as I can before ruling on  
11 that piece.

12 That said, all of it is available for  
13 appeal. So while this is the opportunity to present  
14 the evidence you want to be considered for a decision  
15 I'll be making as to penalty --

16 MR. ERLANSON: Right.

17 JUDGE COUGHLIN: -- any decision that I make  
18 is appealable further. And the next step of review is  
19 going to be the last administrative step, which would  
20 be to the Environmental Appeals Board. They review  
21 the decisions that administrative law judges make.  
22 And that would include my decision on liability.

23 MR. ERLANSON: Yes.

24 JUDGE COUGHLIN: So all of that is  
25 available.

1 MR. ERLANSON: Right.

2 JUDGE COUGHLIN: I want you to understand  
3 that.

4 MR. ERLANSON: I do, Your Honor.

5 JUDGE COUGHLIN: Okay, perfect. So think  
6 about -- if you don't want to take the stand, you  
7 don't have to. You know, this is your opportunity to  
8 express the arguments you have about the Complainant's  
9 case with respect to penalty, and to present your own  
10 evidence and argument with regard to whether you think  
11 it's an appropriate penalty or any mitigating factors  
12 that might reduce a penalty. And if you choose to  
13 forego that, I'm certainly not going to force you to  
14 testify. But just know that I can't consider what  
15 isn't presented.

16 So consider it.

17 MR. ERLANSON: Right.

18 JUDGE COUGHLIN: I'll check in with you at  
19 the appropriate point because, as I said, I'm going to  
20 begin with Complainant. So until they're through with  
21 all of their witnesses, you can wait and make that  
22 decision, if you wish to. So I'll check in with you  
23 then.

24 MR. ERLANSON: As far as your witnesses,  
25 they'll put a witness on, and then I have a chance to

1 ask that witness several questions after they're  
2 done --

3 JUDGE COUGHLIN: Yes.

4 MR. ERLANSON: -- presenting their case,  
5 correct?

6 JUDGE COUGHLIN: Yes. And I may as well get  
7 into that now, too. So basically, what will happen is  
8 I -- you know, to make an opening statement and a  
9 closing statement, it is permissible, but it's  
10 argument. And the purpose of this hearing is really  
11 for purposes of developing a factual record upon which  
12 I'm going to make a decision.

13 MR. ERLANSON: Right.

14 JUDGE COUGHLIN: So for that reason, if it's  
15 really important to you to make an opening statement,  
16 I'll certainly let you do that. I mean, it needs to  
17 be brief, and that's because the purpose of this is to  
18 obtain the evidence, and the evidence is through  
19 testimony, through a witness' testimony, or through  
20 documentary evidence that's admitted into evidence.

21 MR. ERLANSON: Correct.

22 JUDGE COUGHLIN: So that's really the reason  
23 I'm here, which is why I don't intend to allow a lot  
24 of time for an opening or closing. But that said, if  
25 you feel it's really important to you, I'll give you

1 some time. But it does need to be brief.  
 2 MR. ERLANSON: I need about two minutes,  
 3 Your Honor.  
 4 JUDGE COUGHLIN: Okay. Would you like to be  
 5 under oath when you make it, just in case there is --  
 6 MR. ERLANSON: I want my opening statement  
 7 to be on the record so that in further appeal  
 8 decisions, you know, appeals jurisdictions I should  
 9 say, that it will be available. You know, it will be  
 10 on the record.  
 11 JUDGE COUGHLIN: Okay.  
 12 MR. ERLANSON: That's my main purpose  
 13 here --  
 14 JUDGE COUGHLIN: Okay.  
 15 MR. ERLANSON: -- is to get everything that  
 16 I've -- the paperwork that I've submitted over the  
 17 course of the past three months since I've been  
 18 involved in this, firsthand, I should say, since my  
 19 attorney quit because of illness -- I just want to  
 20 make sure that that paperwork is on the record for the  
 21 appeals process.  
 22 JUDGE COUGHLIN: Okay. All right,  
 23 understood.  
 24 MR. ERLANSON: Okay.  
 25 JUDGE COUGHLIN: And it will be.

1 MR. ERLANSON: Okay.  
 2 JUDGE COUGHLIN: I think probably it will  
 3 be -- it might be helpful that before you make your  
 4 opening I put you under oath.  
 5 MR. ERLANSON: Okay.  
 6 JUDGE COUGHLIN: I mean, typically, that's  
 7 reserved for testimony. But just in case there is  
 8 anything that, you know, you may want to be able to  
 9 rely upon, it might be in your best interests if I put  
 10 you under oath.  
 11 MR. ERLANSON: Whatever you think is best.  
 12 JUDGE COUGHLIN: I will. I will do that.  
 13 And that way, you know, it's there. Let me go ahead  
 14 and just briefly talk about the hearing procedures,  
 15 and then we need to talk about some new exhibits that  
 16 I think you're offering. And I also want to make  
 17 mention of some of the exhibits that were submitted  
 18 during the prehearing exchange process, again only so  
 19 you're fully informed, okay?  
 20 MR. ERLANSON: Okay.  
 21 JUDGE COUGHLIN: You decide what you want.  
 22 And if you have questions, let me know. I'm not here  
 23 as an advocate. What is critical to me is that this is  
 24 a full and fair developed record. And I realize  
 25 you're proceeding pro se, and, you know, I know that

1 this can be rather formalistic and certainly it's a  
 2 legal proceeding. So I just want to make sure that  
 3 you understand what is going on.  
 4 MR. ERLANSON: Yeah.  
 5 JUDGE COUGHLIN: Okay?  
 6 MR. ERLANSON: I appreciate it.  
 7 JUDGE COUGHLIN: Okay. So all that said --  
 8 and you can have a seat now. This is going to be a  
 9 little bit -- I don't want you to have to stand  
 10 through it all.  
 11 All that said, the way that the hearing is  
 12 typically handled is, as I mentioned, the Complainant  
 13 goes first. And they go first because they have the  
 14 initial burden with regard to liability, although that  
 15 has been established, as I've said, for my purposes,  
 16 for the ALJ level. But they also have the burden of  
 17 presenting evidence and supporting what they contend  
 18 is an appropriate penalty that they're proposing.  
 19 That's why I start with them.  
 20 So what will happen is if they want to make  
 21 an opening, they can. Again, you know, briefly. And  
 22 then I'll begin with each of their witnesses. I  
 23 understand the court reporter is able to swear those  
 24 individuals in, so they'll take an oath, receive an  
 25 oath, and swear to tell the truth, or affirm that they

1 will. And then the Complainant will have the  
 2 opportunity to ask them questions.  
 3 Once they've completed their questions, you  
 4 then can ask them questions about what they've said.  
 5 So it's referred to as direct and cross. And then if  
 6 there is the need for any follow-up questions by the  
 7 Complainant based on the testimony that came out when  
 8 you asked them questions, they can follow up on that.  
 9 And then the same holds true for you.  
 10 So it's basically the ability to ask  
 11 questions about what the witness has testified about.  
 12 Sometimes I have questions, so I happen with them -- I  
 13 usually try to wait until the end because I don't want  
 14 to disrupt a party's presentation or development of  
 15 testimony. But every once in a while if it's a  
 16 question that can just quickly get answered if I  
 17 interject, I do that, just to save some time rather  
 18 than trying to go back several minutes later and have  
 19 the witness try to remember what it is that they were  
 20 talking about at the time I might have a question on.  
 21 So that said, that's the process for the  
 22 Complainant. And then once they're done with their  
 23 last witness and all testimony has been presented, and  
 24 documentary evidence, then that's when I would turn to  
 25 you and any witnesses that you, you know, would have

1 offered or --

2 MR. ERLANSON: Right.

3 JUDGE COUGHLIN: -- still can if you wanted

4 to, based on what you've exchanged prehearing. And I

5 follow the very same process with you and your

6 witnesses, and with you if you were to take the stand.

7 Because there isn't someone representing you to

8 question you, the way I typically handle that with

9 someone who is proceeding pro se or unrepresented is I

10 simply let you tell me what you want to tell me, and I

11 ask you some questions if I have any. But it's your

12 opportunity to provide your information that you want

13 me to consider, and determining what if any amount of

14 penalty is appropriate here today.

15 And then the Complainant, one of the

16 attorneys, will have the opportunity to ask you

17 questions about what you say. So again, just mull it

18 over, no pressure at all. But I just really want you

19 to understand that I recognize the need to preserve

20 things for appeal. But I wouldn't want you to go down

21 that road and foreclose the opportunity to present

22 information you might want me to consider in making a

23 penalty determination.

24 And if you choose not to testify, it's fine.

25 I just really want you to fully understand what it's

1 all about.

2 MR. ERLANSON: I appreciate it.

3 JUDGE COUGHLIN: Okay? Sure. Any questions

4 about that before we start to get into some documents?

5 MR. ERLANSON: Not from me.

6 JUDGE COUGHLIN: Okay. All right. Then

7 from Complainant?

8 MR. McLAREN: Nothing from Complainant.

9 JUDGE COUGHLIN: All right. So let's just

10 talk briefly here preliminarily about some of the

11 documents. Now, I understand from Michael that you've

12 presented some additional documents that are --

13 they're proposed exhibits that are new, that you want

14 me to accept. I guess first let me give Complainant

15 an opportunity to make any statements with regard to

16 this newly proposed evidence.

17 MR. McLAREN: Do you prefer that I stand

18 when I address you, Your Honor?

19 JUDGE COUGHLIN: It's best.

20 MR. McLAREN: Yes. I would just move to

21 exclude these newly proposed exhibits for the same

22 basis as you provided in the May 2, 2019, order to

23 exclude the newly introduced exhibits from March.

24 These are the first time we've seen them today.

25 JUDGE COUGHLIN: Okay.

1 MR. McLAREN: So that's all I have to say

2 about this. RX-30 -- Respondent provided RX-24

3 through RX-33. Those are the new ones today.

4 JUDGE COUGHLIN: Okay.

5 MR. McLAREN: RX-30 is one item we intend to

6 introduce into evidence. It just has some additional

7 markings on it. So I would move to exclude this on

8 the same basis as the others.

9 JUDGE COUGHLIN: Okay. All right. Thank

10 you.

11 MR. McLAREN: Yes, Your Honor.

12 JUDGE COUGHLIN: Okay. Mr. Erlanson, let me

13 try and explain a little bit about why I'm not going

14 to admit these, and -- but what that means ultimately.

15 This is a very old case. It's one of the oldest in

16 our office.

17 MR. ERLANSON: For sure.

18 JUDGE COUGHLIN: It's nearly three years

19 old, and the complaint was filed in June of 2016. And

20 it has been through a very, you know, full exchange of

21 information. And so the reason that it would be rare

22 for me to admit documents at the last moment is

23 unfairness to the other side, in addition to the fact

24 that there is an opportunity to exchange this

25 information earlier when people have a chance to

1 review it and prepare to respond to it.

2 It's for that reason that in my last order

3 on motions, the most recent one that I issued in May,

4 earlier this month, I excluded basically the new

5 evidence you were proposing as well as what I

6 construed as a new proposed exhibit by Complainant.

7 My rationale was expressed there. I'm trying to sort

8 of summarize it briefly here. It really comes down to

9 fairness and prejudice in terms of a person being able

10 to -- or a party being able to properly prepare.

11 So that's why I'm not going to admit these.

12 But that said, I will maintain them as part of the

13 case record, just as what you presented with your

14 request to add RX-20 through 23. That is maintained

15 in the case record, the difference being that my

16 decision for penalty is going to be based on the

17 evidence presented at this hearing. So if I'm

18 excluding documents, it isn't part of my evidentiary

19 record on which I'm going to base my decision.

20 But it is maintained as part of the overall

21 case record of the case. That includes basically

22 everything that has been filed really, my orders,

23 motions, notices. That is kind of the larger case

24 record, if you will. And so in that sense, it's

25 preserved for appeal.

1 So I'm going to -- did you have a copy of  
 2 these for the court reporter?  
 3 MR. ERLANSON: I gave four copies out.  
 4 JUDGE COUGHLIN: Okay. So does the court  
 5 reporter have a copy of 24 through -- no?  
 6 (Pause.)  
 7 JUDGE COUGHLIN: Well, what I'll -- okay.  
 8 What I'll do is I am going to hand my copy to the  
 9 court reporter.  
 10 MR. MOORE: Your Honor, I think Jay  
 11 (phonetic) also has two copies that we're willing to  
 12 show to the court reporter.  
 13 JUDGE COUGHLIN: Okay, great. Why don't you  
 14 do that then, and then we all have one, and the reason  
 15 being that the court -- so I'll have a working copy,  
 16 if you will, that I'll take back with me to my office.  
 17 But the court reporter is going to be noting in this  
 18 record that you wanted to introduce RX-24 through RX-  
 19 33, that I'm excluding them for the reasons I've  
 20 stated, and that's going to be reflected in the  
 21 transcript. And the court reporter will have all of  
 22 the exhibits, those that were excluded as well as  
 23 those that were admitted, and that's going to be part  
 24 of the official record, so it will be preserved in  
 25 that regard.

1 (The documents referred to  
 2 were marked for  
 3 identification as  
 4 Respondent's Exhibit Nos. 24  
 5 through 33.)  
 6 JUDGE COUGHLIN: And with respect to the  
 7 earlier exhibits, I excluded them through the  
 8 prehearing motion practice. So that's reflected by  
 9 virtue of the order I issued.  
 10 MR. ERLANSON: Right.  
 11 JUDGE COUGHLIN: So those are also preserved  
 12 in the case record. Should you wish to appeal, you  
 13 need only reference that, okay? The same holds true  
 14 with regard to RX-1 and RX-3. That had been the  
 15 subject of an earlier motion in limine that the  
 16 Complainant filed. I could give you the date, I  
 17 think, but suffice to say it was back in December, and  
 18 I had granted it to exclude RX-1 and RX-3. I granted  
 19 their motion.  
 20 So those two are also preserved for appeal  
 21 based on my order excluding them.  
 22 MR. ERLANSON: Okay.  
 23 JUDGE COUGHLIN: Okay?  
 24 MR. ERLANSON: Thank you.  
 25 JUDGE COUGHLIN: Now, what remains an open

1 question -- and I think Mike may have just tried to  
 2 talk to you a little bit about it prehearing, although  
 3 it's good for me to go through it with you thoroughly  
 4 on the record.  
 5 There still remain some proposed exhibits  
 6 that your attorney at the time had submitted as part  
 7 of the prehearing exchange process, namely RX-2 and  
 8 RX-4 through RX-9. Those were previously exchanged.  
 9 Those, if you wanted to, you could seek to introduce  
 10 them, if you wished. But that's up to you. I think  
 11 initially your reaction was no or that you might need  
 12 to think about it. But give that some thought, too.  
 13 You don't have to decide this instant.  
 14 MR. ERLANSON: Oh, that's good.  
 15 JUDGE COUGHLIN: Okay. Because that's  
 16 something that you would want to introduce when you  
 17 present your case, if you do, if you testify, if you  
 18 have any witnesses to testify. You know, I guess just  
 19 to explain a little bit, with regard to documentary  
 20 evidence, if it's authored by someone -- and this sort  
 21 of ties into some of what I explained in my order on  
 22 the first motion in limine back in December.  
 23 If it's authored by somebody, if there is  
 24 someone who needs to authenticate it and explain what  
 25 it is, usually it's done through a witness so that I

1 have some foundation for what the document purports to  
 2 be. If you weren't presenting any witnesses, and you  
 3 simply want to introduce these documents, I can still  
 4 accept them. I mean, whether or not there are  
 5 objections, I will entertain them, of course. But I  
 6 can still potentially accept them and admit them. But  
 7 there could be issues with regard to how much weight I  
 8 can attach to them if they're not really  
 9 authenticated, okay?  
 10 And I'm trying to not get too much into like  
 11 the legalese here, but this is an administrative  
 12 hearing, and we use the Rules of Evidence, the Federal  
 13 Rules of Evidence and the Federal Rules of Civil  
 14 Procedure as a guide. But they are not formally  
 15 binding. So it's a somewhat relaxed standard. But  
 16 that said, it isn't a free-for-all either. And so  
 17 with respect to how much weight I can give a piece of  
 18 evidence, that may be dictated by the extent to which  
 19 it is authenticated and other issues like reliability  
 20 and materiality, and things of that nature.  
 21 So, you know, just think about it. If you'd  
 22 like me to be able to consider it at all, then it  
 23 would be best to ask to have them admitted. I'll  
 24 entertain any objections if there are any. And if I  
 25 admit them, then I can give them the amount of weight

1 that I'm able to, based on the entire evidentiary  
2 record. Does that make sense?

3 MR. ERLANSON: Your Honor, you're talking  
4 about the RX-2 through -- RX-4 through 9? Is that  
5 what you're talking about?

6 JUDGE COUGHLIN: Yes.

7 MR. ERLANSON: We're discussing right now?

8 JUDGE COUGHLIN: Right.

9 MR. ERLANSON: Okay. I just wanted to be  
10 clear. That's what I thought.

11 JUDGE COUGHLIN: Yes. Those were previously  
12 exchanged, so they're available to be offered if you  
13 wish.

14 MR. ERLANSON: I just don't know what they  
15 are. I haven't looked at them.

16 JUDGE COUGHLIN: I have a copy of them, so  
17 if you would like to take a look at them. I haven't  
18 marked them other than on the top right I indicated  
19 the date that they were filed, which I've done with  
20 some things I've copied, just to have kind of a time  
21 line in sequence. So you'll see on my copy in the  
22 upper right-hand corner a pencil mark that indicates  
23 the date.

24 MR. McLAREN: And, Your Honor, as with the  
25 first set of exhibits, EPA has myriad extra copies of

1 everything. So we could also provide a folder that  
2 has them in order for quick review.

3 JUDGE COUGHLIN: Oh, wonderful.

4 MR. McLAREN: Right.

5 JUDGE COUGHLIN: Wonderful. Could you give  
6 that to Mr. Erlanson now?

7 MR. McLAREN: Here you are, sir. Yep.

8 JUDGE COUGHLIN: Great. Thank you.

9 MR. McLAREN: Yep.

10 JUDGE COUGHLIN: So those are the  
11 Respondent's proposed exhibits.

12 MR. McLAREN: Those are all of the initially  
13 proposed exhibits, including those that you've  
14 excluded as a result of our motions.

15 JUDGE COUGHLIN: Okay.

16 MR. McLAREN: So those are all in there.

17 MR. ERLANSON: I see in here listed.

18 MR. McLAREN: Yep. And then perhaps just --  
19 I believe it was 1, 3, and then everything after 9  
20 have been excluded for the purposes of this hearing.

21 JUDGE COUGHLIN: Yes.

22 MR. McLAREN: So just with that reminder.

23 JUDGE COUGHLIN: Right.

24 MR. McLAREN: Yeah.

25 JUDGE COUGHLIN: And I should also just

1 clarify for the record that there were no proposed  
2 Exhibits RX-10 through RX-19. There was a gap there,  
3 for whatever reason. And it doesn't really matter. I  
4 just want to be clear that there is not something that  
5 I'm missing and speaking about.

6 So nothing, no RX-10 through RX-19 was ever  
7 proposed. It ends with RX-9 and then picks up with  
8 RX-20.

9 So take a look through those, and again, the  
10 focus being RX-2 and RX-4 through 9. You've got that.  
11 Those are available. The rest I've excluded. So as I  
12 said, part of the case record, but won't be part of my  
13 evidentiary record upon which I'll base a decision.

14 So all that said, no pressure. You decide.  
15 Think about it. You don't have to decide this  
16 instant, okay? I'll come back to you and check in  
17 once the Complainant is through with their case. We  
18 have plenty of time set aside. We've got all day  
19 today, all day tomorrow, really technically even  
20 through Friday, though I don't think it's going to go  
21 that long. If it does, that's fine.

22 So take your time and just give it some  
23 thought. Do you have any questions for me about any  
24 of this before we get started?

25 MR. ERLANSON: Your Honor, I understood you

1 pretty well, I think.

2 JUDGE COUGHLIN: Okay.

3 MR. ERLANSON: So I'm -- yeah, I'm ready.

4 JUDGE COUGHLIN: Okay. All right. Very  
5 good. Okay. Anything else preliminarily we need to  
6 talk about before we get started?

7 MR. McLAREN: EPA has nothing.

8 JUDGE COUGHLIN: Okay. And, Mr. Erlanson,  
9 you're ready to begin? You just need to answer  
10 verbally for the record.

11 MR. ERLANSON: Oh, yes.

12 JUDGE COUGHLIN: Okay.

13 MR. ERLANSON: Yeah.

14 JUDGE COUGHLIN: And, Mr. Jones, are you  
15 able to hear everyone okay? We're all --

16 THE COURT REPORTER: Mr. McLaren, for some  
17 reason, is not coming through as loud as I would  
18 prefer, but just --

19 MR. McLAREN: I can project.

20 THE COURT REPORTER: Thank you.

21 JUDGE COUGHLIN: Okay. And this swivels.

22 MR. McLAREN: Yeah.

23 JUDGE COUGHLIN: So if you need to get it  
24 closer.

25 THE COURT REPORTER: That's for amplifying,

1 this is for me. But that helps.  
 2 JUDGE COUGHLIN: Okay.  
 3 THE COURT REPORTER: Because you're coming  
 4 through loud and clear, but you're also closer to the  
 5 mike.  
 6 JUDGE COUGHLIN: Yeah. I tend to do that,  
 7 so I --  
 8 THE COURT REPORTER: Which -- that's okay.  
 9 JUDGE COUGHLIN: Okay.  
 10 THE COURT REPORTER: That's okay.  
 11 JUDGE COUGHLIN: Okay.  
 12 THE COURT REPORTER: I like that.  
 13 JUDGE COUGHLIN: Okay.  
 14 THE COURT REPORTER: But if I turn it down  
 15 for you, then sometimes I have trouble hearing them,  
 16 so --  
 17 JUDGE COUGHLIN: Okay. So I pointed to the  
 18 wrong thing. It's the smaller mike.  
 19 MR. McLAREN: I'll bring them all closer to  
 20 me.  
 21 JUDGE COUGHLIN: All right, great.  
 22 MR. McLAREN: Just let me know if I speak  
 23 too fast or too quietly.  
 24 JUDGE COUGHLIN: Okay. And, Mr. Erlanson,  
 25 you, too. It's that small mike that you want to --

1 MR. ERLANSON: Okay.  
 2 JUDGE COUGHLIN: -- make sure you talk into.  
 3 All right, very good.  
 4 Okay. So with that said, Mr. Erlanson, you  
 5 want to be able to make an opening, right? So let me  
 6 start with Complainant, and I'll give you the  
 7 opportunity as well.  
 8 Any opening remarks from Complainant?  
 9 MR. McLAREN: I do have some opening  
 10 remarks, and shall I sit for these to be closer to  
 11 this microphone?  
 12 JUDGE COUGHLIN: That's fine.  
 13 MR. McLAREN: Okay.  
 14 JUDGE COUGHLIN: If it's more comfortable  
 15 for all of you to sit, it's fine with me. And it's a  
 16 small mike, so it might be a bit awkward if you stood  
 17 anyway.  
 18 MR. McLAREN: Okay. Thank you, Your Honor.  
 19 This case, as you said, involves a violation of the  
 20 Clean Water Act carried out by Mr. Dave Erlanson in  
 21 July of 2015. The violation is the unauthorized  
 22 discharge of a pollutant, sediment in the form of  
 23 turbidity to water of the United States, the South  
 24 Fork of Clearwater River, and without authorization  
 25 under a sanctioned permit.

1 In the river several hundred miles northwest  
 2 of here, Mr. Erlanson was mining for gold in 2015, and  
 3 that statement is a benign one without any context.  
 4 So we'll provide you five witnesses for that context.  
 5 First, you'll hear from Clinton Hughes, who is a  
 6 geologist and inspector for the United States Forest  
 7 Service. Mr. Hughes conducted the inspection in which  
 8 he found Mr. Erlanson actively dredging. He'll  
 9 discuss the report he performed and put together after  
 10 the fact. He'll describe the plume of turbid  
 11 discharge that he observed coming from Mr. Erlanson's  
 12 dredge, combining with another plume and floating down  
 13 the river for hundreds of feet and outside of Mr.  
 14 Hughes' field of vision.  
 15 You'll then hear from Tara Martich, the  
 16 compliance officer from the United States EPA who  
 17 developed this case. She'll discuss the very  
 18 conservative penalty calculation that she put  
 19 together, and based on the limited information that  
 20 Mr. Erlanson provided EPA throughout this case. And  
 21 she'll discuss how the EPA determines the harm of a  
 22 violation for the purposes of penalty calculations.  
 23 She'll speak not only to the physical harm  
 24 to the river, but the harm of unchecked dredging on  
 25 sensitive habitat within -- or sensitive wildlife

1 within that sensitive habitat. The sensitive habitat  
 2 here, the South Fork of Clearwater River, which is  
 3 impaired from sediment, and the sensitive wildlife,  
 4 the Endangered Species Act listed species that call  
 5 that river home.  
 6 She'll also speak to Mr. Erlanson's  
 7 willfulness, which goes to her penalty calculation.  
 8 She'll describe how Mr. Erlanson knew of the permit  
 9 requirements, that he knew how to obtain permit  
 10 coverage, and that he knew that the South Fork was  
 11 closed for dredging due to the presence of those  
 12 Endangered Species Act listed species. She'll also  
 13 briefly speak to the harm to the regulatory regime  
 14 caused by unauthorized dredging in the South Fork.  
 15 You'll then hear from Cindi Godsey, who is  
 16 the permit writer for this case -- pardon, for the  
 17 purposes of this permit, a very long-time permit  
 18 writer with significant experience in mining and  
 19 mining regulation. She will discuss how a well-  
 20 working regulatory program can do the very important  
 21 balancing act of restoring the river and protecting  
 22 its species while still allowing this precise activity  
 23 to occur in a way that moderates its environmental  
 24 impact.  
 25 She'll testify to her decades of experience



1 writing permits, rolling them out, how she teaches  
2 them to the regulated community before the permit goes  
3 into effect, and how she issues permit authorizations  
4 related to mining. She'll explain how non-compliance  
5 and unwillingness to obtain permit authorization again  
6 harms the effectiveness of those programs.

7 She'll also testify to the influence of a  
8 few or even just one influential dredger over others  
9 in the regulated community and how that again  
10 amplifies this harm. You'll then hear about the river  
11 itself from Mr. Dan Kenney. Mr. Dan Kenney is a  
12 fisheries biologist with the United States Forest  
13 Service. He'll provide expert testimony based on his  
14 measurement of the size and volume of the hole and  
15 dredge pile caused by Mr. Erlanson's activity.

16 The Court will be given some quantitative  
17 information regarding the harm on a very  
18 individualized basis such that we're not only talking  
19 about a system-wide or systematic impact, but we are  
20 talking about an impact specific with this violation.  
21 He'll be able to speak to the mitigation measures  
22 necessary to minimize the adverse impacts of suction  
23 dredging to those listed species based on the  
24 biological assessment that Mr. Kenney assisted in  
25 preparing, and he'll discuss Mr. Erlanson's non-

1 compliance with those measures.

2 And then the final witness is David Arthaud,  
3 also a fisheries biologist from the National Marine  
4 Fisheries Service. He'll discuss the scientific basis  
5 for the harms of suction dredging, that that suction  
6 dredging causes to aquatic life -- pardon me -- found  
7 both in the biological opinion that he offered on this  
8 activity and in the relevant scientific literature.

9 Based on Mr. Arthaud's review of this case,  
10 he will explain that Mr. Erlanson's dredging activity  
11 incrementally frustrates Endangered Species Act  
12 restoration efforts in the South Fork Clearwater  
13 River. He will explain how the turbid discharge  
14 released by Mr. Erlanson's dredge reduces the quantity  
15 and quality of the habitat for those listed fish  
16 species that I mentioned. And then he'll also  
17 describe suction dredging's impact on both plant life  
18 in the river, as well as the micro-invertebrates that  
19 those fish rely upon for food and other basis for  
20 habitat.

21 Mr. Arthaud will also respond to some common  
22 claims from suction dredge miners about the alleged  
23 beneficial impacts of suction dredging on the river.  
24 And all of this testimony and evidence will come  
25 together to show that the harm here is unmistakable

1 and significant, and that an appropriate penalty in  
2 this case should be calculated and assessed against  
3 Mr. Erlanson. And that's all I have. Thank you.

4 JUDGE COUGHLIN: Okay. All right. Thank  
5 you.

6 Mr. Erlanson, that was a fairly thorough and  
7 comprehensive opening, which is fine. So take your  
8 time. And before you make yours, let me go ahead --  
9 or, Mr. Jones, would you please put Mr. Erlanson under  
10 oath before he makes his opening statement?

11 THE COURT REPORTER: Yes, ma'am.

12 JUDGE COUGHLIN: You just need to stand and  
13 raise your hand.

14 THE COURT REPORTER: Do you solemnly swear  
15 or affirm to tell the truth, the whole truth, and  
16 nothing but the truth here today?

17 MR. ERLANSON: I do.

18 JUDGE COUGHLIN: Okay. Go right ahead and  
19 make your opening. And, yeah --

20 MR. ERLANSON: Okay.

21 JUDGE COUGHLIN: -- feel free to sit in  
22 doing so.

23 MR. ERLANSON: Okay. Foremost, I would like  
24 to thank the Court for its time in coming to our  
25 beautiful state of Idaho. I understand that at this

1 hearing I have the opportunity to present testimony on  
2 my own behalf as a witness. I also understand that I  
3 may call a witness to testify in my defense.

4 Not long ago, I received this voluminous  
5 case against me from the EPA. I received that April  
6 2nd. I already had planned a month's vacation, so I  
7 just barely started leafing through this. So I am not  
8 at this time ready to defend myself. I will not  
9 testify on my behalf, nor call any witnesses for my  
10 defense in this matter before the Court. My case will  
11 rest on my cross-examination and the documents  
12 presented to this Court previously. And, of course,  
13 I'm going to take a look at these other ones that we  
14 mentioned earlier.

15 I do respect the Court's decision that this  
16 hearing is to deal solely with the penalty phase, as I  
17 was found guilty of violating 33 USC 1311 at A  
18 approximately eight months ago, on September 27, 2018,  
19 by an order of this very Court.

20 For the record, I maintain that on July  
21 22nd, I was lawfully engaged in an activity using the  
22 suction dredge, which had a five-inch nozzle capacity,  
23 or less. And that is considered a recreational dredge  
24 because of the nozzle size. The Environmental  
25 Protection Agency does not consider a dredge of five

1 inches or under to be a source point of a pollutant.  
 2 My activity was located on one of my federal  
 3 mining claims located in Idaho County, Idaho, on the  
 4 South Fork of the Clearwater River. The claims are  
 5 named aptly Payday 2 and Payday 3. At this time, on  
 6 July 22, 2015, I was in possession of an Idaho  
 7 Department of Water Resource 2015 Idaho recreational  
 8 mining authorization form, known among the miners as a  
 9 letter permit, which legally allows me to operate a  
 10 five-inch nozzle size -- that's a recreational size  
 11 dredge -- or smaller within the wetted perimeter of  
 12 the South Fork of the Clearwater River.

13 Counsel for the EPA says that I did -- in  
 14 their accelerated motion on the 27th of September,  
 15 2018, states that I didn't have an individual permit,  
 16 but failed to tell the Court the prohibitive cost,  
 17 number one, and the excessive wait period to get that  
 18 permit. The excessive -- the prohibitive cost is from  
 19 \$530 to several thousand dollars, and that's not a  
 20 couple thousand. That's several thousand. It could  
 21 go to 4 or \$5,000.

22 The wait period to get an individual permit,  
 23 NPDES permit, is a minimum of 180 days. That's right  
 24 off the EPA web site. That's where I got this  
 25 information. So since you cannot apply for any

1 permit, and you have to get the Idaho Department of  
 2 Resource permit first, which you're not allowed to  
 3 apply for that until April 1st of each year. So from  
 4 April 1st to July 15th in 2015, when the season  
 5 opened, even if I had applied on April 1st -- and I  
 6 believe I have a -- I believe the dredge permit that I  
 7 got from Idaho I received on something like the 10th  
 8 or the 11th of May, I subsequently applied, made  
 9 application for an NPDES permit to the EPA. Tracy  
 10 Peake, I believe, at that time.

11 And so if it takes six months to get a  
 12 permit, and considering that you have to apply for a  
 13 permit April 1st, there is no way that there was a  
 14 permit available to me by the July 15th opener. Now,  
 15 on that application for an NPDES permit, I received my  
 16 denial on August 14, 2015, one day before the end of  
 17 the legal dredging for the South Fork of Clearwater  
 18 River. There is no way in the time span of less than  
 19 24 hours I could have applied for the individual  
 20 permit as counsel for the EPA asserts. There is just  
 21 -- there is no time.

22 Now, lastly, counsel for the EPA has  
 23 suggested to this Court in the accelerated motion a  
 24 penalty in the amount of \$6,600. I believe that an  
 25 imposition of this excessive fine would be -- well,

1 quite frankly, I think it's too much. I put the term  
 2 in there excessive fine because under the Eighth  
 3 Amendment of the Constitution, it lists it that way.  
 4 And I think only with fairness under equal justice  
 5 under the law, which is the Ninth Amendment, that this  
 6 Court should entertain an amount of penalty that was  
 7 assessed to anyone of the two dozen plus or minus  
 8 dredges that were dredging on the South Fork in 2015.

9 In 2014, I'm not sure how many dredgers were  
 10 dredging there. In 2013, I'm not sure how many  
 11 dredgers were dredging there. But I know from the  
 12 Environmental Protection Agency that no one had an  
 13 NPDES permit. So I would say that there is one other  
 14 individual that I know that was -- I'll use the term  
 15 prosecuted under the NPDES -- not having an NPDES  
 16 permit. He pled guilty. I think his fine was around  
 17 \$3,500. I'm not sure of that. I'm sure counsel for  
 18 EPA can tell you the exact amount.

19 The one thing that I think the Court needs  
 20 to know, that in 2013, the Environmental Protection  
 21 Agency entered into an NPDES general permit program  
 22 with the State of Idaho. That's undisputed. What I  
 23 don't think the Court realizes is that in the process  
 24 of that permit, a statewide permit, that the EPA did  
 25 allow, in fact, 15 suction dredge permits for the

1 South Fork Clearwater River. But because of their  
 2 tardiness and inability, they took three more years to  
 3 get a permit. So what we have is we have 44 years  
 4 from the initiation, October 18, 1972, of the Clean  
 5 Water Act.

6 We have 44 years it took the EPA to get an  
 7 NPDES permit. If in fact the counsel for the EPA  
 8 states that anyone not having an NPDES permit is  
 9 liable for prosecution, penalties, then we would have  
 10 a Fifth Amendment problem with the mining claims,  
 11 which I was on my federal mining claim. We'd have a  
 12 deprivation of use under the Fifth Amendment.

13 So the only other thing -- because of the  
 14 court case, Suter v. Artist M, and the fact that  
 15 citizens cannot take a grievance against the agencies  
 16 this day and age, the only thing left for a citizen is  
 17 to do 33 USC at 1365. And that's take the  
 18 administrator to court for 44 years of failure to not  
 19 do its job.

20 With that, Your Honor, I close in saying  
 21 this. God bless this country. God bless this Court.  
 22 And God bless the principles of liberty and justice  
 23 for all. That's my opening statement.

24 JUDGE COUGHLIN: All right. Thank you, Mr.  
 25 Erlanson.

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1 MR. ERLANSON: Yeah.

2 MR. McLAREN: Your Honor, if I may, I would

3 object -- not to the last part. I accept the last

4 part. But about 9:46 Mr. Erlanson mentioned a

5 settlement in another case, and because he's

6 effectively offering testimony, I would just object to

7 the relevance of that and ask that that be struck from

8 the record, if possible.

9 JUDGE COUGHLIN: It's argument. It's

10 argument, and, you know, each case really stands on

11 its own with regard to what I need to consider and the

12 evidence that needs to be presented with regard to

13 penalty. So the objection is noted. But I'm not

14 going to strike it --

15 MR. McLAREN: Thank you.

16 JUDGE COUGHLIN: -- because it's an opening

17 argument.

18 MR. McLAREN: Great.

19 JUDGE COUGHLIN: So I'll leave it there. If

20 he wishes to inquire any further through questioning,

21 you know, you're welcome to revisit the objection.

22 MR. McLAREN: Thank you, Your Honor.

23 JUDGE COUGHLIN: Yeah. All right. Are you

24 ready for your first witness?

25 MR. McLAREN: We are.

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1 JUDGE COUGHLIN: Okay.

2 MR. McLAREN: The EPA calls Clint Hughes to

3 the stand.

4 JUDGE COUGHLIN: Okay.

5 Whereupon,

6 CLINT HUGHES

7 having been duly sworn, was called as a

8 witness and was examined and testified as follows:

9 JUDGE COUGHLIN: Just to quickly interject,

10 there is a bottle of water there if you need it. And

11 I think we can obtain more if other witnesses do as

12 well, so feel free.

13 THE WITNESS: I don't know if they want to

14 drink.

15 JUDGE COUGHLIN: Please go ahead, Mr.

16 McLaren.

17 MR. McLAREN: Thank you.

18 DIRECT EXAMINATION

19 BY MR. McLAREN:

20 Q Mr. Hughes, please state your full name and

21 spell the last for the record.

22 A My name is Clinton Eric Hughes. That's

23 C-L-I-N-T-O-N, E-R-I-C, H-U-G-H-E-S.

24 Q Are you employed, Mr. Hughes?

25 A Yes, I am.

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1 Q And where do you work?

2 A I work for the USDA Forest Service.

3 Q And what is your position with the Forest

4 Service.

5 A I am a geologist, mineral examiner, and

6 mineral administrator.

7 Q And how long have you been employed by the

8 Forest Service?

9 A Ten years.

10 Q And prior to that, where were you?

11 A I was with the Bureau of Land Management for

12 six years.

13 Q Okay. And what was your title at the Bureau

14 of Land Management?

15 A That was also a geologist.

16 Q Mr. Hughes, generally speaking, what are

17 your responsibilities in your current position?

18 A I work with the regulations of the Forest

19 Service. I make sure that miners and other claimants

20 are within regulations. I inspect sites, mining

21 claims, mining operations. I deal with salable

22 materials, locatable materials, and leasables, and so

23 on.

24 Q You mentioned you inspect sites.

25 Approximately how many inspections have you conducted?

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1 A More than 300, but that's probably a little

2 bit low.

3 Q And how many of those were related to

4 suction dredging specifically?

5 A Sixty, approximately.

6 Q What do you look for when you conduct a

7 suction dredging inspection?

8 A I'm looking for the plume that is being put

9 out by the suction dredge, looking at the size of a

10 hole, the amount of holes, the sediment behind the

11 dredge. I'm looking for disturbance on the side of

12 the banks, how closely they are to the banks.

13 Q You mentioned a hole. What is a hole?

14 A A suction dredger basically is like a vacuum

15 sucking sand and gravel off the bottom of the river,

16 the bed of the river, and that creates a hole as they

17 suction dredge.

18 Q Mr. Hughes, what is a plan of operations?

19 A A plan of operations is basically a contract

20 between the operator or the plan of operations who

21 holds it, and the federal government or the Forest

22 Service.

23 Q And when you inspect, what laws or

24 regulations are you typically inspecting under?

25 A The Forest Service regulations is 36 CFR

1 228.  
 2 Q Do you conduct Clean Water Act inspections?  
 3 A I do not.  
 4 (The document referred to was  
 5 marked for identification as  
 6 Complainant's Exhibit No. 1.)  
 7 BY MR. McLAREN:  
 8 Q At this time, I'd like you to turn in that  
 9 larger folder in front of you to what is marked as CX-  
 10 01. It should be the first tab.  
 11 A Okay.  
 12 Q And go ahead and pull it closer to you if  
 13 you need, if you have space.  
 14 JUDGE COUGHLIN: And, Mr. McLaren, let me  
 15 just interject for one quick moment.  
 16 MR. McLAREN: Yes.  
 17 JUDGE COUGHLIN: I received a CD --  
 18 MR. McLAREN: Yes.  
 19 JUDGE COUGHLIN: -- with the Agency's  
 20 proposed exhibits.  
 21 MR. McLAREN: Yep.  
 22 JUDGE COUGHLIN: Is that precisely what is  
 23 in the binder?  
 24 MR. McLAREN: To the best of my  
 25 understanding it's precisely what is in the binder.

1 JUDGE COUGHLIN: Okay.  
 2 MR. McLAREN: We also have an extra binder  
 3 if that would be easier for you to page through.  
 4 JUDGE COUGHLIN: I can work off the  
 5 electronic. I just wanted to confirm that it's all  
 6 the same.  
 7 MR. McLAREN: It's precisely what is in the  
 8 binder.  
 9 JUDGE COUGHLIN: Okay, very good. Thank  
 10 you.  
 11 MR. McLAREN: No problem, Your Honor.  
 12 BY MR. McLAREN:  
 13 Q So what is CX-01?  
 14 A This is a copy of the report that I did on  
 15 the 22nd of July, 2015.  
 16 MR. McLAREN: All right. I move CX-01 into  
 17 the record.  
 18 JUDGE COUGHLIN: Okay. Mr. Erlanson, do you  
 19 have any objection to CX-01 coming into evidence?  
 20 MR. ERLANSON: No, Your Honor, I don't. I  
 21 have some questions that I'm going to bring before  
 22 this Court on this.  
 23 JUDGE COUGHLIN: And you can do that when  
 24 you question him.  
 25 MR. ERLANSON: Sure, okay.

1 JUDGE COUGHLIN: Okay. So once the Agency  
 2 is done with their initial questioning, you can ask  
 3 him about anything you want in this exhibit.  
 4 MR. ERLANSON: Sounds good.  
 5 JUDGE COUGHLIN: Okay.  
 6 MR. ERLANSON: Thank you.  
 7 JUDGE COUGHLIN: All right. So CX-1 will be  
 8 admitted.  
 9 (The document referred to,  
 10 previously identified as  
 11 Complainant's Exhibit No. 1,  
 12 was received in evidence.)  
 13 JUDGE COUGHLIN: Bear with me just a moment.  
 14 I just want to keep track here.  
 15 (Pause.)  
 16 JUDGE COUGHLIN: Okay. Please go ahead.  
 17 CX-1 is admitted.  
 18 BY MR. McLAREN:  
 19 Q Mr. Hughes, did you conduct the inspection  
 20 on July 22, 2015?  
 21 A Yes, I did.  
 22 Q And what triggered the inspection?  
 23 A There had been information that was passed  
 24 to me and to the district rangers saying that there  
 25 were dredgers out there.

