BEFORE THE
ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF: Special Interest Auto Works, Inc. And Troy Peterson, Individual, Kent, Wa Respondents,	DOCKET NO. CWA-10-2013-0123 COMPLAINANT'S RESPONSE TO RESPONDENTS' MOTION FOR ACCELERATED DECISION

I. INTRODUCTION

Respondents' filed a Motion for Accelerated Decision seeking to dismiss claims related to three issues: 1) individual liability of Troy Peterson; 2) claims based on "threatened" discharges, and 3) dismissal of EPA's claim for "failure to apply for a permit."[1] Respondents' arguments are contrary to the relevant law and unsupported by the facts of this case, and therefore their motion must be denied.

The EPA's claim against Mr. Peterson individually is supported by relevant case law, undisputed facts in the record, and admissions by Respondents in their Amended Answer that Mr. Peterson has "day-to-day operation control" of the activities at the Site.

Second, Respondents' argument pertaining to threatened discharges is based on an incorrect reading of Complainant's Prehearing Exchange. Count 2 of the Complaint is based on the EPA's allegation of actual discharges of industrial stormwater in violation of the CWA.

Third, Respondents argue that the CWA does not provide the authority for EPA to impose liability for an alleged "failure to apply" for an NPDES permit. The EPA believes

[1] Respondent's Motion for Accelerated Decision, p. 1

Respondents' legal arguments are flawed because the duty to apply for a permit is authorized by Section 308 of the CWA, and Section 309 of the CWA authorizes the EPA to impose penalties for failure to comply with Section 308 of the CWA. Further, the cases relied on by Respondents are distinguishable from this matter and the existence of material issues of fact preclude Respondents from prevailing on this Motion for Accelerated Decision with respect to failure to apply for a permit.

For the reasons set forth below, Complainant respectively requests that the Presiding Officer issue an order denying Respondents' Motion for Accelerated Decision on all three issues.

II. STANDARD OF REVIEW

Respondents filed their Motion to Dismiss pursuant to Section 22.20(a) of the Rules of Practice, 40 C.F.R. § 22.20(a). Section 22.20(a) of the Rules of Practice, concerning accelerated decisions and decisions to dismiss, provides:

> The 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 Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

"A long line of decisions by the Office of Administrative Law Judges (OALJ) and the Environmental Appeals Board (EAB), has established that "[the procedure for accelerated decision] is analogous to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure (FRCP)," and therefore summary judgment case law is appropriate guidance as

to accelerated decision.[2]

First it must be determined whether, under FRCP 56(c), the movant has met its initial burden of showing that there exists no genuine issue of material fact, by identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show[ing] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[3] "Evidence not too lacking in probative value must be viewed in the light most favorable to the party opposing the motion."[4] Inferences may be drawn from the evidence if they are "reasonably probable."[5] "Summary judgment is inappropriate when contradictory inferences can be drawn from the evidence."[6]

III. ARGUMENT

A. Liability of Troy Peterson Individually

Respondents' Motion for Accelerated Decision seeks dismissal of the EPA's claims against Mr. Troy Peterson individually. Respondents claim that "all activities on the relevant site are conducted by two corporate entities: Troy Peterson LLC and Special Interest Auto Works, Inc. Mr. Peterson as an individual does not own the site, nor does he manage it."[7] Respondents argue that even though Mr. Peterson possessed authority over Special Interest Auto Works, Inc.'s activities, Mr. Peterson cannot be held liable as a "responsible corporate officer" because Mr.

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[2] *In re Spring Crest Fuel Co., Inc.*, Docket No. CWA-3-99-0009, 2000 WL 974337 (EPA ALJ Order on Motion for Partial Accelerated Judgment, June 28, 2000) (citing *In the Matter of CWM Chemical Services, Inc.*, 6 E.A.D. 1, 12 (EAB 1995)).
[3] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting FRCP 56(c)).
[4] *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002).
[5] *Id.*
[6] *Id.*
[7] Respondent's Motion for Accelerated Decision, p. 5

Peterson believed he was not required to obtain a permit.[8] As set forth below, Respondents fail to provide grounds for the dismissal of the EPA's claims against Mr. Peterson individually. Moreover, Complainant contends that there is no controversy surrounding the fact that Mr. Peterson has "day-to-day operational control" of the activities at the Site.[9]

The CWA defines "person" to include both corporations and individuals.[10] Courts have consistently held that persons may be held responsible individually for violations of the CWA even if those persons were acting in their capacity as an employee or officer of a company that owns the property or conducts operations on that property. For example, the Presiding Officer in *In the Matter of Thomas Waterer and Waterkist Corp. d/b/a Nautilus Foods*, analyzed whether Mr. Waterer could be held jointly and severally liable with Waterkist Corporation for alleged violations of the CWA.[11] In that case, the EPA furnished evidence from respondents' answer, response to information requests, and prehearing exchange that showed Mr. Waterer was the president and manager of the corporation, owned 100% of the stock, and had personal knowledge of the facility.[12] The Court found Mr. Waterer liable as an individual and stated:

> Based on the evidence presented by the parties, there does not appear to be any genuine issue of material fact that Waterer 'had actual hands-on control of the facility's activities, [was] responsible for on-site management, corresponded with regulatory bodies, and [was] directly involved in the decisions concerning environmental matters.'[13]

