UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)
	)
	)
DR. DANIEL J. McGOWAN,	) DOCKET NO. CWA-07-2014-0060
	)
	)
Respondent	)

COMPLAINANT'S REBUTTAL TO RESPONDENT'S MEMORANDUM AND POINTS OF AUTHORITY IN OPPOSITION TO COMPLAINANT'S MOTION FOR ACCELERATED DECISION AS TO LIABILITY AND MOTION TO STRIKE

In support of its Rebuttal to Respondent's Memorandum and Points of Authority in Opposition to Complainant's Motion for Accelerated Decision as to Liability and Motion to Strike ("Respondent's Memo" or "Memo"), Complainant, the United States Environmental Protection Agency, Region VII (EPA) states as follows:

I. McGowan discharged pollutants from a point source into Plum Creek.

A. Respondent's discharges were an intentional act and not a result of "continuous flow" through Respondent's dam or a result of normal operation of the dam.

Respondent asserts in his Memo that depositions of sediment into Plum Creek were a result of "a continuous flow of *water* from upstream of a dam to downstream …" Respondent's Memo, page 11. Later in his Memo, Respondent argues that "any increase in sediment downstream of the dam was incidental to normal dam operations." Respondent's

Memo, page 12. Respondent also argues that "*water* was released in December of 2011" and "*water* was released in July 2012" and that any discharges of sediment along with the water are merely "alleged." Respondent's Memo, page 15 (emphases added). Finally, Respondent posits that there can be no "discharge of dredged material" when such material is simply passed through a "passive dam structure;" and that a dam is not a "point source" if it simply "passed material from the upside stream of the dam to the downstream side of the dam." Respondent's Memo, pages 12 and 15. Putting these arguments together, Respondent contends that any deposition of sediment by Respondent was incidental to the "passive" flow of water during "normal" dam operations. This argument necessarily fails in light of Respondent's admissions, Respondent's failure to present any evidence to support his contention and any reasonable notion of "normal dam operations."

First, Respondent's positions contradict his own admissions that his repeated acts of opening the bottom gate of his dam were both intentional and pursuant to exceptional circumstances, and not simply the result of the routine passage of water through a passive dam structure. Indeed, in an email to the U.S. Army Corps of Engineers ("Corps"), Respondent acknowledged that he had "never drained the lake once" and that he "opened the gates" and planned to keep the gates open until "the lake is completely drained." Complainant's Exhibit 10. Respondent's Prehearing Exchange says that "... the reservoir behind the McGowan dam structure contained a large amount of silt ... and any alleged passage of silt through the McGowan dam structure was necessary to relieve the stress on the structure itself." Respondent's Prehearing Exchange, Section 5. In an October 29, 2012 letter to the Corps, Respondent's attorney admitted that the gates were opened in July 2012 "for purposes of sluicing

the reservoir." Complainant's Exhibit 25. The sluicing admission is particularly relevant because it directly contradicts Respondent's Memo, which denies that sluicing took place, that sluicing events are mere allegations from Complainant, and that - if sediment discharges did occur - they were merely a result of the dam's normal operations and incidental to the release of water.

Second, Respondent's employee, Will Williams, acknowledged that Respondent's opening of the bottom gate to release sediment was a departure from Respondent's "normal dam operations." During an August 24, 2012 conversation between Mike Murphy of the Middle Niobrara Natural Resources District and Will Williams, Mr. Williams informed Mr. Murphy that Respondent was aware he needed to remove sediment above the dam, that it took two men approximately two hours to open and close the "slush gate," and that he was hesitant to close the gate because he was not sure he could get it open again (presumably due to the excess amount of sediment above the dam). Complainant's Exhibit 26.

Third, EPA's expert attests that, based on his review of the evidence, Respondent's discharges were not merely incidental to the pass-through of water from the reservoir and not in keeping with "normal dam operations" for a dam owner who wished to maintain water storage in his reservoir. In the attached Declaration from Paul Boyd, Ph.D, the Corps' Omaha District's Regional Technical Specialist for Sedimentation and Alluvial Processes, and a licensed professional civil engineer, Dr. Boyd attests that, due to the sandy conditions in the river basin in which Respondent resides, Respondent would have to flush sediment at least annually (or more frequently) if he wished to maintain water in his reservoir. Boyd Decl., Attachment 3 ¶3. Thus, to accumulate sand above a dam without release for over ten years, and then to release

sand through the bottom gates of a dam to relieve pressure, is not in keeping with "normal dam operations."

