UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

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| In the Matter of: | ) | DOCKET NO. CWA-10-2020-0181 |
| | ) | |
| Kirk Wilson, Individual | ) | **COMPLAINANT'S OPPOSITION TO** |
| | ) | **RESPONDENT'S MOTION TO** |
| Glennallen, Alaska | ) | **DISMISS AND/OR MOTION FOR** |
| | ) | **ACCELERATED DECISION AND** |
| Respondent. | ) | **COMPLAINANT'S MOTION TO** |
| | ) | **STRIKE** |



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## I. INTRODUCTION

Pursuant to Rule 22.16(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Rules of Practice or Rules), 40 C.F.R. § 22.16, and the Prehearing Order (Docket No. 4), the United States Environmental Protection Agency, Region 10 (Complainant or EPA) opposes the "Motion to Dismiss for Failure to State A Complaint and/or Motion for Summary Judgement" contained within Mr. Kirk Wilson's (Respondent) Answer to Complaint and Request and Demand for Hearing and Exercise of All U.S. and Alaska Constitution Statutory and Administrative Rights (Answer). EPA respectfully requests that the Tribunal deny Respondent's Motions.

EPA also hereby moves to partially strike Respondent's Answer, including allegations that EPA construes as counterclaims; redundant, immaterial, and impertinent matter; and certain affirmative defenses contained therein. Specifically, Complainant moves to strike all references to counterclaims in the "Preamble" on the grounds that the Tribunal lacks subject matter jurisdiction to adjudicate Respondent's claims. On the same grounds, Complainant moves to strike paragraph 7.4 and the first two lines of paragraph 7.5. Complainant also moves to strike parts "d," "e," "f," and "i" of Respondent's "Preamble" on the grounds that those paragraphs and the characterization of the material contained therein is redundant, immaterial, and impertinent. Finally, to maximize the efficiency of this proceeding, Complainant moves to strike paragraph 7.6 on the grounds that Respondent's affirmative defenses of "latches [*sic*] and/or undue delay and/or the statute of limitations" are improperly pleaded and legally insufficient. EPA informed Respondent, through counsel, of its intention to file the instant motion. Respondent, through counsel, informed EPA that he intends to oppose the motion.



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In support of Complainant's Opposition to Respondent's Motions and in support of Complainant's Motion to Strike, Complainant states as follows:

## II. PROCEDURAL HISTORY

On September 30, 2020, EPA filed a civil administrative complaint against Respondent alleging that Respondent violated Section 301(a) of the Clean Water Act (CWA), 33 U.S.C. § 1311(a), when he discharged dredged and/or fill material into wetlands that are waters of the United States. Complaint ¶¶ 3.1-3.26. On November 25, 2020, counsel for Respondent filed Respondent's Answer. Respondent treated the Answer as a legal brief, including a "Preamble," facts immaterial and impertinent to Complainant's action, and unsupported claims that Complainant and others have violated Respondent's rights. In the "Preamble," Respondent asserted that his Answer should be treated as a "Motion to Dismiss for Failure To State A Complaint and/or a Motion for Summary Judgment." Answer at 9.

On December 7, 2020 Complainant filed a Notice in Response to Respondent's Answer to inform the Tribunal that EPA did not read the Answer as a motion of any kind because, among other things, the Answer failed to comply with the requirements of 40 C.F.R. § 22.16. EPA sought clarification from the Tribunal on whether it should treat Respondent's Answer as a motion. On December 31, 2020, the Tribunal issued a Prehearing Order requiring, in part relevant to this response, that EPA respond to the Motions by January 15, 2021.

## III. LEGAL STANDARD

This proceeding is governed by the Rules of Practice. 40 C.F.R. Part 22. The Rules address decisions to dismiss and accelerated decisions as follows:

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine



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

40 C.F.R. § 22.20(a).

**A. Motion to Dismiss**

Motions to dismiss pursuant to Section 22.20(a) of the Rules of Practice are analogous to motions to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (Federal Rules). *In the matter of Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827 (EAB, Oct. 6, 1993); Fed. R. Civ. P. 12(b)(6).[1] The Federal Rules provide for dismissal when the complaint fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570). In evaluating a motion to dismiss, courts must take all allegations in the complaint as true and draw all inferences in favor of the Complainant. *See Twombly*, 550 U.S. at 555; *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). The court may grant dismissal for failure to state a claim when the complaint does not set forth "direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Twombly*, 550 U.S. at 562 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)); *see also McCulloch v. PNC Bank, Inc.*, 298 F.3d 1217,

[1] Although not binding in administrative proceedings, the Presiding Officer may look to the Federal Rules of Civil Procedure for useful and instructive guidance in applying the Rules of Practice. *See Oak Tree Farm Dairy, Inc. v. Block*, 544 F. Supp. 1351, 1356 n.3 (E.D.N.Y. 1982); *In the matter of Wego Chemical & Mineral Corporation*, 4 E.A.D. 513, 524 n.10 (EAB 1993).



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1220 (11th Cir. 2002). Accordingly, to prevail on a motion to dismiss, Respondent must demonstrate that EPA has not properly pleaded a prima facie case.

**B. Motion for Accelerated Decision**

Motions for accelerated decision pursuant to Section 22.20(a) of the Rules of Practice are analogous to motions for summary judgment pursuant to Rule 56 of the Federal Rules.[2] Rule 56 provides that federal courts grant summary judgment upon motion by a party "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In construing this standard, the U.S. Supreme Court has held that a factual dispute is material where, under the governing substantive law, it might affect the outcome of the proceeding. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1985). A factual dispute is genuine if a factfinder could reasonably resolve the dispute in favor of the non-moving party under the evidentiary standards applicable to the particular proceeding. *Id.* at 248, 250-52.