1 Q Did that information mention how many  
 2 dredgers were on the river?  
 3 A Yes.  
 4 Q And about when did that information come in?  
 5 A There was some information that came in a  
 6 month or so beforehand, just from the American Mining  
 7 Rights Association, AMRA, that they were posting on  
 8 their web site. And so there was a little bit of a  
 9 foreshadowing of that. And then also people that were  
 10 driving up and down along the river told me that there  
 11 were dredgers out there two days beforehand.  
 12 Q And about how many dredgers were you  
 13 informed were on the river?  
 14 A About 6 to 12.  
 15 Q And do you -- oh, pardon me.  
 16 A Yeah. It was 6 to 12, sorry.  
 17 Q During your inspection on July 22nd, how  
 18 many dredgers did you observe on the river?  
 19 A I observed 11 dredgers on the river.  
 20 Q In your experience, do suction dredgers  
 21 typically deploy for a time period greater than a few  
 22 hours?  
 23 A Yes.  
 24 Q Will they go for entire days?  
 25 A Yes.

1 Q What about a few days?

2 A Yes.

3 Q Did you receive any subsequent tips about  
4 the activity on the South Fork after your inspection  
5 on July 22, 2015?

6 A Yes, I did.

7 Q And what was the general time frame for  
8 those follow-up tips?

9 A Just within the days after that, I was told  
10 that there were still some dredgers out there.

11 Q Okay. Turning directly to July 22nd, can  
12 you please summarize what you observed during the  
13 inspection? And feel free -- that's a broad question  
14 to refer to an inspection report.

15 A So I just started downriver and came across  
16 the first operation that I could see, and it was a  
17 truck and a tent set up on the side of the road. And  
18 so there was no-one there. I went down, found out  
19 where -- you know, found the trail down to where their  
20 operations were, and it was just a high-banker. And  
21 there was a good-sized hole down there, and I could  
22 see where they had been operating.

23 The sediment that goes across the high-  
24 banker is a sluice box, and you could see the pump was  
25 in the water, and so I went back up to the truck that

1 just said where it was. And that was the first site  
2 in the report that -- and the first site that I  
3 actually looked at I put as number 10 in my report  
4 because it was far removed from all of the other sites  
5 where there was actual suction dredges in the water.

6 Q And what was the next site that you went to?

7 A The next site was the one that Mr. Erlanson  
8 was at, and Mr. Rice was also at that site.

9 Q And can you describe what you found there?

10 A So what I'm looking for as I'm driving  
11 upriver is just people camped on the side of the river  
12 or any disturbance or a dredge in the water. So I did  
13 see two campers at this large pullout and some  
14 vehicles and a trailer. And I got out and started  
15 looking along the shore to see where I could get down  
16 to the water and found a nice path going down, and I  
17 first saw a big hole that it looked like it had been  
18 the year before, that it had been dug, and there was  
19 some vegetation in it.

20 But it also had a high-banker next to it.  
21 And I have a picture of that. It is the second row of  
22 pictures on CX-00005.

23 MR. McLAREN: And if I could ask you to  
24 pause briefly.

25 JUDGE COUGHLIN: And would this be site

1 was sitting there, and I left a notice of non-  
2 compliance on that truck under the windshield wiper.

3 Q Can I interrupt you briefly?

4 A Yes.

5 Q What is a high-banker?

6 A A high-banker is basically a sluice box,  
7 just -- it has a bunch of riffles, and basically a  
8 sluice, and it -- you pull the material up onto it and  
9 let it go over all those riffles, along with water,  
10 and the bigger, lighter particles will just go on past  
11 the riffles, and the gold will get stuck in the  
12 riffles. And the heavier elements will get stuck in  
13 those riffles.

14 Q Thank you. Returning to the summary of the  
15 day, what did you proceed to do after you found the  
16 high-banker and the truck?

17 A Well, I took pictures of that along with  
18 leaving that notice of non-compliance and proceeded  
19 upriver. And what I came across, a dredge that was  
20 sitting in the middle of the river, and so I took some  
21 pictures of that, and that was American Mining -- I  
22 can't remember. There was a -- actually, I'll look in  
23 this here, which is -- I'm looking at page CX-00005.  
24 And it was a Rocky Mountain Mining Rights sign on the  
25 other side of the river, and this is on -- well, I

1 number two?

2 THE WITNESS: This is site number two --

3 JUDGE COUGHLIN: In your report?

4 THE WITNESS: -- in my report.

5 JUDGE COUGHLIN: Okay.

6 MR. McLAREN: Your Honor, I can mark these  
7 photos. They are not otherwise marked. They are not  
8 changed at all. They are just clearer versions of the  
9 photographs from Mr. Hughes' report. I don't intend  
10 to enter them into evidence. I simply want to provide  
11 them for clarity.

12 JUDGE COUGHLIN: Okay.

13 MR. McLAREN: If that's acceptable.

14 JUDGE COUGHLIN: That's fine.

15 MR. McLAREN: Okay.

16 JUDGE COUGHLIN: Yeah. I mean, if you think  
17 it will help with regard to the testimony elicited.

18 MR. McLAREN: It's a bit grainy, and I will  
19 be asking him some questions about the photos  
20 themselves.

21 JUDGE COUGHLIN: Okay. You may approach.

22 MR. McLAREN: All right.

23 JUDGE COUGHLIN: And just please give a copy  
24 to Mr. Erlanson.

25 By the way, is it Erlanson or Erlanson?

1 MR. ERLANSON: No. You said it right the  
 2 first time, Your Honor.  
 3 JUDGE COUGHLIN: Erlanson? Okay.  
 4 MR. ERLANSON: Yes.  
 5 JUDGE COUGHLIN: All right. Thank you.  
 6 (Pause.)  
 7 JUDGE COUGHLIN: Thank you.  
 8 BY MR. McLAREN:  
 9 Q Okay. So after you came upon this high-  
 10 banking, describe what else you found at site two.  
 11 A There were two five-inch dredges with people  
 12 actively dredging, and that turned out to be Mr. Rice  
 13 and Mr. Erlanson. And I noticed a large plume coming  
 14 out of both, and they were very close together. I  
 15 approximated about 50 feet.  
 16 (The document referred to was  
 17 marked for identification as  
 18 Complainant's Exhibit No. 2.)  
 19 BY MR. McLAREN:  
 20 Q Mr. Hughes, can you please turn to the next  
 21 exhibit in that folder? It's CX-02.  
 22 JUDGE COUGHLIN: And I guess just before you  
 23 do that, I just want to -- it's important as you're  
 24 testifying about photographs and whatnot in your  
 25 report that the record is very clear because that's

1 ultimately what I'm left with. So with respect to  
 2 that large hole and the vegetation that you spoke of  
 3 for which there is this blowup photograph, would that  
 4 be contained above the photo where you state previous  
 5 years' disturbance with a question mark?  
 6 THE WITNESS: Yes, it is.  
 7 JUDGE COUGHLIN: Okay, perfect. Please go  
 8 ahead.  
 9 MR. McLAREN: So please turn to CX-02 in the  
 10 folder, please.  
 11 It's in yours as well, Mr. Erlanson.  
 12 MR. ERLANSON: I'm not sure.  
 13 MR. McLAREN: If you don't mind me  
 14 approaching.  
 15 MR. ERLANSON: No. Go ahead.  
 16 MR. McLAREN: I'm asking him to turn to tab  
 17 two. I'm having him turn to these.  
 18 MR. ERLANSON: Oh, I got you. Okay. That  
 19 makes sense. Thank you.  
 20 MR. McLAREN: No problem.  
 21 JUDGE COUGHLIN: And, Mr. Erlanson, you  
 22 know, I want to make sure you're following along.  
 23 MR. ERLANSON: Yeah.  
 24 JUDGE COUGHLIN: So if things are moving a  
 25 little too fast, let me know, and we can slow it down,

1 okay?  
 2 MR. ERLANSON: Appreciate it.  
 3 JUDGE COUGHLIN: Okay. I'm kind of focused  
 4 on the witness, so I don't -- you know, I may not  
 5 necessarily see if you're --  
 6 MR. ERLANSON: Yeah.  
 7 JUDGE COUGHLIN: -- struggling over there.  
 8 MR. ERLANSON: I got you.  
 9 JUDGE COUGHLIN: So you just let me know.  
 10 MR. ERLANSON: Okay.  
 11 JUDGE COUGHLIN: Okay. Go right ahead.  
 12 BY MR. McLAREN:  
 13 Q Can you please describe what CX-02 is?  
 14 A That is my declaration of what I saw on that  
 15 day.  
 16 MR. McLAREN: Your Honor, I move CX-02 into  
 17 evidence.  
 18 JUDGE COUGHLIN: Okay. Mr. Erlanson, do you  
 19 have CX-2 open?  
 20 MR. ERLANSON: I do, Your Honor.  
 21 JUDGE COUGHLIN: Okay. Any objection to  
 22 that one coming in?  
 23 MR. ERLANSON: I'd like to read it before I  
 24 make an objection or agree to it. I haven't had the  
 25 opportunity to look it over.

1 MR. McLAREN: Your Honor, if I may respond.  
 2 JUDGE COUGHLIN: Okay.  
 3 MR. McLAREN: These exhibits were the  
 4 original ones exchanged in 2017. We intend to produce  
 5 43. It may prolong the hearing.  
 6 JUDGE COUGHLIN: Yeah. I understand.  
 7 Yeah. Mr. Erlanson, you know, I want to try  
 8 to provide some latitude where I can, but, you know,  
 9 as counsel had mentioned, I mean, these have been in  
 10 the record a bit. And I guess, you know, to the  
 11 extent it helps, let me kind of reiterate that  
 12 oftentimes evidence that's proposed when it's being  
 13 offered to be admitted into evidence in these types of  
 14 proceedings more often than not, it comes in because  
 15 the standard is a bit more relaxed than in an Article  
 16 3 court.  
 17 MR. ERLANSON: Right.  
 18 JUDGE COUGHLIN: That's what I was kind of  
 19 getting at when I said the Federal Rules of Evidence  
 20 are used as a guide, certainly to not allow something  
 21 that is so patently unreliable that I couldn't assign  
 22 it any weight or other, you know, issues if there was  
 23 an issue of something being altered or, you know,  
 24 fraudulent, or anything of that nature. But generally  
 25 speaking, as long as there aren't any material defects

1 to it, it comes into evidence. But you can always  
2 argue about how much weight I should assign it later  
3 on.

4 Once I close this record, there will be an  
5 opportunity to provide post-hearing briefing.  
6 Basically, you can just make statements as to how much  
7 weight you think I should give the evidence that came  
8 in, whether it be a document or testimony. So kind of  
9 keep that in mind.

10 MR. ERLANSON: Sure.

11 JUDGE COUGHLIN: You know, I mean, if there  
12 is a legal objection that goes to materiality,  
13 relevance, reliability, then that's fine. But if not,  
14 then it's pretty much going to come in. And then you  
15 can argue about weight. And the same would hold true  
16 with regard to your proposed exhibits, should you wish  
17 to introduce those. Does that make sense?

18 MR. ERLANSON: Yes.

19 JUDGE COUGHLIN: Okay.

20 MR. ERLANSON: Yes.

21 JUDGE COUGHLIN: So, you know, I can't  
22 really take the time for you to --

23 MR. ERLANSON: Sure.

24 JUDGE COUGHLIN: -- in hearing to read all  
25 this. You know, the hope would have been that, you

1 you collected and included in your inspection report?  
2 If you could turn back to see it.

3 A Yes, it does. I will find that picture and  
4 describe it.

5 (Pause.)

6 THE WITNESS: Okay. It is on page -- it's  
7 under tab CX-01 on page CX-00006.

8 MR. McLAREN: Thank you.

9 THE WITNESS: It is the bottom two pictures,  
10 where it says, "Truck at Erlanson/Rice camp." And  
11 then it is also on page CX-00007.

12 BY MR. McLAREN:

13 Q And is that just to the right of that  
14 camper?

15 A Yes, it is, on the uppermost left corner of  
16 the page.

17 Q Great. Did you observe Mr. Erlanson  
18 operating a suction dredge?

19 A Yes, I did.

20 Q Did you see exactly when he began dredging  
21 before you arrived?

22 A I did not.

23 Q Did you observe that suction dredge  
24 releasing any material into the river?

25 A Yes, I did.

1 know, while you were represented your attorney went  
2 through it with you, but I can't get into that. But  
3 anyway, based on what I said, any reason I shouldn't  
4 consider the declaration?

5 MR. ERLANSON: None at all.

6 JUDGE COUGHLIN: Okay. All right. So CX-2  
7 is admitted.

8 (The document referred to,  
9 previously identified as  
10 Complainant's Exhibit No. 2,  
11 was received in evidence.)

12 BY MR. McLAREN:

13 Q Mr. Hughes, you mentioned a camp in relation  
14 to site two in your inspection report. Did you  
15 observe any -- in that camp any vehicles set up for an  
16 overnight stay?

17 A Yes, I did.

18 Q Did you observe a truck belonging to Mr.  
19 Erlanson in that camp?

20 A Yes, I did.

21 Q How do you know that truck belonged to Mr.  
22 Erlanson?

23 A That is the truck that he got into when we  
24 went up to the other camp to talk with AMRA.

25 Q Does that truck appear in the photographs

1 Q If you can please turn to page CX-00005.  
2 Did you take all of these photographs?

3 A Yes.

4 MR. McLAREN: I'm going to hand you one more  
5 in the margin at -- and I'll have Mr. Moore  
6 disseminate those to the others.

7 JUDGE COUGHLIN: You may approach. And  
8 you're still in CX-1, right?

9 MR. McLAREN: Yes.

10 JUDGE COUGHLIN: Okay.

11 (Pause.)

12 JUDGE COUGHLIN: Thank you.

13 BY MR. McLAREN:

14 Q And taking a look at that photograph, is  
15 that the same photograph as the one on the page?

16 A Yes. It matches the picture in the -- on  
17 the second line, the far right, on page CX-00005,  
18 and --

19 Q Is -- oh, go on.

20 A Oh, and it says below it, "Rice green dredge  
21 and Erlanson's blue dredges."

22 Q So that is Mr. Erlanson's dredge depicted on  
23 the photo?

24 A Yes, it is.

25 Q Can you describe for the Court in as much

1 detail as possible what you can observe about the  
2 dredge, Mr. Erlanson's dredge in particular, from that  
3 photograph?

4 A The dredge itself or the area around the  
5 dredge?

6 Q The details that you observed.

7 A That they were actively operating. It  
8 looked like about a five-inch dredge, and that was  
9 confirmed a little later by Mr. Erlanson himself. It  
10 has two small motors on it, which is usually  
11 indicative of a five-inch or larger. It's anchored to  
12 a rock or something upstream.

13 Q Thank you. And if I can turn you to the  
14 high-banking photograph that we handed you earlier,  
15 the other enlargement. Can you please describe where  
16 that photo is on page CX-00005?

17 A Well, and that's right when I was coming  
18 down from the bank, and I'm still on the bank there  
19 looking out over the area.

20 Q And does that also depict Mr. Erlanson's  
21 dredge?

22 A Yes, it does.

23 Q Okay. And what can you observe from the  
24 dredge based on the contents of the photo?

25 A Just a plume coming off the dredge, water --

1 you can see that coming off, a little white speck on  
2 the top of the water there, where the water is being  
3 disturbed by the water flowing over the dredge and  
4 back into the river.

5 MR. McLAREN: And I'm going to hand you one  
6 more enlargement, and Mr. Moore will disseminate  
7 those.

8 JUDGE COUGHLIN: Mr. Erlanson, did you have  
9 a question?

10 MR. ERLANSON: Yes, Your Honor. If I object  
11 to an answer for a question, am I allowed to raise  
12 that objection when --

13 JUDGE COUGHLIN: Yes, you certainly can.

14 MR. ERLANSON: Okay. I just -- I didn't  
15 know if I had to wait until they were done presenting  
16 their case or not.

17 JUDGE COUGHLIN: No, no, no. If there is --  
18 you know, you have an objection, a typical one might  
19 be leading, in terms of the questioning. If, let's  
20 say, the answer is presumed in the question that is  
21 being posed or things of that nature. Let me know if  
22 you have an objection, and I'll deal with it. Do you  
23 have one?

24 MR. ERLANSON: Yeah. I have two, actually.

25 JUDGE COUGHLIN: Okay. What are they?

1 MR. ERLANSON: The first one was counsel for  
2 the EPA asked if Mr. Hughes saw my dredge discharging  
3 into the river. I have an objection to that because  
4 my dredge doesn't discharge anything into the river.

5 JUDGE COUGHLIN: Okay. So that's  
6 something --

7 MR. ERLANSON: You know, that's -- it's a  
8 definition type --

9 JUDGE COUGHLIN: Right. And it's actually  
10 one I've already decided.

11 MR. ERLANSON: Okay.

12 JUDGE COUGHLIN: That's an issue I've  
13 decided.

14 MR. ERLANSON: Okay.

15 JUDGE COUGHLIN: So whether or not you  
16 committed a Clean Water Act violation was the subject  
17 of the liability decision that I made.

18 MR. ERLANSON: Correct.

19 JUDGE COUGHLIN: Something you can appeal,  
20 as we talked about.

21 MR. ERLANSON: Oh, yeah.

22 JUDGE COUGHLIN: But I'm not going to  
23 revisit it here because I kind of went through --

24 MR. ERLANSON: Sure.

25 JUDGE COUGHLIN: -- a very lengthy order.

1 MR. ERLANSON: Exactly.

2 JUDGE COUGHLIN: But so that's the type of  
3 thing that you want to make sure you make a note of,  
4 and then you want to ask the witness about it, to the  
5 extent that we even need to get into that because, as  
6 I said --

7 MR. ERLANSON: This is dealing with the  
8 penalty phase.

9 JUDGE COUGHLIN: Precisely, yeah.

10 MR. ERLANSON: Got you.

11 JUDGE COUGHLIN: What was the second point,  
12 though, that you have?

13 MR. ERLANSON: It was Mr. Hughes' answer, a  
14 similar answer, where he said I saw the dredge  
15 discharging into the river, which I --

16 JUDGE COUGHLIN: Okay.

17 MR. ERLANSON: -- disagree with, you know.

18 JUDGE COUGHLIN: Okay. Again, I mean,  
19 arguably it could be, you know, calling for a legal  
20 conclusion with regard to discharging. But as I've  
21 said, I've already made that decision, so --

22 MR. ERLANSON: So, so --

23 JUDGE COUGHLIN: -- it's not really going to  
24 matter for purposes of penalty for me. That said,  
25 though, you can question him about anything he has



1 testified to. So if that has been opened -- I mean,  
 2 I'll allow it to some extent. I'm not going to spend  
 3 too much time on something I've already decided. But  
 4 it's certainly fair for you to follow up. But that  
 5 would be when you have the opportunity to question.  
 6 To the extent that you're objecting because  
 7 you feel it's getting into a matter that I've already  
 8 decided, I would sustain that objection because I  
 9 have. I'm not revisiting liability.  
 10 MR. ERLANSON: Right, okay. Thank you, Your  
 11 Honor.  
 12 JUDGE COUGHLIN: Does that help?  
 13 MR. ERLANSON: Yeah. I'm learning here,  
 14 so --  
 15 JUDGE COUGHLIN: Okay. I understand.  
 16 MR. ERLANSON: -- I'm doing my best.  
 17 JUDGE COUGHLIN: Yeah, no worries.  
 18 MR. ERLANSON: Thank you.  
 19 JUDGE COUGHLIN: Just let me know if you  
 20 have any other concerns about some questions being  
 21 posed. But just know that whatever the witness  
 22 testifies to in response to Mr. McLaren's questions --  
 23 MR. ERLANSON: Yeah.  
 24 JUDGE COUGHLIN: -- you can question him  
 25 about that.

1 MR. ERLANSON: Okay.  
 2 JUDGE COUGHLIN: Okay?  
 3 MR. ERLANSON: Yeah.  
 4 JUDGE COUGHLIN: But we all know that I'm  
 5 really not too focused anymore on liability --  
 6 MR. ERLANSON: Okay.  
 7 JUDGE COUGHLIN: -- because I've made that  
 8 decision.  
 9 MR. ERLANSON: Right.  
 10 JUDGE COUGHLIN: It's really about the  
 11 penalty factors here. The rest of it is kind of a  
 12 waste of time.  
 13 MR. ERLANSON: Okay.  
 14 JUDGE COUGHLIN: Okay?  
 15 MR. ERLANSON: Yeah.  
 16 JUDGE COUGHLIN: All right.  
 17 MR. ERLANSON: Thank you.  
 18 JUDGE COUGHLIN: Thank you.  
 19 Please go ahead, Mr. McLaren.  
 20 MR. McLAREN: No problem.  
 21 BY MR. McLAREN:  
 22 Q So, Mr. Hughes, you've been handed another  
 23 enlargement. Can you please point me to where that is  
 24 in your inspection report?  
 25 A Yes. I -- this enlargement is on page CX-

1 00006. It's the uppermost left-hand corner, where it  
 2 says, "Dave Erlanson, Sr. actively dredging."  
 3 Q And is the plume in the photo I've just  
 4 handed you different from the view of the plumes in  
 5 the other photos in any material way?  
 6 A In this picture, I mean, it appears maybe a  
 7 little bit darker. I think that's the angle that I  
 8 was at. We --  
 9 JUDGE COUGHLIN: And the this, you're  
 10 referring to the blowup version?  
 11 THE WITNESS: To the blowup version, yes.  
 12 JUDGE COUGHLIN: Okay. I mean, it's best to  
 13 the extent that you can, if the blowup aids you,  
 14 that's fine. But if you're speaking with  
 15 particularity about what the photo depicts, it's best  
 16 then to refer to what is actually in evidence --  
 17 THE WITNESS: Okay.  
 18 JUDGE COUGHLIN: -- which is what is in CX-1  
 19 because I'm not going to be taking these with me.  
 20 They're just simply a demonstrative aid, so they don't  
 21 come into the record, if that makes sense to you.  
 22 THE WITNESS: Yes, it does, Your Honor.  
 23 JUDGE COUGHLIN: Okay. So go right ahead.  
 24 BY MR. McLAREN:  
 25 Q Mr. Hughes, were these photos taken at

1 substantially different times?  
 2 A No. They were very close time frame.  
 3 Q Can the nature of the plume change in that  
 4 time frame?  
 5 A Yes, it would constantly change depending on  
 6 how much they're getting into the gravel and  
 7 sediments. They'll pull away sometimes and move some  
 8 rocks, put it back in. You might run into a clay  
 9 layer or something, so the plume is constantly  
 10 changing.  
 11 Q So turning to Mr. Erlanson's dredge, can you  
 12 describe what you -- the plume coming from the dredge?  
 13 A It's -- at one point, there was less  
 14 sediment coming out, but he was possibly moving a rock  
 15 or something at that point. I can't tell exactly  
 16 which picture would depict that, but there is a lot of  
 17 sediment behind the dredge, a lot of gravel. Water is  
 18 actively flowing over the dredge, and I did see some  
 19 sediment coming across the dredge also, across the  
 20 sluice box on the dredge.  
 21 Q Mr. Hughes, is everything that you observed  
 22 about the plume depicted in those photos?  
 23 A No.  
 24 Q Did you see more?  
 25 A Well, I followed the plume downriver and

1 followed that for about 220 yards (sic) based upon my  
 2 pace count. And it went around the bend of the river,  
 3 and I was blocked by vegetation and so I couldn't  
 4 follow it around the bend, so --  
 5 Q If you can approximate, how long did you  
 6 view the plume go?  
 7 A It was approximately 220 feet.  
 8 Q And you said you followed a pace count?  
 9 A Yes.  
 10 MR. ERLANSON: Your Honor?  
 11 JUDGE COUGHLIN: Yes.  
 12 MR. ERLANSON: Mr. Hughes said 220 yards he  
 13 followed it down river, and now he said 220 feet. I'm  
 14 asking for -- was it yards or feet?  
 15 JUDGE COUGHLIN: Okay. Yeah, that's a  
 16 perfectly appropriate question. Okay.  
 17 THE WITNESS: All right. I kind of thought  
 18 I said yards also, and I did say yards, and I did mean  
 19 feet.  
 20 JUDGE COUGHLIN: Okay. So yards was an  
 21 error.  
 22 THE WITNESS: Yes, it was.  
 23 JUDGE COUGHLIN: It's 220 feet. Okay.  
 24 THE WITNESS: Yes.  
 25 JUDGE COUGHLIN: All right. Thank you.

1 BY MR. McLAREN:  
 2 Q And is the length of the plume present in  
 3 your declaration, Mr. Hughes?  
 4 A The total length that I could see is in my  
 5 declaration, but I could not see around that bend and  
 6 past that vegetation.  
 7 Q So you mentioned using a pace count to  
 8 approximate your length?  
 9 A Yes.  
 10 Q Can you explain that for the Court?  
 11 A Well, my pace count is 19.5 feet per 100  
 12 feet, and I learned that in the military.  
 13 Q Okay. Approximately how wide was the plume  
 14 coming from Mr. Erlanson's dredge?  
 15 A It could be anywhere from 5 to 15, depending  
 16 on how far away from the dredge. It starts spreading  
 17 out fairly quickly once it leaves the back of the  
 18 dredge.  
 19 JUDGE COUGHLIN: Five to fifteen?  
 20 THE WITNESS: Feet.  
 21 JUDGE COUGHLIN: Okay.  
 22 BY MR. McLAREN:  
 23 Q Did you observe -- or sorry, did the  
 24 activity you observe, did that require a plan of  
 25 operations?

1 A Yes, it did.  
 2 Q Was it in compliance with the regulation --  
 3 was the activity in compliance with the regulations  
 4 you inspect for?  
 5 A It was not in compliance with our  
 6 regulations or the forest plan for the Nez Perce  
 7 Clearwater National Forest.  
 8 Q You mentioned earlier that Mr. Erlanson was  
 9 too close to the other dredger. What does that mean?  
 10 A For us to do a plan of operations on suction  
 11 dredging, they also need to have other permits that  
 12 are required by the state and by other federal  
 13 agencies. And under those permits, the dredges cannot  
 14 be as close as these dredges were, which I estimated  
 15 to be about 50 feet.  
 16 JUDGE COUGHLIN: That they were apart?  
 17 THE WITNESS: Yeah. They were approximately  
 18 50 feet apart.  
 19 JUDGE COUGHLIN: Okay.  
 20 BY MR. McLAREN:  
 21 Q And do you know how close is the minimum  
 22 proximity for two dredges?  
 23 A I believe the Idaho Department of Water  
 24 Resources has a 100-foot limit between dredges, and  
 25 the EPA NPDES permit I believe is 800 feet between

1 dredges. And that depends on the size of the dredge.  
 2 If it were, say, two-inch dredges, they could be  
 3 closer than 800 feet, as I understand the NPDES  
 4 permit.  
 5 Q Thank you, Mr. Hughes. Did you have any  
 6 communications with Mr. Erlanson at the time of the  
 7 inspection?  
 8 A Yes, I did.  
 9 Q Can you describe that discussion in as much  
 10 detail as possible?  
 11 A Basically, I said that he was required to  
 12 have a plan of operations. He was in non-compliance  
 13 by not having a plan of operations, and gave him a  
 14 notice of non-compliance saying, you know, as such.  
 15 Q Do you recall his reaction when you informed  
 16 him of his non-compliance?  
 17 A He did not seem all that surprised.  
 18 Q And how did your conversation with Mr.  
 19 Erlanson that day end?  
 20 A We fairly quickly went and jumped in our  
 21 vehicles and went to the next camp upstream.  
 22 Q Why did you do that?  
 23 A Mr. Erlanson suggested that we go talk to  
 24 Shannon Poe with AMRA.  
 25 Q And can you briefly describe the

1 conversation with that individual?

2 A Mr. Shannon Poe, he is the one that came up  
3 with this organization, and he's the president of  
4 American Mining Rights Association. And he basically  
5 said that they were allowed to be out there, and that  
6 they didn't need the NPDES permit from the EPA.

7 Q Did you talk to -- sorry. Were you able to  
8 determine whether the other individuals out there  
9 shared the same knowledge or purpose of their presence  
10 there with respect to the regulations and permitting?

11 A They all seemed to be on the same page, but  
12 Mr. Shannon Poe, he did seem to be the leader of the  
13 group, and they deferred to him as to his judgment  
14 what they should be or shouldn't be doing out there.

15 Q And was Mr. Erlanson a member of this group?

16 A I don't know if he's an actual member, but  
17 he did seem to defer to Mr. Shannon Poe.

18 Q I'll rephrase my question. Did it appear to  
19 you that Mr. Erlanson was a member of this group and  
20 was out there mining with them?

21 A Yes, it did.

22 Q So based on your knowledge, on or before the  
23 July 22, 2015, inspection, did Mr. Erlanson have  
24 knowledge of the regulatory requirements and the  
25 permitting requirements?

1 A Yes, he did.

2 Q And can you explain what would lead you to  
3 believe that he knew about those?

4 A He had been sent letters from the Forest  
5 Service as far back as 2008 that said he needed a  
6 notice -- or not a notice, but an NPDES permit.

7 Q And --

8 MR. ERLANSON: Objection.

9 JUDGE COUGHLIN: Tell me why.

10 MR. ERLANSON: No NPDES permit was ever on  
11 the South Fork of the Clearwater River in 2008, '09,  
12 '10, '11, or '12. It's not factual.

13 JUDGE COUGHLIN: Well, his response was that  
14 there were letters sent to you that would have made  
15 you aware of that. You're disputing that that took  
16 place?

17 MR. ERLANSON: Yes, Your Honor.

18 JUDGE COUGHLIN: Okay.

19 MR. ERLANSON: Most definitely because there  
20 was --

21 JUDGE COUGHLIN: These are really I think  
22 points you need to make when you question him.

23 MR. ERLANSON: Okay.

24 JUDGE COUGHLIN: Okay?

25 MR. ERLANSON: Sure.

1 JUDGE COUGHLIN: I mean, if there are  
2 elements to his testimony that you disagree with, then  
3 that's what you're going to elicit when you question  
4 him.

5 MR. ERLANSON: Okay.

6 JUDGE COUGHLIN: Okay? Because inevitably  
7 there is a lot of disagreement in these hearings, so  
8 that's not necessarily a legal objection that I would  
9 exclude when he's having his say. But it certainly  
10 enables you to question him about it and offer a  
11 different position on it.

12 MR. ERLANSON: Okay.

13 JUDGE COUGHLIN: And to the extent that  
14 documents help, you can refer to those as well,  
15 especially if they've already been introduced.

16 MR. ERLANSON: Yeah.

17 JUDGE COUGHLIN: The only other point I'll  
18 make is, you know, in hearings inevitably there are  
19 conflicts in the testimony in an adversarial process.  
20 If it's a material conflict, I have to resolve that.  
21 And I do that by weighing the evidence. So save that  
22 for your questions for him, and be sure to bring out  
23 what you believe is a different position.

24 MR. ERLANSON: Your Honor, one question.  
25 Could you explain to me what a material conflict is?

1 JUDGE COUGHLIN: Something that would go to  
2 the heart of the issue that I have to resolve. This  
3 point as to whether or not you were previously made  
4 aware of the need for an NPDES permit, that's material  
5 in terms of your knowledge. Again, for penalty  
6 purposes, culpability, your intention, the  
7 deliberateness of your actions, all of those types of  
8 things, that's very relevant and material to that.

9 So make sure you question about it when it's  
10 your time. And to the extent you want to offer  
11 something in opposition, you can.

12 MR. ERLANSON: Okay.

13 JUDGE COUGHLIN: Okay?

14 MR. ERLANSON: Thank you.

15 JUDGE COUGHLIN: When you -- if you testify.

16 MR. ERLANSON: If I testify.

17 JUDGE COUGHLIN: Yeah.

18 MR. ERLANSON: Yeah, okay.

19 JUDGE COUGHLIN: Okay? So that's another  
20 thing to kind of keep in the back of your mind about  
21 whether or not you might want to testify.

22 MR. ERLANSON: If I have a document, I  
23 just -- I think I might have it -- that refutes what  
24 he just said, when I cross-examine him, can I bring  
25 you that document up and have him --

1 JUDGE COUGHLIN: You can use whatever you  
2 want to cross-examine.  
3 MR. ERLANSON: Okay.  
4 JUDGE COUGHLIN: You can.  
5 MR. ERLANSON: Okay. Thank you.  
6 JUDGE COUGHLIN: Okay. All right. Go right  
7 ahead, Mr. McLaren.  
8 MR. McLAREN: Thank you.  
9 BY MR. McLAREN:  
10 Q Did you get a chance to finish your question  
11 as to whether he -- as to whether you knew whether Mr.  
12 Erlanson had knowledge before the July 22nd date of  
13 the requirement for the various permits for this  
14 activity?  
15 A I have seen letters that were sent to Mr.  
16 Erlanson saying that to suction dredge in the State of  
17 Idaho, basically, you would need an NPDES permit to  
18 dredge.  
19 MR. McLAREN: Thank you. I have no further  
20 questions at this time.  
21 JUDGE COUGHLIN: Okay. And I should kind of  
22 clarify, too, that when I said you can use whatever  
23 you want to cross-examine, particularly that pertains  
24 to a witness' credibility. So if you think that there  
25 is a statement that has been made that isn't truthful,

1 you can use anything to question about that.  
2 All that said, I guess just to quickly  
3 follow up on that point, the letters that you refer to  
4 as from the Forest Service that would have provided  
5 Mr. Erlanson notice of the need for an NPDES permit,  
6 are those contained in any of the proposed exhibits  
7 that I have?  
8 MR. McLAREN: Your Honor, I could speak to  
9 that. They are not.  
10 JUDGE COUGHLIN: Okay. All right. Thank  
11 you.  
12 Mr. Erlanson, this is your opportunity to  
13 ask questions of the witness, so go ahead.  
14 MR. ERLANSON: Okay.  
15 JUDGE COUGHLIN: And you're welcome to  
16 remain seated if you want --  
17 MR. ERLANSON: Okay.  
18 JUDGE COUGHLIN: -- because the mike is kind  
19 of small, so be comfortable and just make sure it's  
20 getting picked up.  
21 CROSS-EXAMINATION  
22 BY MR. ERLANSON:  
23 Q Okay, Mr. Hughes. We each know each other,  
24 so you know who I am, and I'm also my own counsel  
25 here. So I'm going to ask you a couple of questions.

1 You came down to my mining claim on July 22, 2015. Is  
2 that correct?  
3 A Yes, it is.  
4 Q At that time, there was two campers in the  
5 pullout right above where my suction dredge operation  
6 was. Is that correct?  
7 A Yes.  
8 Q Did you ask me if either one of those  
9 campers was mine?  
10 A I'm not sure exactly if I asked you, but I  
11 did get information after the fact from the EPA. I'm  
12 not sure if it was a -- law enforcement or something  
13 that had run all the plates on all of the vehicles out  
14 there, and they confirmed that the one camper was.  
15 Q Well, that's incorrect. I know that because  
16 I was staying in a tent six miles from there at  
17 Leggett Creek Campground, right at the very end of the  
18 campground. I'm sure you're familiar with it, where  
19 the gravel humps are up there. You said Mr. Rice and  
20 Mr. Erlanson's dredges were close together,  
21 approximately 50 feet.  
22 A Yes.  
23 MR. ERLANSON: Your Honor, can I take a  
24 picture up, one of these pictures, and ask him a  
25 question?

1 JUDGE COUGHLIN: Actually, the witness  
2 should already have those blowups. So if you're able  
3 to just identify which blowup.  
4 MR. ERLANSON: There is no number on it, but  
5 I'm sure you've got it.  
6 MR. McLAREN: Yep, we can see it.  
7 JUDGE COUGHLIN: Okay. So that's -- let's  
8 just identify which one that is.  
9 MR. ERLANSON: I don't know.  
10 JUDGE COUGHLIN: Okay.  
11 MR. ERLANSON: There is no number on mine.  
12 JUDGE COUGHLIN: Well, Mr. Hughes can  
13 answer.  
14 MR. ERLANSON: Okay.  
15 JUDGE COUGHLIN: Yeah. He has got it. You  
16 can have a seat --  
17 MR. ERLANSON: Okay.  
18 JUDGE COUGHLIN: -- Mr. Erlanson. Thank  
19 you.  
20 And, Mr. Hughes, can you just tie that to --  
21 I'm thinking it would be somewhere in CX-1, right?  
22 THE WITNESS: It is in CX-1, Your Honor --  
23 JUDGE COUGHLIN: Is it on --  
24 THE WITNESS: -- on page CX-00006.  
25 JUDGE COUGHLIN: Okay.

1 THE WITNESS: And I'm trying to decide if  
 2 it's the top left or the top right picture that this  
 3 blowup matches.  
 4 MR. McLAREN: We have the blowup as well.  
 5 THE WITNESS: It looks to appear as it is  
 6 the upper left based on the rock behind the dredge and  
 7 the distance to the side of the picture. So --  
 8 JUDGE COUGHLIN: Okay.  
 9 THE WITNESS: -- the upper left of the  
 10 picture.  
 11 JUDGE COUGHLIN: All right. Go ahead with  
 12 your question.  
 13 MR. ERLANSON: Okay. My question to Mr.  
 14 Hughes is --  
 15 BY MR. ERLANSON:  
 16 Q Do you notice the yellow air line?  
 17 A Yes, I do.  
 18 Q Okay. Do you know how long that air line  
 19 is?  
 20 A I'd estimate --  
 21 JUDGE COUGHLIN: And for -- sorry. For my  
 22 benefit, because I'm not a dredger, when you say the  
 23 air line, what are you referring to?  
 24 MR. ERLANSON: I'm referring to this yellow  
 25 line from my -- you can see one air line going to me.

1 I'm underneath the water here.  
 2 JUDGE COUGHLIN: Okay.  
 3 MR. ERLANSON: So when you're under water,  
 4 you've got to breathe. So, I mean, that air line goes  
 5 to a regulator, and you get your air from that.  
 6 JUDGE COUGHLIN: Okay.  
 7 MR. ERLANSON: You'll see another air line  
 8 here that goes upstream. It's stretched out.  
 9 JUDGE COUGHLIN: Okay. I see that.  
 10 MR. ERLANSON: Okay. That air line is 50-  
 11 foot long.  
 12 JUDGE COUGHLIN: Okay. So now that I know  
 13 what you're referring to when you say air line, let's  
 14 go ahead and just have the witness respond.  
 15 MR. ERLANSON: Oh, okay.  
 16 JUDGE COUGHLIN: I just wanted to be clear  
 17 on what the air line was.  
 18 BY MR. ERLANSON:  
 19 Q Okay. Mr. Hughes, do you see the yellow air  
 20 line?  
 21 A Yes, I do.  
 22 MR. ERLANSON: Okay. It would be  
 23 inappropriate, I think, for you to -- for me to ask  
 24 him how long he thinks the air line is. But --  
 25 MR. McLAREN: I have an objection.

1 JUDGE COUGHLIN: Okay.  
 2 MR. McLAREN: To the extent he's introducing  
 3 testimony in lieu of questions, I would ask that he  
 4 simply rephrase his questions.  
 5 JUDGE COUGHLIN: Yes. So this gets to  
 6 another point. And it's often a bit difficult with a  
 7 pro se respondent because inevitably, as you're asking  
 8 questions, and if you don't agree sometimes you want  
 9 to make sure that I know that. I'm going to provide  
 10 you some latitude in that regard because you are  
 11 unrepresented.  
 12 But just bear in mind that to the extent you  
 13 want to basically tell me your side, if you will,  
 14 that's what you really need to do to testify --  
 15 MR. ERLANSON: Right.  
 16 JUDGE COUGHLIN: -- which is why I'm urging  
 17 you to reconsider your decision about doing so.  
 18 MR. ERLANSON: Okay.  
 19 JUDGE COUGHLIN: Because you've been sworn,  
 20 but the appropriate point in the hearing for you to  
 21 basically tell me what your opinion is of all of this  
 22 and what your position is of all of this is when  
 23 you're testifying as opposed to questioning the  
 24 witness about their testimony.  
 25 MR. ERLANSON: Okay.

1 JUDGE COUGHLIN: Okay? So the objection is  
 2 sustained, but I am going to provide you with some  
 3 latitude. So just do your best to limit right now  
 4 what you're asking a witness. Just questions about  
 5 what they've said, and then to the extent that you  
 6 disagree or want to tell me something different, I  
 7 would urge you to make notes of that and reconsider  
 8 telling me on the stand --  
 9 MR. ERLANSON: Correct.  
 10 JUDGE COUGHLIN: -- in your own testimony.  
 11 Okay?  
 12 MR. ERLANSON: Thank you.  
 13 JUDGE COUGHLIN: All right. So please go  
 14 ahead. You were asking about the air line and whether  
 15 he could determine the distance. But I don't want to  
 16 rephrase --  
 17 MR. ERLANSON: The length.  
 18 JUDGE COUGHLIN: The length of it?  
 19 MR. ERLANSON: The length of it. Because he  
 20 was on site, and he walked up and down the bank, so he  
 21 should have, I'm hoping, some type of idea.  
 22 JUDGE COUGHLIN: Okay. So the question is,  
 23 if I understand, Mr. Hughes, that the air line that's  
 24 stretching -- I guess it would be upstream.  
 25 THE WITNESS: Yes.

1 JUDGE COUGHLIN: Did you have an opportunity  
2 when you were on site at that time on July 22, 2015,  
3 to determine the length of that line?

4 THE WITNESS: I did not, Your Honor. I  
5 don't know how long that line is. I made my estimate  
6 from just onshore, and I don't have a calibrated eye  
7 for distance, but I did not pace count between the two  
8 dredges, so that is basic -- it's just an estimate of  
9 50 feet from what I saw that day.

10 JUDGE COUGHLIN: Okay. Go ahead, Mr.  
11 Erlanson.

12 MR. ERLANSON: I'd like to have Mr. Hughes  
13 take a look at this picture.

14 JUDGE COUGHLIN: Okay.

15 MR. ERLANSON: If he would.

16 JUDGE COUGHLIN: And, Mr. Hughes, once you  
17 do, just if you would, point me to where that is in  
18 CX-1 because again, we need to tie these blowups to  
19 what is actually admitted.

20 THE WITNESS: That is in CX-1 on page CX-  
21 00005. And it is the second line down on the far  
22 right.

23 JUDGE COUGHLIN: Okay. Thank you. Where  
24 above it, it says, "Rice green dredge and Erlanson's  
25 blue dredge"?

1 there is a lot of cleanup that needs to be done, you  
2 know, cleaning out the sluice box to get the gold, and  
3 just do other maintenance-type work on your dredge.

