BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of: Dave Erlanson, Sr., Individual, Swan Valley, Idaho, Respondent.	DOCKET NO. CWA-10-2016-0109 **MOTIONS IN LIMINE**

Complainant Environmental Protection Agency Region 10 ("Complainant" or "EPA") respectfully moves for an order *in limine* to Preclude Irrelevant Testimony and to Exclude Certain Documents. This Motion is submitted Pursuant to 40 C.F.R. §§ 22.19 and 22.22(a)(1) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders ("Part 22 Rules"), as well as the Presiding Officer's November 5, 2018, Notice of Hearing Order ("Order").

As detailed below, and as laid out in Respondent's Prehearing Exchange, Respondent offers witnesses whose proposed testimony is related in full or in substantial part to Respondent's liability under the Clean Water Act, which was decided in the Order on Complainant's Motion for Accelerated Decision (Docket No. 38) in this case, as opposed to penalty, the subject of the hearing in this matter. Consistent with the Part 22 Rules, EPA moves for an order *in limine* barring presentation of testimony and evidence related solely to the liability portion of this case. Also, Respondent offers two exhibits that cannot meet the evidentiary standard for admissibility. Complainant moves for an order *in limine* barring the use of exhibits RX01 and RX03 at trial, consistent with the Part 22 Rules.

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Pursuant to the Order, EPA's counsel has attempted to confer with Respondent's counsel before submitting these motions, but has been unable to contact him.

STANDARD

While motions *in limine* are not addressed in the Part 22 Rules, the Rules provide that "[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value." 40. C.F.R. § 22.22(a). In such instances, when the Consolidated Rules of Practice are silent on an issue, the Presiding Officer may rely on federal court practice, specifically, the Federal Rules of Civil Procedure and the Federal Rules of Evidence, as guidance. *See In re Carroll Oil Company*, 10 E.A.D. 635, 649, (EAB 2002); *In re Wego Chem. & Mineral Corp.*, 4 E.A.D. 513, 524 n. 10 (EAB 1993). Under federal law, motions *in limine* "should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose." *Noble v. Sheahan*, 116 F.Supp.2d 966, 969 (N.D. Ill. 2000). Relevant to this Motion: "A motion *in limine* is the appropriate vehicle for excluding testimony or evidence from being introduced at hearing on the basis that it lacks relevancy and probative value." *In re Carbon Injection Systems LLC et al.*, Dkt. No. RCRA-05-2011-0009, ALJ (May 31, 2012) (Biro, C.J.) (granting Complainant's motions *in limine*).

DISCUSSION

I. Respondent should not be permitted to introduce testimony or evidence irrelevant to penalty and relevant only to the settled matter of liability.

Respondent's liability for violating the Clean Water Act has been established in this matter. Docket No. 38 at 22. Beyond offering Joseph Greene's proposed testimony on "the impact caused or not caused by [suction dredging] as well as related subjects" and another witness's proposed testimony about "the nature of discharges" from dredges, Respondent has exchanged no proposed testimony in his Prehearing Exchange, Docket No. 26, or elsewhere

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related to the matters pertinent to the assessment of a penalty in this case. As identified in the Court's Order on Accelerated Decision: "Respondent neither availed himself of the opportunity to file a revised or supplemental prehearing exchange by the deadline set by the Order dated May 9, 2017, nor sought additional leave to revise or supplement his Prehearing Exchange at any point during the protracted period of time that elapsed between that deadline and the issuance of" that Order on September 27, 2018. Given this failure to exchange any such information, the Court may, in its discretion, exclude such information from evidence, 40 C.F.R. § 22.19(g)(2).

EPA does not have reason to believe that matters of liability, though already decided in this case, will be stipulated to by Respondent. As outlined in EPA's two Status Reports and Motion for Status Conference (Dockets No. 39, 42, 43) filed since the Order on Complainant's Motion for Accelerated Decision, EPA's counsel has attempted, unsuccessfully, on at least ten separate occasions to communicate with Respondent and his counsel to discuss, among other things, the holding in the Order and the nature of the upcoming hearing, all in an effort to clarify the status of this enforcement action and discuss matters to be addressed at hearing.

