



Special Interest Auto Works, Inc.
Christy Reynolds

to:
oaljfilng, Elizabeth McKenna
05/02/2014 07:41 PM

Cc:
"Dennis D. Reynolds Law Office", "Christy Reynolds"

Hide Details

From: "Christy Reynolds" <christy@ddrlaw.com>

To: oaljfilng@EPA, Elizabeth McKenna/R10/USEPA/US@MSO365,

Cc: "Dennis D. Reynolds Law Office" <dennis@ddrlaw.com>, "Christy Reynolds" <christy@ddrlaw.com>

3 Attachments



Motion for Leave to Conduct Discovery 050214.pdf Respondents' Motion for Accelerated Decision 050214.pdf



Decl of Client re Motion for Accelerated Decision 050214.pdf

In re the Matter of: SPECIAL INTEREST AUTO WORKS, INC., and TROY PETERSON, Individual, Kent, WA, Docket No. CWA-10-2013-0123

Good afternoon, attached please find Respondents' Motion for Leave to Conduct Discovery, Respondents' Motion for Accelerated Decision, and Declaration of Troy Peterson in Support of Respondents' Motion for Accelerated Decision for filing. Unfortunately, our client was out of town and unavailable to sign his Declaration today. He will be signing it over the weekend and we will send you his signed copy on Monday.

In the meantime, if you have any questions, please don't hesitate to call our office.

Thank you.

Karen for Christy

Christy Reynolds, Legal Assistant

Dennis D. Reynolds Law Office

200 Winslow Way West, #380

Bainbridge Island, WA 98110

(206) 780-6777, tel / (206) 780-6865, fax

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BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

SPECIAL INTEREST AUTO WORKS, INC.
and TROY PETERSON, Individual,
Kent, WA

Respondents

Docket No. CWA-10-2013-0123

DECLARATION OF TROY PETERSON
IN SUPPORT OF RESPONDENTS'
MOTION FOR ACCELERATED
DECISION

I, Troy Peterson, hereby declare and state as follows:

1. I am one of the Respondents in the captioned matter and have personal knowledge of the facts and circumstances set out in this Declaration. I am competent to testify to the matters asserted herein.

2. I am the president of Special Interest Auto Works, Inc. ("Special Interest"). I am also the managing partner of Troy Peterson LLC. Troy Peterson LLC owns the subject parcel located at 25923 78th Avenue S, in Kent, Washington. The property was purchased by Troy Peterson LLC in September, 2006. A recycling business with an auto wrecking component is operated on the site. The site is neither owned nor operated by myself individually.

3. Special Interest is a Washington corporation that was duly incorporated on April 10, 1992 as set out in its Certificate of Formation and Articles of Incorporation, true and

1 accurate copies of which are found in Respondents' Initial Pre-Hearing Exchange, Exhibits.
2 RX-1, RX-2, by reference made part of this Declaration. I have been president of that
3 corporation since it began.

4 4. Troy Peterson LLC is a Washington corporation that was incorporated on
5 August 11, 2006. I have been the managing partner of that entity since it began.
6

7 5. Special Interest has been continually registered as Washington corporation and
8 has filed all necessary papers and paid all necessary taxes to remain in good standing as a
9 Washington corporation, including during the time period of August 1, 2008 through
10 October 4, 2012 referenced in the EPA's Complaint.

11 6. Special Interest has and still follows all standard procedures required for
12 corporations, including accounting and finance procedures. Federal Tax returns have been
13 submitted in the name of Special Interest, true and accurate copies of which are found in
14 Respondents' Initial Pre-Hearing Exchange, Exhibit RX 8, by reference made part of this
15 Declaration.
16

17 7. My personal funds have never been commingled with the corporate funds of
18 either company; any loans or cash infusions by me into Special Interest have been duly noted,
19 memorialized and accounted for under the corporate structure. I have always honored the
20 corporate structure with respect to both companies.
21

22 8. Contrary to the EPA's allegations in its Complaint, I do not personally own,
23 lease or otherwise control the real property that is the subject of the Complaint, nor do I
24 personally control the activities that occur on that site. Since August 11, 2006, Troy Peterson
25 LLC has been the owner of the site, and since September 2008 Special Interest has managed
26

1 operations and conducted all activity on that site. Automobiles were not stored on the site
2 until January 2009.

3 9. I deny the allegations in the EPA's Complaint, particularly that any "pollutant"
4 was ever discharged to the Green River.

5 10. I have personally examined the site on numerous occasions, and there has
6 never been any physical evidence of any stormwater flowing off-site, such as defined
7 channels or rills. Based upon public guidance provided by Ecology as well as physical testing
8 and observations by me and Mr. Ed McCarthy, a licensed professional engineer, I believe that
9 all stormwater on the site vertically infiltrates into the pervious sandy native soil to the
10 groundwater below and not by surface connection to the Green River. *See Respondents'*
11 *Initial Pre-Hearing Exchange, Exhibit RX-11 (McCarthy Analysis), by reference made part of*
12 *this Declaration. I attest the referenced exhibit is a true and accurate copy of the original.*

13 11. The Special Interest site is relatively flat and has three separate drainage
14 basins, including Basin A (northwest portion of the site), Basin B (central portion of the site)
15 and Basin C (northeast portion of the site). Each of the basins has one or more topographic
16 low spots that collect stormwater and infiltrate water into the native soil. Basin A is 0.83
17 acres; Basin B is 2.32 acres and Basin C is 0.35 acres (excluding undisturbed area at western-
18 most corner.

