UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Kent Hoggan and Frostwood 6 LLC,	)	**Docket No. CWA-08-2017-0026**
	)	
Respondents.	)	

COMPLAINANT'S REPLY TO RESPONDENTS' OPPOSITION TO COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY

I. INTRODUCTION

On March 1, 2019, Complainant filed a Motion for Accelerated Decision on Liability (Complainant's Motion) against respondents Kent Hoggan and Frostwood 6 LLC (together, Respondents) seeking an accelerated decision on liability for a subset of the allegations of violation made in the Complaint. Specifically, Complainant was seeking a decision that: (A) Respondents violated section 301 of the Clean Water Act ("CWA") by discharging pollutants from a point source to waters of the U.S. without a permit between November 19, 2016, and April 26, 2017, and (B) Kent Hoggan violated terms and conditions of a CWA discharge permit between November 18, 2015, and November 18, 2016, and Frostwood 6 LLC violated terms and conditions of a CWA discharge permit between April 27, 2017, and the present.

On March 21, 2019, Respondents filed their joint Opposition to Complainant's Motion for Accelerated Decision (Opposition) and served the Opposition on Complainant on March 25, 2019. With their Opposition, Respondents filed affidavits by Kent Hoggan and Jake Jacobsen (together, Affidavits). Complainant submits this Reply to address Respondents' statements in their Opposition and the Affidavits. On March 28, 2019, the Regional Judicial Officer for EPA Region 8 issued a final order resolving this matter as to another respondent, Jake Jacobsen.

In their Opposition and the Affidavits, Respondents make a number of unsupported, inaccurate, or self-serving statements and raise issues immaterial to accelerated decision. Moreover, Respondents do not challenge many elements of Complainant's claims. As more fully discussed in section IV below, Respondents' Opposition and the Affidavits contain no information or facts that raise a genuine issue of material fact or otherwise prevent the Presiding Officer from granting Complainant's Motion for Accelerated Decision.

As more fully discussed in section III below, while seeking to more fully understand Respondents' contention that Mr. Hoggan never owned the Site (defined below) Complainant independently found new evidence supporting this contention. Complainant shares the view of this court that "it appears from the documentation that Mr. Hoggan submitted with his prehearing exchange that he is the sole member and manager of Frostwood 6 LLC, and that their defenses are … intertwined…." OALJ Index Document #33 at 4. In addition, while Mr. Hoggan appears to be fully responsible for all decisions and actions of Frostwood 6 LLC, and potentially liable for the obligations of Frostwood 6 LLC, Complainant has concluded on the base of this new evidence that Frostwood 6 LLC owned the Site during the entire period relevant to its Motion. Complainant, therefore, now seeks an accelerated decision against only Frostwood 6 LLC as owner of the Site, in particular that: (A) Frostwood 6 LLC violated section 301 of the CWA by discharging pollutants from a point source to waters of the U.S. without a permit between November 19, 2016, and April 26, 2017, and (B) Frostwood 6 LLC violated terms and conditions of a CWA discharge permit between November 18, 2015, and November 18, 2016, and again violated terms and conditions of a CWA discharge permit between April 27, 2017, and the present.

In Section II of this Reply Complainant addresses Respondents' rote objections to documents cited in Complainant's Motion, as well as Respondents' questions regarding the authenticity of documents cited in Complainant's Motion, even those documents Respondents provided to Complainant or to this Court. While not required, Complainant provides additional foundation for each exhibit cited in Complainant's Motion.

II. RESPONDENTS PROVIDE NO VALID OBJECTION OR OTHER BASIS FOR THE COURT NOT TO CONSIDER THE EXHIBITS SUPPORTING COMPLAINANT'S MOTION.

The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (Rules of Practice), 40 C.F.R. part 22, govern this proceeding. 40 C.F.R. § 22.20 sets forth the standard for consideration of a motion for accelerated decision:

> [t]he Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

The Rules of Practice do not restrict the type of evidence that a movant can rely upon when seeking accelerated decision. Instead, the Presiding Officer can grant accelerated decision "at any time" and "upon such limited additional evidence, such as affidavits, as [the Presiding Officer] may require[.]" *Id.* As this Court recently explained in ruling on a motion for accelerated decision, "[t]he relevant standard for the admissibility of evidence within the Rules of Practice, at 40 C.F.R. § 22.22(a)(1), provides that '[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value.'" *In the Matter of VSS International, Inc.*, 2018 WL 6930805, at *4 n.9 (ALJ 2018).