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[8] Respondents' Motion for Accelerated Decision, p. 6.
[9] Complaint ¶ 3.2; Amended Answer ¶ 3.2.
[10] 33 U.S.C. 1362(5); Respondents refer to the term "responsible corporate officer." This term is only used in the definition of "person" in the context of penalties for criminal violations under the CWA. Section 309(c)(6) of the CWA states, "For the purpose of this subsection, the term "person" means, in addition to the definition contained in Section 1362(5) of this title, any responsible corporate officer." Since this is not a criminal matter, EPA does not need to prove that Respondent Troy Peterson is a responsible corporate officer.
[11] Docket No. CWA-10-2003-0007 (EPA ALJ, January 28, 2004)(Order on Complainant's Motion for Accelerated Decision).
[12] *Id.* at pg. 4-5.
[13] *Id.* at 5.

Similarly, in *U.S. v. Gulf Park Water Co.*, the district court found that, in addition to the wastewater facility and its parent company, the individuals who owned and operated the facility were liable for violations of the CWA, stating that individuals can be liable for violations of the Act where they participated in or were responsible for the violations, even when the individuals acted through a corporate entity.[14]

Looking now to the instant matter, assuming that all of the other elements of liability are successfully proven by the EPA at trial, Respondents' admissions in the Amended Answer form, in and of themselves, a basis for seeking to hold Mr. Peterson liable individually. Special Interest Auto Works, Inc. and Mr. Peterson admit to the following allegation in the Complaint: "Respondent Troy Peterson is an individual who, at all times relevant to the Complaint, either owned, leased or otherwise controlled all real property that is the subject of this Complaint and/or otherwise controlled the activities that occurred on such property."[15] Respondents also admit that Special Interest Auto Works, Inc. and Mr. Troy Peterson have day-to-day operational control of activities which occur at the Site.[16] Given these admissions, it is clear that Mr. Peterson possessed the requisite authority and control over Special Interest Auto Works, Inc.'s operations to be considered individually liable under the CWA for the violations alleged in the Complaint.

Additionally, there are several facts in the record that support a finding of individual liability: Mr. Peterson is President of Special Interest Auto Works;[17] he is the only officer and

[14] 972 F. Supp. 1056, 1063 (S.D. Miss. 1997).
[15] Amended Answer ¶ 3.1.
[16] Amended Answer, ¶ 3.2.
[17] CX-09, p. 3; Respondents' Prehearing Exchange, p. 3.

holds a 100% ownership interest in the company;[18] the company's business license names Mr. Peterson as the "governing" person for the corporation;[19] an employee of the facility told EPA that government regulators were not allowed access to the Site unless Mr. Peterson was on-site;[20] when seeking entry to Site, EPA negotiated directly with Mr. Peterson, not the manager of the Site;[21] the Storm Water Pollution Plan (SWPPP) states that Mr. Peterson is responsible for SWPPP updates, confirming BMP implementation and effectiveness, and DMR reporting;[22] Mr. Peterson signed the certification in the SWPPP that states the SWPPP and all attachments were prepared under his direction or supervision.[23] Clearly, Mr. Peterson has the requisite authority to exercise control over the corporation's activity that is causing the discharges, thereby establishing the basis for individual liability for violations of the CWA.

Respondents' argument that Mr. Peterson cannot be liable as a "responsible corporate officer" because he believed that no permit was required is without merit. The provisions of the CWA at issue in this matter were written without regard to intentionality, making the person responsible for the discharge of any pollutant strictly liable.[24] As stated by the Court in *U.S. v. Earth Sciences*, the CWA would be severely weakened if only intentional acts were proscribed.[25] Therefore, Respondents' beliefs, whether reasonable or unreasonable, are irrelevant to its liability under the CWA.

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[18] RX-8, p. 4-5.
[19] CX-03.
[20] CX-05, p. 4.
[21] *Id.*
[22] RX - 3, p. 5.
[23] RX – 3, p. 46.
[24] 33 U.S.C. §1311. As stated above, Respondents incorrectly rely on the definition of "responsible corporate officer" in 33 U.S.C. § 1319(c)(6), which is only applicable to the subsection dealing with criminal penalties for negligent and knowing violations.
[25] 599 F.2d 368, 374 (10th Cir. 1979)

B. The EPA Alleged Actual Discharges from the Facility

Respondents interpret a statement in Complainant's Prehearing Exchange to mean that the EPA is seeking a judgment of liability and penalties for *potential* discharges. Respondents' interpretation is in error. The EPA is not alleging liability for a potential to discharge. The Complaint unambiguously states, "activities and associated conditions at the Site resulted in the discharge of pollutants in 'stormwater associated with industrial activity' to the Green River."[26] EPA recognizes that whether or not there was a discharge is a genuine issue of material fact that is in dispute. At hearing, EPA will prove through testimony of its fact and expert witnesses and other evidence that Respondents actually discharged pollutants into the Green River.

