UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7

IN THE MATTER OF	)	
	)	
	)	
DR. DANIEL J. McGOWAN,	)	DOCKET NO. CWA-07-2014-0060
	)	
	)	
Respondent	)	
	)	COMPLAINANT'S REBUTTAL TO
	)	RESPONDENT'S PREHEARING
	)	EXCHANGE
	)	

Pursuant to 40 C.F.R. § 22.19 of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties," 40 C.F.R. Part 22 (CROP) and the Presiding Officer's Order of December 19, 2014, Complainant, United States Environmental Protection Agency (EPA), submits this Rebuttal to Respondent's Prehearing Exchange.

I. NARRATIVE REBUTTAL TO RESPONDENT'S DEFENSES

1. Respondent's Dam is a Point Source.

Respondent's Prehearing Exchange asserts that "Clean Water Act jurisprudence" holds that dams can be point sources "under certain circumstances" but that Respondent's dam does not meet those circumstances. However, Respondent's exchange does not cite to any specific cases, nor list whatever circumstances qualify a dam as a point source, nor explain how Respondent's dam does not meet such circumstances.

The Clean Water Act defines "point source" as "*any* discernable, confined and discrete conveyance, including but not limited to any ... conduit ... from which pollutants are or may be discharged" 33 U.S.C. § 1362(14). In *Greenfield Mills, Inc. v. Macklin,* 361 F.3d 934 (7th Cir. 2004), a case that presents a strikingly similar fact pattern to the present case, the court concluded that the dam in that case constituted a point source and noted that other circuits had reached the same conclusion concerning dams (*see, e.g. Catskill Mountains Chapter of Trout Unltd., Inc. v. City of New York*, 273 F. 3d 481, 493 (2d Cir. 2001). Similar to the present case, the *Catskill* court concluded that the conveyance of pollutants from a reservoir to a stream through a dam clearly made the dam a point source under a plain reading of the statute. *Id.*

Similar to the 7th and 2nd Circuit cases described here, Respondent's dam conveyed pollutants[1] from a reservoir into a stream through a "discernable, confined and discrete conveyance." As such, Respondents dam is a point source.

2. **EPA's "Water Transfers Rule" is inapplicable to this case.**

Respondent's argument that the "Water Transfers Rule" applies to the present case is misplaced.[2] Respondent asserts that the Rule undercuts the court's holding in *Greenfield Mills, Inc. v. Macklin,* 361 F.3d 934 (7th Cir. 2004) that a discharge of sediment removed from a pond via a dam into a contiguous body of water is subject to Section 404 of the Clean Water Act (CWA). This assertion is erroneous in a number of ways. First, Respondent argues that EPA affirmed the "one water" rationale in an official agency policy that was subject to APA Notice and Comment procedures; and that the Rule should apply to both Sections 402 and 404 of the CWA. In the preamble to the 2008 "water transfer rule," however, EPA clearly stated its position that the Rule "will not have an effect on the 404 program." As EPA explained in the preamble to the Water Transfers Rule:

> The statutory definition of "pollutant" includes "dredge spoil," which by its very nature comes from a waterbody. 33 U.S.C. 1362(6); 40 CFR 232.2; *United States v. Hubenka*, 438 F.3d 1026, 1035 (10th Cir. 2006); United States v. Deaton, 209 F.3d 331,335-336 (4th Cir. 2000); *Borden Ranch Partnership v. United States*, 261 F.3d 810, 814 (9th Cir. 2001). Because Congress explicitly forbade discharges of dredged material except in compliance with the provisions cited in CWA Section 301, today's rule has no effect on the 404 permit program, under which discharges of dredged or fill material may be authorized by a permit. 33 U.S.C. 1344." See 73 Fed. Reg. 33697, 33703.