19 12. For the onsite basin identified in EPA's exchange as "Basin B" it is nearly
20 physically impossible for the water to emanate off site based upon depression depths of up to
21 1.5 feet and large volumes of storage capacity within the Basin. There was a low "berm"
22 along the north and east fence lines of the property during the period the EPA claims
23 "discharges" occurred. Attached hereto as **Exhibit A** is a true and correct copy of a photo the
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25
26

1 berm at the edge of the site and between the site and the Green River as it existed prior to
2 constructing a boundary road, by reference made part of this Declaration. After construction
3 of the road, the berm is now higher. This Exhibit is also found in Respondents' Initial Pre-
4 Hearing Exchange, Exhibit RX-12.

5 13. The berm was of variable but sufficient height (at least 8 inches from grade at
6 the toe of the berm) to contain all storm water collected in Basins A and C as identified in
7 EPA's exchange. The berm is located approximately 40 feet from the Green River. The
8 storage depression of Basin B is located at least 200 feet from the Green River.
9

10 14. The State of Washington Department of Ecology issued Special Interest an
11 NPDES Industrial General Permit in October, 20012, a true and accurate copy which is found
12 in Respondents' Initial Pre-hearing Exchange, Exhibit RX- 6. I note that under Guidance
13 from the Department of Ecology, coverage under the NPDES General Permit is not required
14 unless there is discharge of storm water to a surface water body, as referenced in our initial
15 pre-hearing exchange, p, 10, Note 1, and Exhibits RX-23 and RX-24, by reference made part
16 of this Declaration. I attest the referenced exhibits are true and accurate copies of the
17 originals.
18

19 I declare under penalty of perjury under the laws of the State of Washington that the
20 foregoing is true and correct to the best of my knowledge and belief.
21

22 EXECUTED this 2nd day of May, 2014 at Kent, Washington.

23 _____
24 Troy Peterson

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now, and have at all times material hereto been, a resident of the State of Washington, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent to be a witness herein.

I caused a true and correct copy of the foregoing pleading to be served this date, in the manner indicated, to the parties listed below:

<p><u>FILED WITH:</u> Sybil Anderson, Headquarters Hearing Clerk Office of Administrative Law Judges U.S. Environmental Protection Agency 1200 Pennsylvania Avenue NW / Mail Code 1900R Washington, D.C. 20460 OALJfiling@epa.gov, email</p>	<p><input type="checkbox"/> <i>Legal Messenger</i> <input type="checkbox"/> <i>Hand Delivered</i> <input type="checkbox"/> <i>Facsimile</i> <input type="checkbox"/> <i>First Class Mail</i> <input type="checkbox"/> <i>Express Mail, Next Day</i> <input checked="" type="checkbox"/> <i>Email</i></p>
<p><u>SERVED ON:</u> Christine D. Coughlin, Administrative Law Judge c/o Sybil Anderson, Headquarters Hearing Clerk Office of Administrative Law Judges U.S. Environmental Protection Agency 1200 Pennsylvania Avenue NW / Mail Code 1900R Washington, D.C. 20460 OALJfiling@epa.gov, email</p>	<p><input type="checkbox"/> <i>Legal Messenger</i> <input type="checkbox"/> <i>Hand Delivered</i> <input type="checkbox"/> <i>Facsimile</i> <input type="checkbox"/> <i>First Class Mail</i> <input type="checkbox"/> <i>Express Mail, Next Day</i> <input checked="" type="checkbox"/> <i>Email</i></p>
<p><u>SERVED ON:</u> Elizabeth McKenna, Office of Regional Counsel U.S. Environmental Protection Agency, Region 10 1200 Sixth Avenue, #900 / Mail Code OCE-133 Seattle, WA 98101-3140 (206) 553-0016, tel Mckenna.Elizabeth@epamail.epa.gov, email</p>	<p><input type="checkbox"/> <i>Legal Messenger</i> <input type="checkbox"/> <i>Hand Delivered</i> <input type="checkbox"/> <i>Facsimile</i> <input type="checkbox"/> <i>First Class Mail</i> <input type="checkbox"/> <i>Express Mail, Next Day</i> <input checked="" type="checkbox"/> <i>Email</i></p>

DATED at Bainbridge Island, Washington, this 2nd day of May, 2014.



Karen Kimzey
Legal Assistant

EXHIBIT A



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BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:
SPECIAL INTEREST AUTO WORKS, INC.
and TROY PETERSON, Individual,
Kent, WA

Respondents

Docket No. CWA-10-2013-0123
RESPONDENTS' MOTION FOR LEAVE
TO CONDUCT DISCOVERY

I. RELIEF REQUESTED

Pursuant to the EPA's Consolidated Rules of Practice, 40 C.F.R. § 22.19(e), and the Presiding Officer's Order of January 17, 2014, Respondents Special Interest Auto Works, Inc. and Troy Peterson ("Respondents") respectfully request an Order granting leave to conduct additional discovery beyond the prehearing exchange, as specified herein.