While this standard appears to allow for significantly more evidence to be admissible than the Federal Rules allow, not all information proffered by a party automatically is admissible. As this Court explained in *USA Remediation Services, Inc.*:

> While it has been said that a standard such as this used in administrative proceedings for admissibility of evidence is "somewhat lower" than that required for authentication of documents under F.R.E. 901, it nevertheless "does not completely obviate the necessity of proving by competent evidence that real evidence is what it purports to be . . . . absent any such proof, the evidence to be admitted would be irrelevant or immaterial and hence should be excluded from the proceeding."

2003 WL 733884, at *3–4 (ALJ 2003) (quoting *Woolsey v. NTSB*, 993 F.2d 516 (5th Cir. 1993) (documents requested by FAA investigations showed no signs of forgery and were admitted)).

Here, Respondents do not allege that Complainant's evidence is not "what it purports to be" or contains errors— except for CX 15, addressed below. *See id.* In addition, Respondents' misplaced hearsay and foundation objections do not preclude the Presiding Officer from considering and relying on the exhibits Complainant cited in the Motion.

A. Respondents' hearsay objections fail to establish that Complainant's exhibits cannot be considered in connection with Complainant's Motion.

In *VSS International*, this Court held "rote objections offered by Respondent" on hearsay grounds to evidence in the Complainant's motion for accelerated decision "failed to establish" the evidence did not meet the applicable admissibility standard, which is found at 40 C.F.R. § 22.22(a)(1), not in the Federal Rules of Evidence. *See* 2018 WL 6930805, at. at 4. This Court further explained:

> [n]otably, hearsay evidence is admissible in administrative hearings. *See Richardson v. Perales*, 402 U.S. 389, 402 (1971) (finding that hearsay evidence may constitute substantial evidence in an administrative proceeding). More specifically, hearsay has been found to be admissible in EPA administrative enforcement proceedings, such as this matter. *See, e.g., J.V. Peters & Co.*, 7 E.A.D. 77, 104 (EAB 1997); *Great Lakes*, 5. E.A.D. 355, 368-69 (EAB

> 1994); *Cent. Paint & Body Shop*, 2 E.A.D. 309, 311 (EAB 1987) (discussing admissibility of hearsay within the context of EPA administrative proceedings).

Id. at *4 n.9.

Respondents object to the exhibits cited in Complainant's Motion as inadmissible hearsay under the Federal Rules of Evidence. Not one of these rote objections establishes that any of the evidence is inadmissible. In fact, even assuming for argument's sake that any of the documents Complainant cites in its Motion are or contain hearsay, the evidence is admissible because it is relevant, material, probative, and neither unduly repetitious nor unreliable. 40 C.F.R. § 22.22(a)(1). Ultimately, it is up to this Court to determine the evidence's proper weight.

B. Respondents' other objections equally fail to establish that any of Complainant's exhibits cannot be considered in connection with Complainant's Motion.

A Presiding Officer can grant an accelerated decision based on a Complainant's demonstration that no genuine issue of material fact exists by citing to exhibits in the prehearing exchange. *See Erlanson*, 2018 WL 4859961, at *22 (ALJ 2018) (granting accelerated decision on CWA liability based on Complainant's citation to "the proposed evidence" in the prehearing exchange); *Polo Development, Inc.*, 2015 WL 627637, at *28 (ALJ 2015) (same).

While it is possible that an objection can establish that certain evidence does not meet the admissibility standard in 40 C.F.R. § 22.22(a)(1), and therefore should not be considered in connection with a motion, none of Respondents' rote objections establish this. Not one of Respondents' objections citing the Federal Rules of Evidence establish that any of the exhibits supporting Complainant's motion are "irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value.'" *VSS International*, 2018 WL 6930805, at *4 n.9 (quoting 40 C.F.R. § 22.22(a)(1)). Further, Respondents' objections that a fact in Complainant's Motion "lacks foundation and is not supported by any admissible sworn evidence" misapply a requirement that

a fact be supported by "sworn" evidence, like an affidavit. *See, e.g.*, OALJ Index Document #44 at 5-7, 22-27.