4 JUDGE COUGHLIN: And five meaning hours?

5 THE WITNESS: Five hours.

6 JUDGE COUGHLIN: Okay.

7 BY MR. ERLANSON:

8 Q Okay. You mentioned you saw a plume come  
9 off my dredge.

10 A Yes.

11 Q Did you estimate the size of my dredge for  
12 comparison purposes?

13 A I'm not sure exactly what you're saying.

14 MR. ERLANSON: My dredge is X amount of feet  
15 long, Your Honor, and I can look at these pictures  
16 here that --

17 JUDGE COUGHLIN: Well, can you just maybe  
18 rephrase your question so that he understands what it  
19 is you're asking when you asked about --

20 MR. ERLANSON: I'm asking him --

21 BY MR. ERLANSON:

22 Q How far did you see my plume when you walked  
23 down the shoreline, on average? Like you said, I  
24 agree with you, plumes tend to vary in length and  
25 width. So I'm asking you to --

1 THE WITNESS: Yes.

2 JUDGE COUGHLIN: Dredges? Okay. Thank you.

3 BY MR. ERLANSON:

4 Q That's an awful small picture. This one  
5 here you can see clearly, I believe, Mr. Hughes. Look  
6 at the yellow air line, if you would, please.

7 A Okay.

8 Q Do you see between the yellow air line,  
9 where it quits, do you see a blue air line, that air  
10 line there going to the green dredge?

11 A I see that.

12 Q Okay. Let's see here. You testified, Mr.  
13 Hughes, that you thought that the dredgers work a full  
14 day in the water. You stated that. Do you know what  
15 the average hours per day a suction dredge works? I  
16 mean a national average. I'm talking California. I'm  
17 talking Nevada. I'm talking Idaho. I'm talking  
18 Alaska, any place, that a dredger actually spends  
19 actively dredging.

20 A Yes.

21 Q How much is it?

22 A It depends on the amount of rock, large  
23 rock, that you have to move as to how much you're  
24 actually dredging. But I would -- when I say yes, I  
25 would estimate an average of five in the water, and

1 JUDGE COUGHLIN: Hold on. Mr. McLaren,  
2 you're standing up. I assume you're objecting.

3 MR. McLAREN: I'm objecting.

4 JUDGE COUGHLIN: Okay. But -- and I  
5 understand that. I'm going to overrule the objection  
6 because Mr. Erlanson is proceeding pro se, and this is  
7 a formal hearing, and it's a very important issue.  
8 And I'm going to give him some latitude. I will do my  
9 best, though, to jump in because again, to the extent  
10 you need to try to explain what you're trying to ask,  
11 and to rephrase it, that's fine. But really just  
12 questions, okay, just questions of the witness. And  
13 then to the extent you want to share your own opinion,  
14 that you need to do when you testify.

15 MR. ERLANSON: Okay.

16 MR. McLAREN: Your Honor, do you request I  
17 withhold subsequent objections no matter the testimony  
18 he's offering as questions? Should I pick and choose?

19 JUDGE COUGHLIN: I mean, you know, if it's  
20 with respect to some commentary mixed in, my ruling is  
21 going to be the same.

22 MR. McLAREN: Certainly.

23 JUDGE COUGHLIN: That said, I appreciate the  
24 objection in that I'm not going to permit testimony  
25 during cross-examination. But I'm just trying to

1 provide some latitude because, you know, it's a formal  
 2 hearing, and Mr. Erlanson is proceeding pro se.  
 3 MR. McLAREN: I understand, Your Honor.  
 4 JUDGE COUGHLIN: So I try to bend a little  
 5 when I can to ensure a full and fair hearing.  
 6 MR. McLAREN: Thank you, Your Honor.  
 7 JUDGE COUGHLIN: Okay?  
 8 MR. McLAREN: Yes.  
 9 JUDGE COUGHLIN: Sure.  
 10 Okay. So getting to your -- you're asking  
 11 about -- tell me what your question was again.  
 12 MR. ERLANSON: Mr. Hughes has already  
 13 previously testified, Your Honor, that dredge plumes  
 14 vary.  
 15 JUDGE COUGHLIN: Okay.  
 16 MR. ERLANSON: They're never constant  
 17 because it depends what the dredger under water is in  
 18 fact doing.  
 19 JUDGE COUGHLIN: Okay.  
 20 MR. ERLANSON: I'm asking Mr. Hughes to tell  
 21 the Court on average how far my plume was going down  
 22 behind my dredge before it dissipated, before it went  
 23 into the -- you know, mixed with the other water.  
 24 JUDGE COUGHLIN: Okay.  
 25 MR. ERLANSON: I'm asking him --

1 JUDGE COUGHLIN: The only thing --  
 2 MR. ERLANSON: I'm asking him to tell me how  
 3 far that average is because that's a determining  
 4 factor, Your Honor, in the appropriate mixing zone  
 5 under Idaho and NPDES statutes.  
 6 JUDGE COUGHLIN: Okay. Now again, you could  
 7 stop there because it's just a question for him.  
 8 MR. ERLANSON: Right.  
 9 JUDGE COUGHLIN: What I'm a little bit  
 10 confused by, though, is when you're referring to your  
 11 plume on July 22, 2015, but also using a term like  
 12 average, I'm not totally following you there. Are you  
 13 asking him what he observed --  
 14 MR. ERLANSON: Yes.  
 15 JUDGE COUGHLIN: -- the length of your plume  
 16 to be?  
 17 MR. ERLANSON: Yes.  
 18 JUDGE COUGHLIN: Okay. Because he actually  
 19 answered that already, but go ahead and state that  
 20 again.  
 21 THE WITNESS: That was 220 feet that I pace-  
 22 counted down the shore before I could not see around  
 23 the curve of the river and was stopped by vegetation.  
 24 BY MR. ERLANSON:  
 25 Q Okay. Do you know the allowable mixing zone

1 for a suction dredge?  
 2 A I do not.  
 3 Q You testified that behind Erlanson's dredge  
 4 there was a lot of sediment and gravel.  
 5 A Yes.  
 6 Q Did you take pictures before Mr. Erlanson  
 7 started dredging?  
 8 A I did not.  
 9 Q So you have nothing to compare that with.  
 10 JUDGE COUGHLIN: Do you have anything to  
 11 compare it with?  
 12 THE WITNESS: I do not.  
 13 JUDGE COUGHLIN: Okay.  
 14 BY MR. ERLANSON:  
 15 Q You stated that a plan of operations is  
 16 needed.  
 17 A Yes.  
 18 Q Could you further explain that to me?  
 19 A Sure. The disturbance out there, it's  
 20 endangered species in that river, along with a  
 21 requirement in our forest plan for the Nez Perce River  
 22 National Forest. If you had applied for a plan of  
 23 operations, we would have gone out there and looked at  
 24 the river beforehand and seen that there were no  
 25 dredge holes or anything else.

1 So I would have been able to see if I would  
 2 have had the opportunity to go out there beforehand.  
 3 But the plan of operations is required, again, like I  
 4 said, by our forest plan and by our regulations, and  
 5 we are also required to consult with Fish and Wildlife  
 6 Service and NOAA Fisheries because of the ESA status  
 7 of that stream or of the fisheries in that stream.  
 8 JUDGE COUGHLIN: Okay.  
 9 THE WITNESS: So it is a significant  
 10 disturbance on that river to dredge in that river.  
 11 MR. ERLANSON: I can't bring testimony in,  
 12 so I'm trying to figure out how to word things.  
 13 JUDGE COUGHLIN: Okay. Take your time.  
 14 BY MR. ERLANSON:  
 15 Q This is a U.S. Forest Service 36-228. It is  
 16 what initiates a plan of operations. I know you're  
 17 familiar with this, Mr. Hughes.  
 18 JUDGE COUGHLIN: Are you --  
 19 MR. ERLANSON: So --  
 20 JUDGE COUGHLIN: Are you familiar with what  
 21 he's --  
 22 THE WITNESS: Yes, I am.  
 23 JUDGE COUGHLIN: Okay.  
 24 MR. ERLANSON: Yeah.  
 25 //

1 BY MR. ERLANSON:  
 2 Q Does it state anywhere in here that because  
 3 of an ESA-listed species that under U.S. Forest  
 4 Service regulations and rules that a plan of  
 5 operations is required?  
 6 A No, it does not.  
 7 Q Okay. Thank you. The 1987 Nez Perce Forest  
 8 plan that you mentioned in your testimony deals with a  
 9 repairing issue along the side of the stream. Does it  
 10 or does it not?  
 11 A I don't know.  
 12 Q When an agency of the federal government  
 13 makes a new rule, it's supposed to be put into the  
 14 Federal Register. Do you know if this forest plan was  
 15 ever entered into the Federal Register?  
 16 A I do not.  
 17 Q Okay. Do you remember how I got out of the  
 18 water when you came down there? Do you remember what  
 19 you told me?  
 20 A I don't remember the exact words I told you,  
 21 no.  
 22 Q In your own words, what -- how did I comply  
 23 with your request? What was it you said to me to get  
 24 me out of the water and quit dredging?  
 25 A I didn't actually say anything to you to get

1 you out of the water. Mr. Rice, I think, threw a rock  
 2 into the water. You popped your head up, and he's  
 3 motioning you to come over to shore, and you shut your  
 4 dredge off and then came over to talk to us.  
 5 Q Yeah. At that time I had my weight belt on,  
 6 if you remember. Do you remember that?  
 7 A I don't remember exactly what you were  
 8 wearing.  
 9 Q Do you remember saying to me your purpose  
 10 down there when you came down? Do you remember  
 11 articulating your desire to stop all dredging on the  
 12 South Fork of Clearwater River?  
 13 A I never said that.  
 14 Q Okay. Do you remember what I mentioned to  
 15 you, and you testified, that we subsequently went up  
 16 to the AMRA camp? Do you remember why I said I'd like  
 17 to go up there?  
 18 A I don't remember exactly why you said you  
 19 want to go up there.  
 20 Q Okay. You testified that all the dredgers  
 21 stated they did not need an NPDES permit. Do you  
 22 stand by that?  
 23 A Well, I did not talk to every dredger out  
 24 there.  
 25 Q Okay.

1 A There were several dredges that were just  
 2 unoccupied, and I couldn't from the camp, where a lot  
 3 of the dredgers worked -- I wasn't able to determine  
 4 which dredger might have been on which dredge, if  
 5 they're not actively dredging.  
 6 JUDGE COUGHLIN: Now, just to interject a  
 7 minute for clarity. My recollection of who that  
 8 statement was attributed to was this Shannon Poe  
 9 person.  
 10 THE WITNESS: Which --  
 11 JUDGE COUGHLIN: Was that about not needing  
 12 an NPDES permit? Is that what you --  
 13 THE WITNESS: That was Shannon Poe.  
 14 JUDGE COUGHLIN: Poe. Is that --  
 15 THE WITNESS: Basically --  
 16 JUDGE COUGHLIN: -- who made the statement  
 17 to you, or did someone else make the statement, there  
 18 is no need for an NPDES permit?  
 19 THE WITNESS: Shannon Poe is the one that  
 20 was really saying that.  
 21 JUDGE COUGHLIN: Okay.  
 22 THE WITNESS: And as soon as I got to that  
 23 camp, they started filming me, and I said on that film  
 24 that they were not in compliance and that they do need  
 25 an NPDES permit and a plan of operations, a plan of

1 operations which would require that they have an NPDES  
 2 permit along with an Idaho Department of Water  
 3 Resources permit, and any other permits that would be  
 4 needed to dredge in that river.  
 5 JUDGE COUGHLIN: Was Mr. Erlanson present at  
 6 that time amidst that group?  
 7 THE WITNESS: Yes.  
 8 JUDGE COUGHLIN: Okay. All right. Go  
 9 ahead.  
 10 BY MR. ERLANSON:  
 11 Q Do you remember someone leaving that  
 12 conversation for a period of about an hour, hour and a  
 13 half, to go get --  
 14 A Yes.  
 15 Q -- the county sheriff?  
 16 A Yes.  
 17 Q Do you know who that man was?  
 18 A I believe it was you.  
 19 Q Yes, it was. Okay. Thank you. I'm looking  
 20 at -- I don't know the --  
 21 MR. McLAREN: Is it the inspection report?  
 22 MR. ERLANSON: -- CX-1.  
 23 MR. McLAREN: CX-01?  
 24 MR. ERLANSON: Right. You have it on the  
 25 back.



1 BY MR. ERLANSON:  
 2 Q You have -- on the top, you have "Operator  
 3 Claimant," if you would look, Mr. Hughes, "Operator  
 4 Claimant" on the top. Do you see where it says  
 5 "Operator Claimant"?  
 6 A Yes, I see that.  
 7 Q And you have listed there Poe, Erlanson,  
 8 Rice, Dickley, Monahan, right? Is that correct?  
 9 A I believe it also has a slash, et cetera.  
 10 Q Maybe I got a hole punched here.  
 11 A I believe there is a hole punched in mine  
 12 also.  
 13 JUDGE COUGHLIN: Yeah. I see slash, E-T-C,  
 14 period.  
 15 MR. ERLANSON: Okay.  
 16 BY MR. ERLANSON:  
 17 Q And then down below, you have others on  
 18 site, if you would look. And you say, if I pronounce  
 19 the names correctly, "Paul and John Ratley (phonetic),  
 20 Dan Sederberg (phonetic), and approximately 15 to 20  
 21 others." Is that correct?  
 22 A Yes.  
 23 Q Is it a mineral examiner's practice to put  
 24 25 different operations on one mineral inspection  
 25 report?

1 A It's acceptable.  
 2 Q Would you, if you had 15 to 20 different  
 3 mines under different operators, put all of those  
 4 mines on one inspection report?  
 5 A No.  
 6 Q Okay. When we look over here, and it says,  
 7 "Safety and Fire Control," over on the right side in  
 8 the listings area in the middle of the page -- it  
 9 says, "Safety and Fire Control." You have UKN under  
 10 yes. What does UNK stand for?  
 11 A Unknown.  
 12 Q Then can I ask you why you have their  
 13 following approved plan -- you've got an X, because  
 14 apparently they're -- speak to that because you're  
 15 talking a plan of operations? Am I understanding this  
 16 correctly? You have an X under no. And I'm trying to  
 17 --  
 18 JUDGE COUGHLIN: Are you asking what  
 19 "following approved plan" is in reference to?  
 20 MR. ERLANSON: Yes.  
 21 JUDGE COUGHLIN: Okay.  
 22 THE WITNESS: I had put no on that because  
 23 there is no approved plan --  
 24 MR. ERLANSON: Okay.  
 25 THE WITNESS: -- on any of those.

1 BY MR. ERLANSON:  
 2 Q Okay. Resources protected, you have no.  
 3 Why?  
 4 A You did not go through the NEPA process. We  
 5 did not evaluate the resources out there before you  
 6 started dredging. So therefore, we did not look at  
 7 any resource protection for your operations.  
 8 Q Okay, okay. State or federal agency contact  
 9 needed. You have an X under yes. Is that correct?  
 10 A Yes.  
 11 Q So when did you contact a state or federal  
 12 agency? Do you know the dates?  
 13 A I'm not necessarily the one that has to  
 14 contact a federal or a state agency.  
 15 JUDGE COUGHLIN: So what does that mean  
 16 then, that particular listing on the report when it  
 17 says state or federal agency contact needed? What is  
 18 that referring to?  
 19 THE WITNESS: It refers to this operation as  
 20 a suction dredging operations, therefore state and  
 21 federal permits would be required to do this suction  
 22 dredging.  
 23 JUDGE COUGHLIN: Okay. So the checked box  
 24 yes to that refers to the operator's obligation.  
 25 THE WITNESS: Yes.

1 JUDGE COUGHLIN: Okay.  
 2 BY MR. ERLANSON:  
 3 Q Oh, I was under the assumption that it was  
 4 your obligation because as I understand it, you're the  
 5 one that took the pictures and were -- there was no  
 6 EPA individual down here, so, I mean, you took the  
 7 pictures. And I'm asking you when did you notify the  
 8 EPA of the violation that --  
 9 A I'm not sure exactly when I notified them.  
 10 They actually may have notified me or contacted me  
 11 asking for a copy of the report. And I'm not sure  
 12 exactly what date that was.  
 13 Q Do you have an estimation?  
 14 A Within a week of the report.  
 15 Q And you believe that the EPA notified you or  
 16 contacted you.  
 17 A They contacted.  
 18 MR. ERLANSON: Okay. Let's see. The other  
 19 thing -- the last thing I have for Mr. Hughes -- and I  
 20 don't know how to go about this. I'm sorry.  
 21 JUDGE COUGHLIN: Okay. That's okay. Just  
 22 try, and if I can aid, I will.  
 23 MR. ERLANSON: But I have a news document  
 24 here that I quite frankly scribbled all over. It's  
 25 terrible.

1 JUDGE COUGHLIN: Okay.

2 MR. ERLANSON: But it has a date on it, and

3 it talks about the U.S. Forest Service, and it also

4 states down below -- I'd like to have Mr. Hughes read

5 it, if possible, or to the Court.

6 JUDGE COUGHLIN: Well, first --

7 MR. ERLANSON: I don't --

8 JUDGE COUGHLIN: -- I need to know whether

9 or not it --

10 MR. ERLANSON: Do you want to see it?

11 JUDGE COUGHLIN: -- relates to the penalty

12 issues.

13 Mr. McLaren, did you have an objection?

14 MR. McLAREN: I object to any attempt to

15 introduce what may be impeachment evidence. We've not

16 had a chance to review the news article it sounds like

17 Mr. Erlanson is referring to.

18 JUDGE COUGHLIN: Okay. For what purpose do

19 you even want to delve into that? What does it relate

20 to?

21 MR. ERLANSON: Because of the -- his

22 statement on the stand. Remember where he said 2008 I

23 kept getting these letters.

24 JUDGE COUGHLIN: Okay.

25 MR. ERLANSON: This sort of, you know --

1 JUDGE COUGHLIN: Is that a letter? Is that

2 one of the letters that he might have been referring

3 to?

4 MR. ERLANSON: No. But this refutes his

5 statement, is what I'm -- that's what I'm at.

6 JUDGE COUGHLIN: Okay. Well, here is the

7 thing.

8 MR. ERLANSON: I mean, it doesn't --

9 JUDGE COUGHLIN: You know, I hesitate to get

10 into it only because there is no evidence of those

11 letters in the case, so I'm not going to consider what

12 is not before me anyway.

13 MR. ERLANSON: Okay.

14 JUDGE COUGHLIN: So, I mean, and I

15 appreciate your intention to want to question about

16 something that was stated. If I thought that there

17 was something for me to refer to in the record that

18 might make that a more meaningful point, I'd certainly

19 allow you to follow up on it. But I'm not going to

20 refer to something that I don't have anyway, so --

21 MR. ERLANSON: I understand, Your Honor.

22 That's fine.

23 JUDGE COUGHLIN: Okay.

24 MR. ERLANSON: I have no further questions

25 of Mr. Hughes.

1 JUDGE COUGHLIN: Okay. Was there any

2 redirect?

3 MR. McLAREN: I have brief redirect, Your

4 Honor.

5 JUDGE COUGHLIN: Okay. Go right ahead.

6 MR. McLAREN: All right.

7 REDIRECT EXAMINATION

8 BY MR. McLAREN:

9 Q Mr. Hughes, are you familiar with dredge

10 piles?

11 A Yes.

12 Q And can you describe what a dredge pile is

13 for the Court?

14 A It's the sediment and rubble that comes off

15 of the back of the sluice, which is in between the

16 pontoons, again with the riffles in there that is

17 capturing the gold. And all of the reject gravel gets

18 put out behind the dredge, and it has to constantly

19 move so that it doesn't get too high because it's

20 going to come out of the water, basically, all this

21 sediment, and it's going to impede the free flow of

22 the sediments coming off the back of the dredge. So

23 they have to move it around constantly.

24 JUDGE COUGHLIN: And they have to move what

25 around?

1 THE WITNESS: The dredge itself. The whole

2 dredge has to be moved so that it's depositing or

3 putting the gravel off into a different spot so that

4 it flows off the back of the dredge freely.

5 JUDGE COUGHLIN: Okay. Thank you.

6 BY MR. McLAREN:

7 Q Are dredge piles distinguishable from

8 natural river features, in your experience?

9 A Yes.

10 Q Did you observe any dredge piles at the site

11 of Mr. Erlanson's dredging?

12 A Yes, I did.

13 Q Mr. Erlanson briefly held up a laminated

14 document, and he referred to those as some type of

15 regulation. You said you are -- are you familiar with

16 those?

17 A Yes, I am.

18 Q And did you say that they speak to the

19 Endangered Species Act or requirements related to it?

20 A No, they do not speak to the Endangered

21 Species Act.

22 Q Are those the extent of the regulations or

23 the information available to miners?

24 A No. That is some basic information coming

25 out of the regs that was just put into one sheet. So

1 some basic steps to take if you want to do a notice of  
2 intent to mine, which doesn't need approval, and  
3 another one for how to do a plan of operations, the  
4 steps that you would go through if you wanted to file  
5 a plan of operations.

6 Q Is there other information available to  
7 dredgers that does speak to the Endangered Species  
8 Act?

9 A There is regulations on the Endangered  
10 Species Act that is available to anyone that has a  
11 computer or goes into an office and asks for it.

12 Q So is that the limit of the available  
13 information to miners?

14 A It is not.

15 Q You mentioned that your inspection report --  
16 or Mr. Erlanson asked about your inspection report  
17 with respect to the number of operations on the  
18 report. Can you describe for the Court why you would  
19 list so many on one inspection report?

20 A Yes. There were so many dredges doing a  
21 like, you know, the same operation, type operations,  
22 and they all had similar characteristics, and it just  
23 seemed logical to me to put them all on one report.

24 Q And is choosing to do so within your  
25 inspection as a geologist and inspector?

1 A Yes. You can put more than one operation on  
2 one -- on an inspection sheet if they're close  
3 proximity to each other, typically. But if you have  
4 operations that are far apart by miles, for  
5 instance -- some of these were probably a mile or so  
6 apart, but if there is a significant difference in,  
7 you know, the distance between them, and if an  
8 operation is significantly different, say they have a  
9 plan of operations on each of these areas, then, yeah,  
10 I'm going to be doing a different report for each of  
11 those operations.

12 MR. McLAREN: Okay. I have no further  
13 questions. Thank you, Mr. Hughes.

14 Thank you, Your Honor.

15 JUDGE COUGHLIN: All right. Thank you.

16 Mr. Erlanson, do you have some questions?

17 MR. ERLANSON: Yes, Your Honor.

18 RE-CROSS-EXAMINATION

19 BY MR. ERLANSON:

20 Q You mentioned, and Mr. McLaren talked  
21 about -- mentioned this. You said there are more  
22 regulations, that you could go to a Forest Service  
23 office and get these regulations concerning ESA  
24 species.

25 A Is that a question?

1 Q Yes.

2 A Okay.

3 Q I mean --

4 A You can go to the Forest Service office and  
5 ask for those, but I would personally -- if it's  
6 concerning ESA, I would send you in the direction of  
7 an agency that deals with ESA species.

8 Q So you don't -- the U.S. Forest Service  
9 doesn't directly deal with the ESA species located  
10 within the waterways within the jurisdictional areas  
11 of the forest?

12 A We do deal with ESA species, and I don't  
13 personally because I'm a geologist. A fisheries  
14 biologist might, or a wildlife biologist, depending on  
15 what type of species we're talking about that's  
16 endangered. I'm not sure if the EPA itself deals with  
17 endangered species, but we would look at that and the  
18 NEPA analysis if we were processing a plan of  
19 operations, and we would go through the National  
20 Environmental Policy Act. And these I think were done  
21 because we did get these into compliance, a lot of  
22 suction dredgers out there, up to 15 dredges. And we  
23 looked at the Endangered Species Act under that NEPA  
24 analysis.

25 And I believe -- well, we had to consult on

1 that also, and they would -- like NOAA Fisheries and  
2 Fish and Wildlife Service, they're probably the ones  
3 that are more informed on those species that were in  
4 that river.

5 Q Okay. Thank you. You mentioned, in  
6 response to Mr. McLaren's question, about -- he asked  
7 you is it correct that you -- or is it -- I'll just  
8 use the word correct -- to list numerous operations  
9 under one narrow inspection report. And you replied  
10 that, well, if they're only a mile or two apart, and  
11 they are doing like dredgers, like operations, like  
12 characteristics.

13 From the lowest point in the South Fork of  
14 the Clearwater River, to the highest point that you  
15 personally either stopped at a site or saw a dredging  
16 operation or saw a dredge pipe, how far was it?

17 A I'm not sure exactly, but I estimate 10  
18 miles.

19 Q The first dredge you encountered was down at  
20 the power withdrawal down above John's Creek, correct?

21 A I believe so. I'm not sure of the name of  
22 the creek.

23 Q And did you go above Crooked River?

24 A Just barely above Crooked River to one of  
25 the camps that was up there. That was where Mr.

1 Sederberg was camped.

2 Q And you estimate that distance at 10 miles?

3 A That's what I'm saying right now. It could  
4 very much be less or more. I would say less more  
5 likely. I've got a map in here.

6 JUDGE COUGHLIN: And there has been a good  
7 bit of questioning about this. What is the  
8 significance of it, I guess, as it relates to what I  
9 need to decide in terms of whether there are multiple  
10 operators or dredgers put on this inspection report?

11 MR. ERLANSON: Your Honor, I can't enter  
12 testimony.

13 JUDGE COUGHLIN: Right. But you can respond  
14 just to the relevance issue.

15 MR. ERLANSON: I can respond to your  
16 question very easily. The person that took Mr.  
17 Hughes' place, Canton Curtis (phonetic), Stephen Hicks  
18 (phonetic), the BLM retired geologist, mineralogist,  
19 and another person from down here very close all told  
20 me that if -- it's improper to fill out a mineral  
21 report with different plans of operations, if that was  
22 the case. This is not the case because of the fact  
23 that nobody had a plan of operations.

24 But I'm trying to establish the fact that  
25 Mr. Hughes' mineral inspection report cannot be valid

1 because you can't have like characteristics. Some  
2 dredgers -- I follow the dredger mods, but I'm going  
3 to tell you --

4 JUDGE COUGHLIN: Okay. Hold on.

5 MR. ERLANSON: Some --

6 JUDGE COUGHLIN: I think you --

7 MR. ERLANSON: Yeah.

8 JUDGE COUGHLIN: I think you answered me,  
9 though.

10 MR. ERLANSON: Yeah.

11 JUDGE COUGHLIN: Because you're really  
12 trying to attack the validity of his report.

13 MR. ERLANSON: His mineral inspection  
14 report, yeah.

15 JUDGE COUGHLIN: Based on the number of  
16 operations --

17 MR. ERLANSON: Yeah.

18 JUDGE COUGHLIN: -- that he included. Okay.

19 MR. ERLANSON: Yeah.

20 JUDGE COUGHLIN: Mr. McLaren?

21 MR. McLAREN: Your Honor, I would just  
22 quickly respond that Mr. Hughes has already answered  
23 this question quite clearly, that it's within his  
24 discretion and he considered it appropriate.

25 JUDGE COUGHLIN: Yes. I heard that

1 testimony. So now that I understand the point, did  
2 you have any other questions you wanted to ask him?

3 MR. ERLANSON: No. That's all I wanted  
4 to -- redirect, is that what you said?

5 JUDGE COUGHLIN: Recross, but that's fine.

6 MR. ERLANSON: Okay.

7 JUDGE COUGHLIN: Don't worry about the --

8 MR. ERLANSON: Okay.

9 JUDGE COUGHLIN: -- technicalities about  
10 that. That's okay.

11 MR. ERLANSON: Thank you.

12 JUDGE COUGHLIN: Did you have anything else  
13 you wanted to ask him or follow up on?

14 MR. ERLANSON: No. I'm good.

15 JUDGE COUGHLIN: Okay. All right. Mr.  
16 Hughes, thanks very much for your testimony. I  
17 appreciate it. Just have a seat if you would.

18 THE WITNESS: Thank you, Your Honor.

19 JUDGE COUGHLIN: Thank you.

20 (Witness excused.)

21 JUDGE COUGHLIN: Okay. It's about 10 past  
22 11:00. Let me just kind of check in timing-wise, next  
23 witness, that type of thing. What do you think the  
24 likelihood of finishing today is? I'm thinking  
25 probably not.

1 MR. McLAREN: With all witnesses?

2 JUDGE COUGHLIN: Yeah.

3 MR. McLAREN: Very, very low.

4 JUDGE COUGHLIN: Yeah, okay. And that's  
5 fine.

6 MR. McLAREN: Yeah.

7 JUDGE COUGHLIN: I'm just trying to gauge  
8 time. These things are fluid, so I'd like to try and  
9 check in a bit.

10 MR. McLAREN: My best estimate is that we  
11 will get through the first three witnesses today.

12 JUDGE COUGHLIN: Okay.

13 MR. McLAREN: And then Ms. Martich's  
14 testimony ought to run a couple of hours to -- two,  
15 two and a half at the very latest.

16 JUDGE COUGHLIN: Okay.

17 MR. McLAREN: Depending on, again, the  
18 length of time.

19 JUDGE COUGHLIN: Okay. All right. So is  
20 that who you're planning to call next?

21 MR. McLAREN: Yes.

22 JUDGE COUGHLIN: Okay. Then why don't we do  
23 this. I'm assuming everybody would like a break.

24 Yes. The court reporter, absolutely. It's a little  
25 early, but why don't we just take a quick lunch

1 break --

2 MR. McLAREN: Okay.

3 JUDGE COUGHLIN: -- now, and that way we

4 don't have to interrupt the testimony of Ms. Martich.

5 I understand that there are some vending machines in

6 the building. There are some places fairly close by.

7 How much time do you need? I mean, I was thinking 30

8 minutes, if that's enough. I don't know how much time

9 you all need.

10 MR. McLAREN: Could I negotiate for 45?

11 JUDGE COUGHLIN: That's fine.

12 MR. McLAREN: Just in case anyone has to go

13 offsite. I know there are some places nearby, but

14 just to make sure we have everybody back here by then.

15 JUDGE COUGHLIN: Sure. Does that work for

16 you?

17 MR. ERLANSON: I don't need one, other than

18 a nature call. That's all I need.

19 JUDGE COUGHLIN: Right, right. I usually

20 provide a lunch break just so people can kind of

21 regroup, especially with it going into another day,

22 too. So why don't we just plan on coming back at --

23 we'll just go 50 minutes. It's 10 past. So why don't

24 we just come back at noon, and we'll pick up with your

25 next witness, okay?

1 MR. McLAREN: Thank you, Your Honor.

2 (Whereupon, at 11:10 a.m., the hearing in

3 the above-entitled matter recessed, to reconvene at

4 12:01 p.m. this same day, Tuesday, May 14, 2019.)

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1 AFTERNOON SESSION

2 (12:01 p.m.)

3 JUDGE COUGHLIN: All right. We've returned

4 from a lunch break, just a minute or two past noon.

5 And I think at this point, Complainant, were you

6 prepared to call your next witness?

7 MR. McLAREN: Yes, Your Honor.

8 JUDGE COUGHLIN: All right. Please do.

9 MR. McLAREN: Complainant will call Tara

10 Martich to the stand.

11 JUDGE COUGHLIN: Okay.

12 Whereupon,

13 TARA MARTICH

14 having been duly sworn, was called as a

15 witness and was examined and testified as follows:

16 DIRECT EXAMINATION

17 BY MR. McLAREN:

18 Q Hello, Ms. Martich. Can you please state

19 your full name and spell it for the record?

20 A Tara Martich, T-A-R-A, M-A-R-T-I-C-H.

21 Q Where do you work, Ms. Martich?

22 A I work for the Environmental Protection

23 Agency in Region 10.

24 Q And what office of the Environmental

25 Protection Agency do you work for?

1 A The Office of Enforcement and Compliance

2 Assurance Division.

3 Q Did that recently have a different name?

4 A Sorry, yes, it did. We recently realigned,

5 so all of our office names have changed.

6 Q So what was the prior name?

7 A The Office of Compliance and Enforcement.

8 Q Thank you. What is your current position

9 within that office?

10 A I work in the office as a Clean Water Act

11 enforcement specialist.

12 Q Where did you earn your undergraduate

13 degree?

14 A At Clark University.

15 Q And what type of degree was it?

16 A Environmental science and policy.

17 Q And what was the type of degree that you

18 majored in?

19 A A bachelor of arts.

20 Q Okay. What year did you graduate from Clark

21 University?

22 A 1997.

23 Q Did you earn any post-graduate degree?

24 A Yes, I did.

25 Q And where did you earn that?

1 A At the University of Alaska Anchorage.  
 2 Q And what was that degree?  
 3 A A master's in public health and public  
 4 practice.  
 5 Q And when did you graduate?  
 6 A In 2015.  
 7 Q How many years have you worked for the EPA?  
 8 A For 18 years.  
 9 Q And how many of those have you been working  
 10 in your current program?  
 11 A Fifteen of those.  
 12 Q During that time, have you had training  
 13 specific to enforcement case development?  
 14 A Yes.  
 15 Q Can you identify an example of that type of  
 16 training?  
 17 A Sure. An example of the case process  
 18 training is called putting a case together, and it  
 19 goes through how to identify violations and how to put  
 20 together case development documents and proceed to  
 21 enforcement actions.  
 22 Q You said your current position. Can you  
 23 please explain your duties in that position at the  
 24 EPA?  
 25 A Sure. My duties at EPA are to assess

1 potential violations that come into our office. They  
 2 come in through a variety of ways, sometimes by the  
 3 public, sometimes by our own inspectors, or other  
 4 agency inspectors -- and to determine whether they are  
 5 actual violations and whether an enforcement action is  
 6 warranted.  
 7 Q What statutes or regulations do you serve as  
 8 a case developer for?  
 9 A Primarily I serve as a case developer for  
 10 Section 402 of the Clean Water Act, and occasionally I  
 11 have done case development for Section 311 of the  
 12 Clean Water Act.  
 13 Q So can we discuss case development in a  
 14 little bit more depth? What does early case  
 15 development look like?  
 16 A Early case development is looking at the  
 17 violation or potential violation, excuse me, the  
 18 circumstances surrounding that violation or  
 19 violations, and deciding which avenue, if you will,  
 20 for enforcement to pursue.  
 21 Q And if you determined that formal  
 22 enforcement is necessary, what steps do you take  
 23 thereafter?  
 24 A We put together case development documents,  
 25 which are part of our policies and procedures for each

1 case, and we engage with our Office of Regional  
 2 Counsel, and then we notify a respondent and initiate  
 3 settlement discussions and hopefully reach resolution.  
 4 Q If settlement proves difficult or  
 5 impossible, what are your duties there?  
 6 A Then we coordinate with the Office of  
 7 Regional Counsel and pursue litigation.  
 8 Q Can you describe the types of respondents  
 9 you bring enforcement actions against?  
 10 A In my 15 years, I've had a wide variety of  
 11 respondents, large and small corporations,  
 12 individuals, tribes, municipalities.  
 13 Q And are you the one responsible for  
 14 calculating penalties if you find violations in your  
 15 cases?  
 16 A Yes, I am.  
 17 Q Approximately how many Clean Water Act  
 18 enforcement cases have you developed?  
 19 A At least 40.  
 20 Q And approximately how many of those cases  
 21 have you served to assess the penalty?  
 22 A All of those.  
 23 Q Okay. Do the Clean Water cases you develop  
 24 typically involve permits or the need for a permit?  
 25 A Yes, they do.

1 Q And what are those permits called?  
 2 A Those are called NPDES permits.  
 3 Q Can you explicate that?  
 4 A Yes. National Pollutant Discharge and  
 5 Elimination System.  
 6 (The document referred to was  
 7 marked for identification as  
 8 Complainant's Exhibit No. 3.)  
 9 BY MR. McLAREN:  
 10 Q At this time, I'd like you to turn to CX-03  
 11 in the binder in front of you. Can you describe for  
 12 the Court what this document is?  
 13 A This is the NPDES permit for small suction  
 14 dredge miners in Idaho.  
 15 Q Are you familiar with this document?  
 16 A I am familiar with this.  
 17 MR. McLAREN: I move CX-03 into evidence,  
 18 Your Honor.  
 19 JUDGE COUGHLIN: All right. Any objection  
 20 to it coming in, Mr. Erlanson?  
 21 MR. ERLANSON: No.  
 22 JUDGE COUGHLIN: Okay. CX-3 is admitted.  
 23 //  
 24 //  
 25 //

1 (The document referred to,  
 2 previously identified as  
 3 Complainant's Exhibit No. 3,  
 4 was received in evidence.)  
 5 BY MR. McLAREN:  
 6 Q Is this an example of the NPDES permit that  
 7 you mentioned?  
 8 A Yes, it is.  
 9 Q If I can ask you to turn to page CX-00027.  
 10 What was the effective date of this permit?  
 11 A This permit became effective on May 6, 2013.  
 12 Q And broadly speaking, what is this permit  
 13 for?  
 14 A So this permit is for operators of placer  
 15 mining operations in Idaho, with small suction dredge  
 16 equipment, and that means an intake nozzle size of 5  
 17 inches in diameter or less, into waters of the United  
 18 States, within Idaho.  
 19 Q And to your knowledge, did Mr. Erlanson have  
 20 authorization under this permit on July 22, 2015?  
 21 A Not for the South Fork of the Clearwater  
 22 River.  
 23 Q Was authorization under this permit even  
 24 available at that time in 2015?  
 25 A Not on the South Fork of the Clearwater

1 River.  
 2 Q So were you the case developer for the case  
 3 we're dealing with today?  
 4 A Yes.  
 5 Q Can you clarify when the Clean Water Act  
 6 violation in this case occurred? I know it's  
 7 relatively clearly established.  
 8 A When it occurred?  
 9 Q Yeah.  
 10 A July 22, 2015.  
 11 Q And how did you come to learn about the  
 12 violation?  
 13 A Through a Forest Service inspector's  
 14 inspection report.  
 15 Q And prior to receiving that report, were you  
 16 aware of suction dredging activity on the South Fork  
 17 of the Clearwater River?  
 18 A We were aware. EPA had been coordinating  
 19 with its sister regulatory agencies, state and  
 20 federal, and we knew that it was -- there was likely  
 21 to be suction dredging occurring on the South Fork of  
 22 the Clearwater River that summer.  
 23 Q At this time, was that awareness based upon  
 24 any publicly available information?  
 25 A Yes, it was.

1 MR. McLAREN: At this time, I'd like you to  
 2 turn to Exhibit CX-01.  
 3 (Pause.)  
 4 MR. McLAREN: 01, the first one.  
 5 (Pause.)  
 6 MR. McLAREN: Yeah. It's his report.  
 7 BY MR. McLAREN:  
 8 Q Did you -- and this document is already in  
 9 evidence. Did you use this document when developing  
 10 the case at issue today?  
 11 A Yes, I did.  
 12 Q How did you obtain the document?  
 13 A Mr. Clint Hughes provided it to my  
 14 supervisor, who gave it to me to evaluate.  
 15 Q And why would Mr. Hughes from the Forest  
 16 Service share an inspection report like this with EPA?  
 17 Is that common practice?  
 18 A It is. As I mentioned, we had been working  
 19 with the Forest Service. They were one of our sister  
 20 agencies that we had been coordinating with. And the  
 21 Forest Service knew that NPDES permit coverage was not  
 22 available on the South Fork of the Clearwater River,  
 23 so that suction dredging activity, if it was  
 24 occurring, was likely in violation of the Clean Water  
 25 Act.

1 Q And did you initiate the enforcement action  
 2 against Mr. Erlanson based in part on this inspection  
 3 report?  
 4 A Yes, I did.  
 5 Q What was observed during the inspection that  
 6 provoked that initiation of the action?  
 7 A Well, in particular, the areas in the  
 8 inspection report that I looked at are on pages CX-5  
 9 and 6.  
 10 Q Can you point out for the Court any  
 11 particular photos that highlight the violations you  
 12 observed?  
 13 A Sure. The pictures in the upper right-hand  
 14 corner of CX-6 which showed active dredgers in the  
 15 water, and we have the two upper pictures there, and  
 16 then at the bottom of CX-5 on the lower right hand  
 17 corner, you can see that those dredges are actively  
 18 working, and there is water moving off the -- you  
 19 know, through the dredge into the back of the sluice,  
 20 and then discharging out the back.  
 21 JUDGE COUGHLIN: And just to quickly  
 22 clarify, when you say five and six, I think you're  
 23 referring to the page numbers, right?  
 24 THE WITNESS: The page numbers, sorry.  
 25 JUDGE COUGHLIN: Yeah. So it's CX-1. And I

1 know there are a whole series of --  
 2 THE WITNESS: I know. It's six zeros and a  
 3 five --  
 4 JUDGE COUGHLIN: Yeah.  
 5 THE WITNESS: -- the six zeros --  
 6 JUDGE COUGHLIN: Five and six is fine of the  
 7 page. I just wanted to make that clarification --  
 8 THE WITNESS: Yes.  
 9 JUDGE COUGHLIN: -- for the record. Go  
 10 ahead.  
 11 BY MR. McLAREN:  
 12 Q Were there any other photos that depict Mr.  
 13 Erlanson's dredge that would initiate the enforcement  
 14 action, or cause you to believe that a violation may  
 15 have occurred?  
 16 A Those were the main ones.  
 17 Q Okay. In addition to working with  
 18 inspection reports, do you take any other actions to  
 19 obtain additional information in your case  
 20 development?  
 21 A Sure. Sometimes we'll reach back out to a  
 22 sister regulatory agency or the respondents or the  
 23 potential respondent if we haven't pursued an  
 24 enforcement action yet to get more information,  
 25 clarify facts before pursuing case development.