Fourth, similar to the defendants' in *Greenfield Mills,* the sand at issue in this case had settled onto the bottom of Respondent's reservoir and was added back into the River when Respondent opened the gate on his dam. As explained by the Court in *Greenfield Mills,* "it is logical to believe that soil and vegetation removed from one part of a wetland or waterway and deposited in another could disturb the ecological balance of the affected areas – both the area from which the material was removed and the area on which the material was deposited . . . excluding such dredged materials from the concept of 'addition' would effectively remove the dredge-and-fill provision from the Statute." *Greenfield Mills* at 949. *See* Complainant's Exhibit 11, which includes photos taken by Barbara Friskopp of the Corps taken on July 18, 2012, the day Respondent discharged. The photos clearly show accumulated sediment above the dam and the "dredging" of the reservoir.

The record clearly indicates that Respondent directed the opening of the bottom gate, a discrete conveyance within his dam, to release accumulated sand. Respondent's discharges were intentional and in response to an atypical situation he created by allowing the sand to accumulate over a ten-year period. Further, Respondent has presented no evidence to support his assertions that discharges of sand were incidental to the release of water and part of "normal dam operations." This is important because the absence of evidence creates no genuine issue of material fact and eviscerates a number of other arguments Respondent makes in his Memo and other filings with the Court: First, it undermines Respondent's defense that the discharges were the result of some passive "water transfer" through Respondent's dam. Respondent's Memo,

Section IV. Second, it guts Respondent's position that the sediment does not meet the definition of "discharge of dredged or fill" material because he did not "place" or "add" or "deposit" sediment. Respondent's Memo, Section I. Third, it negates the position that the dam is not a "point source" because the dam simply passed material from one side to the other. Respondent's Memo, Section II.

In addition to the factual discrepancies between Respondent's Memo and the evidence, Respondent also erroneously relies on *Gorsuch* and *Consumers Powers* in his Memo, as both can be distinguished from the present case. Unlike the defendants in *Gorsuch* and *Consumers Power*, the pollutants in the present case had settled onto the bottom of the reservoir. The sand would have remained in the reservoir, but for Respondent's opening of the lower gate on the dam to rid his reservoir of excess sand. Respondent's Memo claims Section 402's "one water" rationale of *Gorsuch* and *Consumers Power* should be extended to be applied to all sections of the CWA, particularly Section 404. Respondent Memo, page 13. However, as discussed extensively in EPA's memorandum supporting its Motion for Accelerated Decision, EPA unambiguously stated in the supporting preamble to the Water Transfers Rule that the Rule "*will not have any effect on the 404 permit program*, under which discharges of dredged or fill material may be authorized by a permit." (Emphasis added) Complainant's Memo, page 19–20.

EPA has demonstrated that Respondent's discharge of sand into Plum Creek was not incidental to any "normal dam operation," was not a result of mere water passage through the dam, and that as a matter of law, was not authorized by EPA's Water Transfer Rule. Thus, there is no genuine issue of material fact and EPA is entitled to an accelerated decision as a matter of law.

B. It is beyond dispute that Respondent's discharges resulted in significant accumulations of sediment within Plum Creek.

In his Memo, Respondent argues that his discharges do not meet the definition of "fill material" because EPA has provided "no credible evidence" that the discharges resulted in the conversion of large portions of Plum Creek from water to dry land and changed the bottom elevation of the creek. Respondent's Memo, page 11. Respondent's expert concluded that the "the effect of opening the low level discharge appeared limited and extended only up to the first upstream meander of the reservoir." Respondent's Memo, pages 18-19. Respondent argues that EPA's evidence to the contrary are based on the "subjective" findings of a downstream property owner and a fisheries biologist who manages trout populations downstream from Respondent's dam.