Complainant has already made a sufficient showing that the evidence cited in the Motion is reliable, material, and probative enough to be admissible under 40 C.F.R. § 22.22(a)(1). The Motion ties the cited exhibits to the relevant facts being discussed and demonstrates why the evidence is reliable and material. For example, Complainant's discussion of whether precipitation events at the Site resulted in stormwater runoff, a material fact, cites precipitation data for the relevant location and time period. This factual information is reliable because the National Centers for Environmental Information certified the data. Indeed, many cited exhibits contain the drafters' signatures, certifications under penalty of law, and similar indicia of reliability, materiality, and probative value in the exhibits themselves. *See, e.g.*, CX 18; CX 28.

Information in this Reply and in affidavits attached hereto provides further support for the admissibility and reliability of each exhibit Complainant cited in the Motion. First, a subset of the cited exhibits were published by state and federal agencies and are publicly available. *See* CX 3; CX 5; CX 7; CX 9-11; CX 26; CX 39; CX 75-77; CX 79; CX 81-82; CX 85-86; CX 88-89. The reliability of these exhibits speaks for itself, and Complainant respectfully asks the Presiding Officer to take judicial notice of them under 40 C.F.R. § 22.22(f). A second subset of the cited exhibits were either provided to Complainant by Respondents or were also included in Respondents' prehearing exchange.[1] *See* CX 15; CX 49-54; RX 1-8. Third, Complainant

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[1] Complainant notes that Respondents' Response and Affidavits refer to inspection reports prepared by the State, the MS4, and a certified third-party storm water inspector working on behalf of the Canyons Village Management Association (CVMA); and "inspection reports"

provides further support for the admissibility of the remainder of Complainant's cited exhibits by detailing each of these exhibits' source and reliability in affidavits attached hereto. *See* Johnson Aff. (supporting CX 5; CX 7-11; CX 13; CX 15; CX 18-21; CX 28-30; CX 39; CX 45; CX 49-54; CX 59; CX 61; CX 66; CX 78; CX 79); McCarthy Aff. (supporting CX 70; CX 75; CX 81-83; CX 85; CX 86; CX 88-91); and Monez Aff. (supporting CX 16; CX 19-21; CX 28; CX 31-32; CX 45-46; CX 66 at 22-25).

As every exhibit Complainant cited in its Motion fits one or more of the subsets above, the information in this Reply and attached affidavits provides additional support that each of these exhibits are relevant, material, reliable, and have probative value. The exhibits, therefore, can and should be considered by this Court.

III. COMPLAINANT SEEKS ACCELERATED DECISION ONLY AS TO FROSTWOOD 6 LLC.

Complainant independently has found evidence not in the record that for the first time in this proceeding shows Frostwood 6 LLC owned the Site for the entire period relevant to Complainant's Motion. Complainant, therefore, now seeks accelerated decision against only Frostwood 6 LLC for all claims in Complainant's Motion. The Presiding Officer has the authority to "[d]o all [] acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these

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prepared by Mr. Jacobsen, in RX 1-7 as evidence Respondents would like this Court to consider in support of their position. OALJ Index Document #44 at 12-14; Jacobsen Aff. ¶ 19(d). The same government and third-party inspection reports also are part of Complainant's prehearing exchange and a subset are cited in Complainant's Motion. Respondents, however, appear to object to these same documents being used by Complainant. Respondents also purport to lay a valid foundation for Mr. Jacobsen's inspection reports included in RX 1-7. But, as more fully described in section IV.1.13 below, there is considerable reason for not accepting them as reliable.

Consolidated Rules of Practice." 40 C.F.R. § 22.4(c)(10). As more fully described below, the relevant facts and arguments relating to the allegations remain the same, and neither Respondent will be prejudiced by this Court allowing such a change to Complainant's Motion. Complainant therefore requests that the Court approve this change to Complainant's Motion.