II. RELEVANT FACTS AND RESPONDENTS' LEGAL POSITION

The EPA filed two counts in its enforcement action against Respondents, which are both based on the allegations of an actual discharge of pollutants without an NPDES permit. Count 1 (Failure to Apply for a Permit) is predicated on the alleged failure to obtain a permit to discharge stormwater. Complaint ¶¶ 3.17 – 3.21 (specifically alleging violation of 33 U.S.C. § 1318, which requires the owner of a point source to obtain a NPDES permit). Similarly, Count 2 (Discharge Without a Permit) claims that pollutants were channeled and actually discharged

1 into the Green River. Complaint at ¶¶ 3.23 – 3.27 (specifically alleging violation of 33 U.S.C.
2 § 1311, which prohibits the discharge of pollutants from a point source without a NPDES
3 permit). The allegations are vigorously contested by Respondents, as set out in their Initial
4 Prehearing Exchange, Amended Answer and Affirmative Defenses.

5 Respondents believe there is no proof based upon actual observation or physical
6 evidence (such as photos or dye tests) that any stormwater emanating from the site actually
7 reached and flowed into the Green River, a water of the United States. The EPA brings this
8 case based only upon speculation, with no actual proof of a discharge to any waters. *See*
9 Respondents’ Motion For Accelerated Decision.

10 The EPA has applied a hydrologic model to predict when runoff from the site has
11 allegedly occurred. Respondents contend that the model has been misapplied and is not
12 calibrated to actual site conditions. The model uses the wrong soil type to model those soil
13 types present on the site. The model includes interflow in the surface runoff predictions
14 wherein there is little or no interflow originating from the Special Interest Auto site. The
15 model neglects surface storage provided onsite with naturally occurring surface roughness and
16 a constructed low berm that extends along the site perimeter that was installed to contain
17 runoff. Finally, EPA’s model neglects to take into account the pervious nature of the soils on
18 the site and their natural infiltration capacity.

21 **III. ARGUMENT**

22 The Court should therefore grant leave to conduct the limited written discovery set out
23 below. In an email dated March 18, 2014, counsel for the EPA refused to engage in informal
24 discovery. Thus, a directed interrogatory and request for production is required in order to
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1 obtain evidence, plus depositions. This evidence (or the lack thereof) will demonstrate the
2 relative weakness of the Complainant's case against Respondents. The discovery is also
3 necessary for Respondents to fully and fairly evaluate the possibility of resolution via
4 settlement.

5 Respondents first request leave to depose four witnesses identified by the EPA in its
6 Initial Prehearing Exchange in this matter. Witnesses Beyerlein, Oatis, Mann and Shepard
7 are listed as expert witnesses for Complainants, but have not prepared reports containing the
8 substance of the facts and opinions to which they are expected to testify and a summary of the
9 grounds for each opinion. All that Complainant provided was a brief generalized statement of
10 the subject matter on which the expert is expected to testify.

11 The narratives for these witness found in EPA's two Pre-Hearing Exchanges list
12 generalizations only as to (1) the nature and extent of impaired waters in the Green River and
13 Duwamish watershed; (2) concerns as to pollution and "cumulative" impacts; (3) how certain
14 chemicals or pollutants can affect fish life or the aquatic habitat; (4) that "...inputs,
15 assumptions, and analyses with respect to EPA's model " are "accurate and appropriate;" and
16 (5) Respondents have enjoyed "economic benefit" as an result of their alleged illegal
17 activities.

18 The language in EPA's exchanges appear to be boilerplate. There is no tie-in to the
19 activities of Respondents, that is, no supporting evidence of any nexus. There is no summary
20 or specification as to cumulative impacts or analysis of the beneficial aspects or effects of
21 existing regulatory regimes. There is no foreseeability or probability analysis of the
22 likelihood of measurable (let alone significant) impacts or the degree of possible harm to the
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1 environment caused by Respondents' activities. As to the economic and modeling topics, no
2 specifics are provided.

3 Respondents are entitled to determine if EPA has competent proof upon which expert
4 opinions can be based. If not, they can move to strike the testimony, thereby streamlining this
5 matter for hearing, and hopefully providing a reality check to the EPA such that the issues
6 raised in the Complaint can be resolved short of hearing. Respondents are also entitled to
7 sufficient detail to prepare for hearing, including cross examination.
8

9 In EPA's Rebuttal Prehearing Exchange, it lists Ms. Sandra Brozusky for first time as
10 a fact witness. According to the submittal, this witness made "observations" of the subject
11 site, but the nature of those observations is not provided. Respondents need that information
12 to prepare for hearing. The EPA's initial submittal lists Kristine Karlson and Tracie Walters
13 as fact witness, also to testify as to "observations " made at the subject site without any
14 specifics or detail.
15

16 In order for the Court to order depositions upon oral questions, the moving party must
17 show that the evidence sought cannot reasonably be obtained by other means, or that the
18 evidence might not be preserved for presentation by a witness at the hearing. 40 CFR
19 § 22.19(e)(3). Respondents have a demonstrated need to depose the four experts and three
20 fact witnesses. These witnesses are under the control of the EPA and have evidence that is
21 not available to Respondents. The depositions are necessary for Respondents to evaluate this
22 matter, defend themselves, and prepare for any settlement discussions.
23

24 Second, Respondents request leave to submit written discovery to obtain (1)
25 information as to EPA's issuance (and resolution) of civil penalties to other persons or entities
26

1 reasonably similarly situated to Respondents; (2) instances where EPA has used its
2 “Predictive Model” to support a complaint for civil penalties pursuant to the Clean Water Act;
3 and (3) details as to inputs and calibrations for the Model.