Even the most cursory review of EPA's evidence – which includes 100 photos from six witnesses representing five government agencies and one downstream property owner - disproves Respondent's assertions that his discharges did not result in extensive and damaging accumulations of sediment in Plum Creek. Brown County GIS satellite images from 2010 and 2014 (Complainant's Exhibit 36) clearly indicate the presence of sediment within and along Plum Creek almost two years after Respondent's 2012 discharges, and dispute the findings of Respondent's expert that "(d)ownstream accumulations of residual sediment piles were sparse to non-existent and the stream exhibited significant sediment removal since … September of 2012." Respondent's Memo, Affidavit of Dr. Gutzmer, Exhibit B, page 45. *See also,* prior Declarations from Andrew Glidden, Mike Murphy, Barry Harthoorn and Barb Friskopp, Complainant's Exhibits C11 (Barb Friskopp July 18, 2012 Inspection Report), C2, C33, C44, C45 (Andrew Glidden reports and photographs), C56.1 and 56.2 (Mike Murphy August 24, 2012 Site Visit

Report and photographs), C21 (Barb Friskopp August 24, 2012 Site Visit Report), C57 (Barry Harthoorn photographs). These photos were taken and observations were made at the time of the discharges, or shortly thereafter, and clearly demonstrate that the discharges of sand filled in significant portions of Plum Creek.

To substantiate his claims that his discharges did not result in significant accumulations within Plum Creek, Respondent relies on the findings of one report that was completed nearly a year after Respondent's July 2012 discharge based on findings in the field conducted 11 months after that discharge. However, rather than contradict EPA's allegations, the report acknowledges that Respondent's expert observed "sediment deposition" in Plum Creek below McGowan's Dam after his July 2012 discharge. Respondent's Memo, page 12.

Complainant's evidence show beyond any "subjective" observation that Respondent's discharges changed the bottom elevation of Plum Creek, converted water to dry land and were clearly beyond the "narrowly defined exempted activities" conceived in CWA Section 404(f)(1).

In addition to disproving Respondent's assertion that there is no residual accumulation of sediment in Plum Creek resulting from his discharges, Complainant's evidence also disproves Respondent's argument that the sediment does not meet the regulatory definition of "fill material" because the sediment did not result in changing the bottom elevation of Plum Creek or change water to dry land. Respondent's Memo, Section I(b).

Respondent has presented no evidence that disputes Complainant's assertions that he discharged pollutants through his dam into Plum Creek. In fact, Respondent admits through his expert's findings that sediment was indeed discharged into Plum Creek. As such, EPA is entitled to an accelerated decision concerning this issue.

II. Respondent's discharges of fill and/or dredged material are not exempt under the Act.

A. Respondent failed to meet its burden

In Respondent's Memo, he argues that Respondent's actions are exempt under the Section 404(f)(1) "maintenance exemption." Complainant continues to assert that Respondent has failed to meet its burden in establishing that his actions are exempt. As explained in Complainant's Motion for Accelerated Decision, Courts have consistently found that it is Defendant's burden to prove that its activities fall within the Section 404(f) exemptions and that its actions are not recaptured by Section 404(f)(2). See *United States v. Sargent County Water Resource Dist.*, 876 F. Supp. 1090, 1098 40 ERC 1718 (D.N.D. 1994) ("a defendant claiming an exemption under 404(f) bears the burden of proving that its activities are exempt from regulation"); *Greenfield Mills v. Macklin*, 361 F.3d 934, 949 (7th Cir. 2004) ("defendant bears the burden of establishing both that he qualifies for a section 404(f) exemption and that his actions are not recaptured by section 404(f)(2), 33 U.S.C. § 1344(f)(2)"); *United States v. Brace*, 41 F.3d 117, 124, 39 ERC 1823 (3d Cir. 1994) ("defendant bears the burden of establishing both that he qualifies for a section 404(f) exemption and that his actions are not recaptured by section 404(f)(2), 33 U.S.C. § 1344(f)(2)"); *United States v. Akers*, 785 F.2d 814, 819, 24 ERC 1121 (9th Cir. 1986), *cert. denied*, 479 U.S. 828 (1986) ("Akers must establish that his activities are exempt").

Instead of meeting his burden by presenting evidence indicating that his actions fall within a very narrow class of exemptions for activities "that cause little or no adverse effects either individually or cumulatively,[1]" Respondent makes the dubious claim that EPA has failed

1 *Greenfield Mills*, 361 F.3d 934, *citing* the Legislative History of the 404(b)(1) exemptions, 3 Legislative History 420.

to prove "significant adverse effects" from the discharges. Respondent's argument misses the mark for several reasons: First, Respondent fails to cite any legal authority, suggesting that EPA has such a burden nor is EPA aware of any such case law. The case law cited above makes clear that courts have found that Respondent bears the burden to prove that his actions are exempt. Second, as explained in EPA's Motion for Accelerated Decision, EPA has presented affidavits, reports, and over a 100 photos that clearly demonstrate the harm caused by Respondent's discharges.