Attachment 1 to this Reply is a fully executed Special Warranty Deed that conveyed the Site from the Summit County Municipal Building Authority to Frostwood 6 LLC on August 26, 2014. Oddly, Respondents *never* provided Attachment 1 to Complainant, whether prior to the start of this matter, as part of the prehearing exchange process, or in support of their Opposition or the Affidavits. In fact, the only documents Respondents have cited to support their assertion that Mr. Hoggan has never owned the site are RX 65 through 71. However, RX 65 through RX 71 contain no fully executed documents reliably showing Frostwood 6 LLC was the Site owner from November 15, 2015, to April 26, 2017 (after which NOIs listed Frostwood 6 LLC as the sole owner). Until now, Complainant has relied on the November 18, 2015 NOI Respondents provided as the only credible source of information on Site ownership.[2]

The EPA is not required to independently search for reliable evidence to support unsubstantiated assertions by respondents in administrative proceedings such as this. But in an attempt to verify Site ownership information independent of the NOI Respondents provided to

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[2] Respondents continue to allege that its contractor incorrectly listed Mr. Hoggan as a Site owner in CX15. CX 15, however, was the best source of information available to EPA regarding site ownership, because it was provided by Respondents (Mr. Jacobsen provided Complainant with CX 15 in an email that copied Mr. Hoggan), *see* Attachment 2; Johnson Aff. ¶ 16, because a copy of the NOI comprising CX 15 was observed and photographed on-Site during the EPA's August 31, 2016 inspection, *see* Attachment 3, and because Respondents produced no other reliable evidence on the issue. *See* Sections IV.A. 5-8.

Complainant, the undersigned previously searched Summit County online property records by clicking directly on the parcels associated with the Site on the County website. This activity, however, did not lead to any relevant document, including Attachment 1.[3]

The undersigned later found Attachment 1 on March 28, 2019, by altering the parcel numbers Respondents reference in RX 65 though RX 71 and searching the Summit County property records with those modified numbers.[4] Attachment 1 was obtained from a reliable source and is the first document submitted to this Court that corroborates Respondents' assertion that Frostwood 6 LLC purchased the Site in August 2014, as well as Respondents' admission that Frostwood 6 LLC owned the Site at all relevant times. OALJ Index Document #44 at 6.

Complainant's Motion originally sought an accelerated decision that Mr. Hoggan violated permit conditions between November 18, 2015 and November 18, 2016, and that Mr. Hoggan *and Frostwood 6 LLC* discharged to a waters of the U.S. without a permit from November 19, 2016 through April 26, 2017. OALJ Index Document #41 at Sections IV.A and B. Complainant requests the Presiding Officer allow the claim of permit condition violations between November 18, 2015 and November 18, 2016 to now be asserted against Frostwood 6 LLC to fairly adjudicate the issues in this case.[5] Respondents would not be not be prejudiced by this change because Respondents have asserted multiple times that Frostwood 6 LLC owned the Site during the entire relevant time. Further, no other fact relevant to the Motion changes, or

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[3] During a call with Complainant on March 28, 2019, an employee at the Summit County Recorder's Office explained that the parcel number listed in Attachment 1 was deleted in 2016 to create the subdivided parcels that the property records map now shows at the Site.
[4] Respondents refer to parcel number "FRSTW-6-1AM-X" in RX 65 at 25, 34, but property searches using that number do not locate Attachment 1. Instead, Complainant found Attachment 1 by experimenting and searching for "FRSTW-F6-1AM."
[5] The Complaint included allegations of permit condition violations between November 18, 2015 and November 18, 2016, against Frostwood 6 LLC. OALJ Index Document #1 at ¶ 80.

requires different argument, if this change is allowed. Frostwood 6 LLC and Kent Hoggan as its sole member have had a full and fair opportunity to contest each element of Complainant's Motion.

IV. NO GENIUNE ISSUES OF MATERIAL FACT EXIST

Respondents' Opposition raises no genuine issues of material fact. As detailed below, much of Respondents' Opposition and Affidavits center on "uncorroborated self-serving statements" that "are entitled to little weight" and "hardly satisfy [Respondents'] burden as the non-moving party of providing 'substantial and probative' evidence to demonstrate that [Respondents are] entitled to a hearing[.]" *See Erlanson*, 2018 WL 4859961, at *15 (quoting *A.Y. McDonald Indus., Inc.*, 2 E.A.D. 402, 426 (EAB 1987) and *BWX Techs.*, 9 E.A.D. 61, 76 (EAB 2000))

Because Respondents concluded their Opposition with a list of allegedly disputed material facts, Complainant will reply to each numbered fact for the Presiding Officer's consideration in sections A.1-15 below. *See* OALJ Index Document #44 at 28.[6,7]

A. Respondents' list of allegedly disputed material facts.

1. Whether Kent Hoggan was ever an owner of the land/project

Complainant agrees the Kent Hoggan did not own the Site at times relevant to this case. *See* Section III above and Attachment 1.