4 The requested discovery satisfies each of the requirements of the EPA’s Consolidated
5 Rules of Practice, 40 CFR § 22.19(e)(1).

- 6 • First, the additional discovery must not unreasonably delay the
7 proceeding or unduly burden the opposing party.
- 8 • Second, it must seek information within the control of the non-
9 moving party that it has not provided voluntarily.
- 10 • Finally, it must seek information that has significant probative
11 value on a disputed issue of material fact relevant to liability or
12 the relief sought.

13 The requested discovery is limited and directed at obtaining the relevant evidence
14 specified above. Because the evidence is already in the EPA’s possession and was
15 presumably relied upon by the agency in commencing the enforcement action, requiring the
16 EPA to produce this discovery will neither unreasonably delay the proceeding, nor will it
17 unduly burden the EPA. Only the EPA has the requested evidence, but it refuses to agree to
18 informal discovery.

19 The requested depositions and written discovery seek evidence that directly relates to
20 the question of whether Respondents did in fact discharge pollutants into waters of the United
21 States. That evidence is necessary in order for the Court to weigh the strength of the EPA’s
22 allegations that such occurrences took place. This evidence is of significant probative value
23 because it relates directly to facts of consequence to the case. *Chautauqua Hardware*
24 *Corporation*, EPCRA Appeal No. 91-1, 3 E.A.D. 616, 622, 1991 EPCRA Lexis 2 (CJO,
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1 Order on Interlocutory Review, June 24, 1991). Without such evidence, the EPA cannot
2 establish liability, nor can Respondents be penalized.

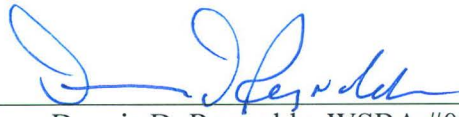
3 **IV. CONCLUSION**

4 For all the foregoing reasons, the Administrative Law Judge should grant
5 Respondents' motion for leave to conduct additional discovery on the matters set forth herein.
6

7 RESPECTFULLY SUBMITTED this 2nd day of May, 2014.

8 DENNIS D. REYNOLDS LAW OFFICE

9
10 By



Dennis D. Reynolds, WSBA #04762

*Attorneys for Respondents Special Interest Auto
Works, Inc. and Troy Peterson*

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now, and have at all times material hereto been, a resident of the State of Washington, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent to be a witness herein.

I caused a true and correct copy of the foregoing pleading to be served this date, in the manner indicated, to the parties listed below:

<p><u>FILED WITH:</u> Sybil Anderson, Headquarters Hearing Clerk Office of Administrative Law Judges U.S. Environmental Protection Agency 1200 Pennsylvania Avenue NW / Mail Code 1900R Washington, D.C. 20460 <u>OALJfiling@epa.gov</u>, email</p>	<p><input type="checkbox"/> <i>Legal Messenger</i> <input type="checkbox"/> <i>Hand Delivered</i> <input type="checkbox"/> <i>Facsimile</i> <input type="checkbox"/> <i>First Class Mail</i> <input type="checkbox"/> <i>Express Mail, Next Day</i> <input checked="" type="checkbox"/> <i>Email</i></p>
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<p><u>SERVED ON:</u> Elizabeth McKenna, Office of Regional Counsel U.S. Environmental Protection Agency, Region 10 1200 Sixth Avenue, #900 / Mail Code OCE-133 Seattle, WA 98101-3140 (206) 553-0016, tel <u>Mckenna.Elizabeth@epamail.epa.gov</u>, email</p>	<p><input type="checkbox"/> <i>Legal Messenger</i> <input type="checkbox"/> <i>Hand Delivered</i> <input type="checkbox"/> <i>Facsimile</i> <input type="checkbox"/> <i>First Class Mail</i> <input type="checkbox"/> <i>Express Mail, Next Day</i> <input checked="" type="checkbox"/> <i>Email</i></p>

DATED at Bainbridge Island, Washington, this 2nd day of May, 2014.