B. Respondent's discharges did not cause "little or no adverse effects."

The evidence in this case is overwhelming that Respondent's discharges did not "cause little or no adverse effects, either individually or cumulatively," as intended by Congress when drafting the 404(f)(1) exemptions. 3 Legislative History 420. January 2012 photos taken by Andy Glidden of the Nebraska Games & Parks Commission clearly show how the heavy sediment load changed portions of the creek from flowing water to dry land. Complainant's Exhibits C2.2 and C.2.5. Mr. Glidden also reported in the January 17, 2012 Plum Creek Flushing Investigations Report that Respondent's discharges had devastating effects on the fish populations in Plum Creek (*see* C3, "(t)his event would have destroyed any brown trout reproduction for the year as it would have destroyed egg production from last fall. This sediment had also covered insect larvae in the substrate and the aquatic vegetation..."). In this same report, Mr. Glidden reasons that the trout may have moved ahead of the "wall of water and sand." Mr. Glidden goes on to explain that once the trout enter the Niobrara River, a warm water stream, the water temperature in the River would have proved lethal." In July and August 2012, Mr. Glidden took additional photographs of the creek that demonstrate how the sediment

impaired the flow of the creek. Attachment 2 to EPA's Motion for Accelerated Decision-Glidden Decl. ¶13; Complainant's Exhibits C44 and C45. As explained by Mr. Glidden in his Declaration, people used to be able to trout fish year round in Plum Creek as "the stream was a deep, fast moving stream that was not covered by ice during the winter." This changed after Respondent's discharges, however, as the heavy sediment loads in Plum Creek made the creek much more shallow, allowing for larger portions of the creek to be covered in ice. Attachment 2-Glidden Decl. ¶13. As further described in Mr. Glidden's Declaration, Mr. Glidden conducted a stream survey of Plum Creek in the fall of 2014 and found far less trout in Plum Creek than what had typically been found in the Plum Creek prior to the 2012 discharges. Attachment 2-Glidden Decl. ¶14.

In the Declaration from downstream property owner Barry Harthoorn in support of Complainant's Motion for Accelerated Decision, Mr. Harthoorn attests that the discharges of sand from Respondent's dam filled the swimming hole used by his family and friends and destroyed the Harthoorns' jumping board and rope swing support. Attachment 3 to Complainant's Motion for Accelerated Decision-Harthoorn Decl. ¶4 & ¶8. "Before" and "after" photos taken by Mr. Harthoorn reveal the impacts to the creek in the aftermath of the sediment release. As described in Mr. Harthoorn's declaration in support of Complainant's Motion for Accelerated Decision, the photos in Exhibit C57 (labeled 06swimhole001, 07arenswim001, 07swimaren001, and 07swimArens006) are pictures of the rope swing and jumping board, in the "swimming hole," prior to the discharges. Photos 100_1568 and DSC_0745July24,2012 and DSC_0771July26,2012 show the obliterated jumping board and rope swing support after the July discharges. Attachment 3-Harthoorn Decl. ¶4 & ¶8 and Complainant's Exhibit C57. As a

result of the discharges of sand from Respondent's dam, the Harthoorns were unable to swim and/or fish in Plum Creek for the rest of 2012, and lost several black walnut trees due to the stream bank erosion. Attachment 3-Harthoorn Decl. ¶4-6.

This type of damage to Plum Creek had been attested to by Mike Murphy of the Middle Niobrara Natural Resources District. In his Declaration in support of Complainant's Motion for Accelerated Decision, Mr. Murphy attested that Respondent's discharges impacted the flow of the creek with resulting erosion, bank cutting and property damage. Attachment 4-Murphy Decl. ¶6-7. As explained by the Court, *In Re: Polo Development, Inc.*, Docket No. CWA-05-2013-0003, for the nonmoving party to preserve its affirmative defense, it must identify "specific facts from which a reasonable fact finder could find in its favor by a preponderance of the evidence." Instead of presenting evidence in support of his claim, Respondent attempts to shift the burden to Complainant. Respondent fails to even argue in his Memo that his activities caused little adverse effects, let alone present evidence in support of such a claim. As a result, there is no genuine issue of material fact and Respondent is not entitled to its defenses as a matter of law for lack of evidentiary support.