Next, Respondent argues that the "fact that the 2008 Water Transfer Rule is in the context of Section 402 is irrelevant—it doesn't matter if the "pollutant" being passed through a dam is a Section 402 pollutant or Section 404 dredged and fill material . . ." This analysis is flawed. The CWA's prohibition on the "the discharge of any pollutant" contains exceptions for discharges in compliance with a permit. The CWA defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source" and establishes two distinct permitting programs for regulating the discharge of pollutants. The Corps-administered permitting program regulates the discharge of dredged or fill material pursuant to Section 404 of the CWA and the EPA-administered National Pollutant Discharge Elimination System permitting program generally regulates the discharge of pollutants other than dredged or fill material under Section 402 of the CWA. As explained by the Fifth Circuit, Section 402 and Section 404 must be treated separately, noting that the "outside world" analysis relevant to what requires a permit under section 402 does not apply in the context of dredged material. *Avoyelles*

[1] "Dredged spoil" is specifically defined as a pollutant under Section 502(6) the CWA.

[2] The "Water Transfers Rule" was vacated "to the extent it is inconsistent with the statute" and remanded "to the extent EPA did not provide a reasoned explanation for its interpretation" by a district court in *Catskill Mountains Chapter of Trout Unltd., Inc. v. U.S.EPA*, 8 F.Supp. 3d 500 (S.D.N.Y. 2014). This case is currently on appeal to the 2nd Circuit.

Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 924 n.43 (5th Cir. 1983). As noted by EPA in the preamble to the "water transfers rule," dredged material by its very nature comes from a waterbody.

The discharges at issue in this case are regulated by Section 404 of the CWA. The sediment at issue had settled onto the bottom of Respondent's reservoir and was added back into the River when Respondent opened the gate on his dam. As explained by the Court in *Greenfield Mills,* "it is logical to believe that soil and vegetation removed from one part of a wetland or waterway and deposited in another could disturb the ecological balance of the affected areas-both the area from which the material was removed and the area on which the material was deposited . . . excluding such dredged materials from the concept of 'addition' would effectively remove the dredge-and-fill provision from the Statute." *Greenfields at 949.* In this case, Respondent's discharge of significant amounts of sediment had devastating impacts on Plum Creek. As explained by downstream property owners, the discharges altered the course of Plum creek and decimated much of the once thriving aquatic communities.[4] Accordingly, Respondent's action constitute an addition of dredge and/or fill material into Plum Creek and were subject to the permit requirement of Section 404 of the Act.

3. **Respondent had other options available to him for the removal of sediment from his reservoir.**

Respondent's argument that the discharge of sediment was necessary to avoid loss of the structure is unavailing for several reasons. First, it is important to note that to the extent Respondent is alleging that the amount of sediment in his reservoir presented an "emergency," this was an "emergency" of Respondent's own making. As pointed out in Complainant's Prehearing Exchange, Respondent had never removed sediment from his reservoir in the decade he had owned the property, despite knowing that the prior owners had removed sediment every two years.[5] Furthermore, as Respondent is well aware, there were other alternatives available to Respondent for removing the sediment in his reservoir such as sediment excavation and slow release on a schedule set forth in a Section 404 permit that could have mitigated harm to the receiving stream.[6] In fact, during the Middle Niobrara Natural Resources District (MNNRD) Site Investigation of the discharges, Respondent's caretaker, Will Williams, told Mike Murphy of the MNNRD that he had spoken with contractors the summer before the discharges to obtain costs associated with removal of the sediment from the reservoir and that it had been costly to remove such sediment. During this same investigation, Will Williams also informed Mike Murphy that prior to the discharge of sediment that there was shallow water over the entire lake.[7] As explained below, the evidence suggests that Respondent's claim the discharges were for the purpose of maintenance is merely pretext for dredging his reservoir without a permit. Lastly,

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[4] As identified in Complainant's prehearing exchange, the downstream landowners will testify to the impacts the discharges of sediment had on Plum Creek.

[5] See Complainant's Exhibit C10.

[6] Corps. Permitting regulations have procedures for applying for an emergency permit at 33 C.F.R. 325.2(e)(4); See, also, U.S. Army Corps of Engineers Regulatory Guidance Letter re; Discharge of Sediments from or through a Dam that was submitted as part of Complainant's prehearing exchange (C35).

