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 REBUTTAL PREHEARING EXCHANGE**

Pursuant to 40 C.F.R. § 22.19 of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Complaint or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" ("Part 22 Rules"), the Presiding Officer's February 24, 2017 Second Prehearing Order, and the Presiding Officer's May 9, 2017 Order Granting Respondent's Motion For Leave to File Revised or Supplemental Prehearing Exchange, Complainant Environmental Protection Agency ("EPA" or "Complainant") submits its Rebuttal Prehearing Exchange.

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I. INFORMATION SUPPLEMENTING COMPLAINANT'S INITIAL PREHEARINING EXCHANGE AND NOTICE OF FILING MOTION FOR ACCELERATED DECISION

A. Witnesses

Complainant provided a summary of expected testimony of proposed fact and expert witnesses in Complainant's Initial Prehearing Exchange. Complainant respectfully submits the following supplemental version to the expected testimony of Complainant's witness Tara Martich:

Tara Martich: Ms. Martich works in the United States Environmental Protection Agency's Alaska Operations Office as an Ecologist and Compliance Officer. Ms. Martich has 13 years' experience within the Clean Water Act (CWA) section 402 compliance and enforcement program. As a Compliance Officer, Tara Martich has participated in settlement of over thirty enforcement cases, which included developing penalty justifications based on the EPA's *Interim Clean Water Act Settlement Penalty Policy* (March 1, 1995). If necessary, Ms. Martich will testify regarding the EPA's evaluation of Mr. Hughes's Forest Service inspection report and Respondent's compliance with the CWA. Additionally, Ms. Martich can testify about the CWA statutory penalty factors and penalty assessment in this case.

B. Exhibits

Copies of the following additional documents and exhibits Complainant may introduce into evidence accompany this Rebuttal Prehearing Exchange. Complainant also provides an updated index listing all of Complainant's exhibits (CX).

CX – 35	EPA, General Enforcement Policy #GM-21, February 1984, *available at* https://www.epa.gov/sites/production/files/documents/epapolicy-civilpenalties021684.pdf

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CX – 36 EPA, A Framework for Statute-Specific Approaches to Penalty Assessment: Implementing EPA's Policy on Civil Penalties #GM-22, February 1984, *available at* https://www.epa.gov/sites/production/files/documents/penasm-civpen-mem.pdf

CX – 37 D. Kenney, *An Investigation of Stream Channel Modifications at Unauthorized Suction Dredging Sites on the South Fork Clearwater River, October 7 and 8, 2015* (February 3, 2016)

CX – 38 D. Kenney, *Addendum Regarding 2016 Conditions at an Unauthorized Suction Dredging Site to: An Investigation of Stream Channel Modifications at Unauthorized Suction Dredging Sites on the South Fork Clearwater River, October 7 and 8, 2015* (May 12, 2017)

CX – 39 Idaho Department of Water Resources, Notice to Dave Erlanson re Potential, Unauthorized Alteration to McCoy Creek, August 13, 2015

CX – 40 Idaho Suction Dredge GP, Appendix G (Endangered Species Critical Habitat Areas)

C. Notice of Filing Motion for Accelerated Decision

The Presiding Officer's May 9, 2017 Order Granting Respondent's Motion for Leave to File Revised or Supplemental Prehearing Exchange stated that Respondent shall file a revised or supplemented prehearing exchange on or before May 22, 2017. As of the date of this filing, Respondent has not filed such a revised prehearing exchange. Under Section 22.19(g) of the Part 22 Rules, where a party fails to provide information within its control, the Presiding Officer may, in her discretion: 1) infer that the information would be adverse to the party failing to provide it; 2) exclude the information from evidence; or 3) issue a default order under Section 22.17(c).

Based on statements and documents provided in Complainant's Prehearing Exchanges and Respondent's May 8, 2017 Prehearing Exchange, Complainant asserts there are no genuine issues of material fact and that Complainant is entitled to a determination of Respondent's liability as a matter of law. Further, Complainant asserts that there is no genuine dispute of

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material fact that Complainant calculated an appropriate penalty based on evidence in the record and in accordance with penalty criteria set forth in the applicable statute. Accordingly, based on the foregoing and pursuant to Sections 22.16(a) and 22.20 of the Part 22 Rules, accompanying this Rebuttal Prehearing Exchange is Complainant's Motion for Accelerated Decision.

II. SPECIFICATION OF PROPOSED PENALTY

In accordance with 40 C.F.R. 22.14(a)(4), the Complaint in this matter did not specify a penalty demand. Rather, Complainant elected to fully consider the information provided through the prehearing exchange process before proposing a specific penalty. Having done so, and in accordance with 40 C.F.R. 22.19(a)(4) and the Presiding Officer's February 24, 2017 Second Prehearing Order, Complainant hereby proposes that Respondent be assessed a penalty of $6,600 for the violations identified in the Complaint. In accordance with the Presiding Officer's instructions, Complainant sets forth in this section the EPA's authority to assess a civil penalty for violations of the CWA, an explanation of the CWA statutory penalty factors and methodology utilized in calculating the amount of the proposed penalty, and a detailed application of the CWA statutory penalty factors and methodology to the particular facts and circumstances of this matter.

A. CWA Penalty Assessment Authority

Complainant alleges that Respondent violated CWA section 301(a) when, on July 22, 2015, he discharged pollutants from a point source into a water of the United States without authorization under a CWA section 402 National Pollutant Discharge Elimination System (NPDES) permit. Compl. ¶¶ 3.1 – 3.9. Pursuant to CWA section 309(g)(1)(A), 33 U.S.C. § 1319(g)(1)(A), the EPA is authorized to assess a Class II civil penalty against person that has violated CWA section 301, 33 U.S.C. § 1311. CWA section 309(g)(2)(B) authorizes the

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assessment of a Class II administrative civil penalty of up to $10,000 per day for each day the violation continues. Pursuant to the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and 40 C.F.R. 19, the statutory maximum administrative penalty amounts have been increased to $16,000 per day for violations occurring after December 6, 2013.[1] Accordingly, and consistent with the explanation of the proposed penalty provided in the Complaint, Compl. ¶ 4.1, Respondent is liable for civil penalties for one day of violation of CWA section 301(a) in an amount not to exceed $16,000.