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[6] Complainant's Motion had two citations errors. The fact that the site is approximately 4.76 acres in size is supported by Compl. ¶ 39 and Answer ¶ 39. The fact that construction activities began on approximately January 7, 2016, is supported by Compl. ¶ 40 and Answer ¶ 40.
[7] Complainant notes that throughout its Opposition Respondents make several other assertions that a material fact is in dispute. To the extent necessary, these assertions are discussed in the most relevant section of A.1-15. Complainant does not address, however, a number of assertions by Respondents that are irrelevant to a determination on Complainant's Motion.

2. **Whether Kent Hoggan performed any construction work at the Site**

Complainant agrees that no evidence has been provided to this Court that Kent Hoggan performed construction work at the Site. *See* Attachment 1.

3. **Whether Kent Hoggan engages in any construction activities that resulted in the disturbance of at least one acre**

Complainant agrees that no evidence has been provided to this Court that Kent Hoggan engaged in construction activity at the Site that disturbed at least one acre. *See id.*

4. **Whether Frostwood 6 LLC owned the land/project at all times**

Complainant agrees with Respondents' admission that Frostwood 6 LLC owned the Site at all relevant times. *See id.*; Hoggan Aff. ¶ 5; Jacobsen Aff. ¶ 8.

5. **Whether CX 15 is authentic**

CX 15 is a true and accurate copy of the Site NOI Respondents provided to Complainant. Johnson Aff. ¶ 16. On October 8, 2016, Mr. Jacobsen sent EPA inspectors Akash Johnson and Emilio Llamozas an email with the subject line, "Frostwood Townhomes NOI". Mr. Jacobsen copied Mr. Hoggan on the email. *Id.* The email is Attachment 2 to this Reply. Mr. Jacobsen's email states, "I forgot to attach the NOI that was prepared by the site contractor CBM Contractors." Attachment 2. CX 15 is a scanned printout the emails' attachment: "stormwaterConstructionNOI (1).pdf." Mr. Jacobsen's October 8, 2016 email directly contradicts his sworn statement that he "did not ever . . . see . . . the document marked CX 15."[8] *See* Jacobsen Aff. ¶ 13.

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[8] In addition, EPA Inspectors observed Respondents' display of CX 15 at the Site during EPA's August 31, 2016 inspection. CX 18 at 41. Photograph 1326 shows the first page of CX 15 displayed at the Site, CX 18 at 41, which was the only page available at the Site, *id.* at 1-2. A magnified version of the photo shows the NOI onsite is identical to CX 15 and that the NOI Respondents displayed onsite listed Kent Hoggan as Site owner. Attachment 3.

6. Who signed CX 15

Complainant agrees that no one signed CX 15, as Respondents admit. *See* OALJ Index Document #44 at 5, n.2.

7. Whether CX 15 includes accurate information

Complainant agrees that Respondents (whether through their contractor actions or not) incorrectly listed Mr. Hoggan as Site owner in CX 15. *See* Attachment 2. Respondents have not raised other particular issues regarding the accuracy of information in CX 15, so no genuine disputes of material fact concerning CX 15 exist.[9]

8. Who submitted CX 15

Who submitted CX 15 was not and is not material to the Motion. Further, as Attachment 2 reliably shows, a contractor for Respondents (Jake Jacobsen) admits on behalf of Respondent that different contractor for Respondent submitted it to the State of Utah, and Mr. Jacobsen submitted it to Complainant.

9. What the Utah DWQ did or did not do at relevant times

Without providing evidence to the contrary, Respondents dispute whether "DWQ authorised the Site's coverage under the Permit, assigning Site-specific UPDES Permit Tracking

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[9] Given that Complainant independently searched for and found evidence supporting Respondents' assertion that Mr. Hoggan did not own the property for any of the time in question, and to the extent this court accepts the transfer of the allegations against Mr. Hoggan to Frostwood 6 LLC, Complainant now only is relying on CX 15 for the following facts related to the allegations addressed in the Motion, which are also supported by other exhibits or admissions: the NOI's permit number, expiration date, and lack of a signature.