1 Q And why do you do this?  
 2 A To ensure the accuracy of the information we  
 3 have in the case at hand.  
 4 Q And does that additional information -- does  
 5 that assist in the development of a penalty as well?  
 6 A It does, absolutely.  
 7 Q Did you obtain or review records of other  
 8 federal agencies or the state in this case?  
 9 A Yes, I did.  
 10 Q And did you communicate with individuals  
 11 from the Forest Service, including but not limited to  
 12 Mr. Hughes, in this case?  
 13 A Yes.  
 14 Q Okay. Finally, did you attempt to obtain  
 15 any information from Mr. Erlanson himself?  
 16 A I did, yes.  
 17 Q Pardon me?  
 18 A So EPA issued a notice of violation. That  
 19 was our first step in our enforcement action, and  
 20 combined with it was a request for information to try  
 21 to obtain information from Mr. Erlanson himself about  
 22 the activities that occurred on July 22, 2015.  
 23 //  
 24 //  
 25 //

1 (The document referred to was  
 2 marked for identification as  
 3 Complainant's Exhibit No.  
 4 27.)  
 5 BY MR. McLAREN:  
 6 Q If I can ask you to turn in your folder to  
 7 CX-27. Are you familiar with this document?  
 8 A Yes, I am.  
 9 Q And what is it?  
 10 A This is the notice of violation and request  
 11 for information I referred to.  
 12 MR. McLAREN: I move CX-27 into evidence.  
 13 JUDGE COUGHLIN: Any objection, Mr.  
 14 Erlanson?  
 15 MR. ERLANSON: None.  
 16 JUDGE COUGHLIN: Okay. CX-27 is admitted.  
 17 (The document referred to,  
 18 previously identified as  
 19 Complainant's Exhibit No. 27,  
 20 was received in evidence.)  
 21 BY MR. McLAREN:  
 22 Q Can you identify, perhaps summarize, the  
 23 information that you sought from Mr. Erlanson using  
 24 this document?  
 25 A Sure. We -- I was interested in the type of

1 dredging equipment that he was using, the approximate  
 2 amount of soil or fill that he moved during the time  
 3 that he was dredging, if he had any information about  
 4 the length in feet of how far downstream his turbidity  
 5 plume extended, the ounces of gold he collected while  
 6 dredging, and if he had any photographic or  
 7 documentation of the events.  
 8 Q Did Mr. Erlanson comply with this  
 9 information request?  
 10 A Well, his -- he did respond, and his  
 11 response explained how the notice of violation was not  
 12 warranted.  
 13 (The document referred to was  
 14 marked for identification as  
 15 Complainant's Exhibit No.  
 16 28.)  
 17 BY MR. McLAREN:  
 18 Q If I can ask you to turn to CX-28.  
 19 A Uh-huh.  
 20 Q Are you familiar with this document?  
 21 A Yes, I am.  
 22 Q And what is this?  
 23 A This is Mr. Erlanson's reply to the notice  
 24 of violation.  
 25 MR. McLAREN: I move CX-28 into evidence,



1 Your Honor.

2 JUDGE COUGHLIN: Okay. Are you there, Mr.

3 Erlanson?

4 MR. ERLANSON: I'm getting there real quick.

5 JUDGE COUGHLIN: Okay. That's okay. Take

6 your time. Just let me know --

7 MR. ERLANSON: I'm on 28. I just got to

8 move this page.

9 JUDGE COUGHLIN: So this is what is being

10 offered into evidence. Let me know if you object to

11 it.

12 MR. ERLANSON: No objection, Your Honor.

13 JUDGE COUGHLIN: Okay. CX-28 is admitted.

14 (The document referred to,

15 previously identified as

16 Complainant's Exhibit No. 28,

17 was received in evidence.)

18 BY MR. McLAREN:

19 Q Did Mr. Erlanson respond to the questions

20 that you submitted seeking more information?

21 A No, he did not.

22 Q I think you briefly touched on the contents

23 prior to us reaching this exhibit. Can you let me

24 know in substance generally what the response was?

25 A The response was an explanation of how Mr.

1 Erlanson, in his perspective, the notice of violation

2 was sent in error, and he requested that EPA consider

3 reversing it or withdrawing that notice of violation.

4 Q I'd like to turn now to the assessment of

5 the penalty. Where does EPA get its authority to

6 assess penalties for violations of the Clean Water

7 Act?

8 A EPA has policies and frameworks that direct

9 our assessment of penalties.

10 Q And are you aware of and familiar with the

11 statutory factors laid out by the Clean Water Act that

12 direct the assessment of the penalties?

13 A Yes, yeah, through the Clean Water Act

14 Section 309(g) is where our authority comes from. And

15 then there are statutory factors that EPA considers

16 when calculating penalties.

17 Q And do you consider those factors when you

18 assess a penalty?

19 A I do.

20 Q And how do you do that?

21 A Through using the policies and frameworks

22 that have been provided.

23 //

24 //

25 //

1 (The document referred to was

2 marked for identification as

3 Complainant's Exhibit No.

4 35.)

5 BY MR. McLAREN:

6 Q Can you please turn to CX-35? Are you

7 familiar with this document?

8 A Yes. This is an EPA policy on civil

9 penalties.

10 MR. McLAREN: Your Honor, I move CX-35 into

11 evidence.

12 JUDGE COUGHLIN: Okay. Mr. Erlanson, this

13 is a policy document. You've heard the testimony

14 about it. Any objection to it coming in?

15 MR. ERLANSON: I don't think I have an

16 objection, Your Honor, no.

17 JUDGE COUGHLIN: Okay. All right. CX-35 is

18 admitted.

19 (The document referred to,

20 previously identified as

21 Complainant's Exhibit No. 35,

22 was received in evidence.)

23 BY MR. McLAREN:

24 Q Is this an example of the type of policy or

25 framework on which you relied to assess a penalty?

1 A Yes.

2 Q And what is the purpose of using a policy

3 like this in an enforcement action?

4 A The main goals of the policy in general are

5 to deter violations, fair and equitable resolution of

6 those violations, and equitable treatment of the

7 regulated community, mainly so that an enforcement

8 action, say, in Massachusetts isn't getting different

9 treatment than an enforcement action in Washington or

10 Idaho.

11 Q If you can turn within CX-35, I believe,

12 pardon me -- within CX-35, if you can turn to page CX-

13 001439.

14 MR. ERLANSON: Did you say 35?

15 MR. McLAREN: It's under CX-35, and I just

16 had her turn to page CX-1439. I know.

17 MR. ERLANSON: A lot of stuff to --

18 MR. McLAREN: I know.

19 MR. ERLANSON: -- turn to, but 1439?

20 MR. McLAREN: 1439. It should say on the

21 bottom right.

22 MR. ERLANSON: Yeah, I see it there.

23 JUDGE COUGHLIN: And the cover page says, "A

24 Framework for Statute-Specific Approaches." It's kind

25 of the cover to that --

1 MR. ERLANSON: Okay.  
 2 JUDGE COUGHLIN: -- section of it, if that  
 3 helps, Mr. Erlanson.  
 4 MR. ERLANSON: Yeah. I should have it right  
 5 here.  
 6 JUDGE COUGHLIN: Are you there? Okay,  
 7 great.  
 8 MR. ERLANSON: Yeah.  
 9 JUDGE COUGHLIN: Go ahead, Mr. McLaren.  
 10 MR. McLAREN: Okay.  
 11 BY MR. McLAREN:  
 12 Q And what is this document?  
 13 A This is a framework for statutory-specific  
 14 approaches of assessing and calculating penalties.  
 15 Q Okay. Did the EPA apply the statutory  
 16 factors as guided by the CX-35 framework in assessing  
 17 the penalty in this case?  
 18 A Yes.  
 19 Q Turning to page CX-1443, can you describe  
 20 for the Court the process the EPA uses when  
 21 calculating a penalty?  
 22 A A preliminary deterrence amount is  
 23 calculated first, and that is comprised of two  
 24 components, an economic benefit component, and a  
 25 gravity component, and then once that preliminary

1 amount is calculated, there are adjustment factors  
 2 that can be applied for individual facts of each case.  
 3 Q On that same page, what are the major  
 4 components EPA uses to calculate the preliminary  
 5 deterrence amount when assessing a penalty?  
 6 A The economic benefit component and the  
 7 gravity component.  
 8 Q Okay. Does this more or less summarize the  
 9 process you use when calculating the preliminary  
 10 deterrence amount and administrative enforcement  
 11 actions?  
 12 A Yes.  
 13 MR. McLAREN: Okay. One moment. Let me  
 14 orient myself.  
 15 JUDGE COUGHLIN: Take your time.  
 16 MR. McLAREN: Thank you.  
 17 BY MR. McLAREN:  
 18 Q When you calculated the preliminary  
 19 deterrence amount here, did you consider any economic  
 20 benefit Mr. Erlanson received from the violation in  
 21 this case?  
 22 A No, I didn't.  
 23 Q Did you consider it a factor?  
 24 A I did consider it a factor.  
 25 Q And when you say you didn't calculate one,

1 can you explain why not?  
 2 A Because I didn't have any information about  
 3 what his economic benefit may have been from the  
 4 activity. So to be conservative, I just applied a  
 5 zero for that component.  
 6 Q And when you apply that assumption, is that  
 7 sort of giving the benefit of the doubt that he did  
 8 not obtain an economic benefit?  
 9 A Yes.  
 10 Q Turning now to the very next page, what is  
 11 the next major factor you consider when determining  
 12 the preliminary deterrence amount?  
 13 A That is the gravity component.  
 14 Q And what factors apply when determining the  
 15 gravity of a Clean Water Act violation like this one?  
 16 A The actual or possible harm and the  
 17 importance to the regulatory scheme.  
 18 Q So what do you consider when you're  
 19 determining the actual or possible harm?  
 20 A We look at the amount of pollutants, the  
 21 toxicity of that pollutant, the sensitivity to the  
 22 environment, the duration of the violation, and the  
 23 size of the violator.  
 24 Q So I'd like to discuss those one by one.  
 25 What information factored into your assessment of the

1 amount of pollutant in this case?  
 2 A I relied on Mr. Hughes' inspection report.  
 3 Q Would you say at the time of developing this  
 4 case that you had complete information about the  
 5 amount of pollutant from the violation in this case?  
 6 A No. The amount of pollutant, the quantity  
 7 wasn't in the inspection report. I could just imply  
 8 from the pictures that it was about a moderate amount,  
 9 but I didn't have any specific quantification for that  
 10 amount.  
 11 Q Would any information have informed you  
 12 about whether there was more or less pollutant?  
 13 A Sure. If we had received some information  
 14 from Mr. Erlanson about how long he dredged in the  
 15 river or how much soil he moved, then we may have been  
 16 able to make calculations based on the amount of  
 17 pollutant, but without that information, we had to use  
 18 what we had.  
 19 Q Let's turn to the toxicity of the pollutant.  
 20 Just to simplify it, what is the pollutant we're  
 21 concerned about in this case?  
 22 A Sediment.  
 23 Q And is sediment considered a highly toxic  
 24 pollutant?  
 25 A No, it's not.

1 Q Can it still be harmful if it's introduced  
 2 into the environment?  
 3 A Yes, it can, especially if it's introduced  
 4 in high quantities. You know, one of the premises in  
 5 a lot of suction dredging and placer mining permits is  
 6 turbidity or sediment is used as a proxy for the  
 7 amount of metals that may be in an effluent, that is  
 8 to say that if you control for turbidity, then you're  
 9 also controlling for the amount of metals that may be  
 10 in an effluent.  
 11 JUDGE COUGHLIN: Do you have a question, Mr.  
 12 Erlanson?  
 13 MR. ERLANSON: Yes. You use the word may.  
 14 You don't --  
 15 JUDGE COUGHLIN: Okay. Hold on, hold on.  
 16 That's something you need to reserve when you question  
 17 her.  
 18 MR. ERLANSON: Okay.  
 19 JUDGE COUGHLIN: Okay?  
 20 MR. ERLANSON: Okay.  
 21 JUDGE COUGHLIN: So just take notes.  
 22 MR. ERLANSON: Okay.  
 23 JUDGE COUGHLIN: Because right now, it's Mr.  
 24 McLaren's opportunity.  
 25 MR. ERLANSON: Okay.

1 JUDGE COUGHLIN: All right? Okay. Go  
 2 ahead, Mr. McLaren.  
 3 MR. McLAREN: Yes.  
 4 BY MR. McLAREN:  
 5 Q So did you get a chance to finish your  
 6 answer about the toxicity of sediment?  
 7 A I did.  
 8 Q Okay. Thank you. Did the harm caused by  
 9 the introduction of sediment, the toxicity of  
 10 sediment, factor into your penalty at all?  
 11 A Yes, it did.  
 12 Q Can you explain what effect it had?  
 13 A Sure. Well, the South Fork of the  
 14 Clearwater River is listed impaired for sediment, the  
 15 pollutant in this case, and it also -- the river is  
 16 habitat for endangered species, which is also  
 17 sensitive to that pollutant. So those factors were  
 18 considered during development of this pollutant  
 19 duration. Sorry, excuse, dilution. Pollutant  
 20 sensitivity and toxicity.  
 21 Q You mentioned something listed as impaired.  
 22 Can you describe that in simple terms, please?  
 23 A Sure. If a water body is listed as  
 24 impaired, it means it doesn't meet the state water  
 25 quality standards. So in this case, the South Fork of

1 the Clearwater River does not meet the state's water  
 2 quality standards for sediment. Therefore, there has  
 3 been a TMDL or a total maximum daily load that has  
 4 been developed for inputs to the river, both point  
 5 sources and non-point sources, to attempt to bring  
 6 that river back to meeting water quality standards at  
 7 some later date.  
 8 Q Okay. Thank you. So I think we briefly had  
 9 gotten in there, but let's now discuss the sensitivity  
 10 of the environment. What is the environment for the  
 11 purposes of this case?  
 12 A The South Fork of the Clearwater River.  
 13 Q Is the South Fork of the Clearwater River  
 14 considered a sensitive environment?  
 15 A Yes, it is.  
 16 Q And can you briefly list -- because I  
 17 believe you already got into it -- what makes it a  
 18 sensitive environment?  
 19 A Sure. The fact that there is a TMDL on it,  
 20 and the presence of ESA-listed species.  
 21 (The document referred to was  
 22 marked for identification as  
 23 Complainant's Exhibit No. 6.)  
 24 BY MR. McLAREN:  
 25 Q Can I please turn you to CX-06, which is not

1 in that large folder. It's its own large folder.  
 2 And --  
 3 (Pause.)  
 4 BY MR. McLAREN:  
 5 Q Are you familiar with this document?  
 6 A Yes, I am.  
 7 Q Is it a publicly available document?  
 8 A It is.  
 9 Q And what is it?  
 10 A This is the total maximum daily load for the  
 11 South Fork of the Clearwater River basin.  
 12 MR. McLAREN: Your Honor, I'd like to move  
 13 CX-06 into evidence.  
 14 JUDGE COUGHLIN: Okay. Any objection to  
 15 that, Mr. Erlanson?  
 16 MR. ERLANSON: None whatsoever.  
 17 JUDGE COUGHLIN: Okay. CX-6 is admitted.  
 18 (The document referred to,  
 19 previously identified as  
 20 Complainant's Exhibit No. 6,  
 21 was received in evidence.)  
 22 BY MR. McLAREN:  
 23 Q Can you please briefly describe what a TMDL  
 24 or total maximum daily load is?  
 25 A Sure. The TMDL evaluates all of the loading

1 to the river for whichever parameters aren't meeting  
2 water quality standards. In this particular TMDL, it  
3 covers sediment, temperature, and some habitat  
4 alteration. And what a TMDL does, it evaluates all  
5 the loading from all of the known sources and attempts  
6 to develop a plan to limit the amount of -- in this  
7 case, I'll stick to just sediment.

8 Q Please.

9 A The discharge or the loading of sediment  
10 from the various sources so that in the end, the hope  
11 is that the river would come off of the 303(d) listed  
12 impaired list for sediment, if the sources are  
13 controlled, at least the ones we can control.

14 Q Thank you. How did this document or the  
15 existence of this TDML influence your calculation of  
16 the penalty with respect to the sensitivity of the  
17 environment?

18 A It showed for me -- or I considered this  
19 document to show me that this is a particularly  
20 sensitive water body, especially for discharge of  
21 sediment, which is the pollutant in this case.

22 (The document referred to was  
23 marked for identification as  
24 Complainant's Exhibit No.  
25 18.)

1 BY MR. McLAREN:

2 Q Can I please ask you now to turn back to the  
3 other folder, CX-18? I'm done with that one. Are you  
4 familiar with this document?

5 A Yes, I am.

6 Q And what is it?

7 A This is a document written by David Arthaud  
8 from National Marine Fisheries Service describing the  
9 summary of suction dredging impacts.

10 MR. McLAREN: And I'd move CX-18 into  
11 evidence.

12 JUDGE COUGHLIN: Okay. He's going to be  
13 testifying as well, right?

14 MR. McLAREN: He will.

15 JUDGE COUGHLIN: Okay. So just -- I mean,  
16 it's fine. We can deal with it now. But for purposes  
17 of authenticating it, just cover it with him.

18 MR. McLAREN: Okay.

19 JUDGE COUGHLIN: I assume you're planning  
20 to?

21 MR. McLAREN: I believe we are.

22 MR. MOORE: Yes, Your Honor.

23 JUDGE COUGHLIN: Okay.

24 MR. McLAREN: Yeah.

25 JUDGE COUGHLIN: Mr. Erlanson, any objection

1 to this one coming in?

2 MR. ERLANSON: None.

3 JUDGE COUGHLIN: Okay. So CX-18 is  
4 admitted.

5 (The document referred to,  
6 previously identified as  
7 Complainant's Exhibit No. 18,  
8 was received in evidence.)

9 BY MR. McLAREN:

10 Q Did this document indicate anything to you  
11 about the sensitivity of the South Fork Clearwater  
12 River?

13 A Yes. This document described the effects on  
14 the -- in specific, the endangered species that are  
15 present in the river.

16 Q Now, I'd like to turn to the next factor.  
17 What informed your determination or consideration of  
18 the duration of the violation?

19 A The duration of the violation, I  
20 specifically used Mr. Hughes' inspection report.

21 Q And what did the report tell you about the  
22 duration in this case?

23 A The report evaluated one day of violation on  
24 July 22nd, so I used one day of violation in this  
25 case.

1 Q Did you have any other information about the  
2 extent of time or the duration that Mr. Erlanson was  
3 suction dredging in this case?

4 A Yes. There were some other publicly-  
5 available information. There were some YouTube videos  
6 and web sites that talked about the dredging events  
7 that were occurring on the river at that time. But it  
8 was anecdotal in nature.

9 Q So did you rely on them in assessing your  
10 penalty here?

11 A I didn't. Our policies and procedures  
12 require us to use credible sources, and so I only  
13 relied on Mr. Hughes' inspection report.

14 Q And finding for one day of violation despite  
15 knowing that perhaps there were more days, did that  
16 affect your penalty in any way?

17 A Yes.

18 Q And how would you say it affected your  
19 penalty?

20 A Well, so the maximum amount for one day of  
21 violations, for example, statutorily would be  
22 different than if we had evidence for more than one  
23 day, say two days or five days, of violations.

24 Q Okay. Did it result in a lower penalty  
25 total?

1 A Yes.

2 Q Okay. Is one day of violation typically the

3 minimum duration of violation that you consider?

4 A Yes, that is.

5 Q Turning to the last factor on the list, what

6 was the size of the violator in this case?

7 A Well, Mr. Erlanson is an individual, so I

8 considered him individually in this case.

9 Q Thank you. So now turning back to CX-35, on

10 page 1455, what is the second aspect of the gravity

11 component that the penalty framework has you consider?

12 A The harm to the regulatory scheme.

13 Q In your opinion, is that factor applicable

14 in this case?

15 A Definitely.

16 Q What is the regulatory scheme in this case?

17 A In this case, it's the NPDES program, and in

18 particular the general permit.

19 Q Does discharging pollutant without the

20 authorization of a permit -- does that harm the

21 regulatory program?

22 A It does.

23 Q And can you say anything about the

24 regulatory program in this case specifically?

25 A Sure. I can describe -- and this is our

1 general practice when we issue new permits. In --

2 2013 was the effective date of this new general

3 permit. EPA had actually public-noticed that permit

4 in 2010 and done a bunch of education and outreach.

5 They held workshops around the state with who would be

6 the regulated community to try to give them awareness

7 around the requirements and the need for a permit, and

8 what was going to be in the permit, and how they could

9 comply with it, how they would apply for coverage

10 under the permit. And so in 2013, EPA then issued

11 that permit and continued to send out notices of

12 violation or warning letters.

13 One example I can say, in 2014, EPA issued

14 over 300 letters to all the suction dredgers who had

15 applied for the state permit, who hadn't applied for

16 an EPA permit to notify them again of their regulatory

17 requirement.

18 Q So I asked before broadly whether or not

19 unauthorized dredging harms the regulatory scheme.

20 I'll ask specifically here, would unauthorized

21 dredging on the South Fork Clearwater tend to erode or

22 impact this regulatory program in this state on this

23 river?

24 A Yes, most definitely.

25 Q Okay. So is this -- is the initial gravity

1 calculation for a penalty like this one based both on

2 the actual harm as well as the harm to the regulatory

3 scheme?

4 A Yes.

5 Q And what is the maximum gravity amount you

6 could have assigned in this case?

7 A That would have been the statutory maximum

8 of \$16,000.

9 Q And what amount did you select for the

10 gravity calculation?

11 A 5,500.

12 Q And why?

13 A I took a number of factors into account

14 here, one being that Mr. Erlanson was -- or is an

15 individual and that there was one day of violations,

16 and EPA had an interest in settlement in this case.

17 So I chose a more conservative penalty amount.

18 Q So turning back to the penalty policy --

19 we're still in CX-35 -- on page 1457, did the policy

20 provide adjustments for this gravity figure?

21 A Yes, it does.

22 Q And can you explain to the Court what the

23 purpose of those adjustments are?

24 A Yes. So there are several adjustments.

25 Sorry, excuse me while I get to the right page.

1 JUDGE COUGHLIN: Take your time.

2 THE WITNESS: So the adjustments are a

3 degree of willfulness, a degree of cooperation, a

4 history of non-compliance, an ability to pay, and

5 other unique factors.

6 BY MR. McLAREN:

7 Q What is the purpose of those adjustments?

8 A Those adjustments are there to address any

9 individual factors for each unique case.

10 Q Turning to page CX-1458 --

11 JUDGE COUGHLIN: You mean page 1458 of CX-

12 35?

13 MR. McLAREN: That's right.

14 JUDGE COUGHLIN: Okay.

15 MR. McLAREN: Yeah.

16 JUDGE COUGHLIN: Yeah, no problem. I just

17 want to pop in just so the record is super-clear,

18 but --

19 MR. McLAREN: If I can start using that

20 parlance, I think that would probably be clearer for

21 everyone, page X of Exhibit. Would you prefer that?

22 JUDGE COUGHLIN: That's fine.

23 MR. McLAREN: Okay.

24 JUDGE COUGHLIN: Because it's really your --

25 it's your Bates stamp that you're referring to.

1 MR. McLAREN: Yeah.  
 2 JUDGE COUGHLIN: And it's -- yeah. So that  
 3 way it's just kind of clearer.  
 4 MR. McLAREN: I'm tripping all over myself.  
 5 JUDGE COUGHLIN: No worries. It's okay.  
 6 MR. McLAREN: Okay. Thank you.  
 7 JUDGE COUGHLIN: There are a lot of  
 8 documents.  
 9 MR. McLAREN: All right.  
 10 JUDGE COUGHLIN: It's fine. Take your time.  
 11 MR. McLAREN: Thank you, Your Honor.  
 12 JUDGE COUGHLIN: Okay.  
 13 BY MR. McLAREN:  
 14 Q So we're on 1458 of CX-35. What are the  
 15 ranges available for those adjustments?  
 16 A The adjustments that are available are up to  
 17 20 percent, a 21 to 30 percent adjustment, and then  
 18 over a 30 percent adjustment.  
 19 Q And what are those various ranges for?  
 20 A So the categories, up to 20 percent is for  
 21 kind of usual circumstances, if you will. The 21 to  
 22 30 percent adjustment is for unusual circumstances, if  
 23 those exist in the case. And then upward of 30  
 24 percent or greater adjustment would be for  
 25 extraordinary circumstances in a case.

1 Q So what were some of the adjustment factors  
 2 that you considered or were at play in this case?  
 3 A The degree of willfulness, the degree of  
 4 cooperation, those two main ones.  
 5 Q Okay. Did Mr. Erlanson's degree of  
 6 cooperation affect your penalty in any way?  
 7 A It did.  
 8 Q What are the facts that inform you of Mr.  
 9 Erlanson's degree of cooperation?  
 10 A The degree of cooperation factor was derived  
 11 particularly from Mr. Erlanson's failure to respond to  
 12 any of the questions that EPA had presented him in our  
 13 information requests or 308.  
 14 Q And did that upwardly or downwardly affect  
 15 the penalty in this case?  
 16 A No.  
 17 Q Okay. And is there a reason why it didn't  
 18 affect the penalty upwardly or downwardly?  
 19 A In this case mainly for purposes of  
 20 settlement --  
 21 Q Okay.  
 22 A -- I stuck with one of the other factors for  
 23 my adjustment.  
 24 Q Okay. Now, turning to page 1459 of CX-35,  
 25 does the penalty policy provide you any guidance on

1 assessing the willfulness of a respondent?  
 2 A It does.  
 3 Q And can you summarize what you're supposed  
 4 to consider regarding the willfulness of the  
 5 respondent?  
 6 A Sure. The willfulness of the respondent, I  
 7 considered how much control Mr. Erlanson had over the  
 8 violations, his foreseeability for knowing that they  
 9 were violations, whether Mr. Erlanson took reasonable  
 10 precautions against violating, whether Mr. Erlanson  
 11 knew or should have known the hazards associated with  
 12 the violation, his level of sophistication, and  
 13 whether Mr. Erlanson knew of the legal requirement  
 14 that was violated.  
 15 Q When you were assessing the penalty in this  
 16 case, did you find that Mr. Erlanson had a degree of  
 17 willfulness in carrying out the violation?  
 18 A Yes.  
 19 (The document referred to was  
 20 marked for identification as  
 21 Complainant's Exhibit No.  
 22 10.)  
 23 BY MR. McLAREN:  
 24 Q I'll ask you now to turn to Exhibit CX-10 in  
 25 the folder.

1 (Pause.)  
 2 MR. ERLANSON: I'm there.  
 3 JUDGE COUGHLIN: Okay.  
 4 (Pause.)  
 5 BY MR. McLAREN:  
 6 Q Are you familiar with this document?  
 7 A Yes, I am.  
 8 Q What is it?  
 9 A This is Mr. Erlanson's joint application for  
 10 permits that he has submitted to the Army Corps of  
 11 Engineers.  
 12 Q And what is the date on that document?  
 13 A This was received on February 10, 2014.  
 14 Q Did you review this document as part of your  
 15 case development?  
 16 A Yes, I did.  
 17 MR. McLAREN: Your Honor, I move CX-10 into  
 18 evidence.  
 19 JUDGE COUGHLIN: Any object, Mr. Erlanson?  
 20 MR. ERLANSON: The only objection I would  
 21 have with this document is that the size of the dredge  
 22 I used on July 22nd that's in question in this case is  
 23 not the same size as this dredge here. So that's a  
 24 big difference. One is considered recreational, and  
 25 one isn't.

1 JUDGE COUGHLIN: Okay. Is that a factor  
 2 here?  
 3 MR. McLAREN: No, not at all.  
 4 JUDGE COUGHLIN: Okay. So with that  
 5 clarification --  
 6 MR. ERLANSON: Yes. Yes, Your Honor.  
 7 JUDGE COUGHLIN: -- I'll go ahead and admit  
 8 it. So CX-10 is admitted into evidence.  
 9 (The document referred to,  
 10 previously identified as  
 11 Complainant's Exhibit No. 10,  
 12 was received in evidence.)  
 13 MR. McLAREN: Thank you.  
 14 BY MR. McLAREN:  
 15 Q Did this document provide you any evidence  
 16 of Mr. Erlanson's willfulness?  
 17 A Yes. Well, this document actually helped me  
 18 to understand that Mr. Erlanson considers himself a  
 19 professional dredger, and that he has been mining in  
 20 at least five different states for the past 20 years,  
 21 which would indicate to me that he would have known  
 22 about regulatory requirements for what permits he  
 23 needed to suction dredge.  
 24 Q And where on this document is that  
 25 information located, if you could please point the

1 Court.  
 2 A Sure. That information is on page CX-  
 3 000859, and it is block 22.  
 4 Q And is it evident from the document when  
 5 this is dated? I believe I already asked, but let's  
 6 turn to that page. On what page is it dated?  
 7 A It -- well, Mr. Erlanson dated this on page  
 8 CX-000860.  
 9 Q And did Mr. Erlanson sign the document?  
 10 A He did.  
 11 (The document referred to was  
 12 marked for identification as  
 13 Complainant's Exhibit No. 9.)  
 14 BY MR. McLAREN:  
 15 Q Thank you. I'd like you to turn now to  
 16 Exhibit CX-9. Are you familiar with this document?  
 17 A Yes, I am.  
 18 Q And what is it?  
 19 A This document is the response from the  
 20 United States Army Corps of Engineers to Mr. Erlanson  
 21 from his permit application.  
 22 Q Did you consider this document in assessing  
 23 and developing this case?  
 24 A Yes, I did.  
 25 MR. McLAREN: I move CX-09 into evidence.

1 JUDGE COUGHLIN: Any objection, Mr.  
 2 Erlanson?  
 3 MR. ERLANSON: None.  
 4 JUDGE COUGHLIN: Okay. CX-9 is admitted.  
 5 (The document referred to,  
 6 previously identified as  
 7 Complainant's Exhibit No. 9,  
 8 was received in evidence.)  
 9 BY MR. McLAREN:  
 10 Q When is this document dated?  
 11 A This document is dated February 11, 2014.  
 12 Q And who is the recipient in this document?  
 13 A Mr. Erlanson.  
 14 Q Was it sent to him via email?  
 15 A No. It was sent to his PO Box in Swan  
 16 Valley.  
 17 Q Can you briefly scan the first page of this  
 18 document and read for the Court the second sentence  
 19 mentioning the Clean Water Act?  
 20 A "The United States Environmental Protection  
 21 Agency has the lead for recreational suction dredging  
 22 in Idaho under the Clean Water Act."  
 23 MR. McLAREN: If it's acceptable to Your  
 24 Honor, can I have her read another aspect of this  
 25 document?

1 JUDGE COUGHLIN: If you think it's  
 2 necessary. I mean --  
 3 MR. McLAREN: Okay. I think it might not be  
 4 necessary.  
 5 JUDGE COUGHLIN: Okay. Well, I mean, you  
 6 know, or --  
 7 MR. McLAREN: It's all --  
 8 JUDGE COUGHLIN: -- whatever you need to  
 9 elicit. I'm familiar with it, but if there is  
 10 something you want to focus on, it's okay.  
 11 MR. McLAREN: Thank you, Your Honor.  
 12 BY MR. McLAREN:  
 13 Q Does the document indicate anything about  
 14 the presence of endangered species in the South Fork  
 15 Clearwater River?  
 16 A Yes, it does.  
 17 Q Can you briefly summarize what that is?  
 18 A Sure. It explains that the South Fork of  
 19 the Clearwater River has endangered species in it, and  
 20 they suggested -- they being the Army Corps of  
 21 Engineers -- suggested to Mr. Erlanson that he reach  
 22 out to both the U.S. Fish and Wildlife Service and  
 23 NMFS about his suction dredging activities.  
 24 Q Did this document indicate to you any  
 25 evidence of Mr. Erlanson's willfulness in carrying out

1 the activity?  
 2 A Yes.  
 3 Q Can you briefly describe what it told you?  
 4 A Sure. It showed me that in February of  
 5 2014, Mr. Erlanson was notified of his regulatory  
 6 requirements regarding dredging in the South Fork of  
 7 the Clearwater River, and was directed to EPA and  
 8 other agencies.  
 9 (The document referred to was  
 10 marked for identification as  
 11 Complainant's Exhibit No. 8.)  
 12 BY MR. McLAREN:  
 13 Q I'd now like to turn you to CX-8. Are you  
 14 familiar with this document?  
 15 A Yes, I am.  
 16 Q And what is it?  
 17 A This is EPA's response to Mr. Erlanson's  
 18 joint application that he submitted to the Army Corps  
 19 of Engineers.  
 20 Q And when is it dated?  
 21 A October 3, 2014.  
 22 Q And who is the recipient?  
 23 A Mr. Erlanson.  
 24 Q Rather than have you read very much about  
 25 it, can I ask you to summarize anything that this

1 would tend to tell you about Mr. Erlanson's  
 2 willfulness or knowledge of the violation?  
 3 A Sure. EPA was very explicit in this letter,  
 4 letting Mr. Erlanson know that dredging in the South  
 5 Fork of the Clearwater River was not available under  
 6 EPA's general permit, and explaining that the South  
 7 Fork of the Clearwater River also contained endangered  
 8 species, and that was an additional process that  
 9 needed to happen before permitting would be allowed  
 10 under EPA's general permit.  
 11 MR. McLAREN: And because I failed to  
 12 before, I move to admit CX-8 into evidence.  
 13 JUDGE COUGHLIN: Mr. Erlanson, any objection  
 14 to CX-8 coming in?  
 15 MR. ERLANSON: None whatsoever.  
 16 JUDGE COUGHLIN: Okay. CX-8 is admitted.  
 17 (The document referred to,  
 18 previously identified as  
 19 Complainant's Exhibit No. 8,  
 20 was received in evidence.)  
 21 BY MR. McLAREN:  
 22 Q And did this provide evidence of Mr.  
 23 Erlanson's willfulness in this case?  
 24 A Yes, it did.  
 25 //

1 (The document referred to was  
 2 marked for identification as  
 3 Complainant's Exhibit No.  
 4 12.)  
 5 BY MR. McLAREN:  
 6 Q Okay. Please turn now to Exhibit CX-12.  
 7 Are you familiar with this --  
 8 MR. McLAREN: I'll give Mr. Erlanson a  
 9 minute.  
 10 (Pause.)  
 11 BY MR. McLAREN:  
 12 Q Are you familiar with this document?  
 13 A Yes, I am.  
 14 Q And what is it?  
 15 A This is Mr. Erlanson's notice of intent or  
 16 application to apply for coverage under EPA's NPDES  
 17 general permit.  
 18 Q And did you review this in developing this  
 19 case?  
 20 A Yes, I did.  
 21 MR. McLAREN: I move to admit CX-12 into  
 22 evidence.  
 23 JUDGE COUGHLIN: Any objection, Mr.  
 24 Erlanson?  
 25 MR. ERLANSON: None.

1 JUDGE COUGHLIN: Okay. CX-12 is admitted.  
 2 (The document referred to,  
 3 previously identified as  
 4 Complainant's Exhibit No. 12,  
 5 was received in evidence.)  
 6 BY MR. McLAREN:  
 7 Q When is this notice of intent dated?  
 8 A Mr. Erlanson dated this on May 17, 2015.  
 9 Q When was it received by the U.S. EPA?  
 10 A On May 29, 2015.  
 11 Q And who is the signatory?  
 12 A Mr. Erlanson.  
 13 Q Did this document provide you evidence of  
 14 Mr. Erlanson's willfulness in carrying out the  
 15 violation?  
 16 A It showed me that he knew he had to apply  
 17 for a permit coverage to the South Fork of the  
 18 Clearwater in addition to the other dredgings he asked  
 19 for coverage.  
 20 (The document referred to was  
 21 marked for identification as  
 22 Complainant's Exhibit No.  
 23 29.)  
 24 BY MR. McLAREN:  
 25 Q Please turn now to Exhibit CX-29.



1 JUDGE COUGHLIN: Incidentally, if I can  
 2 interject just a quick question. In terms of applying  
 3 for coverage, is there a time frame within which it  
 4 needs to be done based on the dredging season, if you  
 5 will? I mean, is there -- are there any parameters in  
 6 which there is a time frame that someone would need to  
 7 submit an application relative to when the dredge year  
 8 begins, if that makes sense?  
 9 THE WITNESS: That does. I can answer you  
 10 generally.  
 11 JUDGE COUGHLIN: Okay.  
 12 THE WITNESS: Your next witness would be  
 13 able to answer this very easily --  
 14 JUDGE COUGHLIN: Okay.  
 15 THE WITNESS: -- because she focuses on the  
 16 permitting side. But if -- there are certain water  
 17 bodies which are only open, you know, at certain times  
 18 of the year, other water bodies which authorizations  
 19 are required annually, which means EPA instead of  
 20 allowing authorization to exist for the duration of  
 21 the permit, they request annual applications for those  
 22 water bodies to monitor the amount of dredging that's  
 23 happening.  
 24 But in terms of time frame, you know, for  
 25 the South Fork of the Clearwater River, authorizations

1 under general permits are a little bit simpler than an  
 2 individual permit would be, and so generally  
 3 speaking -- I can speak to maybe last year's dredge  
 4 season. People were submitting applications in, you  
 5 know, April and May, and being authorized and ready to  
 6 go by July.  
 7 JUDGE COUGHLIN: Okay. And that would be  
 8 under a general permit --  
 9 THE WITNESS: General permit.  
 10 JUDGE COUGHLIN: -- versus an individual  
 11 one.  
 12 THE WITNESS: Right.  
 13 JUDGE COUGHLIN: Okay. Is there -- and only  
 14 if you know this. If not, I can ask another witness.  
 15 Is there a lot more lead time required for an  
 16 individual permit?  
 17 THE WITNESS: Yes, typically. I mean, under  
 18 the statute, the regulations require 180 days lead  
 19 time --  
 20 JUDGE COUGHLIN: Okay.  
 21 THE WITNESS: -- for development of an  
 22 individual permit. Because of resource limitations at  
 23 EPA and the number of permits, we generally can't  
 24 issue a permit within 180 days.  
 25 JUDGE COUGHLIN: Okay. All right. Thank

1 you.  
 2 THE WITNESS: Uh-huh.  
 3 JUDGE COUGHLIN: Sorry to have sidetracked,  
 4 but I wanted to touch on that while she had testified  
 5 a bit about it.  
 6 MR. McLAREN: Well, I think it's an  
 7 important topic.  
 8 BY MR. McLAREN:  
 9 Q A quick follow-up. Does EPA have any  
 10 mandate to permit an activity that causes a discharge  
 11 of a pollutant to the water of the United States?  
 12 A There is no mandate, right. It's a  
 13 privilege to be allowed to discharge pollutants rather  
 14 than a right that someone has to discharge pollutants.  
 15 Q Okay. Thank you for that clarification.  
 16 A And Will, could I have clarification on  
 17 which exhibit we're at now, please?  
 18 Q I will reorient you. We are on CX-29. Are  
 19 you familiar with this document?  
 20 A Yes, I am.  
 21 Q And what is it?  
 22 A This is a permit -- a letter permit from the  
 23 State of Idaho Department of Water Resources to Mr.  
 24 Erlanson.  
 25 Q Did you rely on this document or consider

1 this document in assessing the penalty in developing  
 2 the case here today?  
 3 A Yes, I did.  
 4 MR. McLAREN: I move to admit CX-29.  
 5 JUDGE COUGHLIN: Any objection, Mr.  
 6 Erlanson?  
 7 MR. ERLANSON: No.  
 8 JUDGE COUGHLIN: Okay. CX-29 is admitted.  
 9 (The document referred to,  
 10 previously identified as  
 11 Complainant's Exhibit No. 29,  
 12 was received in evidence.)  
 13 BY MR. McLAREN:  
 14 Q When is this document dated?  
 15 A This document is dated May 13, 2015.  
 16 Q And maybe you described it in answering, but  
 17 can you repeat the entity that issued this document?  
 18 A Sure. The State of Idaho Department of  
 19 Water Resources.  
 20 Q And is this permit signed?  
 21 A It is.  
 22 Q And who signed it?  
 23 A By Mr. Erlanson.  
 24 Q Is that signature dated? Oh, thank you.  
 25 A May 13, 2015.

1 Q Sorry about that. Does this document  
2 mention the United States Environmental Protection  
3 Agency anywhere?

4 A It does.

5 Q And can you summarize what it describes?

6 A Sure. It notifies permittees that EPA  
7 requires permit coverage under EPA's NPDES general  
8 permit, and they need to contact us for that  
9 authorization.

10 Q Does it state anything more about the  
11 federal permit requirements under special conditions?

12 A It does. Under special condition number  
13 two, it explains that this permit, meaning the letter  
14 permit, does not serve in lieu of other permits that  
15 may be required by federal or other state government  
16 agencies, or in any way constitute an exemption of  
17 other permit requirements.

18 Q Did this document provide you any evidence  
19 about Mr. Erlanson's willfulness in this case?

20 A It did.

21 Q And what did it tend to tell you about that?

22 A This was an indication kind of close to when  
23 the violation happened where Mr. Erlanson was notified  
24 by this letter permit that EPA needed to also be  
25 contacted regarding dredging.

1 Q So after taking all of this evidence you've  
2 just discussed into account, did you apply any upward  
3 determination -- or sorry, upward adjustment to the  
4 preliminary deterrence amount that you calculated?

5 A Yes, I did.

6 Q And what was the upward adjustment that you  
7 applied?

8 A I adjusted 20 percent.

9 Q Turning back to Exhibit CX-35, on page 1458,  
10 can you describe for the Court what the 20 percent  
11 upward adjustment applies to, what types of cases?

12 A So this applies to, the framework for the  
13 policy explains that it's within the discretion of the  
14 case development team. This is more of when unusual  
15 circumstances exist where the violator may have known  
16 or had a -- knowing about the requirements that they  
17 violated.

18 Q Would you say that the degree of willfulness  
19 in this case constitutes usual circumstances compared  
20 to other Clean Water Act cases you've developed?

21 A Compared to other Clean Water Act cases I  
22 have developed, no. This was not usual.

23 Q Would you say it's unusual?

24 A I would actually say it's extraordinary. I  
25 have not come across another case in my case

1 development where the entity was notified several  
2 times by different agencies of their legal requirement  
3 to obtain permit coverage and yet proceeded with the  
4 activity of discharging without a permit.

5 Q So applying the upward adjustment that you  
6 selected when developing the initial penalty amount,  
7 what was the total penalty that you came up with?

8 A \$6,600.

9 Q And given all of the facts that we've just  
10 discussed here and everything you know, would you say  
11 that that's a reasonable penalty?

12 A Yes.

13 Q And why would you say that?

14 A Considering the one day of violation and the  
15 factors regarding Mr. Erlanson's willfulness, I  
16 consider it to be a reasonable penalty, and we  
17 remain -- we kept it that way hopefully to settle with  
18 Mr. Erlanson.

19 Q And would you say that that \$6,600 amount is  
20 a relatively conservative one?

21 A Yes.

22 MR. McLAREN: Okay. I have no further  
23 questions at this time.

24 JUDGE COUGHLIN: All right.

25 MR. McLAREN: Thank you.

1 JUDGE COUGHLIN: Mr. Erlanson, do you have  
2 questions for Ms. Martich?

3 MR. ERLANSON: Yes, Your Honor, I do.

4 JUDGE COUGHLIN: Okay.

5 MR. ERLANSON: I got to see where I start,  
6 way back here.

7 CROSS-EXAMINATION

8 BY MR. ERLANSON:

9 Q You state that you work for the Office of  
10 Enforcement and what did you say?

11 A It's the Enforcement and Compliance  
12 Assurance Division.

13 MR. ERLANSON: You have to excuse me. I got  
14 to write this. I don't have a secretary.

15 JUDGE COUGHLIN: It's okay.

16 (Pause.)

17 BY MR. ERLANSON:

18 Q You've been there 18 years?

19 A Yes.

20 Q You stated? Did you receive from Mr. Clint  
21 Hughes any other information related to this case  
22 other than picture evidence?