[7] See Exhibit C56.

Respondent fails to present any legal arguments to support an assertion that the discharge of sediment to avoid loss of the structure is a legal defense to liability under the Act. Not only is Respondent's assertion that the discharge was necessary to avoid loss of the structure contrary to the evidence at hand, but Respondent's claim fails as a matter of law because the CWA is a strict liability statute.[8]

4. **Respondent is not exempted from CWA Section 404 under the "maintenance exemption."**

a. **Respondent failed to assert the Section 404(f) "maintenance" exemption as an affirmative defense in his answer.**

In his Prehearing Exchange, Respondent states that the "sluicing event" should be exempt under the maintenance exception set forth in Section 404(f)(1)(B), 33 U.S.C. § 1344(f)(1)(B). This provision exempts the discharge of dredged or fill material from permitting requirements for purposes of "maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as ... dams ..." Respondent, however, failed to cite to the Section 404(f) exemption or assert that the discharges were necessary for repairs in his April 14, 2014 Answer and Request for a Hearing, which contravenes 40 C.F.R. § 22.15(B) requiring Respondents to raise "circumstances or arguments which are alleged to constitute the grounds of any defense" in an Answer. In one EAB decision involving the Section § 404(f)(1)exemptions, the EAB found that the exemptions is not a jurisdictional claim that can be raised at any time, but is an affirmative defense for which the respondent bears the burden of proof.[9] Complainant asserts that Respondent waived this defense by failing to raise the affirmative defense in his answer.

Even if the Court were to entertain this defense, as explained in detail below, Respondent's defense fails as: (1) Respondent's argument undermines the purpose and intent of the Section 404(f) exemptions; and (2) the record is devoid of any evidence to support that the discharges were reasonably necessary to maintain the dam and that the actions were not recaptured by Section 404(f)(2) of the Act. The Prehearing Order, in this case, specifically required Respondent to submit a narrative statement explaining in detail the legal and/or factual bases for his affirmative defenses and a copy of any documents in support of such defense. Courts have consistently found that it is Defendant's burden to prove that its activities fall within the Section 404(f) exemptions and that its actions are not recaptured by Section 404(f)(2). See *United States*

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[8] *United States v. Bailey*, 571 F.3d 791, 805 (8th Cir. 2009) (holding that liability under the CWA is strict and government is not required to show that defendant knew his actions violated the Act); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374, 13 ERC 1417 (10th Cir. 1979) (Clean Water Act is a strict liability statute; "The regulatory provisions of the FWPCA were written without regard to intentionality, . . . making the person responsible for the discharge of any pollutant strictly liable . . . Willful or negligent violations of the Act are separately punishable by criminal penalties under 33 U.S.C. § 1319(c)(1). The Act would be severely weakened if only intentional acts were proscribed." *Stoddard v. Western Carolina Regional Sewer Authority*, 784 F.2d 1200, 1208 (4th Cir. 1986) (liability under the CWA is a form of strict liability).

[9] See *In re J. Phillip Adams*, ___ E.A.D. ___ (EAB 2007) involving the "farm road" exemption found at 404(f)(1)(E). See, also, *United States v. Chuchua* No. 01cv1479-DMS (AJB) (S.D. Ca. March 10, 2004).