Karen Kimzey
Legal Assistant

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BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:
SPECIAL INTEREST AUTO WORKS, INC.
and TROY PETERSON, Individual,
Kent, WA
Respondents

Docket No. CWA-10-2013-0123
RESPONDENTS' MOTION FOR
ACCELERATED DECISION

I. RELIEF REQUESTED

Pursuant to the EPA's Consolidated Rules of Practice, 40 C.F.R. § 22.20(a), and the Presiding Officer's Order of January 17, 2014, Respondents Special Interest Auto Works, Inc. ("Special Interest") and Troy Peterson (collectively "Respondents") respectfully request issuance of an accelerated decision "without further hearing or upon such limited additional evidence, such as affidavits," because no genuine issue of material fact exists and Respondents are entitled to judgment as a matter of law. Specifically, Respondents request: (1) summary dismissal of all claims against Troy Peterson individually; (2) a summary ruling that any claims based on alleged "threatened" discharge of Special Interest Auto Works, Inc. ("Special Interest") are not cognizable under the Clean Water Act ("CWA"); and (3) summary

1 dismissal of the EPA's claim for "failure to apply for a permit," because the agency lacks
2 authority under the CWA to impose penalties on such a basis.¹

3 II. RELEVANT FACTS

4 A. Background Facts

5 This case involves allegations by the EPA that storm water from Special Interest's
6 property is leaving the site and reaching the Green River. Even though no evidence supports
7 the allegations, EPA brought this case against Special Interest and Troy Peterson individually.
8 The allegations as to Mr. Peterson's exposure to a claim of civil penalties are not specific. It
9 appears EPA's intent is to name him as a responsible corporate officer under 33 U.S.C §
10 1319(6). If the intent is to pierce the corporate veil, EPA presents no proof to allow the
11 Administrative Law Judge to make such a ruling.
12

13 Special Interest is the operator of the Special Interest Auto Wrecking facility located at
14 25923 78th Avenue S., in Kent, Washington. Declaration of Troy Peterson in Support of Motion
15 for Accelerated Decision ("Peterson" Dec.), at ¶2. Troy Peterson has been Special Interest's
16 president since its incorporation in April 1992 Peterson Dec., at ¶ 3.
17

18 In September 2006 Troy Peterson LLC purchased the site discussed in the EPA's
19 Complaint, and Special Interest began operations on the site on August 1, 2008 Peterson Dec.,
20 at ¶2. Automobiles were not stored on the site until January 2009 Peterson Dec., at ¶8. The site
21 is neither owned nor operated by Peterson individually. Mr. Peterson has always honored the
22 corporate structure Peterson Dec., at ¶7. Because Peterson reasonably believed, based upon his
23

24
25 ¹ Respondents are not moving at this time for summary judgment on the issue of actual discharge into the Green
26 River. However, Respondents request a summary ruling on the question of "threatened" discharge so as to
narrow the issues for hearing and to properly define the legal questions before the Court.

1 observations and guidance from the State of Washington Department of Ecology (“Ecology”)
2 that no permit was required where there was no discharge of storm water, it cannot be
3 established that Peterson failed to use his authority to assure compliance with laws or
4 regulations, the basis for a finding of liability by a responsible corporate officer.

5
6 Special Interest believes, based upon personal observation and guidance from Ecology
7 that all storm water on the site vertically infiltrates into the pervious sandy native soil to the
8 groundwater below Peterson Dec., at ¶10.² It therefore believes that there is no run-off from
9 the site to the Green River, and that a permit to discharge storm water is not necessary
10 Peterson Dec., at ¶14. However, in 2012 it applied for and received an NPDES Permit from
11 Ecology after Ecology contacted it and stated it believed Special Interest needed to obtain
12 coverage under the Industrial Stormwater General Permit. *Id.* It accepted that permit without
13 conceding that any discharge had emanated or was emanating from the site Peterson Dec., at
14 ¶14.
15

16 **B. The Enforcement Action**

17 On July 17, 2013, the EPA filed an enforcement action against Mr. Peterson,
18 individually, and against the corporation Special Interest. The two counts in the Complaint are
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21 ² See, e.g., *Vehicle and Metal Recyclers: A Guide for Implementing the Industrial Stormwater General National*
22 *Pollutant Discharge Elimination System Permit Requirements* (Publication no. 94-146; Revised March 2011) at
23 p. 1 (“All vehicle dismantling and recycling facilities and metal recycling facilities in Washington State **that**
24 **discharge to a surface water body**, or a storm sewer that discharges to a surface water body must obtain a
25 National Pollutant Discharge Elimination System (NPDES) Industrial Stormwater General Permit (ISWGP)
26 from the Washington State Department of Ecology (Ecology)”) (emphasis added); *Washington State Department*
of Ecology Water Quality Program: Industrial Stormwater General Permit Frequently Asked Questions, page 5
at Q13 (“Q13: My facility discharges all stormwater to ground (via infiltration basins and dry wells), **with no**
discharge to surface waters. Does this mean I qualify for a Conditional No Exposure (CNE) exemption? A13:
No, “no discharge” is different than “no exposure”. If your facility doesn’t discharge stormwater to surface
waters of the state (or a storm drain connected to surface waters of the state), your facility is exempt from the
permit, and no form or written exemption is required.”) (emphasis added).

1 based on allegations of discharge of pollutants into the Green River between August 1, 2008
2 and July 31, 2012 without an NPDES permit.