B. Summary of CWA Statutory Penalty Factors and Methodology Utilized in Calculating the Proposed Penalty

Pursuant to 40 C.F.R. § 22.27(b), the Presiding Officer shall determine the amount of the recommended penalty based on the evidence in the record and in accordance with the criteria set for in the applicable statute. CWA section 309(g)(3), 33 U.S.C. § 1319(g)(3), identifies the following statutory penalty factors applicable to this case:

> [1] the nature, circumstances, extent, and gravity of the violation, or violations, and, with respect to the violator, [2] ability to pay, [3] any prior history of such violations, [4] the degree of culpability, [5] economic benefit or savings (if any) resulting from the violation, and [6] such other matters as justice may require.

Section 22.27(b) further states that the Presiding Officer shall consider any civil penalty guidance issued under the applicable statute. As noted in Complainant's Initial Prehearing

[1] *See* 78 Fed. Reg. 66643 (November 6, 2013) (2013 Civil Monetary Penalty Inflation Adjustment Rule); 40 C.F.R. § 19.4, Table 1. In 2016 and 2017, EPA promulgated additional Civil Monetary Penalty Inflation Adjustment Rules, however those revised maximum statutory penalty amounts are generally not applicable to violations that occurred on or before November 2, 2015. *See* 82 Fed. Reg. 3633 (January 12, 2017) (2017 Civil Monetary Penalty Inflation Adjustment Rule).

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Exchange, EPA has no CWA-specific penalty pleading policy.[2] In this circumstance, it is appropriate to calculate a penalty by directly examining each statutory penalty factor.[3] Additionally, as described below, the EPA has two general penalty guidance documents that are instructive in calculating the penalty in this matter.[4]

The United States Supreme Court has indicated that "highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties under the Clean Water Act,"[5] and there are a few different penalty calculation methodologies utilized by federal courts, this Tribunal, and the Environmental Appeals Board. Federal courts calculating penalties under the penalty criteria of CWA section 309(d)—which is substantially similar to the criteria of CWA section 309(g)(3)—generally use one of two methods. The first is the "bottom up" method, which starts with the economic benefit of noncompliance, then adjusts upward to reflect

[2] EPA, *Interim Clean Water Act Settlement Penalty Policy*, p.3 (March 1, 1995) ("This Policy is not intended for use by EPA, violators, courts, or administrative judges in determining penalties at a hearing or trial.").
[3] *See Phoenix Constr. Servs.*, 11 E.A.D. 379, 395 (EAB 2004); *Polo Development, Inc.*, 2015 EPA ALJ LEXIS 6, at *29 (EPA, Dec. 1, 2015).
[4] CX – 35 (EPA, General Enforcement Policy #GM-21, February 1984, available at https://www.epa.gov/sites/production/files/documents/epapolicy-civilpenalties021684.pdf); CX – 36 (EPA, A Framework for Statute-Specific Approaches to Penalty Assessment: Implementing EPA's Policy on Civil Penalties #GM-22, February 1984, available at https://www.epa.gov/sites/production/files/documents/penasm-civpen-mem.pdf).
[5] *Tull v. United States*, 481 U.S. 412, 427 (1987).

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the other statutory factors.[6] The second is the "top down" method, which starts with the statutory maximum, then reduces that amount for any statutory factors in mitigation of the penalty.[7]

In addition to the methodologies utilized by federal courts, this Tribunal and the Environmental Appeals Board have calculated penalties under CWA section 309(g) following the framework of EPA's two general civil penalty policies, known as "GM-21" (Policy on Civil Penalties) and "GM-22" (A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties).[8] These policies provide that a preliminary deterrence figure should first be calculated, based upon the economic benefit of noncompliance and the gravity of the violation, and then that figure is increased or decreased based upon the other statutory factors.

After considering the various methods for calculating an appropriate penalty, Complainant asserts that the “top down” method is the appropriate approach based on the circumstances of this case. As described below, Complainant is not presenting evidence regarding Respondent’s economic benefit of noncompliance, and therefore the “bottom up”

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[6] *See United States v. Smithfield Foods, Inc.*, 191 F.3d 516 (4th Cir. 1999*), cert. denied*, 531 U.S. 813 (2000) (rejecting defendant’s argument that CWA does not allow trebling of the penalty, appeals court affirmed trial court’s use of bottom-up method, beginning with economic benefit as lowest possible penalty); *United States v. Municipal Authority of Union Township*, 929 F. Supp. 800, 806, 809 (M.D. Pa. 1996), *aff'd*, 150 F.3d 259 (3d Cir. 1998) (calculating "wrongful profits" earnings the defendant made by not cutting back production volume to come into compliance, multiplied by two for deterrent effect).

[7] *Atlantic States Legal Foundation v. Tyson Foods*, 897 F.2d 1128, 1142 (11th Cir. 1990) (holding that, on remand, the district court should first determine the maximum fine for which Defendant may be held liable, and, if it chooses not to impose the maximum, it must reduce the fine in accordance with the factors spelled out in CWA section 1319(d)); *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996), *cert. denied*, 519 U.S. 811 (1997) (holding that trial court’s use of top-down approach of *Tyson Foods* was appropriate).

[8] *See e.g., Phoenix*, 11 E.A.D. at 395; *Polo Development*, 2015 EPA ALJ LEXIS 6, at *29; *Urban Drainage and Flood Control District*, 1998 EPA ALJ LEXIS 42, at *55-56 (EPA, June 24, 1998).