v. Sargent County Water Resource Dist., 876 F. Supp. 1090, 1098 40 ERC 1718 (D.N.D. 1994) (a defendant claiming an exemption under 404(f) bears the burden of proving that its activities are exempt from regulation,); *Greenfield Mills v. O'Bannon*, 361 F.3d 934, 949 (7th Cir. 2004) (defendant bears the burden of establishing both that he qualifies for a section 404(f) exemption and that his actions are not recaptured by section 404(f)(2), 33 U.S.C. § 1344(f)(2));*United States v. Brace*, 41 F.3d 117, 124, 39 ERC 1823 (3d Cir. 1994) (defendant bears the burden of establishing both that he qualifies for a section 404(f) exemption and that his actions are not recaptured by section 404(f)(2), 33 U.S.C. § 1344(f)(2)); *United States v. Akers*, 785 F.2d 814, 819, 24 ERC 1121 (9th Cir. 1986), cert. denied, 479 U.S. 828 (1986) ("Akers must establish that his activities are exempt). The district court, in *United States v. Chuchua*[10], rejected defendant's 404(f) maintenance exemption on grounds that defendants had not sufficiently plead the defense in its response to plaintiff's motion for summary judgment. In similar fashion to this case, the court pointed to the fact that defendants raised the Section 404(f) exemption in two sentences in its pleadings to the court. Although required to explain in detail the legal and/or factual bases for his affirmative defenses along with any documentation in support, Respondent merely allocated a few sentences in his Prehearing Exchange to the argument that the discharge was necessary to repair the dam without any documentation to support that such work was actually completed.

b. **Respondent's maintenance argument fails as it undermines the purpose and intent of the Section 404(f) exemptions under the Act.**

Courts have found that Section 404(f) of the Act provides a *narrow* exemption for activities that have little or no adverse impacts to the receiving stream. As explained by the 7th Circuit, in *United States v. Huebner*, "congress intended that Section 1344(f)(1) exempt from the permit process only narrowly defined activities. . . that cause little or no adverse effects either individually or cumulatively [and which do not] convert more extensive areas of water into dry land or impede circulation or reduce the reach and size of the water body." 752 F.2d 1235, 1240 (7th Cir. 1985), (quoting 3 Legislative History 420). The 7th Circuit, again opined on this issue in *Greenfield Mills,* and stated that "throughout the legislative history, Congress repeatedly stressed that the 1344(f)(1) exemptions are for activities "that cause little or no adverse effects either individually or cumulatively." (quoting 3 Legislative History 420). 361 F.3d 934 [11] Since Respondent offered no argument or supporting evidence that the discharges caused little or no adverse effects on Plum Creek, the only evidence in the record is that submitted by Complainant. As evidenced in Complainant's Prehearing Exchange and Exhibits 56 & 57 of this Rebuttal, Respondent's discharge of an estimated 130,000 cubic yards of sediment decimated much of the

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[10] No. 01cv1479-DMS (AJB) (S.D. Ca. March 10, 2004).

[11] *See, also, United States v. Brace*, 41 F.3d 117,124 (3 Cir. 1994); 3 Legislative History of the Clean Water Act of 1977 at 283 ("These specified activities should have no serious adverse impact on water quality if performed in a manner which will not impair the flow and circulation patterns and the chemical and biological characteristics of the affected waterbody and which will not reduce the reach of the affected waterbody." (H.R.Rep. No. 95- 830, at 99 (1977)); *id.* at 421 ("A case-by-case permit review would not be required for narrowly defined activities that cause little or no adverse effects either individually or cumulatively, including those activities narrowly defined in 404(f)(1)(A-F)."); *id.* at 474 ("Federal permits will not be required for those narrowly defined activities that cause little or no adverse effects either individually or cumulatively" even though "it is understood that some of these activities may *necessarily* result in incidental filling and minor harm to aquatic resources . . . ." (emphasis added)); *id.* at 474 (Senate Debate, Dec. 15, 1977) (comments by Sen. Muskie, primary author of legislation).

aquatic life in Plum Creek, altered the course of the waterbody, converted areas of water into dry land and reduced the size of the water body. Respondent's argument fails as the discharges cannot reasonably be construed as having little or no adverse effects to Plum Creek.