23 A We spoke about the information and his  
24 visual observations during his inspection.

25 Q Did you have any analytical monitoring

1 information?  
 2 A No.  
 3 Q You state that this is a violation under 402  
 4 NPDES permit, correct?  
 5 A Under 402 of the Clean Water Act.  
 6 Q Yes, the Clean Water Act. Okay. You  
 7 mentioned early case development. When did you first  
 8 become aware of the alleged violation?  
 9 A May I ask a clarifying question? Do you  
 10 mean --  
 11 Q On what date were you notified of the  
 12 violation, the case we are at here, our situation  
 13 here?  
 14 A Well, we received the inspection report  
 15 probably in the October time frame. But since Mr.  
 16 Hughes isn't a Clean Water Act inspector, he didn't  
 17 determine that there was a violation. But we knew  
 18 about the activity that had occurred earlier than when  
 19 we received the inspection report.  
 20 Q So under enforcement, when you found out  
 21 about this October time frame under 33 USC 1319, the  
 22 administrator notifies the state that there is a  
 23 violation that occurred. Did you notify the state  
 24 within 13 days of receiving this?  
 25 A I'm sorry. I don't know what you're

1 referring to.  
 2 Q 33 USC 1319, under enforcement of the Clean  
 3 Water Act. Okay.  
 4 A I don't have it in front of me.  
 5 JUDGE COUGHLIN: So restate your question a  
 6 moment, Mr. --  
 7 MR. ERLANSON: I want to know if -- she  
 8 said -- the witness states that she heard or got  
 9 knowledge of my -- our case here in October.  
 10 According to the enforcement regulations under 33 USC  
 11 1319, she has 13 days to notify the state of that  
 12 violation. I'm asking did she notify the state within  
 13 13 days of her receiving notification.  
 14 JUDGE COUGHLIN: So you're citing to a code  
 15 provision that mandates that type of notice?  
 16 MR. ERLANSON: Yes.  
 17 JUDGE COUGHLIN: Okay. And you said that  
 18 that's 33 USC 1319. Tell me what it is again?  
 19 MR. ERLANSON: I believe so, Your Honor.  
 20 JUDGE COUGHLIN: Okay.  
 21 MR. ERLANSON: There is two provisions in  
 22 that, both A and B.  
 23 JUDGE COUGHLIN: Okay. Let me just get the  
 24 cite so I can kind of --  
 25 MR. ERLANSON: Yeah.

1 JUDGE COUGHLIN: -- pull it up here.  
 2 MR. ERLANSON: I think I've got one here. I  
 3 don't know if I do or not. I'm hoping I do. But it  
 4 is at 1319.  
 5 JUDGE COUGHLIN: Okay. Well, let me start  
 6 out with a threshold question.  
 7 Ms. Martich, are you familiar with a  
 8 provision in the code, somewhere in 1319, that  
 9 requires you to provide notice to the state?  
 10 THE WITNESS: Yes. There is a requirement  
 11 in the regulations that EPA will notify the state.  
 12 It's after the case has been developed, though, and  
 13 when we initiate an enforcement action. So that step  
 14 actually occurred when we filed the complaint in this  
 15 case.  
 16 JUDGE COUGHLIN: Okay.  
 17 MR. ERLANSON: I have it here, Your Honor.  
 18 JUDGE COUGHLIN: Was that responsive,  
 19 though, to what you were asking? I asked it a  
 20 slightly different way, I guess a bit more broadly.  
 21 But did that respond to your question, or do you want  
 22 to ask -- if not, ask another question.  
 23 MR. ERLANSON: Well, can I just have her  
 24 read what it says?  
 25 JUDGE COUGHLIN: What is it? If it's the

1 law, we --  
 2 MR. ERLANSON: Yeah.  
 3 JUDGE COUGHLIN: I mean, I just can pull up  
 4 the cite.  
 5 MR. ERLANSON: Okay.  
 6 JUDGE COUGHLIN: What is the cite?  
 7 MR. ERLANSON: Well, it's 33 USC --  
 8 JUDGE COUGHLIN: Because I think you're  
 9 referring to the code. She responded with regard to  
 10 the regulations. It's possible there are mirror  
 11 portions of it, but without looking at it  
 12 specifically, I don't know. Can you tell me what that  
 13 cite is?  
 14 Or, Mr. McLaren, do you know? You're  
 15 standing up.  
 16 MR. McLAREN: Oh, yeah. It's 1319(g)(3)(b),  
 17 I think --  
 18 JUDGE COUGHLIN: Okay.  
 19 MR. McLAREN: -- that requires the state  
 20 notification.  
 21 JUDGE COUGHLIN: Okay.  
 22 MR. McLAREN: I just -- with an eye on the  
 23 permissive standards here, I would just like to lodge  
 24 an objection as to relevance. This is a state  
 25 notification requirement that's sort of mandatory for

1 any of these compliance and development cases. It  
2 doesn't have anything to do with Ms. Martich's duties.  
3 It's usually just a product of running this through  
4 all the tracks.

5 So it would have nothing to do with the  
6 integrity of the case. It's something that was  
7 satisfied in this case as well. It's just not  
8 relevant to harm or penalty in this case.

9 JUDGE COUGHLIN: Okay. And I guess -- so on  
10 that point, knowing that the focus here is on  
11 penalty --

12 MR. ERLANSON: I understand.

13 JUDGE COUGHLIN: -- what about that will  
14 help me determine the appropriateness of any penalty?

15 MR. ERLANSON: Well, Your Honor, I think  
16 it's real appropriate because if the EPA failed to do  
17 their legal duty here, I mean, I think there is a  
18 procedural problem here, penalty notwithstanding. You  
19 know, she -- what we're talking about here, she has  
20 been on the witness stand, and the counsel, EPA  
21 counsel, has questioned her as to Mr. Erlanson's  
22 willfulness and all this. And I think that's a  
23 relative counter-argument.

24 I mean, if she didn't notify the state of  
25 this violation, and let the state, who has

1 jurisdiction over the waters, take a preemptive step  
2 here to cite me or to take me to court or prosecute  
3 me, however you want to put it, then I think there is  
4 a problem here.

5 JUDGE COUGHLIN: Okay.

6 MR. ERLANSON: That's where I'm at.

7 JUDGE COUGHLIN: I understand. I'm going to  
8 sustain the objection. And I understand that this  
9 might be an important and significant point for you.  
10 But for what I have to resolve and the time we have,  
11 I'm really just focused on the penalty factors, which  
12 is kind of where some of this terminology is feeding  
13 into.

14 MR. ERLANSON: Correct.

15 JUDGE COUGHLIN: Just, I mean --

16 MR. ERLANSON: Correct.

17 JUDGE COUGHLIN: -- I'm assuming that you  
18 know that, but --

19 MR. ERLANSON: Yes.

20 JUDGE COUGHLIN: -- I just want to make sure  
21 that you know that.

22 MR. ERLANSON: Yeah.

23 JUDGE COUGHLIN: So I'm going to sustain the  
24 objection, which means just move on to your next  
25 question.

1 MR. McLAREN: Thank you, Your Honor.

2 MR. ERLANSON: Thank you.

3 JUDGE COUGHLIN: And if you disagree with  
4 any rulings, I mean, that can always be included in a  
5 basis for appeal in the event it's harmful error.

6 MR. ERLANSON: Okay.

7 JUDGE COUGHLIN: You know, the authorities  
8 will let me know if I've messed up, so --

9 MR. ERLANSON: Thank you.

10 JUDGE COUGHLIN: -- go right ahead, Mr.  
11 Erlanson.

12 MR. ERLANSON: Yeah. Okay.

13 BY MR. ERLANSON:

14 Q Were there any other violations during this  
15 October time frame that you were -- or became aware of  
16 from Mr. Hughes?

17 A Violations of yours?

18 Q Other miners, other miners on the South Fork  
19 of Clearwater River, is what I'm getting at.

20 MR. McLAREN: Objection as to relevance of  
21 other miners' enforcement actions or penalties for  
22 other miners. It's not relevant to the assessment of  
23 Mr. Erlanson's penalty or the harm of his violation.

24 JUDGE COUGHLIN: Okay. So, Mr. Erlanson,  
25 why do you think it would matter to me what someone

1 else's circumstances were?

2 MR. ERLANSON: Well, there is two questions  
3 here.

4 JUDGE COUGHLIN: Okay.

5 MR. ERLANSON: First of all, in listening to  
6 Ms. Martich's testimony, I -- well, I agree with a  
7 lot, but what I don't agree with is that there was  
8 another dredger on my mining claim at that time. He  
9 also received a fine. And I would defer to the Court  
10 this consideration. If they fine a person, the other  
11 person, the other dredger, or any of the other 24  
12 dredgers, a certain monetary fine, and we're dealing  
13 with a penalty phase here, I think it's relevant that  
14 the fines be similar in nature.

15 JUDGE COUGHLIN: Okay. So once again, I'm  
16 going to sustain the objection, and the reason  
17 being -- I want to try to explain this a little bit.  
18 My evaluation of what amount of penalty, if any, is  
19 appropriate in your case is going to be dependent upon  
20 the facts and evidence presented here as they relate  
21 to you --

22 MR. ERLANSON: Okay.

23 JUDGE COUGHLIN: -- and your particular  
24 circumstances. So whether or not another miner  
25 received a notice of violation, whether that claim was

1 settled prior to litigation, which is kind of another  
2 component of all this, those are very different  
3 circumstances. And I really don't even want to hear  
4 about the settlement particulars of another case  
5 because it's really not appropriate for me to.

6 MR. ERLANSON: Okay.

7 JUDGE COUGHLIN: Those are generally -- I  
8 mean, I think you went through your own settlement  
9 discussions through our office with another neutral  
10 firewall up. I know nothing about it. I don't want  
11 to know anything about it. It would be improper for  
12 me to know anything about it. Those are very  
13 protected discussions. And in fact, the Rules of  
14 Evidence -- I think it's 408 -- speak to that very  
15 explicitly. Our rules of practice do. So again, it's  
16 an integrity issue. Don't want to know about that.

17 But that, too, can influence what amount the  
18 parties might settle on.

19 MR. ERLANSON: Sure.

20 JUDGE COUGHLIN: So there are kind of other  
21 things that come into play, which is another reason  
22 why I just don't think it's going to be relevant for  
23 me here.

24 MR. ERLANSON: Okay. Thank you.

25 JUDGE COUGHLIN: But again, I'm sustaining

1 the objection, so it's adverse to you.

2 MR. ERLANSON: Right.

3 JUDGE COUGHLIN: And, you know, I mean, if  
4 you feel I've erred, you can certainly include that  
5 should --

6 MR. ERLANSON: No. That's fine, Your Honor.

7 JUDGE COUGHLIN: -- you wish to appeal.

8 MR. ERLANSON: I'm new at this game.

9 JUDGE COUGHLIN: No. It's okay. It's fine.

10 MR. McLAREN: Your Honor?

11 JUDGE COUGHLIN: Was there anything else?

12 MR. McLAREN: For the purposes of  
13 housekeeping, just because this is a fairly unfamiliar  
14 circumstance, I understand Mr. Erlanson was put under  
15 oath initially. So to the extent he's mentioning  
16 those settlements or mentioning anything else with any  
17 other dredger, will it be struck from the record, will  
18 be part of the record that you consider?

19 JUDGE COUGHLIN: I'm not considering other  
20 claims.

21 MR. McLAREN: Great.

22 JUDGE COUGHLIN: And I'm not -- and I  
23 haven't heard up to this point any particulars that  
24 are definitive about settlements.

25 MR. McLAREN: Certainly.

1 JUDGE COUGHLIN: So I'm not worried there.

2 MR. McLAREN: Thank you.

3 JUDGE COUGHLIN: But I'm not considering  
4 that information.

5 MR. McLAREN: Okay.

6 MR. ERLANSON: I don't think it's  
7 appropriate or really germane. These are very fact-  
8 specific scenarios, and I'm just going to consider  
9 what is presented in this evidentiary hearing with  
10 regard to determining what penalty, if any. Okay?

11 MR. McLAREN: Thank you, Your Honor.

12 JUDGE COUGHLIN: Sure.

13 MR. ERLANSON: Okay. Let's go on.

14 BY MR. ERLANSON:

15 Q You mentioned that you had basically  
16 prosecuted many cases against the Clean Water Act.  
17 How many of those were because they didn't have a  
18 NPDES permit for suction dredging, in your tenure at  
19 EPA?

20 MR. McLAREN: Your Honor, to the extent this  
21 touches on what we've just discussed, I would ask that  
22 the question be rephrased. If he's attempting to  
23 elicit whether she has worked on other enforcement  
24 actions that potentially involve other similar claims,  
25 or very similar claims, then I don't think it's

1 appropriate based on the topic we just discussed  
2 there.

3 JUDGE COUGHLIN: Okay. Thank you. Before I  
4 rule, I'm going to rephrase your question, which may  
5 or may not get at the point you're trying to make.  
6 But I do think that there had been some testimony  
7 earlier with regard to case development for Clean  
8 Water Act violations. I'm not sure that it was  
9 narrowed down to relate specifically to NPDES permit  
10 issues.

11 MR. ERLANSON: Yes.

12 JUDGE COUGHLIN: So to the extent your  
13 question is to clarify how many cases Ms. Martich has  
14 worked on relative to that specific area, I think  
15 that's a perfectly legitimate question.

16 So I'll leave it there for the moment. And  
17 can you respond to that?

18 THE WITNESS: Can you repeat the question,  
19 please?

20 JUDGE COUGHLIN: Yes. So I think earlier --  
21 and I don't want to mischaracterize, but I think  
22 earlier in response to Mr. McLaren's questions you  
23 were talking about your experience, and you were  
24 talking about your case development experience. And I  
25 think at one point you were asked, you know, how much

1 of it related to Clean Water Act violations, potential  
 2 violations.  
 3 But with regard to that, are you able to  
 4 drill down what percentage related specifically to  
 5 NPDES issues?  
 6 THE WITNESS: Most of it --  
 7 JUDGE COUGHLIN: Most of it.  
 8 THE WITNESS: -- actually. Uh-huh.  
 9 JUDGE COUGHLIN: Okay. All right. I'm  
 10 going to leave it there because that is the only I  
 11 guess --  
 12 MR. ERLANSON: Right.  
 13 JUDGE COUGHLIN: -- recharacterization I  
 14 had. If that wasn't responsive, and you want to ask  
 15 another question, or you were trying to get down --  
 16 MR. ERLANSON: No. That's fine, Your Honor.  
 17 JUDGE COUGHLIN: That's what you were going  
 18 for?  
 19 MR. ERLANSON: Yeah.  
 20 JUDGE COUGHLIN: Okay, great. Go right  
 21 ahead. Then in that event, I'm going to overrule the  
 22 objection because I think that that's a legitimate  
 23 question.  
 24 MR. McLAREN: Thank you, Your Honor.  
 25 JUDGE COUGHLIN: Sure. Go ahead.

1 BY MR. ERLANSON:  
 2 Q You stated that you contacted Mr. Hughes,  
 3 and he stated he contacted you. There is a  
 4 discrepancy there in the testimony. I'm trying to get  
 5 my hands on it. Can you help me out a little bit on  
 6 that? Mr. Hughes is the fellow that contacted you in  
 7 October with this information. Is that correct?  
 8 A Well, Mr. Hughes and I had frequent  
 9 communications once EPA received his inspection  
 10 report, which is kind of a normal process in case  
 11 development and following up with an inspector on what  
 12 they saw during their inspection. So we likely both  
 13 contacted each other.  
 14 Q Okay, okay. I'll leave that out now. Could  
 15 you by the pictures or by Mr. Hughes' statements to  
 16 you determine what type of suspended solids were  
 17 coming out of the dredge? Because this case hinges on  
 18 not sediment, but suspended solids, according to the  
 19 accelerated motion of September 27, 2018. So I'm  
 20 interested in why it's all of a sudden we're talking  
 21 about sediment here as the pollutant.  
 22 I want to know, do -- well, that's a  
 23 different question. I need to know that answer first.  
 24 Do you have any rationale to tell me what type of  
 25 suspended solids were being emitted from my dredge?

1 A I'm not sure I understand the question.  
 2 Q Suspended solids are a wide range of  
 3 turbidity issues. I mean, there is toxic suspended  
 4 solids. There is naturally-occurring suspended  
 5 solids, which come out of erosion of river banks. So  
 6 there is suspended solids already in the water. And  
 7 in the accelerated motion, as I stated, counsel for  
 8 the EPA states that the pollutant of record here was  
 9 suspended solids.  
 10 So I'm asking you what type of suspended  
 11 solids. Do you have any breakdown since it's a  
 12 generalized term?  
 13 A Between suspended solids from the suction  
 14 dredge versus the river banks?  
 15 Q No. Actually, I'm looking for a specific  
 16 type of pollutant within those suspended solids. Was  
 17 it arsenic? Was it coliform bacteria? What was it?  
 18 A The pollutant in this case is sediment.  
 19 Q Sediment, okay. According --  
 20 JUDGE COUGHLIN: Yeah. Let me interject  
 21 just a second because I want to make sure I'm  
 22 following. You may or may not be familiar, but in the  
 23 prehearing exchange process -- and maybe you are very  
 24 familiar. I don't know. But in the prehearing  
 25 exchange process, the Complainant's rebuttal

1 prehearing exchange was pretty much dedicated to  
 2 explaining the rationale behind the penalty that the  
 3 Complainant was proposing.  
 4 I think that might have even been the first  
 5 time that they fleshed it all out, if you will. And  
 6 in that discussion, the term on suspended solids was  
 7 used. And it was discussed, I believe, insofar as  
 8 distinguishing conventional pollutants from maybe a  
 9 more toxic type of a pollutant, and identified as a  
 10 mitigating factor, if you will, describing this as a  
 11 conventional pollutant and therefore not as harmful,  
 12 if you will.  
 13 But the term there used was suspended  
 14 solids. So to the extent that we're talking about a  
 15 term of sediment, from your perspective in analyzing  
 16 these cases for penalty purposes, is that a  
 17 distinction that should be discussed or explained,  
 18 sediments, suspended solids?  
 19 THE WITNESS: So for -- in this particular  
 20 case, I view them interchangeably. So total suspended  
 21 solids would be an analytical parameter that someone  
 22 could send off to a laboratory and receive a  
 23 concentration. We don't have that information in that  
 24 case, but boiling it down to the pollutant, you know,  
 25 we used sediments I guess as maybe layman's term for

1 representing the total suspended solids --  
 2 JUDGE COUGHLIN: Okay.  
 3 MR. ERLANSON: -- in the effluent.  
 4 JUDGE COUGHLIN: So in terms of the specific  
 5 breakdown, which I think is getting at what Mr.  
 6 Erlanson is asking about, do you possess that  
 7 information?  
 8 THE WITNESS: I don't.  
 9 JUDGE COUGHLIN: Okay. Go ahead.  
 10 MR. ERLANSON: I still don't really have an  
 11 answer there. Hopefully another witness will give me  
 12 the answer.  
 13 JUDGE COUGHLIN: Well, do you need to ask a  
 14 different question?  
 15 MR. ERLANSON: Well, my theory here is  
 16 that --  
 17 JUDGE COUGHLIN: Okay. But I don't want to  
 18 hear testimony, remember?  
 19 MR. ERLANSON: Right.  
 20 JUDGE COUGHLIN: Just a question. If you  
 21 want to follow up with a different question, feel free  
 22 to do that.  
 23 BY MR. ERLANSON:  
 24 Q Are there naturally occurring suspended  
 25 solids in every water body in the world?

1 A I don't have knowledge of every water body  
 2 in the world to be able to answer that.  
 3 Q How about every flowing stream?  
 4 A Again, I couldn't intelligently answer that  
 5 particular question. I'm not a stream expert.  
 6 Q What is a 303(d) impaired stream?  
 7 A That is a stream that for a particular  
 8 parameter does not meet water quality standards.  
 9 Q Explain parameter.  
 10 A There are various parameters under each  
 11 state's water quality standards. So it would be one  
 12 of the identified parameters in their -- or, excuse  
 13 me, in their water quality standards.  
 14 Q If the South Fork of the Clearwater is a  
 15 303(d) impaired water, under what parameters is it  
 16 impaired?  
 17 A It is impaired for sediment, temperature,  
 18 and habitation alteration.  
 19 Q Okay. So according to your testimony, under  
 20 303(d), South Fork Clearwater River already has the  
 21 named pollutant, sediment, as an impaired -- as a  
 22 serious problem. So it's already in the water body.  
 23 A The water body does not meet the water  
 24 quality standards for those parameters, including  
 25 sediment.

1 Q Correct. Therefore, since sediment is the  
 2 pollutant we're talking about here, it's suspended  
 3 solids, South Fork of the Clearwater River then is  
 4 polluted, correct?  
 5 A Again, it is on the 303(d) listed water body  
 6 for sediments.  
 7 Q As impaired, correct. Okay. Thank you.  
 8 Since 2016, the NPDES program has been available for  
 9 suction dredgers and their operations on the South  
 10 Fork of the Clearwater River. Is that correct?  
 11 A Yes.  
 12 Q Subsequent testing in the last three years,  
 13 has it improved the water quality of the South Fork of  
 14 the Clearwater River, yes or no?  
 15 A I do not have that information.  
 16 MR. McLAREN: Objection, relevance as to the  
 17 harm of his activity in July 22, 2015. It also  
 18 doesn't affect the calculation of a penalty around  
 19 that time either.  
 20 JUDGE COUGHLIN: With regard to what has  
 21 happened subsequently?  
 22 MR. McLAREN: With regard to subsequent  
 23 testing, whether the river is coming into compliance  
 24 or come off the 303(d) list is what I assume you're  
 25 trying to get through to there, whether the regulatory

1 scheme has been effective enough to get it off that  
 2 303(d) list.  
 3 JUDGE COUGHLIN: Well, I understand,  
 4 although I also remember -- and whether or not you're  
 5 intending to offer this, I don't know. I also  
 6 remember some proposed evidence that speaks to  
 7 subsequent visits to the site at issue and evidence  
 8 about those observations. So if you're looking to cut  
 9 it off right at July 22, 2015, that's an argument.  
 10 But that means you don't get to delve into anything  
 11 afterwards either.  
 12 MR. McLAREN: I withdraw my objection.  
 13 JUDGE COUGHLIN: Okay.  
 14 MR. ERLANSON: That's fine.  
 15 JUDGE COUGHLIN: Okay. Did you have --  
 16 MR. ERLANSON: I have some more questions --  
 17 JUDGE COUGHLIN: Go right ahead.  
 18 MR. ERLANSON: -- for this witness.  
 19 BY MR. ERLANSON:  
 20 Q You also mentioned total maximum daily load.  
 21 Could you explain that? What is the definition of  
 22 total maximum daily load?  
 23 A So the total maximum daily load is a plan  
 24 that is developed to evaluate sources of -- so for  
 25 whatever parameters the water body is listed for, it

1 looks at all the sources, both point sources and non-  
 2 point sources, and does a bunch of analysis and tries  
 3 to come up with a plan to control the loading of the  
 4 sources that can be controlled in an effort to bring  
 5 the water body back to meeting water quality standards  
 6 Q Okay. You mentioned sources and non-point  
 7 sources. Sources and non-point sources of what?  
 8 A Of the parameters that the TMDL evaluates.  
 9 Q The TMDL only evaluates, we know, one  
 10 parameter. What is that parameter?  
 11 A Actually, the TMDL evaluated three  
 12 parameters. It includes temperature, sediment, and  
 13 habitat alteration.  
 14 Q Okay. That differs from the EPA web site,  
 15 but I can't enter it into testimony, so I'll let you  
 16 go with that.  
 17 JUDGE COUGHLIN: You can if you testify.  
 18 MR. ERLANSON: Oh, yeah.  
 19 JUDGE COUGHLIN: Just letting you know.  
 20 MR. ERLANSON: Oh, I did squeak one in --  
 21 JUDGE COUGHLIN: Later on.  
 22 MR. ERLANSON: -- didn't I? I'm sorry, Your  
 23 Honor.  
 24 JUDGE COUGHLIN: It's okay. I'm just urging  
 25 you to reconsider whether or not you wish to testify

1 later.  
 2 MR. ERLANSON: Boy.  
 3 JUDGE COUGHLIN: It's up to you.  
 4 BY MR. ERLANSON:  
 5 Q You mentioned you had informational meetings  
 6 around the state. Where was the closest one to this  
 7 location, do you know?  
 8 A I --  
 9 MR. McLAREN: I don't -- I was going to  
 10 object to outside the scope of direct. I don't  
 11 believe we discussed informational meetings about the  
 12 state under direct testimony. Oh, you did mention it?  
 13 Okay. Fair enough.  
 14 JUDGE COUGHLIN: Okay. Yeah, that's fine.  
 15 MR. ERLANSON: Well, I -- yeah.  
 16 JUDGE COUGHLIN: Go ahead. No, no. That's  
 17 fine. I mean, if she talked about -- I'm not sure --  
 18 I'm not necessarily seeing it's going to help me  
 19 resolve penalty, but if she testified about it, you're  
 20 welcome to question. So go ahead.  
 21 MR. ERLANSON: Your Honor, the reason that  
 22 is -- you know, we're talking about willful, and  
 23 apparently her testimony is designed to say that Mr.  
 24 Erlanson should have known about all of this stuff.  
 25 And so that's why I asked the question.

1 JUDGE COUGHLIN: Okay. Go ahead.  
 2 BY MR. ERLANSON:  
 3 Q So do you know where the closest  
 4 informational meeting was held here?  
 5 A It's my understanding that one occurred here  
 6 in Idaho Falls.  
 7 Q Do you have any type of time frame since I'm  
 8 not familiar with ever seeing any notice of anything  
 9 like that? That's why I'm asking.  
 10 A I do not know the time frame.  
 11 Q Okay. Can you explain this gravity factor a  
 12 little bit more to me and how you arrived at a \$5,500  
 13 figure? You don't have to go through the whole thing  
 14 like you did with EPA counsel. I just -- I'm more  
 15 interested in the \$5,500. How did you arrive at that?  
 16 You had several factors you mentioned, but I couldn't  
 17 write fast enough.  
 18 A Okay. Can we turn back to one of the  
 19 exhibits?  
 20 JUDGE COUGHLIN: Whatever will aid you.  
 21 Just let us know what to look at.  
 22 (Pause.)  
 23 THE WITNESS: So some of the gravity factor  
 24 is based on the pollutant itself, so the amount of  
 25 pollutant and the toxicity of the pollutant, the

1 sensitivity of the environment, the duration of the  
 2 violation.  
 3 MR. ERLANSON: So -- can I ask her --  
 4 JUDGE COUGHLIN: Yeah, please.  
 5 MR. ERLANSON: I'm sorry.  
 6 JUDGE COUGHLIN: No. It's really your  
 7 floor.  
 8 BY MR. ERLANSON:  
 9 Q You mentioned toxicity.  
 10 A Uh-huh.  
 11 Q What did you find under toxicity that you  
 12 decided to put into this \$5,500 fine? What did you --  
 13 what was your conclusion on toxicity?  
 14 A As I mentioned, sediment is not a toxic  
 15 pollutant.  
 16 Q Okay. What about -- I can't even read my  
 17 own writing -- the duration of the violation? Oh, I  
 18 mean, what type of duration of violation did you  
 19 arrive at to arrive at this \$5,500 figure? Was it 10  
 20 minutes? Was it 5 hours or a 24-hour day?  
 21 A The minimum duration under the Clean Water  
 22 Act is a day, so I evaluated a single day of  
 23 violations.  
 24 Q Thank you. Let's see here. You stated  
 25 that -- in response to a question from Mr. McLaren,



1 you stated -- and I don't have this quite right. You  
2 stated a right to discharge pollutants with the  
3 permit, and that I didn't have a right to discharge  
4 pollutants. Did I understand you correctly? I was  
5 trying to write and listen to you, look for things,  
6 and it gets a little bit hectic.

7 A I was explaining to Mr. McLaren that the  
8 premise behind the NPDES program in general is that  
9 it's a privilege to receive the authorization or  
10 permission to discharge rather than a right to  
11 discharge pollutants into waters of the United States.

12 Q Okay. Doesn't that go against the question,  
13 since you said it's a privilege? Doesn't that go  
14 against the 1866, 1870, 1872 mining laws? Doesn't it  
15 go against the 1897 Organic Act?

16 A I'm not familiar with those laws or acts.

17 Q Okay. That's fine. You mentioned three  
18 circumstances. One was usual, and one was unusual.  
19 And then you said, oh, Davey, boy, you're  
20 extraordinary. So thank you for that. But explain a  
21 little bit more about those three levels for me so I  
22 can understand. What is a usual circumstances?

23 A Boy, that's hard to do. A usual  
24 circumstance -- so we were describing the different  
25 categories for adjustments, so -- an adjustment up to

1 20 percent would be usual circumstances. Those might  
2 exist when there are occasional violations of a  
3 permit, say if someone had a permit, and they had  
4 effluent violations. Unusual circumstances may be if  
5 we were working in a situation where someone had a  
6 permit with effluent limits. That would be maybe when  
7 there were many, numerous -- you know, I've worked  
8 with cases that have had several hundred up to  
9 thousands of violations, and --

10 Q One entity you're talking about?

11 MR. McLAREN: I ask that you -- that Mr.  
12 Erlanson let Ms. Martich respond.

13 JUDGE COUGHLIN: Yeah. So let her -- I  
14 mean, sustained. I don't think you meant to  
15 interrupt, but I think she was trying --

16 MR. ERLANSON: Yeah.

17 JUDGE COUGHLIN: -- to get to her third  
18 category, too.

19 MR. ERLANSON: Okay.

20 JUDGE COUGHLIN: So let her just kind of  
21 finish --

22 MR. ERLANSON: Okay.

23 JUDGE COUGHLIN: -- giving some examples in  
24 each of those categories, and you can follow up as you  
25 need.

1 MR. ERLANSON: Okay.

2 JUDGE COUGHLIN: Go ahead.

3 THE WITNESS: And then extraordinary, so  
4 that would be the -- in situations where you would  
5 adjust the penalty more than the 30 percent, and that  
6 would be really egregious situations. It's hard to  
7 give general descriptions for these things.

8 JUDGE COUGHLIN: Are they -- is it very much  
9 contingent on the particular facts of a case?

10 THE WITNESS: Completely.

11 JUDGE COUGHLIN: Okay. And so here, this  
12 was put under the -- and usual or --

13 THE WITNESS: Usual.

14 JUDGE COUGHLIN: For the up to 20 percentage  
15 adjustment, as opposed to the two higher.

16 THE WITNESS: Right.

17 JUDGE COUGHLIN: Okay. All right. Go  
18 ahead, Mr. Erlanson.

19 MR. ERLANSON: Okay.

20 BY MR. ERLANSON:

21 Q Well, see, I was confused because you  
22 mentioned -- I tried to get those percentages down,  
23 right? But then you mentioned that I was an  
24 extraordinary circumstance, and you just stated that  
25 that is an outrageous type of deal. And unusual is

1 many violations, and usual you say is an occasional  
2 violation, which that is what I would think I would  
3 fall under. Is that correct?

4 A What we calculated or what I calculated for  
5 the adjustment was 20 percent. So that fell into the  
6 usual circumstances.

7 Q Okay. The last -- well, I got two more  
8 things here. But this is my state permit from Idaho.  
9 You looked at it in I don't know what --

10 MR. McLAREN: That's in evidence.

11 MR. ERLANSON: Yeah, it's in evidence, but I  
12 don't know where it's at.

13 MR. McLAREN: I believe it's CX-29. But you  
14 have it --

15 MR. ERLANSON: Yeah. I just got a copy  
16 here.

17 MR. McLAREN: It's in evidence without the  
18 markings on it.

19 JUDGE COUGHLIN: Okay.

20 MR. ERLANSON: Yeah. I'm sure I --

21 JUDGE COUGHLIN: But let's get the -- if  
22 you're going to ask a question about it, we need to  
23 pull up that exhibit, so --

24 MR. McLAREN: It's CX-29, Your Honor.

25 JUDGE COUGHLIN: Is it? Okay. Thank you.

1 (Pause.)  
 2 MR. ERLANSON: Okay. Are we all set? Okay.  
 3 BY MR. ERLANSON:  
 4 Q My question here is that this, of course, we  
 5 all agree that this is my permit for 2015 from Idaho,  
 6 from the State of Idaho. And counsel for the EPA  
 7 brought up, does it have any -- he mentioned something  
 8 like does it have any mention of you as Environmental  
 9 Protection Agency, and you read off the sentence,  
 10 which I can repeat very easily. "The U.S.  
 11 Environmental Protection Agency, EPA, now requires an  
 12 NPDES general permit for small-scale suction dredging  
 13 in Idaho. Do you see any place on this permit, Ms.  
 14 Martich, where it says there is a need for an  
 15 individual permit on the South Fork of the Clearwater  
 16 River? Is there any place on this permit? I don't  
 17 see it.  
 18 A It does not describe individual permit.  
 19 Q Okay. I have here a copy dated October 3,  
 20 2014. It's in --  
 21 MR. McLAREN: Exhibit 8?  
 22 JUDGE COUGHLIN: Yeah. The reverse side,  
 23 Mr. Erlanson, has the exhibit number.  
 24 MR. ERLANSON: Oh, I didn't even see the  
 25 reverse side. I'm sorry.

1 MR. McLAREN: No problem.  
 2 MR. ERLANSON: Okay, CX-08.  
 3 (Pause.)  
 4 BY MR. ERLANSON:  
 5 Q Okay. Down in paragraph three, it says that  
 6 if your operation does not fit the terms and  
 7 conditions of the general permit, you may apply for an  
 8 individual permit. Do you see any place there in that  
 9 paragraph explaining the individual permit that it  
 10 states you have to apply 180 days before the issuance  
 11 of the permit?  
 12 A I do not see the reference to the 180 days.  
 13 It does note or suggest that you visit a web site, and  
 14 I'm not sure what is on that web site.  
 15 Q There is no notice here of the cost factors  
 16 involved in the individual permit either, unless you  
 17 can see it and point it out to me. Can you?  
 18 A I'm reading. No, I don't see any  
 19 information about cost.  
 20 Q Okay. The next one here -- oh, I got the --  
 21 MR. McLAREN: CX-9?  
 22 MR. ERLANSON: Yes, CX-9. Everybody on the  
 23 page?  
 24 JUDGE COUGHLIN: Just go ahead, Mr.  
 25 Erlanson.

1 MR. ERLANSON: Okay.  
 2 JUDGE COUGHLIN: If I'm not following along,  
 3 you'll know.  
 4 MR. ERLANSON: Okay.  
 5 BY MR. ERLANSON:  
 6 Q Right down at the bottom, it says, "We  
 7 suggest you contact the U.S. Fish and Wildlife Service  
 8 and the National Marine Fisheries Service before you  
 9 begin any work on this site." Wait a minute, not on,  
 10 "at this site to ensure that you comply with the  
 11 provisions of the Endangered Species Act."  
 12 Now, my question to you is, do those  
 13 entities have any regulatory authority concerning  
 14 dredging on the South Fork of the Clearwater River?  
 15 A I don't know the answer to that question.  
 16 MR. ERLANSON: Okay. I'm done.  
 17 JUDGE COUGHLIN: Okay. Did you have any  
 18 redirect?  
 19 MR. McLAREN: I have a few questions.  
 20 JUDGE COUGHLIN: Okay.  
 21 MR. McLAREN: Thank you.  
 22 JUDGE COUGHLIN: Go right ahead.  
 23 REDIRECT EXAMINATION  
 24 BY MR. McLAREN:  
 25 Q To begin at the beginning, in your

1 experience, is analytical monitoring required to  
 2 develop a case or determine whether a violation has  
 3 taken place?  
 4 A No.  
 5 Q Can you develop cases without the aid of  
 6 monitoring and sampling equipment?  
 7 A Yes.  
 8 Q And is that commonplace?  
 9 A It is common. Not all permits require  
 10 effluent limits, or excuse me, effluent sampling.  
 11 Q How many mining cases have you developed, do  
 12 you think, of those -- I think 60 that you said that  
 13 you developed, any mining Clean Water Act cases?  
 14 A Yes.  
 15 Q Can you approximate?  
 16 A A handful.  
 17 Q Okay. Thank you. We discussed pollutants,  
 18 the exact pollutant here. Can you clarify the  
 19 pollutant or pollutants that come from suction  
 20 dredging?  
 21 A Sure. Well, as I was explaining before,  
 22 sometimes, you know, in layman's terms, we're  
 23 describing it here as sediment. We also talk about it  
 24 as turbidity, the amount of turbidity in the water,  
 25 and the actual name -- I want -- in our -- so we have

1 a data system that we have to feed information into,  
 2 and it only has certain options for selecting  
 3 pollutants. And so one of those is total suspended  
 4 solids. But --  
 5 Q So would you call that a legalistic  
 6 distinction?  
 7 A Yes.  
 8 Q Okay. Does the TMDL here, to the extent of  
 9 your knowledge -- does it account for suction  
 10 dredging?  
 11 A Yes, it does.  
 12 Q Is that one of the loading sources in the  
 13 TMDL?  
 14 A Yes.  
 15 Q And that loading source, is that based on  
 16 regulated or unregulated suction dredging?  
 17 A It gives information about regulated suction  
 18 dredging.  
 19 Q And is that suction dredging authorized by  
 20 an NPDES permit?  
 21 A It would be. So I will clarify. At the  
 22 time the TMDL was written --  
 23 Q Please.  
 24 A -- there were no NPDES permits available, so  
 25 the TMDL was written in the early 2000s, and there was

1 no general permit for suction dredging until 2013.  
 2 But it did envision under a regulated NPDES program.  
 3 Q So that loading, it's informed by again  
 4 regulated as opposed to unauthorized suction dredging.  
 5 A Right.  
 6 Q But we discussed the evidence you had to  
 7 determine the violation in this case. Did you have  
 8 any evidence as to when Mr. Erlanson began dredging on  
 9 July 22, 2015?  
 10 A No, I did not.  
 11 Q And why is that? What do you know about  
 12 when the earliest information we have as to his  
 13 dredging on July 22, 2015?  
 14 A The earliest information would be in the  
 15 Hughes report, when Mr. Hughes visited Mr. Erlanson.  
 16 Q So was that not the beginning of his  
 17 dredging that day?  
 18 A I don't know.  
 19 Q And why don't you know that?  
 20 A Because he may have been dredging the day  
 21 before. That section of the river is open, or people  
 22 have suction dredged through a particular time frame,  
 23 and that's July 15th to August 15th. So I don't have  
 24 any information to know whether or not there was --  
 25 Mr. Erlanson was dredging on the river between July

1 15th and August 21st, for example.  
 2 Q And did Mr. Hughes even observe Mr. Erlanson  
 3 dredging -- start dredging that day?  
 4 A No. As I recall from the inspection report,  
 5 Mr. Erlanson was in the river when Mr. -- or, excuse  
 6 me, Mr. Erlanson was already in the river actively  
 7 suction dredging when Mr. Hughes took his pictures at  
 8 least.  
 9 Q Okay. Thank you.  
 10 A Uh-huh.  
 11 Q I'd like to discuss those ranges of upward  
 12 adjustment. Did you apply a range of upward  
 13 adjustment here?  
 14 A I did.  
 15 Q And what did you upwardly adjust for, which  
 16 of those adjustment factors?  
 17 A The lowest one, or the most conservative one  
 18 at 20 percent.  
 19 Q And you applied that 20 percent upward  
 20 adjustment based on which of those -- and I know it's  
 21 a dense document -- which of those factors in the  
 22 penalty framework?  
 23 A The degree of willfulness.  
 24 Q All right. So you could have chosen a  
 25 higher tier of upward adjustment?