No. UTR373147." OALJ Index Document #44 at 8, 28.[10] Unquestionably, UDWQ assigned the Site the above-cited UPDES permit tracking number. Respondents' NOIs each list Permit Tracking No. UTR373147 twice in the header on the first page. CX 15 at 1; CX 29 at 1.[11] As further explained in a June 2, 2017 letter from Jeanne Riley, program manager for UDEQ's Division of Water Quality's Storm Water section and a stormwater inspector: "[t]he contractor had submitted a permit application for a Common Plan of Development Permit (UTRH80279) on April 27, 2017; however, the project is not a single lot development, therefore permit UTRH80279 was cancelled and original permit UTR373147 was renewed by DWQ." CX 30 at 1; RX 6 at 6. UDWQ provided this document to Complainant, Johnson Aff. ¶ 22, and Respondents submitted it in their prehearing exchange as RX 6 at 6-10.

Accordingly, there is no genuine dispute that "DWQ authorised the Site's coverage under the Permit, assigning Site-specific UPDES Permit Tracking No. UTR373147." Complainant demonstrated this fact with reliable evidence, while Respondents have provided no evidence to the contrary. *See* OALJ Index Document # 44 at 8; RX 6 at 6.

10. Whether the Project was under Permit at all given times

In their attempt to dispute that "Site coverage under the Permit expired on November 18, 2016," OALJ Index Document # 44 at 8-9, Respondents misapply the UPDES permit program scheme and raise immaterial issues. Respondents conflate the expiration date of the UPDES General Permit for Discharges from Construction Activities, CX 11, with the expiration date of

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[10] Complainant notes that Respondents also cited to "SOF 19" to support their dispute of what the Utah DWQ did or did not do at relevant times, but SOF 19 from Respondents' Opposition relates to when the Site's NOI coverage expired, not DWQ actions.

[11] As of Frostwood 6 LLC's May 18, 2018 NOI, the Site's Permit Tracking No. changed to UTR386641, but listed "Permit No. UTR373147" in response to the prompt: "[W]hat is the number of the previous permit coverage?" CX 51 at 33.

the Site's coverage under the Permit that was automatically issued upon UDWQ's receipt of the initial NOI, CX 15. As the Permit explains:

> to be covered under this permit, you must submit to DWQ a complete and accurate NOI and the permit fee prior to commencing construction activity. . . . To remain covered under the permit the permit fee must be submitted again once every year on the yearly anniversary of the submission date of the NOI along with a permit fee until the project is completed.

CX 11 at 6.

Respondents contest that they did not have Permit coverage between November 19, 2016, and April 26, 2017. Yet Respondents provide evidence in their prehearing exchange that corroborates the fact that the Site's initial coverage under the Permit expired on November 18, 2016, one year after the date their NOI was submitted. RX 2 at 13 ("NOI expired [*sic* expires] November 18. Renewal needed before expiration."); RX 5 at 2 ("NOI is expired. Illicit discharge is occuring during storm water runoff due to expired permit coverage").

In addition, Respondents' attempt to rely on their incorrect belief that they were covered under the Permit, and their attempt to shift responsibility to their contractors are neither material, nor relevant, as owner liability under the CWA is strict. 33 U.S.C. § 1319(g).[12] Therefore, there is no genuine dispute that Site coverage under the Permit expired on November 18, 2016.

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[12] Though Respondents do not list it as a disputed fact, their claim that no construction activity occurred during the unpermitted period is similarly immaterial and irrelevant. Even assuming it is true, Frostwood 6 LLC provided no evidence that the site was stabilized in a manner that would prevent unpermitted discharges from their construction site during the unpermitted period. *See, e.g.*, CX 11 at 1 "[p]ermit coverage is required from the 'commencement of earth-disturbing activities' ... until 'final stabilization'".

11. What the EPA inspectors did or did not do at relevant times

Respondents' argument that there is a material dispute about what EPA inspectors did or did not do at relevant times is a red herring. Whereas Complainant has submitted reliable documents describing EPA inspector activities during the relevant time (CX 18; CX 66; Johnson Aff. ¶¶ 7 and 33), Respondents have not cited to any information or evidence that creates a credible dispute about the EPA Inspectors' activities. Therefore, no genuine dispute exists as to what EPA Inspectors did at the relevant times.