3 Count 1 (Failure to Apply for a Permit) is predicated on the alleged failure to obtain a
4 permit to discharge stormwater. Complaint ¶¶ 3.17 – 3.21 (specifically alleging violation of 33
5 U.S.C. § 1318, which requires the owner of a point source to obtain a NPDES permit).
6 Similarly, Count 2 (Discharge Without a Permit) claims that pollutants were channeled and
7 actually discharged into the Green River. Complaint at ¶¶ 3.23 – 3.27 (specifically alleging
8 violation of 33 U.S.C. § 1311, which prohibits the discharge of pollutants from a point source
9 without a NPDES permit).
10

11 The Complaint does not include any allegations of a “threat” of or potential for an
12 unpermitted discharge as a basis for enforcement action. However, the EPA’s case against
13 Respondents shows that it is based in part on “threatened” discharges of stormwater into the
14 Green River, as predicted by its model. The question of *actual* discharge of stormwater,
15 although vigorously disputed by Respondents, must be addressed at the hearing on the merits.
16

17 III. EVIDENCE RELIED UPON

18 This motion is based on: (1) the Declaration of Troy Peterson; and (2) the records and
19 files herein, including Complainant’s and Respondents’ Initial Prehearing Exchanges and
20 Exhibits, and EPA’s Rebuttal Submittal.
21

22 IV. ARGUMENT

23 A. Standard of Review

24 A motion for accelerated decision is the administrative analog to the motion for
25 summary judgment under Rule 56 (c) of the Federal Rules of Civil Procedure. *See e.g., In the*
26 *Matter of CWM Chemical Services*, Docket No. TSCA-PCB-91-0213, 1995 TSCA LEXIS 13,

1 TSCA Appeal 93-1 (EAB, Order on Interlocutory Appeal, May 15, 1995). As such, decisions
2 establishing the procedures and requirements of summary judgment provide guidance for
3 accelerated decisions under 40 C.F.R. § 22.20. The decision on a motion for summary
4 judgment or accelerated decision must be based on the pleadings, affidavits and other
5 evidentiary materials submitted in support or opposition to the motion. *Celotex Corp. v.*
6 *Catrett*, 477 U.S. 317, 324 (1986); 40 C.F.R. § 22.20(a); F.R.C.P. 56(c)
7

8 Summary judgment must be granted where the moving party demonstrates that there is
9 no issue of material fact and he is entitled to judgment as a matter of law. *Adickes v. Kress*,
10 398 U.S. 144, 157 (1970). The moving party can prevail merely by pointing out that there is
11 an “absence of evidence” to supporting the nonmoving party's case. *Celotex*, 477 U.S. at 324.
12 If the moving party meets his initial burden, the non-moving party must set forth specific facts
13 showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
14 250 (1986).
15

16 An unsupported or speculative allegation that a factual dispute exists cannot defeat a
17 properly supported motion for summary judgment. *Id.* at 256. The nonmoving party must
18 instead present "affirmative evidence" and cannot defeat the motion without offering "any
19 significant probative evidence tending to support" its pleadings. *First National Bank of*
20 *Arizona v. Cities Service Company*, 391 U.S. 253, 290 (1968).
21

22 **B. Mr. Peterson Cannot be Held Individually Liable.**

23 As discussed above and as established by Mr. Peterson’s declaration, all activities on
24 the relevant site are conducted by two corporate entities: Troy Peterson LLC and Special
25 Interest Auto Works, Inc. Mr. Peterson as an individual does not own the site, nor does he
26

1 manage it. The EPA cannot reasonably dispute these facts, so the Court should find as a
2 matter of law that Mr. Peterson cannot be individually liable to the EPA and must be
3 dismissed from this case.

4 In general, the CWA prohibits “the discharge of any pollutant by any person’ unless
5 done in compliance with some provision of the Act.” *S. Fl. Water Mgmt. Dist. v. Miccosukee*
6 *Tribe of Indians*, 541 U.S. 95, 102, 124 S.Ct. 1537, 158 L.Ed.2d 264 (2004) (quoting 33
7 U.S.C. § 1311(a)). The CWA defines the term “person” to include “any responsible
8 corporate officer.” See 33 U.S.C. § 1319(c)(6) (“For the purpose of this subsection, the term
9 ‘person’ means, in addition to the definition contained in section 1362(5) of this title, any
10 responsible corporate officer.”). However, the CWA does not define the term “responsible
11 corporate officer.” *United States v. Iverson*, 162 F.3d 1015, 1022 (9th Cir. 1998). However,
12 the 9th Circuit Court of Appeals has concluded that under the CWA, a person is a “responsible
13 corporate officer” if the person has authority to exercise control over the corporation’s activity
14 that is causing the discharges. *Id.*, at 1025.

15 Peterson cannot be liable as responsible corporate officer here because, while it is
16 clear that he possessed authority over Special Interest Auto Works, Inc.’s activities, the EPA
17 cannot demonstrate that he failed to use his authority to assure compliance with laws or
18 regulations, because Peterson believed he was assuring compliance because no permit was
19 required.