1 A I could.  
 2 Q And again, there were how many higher tiers?  
 3 A Two more.  
 4 Q And you said something on cross-examination  
 5 about the number of violations. Does that inform  
 6 those upward adjustments for willfulness?  
 7 A Yes, it does.  
 8 Q Did that inform you here about upward  
 9 adjustments for willfulness?  
 10 A It did.  
 11 Q The total number of violations?  
 12 A Uh-huh.  
 13 Q And how did it inform you?  
 14 A Well, it helped support my selection of the  
 15 lower number, the fact that there was one day of  
 16 violations.  
 17 Q Okay. I'd like to turn to CX-8 at 853.  
 18 This also came up on cross-examination, I believe as  
 19 to wait times. Would reading that third paragraph  
 20 help you determine whether this provides information  
 21 as to wait times?  
 22 A This third paragraph didn't discuss wait  
 23 times. Oh, excuse me. May I correct my answer?  
 24 Q You may.  
 25 A It did discuss, not in specific terms, but

1 it does include a statement that says, "The EPA must  
 2 inform me that individual permit applications will  
 3 require additional site-specific analysis with  
 4 potentially significant wait times before a final  
 5 individual permit could be issued."  
 6 MR. McLAREN: Okay. Thank you, Ms. Martich.  
 7 I don't think I have anything else. Thank you.  
 8 JUDGE COUGHLIN: Go ahead, Mr. Erlanson.  
 9 MR. ERLANSON: I have one question.  
 10 RE-CROSS-EXAMINATION  
 11 BY MR. ERLANSON:  
 12 Q Total suspended solids, do you know what  
 13 three categories that term was used under in the Clean  
 14 Water Act?  
 15 A I do not know.  
 16 MR. ERLANSON: I know, Your Honor. I'm not  
 17 going to give testimony.  
 18 BY MR. ERLANSON:  
 19 Q Was Erlanson required by law to comply with  
 20 the EPA's request of January 22, 2016, for additional  
 21 information from Erlanson?  
 22 A Yeah.  
 23 Q Please --  
 24 A Under Section 308 of the Clean Water Act,  
 25 there is a requirement for an individual, if issued a

1 Clean Water Act informational request, to respond  
 2 within the time frame requested in the letter.  
 3 Q Is that a rule or is that a law?  
 4 A It's my understanding it's in the statute  
 5 itself.  
 6 MR. ERLANSON: Okay. Thank you.  
 7 That's all I have.  
 8 MR. McLAREN: I have no further questions.  
 9 JUDGE COUGHLIN: Ms. Martich, thanks very  
 10 much for your testimony.  
 11 THE WITNESS: Thank you.  
 12 (Witness excused.)  
 13 MR. ERLANSON: Your Honor?  
 14 JUDGE COUGHLIN: Yes.  
 15 MR. ERLANSON: Could I have a five-minute  
 16 recess?  
 17 JUDGE COUGHLIN: Oh, yeah, of course. I was  
 18 just about to ask if you all wanted a quick break  
 19 before the next witness, so five minutes?  
 20 MR. McLAREN: I'd like one as well.  
 21 JUDGE COUGHLIN: Perfect. See you back  
 22 then.  
 23 (Whereupon, a brief recess was taken.)  
 24 JUDGE COUGHLIN: We had a five-minute break.  
 25 It's ten -- or five minutes to 2:00 local time. And,

1 Complainant, you're ready with your next witness?  
 2 MR. McLAREN: Our third witness is Cindi  
 3 Godsey, and, yes, we call her to the stand.  
 4 JUDGE COUGHLIN: Okay, great.  
 5 MR. McLAREN: Thank you.  
 6 Whereupon,  
 7 CINDI GODSEY  
 8 having been duly sworn, was called as a  
 9 witness and was examined and testified as follows:  
 10 DIRECT EXAMINATION  
 11 BY MR. McLAREN:  
 12 Q Hi, Ms. Godsey. Can you please state your  
 13 full name and spell it for the record?  
 14 A Cindi Godsey, C-I-N-D-I, G-O-D-S-E-Y.  
 15 Q Are you employed?  
 16 A Yes.  
 17 Q And where do you work?  
 18 A I work at the regional office for the  
 19 Environmental Protection Agency in Seattle.  
 20 Q And what division do you work for at EPA  
 21 Region 10?  
 22 A The Water Division.  
 23 Q Which section?  
 24 A The NPDES Permitting Section.  
 25 Q What's your current title or position in

1 that section?  
 2 A I'm an environmental engineer.  
 3 (The document referred to was  
 4 marked for identification as  
 5 Complainant's Exhibit No.  
 6 31.)  
 7 BY MR. McLAREN:  
 8 Q At this time, I'd like to turn you to CX-31  
 9 in the folder before you. Take your time paging  
 10 there.  
 11 (Pause.)  
 12 BY MR. McLAREN:  
 13 Q Ms. Godsey, what is this document?  
 14 A This is my resume.  
 15 MR. McLAREN: I'd like to move CX-31 into  
 16 evidence.  
 17 JUDGE COUGHLIN: Okay. Any objection, Mr.  
 18 Erlanson?  
 19 MR. ERLANSON: None, Your Honor.  
 20 JUDGE COUGHLIN: Okay. CX-31's admitted.  
 21 (The document referred to,  
 22 previously identified as  
 23 Complainant's Exhibit No. 31,  
 24 was received in evidence.)  
 25 //

1 BY MR. McLAREN:  
 2 Q Where did you earn your undergraduate  
 3 degree?  
 4 A Michigan Technological University.  
 5 Q And what type of degree was it?  
 6 A A Bachelor of Science.  
 7 Q And in what major did you obtain your  
 8 Bachelor of Science?  
 9 A Mining engineering.  
 10 Q And what year did you graduate from MTU?  
 11 A 1981.  
 12 Q Did you earn a post-graduate degree?  
 13 A Yes.  
 14 Q And where did you earn your post-graduate  
 15 degree?  
 16 A Northern Kentucky University.  
 17 Q And what type of degree was that?  
 18 A A Master's in Business Administration.  
 19 Q And when did you earn your Master's from  
 20 Northern Kentucky University?  
 21 A 1989.  
 22 Q Can you describe work experience prior to  
 23 joining EPA relevant to mining?  
 24 A I worked as a mining engineer in an  
 25 underground limestone mine in northern Kentucky.

1 Q And did your work at the limestone -- did it  
 2 involve any dealing with mining regulations  
 3 compliance?  
 4 A Yes.  
 5 Q Can you briefly describe what that would be?  
 6 A Well, in the limestone mine, we brought the  
 7 rock up from underground. We had a lot of conveyor  
 8 belts that had to be permitted under the Clean Air  
 9 Act, and so we had to deal with the dust off of the  
 10 conveyors. I was also a certified smoke reader under  
 11 the Clean Air Act, and the radiation safety officer  
 12 for the mine.  
 13 Q Okay. And what years did you work in that  
 14 mine?  
 15 A 1981 through 1987.  
 16 Q And was that your first introduction to the  
 17 business of mining?  
 18 A Yes.  
 19 Q Was that your first introduction to the  
 20 business -- or to the regulation of mining?  
 21 A Yes.  
 22 Q How many years now have you worked at the  
 23 U.S. EPA?  
 24 A Almost 29.  
 25 Q And how many of those have you been working

1 in your permitting program?  
 2 A Over 27.  
 3 Q Have you ever had any Clean Water Act  
 4 permitting training?  
 5 A Yes.  
 6 Q Can you provide an example or two of that  
 7 training for the Court?  
 8 A I've taken permit writer's training five  
 9 different times and Water Quality Standards Academy at  
 10 least twice.  
 11 Q And can you summarize the first of those?  
 12 A The permit writer's training is an  
 13 introduction to permit writing and the components of a  
 14 permit and how to write one that is in compliance with  
 15 the regulations.  
 16 Q And what about Water Quality Standards  
 17 Academy? Can you summarize that?  
 18 A Water quality standards takes the effort  
 19 that EPA does to develop criteria to protect aquatic  
 20 life and human health, and takes that through their  
 21 recommendation of criteria, and then further into how  
 22 those criteria feed into permit effluent limits.  
 23 Q Have you ever served as an instructor for  
 24 those trainings?  
 25 A Yes, for both of them.

1 Q And, Ms. Godsey, I didn't mention it before.  
 2 That bottle of water is available to you.  
 3 A Thank you.  
 4 Q Over the course of your career, what have  
 5 been your various duties with respect to Clean Water  
 6 Act permitting?  
 7 A I have reviewed permit applications, worked  
 8 on environmental impact statements for new source  
 9 projects, drafted fact sheets, the technical basis for  
 10 the draft permits, written draft permits for public  
 11 comments, responded to those comments, and issued  
 12 final permits.  
 13 Q Can you clarify what a general versus an  
 14 individual permit is?  
 15 A So an individual permit is issued to a  
 16 specific facility, and a general permit is issued to a  
 17 category of facilities, and then different permittees  
 18 can be authorized under it.  
 19 Q Approximately how many general permits have  
 20 you developed or worked on in your career?  
 21 A Six.  
 22 Q Is that a high number for general permit  
 23 development?  
 24 A Yes.  
 25 Q Approximately how many general permits have

1 you developed or worked on specific to mining?  
 2 A Four.  
 3 Q Do your responsibilities include authorizing  
 4 discharge under those permits?  
 5 A Yes.  
 6 Q And how many authorizations have you worked  
 7 on?  
 8 A I have done over 6,000 authorizations to  
 9 authorize certain locations to over 1600 permittees.  
 10 Q So some of those were repeat authorizations  
 11 to those same permittees?  
 12 A Right, for different -- the authorizations  
 13 are per water body.  
 14 Q Okay.  
 15 A So some permittees had multiple water  
 16 bodies.  
 17 Q And how many of those authorizations were  
 18 related to suction dredging specifically?  
 19 A The vast majority of them.  
 20 Q Okay. Talking about individual permits, how  
 21 many individual permits have you developed or worked  
 22 on?  
 23 A Over 30.  
 24 Q And for approximately how many years have  
 25 you worked on small-scale suction dredging-related

1 permits?  
 2 A Over 20 since 1997.  
 3 Q What was the first small-scale suction-  
 4 dredging permit you worked on?  
 5 A The Alaska permit.  
 6 Q And when was that?  
 7 A It was issued in 19 -- it was effective in  
 8 1997.  
 9 Q Is that permit still in effect?  
 10 A It's been reissued several times, but it  
 11 still exists, and the authorization for the program  
 12 transferred to Alaska in 2010. But they still have a  
 13 small suction dredge permit.  
 14 Q So you said that began in 1997?  
 15 A Yes.  
 16 Q During that time, has the Alaska small-scale  
 17 suction dredge general permit been in effect the  
 18 entire time?  
 19 A Yes.  
 20 Q So is small-scale suction dredging in Alaska  
 21 permitted under an NPDES program?  
 22 A Yes.  
 23 Q For the duration of that period?  
 24 A Yes.  
 25 Q Are there others like the Alaska permit, the

1 small-scale suction dredging general permits?  
 2 A Well, the Idaho permit is similar.  
 3 Q Ms. Godsey, were you assigned to work on the  
 4 Idaho small-scale suction dredge general permit?  
 5 A Yes.  
 6 Q And when was that?  
 7 A Around 2009.  
 8 Q What was your role on the general permit?  
 9 A I was the permit writer.  
 10 Q And as permit writer, what were your duties  
 11 for that general permit?  
 12 A Well, I drafted a fact sheet and a draft  
 13 permit for public comment. We took comment on that  
 14 permit, revised the fact sheet and the draft permit,  
 15 renoticed it, solicited comments again, responded to  
 16 those comments, and finalized the permit.  
 17 Q Through your work on the general permit, did  
 18 you become aware of the scale of small-scale suction  
 19 dredging in Idaho?  
 20 A Yes.  
 21 Q Had that previously been unpermitted?  
 22 A Yes.  
 23 Q Can you briefly describe the extent of that  
 24 dredging?  
 25 A When we issued the permit in 2013, we had an

1 extensive mailing list of over 900 email addresses,  
 2 the vast majority of which were potential permittees.  
 3 The others were mainly land management and state  
 4 agency people.  
 5 Q So that extent of activity, does that inform  
 6 the importance of a general permit for that activity?  
 7 A Yes.  
 8 Q Does Idaho issue other types of permits for  
 9 this activity?  
 10 A Yes.  
 11 Q Why would the EPA have a permit of its own  
 12 in addition to an Idaho permit?  
 13 A Because the permit issued by the Idaho  
 14 Department of Water Resources is a stream alteration  
 15 permit, and it can't substitute as a Clean Water Act  
 16 402 permit.  
 17 Q Ms. Godsey, I'd like you to turn in that  
 18 folder in front of you to CX-29. And I believe this  
 19 document is already in evidence. Is this an example  
 20 of a stream alteration permit?  
 21 A Yes.  
 22 Q Are you familiar with these types of  
 23 permits?  
 24 A Yes.  
 25 Q Are the best -- can you describe briefly

1 what a best management practice is?  
 2 A So a best management practice is a method of  
 3 doing things to lessen the environmental impacts of an  
 4 activity.  
 5 Q Are the best management practices in the  
 6 stream alteration permits the same as those required  
 7 in the general permit that you wrote?  
 8 A No.  
 9 Q How is the federal permit different, in very  
 10 short terms?  
 11 A The federal permit addresses more water  
 12 quality issues, more biologic issues and fish habitat  
 13 issues than the stream alteration permit does.  
 14 Q So, beyond more best management practices,  
 15 is the federal permit more stringent in any other way?  
 16 A Yes.  
 17 Q And can you briefly describe any other way  
 18 in which the federal permit might be more stringent?  
 19 A Well, one of the BMPs has a spacing  
 20 requirement between dredges of 800 feet, and the water  
 21 resource permit is generally 100 feet.  
 22 Q Okay. Ms. Godsey, at this time, I'd like to  
 23 turn you to Complainant's Exhibit CX-03. Are you  
 24 familiar with this document?  
 25 A Yes.

1 Q What is it?  
 2 A It is the 2013 general permit as modified in  
 3 2014.  
 4 Q And I believe this document is also in  
 5 evidence. Does the general permit deal with water  
 6 pollution?  
 7 A Yes.  
 8 Q Does the Idaho permit deal with water  
 9 pollution?  
 10 A No, except -- the Idaho permit only touches  
 11 on it in dissuading anybody from spilling fuel. But,  
 12 other than that, there's no water quality  
 13 requirements.  
 14 Q Okay. So now speaking to the general  
 15 permit, can you please give a high-level summary of  
 16 what the permit allows?  
 17 A The general permit authorizes discharges  
 18 from small suction dredges in specific waters in the  
 19 State of Idaho.  
 20 Q And when did it go into effect?  
 21 A May 6, 2013.  
 22 Q Was this permit in place on July 22, 2015?  
 23 A Yes.  
 24 Q Is it still in effect today?  
 25 A It was reissued last year, but, yes, it's in

1 effect until May of 2023.  
 2 Q Can you approximate how many authorizations  
 3 EPA has issued under this permit?  
 4 A Under this one, we issued over 350.  
 5 Q Okay. And how many of those authorizations  
 6 have been for dredging on the South Fork Clearwater  
 7 River?  
 8 A Thirty-nine.  
 9 (The document referred to was  
 10 marked for identification as  
 11 Complainant's Exhibit No. 4.)  
 12 BY MR. McLAREN:  
 13 Q At this time, I'd like to turn you to  
 14 Complainant's Exhibit CX-4. What is this document?  
 15 A This is the fact sheet, the technical basis  
 16 for the conditions in the permit.  
 17 Q And are you familiar with this document?  
 18 A Yes.  
 19 Q How are you familiar with it?  
 20 A I wrote it.  
 21 MR. McLAREN: I move CX-4 into evidence.  
 22 JUDGE COUGHLIN: Any objection, Mr.  
 23 Erlanson?  
 24 MR. ERLANSON: None, Your Honor.  
 25 JUDGE COUGHLIN: Okay. CX-4 is admitted.

1 (The document referred to,  
 2 previously identified as  
 3 Complainant's Exhibit No. 4,  
 4 was received in evidence.)  
 5 BY MR. McLAREN:  
 6 Q You might have mentioned it when you were  
 7 describing it, but how does the fact sheet relate to  
 8 the general permit?  
 9 A The fact sheet is the technical basis for  
 10 the conditions that are proposed in the draft permit.  
 11 Q Does the permit address suction dredging in  
 12 closed waters of the United States?  
 13 A Yes.  
 14 Q What's a closed water?  
 15 A Well, there are several categories of closed  
 16 waters, and there's -- within those, there are  
 17 basically two segments of it. There's a closed --  
 18 generally closed, and then conditionally closed. And  
 19 so waters that are impaired for sediment or mercury,  
 20 wild and scenic rivers, and state protected waters are  
 21 closed, generally closed, and then waters that are in  
 22 nationally-designated areas, like parks or wildlife  
 23 refuges, can be open if the land manager agrees. And  
 24 then waters that are in designated critical habitat  
 25 under the Endangered Species Act can be open if a

1 federal agency does a consultation with the services  
 2 on that water body.  
 3 Q And can I ask you to turn to page 77 of CX-  
 4 04? I know you can probably do it from memory, but  
 5 does this describe the types of closed waters under  
 6 this permit?  
 7 A Yes.  
 8 (The document referred to was  
 9 marked for identification as  
 10 Complainant's Exhibit No.  
 11 39.)  
 12 BY MR. McLAREN:  
 13 Q Ms. Godsey, at this time, I'd like you to  
 14 turn to Complainant's Exhibit CX-39. I know it's  
 15 towards the back of that. Are you familiar with this  
 16 document?  
 17 A Yes.  
 18 Q And can you briefly describe to the Court  
 19 what this is?  
 20 A It is Appendix G of the permit.  
 21 Q And is it typically available along with the  
 22 permit?  
 23 A It was available online. It's a large  
 24 document, and so we did not send it out with every  
 25 copy of the permit that we send out.

1 MR. McLAREN: Okay. I'd like to move CX-39  
 2 into evidence.  
 3 JUDGE COUGHLIN: Mr. Erlanson, any  
 4 objection?  
 5 MR. ERLANSON: None, Your Honor.  
 6 JUDGE COUGHLIN: Okay. CX-39 is admitted.  
 7 (The document referred to,  
 8 previously identified as  
 9 Complainant's Exhibit No. 39,  
 10 was received in evidence.)  
 11 BY MR. McLAREN:  
 12 Q How does this document relate to the permit?  
 13 A It lists the designated critical habitat  
 14 areas under the Endangered Species Act that are  
 15 conditionally closed under the permit.  
 16 Q If I could ask you to turn to page 1535 of  
 17 that document. Was the South Fork Clearwater River  
 18 closed under this general permit?  
 19 A Yes.  
 20 Q Why was it closed?  
 21 A It's designated critical habitat.  
 22 Q What would allow the South Fork Clearwater  
 23 River to reopen to be authorized for dredging under  
 24 this permit?  
 25 A If a consultation was completed under the

1 Endangered Species Act with the services.  
 2 Q And as of July 22, 2015, had such a  
 3 consultation been completed?  
 4 A No.  
 5 Q So if I could ask you to turn all the way  
 6 back to CX-4. Pardon the detour.  
 7 MR. ERLANSON: I missed it. Where?  
 8 MR. McLAREN: CX-04. It's the other side.  
 9 JUDGE COUGHLIN: And, Mr. McLaren, while  
 10 they're turning to that page, can you just reiterate,  
 11 CX-39, what page were you referencing for the closure?  
 12 MR. McLAREN: I believe 1535.  
 13 JUDGE COUGHLIN: Okay. Thank you.  
 14 MR. McLAREN: Yes.  
 15 (Pause.)  
 16 BY MR. McLAREN:  
 17 Q If I could ask you to turn to 83, page 83,  
 18 of CX-4. Was there a Total Maximum Daily Load on the  
 19 South Fork Clearwater River? Is there a Total Maximum  
 20 Daily Load on the South Fork Clearwater River?  
 21 A Yes, there is.  
 22 Q And can you briefly explain why there's a  
 23 TMDL on the South Fork Clearwater River?  
 24 A Well, the South Fork Clearwater River is  
 25 impaired for sediment, and the state developed a total

1 maximum daily load to address the exceedences of water  
 2 quality and developed waste load allocations that were  
 3 applicable to suction dredging within that TMDL.  
 4 Q Is the number of permit authorizations  
 5 available under the general permit, is that related in  
 6 any way to the TMDL's waste load allocation?  
 7 A Yes. EPA used the same side bores as the  
 8 TMDL to authorize the same number of dredgers that  
 9 were used when the Idaho Department of Environmental  
 10 Quality developed the TMDL.  
 11 Q If you can explain, what is a side bore?  
 12 A Well, the waste load allocation was  
 13 developed using 15 dredgers operating no more than  
 14 eight hours a day and moving no more than two cubic  
 15 yards an hour. And those side bores are part of the  
 16 general permit.  
 17 Q So does the general permit set a maximum  
 18 coverage number for total dredgers in the South Fork?  
 19 A Yes.  
 20 Q And what's --  
 21 A Fifteen.  
 22 Q Fifteen? In your experience, is it possible  
 23 that more than 15 dredgers operating in the South Fork  
 24 could act to exceed the waste load allocation?  
 25 A Yes.



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1 Q Can unpermitted suction dredging on a water  
 2 body with a TMDL harm the purpose of the TMDL?  
 3 A Yes.  
 4 Q Can you explain how?  
 5 A Well, the TMDL is meant to bring a water  
 6 body back into compliance with the water quality  
 7 standards. And if there's excess discharges occurring  
 8 in the water body, then that -- those exceedences  
 9 won't be remedied, and the water quality exceedences  
 10 would continue.  
 11 Q Can you please turn to page 85 of CX-04,  
 12 page 85, please? Does the permit impose specific best  
 13 management practices on suction dredgers?  
 14 A Yes.  
 15 Q I'd like to go through and ask the  
 16 importance of some of those best management practices,  
 17 and I'll try to be brief. Can you describe the  
 18 purpose of any best management practice related to  
 19 silt and clay areas?  
 20 A Well, silt and clay are composed of finer  
 21 particles, and they stay suspended in the water column  
 22 longer, and, as such, they can cause a longer  
 23 turbidity plume behind the dredge.  
 24 Q So what is the BMP imposed upon suction  
 25 dredgers?

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1 A The BMP is to avoid those areas, and if they  
 2 do -- if the dredge does hit them, to reduce or stop  
 3 the activity if an exceedence of the permit limits  
 4 would be forthcoming.  
 5 Q Thank you. Can you describe the importance  
 6 of the BMP related to mercury?  
 7 A Well, mercury has historically been used in  
 8 mining, and sometimes it's dislodged in the activity  
 9 of dredging and captured in the sluice box of the  
 10 dredge. And the BMP is not to release that mercury to  
 11 avoid any toxic effects of it downstream.  
 12 Q Can you describe the importance of the best  
 13 management practice related to spacing between  
 14 dredgers?  
 15 A Well, the spacing between dredges is a  
 16 compilation of two things. The Idaho Department of  
 17 Environmental Quality authorized a 500-foot mixing  
 18 zone for each dredge. And so the 800-foot spacing  
 19 distance encompasses that 500-foot mixing zone, along  
 20 with a 300-foot undisturbed buffer between the  
 21 dredges.  
 22 Q Can you briefly break down what the mixing  
 23 zone is?  
 24 A Well, a mixing zone is a part of the  
 25 water -- the state's water quality standards, where

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1 they can authorize an area of non-compliance with the  
 2 water quality standards. Basically, it's a dilution  
 3 area to come into compliance with the standard.  
 4 Q So what's the actual best management  
 5 practice here?  
 6 A Is that the turbidity plume is -- well, I  
 7 mean, that the spacing distance be 800 feet.  
 8 Q Okay. From one dredger to another dredger?  
 9 A Yes.  
 10 Q Great. Can you describe the purpose of the  
 11 BMP related to fish passage, spawning, and spawning  
 12 habitat?  
 13 A That BMP is meant to avoid disturbance to  
 14 fish habitat, to spawning beds, and also to provide a  
 15 zone of passage for the fish around the dredge.  
 16 Q Can you describe the purpose of the BMP  
 17 related to undercutting and erosion?  
 18 A The BMP is not to undercut or erode the bank  
 19 because that access material then could fall into the  
 20 water, increasing sedimentation.  
 21 Q How about the importance of the BMP related  
 22 to dams and diversions?  
 23 A Well, EPA doesn't have the authority to  
 24 regulate, to authorize dams or diversions, and so the  
 25 permit spells out that the permit does not authorize

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1 those.  
 2 Q Can you describe the BMP related to  
 3 refueling?  
 4 A The BMP is meant to prevent spills in the  
 5 water body.  
 6 Q And sorry. You said that the importance of  
 7 it -- and what is the actual BMP?  
 8 A Well, there's several things, that there  
 9 should be care in refueling. The permittee should  
 10 check for leaks. The storage of the fuel should be in  
 11 a safe area. And then any disposal should be done  
 12 properly.  
 13 Q Can you describe the importance of the BMP  
 14 related to invasive species?  
 15 A Well, it's to prevent the spread of invasive  
 16 species between water bodies.  
 17 Q And what's the BMP there?  
 18 A The BMP is to clean the equipment  
 19 following -- between each move of the dredge to a  
 20 different water body per the protocols of the Idaho  
 21 Department of Environmental Quality.  
 22 Q Can you describe the purpose finally of the  
 23 BMP relating to screening requirements?  
 24 A The screening requirements on the suction  
 25 dredge pump intake are meant to eliminate impingement

1 or entrapment of fish into the pump.  
 2 Q So what's the actual BMP?  
 3 A The BMP, it calls for certain-sized screens,  
 4 depending on what kind of fish are in the area.  
 5 Q So, of all of those BMPs we just covered,  
 6 how many are captured in the state permit that we've  
 7 discussed here today?  
 8 A Two.  
 9 Q And in your opinion and your experience, do  
 10 suction dredgers operating without a Clean Water Act  
 11 permit typically employ all of those BMPs?  
 12 A No.  
 13 Q Ms. Godsey, are you aware of outreach  
 14 efforts to stakeholders in the regulated community  
 15 related to this general permit as it was being rolled  
 16 out?  
 17 A Yes.  
 18 Q And how are you aware of those?  
 19 A Well, I conducted workshops when we first  
 20 issued the draft permit in 2010 in four different  
 21 locations in the state. We did a webinar right after  
 22 the permit, the final permit was published in the  
 23 Federal Register before it became effective. And  
 24 there's been several presentations to suction dredge  
 25 groups since then.

1 Q What was the closest in proximity to where  
 2 we are today of those?  
 3 A EPA conducted a workshop in Idaho Falls.  
 4 Q What was the purpose of those outreach  
 5 efforts?  
 6 A To inform the regulated community and the  
 7 other agencies about the conditions of the new permit.  
 8 Q And you may have said it in your answer, but  
 9 what were the years that you were performing the -- or  
 10 that EPA was performing those outreach efforts?  
 11 A Well, we did the workshops in 2010, and the  
 12 webinar happened in 2013. And there's been other  
 13 outreach efforts, and I don't know the exact dates of  
 14 those.  
 15 Q Have they continued throughout the years?  
 16 A The latest one that I've seen record of was  
 17 in 2016.  
 18 (The document referred to was  
 19 marked for identification as  
 20 Complainant's Exhibit No. 7.)  
 21 BY MR. McLAREN:  
 22 Q Okay. Ms. Godsey, at this time, I'd like to  
 23 turn you to Complainant's Exhibit CX-07. What is this  
 24 document?  
 25 A This is one of the presentations that was

1 given.  
 2 Q Are you familiar with this document?  
 3 A Yes.  
 4 MR. McLAREN: I'd like to move CX-07 into  
 5 evidence.  
 6 JUDGE COUGHLIN: Okay. Do you have any  
 7 objection, Mr. Erlanson?  
 8 MR. ERLANSON: None.  
 9 JUDGE COUGHLIN: Okay. CX-7's admitted.  
 10 (The document referred to,  
 11 previously identified as  
 12 Complainant's Exhibit No. 7,  
 13 was received in evidence.)  
 14 BY MR. McLAREN:  
 15 Q So when was this presentation given?  
 16 A April 13, 2016.  
 17 Q Is it similar to any given before 2016 or  
 18 before 2015?  
 19 A Yes.  
 20 Q And similar in what way?  
 21 A It's general information about the permit  
 22 and its requirements.  
 23 Q And I think that's all I have on that.  
 24 Quickly, I'd like to turn back to CX-3, particularly  
 25 page 3 of CX-3.

1 JUDGE COUGHLIN: And you're still using the  
 2 Bates stamp reference page?  
 3 MR. McLAREN: Yes.  
 4 JUDGE COUGHLIN: Okay.  
 5 MR. McLAREN: Yes.  
 6 BY MR. McLAREN:  
 7 Q Feel free to scan this page, but does the  
 8 general permit speak to suction dredging before  
 9 authorization has been confirmed or denied under a  
 10 certain application?  
 11 A Yes.  
 12 Q And, generally, what does the permit say  
 13 about suction dredging prior to an authorization?  
 14 A Well, it says that authorization to  
 15 discharge requires a written notification from EPA  
 16 that coverage has been granted.  
 17 Q So what does that tend to tell an individual  
 18 who's applying for coverage under this permit?  
 19 A That if written notification isn't received,  
 20 they aren't covered yet.  
 21 Q Okay. Thank you very much. I'd like to  
 22 turn now to more broadly the regulatory program. Is  
 23 the Clean Water Act permitting program most effective  
 24 when all potential dischargers obtain authorization?  
 25 A Yes.

1 Q And how so?

2 A Well, the Clean Water Act permits are meant

3 to protect water quality, and if all dischargers

4 aren't covered by the permit, then water quality may

5 not be protected, fully protected.

6 Q So, if a number of individuals do not obtain

7 authorization, does that affect the regulatory program

8 in any specific way?

9 A Yes.

10 Q And what would that be?

11 A Well, water quality in those areas of the

12 discharge wouldn't be protected.

13 Q Is that true of even an individual?

14 A Well, yes. I mean, the area gets smaller,

15 but still water quality may not be protected.

16 Q How many suction dredge permits were

17 available on the South Fork on July 22, 2015?

18 A None.

19 Q Are you aware of approximately how many

20 annual permits have been issued on the South Fork

21 since July 2015?

22 A EPA issued 11 in 2016, and 14 in each of

23 2017 and 2018.

24 Q In your experience, in 2015, would you say

25 the Idaho suction dredge general permit was a

1 relatively new permitting program?

2 A Yes.

3 Q Does the refusal or the failure to obtain

4 permit coverage impact new permitting programs in any

5 specific way?

6 A Well, with the permit just coming online in

7 2013, there was a lot of reticence against getting

8 coverage under the permit because no one had ever had

9 to before. And so not getting coverage under it just

10 kind of foils the purpose of having the permit and

11 getting the people that need coverage under it

12 covered.

13 Q Do you have any experience in the decades of

14 your permitting experience with suction dredgers

15 failing to obtain permit authorization?

16 A Yes.

17 Q How do you come to know if a suction dredger

18 has failed to obtain permit authorization?

19 A Well, generally, there's not a way of

20 knowing unless an inspection happens or a complaint is

21 filed.

22 Q Is there any way for you as the permitting

23 writer to know whether there's any degree of

24 unauthorized dredging at any time beyond an inspection

25 discovering it?

1 A No.

2 Q Do you have any experience with suction

3 dredgers who are aware of other suction dredgers

4 failing to obtain permit authorization?

5 A Yes.

6 Q Can you briefly describe how that would come

7 about?

8 A Well, anecdotally, when I have someone call

9 me to find out about whether a water body is open, and

10 if I have to tell them that it isn't, then sometimes

11 they will say, well, what about these other three or

12 four dredgers that are operating there. And it's

13 confusing to them when I have to say that I can't

14 cover them when other people are operating likely

15 without permit coverage in those areas.

16 Q Can you say -- or would you say that -- does

17 that frustrate the permitting program in any way?

18 A Well, it frustrates the program in the fact

19 that when people see others that are operating out of

20 compliance and not getting permits, then they start to

21 wonder why they have to, and it can affect the amount

22 of coverage that we have and thus the water quality

23 that we protect.

24 Q In your experience, is the failure to obtain

25 permit authorization particularly relevant to suction

1 dredging as an activity?

2 A Yes.

3 Q And why would it be particularly relevant to

4 suction dredging?

5 A Well, suction dredging is a portable,

6 temporary activity. When you can throw your dredge in

7 the back of a pickup truck and move from location to

8 location, it's hard to track. And so not getting a

9 permit for a certain location, and with the low

10 likelihood of getting caught, it makes it less

11 desirable to be on the record of having permit

12 coverage.

13 Q Would you say you have some familiarity with

14 the suction dredging community?

15 A Yes.

16 Q In your experience, would an influential

17 member of the suction dredging community tend to

18 affect the obtaining of authorization by other members

19 of the suction dredging community, if that made sense?

20 A Yes. I mean, an influential member of the

21 community can try to convince and persuade others that

22 they didn't need coverage under the permit, and thus

23 other people may follow in their footsteps and not get

24 coverage.

25 Q What about organized refusal to obtain a

1 suction dredge permit? Can that frustrate the  
 2 permitting program in any specific way?  
 3 A Well, I mean, pretty much the same way.  
 4 Q Okay. And how about in terms of just a  
 5 single miner refusing coverage? Would that single  
 6 miner, if they have outsized influence in the suction  
 7 dredging community, could they frustrate the  
 8 permitting program?  
 9 A Like any other influential miner, yes.  
 10 Q In your opinion, did Mr. Erlanson's refusal  
 11 to obtain suction dredge authorization prior to  
 12 dredging on July 22, 2015, did that cause any harm to  
 13 the regulatory program?  
 14 A Yes.  
 15 Q Can you briefly summarize that harm?  
 16 A Well, EPA issued the general suction dredge  
 17 permit for a reason. We've been telling the federal  
 18 land managers for years through their NEPA processes  
 19 that a suction dredge project shouldn't move forward  
 20 without an NPDES permit. So EPA undertook the effort  
 21 to muddle through the disparate information on  
 22 permitting requirements to address ESA-critical  
 23 habitats and mercury and sediment-impaired waters to  
 24 develop a permit that would allow the dredgers to be  
 25 in compliance with the Clean Water Act.

1 I know that dredgers think that EPA wants to  
 2 close down suction dredging in Idaho, but nothing  
 3 could be further from the truth. EPA does have to  
 4 abide by different laws in the State of Idaho, so we  
 5 can't be as permissive as the Department of Water  
 6 Resources. But EPA is issuing permits in the state.  
 7 There are two areas in Idaho where we  
 8 require annual authorizations, and we just wrapped up  
 9 the first one by issuing 18 authorizations. And the  
 10 permitting effort on the South Fork of the Clearwater  
 11 will gear up by the end of May.  
 12 Other than that, we have 81 different  
 13 locations authorized for the remainder of the permit  
 14 term, until May of 2023. So, while one of the  
 15 objectives of issuing the permit was to provide legal  
 16 coverage for the dredgers, the prime objective of the  
 17 permit is to protect water quality. And without  
 18 having authorized -- authorizing the dischargers,  
 19 there's no way that EPA can know whether that  
 20 objective is being met.  
 21 So, given all that I've said about  
 22 influential dredgers and them impacting others and not  
 23 getting permit coverage, it does matter. Having  
 24 unpermitted discharges means that EPA can't do its job  
 25 of protecting water quality.

1 MR. McLAREN: Thank you, Ms. Godsey.  
 2 I have no further questions at this time.  
 3 JUDGE COUGHLIN: Okay. One second, Mr.  
 4 Erlanson.  
 5 I think, Mr. McLaren, you had identified Ms.  
 6 Godsey as a fact/expert.  
 7 MR. McLAREN: Uh-huh.  
 8 JUDGE COUGHLIN: So were you intending to  
 9 tender her as an expert, or did you want to just leave  
 10 it as is without --  
 11 MR. McLAREN: Pardon me. I'm not familiar  
 12 with tendering in the administrative law context.  
 13 JUDGE COUGHLIN: Okay.  
 14 MR. McLAREN: I thought, by establishing a  
 15 foundation for her expertise, that was enough. Would  
 16 a formal tendering motion be appropriate at this time?  
 17 JUDGE COUGHLIN: Well, typically, if you're  
 18 identifying her as a prospective expert, it's  
 19 appropriate, including a CV or a resume is  
 20 appropriate. You've covered that. But, apart from  
 21 that, generally, the expectation is you formally offer  
 22 the witness as an expert and specify with kind of  
 23 particularity the area of expertise.  
 24 MR. McLAREN: May I do so post facto, Your  
 25 Honor?

1 JUDGE COUGHLIN: Yes.  
 2 MR. McLAREN: So I'll make a tender of Ms.  
 3 Godsey as an expert witness with respect to permitting  
 4 as it relates to suction dredge mining in particular.  
 5 JUDGE COUGHLIN: Okay.  
 6 MR. McLAREN: As well as Clean Water Act  
 7 permitting in general.  
 8 JUDGE COUGHLIN: Okay. Thank you.  
 9 MR. McLAREN: Yes, Your Honor.  
 10 JUDGE COUGHLIN: I'm going to talk to Mr.  
 11 Erlanson about that.  
 12 MR. McLAREN: Certainly.  
 13 JUDGE COUGHLIN: In the event you have an  
 14 objection to that. Are you familiar at all with the  
 15 differences in the type of witnesses between experts  
 16 and non-experts?  
 17 MR. ERLANSON: No, Your Honor.  
 18 JUDGE COUGHLIN: Okay. So, in essence, what  
 19 this gets to is, when a witness is testifying and  
 20 characterized, let's say, as a fact witness, they're  
 21 testifying as a lay witness based on their perception.  
 22 They're talking about the things that they've been  
 23 able to perceive.  
 24 For testimony that's of a more specialized  
 25 nature, scientific, technical, that type of thing,

1 where a witness is testifying about an area that is  
2 based on their -- and let me kind of identify all the  
3 specifics -- based on their specialized and qualified  
4 knowledge, skill, experience, training, or education,  
5 can testify as an expert in a particular area,  
6 assuming that they've been qualified. And, typically,  
7 that's why we talk about having a CV or a resume to  
8 spell out those qualifications. And, typically, a  
9 foundation is laid for that by going over those  
10 qualifications to establish why they're being  
11 presented as an expert in a particular area.

12 So a lot of that's already been done here.  
13 And you just heard Mr. McLaren's offer to have Ms.  
14 Godsey identified as an expert in those particular  
15 permitting areas, one specializing in suction dredge  
16 mining and the other more generally in Clean Water Act  
17 permit drafting. So it really gets to the nature of  
18 the testimony, specialized versus non, to put it in  
19 very general terms. Any objection to that?

20 MR. ERLANSON: I have none, Your Honor.  
21 JUDGE COUGHLIN: Okay.  
22 MR. ERLANSON: I consider her an expert too.  
23 She's got a real impressive resume as far as I'm  
24 concerned.  
25 JUDGE COUGHLIN: All right. Very good.

1 Then so deemed. And, Mr. Erlanson, please go ahead  
2 with your questions.

3 MR. ERLANSON: Okay.  
4 CROSS-EXAMINATION  
5 BY MR. ERLANSON:

6 Q As I said before, I glanced through your  
7 resume, and it's impressive. Okay. You stated that  
8 in 2013, you wrote the NPDES program, as you stated,  
9 for the State of Idaho or helped develop it. So, in  
10 2013, were there 15 suction dredges authorized or  
11 listed to be in mining operation on the South Fork of  
12 the Clearwater River? In the general statewide  
13 permit, did you allow for 15 suction dredge spots,  
14 operations on the South Fork, even though you didn't  
15 have the thing complete 'til 2016?

16 A Yes. The general permit contained the  
17 requirements based on the Total Maximum Daily Load,  
18 with the caveat that the Endangered Species Act  
19 consultation was not complete yet.

20 Q Thank you. You mentioned my favorite topic,  
21 Total Maximum Daily Load. What is the definition of  
22 Total Maximum Daily Load?

23 A Total Maximum Daily Load is an allocation, a  
24 waste load allocation, that is developed for a water  
25 body on a pollutant-by-pollutant basis if the

1 pollutant in the water body exceeds the water quality  
2 criteria. And the waste load allocation for each  
3 activity is meant to lessen the load and have the  
4 water body come back into compliance.

5 Q Thank you. Do you know how long the South  
6 Fork of the Clearwater River has been listed as an  
7 impaired water under TMDL?

8 A I know the TMDL was completed in 2003.  
9 Q Three.

10 A I don't know how soon before that it was  
11 listed.

12 Q Are you familiar with Idaho Code 39, Section  
13 3611, at Section 3?

14 A Not off the top of my head.

15 Q Okay. You mentioned best management  
16 practices.

17 A Yes.

18 Q Is my understanding correct that a suction  
19 dredge for the extraction of minerals is a best  
20 management practice tool?

21 A I'm sorry. I'm not sure I understand the  
22 question.

23 Q A suction dredge -- and this is what this  
24 discussion's about -- is it considered a best  
25 management practice tool for the extraction of

1 minerals, mainly gold, silver, gemstones, within the  
2 wetted perimeter, as opposed to possibly a high  
3 banker, where you would shovel material out of the  
4 stream bed, pick it up and throw it into a machine?

5 A I'm not familiar with where that would be  
6 listed as a best management practice because it's not  
7 included in the permit.

8 Q Okay. You mentioned that the State of  
9 Idaho -- oh, I'm sorry.

10 MR. ERLANSON: You all set, Dave?

11 THE COURT REPORTER: Yes, sir.

12 BY MR. ERLANSON:

13 Q You mentioned that the State of Idaho  
14 permitting system, that the NPDES rules are in  
15 addition to the permit from the state, which has been  
16 20-some odd years. But you mentioned that there was  
17 more fish habitat conditions. Could you list a few of  
18 those conditions for me right now?

19 A Well, the water resource permit doesn't  
20 specifically call out BMPs to be protective of fish  
21 habitat. And so the general -- the EPA general permit  
22 has avoidance of fish spawning areas, providing for  
23 zones of passage, and -- without looking, I can't say  
24 any other ones.

25 JUDGE COUGHLIN: If you need to refer to an

1 exhibit, you're welcome to.  
 2 THE WITNESS: Okay.  
 3 MR. McLAREN: It should be 85 of CX-4.  
 4 THE WITNESS: Thank you, Will.  
 5 MR. McLAREN: Around where the BMPs are.  
 6 MR. ERLANSON: What was it?  
 7 MR. McLAREN: I think it's 85 in CX-4. I  
 8 think that's where they start discussing BMPs. I'm  
 9 embarrassed that I know that.  
 10 THE WITNESS: I'm embarrassed that I don't.  
 11 (Pause.)  
 12 MR. ERLANSON: I'm working on it.  
 13 THE WITNESS: So the bottom of 86.  
 14 BY MR. ERLANSON:  
 15 Q Uh-huh. Have you ever read the special  
 16 supplement, not in 2015, but it came out later, 2016,  
 17 along with your NPDES permit? Have you ever read the  
 18 Idaho permit, where it says to avoid fish spawning  
 19 areas, to avoid the -- it's almost word for word what  
 20 the Idaho permit is, is what you stated, you know,  
 21 that's stated in here. But I just wondered, you know,  
 22 if there was anything else additional that I wasn't  
 23 aware of that you might be able to mention to me.  
 24 JUDGE COUGHLIN: In the EPA --  
 25 MR. ERLANSON: Yes. That would be --

1 JUDGE COUGHLIN: -- general permit?  
 2 MR. ERLANSON: -- in addition to the Idaho,  
 3 because, if you read the Idaho special dredge permit  
 4 authorization, not for 2015, these gentlemen are  
 5 correct, and she's correct. But, in 2016 on, they  
 6 added a section in there that states -- basically, it  
 7 mirrors what's listed on this page 85 and stuff.  
 8 JUDGE COUGHLIN: Okay.  
 9 MR. ERLANSON: So I just wondered if she was  
 10 aware of it, so, you know --  
 11 JUDGE COUGHLIN: Okay. I mean, you know,  
 12 the date of violation is in 2015.  
 13 MR. ERLANSON: Right, right.  
 14 JUDGE COUGHLIN: So my focus is really then.  
 15 MR. ERLANSON: Yeah.  
 16 JUDGE COUGHLIN: But are you familiar with  
 17 what the additions were that you --  
 18 THE WITNESS: I know there's a special  
 19 supplement. I cannot recall all of the special  
 20 conditions of it.  
 21 JUDGE COUGHLIN: Okay, okay.  
 22 MR. ERLANSON: Okay.  
 23 BY MR. ERLANSON:  
 24 Q You mentioned a best management practice of  
 25 a 500-foot mixing zone for the turbidity, which is

1 cloudiness in the water. It shouldn't be construed as  
 2 a pollutant, but the suspended solids. But anyhow,  
 3 under previous testimony today, we had -- I'm thinking  
 4 an expert witness.  
 5 MR. ERLANSON: I don't know how you  
 6 characterize Mr. Hughes.  
 7 MR. McLAREN: Mr. Hughes was a fact witness.  
 8 MR. ERLANSON: A fact witness.  
 9 BY MR. ERLANSON:  
 10 Q Mr. Hughes stated that the plume from my  
 11 suction dredge was approximately 220 feet below the  
 12 dredge. Since the mixing zone goes to a 500-foot  
 13 level, would you say that I was operating under best  
 14 management practice in that regard?  
 15 A Since you didn't have permit coverage at the  
 16 time, you couldn't be operating under the best  
 17 management practices of the permit.  
 18 Q Of the permit. But I'm asking you best  
 19 management practice as far as suction dredge ethics  
 20 go.  
 21 A But the best management practice of a 500-  
 22 foot mixing zone is a best management practice of the  
 23 permit. I don't know where else it would be stated  
 24 that it was a best management practice overall for  
 25 suction dredging.

