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 COMPLAINANT'S REPLY POST-HEARING BRIEF

INTRODUCTION

Pursuant to 40 C.F.R. § 22.26 and the Court's Order Scheduling Post-Hearing Submissions, dated June 26, 2019 (Docket No. 72), the U.S. Environmental Protection Agency, Region 10 ("Complainant" or "EPA") submits the following Reply Post-Hearing Brief. For the reasons set forth below, the Presiding Officer should assess at least the proposed penalty of $6,600.

SUMMARY OF ARGUMENT

Respondent's Initial Post-Hearing Brief, submitted September 4, 2019 ("Respondent's Brief"), fails to persuade that a penalty less than $6,600 is justified. Rather than address the appropriateness of the proposed penalty, Respondent's Brief focuses primarily on his liability for the violations, an issue that this Court resolved in Complainant's favor in the Order on Motion for Accelerated Decision (Docket No. 38). To the extent that Respondent's Brief addresses the penalty for his Clean Water Act (CWA) violations, it fails to demonstrate that EPA's proposed

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penalty should be reduced. Thus, the Presiding Officer should find for the EPA and assess at least the proposed penalty.

ARGUMENT

I. THIS COURT ALREADY DETERMINED RESPONDENT'S CWA LIABILITY.

Respondent's Brief primarily sets forth various arguments regarding his liability for violating the CWA, but that issue has already been decided. Complainant previously addressed Respondent's liability in its Motion for Accelerated Decision, presenting evidence that satisfied each element of statutory liability for violations of CWA Section 301(a), 33 U.S.C. § 1311(a). Docket No. 31. In the Order on Complainant's Motion for Accelerated Decision, this Court concluded that Respondent's suction dredge activity "constitutes a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a)." Docket No. 38 at 22. The evidentiary hearing scheduled in this case was intended only for "[f]urther development of issues bearing on the assessment of a penalty. . . ." *Id*. at 24.

Leading up to the administrative hearing on the appropriateness and amount of penalty for Respondent's violations, Complainant moved the Court for a ruling *in limine* barring irrelevant evidence and testimony related to the issue of liability. In granting Complainant's Motion in Limine, this Court reaffirmed its previous decision, stating "Respondent may not introduce evidence or testimony relating solely to his liability for the charge in the Complaint as that issue has been decided." Docket No. 56 at Section V.2. Again, the Court defined the scope of the hearing in response to Respondent's untimely-filed Motion to Dismiss: "It appears that the Motion to Dismiss seeks to relitigate liability, which has already been decided in the September 27, 2018 Order on Complainant's Motion for Accelerated Decision." Docket No. 69 at 8.

Now, despite multiple rulings from this Court, Respondent again attempts to relitigate his CWA liability. One of several ways in which Respondent attempts to relitigate his liability is through discussion of the declaration he submitted to support Respondent's Brief in Opposition to Motion for Accelerated Decision (Docket No. 34). Respondent's Initial Post-Hearing Brief at 9-10, 21. Despite filing and relying on the declaration when opposing accelerated decision, Respondent disavowed it during the administrative hearing when faced with the inconvenience of its contents. TR 530:18–531:17. Now, Respondent's Brief contends that the Court's reliance on the declaration should impact the outcome of this case.

The court's reliance on the declaration was inconsequential. As an initial matter, the Presiding Officer assigned limited weight to some portions of the declaration in her Order on Complainant's Motion for Accelerated Decision, reasoning that it was, among other things, contradictory and self-serving. Docket No. 38 at 14-15. To the extent the Presiding Officer cited Respondent's declaration, she did so in conjunction with citations to his own brief opposing accelerated decision, which cited the same. That brief explained the factual aspects of Respondent's admitted suction dredging, which are consistent with some facts to which Respondent stipulated at the hearing. TR 382:25-383:4. Respondent should not be permitted to rely on this declaration when it suits him and disavow it when he no longer thinks it is helpful. As a final matter, the Presiding Officer has expressly refused to consider Respondent's newly-disavowed declaration in determining an appropriate penalty for the violation. TR 537:6–541:2.