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method is not appropriate. Complainant's application of the "top down" method is also informed by the GM-21 penalty policy and GM-22 penalty framework, consistent with the approach taken by this Tribunal in *Polo Development, Inc. et al*. In application, Complainant begins with the maximum statutory penalty of $16,000 and reduces that amount to provide for an appropriate initial deterrence amount based on the gravity of the violation at issue (i.e., the nature circumstances, extent, and gravity factor), and then increases or decreases that amount based upon the other statutory factors.

C. Application of Statutory Factors and Methodology to this Matter

1. Nature Circumstances, Extent, and Gravity of the Violation

The nature, circumstances, extent, and gravity of the violation reflect the "seriousness" of the violation.[9] The seriousness of a particular violation depends primarily on the actual or potential harm to the environment resulting from the violation, as well as the importance of the violated requirement to the regulatory scheme.[10] In assessing the actual or potential harm to the environment, GM-22 provides that, for purposes of ranking violations according to seriousness, the Agency should consider the amount of pollutant, toxicity of pollutant, sensitivity of the environment, and length of time a violation continues. GM-22 also provides that the normal gravity amount may be insufficient to effect general deterrence, and, in such cases, the Agency should consider increasing the gravity amount to achieve general deterrence. The evidence in this matter establishes that the nature, circumstances, extent, and gravity of Respondent's violations are serious and justify a penalty.

[9] *See Urban Drainage*, 1998 EPA ALJ Lexis 42, at *56.
[10] *See id.*

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a. Potential for Harm

In evaluating the potential for impacts to the environment, it is appropriate to assess the sensitivity of the impacted aquatic resource.[11] The evidence in this matter demonstrates that the aquatic resource where the violation occurred is sensitive and that there is a potential for harm to the environment resulting from the violation. The South Fork Clearwater River, including the stretch of river where Respondent's unauthorized discharges took place, is designated critical habitat for species listed as threatened under the Endangered Species Act (ESA), including steelhead, and Essential Fish Habitat under the Magnuson-Stevens Fishery Conservation and Management Act, including Chinook and Coho salmon.[12] Additionally, the South Fork Clearwater River is a CWA section 303(d)-listed impaired waterbody for sediment and temperature and, accordingly, the State of Idaho has established a plan, known as total maximum daily load (TMDL), for restoring the South Fork Clearwater River. The TMDL identifies the maximum amount of a pollutant that the River can receive while still meeting water quality standards.[13]

It is also well documented that discharges from suction dredges operating on the South Fork Clearwater River have the potential to harm sensitive aquatic resources. As discussed in Complainant's Initial Prehearing Exchange, in a 2014 report summarizing the impacts to

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[11] *See Don Cutler*, 11 E.A.D. 622, 653 (EAB 2004) ("[I]n assessing the gravity or seriousness of any violation, [EPA] customarily considers 'the sensitivity of the environment' at the location where the violation occurred.")

[12] *See e.g.*, CX – 17, p.977 (NMFS Biological Opinion for the South Fork Clearwater – identifying the affected ESA-listed species); CX – 40 (Appendix G to the Idaho Suction Dredge GP – identifying the Endangered Species Critical Habitat Areas).

[13] *See e.g.*, CX – 06, p.178, Table A (South Fork Clearwater TMDL executive summary with Table identifying water quality limited water bodies in the South Fork Clearwater Subbasin); CX – 03, p.38 (Idaho Suction Dredge GP – Section II.B.4 of the GP contains effluent limits for the South Fork Clearwater based on the TMDL).

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salmonid species, such as steelhead trout, and their habitat from suction dredging on the South Fork Clearwater River, Mr. Arthaud, Fishery Biologist with the National Marine Fisheries Service (NMFS), wrote the following:

> Generally the [South Fork Clearwater River] is shallow river habitat. Spawning and rearing quality varies from good to poor with habitat quality throughout reduced by physical substrate habitat alterations, fine sediment/siltation, and warm temperatures (CWA 303d listed), largely caused by mining. Suction dredge mining directly contributes to this degraded baseline and slows restoration.
>
> Suspended fine sediments can directly cause a full range of injuries with denser, wider and longer plumes generally increasing adverse effects. Fine sediments in plumes settle in slower velocity substrates, filling pools or creating a film of silt in shallow areas that reduces invertebrate production, which limits the growth and production of steelhead. Reduced growth in young fish transfers small size to later life stages and significantly reduces survival during smolt migration and ocean entry.[14]

Mr. Arthaud's conclusions are further supported by detailed analyses completed by NMFS and the United States Forest Service ("Forest Service") as part of the ESA section 7 consultation for the Forest Service's and Bureau of Land Management's suction dredge program on the South Fork Clearwater River.[15]

Respondent's suction dredge activities on July 22, 2015, resulted in the potential for harm to the South Fork Clearwater River as set forth in Mr. Arthaud's 2014 report, and as further described in the subsequent ESA consultation documents. As documented in the Inspection Report and Declaration of Complainant's witness Mr. Hughes, of the Forest Service, Respondent was "actively dredging with the plume from the upstream dredge mixing with the plume of the

[14] CX – 18, p.1064.
[15] CX – 17, p.1013-1032 (NMFS Biological Opinion detailing the potential adverse effects to ESA-listed species), p. 1058 (Appendix B contains a summary of effects on fish and invertebrates associated with various turbidity levels); CX – 21, p.1147-1151 (Forest Service Biological Assessment detailing the potential adverse effects to ESA-listed steelhead trout and habitat).