C. Respondent was aware of alternatives for sediment removal besides discharging and never completed any repairs to his dam

Despite the fact that Respondent admitted that he never actually conducted any maintenance activities on his dam between and after his discharges, Respondent continues to argue in his Memo that he is exempt from Clean Water Act 404 requirements because he *intended* to conduct such activities. Respondent's Memo, Section VII. Further, Respondent contends in his Memo that he was unable to complete any maintenance because the Cease & Desist Orders issued by the Corps prevented him from draining all of the water from the

reservoir. These arguments are completely without merit.

The record demonstrates that Respondent's maintenance claim is merely pretext for dredging the reservoir without a permit for the following reasons. First, the photos in the record demonstrate that the July discharges drained the water from the reservoir leaving a large amount of sand behind the dam. *See* Exhibit C11 (#4-8); As explained by Barry Harthoorn, who was fighting the Fairfield Creek Wildfire at the time of the July 2012 discharges, the firefighter helicopters were unable to use water from the dam to fill their containers to fight the fire because there was no longer water above the dam. Attachment 1-Harthoorn Decl. ¶3. The record clearly demonstrates that the water level in the reservoir did not prevent Respondent from completing any maintenance on the dam as the reservoir was drained. And nothing contained in the Corps Cease & Desist Orders would have prevented Respondent from performing maintenance once the reservoir was drained.

Second, Respondent was aware of the need for dam maintenance and had explored options for removing sand above the dam, which would have allowed him to make repairs to his dam prior to and even after his 2011 and 2012 discharges, if Respondent ever intended on making those repairs. For example, Respondent admitted in an email to the Corps on February 14, 2012 that he was aware that the previous dam owners discharged sediment "every two years," but that Respondent had "never drained the lake once." Complainant's Exhibit 10. Additionally, Respondent relies on 2003 and 2008 dam safety inspection reports from the Nebraska Department of Environmental Quality to demonstrate the need for repairs on the dam. However, Respondent provides no evidence that he completed repairs, even though he was aware of the need for almost ten years after purchasing the property and prior to his discharges.

Further, as explained by Bruce Dannatt, a contractor that provided Respondent with an estimate for removal of the sand from his reservoir in the winter of 2011/2012, Mr. Dannatt explained to Will Williams that it was possible to divert Plum Creek to the north side of the channel in order to lower the reservoir and use heavy equipment to remove the sediment. Dannat Decl, Attachment 2 ¶3. Mr. Williams made a comment that Dr. McGowan had a patient who owned a gravel pit and that a gravel pumping barge could be used for disposal of sediment. Mr. Dannatt provided an initial estimate of $40,000 and informed Mr. Williams that we would "go from there" concerning additional costs for removal. Dannatt Declaration, Attachment 2 ¶1-5. The evidence demonstrates that Respondent was aware he could have managed sediment removal in a way that was much less destructive than allowing sediment to accumulate for over a decade before releasing it downstream.

Indeed, as attested by Paul Boyd, the Omaha Corps' District's chief dam engineer, Respondent had several options for removing sediment that would not result in the destructive discharges initiated by Respondent, including but not limited to, hydraulic discharge through dredging or hydrosuction, or mechanical removal of the reservoir sediment by excavation. Boyd Declaration, Attachment 3 ¶4.

Complainant's evidence is uncontested that Respondent rejected options – including ones for which he has demonstrated awareness – in favor of an inexpensive "quick fix" to his sand problem. After Respondent drained the reservoir of water, there was nothing stopping him from having a contractor mechanically remove the remaining sand and make the repairs to the dam that Respondent argues were necessary. Similar to the defendants in *Greenfield Mills*, Respondent drained his reservoir and then made no effort to repair his dam.

Respondent's argument that his activities are exempt as "maintenance" under the Act fails due to the fact that Respondent never actually performed any maintenance activities on his dam after the 2011 and 2012 discharges despite having the ability to do so. And Respondent has simply failed to assert let alone present any probative evidence to suggest that his actions caused little to no adverse harm to Plum Creek.