12. Respondents did not list a twelfth disputed fact

13. Whether Frostwood 6 LLC and Mr. Jacobsen promptly corrected any deficiencies after notice

Respondents provide no reliable evidence to dispute Complainant's evidence that CWA and NPDES violations existed on the Site. Respondents admit to certain deficiencies, including that: Mr. Jacobsen did not have formal training or certification; a SWPPP was not provided to the EPA inspectors upon request;[13] uncontained concrete washout had occurred in the southern area of the Site; a disturbed area at final grade along the northern Site boundary remained unstabilized for over 14 days; stormwater controls were not installed in some permitted areas downgradient of disturbed soils; some stormwater controls needed maintenance or replacement; and adequate stormwater and sediment controls were not installed prior to upgradient earth disturbance. OALJ Index Document #44 at 12-13; Jacobsen Aff. ¶ 19.

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[13] Respondents falsely state that "copy of the SWPPP was always deliverable to the Site within 10 minutes as required under the applicable rules" yet Complainant's inspectors "wrote their report claiming a violation because the SWPPP was not onsite." OALJ Index Document #44 at 15; Jacobsen Aff. ¶ 19(a). Complainant simply alleges that Respondents failed to provide the SWPPP to EPA Inspectors within 72 hours, as required by Permit Part 7.3.

Complainant alleges that these and other violations existed on the Site for extended periods of time. In support, Complainant cites to direct observations recorded in multiple inspection reports prepared by federal, state, and MS4 inspectors as closely in time as possible to their inspections as evidence that violations at the Site continued for extended periods.[14] In response, Respondents now claim that all violations were corrected "within a week[.]" OALJ Index Document #44 at 28; Jacobsen Aff. ¶ 19. Respondents support this contention with Mr. Jacobsen's statements in his Affidavit and inspection reports made by Mr. Jacobsen (Jacobsen Reports), which Respondents assert are genuine and reliable.

Respondents claim that Mr. Jacobsen "kept not only all inspection reports, but also kept contemporaneous notes of all corrective action" *See* OALJ Index Document #44 at 12; Jacobsen Aff. ¶ 19(d). Mr. Jacobsen's sworn statement, however, conflicts with his statement in the consent agreement settling him out of this matter executed by him on March 13, 2019: "[r]espondent David Jacobsen admits that he did not create the Inspection Logs submitted as RX 1 through RX 7 contemporaneously with the dates listed on those logs. Instead, Respondent David Jacobsen admits he created them after the issuance of the Complaint." OALJ Index Document #47 at ¶ 2.[15]

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[14] Complainant also cites to an inspection report prepared by a third-party storm water inspector, working on behalf of the CVMA.

[15] Further, the administrative order Complainant issued to Jacobsen Construction and Frostwood 6 LLC on March 7, 2017, required those respondents to: "[b]y April 15, May 15, June 15, and July 15, 2017, provide the EPA and the UDEQ with copies of all reports documenting inspections conducted at the Site and corrective action logs for corrective actions implemented at the Site during the previous calendar month." CX 26 at 4, ¶ 35. These inspection reports were not provided to Complainant until May 2018. CX 49-54; Johnson Aff. ¶¶ 25-30; OALJ Index Document #44 at 19.

In *USA Remediation Services, Inc.* this Court explained that a party must prove "by competent evidence that real evidence is what it purports to be" and that "absent any such proof, the evidence to be admitted would be irrelevant or immaterial and hence should be excluded from the proceeding." 2003 WL 733884, at *3-4 (ALJ 2003). The Jacobsen Reports are not real evidence and this court should not rely on them.

Without real evidence to support Respondents' assertion that Mr. Jacobsen corrected all violations within a week, this unsupported assertion does not create a genuine dispute regarding the duration of violations alleged in Complainant's Motion. *See Erlanson*, 2018 WL 4859961 at *15 ("the uncorroborated claims of Respondent in his declaration hardly satisfy his burden as the non-moving party of providing "substantial and probative" evidence to demonstrate that he is entitled to a hearing on this issue.") (citing *BWX Techs.*, 9 E.A.D. at 76.)

14. Whether the Project's SWPPP was adequate or deficient

To date, Respondents have not raised any factual disputes regarding what the SWPPP contained or did not contain. Instead, Respondents raised matters of law for the Presiding Officer to decide in ruling on Complainant's Motion. For example, Respondents made an unsubstantiated denial of the SWPPP's deficiency—a legal conclusion—rather than dispute Complainant's allegations of what the SWPPP did and did not contain. OALJ Index Document #44 at 15. In addition, Respondents state they are "entitled" to rely on statements from consultants who authored the SWPPP that the SWPPP complied with applicable regulations, *id.* at 16-17, notwithstanding that liability under the CWA is strict and the Presiding Officer determines whether the SWPPP was deficient, not consultants.