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downstream dredge."[16] Mr. Hughes estimates that the combined plume extended 220 feet downstream from Respondent's dredge before it went beyond his field of vision.[17] The analysis below regarding risk to the CWA Regulatory Framework contains additional information regarding the potential impacts from the Respondent's specific discharge, including permit requirements from the Idaho Suction Dredge GP that could have applied had Respondent obtained CWA authorization to discharge as well as reasonable and prudent measures NMFS considers necessary and appropriate to minimize the amount or extent of harmful impacts to critical habitat for ESA-listed species associated with authorized suction dredging activities.

In addition to the potential impacts from the turbid plume, on October 8, 2015 and September 13, 2016, staff from the Forest Service returned to the South Fork Clearwater River and evaluated the areas identified during Mr. Hughes July 22, 2015 inspection, including the area where Respondent operated his suction dredge.[18] For the area dredged by Respondent, Forest Service staff documented five holes and seven dredge tailings piles, which provide additional evidence of the physical impacts from this suction dredging activity.[19]

As described above, there is potential for harm to the sensitive aquatic resources of South Fork Clearwater River from Respondent's discharge, but there are certain mitigating factors that Complainant acknowledges and has taken into account in the derivation of the initial gravity

[16] CX – 01, pp.02, 5-7; CX – 02, ¶5, p.24.
[17] *Id.*
[18] CX – 37 (D. Kenney, An Investigation of Stream Channel Modifications at Unauthorized Suction Dredging Sites on the South Fork Clearwater River, October 7 and 8, 2015, February 3, 2016); CX – 38 (D. Kenney, Addendum Regarding 2016 Conditions at an Unauthorized Suction Dredging Site to: An Investigation of Stream Channel Modifications at Unauthorized Suction Dredging Sites on the South Fork Clearwater River, October 7 and 8, 2015, May 12, 2017).
[19] *Id.*

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amount. First, the Agency's GM-22 penalty framework guidance identifies toxicity of the pollutant as a factor to consider when ranking violations according to seriousness.[20] The primary pollutant of concern from the discharge at issue, i.e., suspended solids (and the resulting turbidity),[21] is considered a conventional pollutant.[22] Complainant acknowledges that, in terms of relative risk to the environment and depending on the circumstances, conventional pollutants generally pose less risk than a toxic pollutant (e.g., mercury).[23] That general proposition would appear applicable to the discharge at issue here. In the Forest Service's Biological Assessment associated with the 2016 ESA consultation, the Forest Service concluded that its suction dredge program on the South Fork Clearwater River was likely to adversely affect steelhead and steelhead critical habitat.[24] NMFS's Biological Opinion prepared in response to the Forest Service Biological Assessment, summarized the potential effects on listed salmon and steelhead and steelhead critical habitat, but determined the effects are likely to be small, if properly regulated, for several reasons, including: mining disturbance will be limited to 15 dredge operations per year, season will be limited to one month in mid-summer, work areas must remain at least 800 feet apart, miners will be required to limit turbidity plumes to 150 feet, miners will

[20] CX – 36 (GM-22, p. 15).
[21] CX – 04, p.76 (Idaho Suction Dredge GP Fact Sheet).
[22] 33 U.S.C. § 1314(a)(4).
[23] *See* 40 C.F.R. § 401.15 (list of toxic pollutants designated pursuant to CWA section 307(a)(1)). Complainant notes that the Idaho Suction Dredge GP does not authorize the discharge of mercury from suction dredge operations. *See* CX – 4, p.76. The GP contains Best Management Practices for handling of mercury encountered during suction dredge operations. *See id.* at p.85 (stating that if mercury is found during suction dredge operation, i.e., mercury is collected in the sluice box, the operator must: (1) Keep mercury collected, do not remobilize the collected mercury; (2) Stop dredging immediately if this is the only way to achieve Step 1; and (3) Work with the appropriate entity to dispose of the mercury properly.").
[24] *See* CX – 21, p.1130 (Forest Service Biological Assessment).

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be required to refill dredged holes before dredging another hole.[25] Additionally, while there are well-documented potential impacts to the sensitive aquatic resource of the South Fork Clearwater, Complainant acknowledges that there are no documented actual or potential impacts to human health and accounts for that in the proposed penalty calculation.

Second, GM-22 identifies the length of time a violation continues as a factor to consider when ranking violations according to seriousness, noting that the longer a violation continues uncorrected, the greater the risk of harm.[26] Here, while the South Fork Clearwater River is habitat to ESA-listed salmonids and other native species that are susceptible to impacts from turbidity caused by Respondent's discharge, Complainant acknowledges that the potential impact from the one day of discharge may be comparatively low.[27]

Third, GM-22 identifies the size of the violator as a relevant factor to assessing the overall gravity of the violation,[28] and Complainant asserts that it is appropriate to take this into account in examining the potential for harm to the environment. Here, given that Respondent was operating a small-scale suction dredge and discharged a relatively low quantity of material,

[25] CX – 17, p.1030 (NMFS Biological Opinion). However, see section below regarding Risk to the CWA Regulatory Program, for a discussion on Respondent's activities in light of the NPDES permit requirements and the reasonable and prudent measures identified in NMFS's Biological Opinion.
[26] CX – 36 (GM-22, p. 15).
[27] The scale of short-term impacts is likely on the low end, assuming that suction dredge activity is conducted properly. *See e.g.*, Respondent's Exhibit (RX) – 02 p. 2 (concluding that "Idaho Water Quality Standards criteria for turbidity were not violated within the sediment plumes of active recreational suction dredges," but noting that the study "had limited use in predicting recreational dredge mining impacts to water quality in South Fork Clearwater River.").
[28] CX – 36 (GM-22, p.15).