c. **The evidence does not support that Respondent "maintained" the dam.**

In the *Greenfield Mills* case, the 7th Circuit found that, in order to qualify for the maintenance exemption found in 404(f)(1)(B), the "objective purpose of the activity" conducted by the alleged violator must be confirmed by the *actual* activity undertaken. Respondent's assertion that his discharge activities were exempted under the CWA for purposes of maintenance is not supported by the case record and appears to be a pretext for dredging his reservoir without a permit. First, Respondent failed to raise the defense that the discharges were necessary to conduct repairs to the dam nor did Respondent even cite Section 404(f)(1)(B) of the Act in his April 4, 2014 Answer and Request for Hearing. Second, in an October 29, 2012 letter from Steve Mossman, Respondent's attorney, to the Corps, Mr. Mossman said that the dam gate was opened "for the purpose of sluicing the reservoir," but mentions nothing about maintenance or "emergency reconstruction."[13] Third, Respondent had looked into the costs associated with mechanical removal of sediment of the reservoir prior to the discharges.[14] Lastly, on February 6, 2015, Respondent submitted to EPA a response to questions posed by EPA asking Respondent to describe any maintenance or repairs performed to the dam between December 28, 2011 (the first instance that Respondent opened the dam gate) and July 18, 2012 (the second instance), and to provide any documentation concerning such repairs or maintenance. In the response, Respondent presented no evidence that he had conducted any repairs, nor performed any maintenance or "emergency reconstruction," to the dam after the dam gates were opened from December 2011 to July 2012. Although his response indicates that the gate was once again opened in July 2012 "for the purpose of" conducting maintenance work, Respondent provides no evidence that the work was actually performed. It is notable that Respondent raised the 404(f)(1)(B) maintenance exemption for the first time in its Prehearing Exchange.

d. **Respondent's discharge exceeded what was reasonably necessary for maintenance.**

In the *Greenfield Mills* case, the 7th Circuit also found that "dredging also must be reasonably necessary to the proposed maintenance." 361 F.3d 934, at 950-51.[15] To bolster this point, the Court cites the legislative history and intent of the Section 404(f) exemptions, citing Congress's direction that the exemptions be construed narrowly and should only include activities "that cause little or no adverse effects either individually or cumulatively." 361 F.3d 934, at 951, *quoting* 3 Legislative History 420. On remand from the 7th Circuit, the district court held that the § 404(f) dam maintenance exemption did not apply to the release of sediment because the

[13] See Complainant's Exhibit C25 from the Prehearing Exchange

[14] See Complainant's Exhibit C56 (Respondent's caretaker, Will Williams, explained to Mike Murphy of the MNNRD that he had spoken to contractors about removing the sediment from the reservoir the summer before the discharges).

[15] *See, also, United States v. Sargent County Water Res.*, 876 F. Supp. 1090 (D. N.D. 1994); *United States v. Zanger*, 767 F. Supp. 1030 (N. D. Cal. 1991).

record was devoid of any evidence that the release was reasonably necessary to make the repairs to the dam. Greenfield Mills, Inc. v. Carter, 2007 WL 3333335 (N.D. Ind. 2007)

Respondent provides no evidence that the dredging of approximately 130,000 cubic yards of sediment was proportional to the maintenance work needed to maintain the dam. Further, the proportionality argument is particularly relevant in this case as Respondent had options other than mass discharges to remove accumulated sediment above his dam, including a permitted sluicing schedule arranged with the Corps and/or mechanized removal.[16] Finally, the devastating impacts to Plum Creek as a result of Respondent's discharges clearly do not comport with Congress's intent that exempted activities should cause "little or no adverse effects."

The evidence shows that Respondent did not perform maintenance work to the dam in conjunction with his admitted sediment releases; nor has Respondent demonstrated that the extent of his releases were necessary to perform maintenance work on the dam. Therefore, his argument that he was exempt from CWA Section 404 requirements fails.

e. **Respondent fails to present any evidence or legal arguments that his actions are not recaptured by Section 404(f)(2)**

The "Recapture Provision" found in CWA Section 404(f)(2) holds that none of the 404(f)(1) exemptions apply if the discharges in question meet a two-prong test: (1) The discharges are "incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject," and (2) "the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced" by the discharges. 33 U.S.C. § 1344(f)(2). Courts have found that the Defendant again bears the burden of establishing both that he qualifies for a section 404(f) exemption and that his actions are not recaptured by section 404(f)(2), 33 U.S.C. § 1344(f)(2). *Greenfield Mills v. O'Bannon*, 361 F.3d 934, 949 (7th Cir. 2004); *United States v. Brace*, 41 F.3d 117, 124, 39 ERC 1823 (3d Cir. 1994). Respondent clearly failed to meet his burden as Respondent failed to even address this issue in his Prehearing Exchange and the record is devoid of any evidence suggesting that Respondent's actions are not recaptured by Section 404(f)(2).