In sum, the Court already determined that Complainant satisfied all of the statutory elements of a violation of CWA Section 301(a), and the liability issue is not relevant to the issue

currently before the Court. Thus, the Presiding Officer should not consider Respondent's arguments regarding liability.[1]

II. RESPONDENT FAILED TO DEMONSTRATE THAT THE PROPOSED PENALTY SHOULD BE REDUCED FOR LACK OF ENVIRONMENTAL HARM.

Respondent's Brief attempts to argue that the environmental harm caused by Respondent's suction dredge activity was insignificant because (1) the South Fork Clearwater River is already impaired; (2) certain studies have suggested the harm caused by suction dredging is minimal; and (3) the impact of sediment pollution is somehow related to particle size and the flow rate of the River. These arguments are unpersuasive.

As discussed in Complainant's Initial Post-Hearing Brief, the fact that the South Fork Clearwater River is an impaired waterbody, pursuant to CWA Section 303(d), weighs in favor of a higher penalty, not a lower penalty as Respondent contends. Complainant's Initial Post-Hearing Brief at 6-7. According to EPA's general civil penalty policies, Policy on Civil Penalties ("GM-21") and A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties ("GM-22"), the sensitivity of the environment is an aggravating factor in assessing the environmental harm caused by the violation. CX-35 at CX_001444, 001456. In this case, Respondent discharged sediment into a waterbody that is impaired for the same pollutant. CX-6 at CX_000178; TR 137:8–138:20. Therefore, Respondent's violation exacerbated an existing environmental problem and frustrated EPA's procedure to remedy it (i.e., total maximum daily load ("TMDL")). TR 344:22–345:3, 430:10-

[1] Respondent's arguments include a list of facts that Respondent alleges were undisputed at the administrative hearing in this matter. Respondent Initial Post-Hearing Brief at 19-21. Complainant disagrees with Respondent's assertion and notes that this list of facts contains arguments and inaccuracies. Therefore, those facts are disputed and sufficiently addressed in Complainant's Initial Post-Hearing Brief.

21. Respondent's additional contributions of pollutants to a polluted waterbody justify an upward penalty adjustment. *See In re Service Oil, Inc*., Docket No. CWA-08-2005-0010, 2007 WL 3138354, at *49, ALJ (Aug. 3, 2007).

In addressing environmental harm, Respondent's Brief cites new evidence, which the Presiding Officer should not consider. Respondent relies on scientific studies that he did not provide to Complainant during the prehearing exchange or afterward.[2] Respondent's Initial Post-Hearing Brief at 18-19. This Court has provided Respondent ample opportunity to introduce evidence and testimony regarding the environmental impact of his violation, and Respondent has expressly refused to take advantage.[3] To consider these studies now would allow Respondent to benefit from withholding evidence until the final hour and depriving Complainant the opportunity to review the referenced studies before this Reply Post-Hearing Brief. Thus, Complainant requests that the Presiding Officer refuse to consider the new studies cited in Respondent's Brief for purposes of deciding the appropriate penalty in this case. *See In re Catalina Yachts, Inc*., Docket No. EPCRA-09-94-0015, 1998 WL 99994, at *12 n.13, ALJ (Feb. 2, 1998) ("reject[ing] attempts to introduce evidence into the record through the medium of post-hearing briefs . . . .").

[2] Specifically, Respondent references four studies that have not been shared with Complainant: (1) "Harvey, B.C., K. McCleneghan, JD Linn, CL Langley 1982 study"; (2) "Huber, C.D. Blanchet, 1992;" (3) "EPA Study 2013, 'Connectivity of Streams and Wetlands to Downstream Water;'" and (4) "US ACE 1994 study." Respondent's Post-Hearing Brief at 18-19.