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the relative potential for impacts (e.g., when compared to large-scale suction dredging)[29] is on the lower end of the spectrum in the gold placer mining sector.[30]

In Respondent's Prehearing Exchange, he argues in one sentence that the discharge "was not more than *de minimus* and caused no adverse environmental effects." Respondent's Prehearing Exchange p. 5. While Complainant disputes this particular characterization, as discussed above, Complainant acknowledges that there are mitigating factors regarding the seriousness of the violations in terms of the actual and/or potential environmental impacts from Respondent's discharge and has taken that into account in the proposed penalty. Additionally, Complainant took into account the reports identified in Respondent's Prehearing Exchange that discuss the environmental impacts associated with suction dredging.[31] While some of the conclusions from these reports suggest that actual impacts from small-scale suction dredging may be relatively low depending on circumstances, a conclusion that Complainant does not dispute, they do not support Respondent's assertion that there are no adverse environmental effects.[32]

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[29] *See e.g.*, CX – 17, p.1009 (NMFS Biological Opinion briefly describing the lasting impacts of historical large-scale hydraulic and dredge mining operations on the South Fork Clearwater River).

[30] *See* RX – 04 p. 1 (describing the summary of conclusions regarding a study of impacts associated with recreational suction dredging in Alaska: "Of the factors we measured, the primary effects of suction dredging on water chemistry of the Fortymile River were increased turbidity, total filterable solids, and copper and zinc concentrations downstream of the dredge. These variables returned to upstream levels within 80-160 m downstream of the dredge. The results from this sampling revealed a relatively intense, but localized, decline in water clarity during the time the dredge was operating.).

[31] *See* RX – 02; 03; 04; 05; 06; 07.

[32] *See* RX – 02 p.13 ("The study plan implemented in 2001 had limited use in predicting recreational dredge mining impacts to water quality in South Fork Clearwater River."); RX – 03 (providing a string of references with selected quotations, many of which acknowledge a range of environmental impacts associated with suction dredging; e.g., "Impacts on fish and habitat were moderate, seasonal and site-specific"); RX – 04, p.1 ("Of the factors we measured, the

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b. Risk to the CWA Regulatory Program

Second, it is most significant that the discharges occurred without any CWA permits or meaningful oversight by the EPA. The CWA's fundamental purpose is to "restore and maintain the chemical, physical, and biological integrity of the nation's waters."[33] In order to achieve that objective, one of the most critical aspects of the CWA statutory scheme is the prohibition on discharges of pollutants from a point source into waters of the United States unless expressly authorized and regulated through the issuance of a CWA permit.[34] As federal courts have noted, any unpermitted discharge into waters of the United States is a serious violation which significantly undermines the CWA's regulatory scheme.[35] This is consistent with the Agency's GM-22 general penalty framework guidance, which lists "importance to the regulatory scheme" as one of the primary factors to consider in quantifying the gravity of a violation.[36] As the GM-22 explains, "this factor focuses on the importance of the requirement to achieving the goal of the statute or regulation."[37] Further, the Environmental Appeals Board has noted, "even if there is no actual harm to the environment, failure to obtain a [CWA] permit before [discharging

primary effects of suction dredging on water chemistry of the Fortymile River were increased turbidity, total filterable solids, and copper and zinc concentrations downstream of the dredge."); RX – 06, p.8 ("Given the current level of uncertainty about the effects of dredging, where threatened or endangered aquatic species inhabit dredged areas, fisheries managers would be prudent to suspect that dredging is harmful to aquatic resources.").

[33] 33 U.S.C. § 1251(a).

[34] 33 U.S.C. § 1311(a).

[35] *See United States v. Pozsgai*, 999 F.2d 719, 725 (3rd Cir. 1993) (noting that "[u]npermitted discharge is the archetypal Clean Water Act violation, and subjects the discharger to strict liability").

[36] CX – 36 (GM-22, p.14).

[37] *Id.*

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pollutants into waters of the United States] may cause significant harm to the regulatory program."[38]

Here, Respondent has stipulated to the fact that he did not have a CWA section 402 NPDES permit authorizing him to discharge pollutants into the South Fork Clearwater River.[39] At the time of Respondent's discharge on July 22, 2015, discharges into the South Fork Clearwater River were not covered under the Idaho Small Suction Dredge GP because, during ESA section 7 consultation, NMFS concluded that small-scale suction dredging as a general activity would adversely affect ESA-listed salmon and steelhead and their habitat.[40] Thus, Respondent could not have CWA coverage under the Idaho Suction Dredge GP for discharging pollutants from a suction dredge into the South Forth Clearwater, and it is undisputed that Respondent did not have or seek to obtain coverage under an individual NPDES permit.

Even if Respondent could have obtained coverage under the Idaho Suction Dredge GP, based on the evidence in this matter, Respondent was not in compliance with even the most basic Best Management Practices listed in the GP. For example, Section II.D.3 of the GP states "Suction dredge operations shall not operate within 800 feet of another suction dredging operation occurring simultaneously."[41] As documented in the Inspection Report and Declaration of Complainant's witness Mr. Hughes, Respondent's dredge was actively operating just 50 feet

[38] *Phoenix*, 11 E.A.D. at 400.
[39] Respondent's Prehearing Exchange, p.6.
[40] CX – 03, Section I.D.4.a. (Idaho Suction Dredge GP); CX – 16 (NMFS ESA consultation response re the Idaho Suction Dredge GP); CX – 17, pp.983-84 (NMFS Biological Opinion documenting consultation history).
[41] CX – 03, p.40 (Idaho Suction Dredge GP).