The statement that Respondents' cite to suggest EPA is alleging a threatened discharge merely describes the expected testimony of certain witnesses who observed site conditions indicating that there was a potential for discharge at the Site.[27] Complainant will use this testimony at hearing as circumstantial evidence that actual discharges of pollutants into waters of the United States occurred at the Site. As noted by the Environmental Appeals Board in *In re Robert Wallin*, a discharge in violation of the CWA may be proved by circumstantial evidence of a discharge.[28]

EPA will present additional evidence at hearing that proves actual discharges ocurred. In the same sentence that Respondents cite as a basis for their Motion for Accelerated Decision on "threatened discharges," Complainant's Initial Prehearing Exchange states that EPA's witnesses

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[26] Complaint, ¶ 3.23.
[27] Complainant's Initial Prehearing Exchange, p. 8.
[28] 10 E.A.D. 18, 32-33 (EAB 2001)(citing *Concerned Area Residents for the Environment v. Southview Farm,* 34 F.3d 114 (2d Cir. 1994) (holding that evidence of discharge of liquid manure to a navigable water from a point source may be proved by circumstantial evidence)).

"will testify regarding an observed discharge from the Site."[29] Additionally, EPA's expert witnesses will testify regarding surface and subsurface discharges based on EPA's hydrologic modeling of the Site.[30] As noted in Complainant's Rebuttal Prehearing Exchange, courts have upheld the use of hydrologic modeling as a basis for establishing the number of discharges in violation of the CWA.[31]

C. Respondents are Liable for Failure to Apply for a Permit

Respondents argue that the CWA does not provide the authority for EPA to impose liability for an alleged "failure to apply" for an NPDES permit.[32] The EPA believes Respondents' legal arguments are flawed because Section 309 of the CWA authorizes the EPA to impose penalties for failure to apply for a permit, and the cases relied on by Respondents are distinguishable. Further, the existence of material issues of fact preclude Respondents from prevailing on this Motion for Accelerated Decision with respect to failure to apply for a permit.

1. Section 309 of the CWA authorizes the EPA to impose penalties for failure to apply for a permit.

Pursuant to Section 308, as well as to its other authorities under the Act, EPA promulgated National Pollutant Discharge Elimination System (NPDES) permit regulations that require the submission of permit applications containing information necessary for effective administration of the NPDES program.[33] NPDES regulatory agencies use information submitted by dischargers to make informed decisions about a particular water body and to support the

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[29] Complainant's Initial Prehearing Exchange, p. 8 (citing EPA's Inspection Reports, CX-05 and 06).
[30] *Id.* (citing Dr. Marshalonis's expert report, CX – 30).
[31] Complainant's Rebuttal Prehearing Exchange, p. 8; s*ee In Re Leed Foundry, Inc.*, Docket No. CWA-03-2004-006 (April 24, 2007) (EPA's use of modeling to extrapolate multiple discharges accepted by the Court); *see also*, *In re Service Oil Co.*, Docket No. CWA-08-2005-0010 (August 3, 2007) (expert testimony regarding stormwater runoff from construction site that was based on computer modeling held to be reliable evidence of discharge).
[32] Respondent's Motion for Accelerated Decision, p. 9
[33] See 40 C.F.R. § 122.21(a)(1)("Any person who discharges or proposes to discharge pollutants . . . and who does not have an effective permit, except persons covered by general permits under §122.28, . . . must submit a complete application to the Director in accordance with this section and part 124 of this chapter. . . .").

development of future permitting activities. In the absence of an enforceable duty to submit this information, the EPA or the State would have to investigate thousands of individual dischargers to determine whether they needed permit coverage. These permit application requirements thus fall within the ambit of EPA's information-gathering authority under CWA Section 308(a).[34] Therefore the failure of a discharger of stormwater associated with industrial activities to comply with these permit applications requirements constitutes a violation of CWA Section 308, 33 U.S.C. § 1318(a), as implemented through 40 C.F.R. §122.21. Section 309 of the CWA[35] sets forth a variety of enforcement mechanisms to address violations of the CWA, including violations of Sections 301 and 308. Thus, Respondents in this case can be held liable for their failure to provide information in a notice of intent to apply for a general permit or an individual permit application under CWA Section 308(a)[36] and 40 C.F.R. § 122.21, and are subject to the assessment of civil penalties pursuant to Section 309.[37]

2. The case law cited by Respondents in support of their legal arguments are inapposite.

Respondents rely on two cases, *National Pork Producers Council v EPA*[38] (hereinafter "*NPPC*") and *Service Oil v. EPA*[39] (hereinafter "*Service Oil*"), to support their position that EPA cannot impose penalties for failure to apply for a permit. Neither of these decisions is determinative in this case. In *Service Oil*, a construction site operator appealed the assessment of an administrative penalty for failure to apply for a permit prior to the commencement of construction, arguing that "failure to apply for an NPDES permit prior to construction in the time

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[34] 33 U.S.C. § 1318(a); *see e.g.,* NRDC v. EPA, 822 F.2d 104, 119 (D.C. Cir. 1987)("the statute's sweep is sufficient to justify broad information disclosure requirements"); United States v. Allegheny Ludlum Corp., 366 F.3d 164, 175 (3d Cir. 2004) (recognizing EPA's ability to implement Section 308(a) through broad, nationwide regulations).
[35] 33 U.S.C. § 1319.
[36] 33 U.S.C. § 1318(a).
[37] 33 U.S.C. § 1319.
[38] 635 F.3d 738 (5th Cir. 2011).
[39] 590 F. 3d 545 (8th Cir. 2009).