20 **C. Threatened Discharges are Not Actionable Under the CWA**

21 The plain language of the CWA only prohibits the *actual* discharge of a pollutant into
22 navigable waters without a permit. 33 U.S.C. § 1311(a); *Sackett v. EPA*, 132 S. Ct. 1367,
23
24
25
26

1 1369-70 (2012).³ The CWA specifically requires the “addition of any pollutant,” which
2 requires the EPA to prove more than a threat of discharge; the EPA must prove an actual
3 discharge. *National Min. Ass’n v. U.S. Army Corps of Engineers*, 145 F. 3d 1399, 1404 (D.C.
4 Cir 1999) (concluding that even dredged material that falls back into navigable water is not a
5 violation because the fallback material is not an addition of any pollutant). Nonetheless, the
6 EPA in its Initial Prehearing Exchange states, at page 8:

8 Several of EPA’s witnesses listed in Section I of this Prehearing
9 Exchange ... will testify that they observed conditions at the
10 Site that created a *potential* for pollutant-laden stormwater to
11 discharge from the Site to the Green River.... (emphasis added).

12 Numerous courts have confirmed that the EPA lacks authority to require discharge
13 permits under the CWA unless a facility is actually discharging pollutants into the waters of
14 the United States. *E.g. National Pork Producers Council v. EPA*, 635 F.3d 738, 750-51 (5th
15 Cir. 2011); *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 504-06 (2nd Cir. 2005). The
16 court in *National Pork Producers Council* examined the *Waterkeeper* ruling:

17 [T]he CWA is clear that the EPA can only regulate the
18 discharge of pollutants. To support its interpretation, the Second
19 Circuit examined the text of the Act. The court noted: (1) 33
20 U.S.C. § 1311(a) of the CWA "provides . . . [that] the *discharge*
21 *of any pollutant* by any person shall be unlawful," (2) section
22 1311(e) of the CWA provides that "[e]ffluent limitations . . .
23 shall be applied to all point sources of *discharge of*
24 *pollutants*," and (3) section 1342 of the Act gives "NPDES
25 authorities the power to issue permits authorizing the *discharge*
26 *of any pollutant or combination of*
pollutants." *Waterkeeper*, 399 F.3d at 504. Accordingly, the
Second Circuit concluded that in the absence of an actual

³ NPDES permits are required for stormwater discharges, “associated with industrial activity,” for stormwater discharges from municipal storm sewer systems, and for stormwater discharges that contribute to water quality violations or are otherwise “significant contributor[s] of pollutants.” *Northwest Envtl. Def. Ctr. v. Brown*, 617 F.3d 1176, 1193 (9th Cir. 2010); 33 U.S.C. § 1342(p)(2)(B) & (E).

1 addition of any pollutant to navigable waters from any point,
2 there is no point source discharge, no statutory violation, no
3 statutory obligation of point sources to comply with EPA
4 regulations for point source discharges, and no statutory
5 obligation of point sources to seek or obtain an NPDES permit
6 in the first instance. ***The Second Circuit's decision is clear:
7 without a discharge, the EPA has no authority and there can
8 be no duty to apply for a permit.***

6 635 F.3d at 750 (emphasis added). Specifically, the Supreme Court explained:

7 [T]he National Pollutant Discharge Elimination System
8 [requires] a permit for the "discharge of any pollutant" into the
9 navigable waters of the United States, 33 U.S.C. § 1342(a). The
10 triggering statutory term here is not the word "discharge" alone,
11 but "discharge of a pollutant," a phrase made narrower by its
12 specific definition requiring an "addition" of a pollutant to the
13 water.

12 *S.D. Warren Co. v. Maine Bd. of Env'tl. Protection*, 547 U.S. 370, 380-81, 126 S.Ct. 1843, 164
13 L.Ed.2d 625 (2006).

14 The scope of the EPA's authority under the CWA is strictly limited to the discharge of
15 pollutants into navigable waters. In *Natural Resources Defense Council, Inc. v.*
16 *Environmental Protection Agency*, 859 F.2d 156 (D.C. Cir. 1988), the D.C. Circuit explained
17 more than 25 years ago that the CWA "does not empower the agency to regulate point sources
18 themselves; rather, EPA's jurisdiction under the operative statute is limited to regulating the
19 discharge of pollutants." *Id.* at 170. In *Waterkeeper*, the Second Circuit confirmed that "unless
20 there is a discharge of any pollutant, there is no violation of the Act." 399 F.3d at 504. The
21 Eighth Circuit, in *Service Oil, Inc. v. Environmental Protection Agency*, 590 F.3d 545, 550
22 (8th Cir. 2009), reiterated the scope of the EPA's regulatory authority and concluded that
23 "[b]efore any discharge, there is no point source" and the EPA does not have regulatory
24 authority. As the Fifth Circuit aptly stated:
25
26

1 These cases leave no doubt that there must be an actual
2 discharge into navigable waters to trigger the CWA's
 requirements and the EPA's authority.

3 *National Pork Producers Council*, 635 F.3d at 750.

4 As set forth above, courts have unanimously and consistently ruled that the EPA may
5 not regulate on the basis of a “potential to discharge.” The Administrative Law Judge should
6 confirm in a summary determination that any allegations of the EPA against Respondents in
7 this regard are without legal basis and not cognizable under the CWA. As a matter of law,
8 “threatened” or “potential” discharges are not regulated, nor prohibited. A CWA violation
9 can only occur if a pollutant is actually added – not threatened to be added – to the Green
10 River from a point source.