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apart from another suction dredge that was actively operating, and the plume from the two dredges merged to form one larger plume.[42]

Furthermore, because Respondent's unauthorized suction dredging activities took place prior to the completion of the required ESA section 7 consultation, he could not take into account nor document compliance with the reasonable and prudent measures NMFS considers necessary and appropriate to minimize the amount or extent of harmful impacts to the sensitive aquatic resource associated with authorized suction dredging activities (i.e., "incidental take"). As a result of the 2016 consultation, suction dredge operators may now seek CWA coverage under the Idaho Suction Dredge GP for operations on the South Fork Clearwater River, subject to the reasonable and prudent measures outlined in NMFS's Biological Opinion. For example, NMFS identified several non-discretionary terms and conditions that must be complied with in order to meet the reasonable and prudent measures, including monitoring the downstream extent and duration of visible turbidity plumes created by the action.[43] The purpose of this term and condition is to help ensure that operations do not exceed the authorized incidental take statement, which would occur if visible turbidity plumes exceed 150 feet in length.[44] As documented in the Inspection Report and Declaration of Complainant's witness Mr. Hughes, Respondent was "actively dredging with the plume from the upstream dredge mixing with the plume of the downstream dredge" and that the combined plume extended 220 feet downstream from Respondent's dredge before it went beyond Mr. Hughes's field of vision.[45]

[42] CX-01; CX-02.
[43] CX – 17, p.1034 (NMFS Biological Opinion).
[44] *Id. at* 1033.
[45] CX – 01, p.02 (Site #2), pp.05-07 (photographs); CX – 02, ¶ 5.

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As the foregoing analysis demonstrates, Respondent's decision to operate his suction dredge in the South Fork Clearwater River without the required NPDES permit and prior to the completion of ESA section 7 consultation, is a serious violation of the CWA.

Finally, there is one additional aspect of potential harm to the regulatory program that is worth noting in the context which Respondent's unauthorized activity occurred. Where an activity is typically visible to other members of the community, "the perception that an individual is 'getting away with it' and openly flaunting the environmental requirements may set a poor example for the community and encourage other similar violations in the future and/or lead to the acceptance of such activities as commonplace, minor infractions not worthy of attention."[46] This consideration is relevant to the suction dredge mining community that operates on the South Fork Clearwater River in Idaho. During the 2014 and 2015 Idaho dredging season, a group of suction dredgers, knowing that the Idaho Suction Dredge GP was not available for CWA coverage on the South Fork Clearwater River due to the need to conduct ESA section 7 consultation, participated in suction dredge operations on the South Fork Clearwater River in open opposition to EPA's CWA regulation.[47] In fact, on the day of the discharge at issue in this matter, a collection of this same group, took video of an exchange between themselves and EPA's witness Mr. Hughes.[48] The exchange shows Mr. Hughes attempting to hand out notices of noncompliance for suction dredging without the required Forest Service plan of operations, and one member of the group threatening to sue Mr. Hughes in his personal capacity. The Agency's

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[46] *Phoenix*, 11 E.A.D. at 399.
[47] *See e.g.*, "Clearwater EPA gold dredging trip 2014" *available at* https://www.youtube.com/watch?v=h-G1N9ywE9Y (last visited June 2, 2017).
[48] "Dredging Idaho and facing a tyrannical government p2" *available at* https://www.youtube.com/watch?v=e4q_nV0Ndf8 (last visited June 2, 2017). The exchange begins at approximately the 5:30 minute mark.

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GM-22 general penalty framework guidance provides that the normal gravity amount may be insufficient to effect general deterrence, and, in such cases, the Agency should consider increasing the gravity amount to achieve general deterrence.[49] Complainant has taken the facts above into consideration, but has elected not to increase the initial gravity amount because it believes the normal gravity amount will be sufficient to effect general deterrence. However, if, in the future, EPA is compelled to bring another enforcement action based on a similar set of circumstances, it will likely weigh this factor heavily.

c. Complainant's Proposed Initial Gravity Amount

As noted above, for one day of discharge in violation of CWA section 301(a), the total maximum allowable penalty under the CWA is $16,000. Borrowing from the methodology used by this Tribunal in *Urban Drainage*, the gravity of violations to CWA Section 301(a) can reasonably be classified as minor, moderate, or major, and the maximum statutory penalty can be reduced based on the respective ranges for the initial gravity amount.[50] For all of the reasons described in detail above, Complainant believes that the violation at issue in this case should be classified as moderate and reduced accordingly; i.e., an initial gravity amount between $5,334 – $10,666. The violation occurred in an area designated as critical habitat for threatened species and the discharge at issue has the well-documented potential to adversely impact that critical habitat. Additionally, and most importantly, the discharges at issue were unauthorized and caused significant harm to the CWA regulatory program. Complainant also recognizes that the

[49] CX – 36 (GM-22, p.16).

[50] *Urban Drainage*,1998 EPA ALJ Lexis 42, at *65-66 (EPA, June 24, 1998). Complainant recognizes that the violations at issue in *Urban Drainage* involve the CWA section 404 dredge and fill permit program. However, the ranking of the seriousness of violations into dollar ranges provides a reasonable approach to the inherently subjective process of categorizing the gravity violations of CWA section 301(a).

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relative scale of the potential impairment to the aquatic resource resulting from one day of documented discharge of a conventional pollutant from a small-scale suction dredge warrants an appropriate reduction in the size of the proposed penalty. In terms of dollars, an initial gravity amount on the low end of the range for a moderate violation is appropriate and justifiable, and Complainant proposes an initial gravity amount of $5,500. The initial gravity amount proposed today would serve as a deterrent without being disproportionate to the seriousness of the violations.

2. Respondent's Economic Benefit

The Federal courts as well as the Environmental Appeals Board have emphasized the importance of the economic benefit factor, even where the exact or full amount cannot be calculated, and have provided that a partial amount or reasonable approximation is sufficient to include in a penalty assessment.[51] Respondent's noncompliance with the CWA resulted in an economic benefit from the extraction of gold resources from the South Fork Clearwater River (Respondent admits as much, Answer ¶ 4.5). Respondent has not offered any specifics on the amount of gold he obtained as a result of his July 22, 2015 dredging activities, and, in any event, is likely not a significant dollar amount.[52]

Additionally, Respondent benefited through the avoidance of costs associated with suction dredging without applying for and complying with an individual NPDES permit and the associated regulatory measures that are required to ensure that suction dredge gold mining is

[51] *United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 529 (4th Cir. 1999), *cert. denied*, 531 U.S. 813 (2000); *B.J. Carney*, 7 E.A.D. 171, 207-08 (EAB 1997), *on remand*, 1998 EPA ALJ LEXIS 112 (ALJ, January 5, 1998), *appeal dismissed*, 192 F.3d 917 (9th Cir. 1999).
[52] For one perspective, *see* Bedrock Dreams, "Can I Make a Living Gold Mining?", *available at* http://www.bedrockdreams.com/2008/08/can-i-make-living-gold-mining.html (last visited June 2, 2017).