prescribed by EPA's permit regulations does not violate §1318 and therefore cannot be the basis of a civil monetary penalty under 1319(g)(1)."[40] The Eight Circuit concluded that that EPA could not seek administrative penalties for a violation of Section 308 prior to the existence of a point source and remanded the case to EPA.[41]

Since the decision in *Service Oil* turned on the enforcement of the permit application requirement prior to the existence of a point source, it is readily distinguishable from the instant case. Here, Respondents were the operators of a facility that discharged pollutants prior to Respondents obtaining coverage under Washington's Industrial Stormwater General Permit ("ISGP"). On March 29, 2012, the EPA observed a discharge of stormwater laden with pollutants leaving the Site and flowing onto a steep embankment to the Green River.[42] The EPA alleges, and Respondents admit, that they did not obtain coverage under the ISGP until October 9, 2012.[43] There is no dispute that a discharge of stormwater carrying pollutants off the Site occurred, and that it occurred prior to Respondents obtaining a permit for such discharges.

Respondents' reliance on *NPCC* for the proposition that the EPA cannot impose a penalty pursuant to CWA Section 309 for failure to obtain a permit is also misguided. *NPCC* concerned regulations requiring concentrated animal feeding operations (CAFOs) that "discharge or propose to discharge" to seek NPDES permit coverage.[44] In *NPPC*, the Fifth Circuit considered a challenge to EPA's revised CAFO regulations codified at 40 C.F.R. § 122.23, not the general "duty to apply" provisions of 40 C.F.R. § 122.21(a), nor the provisions of 40 C.F.R.

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[40] *Id.* at 549.
[41] *Id.* at 551.
[42] CX-06, pp. 3-4.
[43] Amended Answer, p. 7, paragraph 3.19, and p. 8 paragraph 3.20.
[44] 635 F.3d 738, at 745.

§ 122.26(c)(1) on which the EPA's allegations are based. The Fifth Circuit held that only CAFOs that actually discharge can be required to apply for a permit. EPA's alleges in the instant case that Respondents discharged stormwater associated with industrial activities for a minimum of approximately five months prior to the date that they obtained a permit.[45] For such existing dischargers, the Fifth Circuit recognized EPA's authority to impose application requirements: "[I]t is within the EPA's province, as contemplated by the CWA, to impose a duty to apply on CAFO's that are discharging."[46]

Finally, it should be noted that neither *Service Oil* nor *NPPC* is binding in this case and neither decision affected the validity of the statutory and or regulatory provisions at issue in this case.

3. There are genuine issues of material fact that prevent Respondents from meeting their burden of proof

Respondents cannot meet their burden of demonstrating that there are no genuine issues of material fact related to the issue of Respondents' failure to obtain a permit. Respondents cannot prevail on a motion for accelerated decision because Respondents' legal argument for dismissing Count 1 of the Complaint is inextricably tied to the disputed issue of material fact as to whether a discharge occurred prior to the time that Respondents obtained permit coverage. EPA alleges, and will present evidence at hearing to prove, that the discharges did reach the Green River, and that discharges occurred prior to the time that Respondents obtained permit

[45] This represents the time between the inspection during which the discharge was observed and the date Respondents were covered under the ISGP. The EPA would argue that the period in which Respondents discharged without a period extended for almost five years because, the EPA's stormwater modeling proves discharges occurred as early August 1, 2008.
[46] 635 F.3d at 751.

coverage. Conversely, Respondents deny that they have discharged pollutants via stormwater to the Green River. Statements in the Declaration of Troy Peterson regarding discharges paradoxically highlight the factual issues in dispute.[47] Since the issue of a discharge is in dispute, a motion for accelerated decision to dismiss the EPA's claim of failure to obtain a permit must be denied.

IV. CONCLUSION

For the foregoing reasons, the Presiding Officer should deny Respondents' Motion for Accelerated Decision.

RESPECTFULLY SUBMITTED this 19th day of May, 2014.

/s/

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[47] Complainant also notes that Mr. Peterson's statements related to discharge are not appropriate for a fact witness. The Federal Rules of Evidence prohibit lay witnesses from providing opinion testimony unless the proffered opinion is "rationally based on the perception of the witness." Fed. R. Evid. 701. Many of Mr. Peterson's statements regarding discharge appear to be opinions that may only be given by a witness who is "qualified as an expert by knowledge, skill, experience, training, or education." Fed. R. Evid. 702. For example, Mr. Peterson states, "I believe that all stormwater on the site vertically infiltrates into the pervious sandy native soil to the groundwater below and not by surface connection to the Green River." Declaration, ¶ 10. Complainant plans to file a motion in limine to strike testimony to the extent that it does not comply with Fed. R. Evid. 701 and Fed. R. Evid. 702.