[3] *See* Docket No. 19 at 3 (Second Prehearing Order requiring Respondent to submit, *inter alia*, "all factual information Respondent considers relevant to the assessment of a penalty and any supporting documentation"); Docket No. 56 at Section V.1 (Order on Motion to Compel Additional Discovery and Compliance with Second Prehearing Order, allowing Respondent to cure deficiencies in his Prehearing Exchange so that he be allowed to provide testimony at hearing); TR 7:19–14:4 (the Presiding Officer explaining to Respondent his opportunity to introduce evidence and testimony at the administrative hearing); TR 517:6-8, 536:4-25 (Respondent deciding to provide no testimony and no exhibits during the hearing).

Finally, Respondent's Brief fails to demonstrate that the degree of environmental harm caused by his violation is somehow dependent on the size of the sediment particles he discharged and the flow rate of the receiving water. Respondent's arguments seem to suggest that particle size and flow rate may determine how long the sediment remains suspended before settling on the river bottom. Respondent's Post-Hearing Brief at 17-18. However, Respondent's argument falls short of providing any basis for these assertions or even asserting how this information should influence this Court's analysis of environmental harm. In fact, Complainant's experts demonstrated that Respondent's discharge of sediment caused environmental harm both by remaining in suspension and ultimately settling to the river bottom. Regarding smaller sediment particles that remain in suspension, National Marine Fisheries Service ("NMFS") biologist David Arthaud explained that turbidity causes behavioral and physiological changes in fish and invertebrates at levels as low as 20 NTUs. TR 429:8–430:4. Mr. Arthaud estimated that the turbid plume caused by Respondent's dredge was approximately 25 to 30 NTUs. TR 459:20–460:9. As for larger particles that fall from suspension sooner, Mr. Arthaud explained that sedimentation covers fish eggs, reducing their growth and survival rate, limits habitat for rearing juvenile salmon, and reduces photosynthesis. TR 430:10–434:11. The stretch of river that Respondent dredged exhibited excess sediment until at least 2018, three years after the violation. TR 474:9-20. Respondent's arguments fail to lessen these impacts of sedimentation and suspended sediment, let alone the other environmental harms of Respondent's violation that are detailed in Complainant's Initial Post-Hearing Brief. *See* Complainant's Initial Post-Hearing Brief at 6-15.

III. RESPONDENT FAILED TO DEMONSTRATE THE PROPOSED PENALTY SHOULD BE REDUCED FOR LACK OF CULPABILITY.

A reduction to the proposed penalty is not warranted based on Respondent's arguments regarding culpability. Although not expressly stated, portions of Respondent's Brief could be construed to contend that he was unaware that suction dredge mining was prohibited in the South Fork Clearwater River. However, evidence in the record demonstrates that Respondent was fully aware that his activities violated the CWA, and he acted with substantial culpability.

Respondent's primary contention is that his suction dredging activity was exempted by the Idaho Recreational Mining Authorization ("Letter Permit") issued to him by the Idaho Department of Water Resources ("IDWR") on May 13, 2015. However, the Letter Permit clearly states in bold font that it is not an exemption from EPA regulation: "The U.S. Environmental Protection Agency (EPA) now requires an NPDES general permit for small scale suction dredging in Idaho." CX-29 at CX_001415. Additionally, in a 2014 letter, EPA again informed Respondent that his Letter Permit did not substitute as or supplant the need for NPDES coverage. CX-08 at CX_000853-54.

Similarly, Respondent contends that the U.S. Army Corps of Engineers ("Corps") explained to him in a 2007 letter that "Your recreational suction dredging project will not involve a discharge of dredge materials into the 'Waters of the United States.'" Respondent's Initial Post-Hearing Brief at 16. Like the scientific studies discussed in Section II above, Respondent has failed to provide the referenced letter to Complainant or introduce it into evidence, and he should not be permitted to do so for the first time during post-hearing briefing. Moreover, the Corps informed Respondent in a 2014 letter—in the year prior to his violation—that EPA "has the lead for recreational suction dredging in Idaho under the Clean Water Act"

and the Corps has no permitting responsibilities for Respondent's proposed suction dredging activity. CX-9 at CX_000855. In that same letter, the Corps explained that the area that Respondent dredged is designated critical habitat for species protected under the Endangered Species Act ("ESA") and recommended Respondent contact various federal agencies to ensure his compliance. *Id*.