The 7th Circuit found in *Greenfield Mills* that, if a party's maintenance exemption claim is construed to be merely a pretext for discharging without a 404 permit, then a reasonable trier of fact may conclude that the discharge activity *could* have as its purpose to bring a water "into a use to which it was not previously subject." *Id. See, also Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 926 (5th Cir. 1983) (activity that resulted in substantial alteration of the wetland did not fall within 404(f) exemption because it brought "an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced.").

[16] Paul M. Boyd, professional civil engineer with the United States Army Corp of Engineers, Omaha, Nebraska District will testify concerning Dr. McGowan's non-discharge options for removing sediment above the dam.

As discussed, Respondent has not established that he performed maintenance on the dam in conjunction with his releases of sediment and did not raise the maintenance exemption until he made mere assertions in his Prehearing Exchange. Further, Respondent's attorney told the Corps that the opening of the dam gate was for the purposes of sluicing, not maintenance. Thus, Respondent's exemption claim due to maintenance could reasonably be construed as pretext for discharging without a 404 permit, and thus, Respondent's discharges could reasonably be construed as its purpose to change the use of Waters of the U.S.

Turning to the second prong of the Recapture Provision, several EPA witnesses will testify to the fact that Respondent's discharges of approximately 130,000 cubic yards of sediment impaired "the flow or circulation" of Plum Creek.

5. **Respondent's factual assertions are not supported by the evidence.**

Respondent's Prehearing Exchange asserts that Respondent had monthly conversations with Barbara Friskopp at the U.S. Army Corps of Engineers in which Ms. Friskopp authorized Respondent to "open his (dam) gates." Ms. Friskopp will testify that, to her recollection, she did not have monthly conversations with Respondent authorizing him to leave open his dam gates. Respondent failed to submit any evidence that these conversations took place. While Respondent asserts that this allegation has "substantive implications", Respondent fails to explain how this is a defense to liability under Section 404 of the Act. Because the CWA is a strict liability statute, defendant's assertion that he believed he had authorization to discharge is irrelevant. As explained by the 6th Circuit, in *United States v. Earth Sciences,* "The regulatory provisions of the FWPCA were written without regard to intentionality, . . . making the person responsible for the discharge of any pollutant strictly liable . . . Willful or negligent violations of the Act are separately punishable by criminal penalties under 33 U.S.C. § 1319(c)(1). The Act would be severely weakened if only intentional acts were proscribed." 599 F.2d 368, 374, 13 ERC 1417 (10th Cir. 1979). In a similar vein, the 6th Circuit also spoke to the relationship between strict liability and penalty in the context of an EPCRA case and explained that "[I]t must be remembered that liability and punishment serve similar purposes. To find a party liable despite its lack of culpability, but then to reduce, significantly, the applicable penalty based on this lack of culpability, would certainly undermine the goals of the statute." *Steeltech, Ltd. v. United States,* 273 F.3d 652 (6th Cir. 2001).[18] Moreover, the evidence previously submitted by EPA in its Prehearing Exchange clearly shows that the Corps considered the sediment releases to be violations of the CWA.

Respondent's Prehearing Exchange also asserts that "the alleged sluicing event took place with the full knowledge of the EPA ..." Again, Respondent fails to provide any evidence to support this vague allegation nor does Respondent identify a specific person at EPA who allegedly knew about this event. Dr. Delia Garcia, EPA Environmental Scientist, will testify that the Agency had no prior knowledge of either the December 2011 or July 2012 sluicing events.