Certificate of Service

The undersigned certifies that the attached **Complainant's Response to Respondents' Motion for Accelerated Decision**, dated May 19, 2014, In the Matter of Special Interest Auto Works, Inc. and Troy Peterson, Docket No. CWA-10-2013-0123, was filed with the Office of Administrative Law Judges and Respondents' counsel, Dennis Reynolds, Esq. via email at the following email addresses:

Sybil Anderson, EPA Headquarters Hearing Clerk: OALJfiling@epa.gov
Dennis Reynolds, Esquire: dennis@ddrlaw.com

DATED this 19th Day of May, 2014.

/s/
Elizabeth McKenna
Assistant Regional Counsel

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10

IN THE MATTER OF: Special Interest Auto Works, Inc. and Troy Peterson, an Individual Kent, WA Respondents.	**COMPLAINANT'S RESPONSE OPPSOING RESPONDENTS' MOTION FOR LEAVE TO CONDUCT DISCOVERY** **Docket No. CWA-10-2013-0123**

I. INTRODUCTION

Before the Presiding Officer is Respondents' motion for leave to conduct discovery ("Motion for Discovery") pursuant to Section 22.19(e) of EPA's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ("Rules of Practice"). Respondents' broad request for additional discovery beyond the Prehearing exchange to depose seven of Complainant's witnesses and obtain three items of written discovery fails to meet the restrictive standard for discovery under Section 22.19(e) and should be denied.

First, Respondents' request to depose seven of Complainant's witnesses fails to meet the requirements of Section 22.19(e)(1) because Complainant has already provided its Prehearing Exchanges the information that Respondents seek, including a brief summary of each witnesses' testimony and the exhibits that those witnesses will rely on at hearing. Accordingly, depositions in this matter are unnecessary and would unreasonably delay the proceedings. Further, Respondents make no attempt to explain why, as required by Section 22.19(e)(3), the information they seek in deposing Complainant's witnesses cannot be obtained through other means of discovery or why the information may not be preserved for presentation by a witness at hearing. Respondents' vague and open-ended request for depositions appears to be nothing more

than an attempt to obtain a detailed recitation of Complainant's witnesses' testimony prior to hearing, in spite of the fact that Complainant already provided the relevant information in its two Prehearing Exchanges.

Second, Respondents seek written discovery to obtain information regarding Complainant's: 1) issuance of civil penalties in other cases; 2) use of its hydrologic model in other cases; and, 3) "inputs and calibrations" for the hydrologic model. Complainant's issuance of civil penalties and use of its hydrologic model in other cases, have no bearing whatsoever on any issue of material fact in this matter and therefore do not have "significant probative value" within the meaning of Section 22.19(e)(1). With respect to inputs and calibrations for Complainant's hydrologic model, once again, fail to meet the requirements of Section 22.19(e)(1) because Complainant already provided this information to Respondents in its Prehearing Exchanges, including Dr. Marshalonis's 98-page expert report.

For these reasons, Respondents' Motion for Discovery should be denied.

II. STANDARD OF REVIEW

The Environmental Appeals Board ("EAB") stated in *Tennessee Valley Authority* that the standard for discovery under the Rules of Practice is more restrictive than that under the Federal Rules of Civil Procedure.[1] In contrast to the extensive and time-consuming discovery that takes place in practice before the Federal courts, the discovery procedure in administrative proceedings under the Rules of Practice is intentionally abbreviated and accomplished principally through the prehearing exchange and the ability to cross-examine witnesses at the hearing.

[1] CAA Docket No. 00-6, 2000 EPA App. LEXIS 22, *5 (EAB, Rulings and Guidelines on Discovery, June 29, 2000).

Section 22.19(e) of the Rules of Practice provides that the Presiding Officer may order discovery only if it:

> (i) Will neither unreasonably delay the proceeding nor unreasonably burden the nonmoving party;
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> (ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and
>
> (iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.[2]

Moreover, the Presiding Officer may order depositions, only upon the additional finding that:

> (i) the information sought cannot reasonably be obtained by alternative methods of discovery; or
>
> (ii) there is substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.[3]

III. ARGUMENT

A. Respondents' Request to Depose Seven of Complainant's Witnesses Fails to Meet the Requirements of Section 22.19(e) and Should Therefore be Denied.

Respondents seek an order allowing them to depose seven of Complainant's witnesses; four expert witnesses and all three of Complainant's fact witnesses. To support their request, Respondents make broad assertions that depositions are necessary to "evaluate the matter, defend themselves, and prepare for any settlement discussions."[4] However, Respondents' open-ended request to depose all but one of Complainant's witnesses fails to meet the general requirements for discovery under Section 22.19(e)(1) of the Rules of Practice because Complainant has already provided all relevant information sought by Respondents. Moreover, Respondents fail to make the requisite showing for depositions under Section 22.19(e)(3) of the Rules of Practice.

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[2] 40 C.F.R. § 22.19(e)(1)
[3] 40 C.F.R. § 22.19(e)(3).
[4] Motion for Discovery at 4.