11
12 **D. The EPA Cannot Impose Penalties for a “Failure to Apply for a Permit”**

13 The CWA does not provide authority for EPA to impose liability for an alleged
14 “failure to apply” for an NPDES Permit, as set forth in Count 1 of the EPA’s Complaint in
15 this case. The Fifth Circuit, in *National Pork Producers Council*, *supra*, observed:

16
17
18 33 U.S.C. § 1319 allows the EPA to impose liability if it "finds
19 that any person is in violation of any condition or limitation
20 which implements [violations of]": the discharge prohibition,
21 certain water-quality based effluent limitations, national
22 standards of performance for new sources, toxic and
23 pretreatment effluent standards, the EPA's information-
24 gathering authority, provisions permitting the discharge of
25 specific aquaculture pollutants, any permit condition or
26 limitation, and provisions governing the disposal or use of
 sewer sludge. *Notably absent from this list is liability for
 failing to apply for an NPDES permit. ...*

 [O]nly certain violations of the Act can be enforced using
 section 1319's penalties. *See* 33 U.S.C. § 1319; *see, e.g., Serv.*
 Oil, Inc., 590 F.3d at 550 ("Congress in § 1319(g)(1) granted
 EPA limited authority to assess administrative monetary

1 penalties for violations of specific statutory provisions related to
2 the core prohibition against discharging without a permit, or
3 contrary to the terms of a permit")... ***Accordingly, the***
imposition of "failure to apply" liability is outside the bounds
of the CWA's mandate.

4 635 F.3d at 752-53 (footnotes and citations omitted; emphasis added).

5 The Eighth Circuit's analysis in *Service Oil* is also instructive. In that case, the court
6 examined whether the EPA can assess administrative penalties for failing to apply for an
7 NPDES permit. There, the EPA argued that section 1318, which gives the EPA its
8 information-gathering authority, also gives the EPA power to impose liability for failing to
9 apply for an NPDES permit. 590 F.3d at 550. The Eighth Circuit rejected this argument. In
10 concluding that the EPA cannot assess such penalties, the court commented on the scope of
11 the EPA's regulatory authority. The court explained that "the agency's authority to
12 assess monetary penalties by administrative proceeding is limited to unlawful discharges of
13 pollutants." *Id.*; see also *Env'tl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 469 F.Supp.2d 803, 826
14 (N.D.Cal.2007) (finding 33 U.S.C. § 1342(p) does not authorize liability for "failure to apply"
15 for NPDES permit coverage, but only for non-compliance with permit terms).

16 The EPA may attempt to argue that its interpretation of its regulations is entitled to
17 deference. However, the Supreme Court has explained: "Agencies may play the sorcerer's
18 apprentice but not the sorcerer himself." *Alexander v. Sandoval*, 532 U.S. 275, 121 S.Ct.
19 1511, 149 L.Ed.2d 517 (2001). In other words, an agency's authority is limited to what has
20 been authorized by Congress. See *id.* As the court in *National Pork Producers Council*
21 confirmed, since the creation of the NPDES permit program, Congress has not made any
22 changes to the CWA that creates a "failure to apply" liability. 635 F.3d at 753.

1 The Administrative Law Judge should summarily dismiss Count 1 of the EPA's
2 Complaint based on an alleged failure to apply for a permit because the agency lacks authority
3 to impose penalties on such a basis. The EPA has failed to "establish a prima facie case or
4 other grounds which show no right to relief." 40 C.F.R. § 22.20(a).

5
6 **V. CONCLUSION**

7 For all the foregoing reasons, the Administrative Law Judge should grant
8 Respondents' motion for an Accelerated Decision on the three issues set forth herein.

9 RESPECTFULLY SUBMITTED this 2nd day of May, 2014.

10 DENNIS D. REYNOLDS LAW OFFICE

11
12 By 

13 Dennis D. Reynolds, WSBA #04762
14 *Attorneys for Respondents Special Interest Auto
15 Works, Inc. and Troy Peterson*


CERTIFICATE OF SERVICE

I, the undersigned, hereby certify under penalty of perjury under the laws of the State of Washington, that I am now, and have at all times material hereto been, a resident of the State of Washington, over the age of 18 years, not a party to, nor interested in, the above-entitled action, and competent to be a witness herein.

I caused a true and correct copy of the foregoing pleading to be served this date, in the manner indicated, to the parties listed below:

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<u>SERVED ON:</u> Elizabeth McKenna, Office of Regional Counsel U.S. Environmental Protection Agency, Region 10 1200 Sixth Avenue, #900 / Mail Code OCE-133 Seattle, WA 98101-3140 (206) 553-0016, tel <u>Mckenna.Elizabeth@epamail.epa.gov</u> , email	<input type="checkbox"/> <i>Legal Messenger</i> <input type="checkbox"/> <i>Hand Delivered</i> <input type="checkbox"/> <i>Facsimile</i> <input type="checkbox"/> <i>First Class Mail</i> <input type="checkbox"/> <i>Express Mail, Next Day</i> <input checked="" type="checkbox"/> <i>Email</i>

DATED at Bainbridge Island, Washington, this 2nd day of May, 2014.



Karen Kimzey
Legal Assistant