Finally, Respondent's culpability is not mitigated by his Notice of Intent ("NOI") to obtain coverage under the NPDES General Permit No. IDG370000 for Small Suction Dredge Placer Miners in Idaho ("General Permit"), dated May 17, 2015. Respondent argues that he "showed compliance" by submitting an NOI for the General Permit, to which EPA did not respond until the end of the dredging season. Respondent's Post-Hearing Brief at 20. However, just six months before Respondent submitted his NOI, EPA had explicitly informed Respondent that suction dredging in the South Fork Clearwater River could not be permitted until an ESA determination was completed. CX-08 at CX_000853-54. Additionally, the General Permit specifies that "[a]uthorization to discharge requires **written notification from EPA** that coverage has been granted to the operation." CX-03 at CX_000030 (emphasis in original). Therefore, Respondent's submission of an NOI does not mitigate his culpability for the violations. In fact, it goes to support his awareness that permit coverage was required for suction dredging and that he engaged in the same despite receiving no authorization to do so, as emphasized at the hearing. TR 158:12-159:19.

In addition to the communications noted above, Complainant's Initial Post-Hearing Brief identified several exhibits demonstrating that Respondent's violation was knowing. Complainant's Initial Post-Hearing Brief at 21-26. The evidence includes permit applications, the submission of which demonstrates Respondent's knowledge that suction dredging requires

authorization through a federal permit. CX-10; CX-12. Moreover, the testimony of Clint Hughes, U.S. Forest Service geologist, indicates that Respondent's CWA violation was part of a concerted effort, involving several dredgers, to purposefully frustrate EPA's regulation of suction dredge mining on the South Fork Clearwater River. TR 71:5–73:6. In total, the evidence shows that Respondent's culpability is of a degree seldom encountered by EPA compliance officers in the administrative context. TR 165:18–166:4. Given that GM-22 contemplates adjustments over 30% for unusual cases of culpability, Complainant's 20% upward adjustment to its initial gravity amount in this case is conservative. *See* CX-35 at CX_001458.

IV. RESPONDENT FAILED TO DEMONSTRATE THE PROPOSED PENALTY SHOULD BE REDUCED BASED ON ECONOMIC BENEFIT.

Respondent's arguments regarding economic benefit are also unpersuasive. Respondent states that he dredged for a period less than twenty minutes on the date of the violation, presumably arguing that he could not have obtained a substantial economic benefit in a short period. Respondent's Initial Post-Hearing Brief at 21. Respondent's statement is not substantiated by any evidence or testimony in the record. In fact, the evidence indicates that Respondent dredged in the South Fork Clearwater River for at least several days in 2015, as discussed in detail in Complainant's Initial Post-Hearing Brief at 13-14. Moreover, EPA did not increase the proposed penalty based on the economic benefit of the violation. TR 133:18–134:5. Therefore, no penalty reduction is warranted.

CONCLUSION

Based on the foregoing, Complainant contends that Respondent's Brief fails to demonstrate that a reduction of the proposed penalty is appropriate. The nature, circumstances, extent and gravity of Respondent's violation is substantial, and Respondent is culpable for

violating the CWA, warranting the assessment of a penalty of at least $6,600, within the sound discretion of this Court.

Dated this 20th day of September, 2019.

Respectfully submitted,

/s/ J. Matthew Moore

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **COMPLAINANT'S REPLY POST-HEARING BRIEF**, dated September 20, 2019, 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 **COMPLAINANT'S REPLY POST-HEARING BRIEF**, via regular US Mail, postage prepaid, on Respondent Dave Erlanson, Sr., at P.O. Box 46, Swan Valley, Idaho 83449.

Dated this 20th day of September, 2019.

/s/ Shannon K. Connery
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