1. Respondents Fail to Meet the Requirements of Section 22.19(e)(1) because Complainant Provided the Information in Its Prehearing Exchanges

In order for Respondents to depose Complainant's witnesses, they must first meet the threshold requirements for discovery, including, under Section 22.19(e)(1)(ii), demonstrating that the information they seek is most reasonably obtained from the Complainant, and which the Complainant has refused to provide voluntarily. Respondents fail to meet this threshold requirement because Respondents have not detailed any information that they seek in deposing Complainant's witnesses that has not already been made available in Complainant's Prehearing Exchanges. As described below, Complainant fully complied with the Presiding Officer's January 17, 2014 Prehearing Order and the Prehearing Exchange requirements of Section 22.19(a)(2) of the Rules of Practice by providing a "brief narrative summary" of each witnesses' testimony and the documents and exhibits that those witnesses will rely on at hearing.

With respect to the proposed deposition of Mr. Beyerlein, Respondents do not indicate what specific information they seek through deposition, but generally assert that Complainant has not provided specifics as to the "modeling topics."[5] Complainant's Initial Prehearing Exchange states that Mr. Beyerlein will testify that EPA accurately and appropriately used the Western Washington Hydrology Model ("WWHM") to calculate site specific stormwater runoff.[6] The details of EPA's use of the model are provided in Dr. Marshalonis's 98-page expert report, which includes an overview of the model, the data input parameters and assumptions, simulations, and model calibrations and evaluation.[7] Additionally, Complainant's Rebuttal

[5] Motion for Discovery at 4.
[6] Complainant's Initial Prehearing Exchange at 3.
[7] CX – 30.

Prehearing Exchange includes as an exhibit the WWHM Version 3.0 User Manual, for which Mr. Beyerlein was an author.[8]

With respect to Mr. Oatis, once again Respondents do not specify what information they seek through deposition, but generally assert that Complainant has not provided specifics as to the "economic and modeling topics."[9] Complainant's Initial Prehearing Exchange states that Mr. Oatis will testify regarding portions of the proposed penalty, including the economic benefit enjoyed by Respondents.[10] Complainant's Rebuttal Prehearing Exchange contains a precise dollar amount for Respondents' economic benefit, which was calculated using the computer model BEN Version 5.4.0.[11] The BEN model is publically available on EPA's website.[12] Mr. Oatis will testify regarding these specific calculations. Respondents' expert witness, Mr. Fuhrman, will also testify regarding economic benefit and is "quite familiar" with EPA's BEN model.[13] Additionally, Mr. Oatis will testify regarding his analysis of information that Respondents submit regarding their ability to pay the proposed penalty, which, at this moment, only includes Respondents' tax returns.[14] Complainant reserves the right to move for additional limited discovery seeking specific information on Respondents' ability to pay the proposed penalty if Respondent refuses to voluntarily provide that information.

With respect to Ms. Mann and Mr. Shepard, Respondents' do not specify what information they seek through deposition, but generally assert that there is no "foreseeability or probability analysis of the likelihood of measurable . . . impacts or the degree of possible harm to

[8] CX – 52.
[9] Motion for Discovery at 4.
[10] Complainant's Initial Prehearing Exchange at 3.
[11] Complainant's Rebuttal Prehearing Exchange at 18-21.
[12] The BEN model is available for download at http://www2.epa.gov/enforcement/penalty-and-financial-models.
[13] Respondents' Prehearing Exchange at 5-6.
[14] RX – 8 and 9.

the environment caused by Respondents activities."[15] While Ms. Mann and Mr. Shepard have not prepared such a written analysis, they will provide testimony regarding the potential risk of environmental harm associated with Respondents' unauthorized activities. This testimony is relevant to the proposed penalty, specifically the gravity of the violations, which is discussed in detail in both of Complainant's Prehearing Exchanges.[16] Complainant's Initial Prehearing Exchange states that Ms. Mann will testify regarding, among other things, the potential impacts of discharges of pollutants in the Green River and downstream water quality.[17] Complainant's Initial Prehearing Exchange states that Mr. Shepard will testify regarding, among other things, the potential effects of pollutants associated with the auto-wrecking industry on aquatic species in the Green River.[18] Complainant's Rebuttal Prehearing Exchange provides additional detail of both witnesses' testimony.[19] Further, both Complainant's Prehearing Exchanges contain scientific literature and reports that the witnesses will rely on at hearing.[20]

With respect to Ms. Karlson, Ms. Walters, and Ms. Brozusky, Respondents do not specify what information they seek through deposition, but generally assert that there is no specifics or detail regarding these witnesses' observations at the Site.[21] Complainant's Initial Prehearing Exchange states that Ms. Karlson and Ms. Walters will testify regarding their

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[15] Motion for Discovery at 3-4.
[16] *See* Complainant's Initial Prehearing Exchange at 12; Complainant's Rebuttal Prehearing Exchange at 12-14. Complainant notes it does not need not establish actual environmental harm to seek a penalty for alleged Clean Water Act violations. *See e.g., United States v. Allegheny Ludlum Steel Corp.*, 187 F. Supp. 2d 426 (W.D. Pa. 2002), *aff'd in part, rev'd in part*, 366 F.3d 164, (3rd Cir. 2004) (assessing an $8.2 million penalty for 1,122 days of violation and stating that potential harm to the environment is enough to support a large penalty, plaintiff need not show actual environmental harm).
[17] Complainant's Initial Prehearing Exchange at 4.
[18] *Id.*
[19] Complainant's Rebuttal Prehearing Exchange at 2-4.
[20] CX – 28, 29, 46, and 54.
[21] Motion for Discovery at 4.