1 Q Okay. That's fair. You stated that no  
 2 suction dredges -- no suction dredgers, excuse me --  
 3 would comply with CWA regulations unless forced to do  
 4 so. Where do you make that opinion?  
 5 A Well, part of it comes from the differences  
 6 between the requirements of the water resource permit  
 7 and the NPDES permit. And where the spacing  
 8 differences -- where there's spacing differences, a  
 9 dredger with just a water resource permit would only  
 10 have to be within 100 feet of another dredge, whereas  
 11 a dredger with an NPDES permit isn't supposed to be  
 12 within 800 feet of another dredge.  
 13 Q That's a good example. Are you aware of the  
 14 10-mile mining district's efforts to mitigate  
 15 unfavorable practices of suction dredging on the South  
 16 Fork of the Clearwater River?  
 17 A No.  
 18 Q Okay. How many miners applied for a permit  
 19 in 2015?  
 20 A I don't know the number.  
 21 Q Okay. I can't add facts, so I can't say.  
 22 JUDGE COUGHLIN: You can ask a question.  
 23 MR. ERLANSON: Two was the answer.  
 24 JUDGE COUGHLIN: Do you have any idea? I  
 25 mean, when you said you didn't know the exact

1 number --

2 THE WITNESS: No. I wasn't doing the permit  
3 authorizations in 2015. I had a coworker of mine was  
4 doing that.

5 JUDGE COUGHLIN: Okay.

6 THE WITNESS: And so she was receiving all  
7 the applications and doing all the permit coverages.  
8 So, without going back into my records, I couldn't  
9 tell you exactly how many.

10 JUDGE COUGHLIN: Okay.

11 MR. ERLANSON: Right.

12 JUDGE COUGHLIN: Go ahead with your next  
13 question.

14 BY MR. ERLANSON:

15 Q Let's see here. I guess I already mentioned  
16 it. Who was the one individual that actually did  
17 apply? Me and another fellow. But anyhow, you said  
18 that Erlanson does harm to the resource by not having  
19 an NPDES permit. Yet, in three years, I applied twice  
20 to try and get an NPDES permit. And I feel it unfair  
21 that you make that statement when I actually tried to  
22 be one of the 85 or 90 miners on that stream, I tried  
23 to do it legal, but I was denied a permit. But  
24 that's -- we've already discussed that.

25 JUDGE COUGHLIN: So that's really more of a

1 statement.

2 MR. ERLANSON: Yeah, yeah. That's true.

3 JUDGE COUGHLIN: But was there any response  
4 you had to that statement? It's not a question, but  
5 is there anything you want to say in response to it?

6 THE WITNESS: Well, the permit -- the  
7 activity on the South Fork couldn't be permit --  
8 couldn't be authorized under the permit until the  
9 consultation was done, and that wasn't done until  
10 2016. So, when notices of intent came in prior to  
11 that, we had to deny them because we could not  
12 authorize them under the permit at that time.

13 JUDGE COUGHLIN: Okay.

14 MR. ERLANSON: But yet --

15 JUDGE COUGHLIN: Under the general permit.

16 MR. ERLANSON: Yes.

17 THE WITNESS: Yes, under the general --

18 BY MR. ERLANSON:

19 Q But yet, under the general permit in 2013,  
20 you did allow for 15 suction dredgers on that stream.

21 A Caveated by the --

22 Q Correct.

23 A -- ESA, yes. We included the conditions of  
24 the TMDL because, if we hadn't, when the consultation  
25 was complete, we would have had to go through a permit

1 modification to include the conditions of the TMDL if  
2 we hadn't done it when we issued the permit in 2013.

3 JUDGE COUGHLIN: Okay.

4 BY MR. ERLANSON:

5 Q Okay. One jurisdictional question. Who has  
6 the legal jurisdiction, the primary legal  
7 jurisdiction, over the waters in the State of Idaho,  
8 the Environmental Protection Agency or the State of  
9 Idaho?

10 JUDGE COUGHLIN: Okay. Hold on. Mr.  
11 Erlanson, this was decided. In terms of  
12 jurisdiction --

13 MR. ERLANSON: Oh, okay.

14 JUDGE COUGHLIN: -- that was decided in the  
15 order I issued on accelerated decision.

16 MR. ERLANSON: Okay.

17 JUDGE COUGHLIN: Now, as I've said, you can  
18 argue it --

19 MR. ERLANSON: Right.

20 JUDGE COUGHLIN: -- but not here.

21 MR. ERLANSON: Okay.

22 JUDGE COUGHLIN: Save it for the reviewing  
23 authority to entertain that.

24 MR. ERLANSON: Okay.

25 JUDGE COUGHLIN: Okay?

1 MR. ERLANSON: Okay, Your Honor. Thank you.

2 JUDGE COUGHLIN: Was that the basis of your  
3 objection? I didn't mean to --

4 MR. McLAREN: I withdraw my silent  
5 objection.

6 (Laughter.)

7 JUDGE COUGHLIN: It's okay.

8 THE WITNESS: He was just stretching his  
9 legs.

10 (Laughter.)

11 JUDGE COUGHLIN: I understand. But go ahead  
12 with your next question, please.

13 MR. ERLANSON: That's all I have for you,  
14 ma'am. Thank you.

15 JUDGE COUGHLIN: Okay. All right. Any  
16 redirect?

17 MR. McLAREN: Very briefly.

18 JUDGE COUGHLIN: Okay.

19 REDIRECT EXAMINATION

20 BY MR. McLAREN:

21 Q Mr. Erlanson mentioned on cross a 220-foot  
22 plume of turbid discharge. Could a 220-foot plume of  
23 turbid discharge tell you anything about a suction  
24 dredger's compliance or non-compliance with the  
25 general permit?

1 A If he had been authorized under the general  
2 permit, a 220-foot turbidity plume would have been in  
3 compliance with the conditions of the permit.

4 Q Does it tell you anything about the silt and  
5 clay aspect of the general permit?

6 A It could. That silt and clay probably  
7 weren't being dredged because the plume was shorter  
8 than the 500-foot.

9 MR. McLAREN: Okay. Thank you. I have no  
10 further questions. And I --

11 JUDGE COUGHLIN: Did that raise anything  
12 else you needed to ask about, Mr. Erlanson?

13 MR. ERLANSON: I do have one. It's a  
14 technical question for her. She's the one that writes  
15 the permits. And it's just a question.

16 RE-CROSS-EXAMINATION

17 BY MR. ERLANSON:

18 Q The general permit, according to the EPA  
19 website, and you stated it already, it's made out to  
20 no one. It's made out to a general group of  
21 dischargers. I've always been confused by the general  
22 permit because -- and I've got one right here, I mean,  
23 and I know you know what they are because you write  
24 them out. You sign them. That's how I know. But, on  
25 one side of this, you have your general permit. And

1 according to the EPA website, it's made out to no one.  
2 And, of course, it is made out to no one. So, hey,  
3 the citizen, I understand that.

4 But, on the back, it's made out to a dredge  
5 owner, and that dredge owner is an individual. And I  
6 could never differentiate why on the website it says  
7 an individual permit is made out to an individual, and  
8 this general permit is made out to an individual. I  
9 just couldn't figure out the difference, and then the  
10 discrepancies on the same river from one individual's  
11 permit to another one on the time frame. This one  
12 here says July 15 to August 15. I have another one in  
13 here for the South Fork. I have another one here that  
14 says July 15 to December 18.

15 JUDGE COUGHLIN: Can you --

16 MR. ERLANSON: So I don't understand the  
17 discrepancy.

18 JUDGE COUGHLIN: Can you speak to that?

19 THE WITNESS: I can speak to the discrepancy  
20 between -- for the -- try to clarify the general  
21 permit question. So a general permit is issued to a  
22 category of dischargers, and then individuals are  
23 authorized under it. So what you have there is an  
24 authorization letter under the general permit. If you  
25 were to apply for an individual permit, that

1 individual permit would be issued -- I mean, the draft  
2 would come out. It would have your name on the cover,  
3 your water body, specific water body, and conditions  
4 that were applicable only to your operation.

5 And so that's the difference between an  
6 individual and the general. And like I said, what you  
7 have there is an authorization under the general  
8 permit.

9 Now, as to the discrepancies in the dates,  
10 is it December 18, did you say, or December 31?

11 BY MR. ERLANSON:

12 Q Let me put my glasses on. This one here,  
13 ma'am, is made out July 15 to August 15. That's the  
14 legal dredging season for the South Fork. We know  
15 that.

16 A Uh-huh, uh-huh.

17 Q This one here really doesn't count. This is  
18 made out to me for McCoy Creek, okay?

19 A And it goes until May 2023.

20 Q Well, this one here --

21 A Or did it go 'til April 2018?

22 Q Yeah.

23 A Okay. Under the 2013.

24 Q Yeah, right.

25 A Okay.

1 Q Okay. This one here is made out to a fellow  
2 dredger, okay. But it's South Fork, and its date of  
3 issuance, July 15, expiration date December 31. I  
4 told you in error the 18th.

5 A So is it July 15, 2015?

6 Q No.

7 A It's just July 2015?

8 Q It's July 15, 2017 --

9 A Okay.

10 Q -- to December 31, 2017. December 31. So I  
11 don't understand why in the same river you've got one  
12 permit that's -- well, what is July, the seventh  
13 month -- five months long, and you got another permit  
14 that's only a month long. I couldn't figure that one  
15 out. It's just a question.

16 JUDGE COUGHLIN: It's really a question  
17 outside the area --

18 MR. ERLANSON: The realm of this.

19 JUDGE COUGHLIN: -- of what we're --

20 MR. ERLANSON: Yeah.

21 JUDGE COUGHLIN: But, I mean, to the extent  
22 it's helpful, I'll take a second to do it, if you can  
23 respond. I think that the evidence or the testimony  
24 you offered with regard to clarifying the general  
25 permit and individual permit is helpful. Do you have



1 any comment? Do you know about the date, the dates?  
 2 THE WITNESS: Yeah, I do know about the  
 3 dates. And in the two areas that I mentioned where we  
 4 have annual authorizations, in the 2013 permit, we did  
 5 struggle with how long we should cover those  
 6 operations. And in the South Fork, we covered them  
 7 from July 15 to the end of the year sometimes. And in  
 8 the last permit, when we reissued it last year, we  
 9 made the determination that we would cover only the  
 10 dredge season that was authorized by the Department of  
 11 Water Resources.  
 12 MR. ERLANSON: Well, thank you. That really  
 13 clarifies it for me, because I've had a lot of miners  
 14 question me, and now I've got an answer for everybody.  
 15 JUDGE COUGHLIN: Okay.  
 16 MR. ERLANSON: So that helps.  
 17 JUDGE COUGHLIN: And you were referring to  
 18 just your own documents there just to clarify, not in  
 19 the record.  
 20 MR. ERLANSON: Correct. Yeah. This is --  
 21 JUDGE COUGHLIN: Okay. Very good.  
 22 Anything else for this witness?  
 23 MR. McLAREN: I have nothing.  
 24 JUDGE COUGHLIN: Mr. Erlanson, you all set?  
 25 Okay. Hold on one second.

1 Thank you very much, Ms. Godsey, for your  
 2 testimony.  
 3 (Witness excused.)  
 4 MR. ERLANSON: No, I'm good, I'm good. I  
 5 just --  
 6 JUDGE COUGHLIN: Did you need a break?  
 7 MR. ERLANSON: Yeah.  
 8 JUDGE COUGHLIN: Okay. And who are you  
 9 going to pick up with next?  
 10 MR. McLAREN: EPA's next witness is Dan  
 11 Kenney.  
 12 JUDGE COUGHLIN: Okay. All right. So let's  
 13 take -- is five minutes good, or do you need longer  
 14 than that?  
 15 MR. McLAREN: That works for EPA.  
 16 JUDGE COUGHLIN: Five good?  
 17 MR. ERLANSON: Five.  
 18 JUDGE COUGHLIN: Okay. I'll see you back  
 19 then.  
 20 MR. ERLANSON: Thank you.  
 21 JUDGE COUGHLIN: Sure.  
 22 (Whereupon, a brief recess was taken.)  
 23 JUDGE COUGHLIN: We're back on record about  
 24 eight minutes or so past 3. And, Complainant, are you  
 25 ready for your next witness?

1 MR. McLAREN: Yes, Your Honor.  
 2 JUDGE COUGHLIN: Okay.  
 3 MR. McLAREN: EPA calls Dan Kenney to the  
 4 stand.  
 5 JUDGE COUGHLIN: Okay.  
 6 Whereupon,  
 7 DANIEL KENNEY  
 8 having been duly sworn, was called as a  
 9 witness and was examined and testified as follows:  
 10 MR. MOORE: Your Honor, may I provide the  
 11 witness with a bottle of water?  
 12 JUDGE COUGHLIN: I was just about to ask,  
 13 yes. Thanks.  
 14 (Pause.)  
 15 DIRECT EXAMINATION  
 16 BY MR. McLAREN:  
 17 Q Hi, Mr. Kenney. Can you state your full  
 18 name and spell your last name for the record?  
 19 A Daniel R. Kenney, K-E-N-N-E-Y.  
 20 Q Are you employed, Mr. Kenney?  
 21 A Yes.  
 22 Q Where do you work?  
 23 A I work for the USDA Forest Service for the  
 24 Nez Perce Clearwater National Forest.  
 25 Q And what's your current title?

1 A I am the North Zone fisheries biologist for  
 2 the forest.  
 3 Q And can you describe for the Court the  
 4 topics on which you've been asked to testify today?  
 5 A Yes. The observations and measurements that  
 6 I and my technicians made on the South Fork Clearwater  
 7 River in 2015 and subsequent years, and also the  
 8 potential effects of the unauthorized suction dredging  
 9 at the particular site there.  
 10 Q And have you reviewed any documents in  
 11 reaching your expert opinions today?  
 12 A Yes, I have.  
 13 Q Can you just generally describe the  
 14 documents that you've reviewed?  
 15 A There were three documents that were  
 16 produced by -- well, three documents produced by  
 17 Forest staff, the Hughes report, two reports that I  
 18 put together, a biological assessment that I was  
 19 principal author on, an environmental assessment, and  
 20 I also reviewed the NMFS biological opinion.  
 21 Q And very briefly, can you just describe what  
 22 your conclusions were on the issues that you've been  
 23 asked to testify?  
 24 A Yes. Based on what I reviewed and what I  
 25 saw, it appears that Mr. Erlanson dredged at a

1 particular site on the South Fork on July 22, 2015,  
2 that we were -- we, Forest Service staff, were able to  
3 make some -- take some measurements and observations  
4 at that site in 2015, a few months later, and also in  
5 subsequent years, and that there was some adverse  
6 environmental impact, albeit a small one.

7 (The document referred to was  
8 marked for identification as  
9 Complainant's Exhibit No.  
10 34.)

11 BY MR. McLAREN:

12 Q And, Mr. Kenney, because we are proffering  
13 you as an expert witness, I want to talk a little bit  
14 about your qualifications. So, first, I'll turn you  
15 to Exhibit 34 in the binder that you have next to you.

16 A All right.

17 Q Do you recognize this document, Mr. Kenney?

18 A Yes. This is a resume I put together.

19 MR. McLAREN: So EPA moves to admit  
20 Complainant's Exhibit 34 into evidence.

21 JUDGE COUGHLIN: Okay. Mr. Erlanson, any  
22 objection to that coming in? Just answer verbally.

23 MR. ERLANSON: Oh, no, Your Honor.

24 JUDGE COUGHLIN: Okay. Thank you.

25 CX-34 is admitted.

1 (The document referred to,  
2 previously identified as  
3 Complainant's Exhibit No. 34,  
4 was received in evidence.)

5 BY MR. McLAREN:

6 Q Mr. Kenney, from what university did you  
7 obtain your undergraduate degree?

8 A I believe -- oh, I'm sorry. The Ohio State  
9 University in Columbus.

10 Q And what degree did you obtain?

11 A I'm sorry. I'm having a little bit of  
12 difficulty hearing you.

13 Q Oh, I'm sorry.

14 A Could you speak up a bit?

15 Q I'll try to speak up, and I'll speak into  
16 the mike.

17 A I've got my hearing aids in, but there's  
18 kind of an echo in here.

19 Q Sure. What degree did you obtain?

20 A I achieved a Bachelor of Science degree in  
21 fisheries management.

22 Q And can you describe the types of courses  
23 that you took in obtaining that degree?

24 A Yes. Aside from the basic chemistry and  
25 math and that sort of thing, ichthyology, invertebrate

1 and vertebrate zoology, fisheries management,  
2 statistics, hydrology.

3 Q And in what year did you graduate?

4 A 1983.

5 Q And did you also complete any post-graduate  
6 education?

7 A Yes. I attended -- yes.

8 Q From what university?

9 A Frostburg State University in Maryland.

10 Q And what degree did you obtain there?

11 A That was a Master's of Science in fisheries  
12 management.

13 Q In what year?

14 A 1994 was when I graduated.

15 Q And what were the types of courses that you  
16 took there?

17 A More biologically-inclined, such as genetics  
18 and ecology, and also some fisheries management  
19 classes.

20 Q And so you mentioned that you currently  
21 serve as a fisheries biologist for the Forest Service.  
22 How long have you been in your current role?

23 A I've worked for this particular forest  
24 since, let's see, 2011, so I'm in my ninth year.

25 Q And can you describe your duties in your

1 current role?

2 A Yes. As a fisheries biologist for the  
3 Forest Service, I mainly provide a support role for  
4 the other Forest Service specialists who design and  
5 implement things like -- activities such as timber  
6 sales, grazing, mining, recreational sorts of things.  
7 I provide advice to these folks, and also prepare  
8 documentation regarding those activities.

9 Q All right. Specifically, what types of  
10 documentation are you referring to?

11 A Primarily documents such as EAs and EISs  
12 under the National Environmental Policy Act. I handle  
13 the fisheries and aquatics aspects of those, and also  
14 biological assessments and other sorts of documents in  
15 compliance with the Endangered Species Act.

16 JUDGE COUGHLIN: And just quickly, you used  
17 a couple of acronyms there. Just spell them out for  
18 the record.

19 THE WITNESS: I'm sorry.

20 JUDGE COUGHLIN: That's okay. EA and?

21 THE WITNESS: I'm sorry. Under the National  
22 Environmental Policy Act, NEPA, there are  
23 Environmental Assessments, and then a higher level of  
24 analysis is an Environmental Impact Statement, or EIS.

25 JUDGE COUGHLIN: Thank you.

1 THE WITNESS: Sure.  
 2 BY MR. McLAREN:  
 3 Q And how many biological assessments have you  
 4 completed?  
 5 A I tried to figure this out, but I think  
 6 about five to six dozen over the course of my nearly  
 7 30-year federal career.  
 8 Q And of those EAs, how many involved your  
 9 analysis of impacts to salmonids or salmon species?  
 10 A Essentially all of them.  
 11 Q In your current role with the Forest  
 12 Service, has your work involved the South Fork  
 13 Clearwater River?  
 14 A It doesn't anymore, no.  
 15 Q Has it?  
 16 A It has in the past, in 2015 through 2017.  
 17 Q In what ways?  
 18 A In 2015, it was one of the subjects that  
 19 we're going to talk about. I conducted a study with  
 20 some of my technicians of some unauthorized suction  
 21 dredging activities on the South Fork. And then we  
 22 were in the process at that time of putting together  
 23 the environmental assessment for suction dredging on  
 24 the South Fork and also the biological assessment for  
 25 that dredging. And then, in the following two years,

1 in 2016 and 2017, I was involved in the implementation  
 2 of that dredging and the monitoring of it in  
 3 production of reports.  
 4 (The document referred to was  
 5 marked for identification as  
 6 Complainant's Exhibit No.  
 7 21.)  
 8 BY MR. McLAREN:  
 9 Q So I'll turn you to Complainant Exhibit 21  
 10 right now.  
 11 A You said 21, right?  
 12 Q Correct.  
 13 A Yes.  
 14 Q Do you recognize this document, Mr. Kenney?  
 15 A Yes, I do.  
 16 Q What is it?  
 17 A This is the biological assessment for  
 18 suction dredging, a certain number of suction dredging  
 19 operations on the South Fork Clearwater River that I  
 20 wrote with Craig Johnson, who's a biologist for the  
 21 BLM.  
 22 MR. McLAREN: EPA moves to admit  
 23 Complainant's Exhibit 21 into evidence.  
 24 JUDGE COUGHLIN: Okay. Any objection to  
 25 that, Mr. Erlanson?

1 MR. ERLANSON: None, Your Honor.  
 2 JUDGE COUGHLIN: Okay. CX-21 is admitted.  
 3 (The document referred to,  
 4 previously identified as  
 5 Complainant's Exhibit No. 21,  
 6 was received in evidence.)  
 7 (The document referred to was  
 8 marked for identification as  
 9 Complainant's Exhibit No.  
 10 22.)  
 11 BY MR. McLAREN:  
 12 Q Mr. Kenney, can you now turn to  
 13 Complainant's Exhibit 22?  
 14 A Yeah.  
 15 Q Do you recognize this document?  
 16 A Yes, I do.  
 17 Q And what is it?  
 18 A This is the environmental assessment that  
 19 the forest conducted for suction dredging on the South  
 20 Fork Clearwater River and also on another suction  
 21 dredging area over Grand and French Creeks, which is  
 22 on a different district than the South Fork.  
 23 Q Did you have any role in creating this  
 24 document?  
 25 A Yes. I did most of the -- well, I did all

1 the aquatics analysis and biological analysis, and  
 2 also provided a lot of the proposed mitigation  
 3 measures and research analysis, similar to that.  
 4 MR. McLAREN: EPA moves to admit  
 5 Complainant's Exhibit 22 into evidence.  
 6 JUDGE COUGHLIN: Any objection to that, Mr.  
 7 Erlanson?  
 8 MR. ERLANSON: No objection.  
 9 JUDGE COUGHLIN: All right. CX-22 is  
 10 admitted.  
 11 (The document referred to,  
 12 previously identified as  
 13 Complainant's Exhibit No. 22,  
 14 was received in evidence.)  
 15 BY MR. McLAREN:  
 16 Q I want to talk a little bit about your  
 17 experience prior to your current role, so I'll turn  
 18 you back to your resume at Complainant's Exhibit 34.  
 19 Can you briefly describe the position you held  
 20 immediately prior to your current position with the  
 21 Forest Service?  
 22 A Yes. I was a zone fisheries biologist for a  
 23 different forest in southern -- this one in southern  
 24 Idaho, the Sawtooth National Forest, for about 10  
 25 years.

1 Q And what were your general duties there?

2 A Essentially the same, support for other

3 forest programs, including timber harvesting, grazing,

4 and minerals.

5 Q And prior to working for the Sawtooth

6 National Forest, what was your job?

7 A I worked for about three years for the

8 National Marine Fisheries Service in Roseburg, Oregon.

9 There, I was doing Section 7 consultation with the BLM

10 and the Forest Service, and also the Corps of

11 Engineers, for Clean Water Act 404 permits.

12 Q And did your duties specifically involve

13 fisheries or salmonids?

14 A I'm sorry. Yes, my duties were entirely the

15 analysis of biological assessments and working with

16 other federal agencies to conduct consultations for

17 several different species of ESA-listed salmonids.

18 Q And prior to working for NMFS, what was your

19 job?

20 A I worked for about five and a half years for

21 the U.S. Army Corps of Engineers in Walla Walla,

22 Washington.

23 Q And what was the approximate time period

24 there?

25 A I'm sorry. 1992 through mid-1997.

1 Q And what were your general job duties?

2 A I was in the planning division there. The

3 Walla Walla district covers the lower Snake River and

4 the McNary Dam for Snake -- excuse, four dams on the

5 lower Snake River, and mostly what I was doing was ESA

6 consultation, coordination with other agencies and

7 Indian tribes, and overseeing research dealing

8 generally with juvenile salmonid passage through those

9 dams on the lower Snake and Columbia.

10 Q And the last one, what was your position

11 prior to working with the Army Corps?

12 A I was at the Federal Energy Regulatory

13 Commission in Washington, D.C., for about a year. I

14 was in the Office of Hydropower Licensing there, where

15 I was tasked with overseeing the compliance with

16 hydropower licenses, making sure that the licensees

17 complied with things like fish passage requirements,

18 research requirements, that sort of thing.

19 Q And, Mr. Kenney, do you have any

20 certifications that are relevant to your testimony

21 today?

22 A Yes. I am a certified professional

23 fisheries biologist. That's given out by the American

24 Fisheries Society.

25 Q And have you received any awards that

1 commended your service in the various roles that

2 you've mentioned?

3 A Yes. When I was with the Corps of

4 Engineers, I received the Civilian Medal for

5 Meritorious Service, I think it was called. With the

6 Forest Service, I've received six -- what are they

7 called -- certificates of merit. That's what they're

8 called.

9 MR. McLAREN: Your Honor, at this time, I'd

10 like to tender this witness as an expert witness,

11 specifically in fisheries species, ESA-listed species

12 in the South Fork Clearwater River, impacts of suction

13 dredge mining on ESA-listed species, and the ESA

14 consultation process.

15 JUDGE COUGHLIN: Any objection, Mr.

16 Erlanson?

17 MR. ERLANSON: No objections, Your Honor.

18 JUDGE COUGHLIN: Okay. So deemed.

19 BY MR. McLAREN:

20 Q Mr. Kenney, will you please turn to

21 Complainant's Exhibit No. 1? Do you recognize this

22 document?

23 A Yes, I do.

24 Q And what is it?

25 A This is the report that Clint Hughes put

1 together in 2015 based on his observations on July 22,

2 2015, on the South Fork Clearwater River of

3 unauthorized dredging.

4 Q And you mentioned that the dredging was

5 unauthorized. Why do you describe it as so?

6 A I'm sorry. Why I qualified it as

7 unauthorized?

8 Q Yes.

9 A The miners that were there on the South Fork

10 in that summer did not have an approved plan of

11 operation with the Forest Service.

12 Q And at the time of this investigation, can

13 you describe the status of the Forest Service ESA

14 consultation for suction dredge mining in the South

15 Fork?

16 A Yes. A consultation can be a long process.

17 We had begun consultation discussions with the

18 Forest -- excuse me, with the National Marine

19 Fisheries Service and the Fish and Wildlife Service,

20 but we had not yet completed a biological assessment

21 and not completed the full consultation yet.

22 Q And how did you come to be familiar with

23 this document?

24 A I was working on a different zone at that

25 time, but Clint Hughes and I coordinated on three

1 other suction dredging areas on the forest, and so I  
2 was generally aware of some of the things that were  
3 going on on the South Fork. So when Mr. Hughes -- I  
4 assume I received an email copy of it at the time.

5 Q And did you use this report as a basis for  
6 any studies that you conducted?

7 A Yes, I did. So Mr. Hughes -- I reviewed  
8 this report, and I also got GPS coordinates from Mr.  
9 Hughes of the sites that he took a look at in this  
10 report. And I endeavored to take a look at and  
11 measure -- make observations of and measure the  
12 conditions at the unauthorized suction dredging site,  
13 and I waited until October, while the water was still  
14 low, but it went past the suction dredging season.

(The document referred to was  
marked for identification as  
Complainant's Exhibit No.  
37.)

19 BY MR. McLAREN:

20 Q And I'll turn you now to Complainant's  
21 Exhibit 37. Do you recognize this document, Mr.  
22 Kenney?

23 A Yes.

24 Q What is it?

25 A This is the report I wrote that described

1 that we had done there. I wanted to see -- and as I  
2 said, I was working on a consultation for dredging on  
3 the South Fork, so I wanted to see what suction  
4 dredging, even unauthorized, looked like on the South  
5 Fork, and I also wanted to get a different impression  
6 of what the activities might look like in years  
7 following that dredging.

8 Q And how did you anticipate the study would  
9 influence your drafting of the biological assessment  
10 and the environmental assessment?

11 A I just thought it would provide more  
12 information on which to base that assessment and on  
13 which the NMFS could base their biological opinion.

14 Q So I'll turn you to a specific page in this  
15 exhibit. It's page CX-001501.

16 A 1501, okay.

17 Q And specifically the section that's entitled  
18 "Methods." Can you describe the methods that you used  
19 to perform your study?

20 A Yes. As I said, we had obtained Mr. Hughes'  
21 GPS coordinates for the sites, and so we went out to  
22 each of those sites to see what sorts of suction  
23 dredging features we could find in the stream. And,  
24 again, this was about two and a half months after the  
25 end of the -- or two and a half months after Mr.

1 the findings that I and my two technicians made on  
2 October 8 -- excuse me, 7th and 8th of 2015 on the  
3 South Fork Clearwater River.

4 MR. McLAREN: EPA moves to admit  
5 Complainant's Exhibit 37 into evidence.

6 JUDGE COUGHLIN: Okay. Mr. Erlanson, have  
7 you reached that exhibit?

8 MR. ERLANSON: Yes, I'm on 37, Your Honor.

9 JUDGE COUGHLIN: Okay. Any objection to it  
10 coming in?

11 MR. ERLANSON: I don't think so, no.

12 JUDGE COUGHLIN: Okay. All right. CX-37 is  
13 admitted.

(The document referred to,  
previously identified as  
Complainant's Exhibit No. 37,  
was received in evidence.)

18 BY MR. McLAREN:

19 Q Mr. Kenney, why did you undertake this  
20 investigation?

21 A Well, as I said, I had been involved or was  
22 still involved in suction dredging on three other  
23 areas on the forest. These were smaller streams, and  
24 the folks that were dredging on them were complying  
25 with the terms and conditions of the consultations

1 Hughes' report and his observations.

2 And so there were more suction dredging  
3 features evident on the river than were described in  
4 Mr. Hughes' report. So we grouped the suction  
5 dredging features into 14 different sites. We did  
6 make drawings of each of the sites showing the  
7 different features, and took photos of the different  
8 features we saw, and also made some relatively crude  
9 measurements of these features.

10 Q And in the second paragraph under the same  
11 heading, Methods, can you read the sentence regarding  
12 the focus of your study?

13 A I'm sorry, the second?

14 Q The second paragraph under the section  
15 Methods.

16 A "Our observations were primarily focused on  
17 location and measurements of the dredge holes and  
18 tailings piles, along with observations of stream bank  
19 alterations, substantial accumulations of fine  
20 sediment, and presence of Western Pearl Shell mussel."

21 Q And, as you used the term in the report, can  
22 you describe what a hole or a dredge hole is?

23 A Certainly. A dredge hole is what a miner  
24 constructs to try to find gold. Generally, the gold  
25 is towards the bottom and perhaps even on or within

1 the bedrock. And so the miners will use both their  
2 hands and the dredge to move the bottom substrate to  
3 get down to the bottom, and so they're digging a hole  
4 in the stream substrate. So it's wider at the top  
5 than it is at the bottom, and it has edges, and it's a  
6 hole in the stream bottom.

7 Q And I think you touched on this in your  
8 answer, but how does a dredge operate in creating a  
9 hole like this?

10 A The dredge has a pump, a gasoline  
11 generally -- gasoline-powered pump that creates a  
12 suction through a hose. The miner will take the  
13 nozzle of the hose and place it on the substrate. If  
14 it's small enough, the substrate will go through the  
15 hose and through -- or on to cross a sluice box, which  
16 he hopes will catch any gold. And then that material  
17 drops off the end of the dredge.

18 Since these dredges on the South Fork are  
19 typically four to five inches in the nozzle diameter,  
20 the miner handles and moves pieces of material,  
21 cobbles and small boulders, that are larger than that  
22 size, and generally tosses them off to the side or  
23 piles them up.

24 Q You also used the term tailings pile. Can  
25 you define what that means?

1 A A tailings -- mine tailings is a general  
2 mining term and just generally means waste material  
3 that is not what the miner is looking for and has to  
4 sort through. So, in this case, with suction  
5 dredging, as I said, it's the material that passes  
6 through the dredge hose across the sluice box and back  
7 into the river. In this case generally, it's mostly  
8 sand and gravel.

9 Q In addition to these substrate changes that  
10 you testified were caused by miners, does a river also  
11 undergo any natural variations to its substrate?

12 A Certainly. So a riverbed, especially in a  
13 place like the mountains of Idaho, is underlaid by  
14 bedrock, and materials, rock materials, filter into  
15 the river and fill up -- cover that bottom for the  
16 most part, although there's sometimes places where the  
17 bedrock juts out.

18 The river bottom and the flood plain for  
19 that matter are then over millennia filled with  
20 different sizes of this substrate from clay and silt,  
21 sand and gravel, up to cobble and boulders. And as I  
22 said, bedrock can be a substrate also. And the  
23 substrate is moved over time by the stream flows,  
24 which vary annually and also over longer periods,  
25 with -- generally, there's a peak flow in a place like

1 the South Fork in the winter or spring that coincides  
2 with snow melt and precipitation. And that's when the  
3 flows are the highest and have the most velocity and,  
4 therefore, have the most ability to move the  
5 substrate. It's only during the highest flows that  
6 the water velocities are strong enough to move  
7 boulders and cobbles, whereas the lower velocities  
8 will only move sand and silt and clay.

9 Just as the water increases in velocity and  
10 moves the larger substrate as the water velocity  
11 drops, water level and velocity drop, the pieces of  
12 substrate drop out in order of the velocity that can  
13 move it. So the boulders that are moved by high flows  
14 drop out at first, and then the cobbles, and then the  
15 gravel and such and so on.

16 So the substrate in the stream bottom varies  
17 in three dimensions but also in the fourth dimension  
18 of time. And by the -- since the dredge -- excuse me,  
19 since the stream bottom, the stream channel is  
20 generally not straight, the velocity varies across the  
21 stream channel, and as I said, it varies across time,  
22 and eventually you have sorting in layers of different  
23 sorts of substrate that may, depending on the size and  
24 where exactly it is, may move every year or may stay  
25 in place for many years.

1 Q So do these natural substrate variations  
2 differ from the type of alterations that miners  
3 create?

4 A In several ways, yes.

5 Q How so?

6 A One is that the miners operate during low-  
7 flow periods when the water velocity is also the  
8 lowest during the year. And that means that the water  
9 would not naturally be moving the larger particles,  
10 such as the cobbles and boulders that the miner picks  
11 up to make the dredge hole, or even the gravel or the  
12 sand that are entering through the dredge.

13 So the use of the mining moves substrate  
14 that wouldn't be moved during that time period. And  
15 in particular, the fine materials, the clays and silt,  
16 would be in the water to a certain extent even at low-  
17 flow periods but not nearly to the extent that is  
18 often caused by the suction dredging.

19 As I said, the actual construction of the  
20 hole is something that large amounts of material, as I  
21 said, can be moved by natural forces, natural water.  
22 But the flow volume and strength during the summer,  
23 during the dredging period, would not be enough to  
24 excavate something similar to a dredge hole.

25 Q Thank you. So now I want to focus more on

1 the details of your report. So we're still on Exhibit  
2 No. 37. And can you turn to page 001519? Can you  
3 describe what's depicted on this page?

4 A Yes. As I said, we identified 14 different  
5 unauthorized dredging areas. This is a sheet that  
6 provides information on what we called Unauthorized  
7 Site Number 14.

8 Q And at the top of the page, it says, "Hughes  
9 Site Number Two." What does that denote?

10 A Mr. Hughes identified a number of sites, I  
11 believe 10, in his report. As I said, we were doing  
12 our investigations in October, and so we actually  
13 found more than 10 areas, and so -- but this  
14 particular area is one that Mr. Hughes identified,  
15 both with the photos and with the GPS coordinates. So  
16 we were able to tell it was essentially the same spot.

17 Q And was Hughes' Site Number Two, to your  
18 knowledge, the site that he photographed Mr. Erlanson  
19 dredging?

20 A Yes, as far as I can tell.

21 Q Can you turn to page 1523 of the same  
22 exhibit? Are these photos of the same site?

23 A Yes, I believe they are. Yeah, I believe  
24 they are.

25 Q Can you describe what's depicted in the

1 bottom left photo?

2 A The bottom left photo is one I pulled out of  
3 Mr. Hughes' report. It shows someone identified in  
4 Mr. Hughes' report as Mr. Erlanson dredging with that  
5 blue dredge there.

6 Q And what's depicted in the bottom-right  
7 photograph?

8 A This is a photo that was taken by my  
9 technicians on October 8, 2015, that shows essentially  
10 the same area as in the left-hand photo, except at a  
11 slightly different angle and location.

12 JUDGE COUGHLIN: Just one second.

13 Mr. McLaren, thank you for helping Mr.  
14 Erlanson locate -- it's okay. There's a lot here.  
15 It's fine. Were you following what he just said?  
16 He's talking about the photographs at 1523. Are you  
17 there?

18 MR. ERLANSON: Yes, I am now, Your Honor.

19 JUDGE COUGHLIN: Okay. Would it be helpful  
20 if he just repeated what he said? Do you want to --

21 MR. ERLANSON: Yeah, it would be nice. I  
22 was --

23 JUDGE COUGHLIN: -- have just the last  
24 question, I think, was when --

25 MR. McLAREN: Sure.

1 THE WITNESS: Sure.

2 JUDGE COUGHLIN: Yeah. Thanks very much for  
3 your indulgence, Complainant. You've been very  
4 helpful, I think, in trying to get Mr. -- helping Mr.  
5 Erlanson through some of the tabs. So thank you for  
6 the courtesy.

7 MR. McLAREN: Of course.

8 JUDGE COUGHLIN: Is it easy for you to just  
9 repeat the last question?

10 MR. McLAREN: It is, Your Honor.

11 JUDGE COUGHLIN: Perfect. Thank you.

12 BY MR. McLAREN:

13 Q Mr. Kenney, can you describe again what's  
14 depicted in the lower-right photograph on page 1523 of  
15 Complainant's Exhibit 37?

16 A Yes. This is a photo taken by one of my  
17 technicians on October 8, 2015, that shows, I believe,  
18 the same, essentially the same, site as Mr. Erlanson  
19 dredging on the left there. It's from a slightly  
20 different angle and distance than the photo on the  
21 left from the Hughes report.

22 Q And I notice a star in each of those bottom  
23 photographs. Why did you include that star?

24 A My technicians took a number of different  
25 photos of this site, from -- this was a fairly

1 extended site, and they took a number of photos. I  
2 reviewed this particular photo along with others and  
3 determined that the rock under which that star is is  
4 the same rock as the rock I starred in the photo that  
5 Clint Hughes took on the 22nd of July.

6 Q Are there other indicators in these photos  
7 that they depict the same site?

8 A Yes. There are two in-stream rocks that are  
9 the same, although, again, at a different angle. If  
10 you look on the left-hand photo, there are two rocks  
11 just downstream of the dredge, and I believe the  
12 photos just to the right and below the rock with the  
13 star are those same two rocks. If you look closely at  
14 a number of the photos, you can also match up some of  
15 the trees on the far bank.

16 Q And so, through these photos, were you able  
17 to identify the specific pile that Mr. Erlanson was  
18 photographed creating?

19 A Yes, I believe so.

20 MR. ERLANSON: Objection, Your Honor.

21 JUDGE COUGHLIN: Okay.

22 MR. ERLANSON: I disagree with the EPA's  
23 counsel saying that Mr. Erlanson created. There's  
24 been no proof brought here that I created that pile.

25 JUDGE COUGHLIN: Okay. So, once again, make

1 a note so you can question the witness about it.

2 MR. ERLANSON: Okay.

3 JUDGE COUGHLIN: Okay? I think that's  
4 really the best way to approach it.

5 MR. ERLANSON: Okay.

6 JUDGE COUGHLIN: Okay?

7 MR. ERLANSON: Thank you.

8 JUDGE COUGHLIN: Go ahead, Mr. McLaren.

9 BY MR. McLAREN:

10 Q Can you describe for the Judge what you've  
11 identified as a pile in the bottom-right photograph,  
12 and still on page 1523?

13 A Yes. The bottom-right photo, the area in  
14 the foreground, especially on the left-hand side, is  
15 lighter in color, and the substrate is finer in  
16 texture for the most part compared to, say, the rocks  
17 that are in the foreground of the left-hand photo.  
18 And there's also some rocks that would appear to me to  
19 be literally piled up in the middle of that pile of  
20 the area of finer material.

21 Q Thank you. And I'll turn you to page 1519  
22 of the same exhibit. Can you describe what's depicted  
23 in the bottom-right photograph on that page?

24 A Yes. This is another photo that was taken  
25 on October 8 by one of my technicians, and it shows

1 the lowermost features of the unauthorized dredging at  
2 this site.

3 Q Through this photo, were you able to  
4 identify the specific hole that Mr. Erlanson was  
5 photographed creating?

6 A Yes, I believe I can. I believe it's the  
7 same hole and tailings pile, mainly tailings pile,  
8 that we showed in the previous photo from the -- on  
9 23. You can see the tailings, the fine tailings in  
10 the middle of the photo. You can see the small piles  
11 of larger cobbles in the middle of that tailings pile.  
12 And if you look, again, if you compare other photos  
13 that aren't actually in here at different angles, you  
14 can confirm that these are -- or I can confirm that  
15 this is the same area.

16 Q And so, specific to the hole, can this  
17 photograph identify for you which hole Mr. Erlanson  
18 created?

19 A Well, when I compare the photos on 1523, as  
20 I said, I believe I can identify the same tailings  
21 pile in -- the beginnings of the tailings pile on the  
22 left-hand photo. It's smaller than the one in October  
23 here. And so, as I said, I believe that's the same  
24 tailings pile as we can see on 1519. And if you go  
25 back to -- and that corresponds to the drawing that

1 shows Hole Number Five being just upstream of Tailings  
2 Pile Number Seven.

3 Q So explain how the relative location of the  
4 hole and pile helped you identify that that's the hole  
5 that Mr. Erlanson created?

6 A Well, in the creation of the hole during the  
7 dredging at that site, the dredge is below the hole,  
8 and so the tailings come off the end of the dredge,  
9 and the miner keeps that dredge downstream of the  
10 hole. So if he kept it -- sometimes they'll keep it  
11 off to the side, but they can't really keep it  
12 upstream of the hole they're dredging. Otherwise,  
13 they just have material fall back into their hole.

14 (The document referred to was  
15 marked for identification as  
16 Complainant's Exhibit No.  
17 38.)

18 BY MR. McLAREN:

19 Q Thank you. So I apologize in advance  
20 because I'm going to have you jump around a little bit  
21 with exhibits. But can you please turn to  
22 Complainant's Exhibit 38? Are you familiar with this  
23 document?

24 A Yes, I am.

25 Q And what is it?

1 A This is a follow-up to the No. 37. It  
2 follows with additional information at in particular  
3 Site Number 14 that was collected in about nine -- or  
4 about 11 months later in September of 2016. We did  
5 surveys and took photos of all the 14 sites, but  
6 this addendum, I just put Site 14 in it.