Given recent changes in Respondent's representation and the consistent lack of response and incomplete exchange of information characteristic in this case thus far, EPA has no reason to believe that Respondent is willing to voluntarily limit testimony and evidence to only those items relevant to the assessment of a penalty at the hearing in this case. These concerns, taken together with the limited information exchanged thus far as well as the strong likelihood that Clean Water Act liability for unauthorized suction dredging may likely comprise the crux of testimony and evidence presented by Respondent and his proposed witnesses in the absence of a clear limiting order, support this motion *in limine* for an order barring presentation of testimony and evidence

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related solely to the liability portion of this case, and not related to the assessment of a penalty or the pertinent Clean Water Act statutory factors.[1]

For these reasons, EPA respectfully moves this Court to issue an order *in limine* limiting testimony and evidence to be offered at hearing to only those subjects relevant to the assessment of a penalty, as opposed to the arguments and subjects offered in Respondent's Prehearing Exchange and elsewhere intended to contest Respondent's liability in this matter, including but not limited to: (1) testimony and evidence related to water transfers; (2) testimony and evidence related to incidental fallback; (3) testimony and evidence related to whether suction dredging causes the discharge of a pollutant; and (4) testimony and evidence related to whether the turbid discharge emanating from suction dredges becomes suspended in water to which it is discharged. These matters are all settled, and such testimony and evidence would be irrelevant, immaterial, unduly repetitious, and of no probative value at this point in the case. Docket No. 38 at 15–20.

II. Respondent should not be permitted to introduce exhibits RX01, RX03, or related testimony because those items are immaterial, unreliable, and of little or no probative value.

Complainant respectfully moves for an Order *in limine* barring the introduction of Respondent's exhibits RX01 and RX03[2] or related testimony because those items do not meet the admissibility standards set forth in 40. C.F.R. § 22.22(a), primarily because they are irrelevant, unreliable, and of no probative value. Both RX01 and RX03 are letters to state and federal legislators advocating against the regulation of suction dredging based on arguments

[1] Those factors include the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. 33 U.S.C. § 1319(g)(3).

[2] RX01 and RX03 are attached to these Motions as Attachments A and B, respectively.

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comparable or identical to those supplied by Respondent against liability in this matter.[3] RX01 and RX03 also purport to argue that the impacts of suction dredging, a matter that is relevant at hearing, are negligible. However, those arguments are based on official reports, findings, and data that are misconstrued and misrepresented in RX01 and RX03, making even the relevant portions so unreliable as to be inadmissible pursuant to 40. C.F.R. § 22.22(a).

Although RX01 presents as a scientific report or article, it is instead a summary of opinions based on Mr. Greene's suction dredging experience and advocacy, as well as misleading excerpts of official reports and data. The apparently relevant arguments in RX01—namely that a series of official reports have found that impact from suction dredging is "less than significant"—are unreliable and, in some parts, wholly false. The primary argument of RX01 is that suction dredging itself has been shown scientifically to have a less than significant impact on the environment. RX01 sets out to do this ostensibly by citing to the findings of a series of environmental impact statements or reports prepared in advance of the issuance of various state permits for small-scale suction dredging. However, the thrust of RX01 is unsupported by even a cursory review of those reports, which are not collectively conducive to attaching to this motion. The author of RX01 argues that this collection of environmental reports uniformly finds that suction dredging has a less than significant impact to the environment, but those reports are uniformly analyzing the impacts of suction dredge mining *mitigated by a permit or program regulating the activity*. That is to say, any findings of "less than significant impact" are necessarily related to the activity only as it is regulated or governed by the proposed permitting action that is the subject of the environmental impact report or statement. This very important

[3] EPA does not here address the irrelevant portions of RX01, as those are encompassed in the first motion *in limine* laid out in Section I of this document.