15. Whether storm water and snowmelt runoff from the Site flow into any waters of the U.S.

Complainant has provided substantial, reliable evidence to show that stormwater runoff from the Site flows through multiple, separate MS4 pathways to reach MIT1 and MIT2, which are tributaries of waters of the U.S. Rather than provide opposing evidence, Respondents argue that they "believe that this is impossible." OALJ Index Document #44 at 23. Respondents base their belief on alleged advice from unknown engineers "based on percolation test estimates[,]" without providing those estimates. *Id.* at 22.[16] Respondents also make unsubstantiated, percolation claims based on a conversation with an unnamed MS4 representative, regarding an unspecified detention basin, at an unknown time. *Id.* Lastly, Respondents claim that Mr. Hoggan and Mr. Jacobsen walked the length "of every possible outflow of storm water runoff from the project, and in all events, such runoff . . . terminates miles away from East Canyon Creek[,]" without providing any supporting evidence. *Id.*; Hoggan Aff. ¶ 21; Jacobsen Aff. ¶ 24.

In contrast to the comprehensive report, expert declaration, and jurisdiction documents Complainant provided to support its position with photos, detailed observations, MS4 connectivity and outfall maps, and aerial imagery, *see, e.g.*, CX 5; CX 66; CX 91, Respondents do not provide *any* evidence to substantiate their claims. "Thus, the uncorroborated claims of Respondent[s] in [their affidavits] hardly satisfy [Respondents'] burden as the non-moving party

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[16] Respondents focus on the pathway through the Bubble-up Box, not the pathways from the Site through the MS4 that avoid the Bubble-up Box and still discharge to MIT1 and MIT2. Complainant has provided ample evidence that water overflows from the bubble-up box east of the Site and enters MIT 1; storm water from the Site enters MIT 1 and MIT 2 via separate MS4 conveyances that do not involve a bubble-up box; and that runoff from the Site reaches a water of the U.S. despite any potential percolation. CX 66; Monez Aff. ¶¶ 6, 15-23.

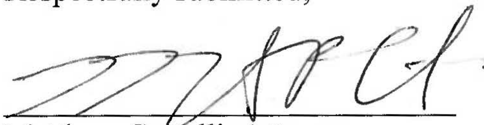
of providing "substantial and probative" evidence to demonstrate that [they are] entitled to a hearing on this issue." *Erlanson*, 2018 WL 4859961 at *15 (citing *BWX Techs.*, 9 E.A.D. at 76).

V. CONCLUSION

Complainant, having demonstrated no genuine issue of material facts exists, is entitled to judgment as a matter of law against Frostwood 6 LLC. Accordingly, Complainant requests the Presiding Officer grant Complainant's Motion and hold that: (A) Frostwood 6 LLC violated section 301 of the CWA by discharging pollutants from a point source to waters of the U.S. without a permit between November 19, 2016, and April 26, 2017, and (B) Frostwood 6 LLC violated terms and conditions of a CWA discharge permit between November 18, 2015, and November 18, 2016, and again violated terms and conditions of a CWA discharge permit between April 27, 2017, and the present.

Respectfully submitted,

4/4/19
Date



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CERTIFICATE OF SERVICE

I certify that the foregoing COMPLAINANT'S REPLY TO RESPONDENTS' OPPOSITION TO COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY, in In the Matter of Kent Hoggan and Frostwood 6 LLC, Respondents, Docket No. CWA-08-2017-0026, dated April 4, 2019, were sent this day in the following manner to the addressees listed below:

Copy by OALJ E-Filing System to:

Headquarters Hearing Clerk	Mary Angeles U.S. Environmental Protection Agency Office of Administrative Law Judges 1200 Pennsylvania Avenue, N.W. Washington, DC 20460
Presiding Officer	The Honorable Susan L. Biro U.S. Environmental Protection Agency Office of Administrative Law Judges 1200 Pennsylvania Avenue, N.W. Washington, DC 20460

Copy by email to:

Attorney for Respondents	David W. Steffensen, Esq. Law Office of David W. Steffensen, P.C. 4873 South State Street Salt Lake City, UT 84107 Email: dave.dwslaw@me.com

Dated: April 4, 2019

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