7 MR. McLAREN: EPA moves Complainant's  
8 Exhibit 38 into evidence.

9 JUDGE COUGHLIN: Any objection, Mr.  
10 Erlanson?

11 MR. ERLANSON: The only objection I have is  
12 did Mr. Kenney say seven months later?

13 THE WITNESS: I'm sorry. I meant --

14 MR. ERLANSON: Or 11 months later?

15 THE WITNESS: I meant 11 months later. This  
16 was in September of 2016, which was about 11 months  
17 after the original survey for the report that was  
18 October 7th and 8th of 2015.

19 MR. ERLANSON: Where are you people at? I  
20 must be lost again.

21 MR. McLAREN: So the exhibit is  
22 Complainant's Exhibit 38.

23 JUDGE COUGHLIN: So it's CX-38, the tab CX-  
24 38.

25 MR. ERLANSON: Yeah, I'm on that.



1 JUDGE COUGHLIN: And then it's on -- that's  
2 actually -- that's what we're talking about right now.  
3 It's that exhibit. It's an --

4 MR. ERLANSON: Oh, it's not a picture.

5 JUDGE COUGHLIN: Let's see. There are some  
6 pictures included in there. But the first page  
7 reads --

8 MR. ERLANSON: Okay.

9 JUDGE COUGHLIN: -- that it's an addendum  
10 regarding 2016 conditions.

11 MR. ERLANSON: Okay, because I was looking  
12 at the picture, and it says February 3, 2016, and I  
13 couldn't figure out from September 15 to February,  
14 that can't be 11 months. So that's why I was  
15 wondering.

16 THE WITNESS: It took me a while to get  
17 around to writing these things.

18 MR. ERLANSON: Yeah.

19 JUDGE COUGHLIN: Did you have an objection  
20 to it coming in?

21 MR. ERLANSON: No, no.

22 JUDGE COUGHLIN: Okay. All right. CX-38 is  
23 admitted.

24 //

25 //

1 (The document referred to,  
2 previously identified as  
3 Complainant's Exhibit No. 38,  
4 was received in evidence.)

5 BY MR. McLAREN:

6 Q So, Mr. Kenney, we'll talk a little bit more  
7 about the details of your report in a bit, but right  
8 now, I just want you to turn to a specific photograph  
9 on page 1527. Can you describe what's depicted in  
10 Figure 4 on the bottom left of that page?

11 A Yes. This is a photo of the Hole Number  
12 Five and the Tailings Pile Number Seven taken in 2015  
13 by my technicians. It's a somewhat different photo  
14 from a different angle and different location than any  
15 of the other ones we've seen so far. But it's the  
16 same site.

17 Q And how do you know that it's the same site?

18 A Well, I'm looking at the dredge -- the  
19 tailings pile that has the same piles of cobbles in  
20 it, and we have the two midstream rocks over on the  
21 far right-hand side there.

22 Q Using this photograph as a reference, can  
23 you describe what you identify as the hole in this  
24 photo?

25 A I'm sorry. Identify what?

1 Q What you identify as a hole.

2 A Yes. So this is -- from this photo and from  
3 looking at other photos, I am able to draw a little  
4 delineation approximately around where that hole is.  
5 And, again, it's directly upstream from the tailings  
6 piles we've seen from some of the other photos and  
7 drawings.

8 Q And also, using the photograph as a  
9 reference, can you describe what you identified as a  
10 pile?

11 A What? I'm sorry.

12 Q Using the photo again as a reference, can  
13 you describe what you identify as a pile?

14 A Oh, I'm sorry. Yes. The tailings pile is  
15 in the -- from the center of the photo on down to the  
16 bottom, it is the area of finer substrate that's  
17 lighter in color, and even at the bottom of the photo,  
18 in the very foreground there, some of these fines are  
19 surrounding larger cobbles that either weren't moved  
20 prior to -- or weren't moved in the mining process or  
21 were part of what Mr. Erlanson or someone else  
22 discarded in formation of the hole.

23 Q In your opinion, do you think it's difficult  
24 for the untrained eye to identify holes or piles that  
25 are created by suction dredge miners?

1 A It's not hard if the flows in the meantime  
2 haven't come up and moved things around, and also  
3 while it can't be very long because algae starts to  
4 grow on some of the rocks and makes it darker. So  
5 it's easiest when it's within a few months of the  
6 dredging operation.

7 Q And so, in your post-dredge reports, did you  
8 assign a specific number to the hole and the pile that  
9 Mr. Erlanson was photographed creating in the Clint  
10 Hughes report?

11 A Yeah. Well, yes. My technician called the  
12 hole that we're looking -- the photos we're looking at  
13 as Hole Number Five at Site Number 14.

14 Q And did you also assign a specific number to  
15 the pile that Mr. Erlanson was photographed creating?

16 A Yes. My technicians called the tailings  
17 pile just downstream of that hole Number Seven.

18 Q Great. So I want to -- I'm going to turn  
19 you back -- sorry for flipping around. I'm going to  
20 turn you back to Complainant's Exhibit 37 and  
21 specifically page 1519.

22 A I'm sorry, specifically what?

23 Q Page 1519.

24 A Nineteen.

25 Q So can you describe for the Court the

1 information that you collected regarding Hole Number  
2 Five?

3 A Yes. As I said, starting out, my  
4 technicians made a sketch of the area which showed all  
5 of the features that they discerned. In this case,  
6 they discerned five dredge holes and seven tailings  
7 piles. Then they would take measurements of each of  
8 these features and then take photos of them.

9 Q Did you also take measurements of Hole  
10 Number Five?

11 A Yes. Well, my technicians took measurements  
12 of Hole Number Five and Tailings Pile Number Seven.

13 Q So can you -- what was the length of Hole  
14 Number Five?

15 A The maximum length of Hole Number Five was  
16 measured at 5.6 meters.

17 Q And the width?

18 A At 4.3 meters.

19 Q And the depth of Hole Number Five?

20 A The basic depth that was to the water  
21 surface was 1.1 meter to the deepest portion of that  
22 hole.

23 Q Have you calculated the volume of Hole  
24 Number Five?

25 A Yes, I have, but it's not really shown on

1 this page, and I made up some scratch -- some  
2 calculations. Would I be able to look at those?

3 Q Do you remember what the volume of Hole  
4 Number Five was off the top of your head?

5 A Not with certainty.

6 Q Would your notes refresh your recollection?

7 A Yes, they would.

8 MR. McLAREN: May I present the witness with  
9 his notes?

10 JUDGE COUGHLIN: You may.

11 MR. McLAREN: I have only one copy. I can  
12 show them to Mr. Erlanson before showing them to the  
13 witness.

14 JUDGE COUGHLIN: Okay. Mr. Erlanson, the  
15 way this works is that's not coming in, but it can be  
16 used to refresh a witness's recollection. So what  
17 happens is he's testified he doesn't recall, but his  
18 notes would help him. So he has the opportunity to  
19 take a look at his notes and then testify from a  
20 refreshed recollection. But the notes themselves do  
21 not come into evidence. Okay?

22 MR. ERLANSON: Fine.

23 JUDGE COUGHLIN: Okay.

24 (Pause.)

25 MR. McLAREN: And, Your Honor, do you prefer

1 that I remove the note before he answers the question?

2 JUDGE COUGHLIN: That's probably the most  
3 appropriate --

4 MR. McLAREN: Sure.

5 JUDGE COUGHLIN: -- way to do it, if you're  
6 able to do that, Mr. Kenney.

7 THE WITNESS: All right.

8 BY MR. McLAREN:

9 Q Did that refresh your recollection on the  
10 volume of Hole Number Five, Mr. Kenney?

11 A Yes. I came up with a volume of 15.4 cubic  
12 meters. That's after some adjustments to take into  
13 account the ambient depth of the creek -- or, excuse  
14 me, of the river, and also taking into account that  
15 the maximum width and maximum length will give a  
16 larger area than the more rounded actual hole was. So  
17 I made some adjustments. So 15.4 is a number. It's a  
18 rough number. I probably shouldn't even put a .4 on  
19 it.

20 Q Thank you. So the same questions for Dredge  
21 Pile Number Seven. Can you describe the information  
22 that you collected regarding Dredge Pile Number Seven?

23 A I can. We took measurements -- or my  
24 technicians took measurements of the width and the  
25 length of what they discerned to be the dredge pile,

1 and also of how candidly thick it was.

2 Q So what was the length of Pile Number Seven?

3 A We have 8 meters long and 7.8 meters wide.

4 Q And did you measure the height of Pile  
5 Number Seven?

6 A They did measure the height, but I didn't  
7 include it on this page.

8 Q Is the height included in your notes?

9 A I believe it is, yes.

10 Q And would that refresh your recollection?

11 A I believe so, yeah.

12 JUDGE COUGHLIN: You can go ahead, Mr.  
13 Moore.

14 MR. McLAREN: Mr. Erlanson, do you care to  
15 look at his --

16 (Pause.)

17 MR. ERLANSON: I want to make sure -- okay,  
18 got it.

19 (Pause.)

20 BY MR. McLAREN:

21 Q Does that refresh your recollection, Mr.  
22 Kenney, on the height of Pile Number Seven?

23 A Yes, it does.

24 Q And what is it?

25 A The number I used in the calculations was .1

1 meter. That was adjusted again with the -- just a  
2 look at the average depth of the water level, was  
3 about 3/10ths of a meter deep, and parts of the pile  
4 went up to the surface that day because most of it was  
5 lower, and that's why I used an adjustment of .1  
6 meter.

7 Q And so did you calculate an approximate  
8 volume of Pile Number Seven?

9 A Yes, I did.

10 Q And do you remember what that volume was?

11 A I managed to remember it as 5.0 meters,  
12 square meters -- excuse me, cubic meters, again,  
13 roughly.

14 Q Thank you. So I want to talk about any  
15 conclusions that you can draw based on the information  
16 that you've gathered. So, based on the data that you  
17 collected on Hole Number Five and Pile Number Seven,  
18 can you determine whether Mr. Erlanson caused any  
19 direct injury to fish or invertebrates while he  
20 dredged?

21 A I believe I can.

22 Q How so?

23 A Well, the construction of the hole required  
24 the basically disassembly of the stream bottom down --  
25 presumably down to the bedrock of the size hole I

1 mentioned. This was habitat undoubtedly for many  
2 hundreds or more of aquatic invertebrates, such as  
3 aquatic insects. It's possible that there could have  
4 been small fish within that area that was dredged,  
5 although I can't say for certain about that.

6 Similarly, the tailings pile covered up a  
7 relatively small for the river as a whole, but a  
8 substantial area of what was predominantly cobbles,  
9 and potentially either smothered some invertebrates or  
10 at least filled in some of the interstitial spaces  
11 between the cobbles. And it's possible that there  
12 could have been fish in that area too that might have  
13 been affected.

14 Q So you spoke on this a little bit, but I  
15 want to talk more about habitat. Based on the data  
16 that you collected, can you determine whether Mr.  
17 Erlanson adversely impacted any habitat in the river?

18 A Any habitat?

19 Q In the river.

20 A Yes, I believe so.

21 Q And what types of habitat do you think it's  
22 likely that Mr. Erlanson destroyed?

23 A Okay. Well, there are three different types  
24 of habitat I'm thinking of. One is the in the water  
25 column itself. One is on the surface of the stream

1 bottom. And then the third would be below the surface  
2 of the stream bottom and into the substrate for a  
3 certain depth.

4 Q So let's talk about first the surface  
5 habitat. You know, what is surface habitat?

6 A The surface of the stream bottom is an area  
7 that is in an undisturbed state in the summer, covered  
8 with algae that's growing, and is also generally a  
9 place that aquatic invertebrates live either on top of  
10 or among the cobbles on the surface. And then it also  
11 provides at least some habitat for fish.

12 Q And so how did Mr. Erlanson's activities  
13 likely impact that surface habitat?

14 A Well, first of all, by creating the hole,  
15 the cobbles, as I said, were manually handled by a  
16 miner and tossed to the side or placed somewhere else.  
17 Again, that's the surface habitat that we're talking  
18 about at the hole. So that area was physically moved  
19 and either moved manually or taken and trayed through  
20 the dredge, and then the trayed material and perhaps  
21 some of the manually moved cobbles were placed in a  
22 different area than where they started, especially the  
23 finer materials of the sand covered up the cobbles and  
24 larger material underneath that tailings pile.

25 Q I think the second type of habitat that you

1 mentioned was interstitial habitat. What does that  
2 mean?

3 A So, on the stream bottom, especially where  
4 there is relatively high stream flow velocities during  
5 certain parts of the year, the material that remains  
6 are relatively large cobbles and small boulders. And  
7 so, since they don't fit together exactly, there are  
8 spaces as these cobbles and boulders are piled up, and  
9 so there are fishes and aquatic invertebrates that  
10 live within these spaces.

11 Q And how did Mr. Erlanson's activities likely  
12 impact that type of habitat?

13 A Well, again, there were presumably  
14 interstitial spaces in the cobbles that were moved in  
15 the creation of the hole in the first place, and then  
16 there were also the potential filling in of these  
17 interstitial spaces with the fine fines mostly in the  
18 form of sand that created the tailings pile.

19 Q And I believe the last type of habitat that  
20 you mentioned was the water column.

21 A The water column, yes. So, apparently, from  
22 Mr. Hughes' report and testimony, there was some  
23 turbidity created through the operation of the dredge.  
24 And in the water column, that creates a less than  
25 normal for that time of year environment for the fish

1 for the most part. And it's fish that we're talking  
2 about in the water column to live and feed. It  
3 reduces the visibility with the suspension of clays  
4 and fine sediment.

5 Q So perhaps it's obvious at least for that  
6 last type of habitat that you mentioned, but can you  
7 explain how this habitat reduction might impact ESA-  
8 listed species in the South Fork?

9 A Certainly. For the habitat, the primary  
10 ESA-listed species in the South Fork that's there all  
11 the time are juvenile steelhead trout, either in the  
12 form of fry or in the later stage called parr. These  
13 fry and parr find refuge, depending on their size and  
14 habitat characteristics, either along the stream banks  
15 or in eddies or in weed debris piles. But one of the  
16 places they also find habitat is in these interstitial  
17 spaces. Less during the summer, but especially in the  
18 winter, they'll find refuge in these interstitial  
19 spaces underneath the surface of the stream bottom.

20 Q And sorry if you mentioned this, but would  
21 that habitat reduction impact the prey species on  
22 which endangered species rely on?

23 A Yes. Again, you know, on the relatively  
24 small scale of this dredging area in the entire South  
25 Fork Clearwater River, the surface and interstitial

1 habitat is where the invertebrates live, and they have  
2 different life cycles and lengths of life. And so  
3 there are all different sorts of types of  
4 invertebrates in different ages and different sizes  
5 that are living within these interstitial spaces and  
6 on the surface. And so by either modifying the -- or  
7 by creating the hole and basically taking away that  
8 habitat or by creation of the tailings piles and  
9 potentially covering up or filling in that habitat,  
10 there is less space for these aquatic invertebrates to  
11 live, and/or they may be actually directly injured in  
12 the dredging process.

13 Q And so also, based on the information that  
14 you gathered in your report, can you determine whether  
15 Mr. Erlanson destructed stream bottom armor?

16 A Yes. Again, the start of the hole is the  
17 stream bottom. And so I explained that taking away  
18 the -- making the hole changes that stream bottom.  
19 And, again, the stream bottom and the tailings pile is  
20 covered up with the fines that were produced, at least  
21 partially cobbles and small boulders. And in  
22 particular, for the algae that's growing in those  
23 rocks, that's no longer available to the aquatic  
24 invertebrates that do eat it.

25 Q What does armor mean in the phrase stream

1 bottom armor?

2 A As I -- excuse me. As I explained earlier,  
3 high-flow volumes -- excuse me. Can I get --  
4 JUDGE COUGHLIN: Please.  
5 (Pause.)

6 THE WITNESS: As I explained earlier, the  
7 higher flow volumes equal higher flow velocities,  
8 which can move larger substrate. If you have an area  
9 with relatively large substrate on the surface, it's  
10 possible that over the years or decades or centuries,  
11 that material hasn't moved because it might be in just  
12 a -- for whatever reason, not moved, not experienced  
13 those high flows.

14 But it also has the potential to keep finer  
15 material that's underneath those cobbles and boulders  
16 from being moved by the higher flow lines that would  
17 move them if that finer material was on the surface  
18 and not covered by the larger.

19 BY MR. McLAREN:

20 Q And so, in your opinion, did Mr. Erlanson's  
21 activities disrupt stream bottom armor?

22 A To some extent, yes. It's impossible for me  
23 to tell exactly how much because I would need to have  
24 taken a closer look and better measurements before the  
25 dredging occurred.

1 Q So do you consider such a disruption an  
2 adverse environmental impact?

3 A Yes. Again, at a minor spatial scale, but,  
4 yes.

5 Q And so why would it be an adverse impact?

6 A Oh, I'm sorry. So the disruption of the  
7 stream bottom armor allows the next high flow that  
8 comes along, in this case, it would have been during  
9 the winter of 2015 or spring of 2016, to have access  
10 to the finer material that is probably mixed with  
11 larger material but was previously armored better. It  
12 would allow the high flows to access that area and  
13 destabilize the area, potentially anyway, in the area  
14 of that dredge hole.

15 Q And describe further what happens when that  
16 area is destabilized.

17 A Well, the finer materials -- when I say  
18 destabilize, it means that the -- at least in some  
19 situations could -- the finer materials could be  
20 picked up by high flows and moved farther downstream,  
21 where those fine materials can then potentially affect  
22 the interstitial spaces and the surfaces of materials  
23 of larger substrate downstream, or accumulate in areas  
24 where these fines accumulate and get even thicker.  
25 And as we were talking or was discussed earlier, these

1 fine sediments are considered to be a problem for the  
2 South Fork. So, to summarize, the destabilization of  
3 the stream channel has the potential to adversely  
4 affect the fine sediment load downstream of the site.

5 Q And so how might that disruption impact ESA-  
6 listed species in the South Fork?

7 A Well, as I mentioned, there are steelhead  
8 that live in the South Fork year-round, juveniles, and  
9 there are also steelhead that spawn in the South Fork.  
10 And the addition of fine materials in the rearing and  
11 spawning habitat is generally a bad thing for the --  
12 or the smaller -- for the steelhead, if only in an  
13 incremental way. Yes.

14 Q And why is it a bad thing?

15 A Well, as I've explained, there are fines  
16 that -- the fines that infiltrate into these  
17 interstitial spaces that will reduce the potential for  
18 both the fish to have a sheltering habitat and for the  
19 macro invertebrates to live. There's also the  
20 potential for putting more fines into steelhead  
21 spawning habitat, which is an adverse thing for the  
22 incubation of the eggs and the fry in the steelhead  
23 nest.

24 Q Based on the data that you collected in your  
25 investigation, can you determine whether Mr. Erlanson

1 not be suspended for very far in the water column.

2 Q And you mentioned that you relied on a few  
3 exhibits in making a determination that Mr. Erlanson's  
4 activities caused turbidity. I'll turn you to those  
5 in particular so you can point out to the Judge  
6 exactly what you're talking about. First, we'll go to  
7 Complainant's Exhibit 37 and specifically page 1523.  
8 In the bottom right photograph, are there indicators  
9 in the pile that's photographed that Mr. Erlanson's  
10 activity caused turbidity?

11 A I believe so. It's a little hard to tell  
12 from this photo of this quality, but I believe the  
13 areas -- the light areas that are downstream of  
14 those -- especially that are downstream of those two  
15 in-stream -- large in-stream boulders, I think it's  
16 likely that those are relatively small fines in the  
17 form of small sand and some silt probably. Around the  
18 edges of the dredge pile, especially on the lower  
19 edge, I believe that that looks like the grain is  
20 there, the sediment -- excuse me, the substrate is of  
21 a finer quality than it is farther on up. And that's  
22 what one would expect to see with the gravel and the  
23 sand dropping out before the fines, which -- some of  
24 which would drop out below -- downstream of the sand.

25 JUDGE COUGHLIN: And I think you were

1 caused turbidity in the South Fork Clearwater River?

2 A I think so, yes.

3 Q And how do you know that Mr. Erlanson's  
4 activities likely caused turbidity?

5 A Well, first of all, I believe that I can see  
6 it in some of the photos that Clint Hughes took on the  
7 22nd. Also, it's visible in some of the photos that  
8 were taken -- excuse me -- in October, that there are  
9 fines beyond just the sandy portions of the dredge  
10 tail pile, and the fines that are part of the dredge  
11 tail pile are generally mixed with some smaller fines.  
12 And so it seems likely that those smaller fines are  
13 carried off and not deposited.

14 Also, it is very clear that Mr. Rice was  
15 creating a turbidity plume, and there are just  
16 places -- the sites are just not that far apart, so it  
17 seems very likely that there's at least some turbidity  
18 plumes some of the time when Mr. Erlanson was  
19 dredging.

20 Q And when you say the word fines, what do you  
21 mean?

22 A I'm sorry. Fine sediment in the forms of  
23 clay particles and silt particles for the most part.  
24 When you get to the size of a sand particle, it'll  
25 generally drop out fairly quickly below the dredge and

1 pointing, I think, to the lower right corner of the  
2 photograph. Is that --

3 THE WITNESS: Yeah. I'm seeing some right  
4 in here, and then right around in here also.

5 JUDGE COUGHLIN: So when you were talking  
6 about the boulders to the right-most area of the  
7 photograph, right?

8 THE WITNESS: Yeah. I was talking about  
9 the -- so these are the two in-stream boulders I was  
10 talking about, and I believe this area of lighter  
11 color are fines.

12 JUDGE COUGHLIN: Okay. And so I guess the  
13 best way I could describe that for the record is the  
14 two boulders that are kind of sticking up from the  
15 water surface to the right of where the star is  
16 marked, and you're referencing further to the right of  
17 that, of that lower boulder, right?

18 THE WITNESS: Yes, that's right.

19 JUDGE COUGHLIN: Okay, great.

20 BY MR. McLAREN:

21 Q Mr. Kenney, I will direct you now to  
22 Complainant's Exhibit No. 1 again.

23 A I'm sorry. What?

24 Q Number 1.

25 A All right.

1 Q You had referenced the photographs in this  
2 report. Can you describe the indicators here that Mr.  
3 Erlanson's activities caused turbidity?

4 A Yes. It's a little hard to see, but if  
5 you -- in the -- let's see, on page --

6 Q And, Mr. Kenney, if it's helpful, the  
7 enlarged photographs are still --

8 A Yes.

9 Q -- on the stand there.

10 A Yes. So this looks to be a blowup of the  
11 upper -- well, the second from -- on the right-hand  
12 side, second from the bottom, on page 5. Is that  
13 correct? I think so. Yes. And one can see that both  
14 of the dredges, apparently Mr. Rice's and Mr.  
15 Erlanson's dredges, with Mr. Erlanson's on the right-  
16 hand side -- you can see the discharge from Mr.  
17 Erlanson's dredge as being white just below the dredge  
18 there.

19 JUDGE COUGHLIN: Okay. Now hold on just one  
20 second because I'm not sure --

21 THE WITNESS: Okay.

22 JUDGE COUGHLIN: -- if we're actually  
23 looking at the same photo.

24 THE WITNESS: Okay.

25 JUDGE COUGHLIN: So you said at the bottom

1 of five, but I think the photo that you have in your  
2 hand is actually the --

3 THE WITNESS: Right. It's the one above --

4 JUDGE COUGHLIN: Bless you.

5 MR. McLAREN: Bless you.

6 THE WITNESS: It's the one titled Rice green  
7 dredge and Erlanson's blue dredges, I believe.

8 JUDGE COUGHLIN: Okay, okay.

9 THE WITNESS: Sorry about that.

10 JUDGE COUGHLIN: I see that. That's a more  
11 ideal way to describe it for clarity of the record.

12 THE WITNESS: Okay. Sorry.

13 JUDGE COUGHLIN: No, that's okay. It's  
14 fine. So I'm on the same photograph you're on.

15 Mr. Erlanson, are you following along here?

16 MR. ERLANSON: I think this is the one we're  
17 looking at.

18 JUDGE COUGHLIN: Yeah. I'm --

19 THE WITNESS: No, not that one.

20 JUDGE COUGHLIN: The blowups, I realize, are  
21 helpful.

22 MR. ERLANSON: No, not this one? Oh, that  
23 one. Okay.

24 JUDGE COUGHLIN: So for what's in evidence,  
25 we're at CX-1, and we're on page 5 of that per the

1 Bates stamp. And as the witness just referred to,  
2 it's the picture under which it's written, "Rice green  
3 dredge and Erlanson's blue dredges," correct?

4 THE WITNESS: Yes.

5 JUDGE COUGHLIN: Okay. Please go ahead.

6 THE WITNESS: So the Erlanson blue dredge  
7 there, you can see the discharge from the dredge is  
8 white water right below the dredge, and that is  
9 pointing out a large in-stream boulder. And you can  
10 see the plume from the Rice dredge in front of, in the  
11 foreground anyway of this photo, but then you can also  
12 see a separate plume going on the upper -- above the  
13 white water coming out of the dredge that goes down  
14 towards that larger rock. So that appears to me to be  
15 two separate plumes, one from the main one in the  
16 front from the Rice dredge, and the one farther  
17 downstream from the Erlanson. It's fairly subtle, but  
18 I believe it's there.

19 BY MR. McLAREN:

20 Q And are there indicators in any of the other  
21 photos that helped you determined that Mr. Erlanson's  
22 activities caused turbidity?

23 A Yes. In the photos that shows previous  
24 year's disturbance, there's a blowup of -- you know, a  
25 blowup of that. And in the upper left-hand corner,

1 one can see Mr. Erlanson's dredge, and I believe you  
2 can see the same -- about the same level of turbidity  
3 below that dredge. And you also see somewhat less --  
4 a lower level of turbidity at this particular moment  
5 coming out of Mr. Rice's dredge.

6 JUDGE COUGHLIN: I'm following along. Thank  
7 you.

8 Are you, Mr. Erlanson?

9 MR. ERLANSON: Yeah.

10 JUDGE COUGHLIN: Okay. Great.

11 BY MR. McLAREN:

12 Q And so how does turbidity -- how does  
13 increased turbidity impact ESA-listed species in the  
14 South Fork Clearwater?

15 A All right. So, again, it's primarily young  
16 steelhead. And during this time of year, when the  
17 dredging occurred, the water is -- you can see from  
18 the other -- from the photos, is very clear, outside  
19 of the turbidity created by the dredges. And the  
20 juvenile steelhead are primarily visual feeders. They  
21 are picking for the most part little invertebrates out  
22 of the water column as the water flows past them.

23 And so a turbidity can impair their ability  
24 to see and catch these food items and, in that manner,  
25 reduce at least potentially their growth and

1 inevitably -- and perhaps their survival long-term.  
2 Of course, in this case, when there are relatively  
3 discrete and narrow plumes of turbidity, the fish can  
4 relatively easily avoid those areas. But it does  
5 reduce the area that they can feed in.

6 Q I'll turn you now to Complainant's Exhibit  
7 38. We briefly referenced this exhibit before, but  
8 can you remind the Court what this document is?

9 A This is 38, right?

10 Q Correct.

11 A This is the addendum to the original report  
12 I put together on unauthorized suction dredging. This  
13 is an addendum that describes 2016 observations and  
14 photos at Site Number 14 that was identified in the  
15 previous report.

16 Q And what was the purpose of this report?

17 A The purpose of this report was to document  
18 changes in the dredge features at this particular  
19 site. There had been about 11 months, and more  
20 importantly, there had been a high-flow event in  
21 between 2015 and 2016, and expected to see some  
22 differences in the features at the site.

23 Q And, for the record, did you clarify the  
24 specific site that this report analyzes?

25 A Yes. So this is Site -- what I term Site

1 Number 14 in my report.

2 Q And can you describe your methods in  
3 conducting this study?

4 A Yes. These were the same methods as in  
5 2016, with the exception that a new dredging -- excuse  
6 me, a new drawing was not made. So my crew went out  
7 there and took photos and measurements but did not  
8 make a new drawing.

9 Q Can you turn to page 1526 of the same  
10 exhibit? One year after Mr. Erlanson dredged, what  
11 was the size of Hole Number Five?

12 A My crew measured Hole Number Five at a  
13 length of 5.8 meters, a width of 3.6 meters, and an  
14 adjusted depth of .8 meters.

15 Q And what was the size of Pile Number Seven?

16 A My crew measured it at 7 and a half meters  
17 by 5.2 meters.

18 Q At the bottom of page 1527, can you  
19 described what's depicted in Figures 4 and 5?

20 A Yes. On the left-hand side is a photo from  
21 2015 that we previously looked at that shows the  
22 dredge tailing pile, obvious, and I also made an  
23 outline around Hole Number Five because this  
24 particular photo is less visible. On the right-hand  
25 side is a photo taken in 2016 from pretty close to the

1 same site. It may have been a little farther  
2 upstream. And it does not show the same sort of  
3 tailings pile that was present in 2015. And also, the  
4 basic outline of the dredge hole was still present but  
5 a little difficult to see if you're just looking at  
6 this one photo.

7 Q And did you complete any calculations to  
8 determine the percent volume of Hole Number Five that  
9 remained on the site in 2016?

10 A Yes, I did.

11 Q And what was it?

12 A I believe it was about 55 percent, but I  
13 would be helped if I had my memory refreshed.

14 Q And would your notes refresh your  
15 recollection?

16 A Yes, they would.

17 MR. McLAREN: Permission to give the witness  
18 his notes?

19 JUDGE COUGHLIN: You may.

20 THE WITNESS: Thank you.

21 (Pause.)

22 BY MR. McLAREN:

23 Q Did that refresh your recollection, Mr.  
24 Kenney?

25 A Yes, it did.

1 Q And so you were going to tell me the percent  
2 volume of Hole Number Five that remained in 2016.

3 A Yes. After adjustments for the ambient  
4 water level and for the non-square shape of the hole,  
5 it appears to be about 55 percent of the hole was  
6 remaining in 2016.

7 Q Did you also calculate the percent area of  
8 Pile Number Seven that remained onsite in 2016?

9 A Yes, I did, although that was a little bit  
10 more difficult of a calculation. Well, not more  
11 difficult. The pile itself, as I said, was not really  
12 visible as a thickness that it was in 2015. My crew  
13 was able to discern a rough edge to that pile based on  
14 the fines that were wedged between the larger pieces  
15 of substrate. And based on their measurements, it  
16 appeared to me to be about 63 percent of the area of  
17 that tailings pile was still visibly evident. And,  
18 again, these are rough measurements, so I would  
19 probably say about half in both cases.

20 Q And so earlier you testified that Mr.  
21 Erlanson's mining activity caused a reduction in  
22 habitat in 2015. Can you draw any conclusions  
23 regarding whether those impacts continued in 2016?

24 A Yes.

25 Q What's your conclusion?

1 A Well, the hole -- excuse me. The hole was  
2 still present to some extent. The high-flow event or  
3 events earlier in that year had moved material into  
4 the hole to fill it to some extent. It's not clear to  
5 me whether that hole is the same -- or, excuse me,  
6 whether that material was the same as what was at  
7 depth that weren't filled in, so I can't really say  
8 whether that material that's now at the bottom of the  
9 hole was an improvement from a habitat standpoint  
10 compared to what was there before.

11 But the surface of the hole and those  
12 cobbles, they were very likely there. It's still not  
13 there, and from other photos of this site, one can see  
14 that there are fines that pretty much cover the  
15 cobbles and the boulders at the bottom of that hole.  
16 So it's better than just sand from an invertebrate  
17 standpoint or a fish's standpoint but not quite the  
18 same as it had been previously.

19 Q You also testified that Mr. Erlanson's  
20 mining activities caused a disruption to the stream  
21 bottom armor in 2015. Can you draw any conclusions  
22 regarding whether those impacts continued in 2016?

23 A Well, certainly, I think I can conclude that  
24 the armor situation was not the same. There are  
25 larger rocks that fell into the hole during the stream

1 high flow, so there is -- the rebuilding of the armor,  
2 I believe, is occurring, but, again, I don't believe  
3 it's the same as it previously was.

4 Q And you testified that Mr. Erlanson's  
5 activities caused an increase in turbidity in 2015.  
6 Can you draw any conclusions regarding whether those  
7 turbidity impacts continued in 2016?

8 A Well, I think I can say that since the  
9 tailings pile is now mostly gone in terms of its  
10 thickness, that whatever fines were present in that  
11 tailings pile have been swept away during the high  
12 flows. Now, during the high flows, the ambient  
13 turbidity is likely a lot higher than what it would  
14 have been during the dredging season or during October  
15 and September when we took the photos. So it probably  
16 incrementally increased the amount of turbidity in the  
17 South Fork downstream of the site but probably not in  
18 a measurable way.

19 Q I'll turn you to Complainant's Exhibit 38  
20 and specifically page 1524. At the bottom of the  
21 narrative portion of your report, can you read into  
22 the record the final sentence of your report?

23 A Certainly. "In summary, the channel  
24 modifications caused by the unauthorized dredging at  
25 Site No. 14 in 2015 recovered toward their pre-

1 dredging condition somewhat in the following year but  
2 were still observable. Subsequent peak flow events  
3 will likely continue to change substrate conditions at  
4 the site, but, because stream channel conditions are  
5 naturally unstable to a greater or lesser extent, the  
6 site is unlikely to ever return to its pre-dredging  
7 state."

8 Q So why do you believe that the site that Mr.  
9 Erlanson dredged will never return to its pre-dredging  
10 state?

11 A Primarily because I believe that the way  
12 that the hole is being refilled by high flows is not  
13 going to result in the same level of stability as  
14 occurred in -- excuse me, as was present prior to the  
15 dredging. I could be wrong, but that's my -- when I  
16 thought about it.

17 Q Have you returned to the site since your  
18 study in 2016?

19 A Yes.

20 Q And when did you do that?

21 A In October of 2018, last fall.

22 Q And what did you observe in 2018?

23 A What I observed was basically the hole had  
24 been completely filled in. There was essentially no  
25 real sign, visible sign, of the tailings pile left,

1 although I suspect that there are still a higher level  
2 of interstitial fines left over. So I guess I would  
3 caution that the measurements and observations we made  
4 were relatively crude, that if you really wanted to  
5 know what changes are left over, you would need to do  
6 some sort of at-depth sampling, which is beyond really  
7 my capabilities.

8 Q So do your observations in 2018 contradict  
9 your opinion in 2016 that the site would never return  
10 to its pre-dredging conditions?

11 A No, I don't believe they contradicted. As I  
12 said, what I saw in 2018 was what I saw, and I believe  
13 there are likely changes at depth that were not  
14 visible.

15 Q So, in your opinion, did the site of Mr.  
16 Erlanson's dredging continue to cause adverse impacts  
17 in 2018?

18 A Likely slightly and, you know, not at the  
19 same level as in 2015 and 2016. I think that, over  
20 time, while the changes may never completely recover,  
21 they are incrementally improving from year to year,  
22 likely.

23 Q Okay. So I want to switch topics a little  
24 bit here. I'll turn you to your biological  
25 assessment. It's at Complainant's Exhibit 21.



1 A I'm sorry. What's the number?  
 2 Q 21.  
 3 A All right.  
 4 Q We referenced this document before, but can  
 5 you remind the Judge what this document is?  
 6 A Yes. This is a biological assessment, which  
 7 is a document that action agencies like the Forest  
 8 Service and the BLM produce in order to meet our  
 9 Section 7 ESA obligations of analyzing potential  
 10 activities that are proposed or funded or permitted by  
 11 the action agency.  
 12 Q And to be clear, was this document created  
 13 before or after Mr. Erlanson's activity in July 2015?  
 14 A Parts of it were started prior to that, but  
 15 it was not completed until the spring of 2016.  
 16 Q And can you briefly explain, why is the  
 17 Forest Service required to draft this document?  
 18 A The Forest Service, as well as any federal  
 19 agency, is required to comply with the Endangered  
 20 Species Act, the first part of which is to avoid  
 21 jeopardy to ESA-listed species, and the second, as I  
 22 said, is to analyze the potential effects of actions,  
 23 permits, and funding that has the potential to affect  
 24 even -- adversely affect even one individual -- excuse  
 25 me, to -- I'm getting confused -- to affect even one

1 individual of an ESA-listed species.  
 2 Q And so, in this particular document, on what  
 3 activity was the Forest Service requesting  
 4 consultation?  
 5 A We proposed to allow up to 15 dredging  
 6 operations per year on a specific reach of the South  
 7 Fork Clearwater River, and those would be -- so those  
 8 are plans of operation, so, specifically, that is  
 9 approval of up to 15 plans of operation. And that's  
 10 split between the Forest Service and the BLM.  
 11 Q Under the ESA, are there threatened or  
 12 endangered species in the South Fork Clearwater River?  
 13 A Yes, there are.  
 14 Q And can you list what species are listed?  
 15 A As I mentioned before, there are ESA-  
 16 threatened Snake River Basin steelhead trout. There  
 17 are also ESA-threatened Fall Chinook salmon, Snake  
 18 River Basin Fall Chinook salmon. And then there are  
 19 Columbia Basin bull trout, which are also listed as  
 20 threatened.  
 21 Q Did the Forest Service conclude that the  
 22 proposed action was likely to adversely affect any  
 23 ESA-listed species?  
 24 A Yes. Our determination was likely to  
 25 adversely affect steelhead trout.

1 Q And why was the proposed action likely to  
 2 adversely affect those species?  
 3 A It was the potential to directly harm  
 4 juvenile steelhead and also modification of steelhead  
 5 habitat, both for juveniles and spawning habitat.  
 6 Q Did the National Marine Fisheries Service  
 7 completely agree with your determination regarding  
 8 adverse impact?  
 9 A They agreed with our adverse impact  
 10 determination for steelhead. We also made a not  
 11 likely to adversely affect determination for Fall  
 12 Chinook salmon, which they did not concur with.  
 13 Q Meaning that they?  
 14 A Meaning that they said, no, you're wrong,  
 15 that it is actually likely to adversely affect Fall  
 16 Chinook salmon also, particularly the juvenile rearing  
 17 habitat and spawning habitat.  
 18 Q Can you please turn to page 1138 of this  
 19 exhibit?  
 20 A Yes.  
 21 Q There is a section on this page called  
 22 Mitigation and Monitoring. Why does the Forest  
 23 Service include a Mitigation and Monitoring section in  
 24 the biological assessment?  
 25 A Well, when the Forest Service proposes or

1 wants to permit or wants to fund an action that has  
 2 the potential to affect ESA-listed species, we are  
 3 required to try to find ways to mitigate that harm, to  
 4 reduce that harm, potential harm anyway, while we  
 5 still are able to complete the activity.  
 6 Q And can you generally describe the Forest  
 7 Service process in creating mitigation measures,  
 8 specifically for the proposed suction dredging  
 9 activity?  
 10 A Sure. In any biological assessment, the  
 11 action agency needs to make a determination about the  
 12 presence of individuals of listed species or their  
 13 critical habitat, and so take a close look at that,  
 14 what types of the fish might be in what parts of the  
 15 project area. And we also take a look at what  
 16 activities are then most likely to have an effect.  
 17 When I say activities, those are a component of an  
 18 action. So you have an action, which is the approval  
 19 of plans of operation, and there are activities  
 20 underneath that plan of operation that actually  
 21 implement the action.  
 22 So we try to find which activities have the  
 23 most likely -- most likely would affect the species  
 24 that we're talking about or their habitat, and we try  
 25 to find ways to still complete the activity but while

1 mitigating -- while reducing the potential effects.  
 2 JUDGE COUGHLIN: I'm sorry to interject, but  
 3 apparently we need to be out of here at 5, and that's  
 4 a firm, firm time, I am told. So I don't know if  
 5 you'll be able to get through your direct. I'm  
 6 assuming you've got more or a good bit more or --  
 7 MR. McLAREN: I do have a good bit more. It  
 8 would be pushing it to try to end in 15 minutes and  
 9 get out of the courtroom.  
 10 JUDGE COUGHLIN: Yes. Right. We have to  
 11 pack up and everything. Is now an okay breaking point  
 12 for you?  
 13 MR. McLAREN: That would be fine, Your  
 14 Honor.  
 15 JUDGE COUGHLIN: Okay. All right. Sorry  
 16 about that. You know, we are beholden to those that  
 17 will receive us to hold these hearings, so, you know,  
 18 we need to be courteous of that.  
 19 So we'll just adjourn for today, and then  
 20 tomorrow completing Mr. Kenney, and then you have one  
 21 more witness, I understand.  
 22 MR. McLAREN: That's correct.  
 23 JUDGE COUGHLIN: Okay. And then, Mr.  
 24 Erlanson, you can take the evening to think about  
 25 whether or not you want to testify and whether you

1 want to present those proposed exhibits we talked  
 2 about earlier. Were you -- I assume you weren't  
 3 planning on presenting any additional witnesses, or  
 4 did you want to --  
 5 MR. ERLANSON: No.  
 6 JUDGE COUGHLIN: No, okay. So I don't  
 7 anticipate an issue with being able to finish  
 8 tomorrow, but, to play it safe, would you like to get  
 9 started a little bit earlier than we did? We could  
 10 start up at 8:30. The building opens at 8.  
 11 MR. McLAREN: That works fine for us, Your  
 12 Honor.  
 13 JUDGE COUGHLIN: Okay.  
 14 MR. McLAREN: Just effectively the same time  
 15 as this morning is when we met with Mr. Wright, yeah,  
 16 but that works for everybody on EPA's side.  
 17 JUDGE COUGHLIN: Okay. How about you, Mr.  
 18 Erlanson?  
 19 MR. ERLANSON: I'm good with it.  
 20 JUDGE COUGHLIN: Okay. So why don't we just  
 21 adjourn then for tonight, and then I'll see you all  
 22 back at 8:30 in the morning. All right?  
 23 MR. McLAREN: Very good, Your Honor.  
 24 JUDGE COUGHLIN: All right. Have a good  
 25 evening, everyone.

1 MR. ERLANSON: Yep.  
 2 JUDGE COUGHLIN: Thank you.  
 3 MR. ERLANSON: Thank you.  
 4 (Whereupon, at 4:45 p.m., the hearing in the  
 5 above-entitled matter adjourned, to reconvene at 8:30  
 6 a.m. the following day, Wednesday, May 15, 2019.)  
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REPORTER'S CERTIFICATE

DOCKET NO.: CWA-10-2016-0109  
 CASE TITLE: Dave Erlanson, Sr.  
 HEARING DATE: May 14, 2019  
 LOCATION: Rigby, Idaho

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the United States Environmental Protection Agency, Office of Administrative Law Judges.

Date: May 14, 2019

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