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detail renders the relevant portions of RX01—those going to impact of the activity—inaccurate and misleading at hearing and to the Tribunal, and therefore unreliable pursuant to 40. C.F.R. § 22.22(a).

RX03 fares no better. That document states that suction dredging was "declared to have effects to the environment that are less than significant." RX03 at 1. Here again, Mr. Greene purports to prove that suction dredging has a less than significant impact by listing potential impacts and concluding those statements with the words "less-than-significant." This document is not peer reviewed; no apparent research or experimentation was performed in preparation of the report; no credentials have been offered to support Mr. Greene's education or expertise; Mr. Greene does not appear to have published research on these subjects; and no resume is available in evidence to support his ability to provide expert opinion. Aside from those issues, RX03 cites, without specificity, over thirty times to a California Final Subsequent Environmental Impact Report (FSEIR) to show that it purportedly found a "less than significant impact" on a range of ecosystem and water resources. The FSEIR itself does not support RX03. While the FSEIR includes, in many places, the words "less than significant," it does so only when noting, for example, that "any impacts on fish that do occur with suction dredging *authorized under the proposed regulations* will be less than significant and not deleterious." FSEIR, Responses to Cmts., at 4-19, *available at* https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=43702&inline (emphasis added). RX03 misleadingly omits that the "proposed regulations" mentioned in that FSEIR include seventeen pages of permit and regulatory requirements designed to limit the impacts of unregulated dredging. *See* FSEIR, Suction Dredge Regulations, 3-1–3-17, *available at* https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=43701&inline.

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Beyond potentially misleading this Tribunal about the actual findings of these reports, RX01 and RX03 omit other reports or developments that undermine or contradict their simplified arguments. For instance, in bullet 2 on page 2 of RX01, the author argues that the 1994 California Department of Fish & Game Final Environmental Impact Report found the impacts of suction dredging to be "less-than-significant," but cites to no portion of that Report making that finding. Further, in a manner that is severely misleading to this Tribunal, RX01 omits the fact that the California Department of Fish & Game prepared a superseding document with a contradictory basis and findings in the form of a "draft subsequent environmental impact report (DSEIR) to analyze the potential of any new significant or substantially more severe environmental impacts than were previously disclosed in an environmental impact report (EIR) prepared in 1994." Executive Summary, Draft Subsequent Environmental Impact Report, ES-1, Feb. 2011, *available at* https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=27601&inline. The 2011 DSEIR acknowledges a range of impacts not addressed by the 1994 EIR, which itself only supported the then-proposed permitting regime for suction dredging and did not find that the act of suction dredging itself is without impacts. Additionally, RX01 and RX03 both omit other legal and regulatory changes to those permitting programs, including wholesale moratoria on the activity imposed in several states, including in California.

In total, RX01 and RX03 are at worst misleading and at best unreliable. Admission of either document, given their inclusion of misleading citations and incomplete information, would unduly prejudice Complainant in a hearing, mislead the Tribunal, or confuse testimony at hearing. Should a witness wish to proffer their opinion based on observations or experience that the activity results in limited impacts, such testimony and supporting evidence would ostensibly

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be admissible. Here, however, an advocacy document disguised as an expert report including misleading and obfuscating citations and data should not be admitted at hearing.

For all of these reasons, EPA respectfully moves for an Order *in limine* barring the introduction of RX01 and RX03.

CONCLUSION

EPA moves for an Order *in limine* (1) barring presentation of testimony and evidence related solely to the liability portion of this case; and (2) barring the use of exhibits RX01 and RX03 at trial, consistent with the Part 22 Rules.

Dated this 14h day of December, 2018.

Respectfully submitted,

/s/ William M. McLaren
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **MOTIONS IN LIMINE**, dated December 14th, 2018, was filed electronically with the Clerk of the Office of Administrative Law Judges using the ALJ e-filing system, which sends a Notice of Electronic Filing to Respondent.

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

Dated this 14th day of December, 2018.

/s/ Shannon K. Connery

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