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conducted in a manner that will limit impacts to the aquatic resource. As described above, in order to obtain CWA coverage for suction dredging on the South Fork Clearwater River in 2015, Respondent would have had to apply for an individual NDPES permit, which entails a minimum amount of time commitment to gather the requisite information to complete the application. There are also compliance costs associated with basic conditions that any individual permit would have contained; e.g., implementation of any Best Management Practices identified in the permit, recording daily visual observations of the turbidity plumes caused by the dredging activity, and completion and submittal of an annual report. In addition to the regular NPDES conditions, due to the presence of threatened species and their critical habitat on the South Fork Clearwater River, EPA would have to engage in ESA section 7 consultation with both the NFMS and U.S. Fish and Wildlife Service in order to issue an individual NPDES permit. The resulting terms and conditions, likely similar or identical to those described above, designed to ensure that the suction dredging operation did not result in adverse effects to ESA-listed species and their habitat, or further impair the river's water quality, would also have associated compliance costs. It is reasonable to conclude that by failing to obtain and comply with an individual NPDES permit Respondent avoided costs of approximately $300 to $500.

Notwithstanding the information above, Complainant asserts that the deterrence factor associated with the gravity of the violation is the most relevant factor to consider. Accordingly, because the gravity-based penalty amount of $5,500 is sufficiently in excess of any possible economic benefit realized by Respondent, and in the interest of approaching the issue of penalty in a fair and equitable matter, Complainant proposes to assess no increase in the penalty for the economic benefit factor.

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3. Respondent's Ability to Pay

Respondent has presented no information indicating that Respondent is unable to pay a penalty up to the statutory maximum penalty for this violation.

4. Respondent's Prior History of Violations

Complainant is unaware of Respondent having any history of CWA violations and therefore proposes no adjustment to the proposed penalty based on this factor. Complainant adds that just because Respondent had not previously and affirmatively been found in violation of the CWA, this is not a reasonable basis for adjusting downwards the proposed penalty.[53]

5. Respondent's Culpability

The penalty must be adjusted to consider the degree of Respondent's culpability, which the Environmental Appeals Board and this Tribunal have generally described as Respondent's "blameworthiness."[54] The Agency's GM-22 general penalty framework guidance describes several factors to consider when assessing the Respondent's culpability (or "degree of willfulness and/or negligence"): how much control the violator had over the events constituting the violation; the foreseeability of the events constituting the violation; whether the violator took reasonable precautions against the events constituting the violation; whether the violator knew or should have known of the hazards associated with the conduct; the level of sophistication within the industry in dealing with compliance issues; and whether the violator in fact knew of the legal

[53] *See Serv. Oil, Inc.*, 2007 EPA ALJ LEXIS 21, at *165-67 (EPA, August 3, 2007).
[54] *See e.g., Phoenix*, 11 E.A.D. at 418, n.87 (EAB 2004); *Polo Development*, 2015 EPA ALJ LEXIS 6, at *46.

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requirement which was violated.[55] This approach has been adopted on number of occasions by the Environmental Appeals Board as well as this Tribunal.[56]

There is no reasonable dispute that Respondent was solely responsible for the discharges from his suction dredge, and therefore had full control over the events constituting the violation.

Respondent could, and should, have foreseen that he was required to obtain a NPDES permit prior operating and discharging pollutants from his suction dredge. Prior to the 2015 mining season, Respondent had knowledge of the requirement to obtain an EPA NPDES permit and that coverage was not available under the Idaho Suction Dredge GP. In 2014, Respondent submitted a CWA section 404 permit application to the United States Army Corps of Engineers ("Corps") for suction dredging in the South Fork Clearwater River. Both the Corps and the EPA informed Respondent of the requirement to obtain a CWA section 402 NPDES permit and notified Respondent that the South Fork Clearwater River contains critical habitat for bull trout and steelhead, requiring an ESA determination before suction dredging can be permitted.[57] On May 13, 2015, Respondent signed an Idaho Department of Water Resources Recreational Mining Authorization ("Letter Permit"), which authorized Respondent to operate recreational mining equipment in accordance with Idaho law and provided clear notification in bold font that EPA requires NPDES permit coverage for small scale suction dredging in Idaho.[58] On May 17, 2015, Respondent submitted a Notice of Intent to EPA to obtain coverage under the General Permit for placer mining operations in three waterbodies, including the South Fork Clearwater River. EPA

[55] CX – 36 (GM 22 at 18).
[56] *See e.g.*, *Phoenix*, 11 E.A.D. at 418 (EAB 2004); *Polo Development*, 2015 EPA ALJ LEXIS 6, at *46-47; *Urban Drainage*, 1998 EPA ALJ Lexis 42, at *171-72.
[57] CX – 08 (EPA letter to D. Erlanson, October 3, 2014); CX – 09 (Corps letter to D. Erlanson, February 11, 2014); CX – 10 (D. Erlanson, Joint Application for Permits, February 10, 2014).
[58] CX – 29.