D. Respondent does not meet his burden of proof that his actions were not recaptured by CWA Section 404(f)(2).

In Respondent's Memo, he argues that his actions are not recaptured by Section 404(f)(2) because there is "no showing" that the purpose of the discharges was to bring a navigable water into a new use or evidence that the flow of Plum Creek was impaired. Not only does Respondent's Memo again misconstrue the burden of proof, but his Memo ignores the evidence in the record presented by Complainant. As explained in Complainant's Memorandum Supporting its Motion for Accelerated Decision, Respondent bears the burden of demonstrating both that he qualifies for a section 404(f) exemption and that his actions are not recaptured by section 404(f)(2), 33 U.S.C. § 1344(f)(2). *Greenfield Mills v. Macklin*, 361 F.3d 934, 953 (7th Cir. 2004); *United States v. Brace*, 41 F.3d 117, 124, 39 ERC 1823 (3d Cir. 1994). Again, Respondent fails to meet this burden and present any evidence indicating that his actions are not recaptured by Section 404(f)(2). Therefore, there is no material issue of fact and Respondent's defense fails as a matter of law.

Even if Respondent had presented evidence on this issue his defense would still fail, as the evidence in this case presented by Complainant indicates that his actions are recaptured by section 404(f)(2). In the *Greenfield Mills* case, the Seventh Circuit found that the defendants had failed to establish that their purpose in drawing down the supply pond was maintenance

because "many of the defendants' actions were inconsistent with their stated purpose of performing maintenance." As explained by the Court:

> After they drew down the water to expose the pipes and the dam, they did not engage in the proposed repairs immediately, but took a lunch break, drove to purchase supplies, and, indeed, never accomplished the proposed repairs on that day. Furthermore, there was evidence in the record that, prior to May 18, 1998, the defendants expressed interest in dredging the supply pond. 361 F.3d 934, 956.[2]

As described above, not only did Respondent fail to conduct maintenance on the dam on the day of the discharge, he has never completed the proposed repairs even though he had the opportunity to do so. Furthermore, there is evidence in the record that Respondent expressed interest in dredging the reservoir prior to the discharges.[3] Taken together, these actions make it evident that Respondent did not discharge sand for the purpose of making repairs to his dam. Similar to the defendants in the *Greenfield Mills* case, Respondent's reservoir had become unusable due to the build-up of sand over the past decade. *See* photos C11 and Harthoorn Declaration, Attachment 1. With respect to the "effects" prong of the recapture provision, Respondent again fails to present any evidence in support of its claim that his actions are not "recaptured," and ignores all of the evidence in the record demonstrating that the flow or circulation of Plum Creek has been impaired and that the reach of the water has been reduced. *See* photos and affidavits of Andrew Glidden, Barry Harthoorn, Mike Murphy and Barb Friskopp.

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2 Although the discussion in the *Greenfield Mills* case was with respect to holding that the defendants were not entitled to summary judgment, the court's reasoning is still applicable to this case.

3 As evidenced by the conversation Will Williams had with Mike Murphy and the accompanying affidavit from Bruce Dannatt, Respondent had been looking into ways to rid his reservoir of sand prior to his unauthorized discharges.

III. Defenses raised by Respondent have no bearing in Law

Respondent continues to argue in his Memo that the Corps represented to McGowan that a Section 404 permit was not necessary. As explained in Complainant's Motion for Accelerated Decision, not only does Complainant dispute this allegation, but it is factually and legally irrelevant. It is important to note that the January 26, 2012 conversation between Respondent and Ms. Friskopp took place 28 days *after* Respondent admitted to first opening the gates on his dam (December 28, 2011) and *after* the date that Respondent acknowledged he closed the gate on his dam (January 22, 2012). (*See* Complainant's Exhibit C25 in which Respondent's attorney provides the dates of the dam gate openings and closings.). It is evident that this conversation had no bearing on Respondent's decision to discharge sand from his dam in December 2011 and keep it open until January 22, 2012.