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

The Prehearing Exchange also asserts that Respondent "does not believe the lake was sluiced" during the time period in December 2011/January 2012 when Respondent admits to opening the dam gates. Downstream property owner Barry Harthoorn and Andy Glidden, a fish and wildlife biologist who works at the Bobcat Wildlife Management Area downstream from Respondent's dam, will testify to their observations that Respondent's opening of his dam gates in December 2011 and January 2012 resulted in significant and detectible discharges of sediment to Plum Creek; and that the discharges resulted in degradation to Plum Creek, including a fish kill.

Finally, a reference in Respondent's Prehearing Exchange says that "the Corps considered (the sluicing) to be a local matter."[19] Another reference in Respondent's Prehearing Exchange alleges that EPA considered the sluicing to be "a local matter." It is unclear what Respondent means by "a local matter." However, the evidence previously submitted by EPA in its Prehearing Exchange clearly shows that the Corps considered the sediment releases to be violations of the CWA. Also, Ms. Friskopp will testify to the Corps' determination that Respondent's releases qualified as CWA violations. Further, Dr. Garcia will testify concerning the EPA's determination that Respondent's discharges are CWA violations.

II. EXHIBITS

C55 Economic benefit expert report prepared by Jonathan Schefftz, financial analyst with JShefftz Consulting in Amherst, Massachusetts, provided via EPA's contract with Industrial Economics, Incorporated.

C56.1 August 24, 2014 MNNRD Site Investigation along with maps (Complainant submitted this report as part of the Prehearing Exchange (Exhibit C26) but has included additional attachments to the Site Investigation to address Respondent's Prehearing Exchange).

C56.2 Photos that were taken by the MNNR at the time of the MNNRD 8.24.14 Site Investigation.

C57 Additional photographs from MNNRD.

C58 Complaint submitted to MNNRD from Jason Appelt (Complainant submitted this report as part of the Prehearing Exchange but has included additional photos to the Complaint to address Respondent's Prehearing Exchange).

[19] Although Respondent refers to the discharges as "alleged sluicing event(s)," the evidence submitted by EPA in its Prehearing Exchange shows that Respondent has repeatedly admitted to the discharges, including an October 29, 2012 letter to the Corp by Respondent's attorney, which discusses the dates Respondent opened and closed the dam gate.

Respectfully Submitted this 19th day of March, 2015.

Elizabeth Huston
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 7

Christopher Muehlberger
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U.S. Environmental Protection Agency, Region 7

CERTIFICATE OF SERVICE

I hereby certify that on the date stated below, with regard to Complainant's Rebuttal to Respondent's Prehearing Exchange, I sent the original pleading via the OALJ E-filing system, and a disk containing the attachments to Sybil Anderson, the Office of Administrative Law Judges via UPS overnight to the following addresses:

Ms. Sybil Anderson, Headquarters Hearing Clerk
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Ronald Reagan Building, Room M1200
1300 Pennsylvania Ave., NW
Washington, DC 20004

I further certify that on the date stated below I sent one true and correct of the Rebuttal along with the attachments via UPS overnight to Mr. Stephen D. Mossman, Esq., to the following addresses:

Mr. Stephen M. Mossman, Esq.
Mattson Ricketts Law Firm
134 South 13th Street, Suite 1200
Lincoln, Nebraska 68508

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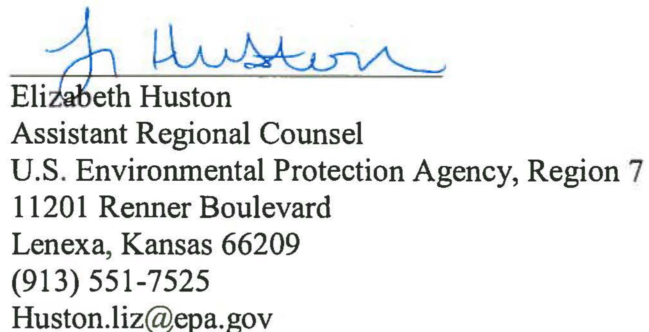
Date



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