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permitted dredging operations on two of the waterbodies and sent a letter to Respondent explaining again that Respondent's proposed small suction dredge operation on the South Fork Clearwater River was not eligible for coverage under the General Permit because of the need to complete ESA section 7 consultation.[59]

The evidence in this matter documents the willful nature of Respondent's actions, but Complainant acknowledges that Respondent submitted a Notice of Intent to obtain coverage under the Idaho Suction Dredge GP to discharge into the South Fork Clearwater River. While it should have been clear to Respondent that his suction dredging activities on the South Fork Clearwater River were not authorized under the Idaho Suction Dredge GP and the reasons why (e.g., the requirement to assess impacts to critical habitat for ESA-listed species) and Respondent made no attempt to apply for and obtain an individual NPDES permit for his discharges, Complainant has taken into account Respondent's limited efforts to comply with the CWA when assessing the adjustment to the gravity amount based on the level of culpability.

The evidence also demonstrates that Respondent failed to take reasonable precautions associated with his suction dredging activity. As described above in the discussion regarding the risks to the CWA regulatory program, Respondent did not comply with even the most basic Best Management Practices listed in the GP, e.g., the requirement that "Suction dredge operations shall not operate within 800 feet of another suction dredging operation occurring simultaneously." Complainant does acknowledge that Respondent received state-authorization to operate his suction dredge on the South Fork Clearwater River in accordance with Idaho law.

[59] CX – 11 (EPA letter to D. Erlanson, August 7, 2015); CX – 12 (D. Erlanson, Notice of Intent, May 29, 2015).

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However, as noted above, the Letter Permit provides clear notification in bold font that EPA requires NPDES permit coverage for small-scale suction dredging in Idaho.

Additionally, the State of Idaho Department of Water Resources sent Respondent a notice of "Potential, Unauthorized alteration" regarding Respondent's suction dredging activities in 2014 at a different location, providing evidence that in the past Respondent may have failed to take reasonable precautions associated with his state-issued Letter Permit.[60] The notice states: ". . . large pools were dredged, the bank was undercut, and stream bed and bank materials were placed immediately next to the active channel. This alteration appears to have resulted in the channel being breached, changing the direction of flow of the active channel."[61]

In Respondent's Prehearing Exchange, he argues he was "acting in good faith reliance on his right to work his vested mining claim" and that a question exists as to whether Respondent fully understood his rights to carry out his suction dredging activities on the South Fork Clearwater River. Respondent's Prehearing Exchange p.5. However, the information provided above demonstrates that the EPA, the Corps, and the Letter Permit from the Idaho Department of Water Resources provided Respondent with notice that his suction dredge operation required CWA authorization. Additionally, the Agency's GM-22 general penalty framework guidance states that "lack of knowledge of the legal requirement, should never be used as a basis to reduce the penalty. To do so would encourage ignorance of the law. Rather, knowledge of the law should serve only to enhance the penalty."[62]

[60] CX - 40.
[61] *Id.* at p.1.
[62] CX – 36 (GM-22 at 18).

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Based on the foregoing, and consistent with the suggested approach set forth in the Agency's GM-22 general penalty framework guidance,[63] Complainant proposes a 20 percent increase to the initial gravity amount of $5,500 to account for Respondent's culpability, for a total interim penalty of $6,600.

Finally, in assessing culpability, the Environmental Appeals Board has also considered the violator's attitude, cooperativeness, and good faith efforts in reporting or remedying violations.[64] In this regard, Complainant notes that the EPA sent Respondent a Notice of Violation and Request for Information pursuant to CWA section 308.[65] In his response, Respondent failed to provide any of the requested information; instead, Respondent set forth legal arguments regarding why the request was in error and recommended that EPA withdraw the request.[66] This exchange is demonstrative of Respondent's attitude and noncooperation in remedying the alleged violation. The Agency's GM-22 general penalty framework guidance provides that the case development team has absolute discretion on any adjustments up to a 10 percent increase in the initial gravity amount for cooperation/noncooperation.[67] While Respondent's noncooperation may justify an additional increase in the initial gravity amount of 10 percent (i.e., an additional $550), Complainant proposes no increase for noncooperation because, in its discretion, the 20 percent increase for his willfulness in violating the CWA is sufficient to account for Respondent's culpability in this matter.

[63] *See id.* at 18-19.
[64] *Phoenix,* 11 E.A.D. at 418.
[65] CX – 27.
[66] CX – 28.
[67] CX – 36 (GM-22 p 19).

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6. Other Matters as Justice May Require

The Environmental Appeals Board has noted that application of the justice factor "should be far from routine, since application of the other adjustment factors normally produces a penalty that is fair and just."[68] Complainant asserts that there are no facts justifying the use of this factor to reduce the penalty amount and that Complainant's application of the other penalty factors to this matter have resulted in a proposed penalty that is fair and just.

III. Conclusion

For the foregoing reasons, Complainant proposes a penalty in this matter in the amount of $6,600. This is the appropriate penalty to assess against Respondent, in light of the CWA section 309(g) statutory penalty factors, for discharging a pollutant from his suction dredge into the South Fork Clearwater River, which is critical habitat for ESA-listed species, without a NPDES permit required by CWA section 402, in violation of CWA section 301(a).

Dated this 5th day of June, 2017.

Respectfully submitted,

/s/ Endre M. Szalay

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[68] *Spang & Co.*, 6 E.A.D. 226, 250 (1995). *See Phoenix*, 11 E.A.D. at 415-16 (holding that the facts of the case were insufficient to justify a penalty reduction, and that the Presiding Officer did not error or abuse her discretion in not discussing the facts in greater detail in her consideration of the justice factor).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **COMPLAINANT'S REBUTTAL PREHEARING EXCHANGE**, dated June 5th, 2017, 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 REBUTTAL PREHEARING EXCHANGE**, via regular US Mail, postage prepaid, on Mark Pollot, Attorney for Respondent Dave Erlanson, Sr., at 772 E. Lava Falls St., Meridian, Idaho 83646 and via email at conresctr@cableone.net.

Dated this 5th day of June 2017.

/s/ Shannon K. Connery
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