Respondent again fails to explain how this is a defense to liability under Section 404 of the Act. Because the CWA is a strict liability statute, Respondent's assertion that he believed that he had authorization to discharge is irrelevant. As explained by the 6th Circuit, in *United States v. Earth Sciences,* "(t)he regulatory provisions of the [CWA] were written without regard to intentionality, . . . making the person responsible for the discharge of any pollutant strictly liable . . . Willful or negligent violations of the Act are separately punishable by criminal penalties under 33 U.S.C. § 1319(c)(1)." Similarly, *In the Matter of Polo Development, Inc., et. al.,* Judge Buschmann granted EPA's Motion for Accelerated Decision with respect to Respondents' affirmative defense that the Corps authorized Respondents' discharges because Respondent's Prehearing Exchange did not provide factual evidence to support the allegation and

the CWA is a strict liability statute. Docket No. CWA-05-2013-0003.[4]

Along the same lines, Respondent continues to argue in his Memo that he acted prudently to avoid potential loss of the dam structure, but fails to cite to any legal authority that would exempt Respondent's discharges based on this assertion. As previously discussed, Respondent has failed to present any probative evidence to suggest that the discharges were necessary to avoid loss of the dam. As such, there is no genuine issue of material fact and Complainant is entitled to an accelerated decision on this issue as a matter of law.

G. Hearsay is allowed in Administrative Proceedings

Respondent contends in his Memo that certain statements made by a witness are inadmissible hearsay and should be disregarded. Respondent's Memo, Section V. However, hearsay is admissible in administrative proceedings so long as the evidence comports with 40 C.F.R. § 22.22 ("The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value ..."). ALJ Susan Biro held *in the Matter of Chem-Solv,* "the Consolidated Rules governing this proceeding do not prohibit the admission or consideration of hearsay ..." Docket No. RCRA-03-2011-0068, 2014.

H. Issues Not Disputed by Respondent

In its Motion for Accelerated Decision and Motion to Strike, Complainant sought to have the Court rule on liability or to strike concerning nine separate issues. Complainant notes that in Respondent's Memo, Respondent has not countered, nor provided any evidence to the contrary, that Plum Creek is a Water of the United States and that Respondent did not have a CWA

4 *See also, United States v. Bailey*, 571 F.3d 791 (8th Cir. 2009) (holding that liability under the CWA is strict and the government is not required to show that defendant knew his actions violated the Act); *Stoddard v. Western Carolina Regional Sewer Authority*, 784 F.2d 1200, 1208 (4th Cir. 1986) (holding that liability under the CWA is a form of strict liability).

Section 404 permit issued by the Corps. Therefore, there is no genuine issue of material fact and Complainant is entitled to accelerated decision on these issues as a matter of law.

X. CONCLUSION

As demonstrated in Complainant's Motion for Accelerated Decision as to Liability and Motion to Strike and this Rebuttal, Respondent has failed to provide evidence or legal support that he is not liable for his discharges of dredged and/or fill material into Plum Creek without a 404 permit, or that he is entitled to the defenses raised in his Prehearing Exchange. Any evidence that has been placed in the record by Respondent certainly does not give rise to any genuine issues of material facts.

EPA continues to seek a determination from the Court that it is entitled to an Accelerated Decision pursuant to 40 C.F.R. §22.20 concerning each of these issues:

1. Respondent discharged pollutants.
2. Respondent discharged dredged and/or fill material.
3. Plum Creek is a water of the United States.
4. Respondent's dam is a point source.
5. Respondent did not have a CWA Section 404 permit from the Corps.
6. Respondent's application of EPA's "Water Transfers Rule" is inapplicable as a defense in this Case and, therefore, this defense fails.
7. Respondent's affirmative defense that his discharges were necessary to avoid loss of his dam fails.
8. Respondent's affirmative defense that the Corps authorized his discharges fails.
9. Respondent's affirmative defense that his discharges were exempt from the CWA because they were necessary to maintain the dam fails.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of June, 2015, I sent via the OALJ E-filing system the original Memorandum in Support of Motion for Accelerated Decision to Sybil Anderson, the Office of Administrative Law Judges Hearing Clerk, and sent one true and correct copy via email to Mr. Stephen D. Mossman, Esq. at SDM@MattsonRicketts.com.

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Signature of Sender

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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BEFORE THE ADMINISTRATOR

IN THE MATTER OF

DR. DANIEL J. McGOWAN,	)	DOCKET NO. CWA-07-2014-0060
Respondent	)	

DECLARATION OF BARRY HARTHOORN
IN SUPPORT OF COMPLAINANT'S MOTION FOR ACCELERATED DECISION

I, Barry Harthoorn, subject to penalty of perjury, declare the following:

- My property is directly downstream of Dr. McGowan's dam.
- As stated in my prior declaration, on July 18, 2012 I observed a discharge of sand from the lower gate of Dr. McGowan's dam into Plum Creek. This discharge of sand and water continued for several days and drained the reservoir. The only water remaining in the reservoir came from the continuous flow from Plum Creek, which was low due to the drought of 2012. After the July discharges, there was no longer a sizable impoundment of water in the reservoir.
- At the time of the July discharges, I was helping to fight the Fairfield Creek Wildfire and, the firefighter helicopters were unable to use water from the dam to fill their containers to fight the fire because these was no longer impounded water behind the dam.
- Prior to the summer discharges, the reservoir was nearly full of sand. Based on my observations, only a portion of the reservoir would have been usable for boating due to the build-up of sand.
- I attest that the photographs of Plum Creek identified as Complainant's Exhibit C15,18,23,24, and 57 are photos that were either taken by myself or in my presence. The last nine photos contained in Complainant's Exhibit 41 were taken by myself or in my presence. I sent those photos to Barbara Friskopp.

The photos in Exhibit 57 (100_1528July20, 2012 and 100_1532July20,2012) show the nearly drained reservoir.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 3 day of June, 2015.

Attachment 1

6-3-2015
(Date)

Barry Hatthoorn
(Name, printed)

(Signature)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
	)	
DR. DANIEL J. McGOWAN,	)	DOCKET NO. CWA-07-2014-0060
	)	
	)	
Respondent	)	
	)	

DECLARATION OF BRUCE DANNATT
IN SUPPORT OF COMPLAINANT'S REBUTTAL

I, Bruce Dannatt, subject to penalty of perjury, declare the following:

1. I am Bruce Dannatt, owner of Frontier Diesel Inc., and do construction work in conjunction with the heavy duty truck repair.

2. Sometime in the winter of 2011/2012, I met with Will Williams, who does work for Dr. Daniel J. McGowan. Mr. Williams was inquiring about the removal of sediment above Dr. McGowan's dam.

3. I informed Mr. Williams that in my opinion it was possible to divert Plum Creek to the north side of the channel in order to lower the reservoir and remove the sediment. I informed Mr. Williams that the sediment could be removed by heavy equipment and transported away from the reservoir.

4. Mr. Williams made a comment that Dr. McGowan had a patient who owned a gravel pit and that a gravel pumping barge could be used for disposal of sediment.

5. I provided to Mr. Williams an initial estimate of $40,000 and that we would "go from there" concerning additional costs for removal.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Attachment 2

Executed on this 29 day of May, 2015.

5-29-15
(Date)

Bruce L. Dennett
(Name, printed)

(Signature)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
	)	
DR. DANIEL J. McGOWAN,	)	DOCKET NO. CWA-07-2014-0060
	)	
	)	
Respondent	)	
	)	

DECLARATION OF PAUL BOYD, Ph.D., P.E.
IN SUPPORT OF COMPLAINANT'S REBUTTAL TO RESPONDENT'S MEMORANDUM AND POINTS OF AUTHORITY IN OPPOSITION TO COMPLAINANT'S MOTION FOR ACCELERATED DECISION AS TO LIABILITY AND MOTION TO STRIKE

I, Paul Boyd, subject to penalty of perjury, declare the following:

1. I am the Regional Technical Specialist for Sedimentation and Alluvial Processes for the U.S. Army Corps of Engineers, Omaha District. I am a licensed professional civil engineer.

2. Based on my review of the evidence in this case, it is clear that the sediment deposits from Dr. McGowan's discharges were not merely incidental to the pass-through of water from the reservoir, through the dam and into Plum Creek.

3. Streams and rivers in the Niobrara River basin carry large amounts of sand due to the geomorphic conditions in the sandhills of Nebraska. This basin characteristic requires any reservoir in the basin be managed for sediment frequently. An example is Spencer Dam near Spencer, NE, downstream of Plum Creek. Reservoir sediment is hydraulically flushed at least annually (or more frequently) by the owners to maintain usable water storage in the reservoir.

4. Dr. McGowan had many alternatives for managing sediment other than discharging sediment through the bottom gates of his dam. These alternatives include, but are not limited to, hydraulic discharge through dredging or hydrosuction, or mechanical removal of the reservoir sediment by excavation. These alternatives allow for control of the rate of sediment delivery to the downstream river reach and therefore minimize impacts.

Attachment 3

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 4th day of June, 2015.

04JUN2015
(Date)

PAUL M BOYD
(Name, printed)


(Signature)