multiple inspections of Respondents' facility.[22] Complainant's exhibits contain the inspection reports from those inspections; those reports include a detailed written summary of the inspectors' observations as well as numerous photographs.[23] Complainant's Rebuttal Prehearing Exchange states that Ms. Brozusky will testify regarding her sampling activities of Respondents' facility, which took place during EPA's inspections that are documented in the aforementioned inspection reports.[24] Complainant's exhibits also include EPA's sample report, chain of custody, and sampling field notes.[25]

In summation, while Respondents' request to depose Complainant's witnesses is vague and open-ended, Complainant appears to have already provided Respondents' with the information they seek and therefore they have not met the more restrictive administrative discovery requirements under Section 22.19(e)(1)(ii). Furthermore, because Complainant provided Respondents with the information they seek, depositions in this matter are unnecessary and would unreasonably delay the proceeds, and therefore fail to meet the requirements of Section 22.19(e)(1)(i).

2. Respondents Fail to Meet the Additional Requirements for Depositions under Section 22.19(e)(3).

In addition to failing to meet the threshold requirements for discovery, Respondents have failed to show that their request to depose Complainant's witnesses is warranted under Section 22.19(e)(3) of the Rules of Practice. First, Respondents have failed to demonstrate that the information they seek cannot be obtained through alternative means.[26] Respondents make zero

[22] Complainant's Initial Prehearing Exchange1-2.
[23] CX – 05, 06, and 11.
[24] Complainant' Rebuttal Prehearing Exchange at 1-2; CX – 05 and 06.
[25] CX – 07, 56, and 57.
[26] 40 C.F.R. § 22.19(e)(3)(i).

attempt to explain why the information they seek cannot be reasonably obtained through other forms of discovery, such as directed written interrogatories. This is unsurprising, because, as discussed above, Complainant has already provided Respondents with the information they seek through its Prehearing Exchanges. Second, Respondents have not proffered any reason for believing that the evidence they seek may not be preserved for hearing without the depositions.[27] The simple fact is that the witnesses that Respondents' wish to depose will be present to testify at the hearing, and Respondents' will have an opportunity to cross-examine each witness. Thus, Respondents have not shown that the depositions are warranted under Section 22.19(e) of the Rules of Practice.

B. Respondents' Requests for Written Discovery Fail to Meet the Requirements of Section 22.19(e)(1) and Should Therefore be Denied

1. Information Regarding EPA's Assessment of Civil Penalties in Other Cases Does Not Have Significant Probative Value on a Disputed Issue of Material Fact

Respondents' request to obtain information regarding EPA's issuance of civil penalties to "other persons or entities similarly situated to Respondents,"[28] fails to meet the requirements of Section 22.19(e)(1) of the Rules of Practice. Specifically, Respondents have failed to demonstrate how information concerning penalties assessed in other cases satisfies the "significant probative value" element of Section 22.19(e)(1)(iii).[29] The EAB stated in *Chautauqua Hardware Corporation* that probative value "denotes the tendency of a piece of evidence to prove a fact that is of consequence to the case."[30] In that case, the EAB reversed the

[27] 40 C.F.R. § 22.19(e)(3)(ii).
[28] Motion for Discovery at 4-5.
[29] Complainant also notes that Respondents have not shown that the documents requested are not otherwise attainable. EPA penalty assessments are available from a variety of public sources, including EPA websites.
[30] EPCRA Appeal No. 91-1, 3 E.A.D. 616, 622, 1991 EPCRA Lexis 48 (CJO, Order on Interlocutory Review, June 24, 1991).

Presiding Officer's discovery order regarding, among other things, documents relating to EPA's resolution of other cases, holding that "what has happened in other cases can have no bearing on any factual issues in this case" and does not have "significant probative value."[31] Following the EAB's reasoning, penalties assessed in other cases "can have no bearing on any factual issues in this case" and thus, do not have "significant probative value," within the meaning of Section 22.19(e)(1)(iii), on EPA's proposed penalty in this matter.[32] Complainant, has provided Respondents with all exhibits relevant to the proposed penalty, including the Specification of Proposed Penalty in Complainant's Rebuttal Prehearing Exchange.[33] If Respondents wish to dispute or challenge any elements of the Specification of Proposed Penalty, they will have an opportunity to do so through their own witnesses or through cross-examination of Complainant's witnesses at hearing. Therefore, because the issuance of civil penalties in other cases has no probative value on a disputed issue of material fact, Respondents have failed to meet the requirements of Section 22.19(e)(1)(iii).

2. Information Regarding EPA's Use of Its Predictive Model in Other Cases Does Not Have Significant Probative Value on a Disputed Issue of Material Fact

Respondents' request to obtain "instances where EPA has used its 'Predictive Model' to support a complaint for civil penalties pursuant to the Clean Water Act."[34] Similar to information regarding penalties assessed in other cases, EPA's use of a predicative model to support civil penalties in other cases has no bearing on the factual issues in the instant matter, and Respondents' Motion is completely silent on how this information has "significant probative

[31] *Id.* at 627.
[32] *Id.*
[33] Complainant's Rebuttal Prehearing Exchange at pages 9 thru 22.
[34] Motion for Discovery at 4-5.

value on a disputed issue of material fact relevant to liability or the relief sought."[35] Complainant's Initial Prehearing Exchange provided Respondents with an expert report regarding EPA's use of a hydrologic model to predict the number of days of discharges in this matter.[36] If Respondents wish to dispute or challenge the reliability of Complaint's hydrologic model, they will have an opportunity to do so through their own witnesses (e.g., Ed McCarthy), or through cross examination of Complainant's witnesses. Therefore, because Complainant's use of its model in other cases has no probative value on a disputed issue of material fact, Respondents have failed meet the requirements of Section 22.19(e)(1)(iii).

3. Complainant Provided Inputs and Calibrations of EPA's Model in Its Prehearing Exchange

Finally, Respondents' request to obtain "details as to inputs and calibrations" for EPA's hydrologic model.[37] Section 22.19(e)(1)(ii) of the Rules of Practice require that in order to obtain discovery, Respondents must seek information within the control of Complainant that it has not provided voluntarily. Once again, Respondents fail to demonstrate that discovery is warranted because Complaint has already provided the requested information. Complainant's Initial Prehearing Exchange provided Respondents with Dr. Marshalonis's expert report regarding EPA's hydrologic model.[38] The report discusses the major categories of necessary input variables, including climate data, topography, soil data, and land use conditions.[39] The

[35] 40 C.F.R. § 22.19(e)(1)(iii); *Chautauqua*, 3 E.A.D. *at* 627. Courts have upheld the use of hydrologic modeling as a reliable basis for determining the number of discharges from facilities in stormwater cases. *See In Re Leed Foundry, Inc.*, Docket No. CWA-03-2004-006 (April 24, 2007) (EPA's use of modeling to extrapolate multiple discharges accepted by the Court); *See also*, *In re Service Oil Co.*, Docket No. CWA-08-2005-0010 (August 3, 2007) (expert testimony regarding stormwater runoff from construction site that was based on computer modeling held to be reliable evidence of discharge).
[36] CX – 30.
[37] Motions for Discovery at 4-5.
[38] CX – 30.
[39] *Id.* at Section 6.2.

report also discusses the additional adjustments and parameter modifications made to customize the model to the Site.[40] Appendix A of the report contains the regionally calibrated parameter values, which are specifically calibrated for the Western Washington region where Respondents' facility is located.[41] Appendix B contains User Control Input file, which shows "the exact model processes executed, the way the model schematic was created to mathematically recreate the physical environment, and all the parameter values used in the model, as well as any other special modifications to the model or model calculations."[42] Therefore, because Complainant has already provided Respondents with the information they seek regarding EPA's model, Respondents have failed meet the requirements of Section 22.19(e)(1)(ii). Because Complainant provided Respondents with the information they seek, discovery in this matter is unnecessary and would unreasonably delay the proceeds, and therefore fail to meet the requirements of Section 22.19(e)(1)(i).

IV. CONCLUSION

For the foregoing reasons, the Presiding Officer should deny Respondents' Motion for Discovery.

RESPECTFULLY SUBMITTED this 19th day of May, 2014.

/s/
Endre M. Szalay
Assistant Regional Counsel
(206) 553-1

[40] *Id.* at Section 6.4.
[41] *Id.* at p. 78.
[42] *Id.* at p. 90.

Certificate of Service

The undersigned certifies that the attached **Complainant's Response Opposing Respondents' Motion for Leave to Conduct Discovery**, dated May 19, 2014, In the Matter of Special Interest Auto Works, Inc. and Troy Peterson, Docket No. CWA-10-2013-0123, was filed with the Office of Administrative Law Judges and Respondents' counsel, Dennis Reynolds, Esq. via email at the following email addresses:

Sybil Anderson, EPA Headquarters Hearing Clerk: OALJfiling@epa.gov

Dennis Reynolds, Esquire: dennis@ddrlaw.com

DATED this 19th Day of May, 2014.

/s/

Elizabeth McKenna
Assistant Regional Counsel

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF: Special Interest Auto Works, Inc. and Troy Peterson, an Individual Kent, WA Respondents.	**NOTICE OF APPEARANCE OF ENDRE SZALAY FOR COMPLAINANT** **Docket No. CWA-10-2013-0123**

The undersigned counsel hereby enters an appearance as co-counsel on behalf of Complainant, United States Environmental Protection Agency, Region 10, in the above-captioned matter. The undersigned can be reached at the following address, telephone number, and email address:

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Respectfully submitted this 19th day of May, 2014.

/s/
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U.S. EPA, Region 10

Certificate of Service

The undersigned certifies that the attached **Notice of Appearance of Endre Szalay for Complainant**, dated May 19, 2014, In the Matter of Special Interest Auto Works, Inc. and Troy Peterson, Docket No. CWA-10-2013-0123, was filed with the Office of Administrative Law Judges and Respondents' counsel, Dennis Reynolds, Esq. via email at the following email addresses:

Sybil Anderson, EPA Headquarters Hearing Clerk: OALJfiling@epa.gov

Dennis Reynolds, Esquire: dennis@ddrlaw.com

DATED this 19th Day of May, 2014.

/s/
Elizabeth McKenna
Assistant Regional Counsel