The party moving for summary judgment bears the burden to show an absence of a genuine dispute as to any material fact. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). The movant's burden consists of two components: (1) the initial burden of production, which shifts to the non-moving party after the moving party satisfies its burden, and (2) the ultimate burden of persuasion, which always remains with the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986) (Brennan, J., dissenting) (citing 10A C. Wright, A. Miller, & M. Kane,

[2] The Environmental Appeals Board has consistently looked to Rule 56 and its jurisprudence for guidance in adjudicating motions for accelerated decision pursuant to Section 22.20(a) of the Rules of Practice. *See, e.g.*, *In the matter of Consumers Scrap Recycling, Inc.*, 11 E.A.D. 269, 285 (EAB 2004); *In the matter of BWX Techs., Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000); *In the matter of Clarksburg Casket Co.*, 8 E.A.D. 496, 501-02 (EAB 1999).



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Federal Practice and Procedure § 2727 (2d ed. 1983)). Likewise, in adjudicating motions for accelerated decision pursuant to Section 22.20(a) of the Rules of Practice, the EAB has held that the moving party "assumes the initial burden of production . . . , and must make out a case for presumptive entitlement to summary judgment in his favor." *In the matter of BWX Techs.*, 9 E.A.D. 61, 76 (EAB 2000).

To discharge its initial burden of production, the moving party is required to support its assertion that a material fact cannot be genuinely disputed by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials," or by "showing that the materials cited do not establish the . . . presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). Where, as here, the party moving for summary judgment does not bear the burden of persuasion at hearing, it has the "lesser burden of 'showing' or 'pointing out' to the reviewing tribunal that there is an absence of evidence in the record to support the nonmoving party's case." *BWX Techs.*, 9 E.A.D. at 76.

If the moving party satisfies its initial burden of production, the burden shifts to the non-moving party to show that a genuine dispute of material fact exists by similarly "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence . . . of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

The EAB has noted that "neither party can meet its burden of production by resting on mere allegations, assertions, or conclusions of evidence," *BWX Techs.*, 9 E.A.D. at 75. A party opposing a properly supported motion for accelerated decision is required to "provide more than



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a scintilla of evidence on a disputed factual issue to show their entitlement to a[n] . . . evidentiary hearing: the evidence must be substantial and probative in light of the appropriate evidentiary standard of the case." *Id.* at 76.

In determining whether a genuine dispute of material fact exists, courts must construe the evidentiary material and reasonable inferences drawn therefrom in a light most favorable to the non-moving party. *See Anderson*, 477 U.S. at 255 (stating that the "evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."). Where the evidence viewed in the light most favorable to the non-moving party is such that the factfinder could not reasonably find in favor of the non-moving party, summary judgment is appropriate. *See Adickes*, 398 U.S. at 158-59. Conversely, where conflicting inferences may be drawn from the evidence and a choice among those inferences would amount to factfinding, summary judgment is not appropriate. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1105 (D.C. Cir. 2002).

Even where summary judgment appears technically proper, sound judicial policy and the exercise of judicial discretion may support denial of the motion in order for the case to be more fully developed at hearing. *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979).

**C. Motion to Strike**

Motions to strike are the appropriate remedy to eliminate redundant, immaterial, impertinent, or scandalous material, and are the primary procedure for objecting to insufficient defenses. *In the Matter of Dearborn Refining Company*, Docket No. RCRA-05-2001-0019, 2003 WL 21213218, at *3 (Jan. 17, 2003).[3] Federal Rule 12(f) provides that a court "may strike

[3] The Rules of Practice do not address motions to strike; however, the Tribunal may look to the Federal Rules for guidance on procedural matters. *See In the Matter of Eagle Brass Company*, Docket No. EPCRA-03-2015-0127,



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from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f).

Federal court decisions provide guidance on the meaning of "redundant, immaterial, impertinent, or scandalous material." "Redundant" matter consists of "allegations that constitute a needless repetition of other averments." *Sagan v. Apple Computer, Inc.*, 874 F. Supp. 1072, 1079 (C.D. Cal. 1994) (quoting 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1382, at 704 (1990)). "Immaterial" matter is that which has no essential or important relationship to the claim for relief or the defenses being pleaded. *Greenwich Ins. Co. v. Rodgers*, 729 F. Supp. 2d 1158, 1162 (C.D. Cal. 2010) (citing *Fantasy, Inc. v. Fogerty*, 984 F.2d at 1527). "Immaterial" matter may also consist of statements of unnecessary particulars in connection with and descriptive of that which is material. *Wilkerson v. Butler*, 229 F.R.D. 166, 170 (E.D. Cal. 2005). "Impertinent" matter consists of statements that do not pertain, and are not necessary, to the issues in question. *Greenwich Ins. Co.*, 729 F. Supp. at 1079. Courts sometimes determine whether an allegation is immaterial and/or impertinent by considering whether proof concerning the material could be received at hearing. *See U.S. v. Cole*, 2014 WL 1303143, *7 (D. Or. 2014). "Scandalous" matter is that which improperly casts a derogatory light on someone. *In re 2TheMart.com, Inc. Securities Litigation*, 114 F.Supp.2d 955, 965 (C.D. Cal. 2000).

Motions to strike an affirmative defense are appropriate when the defense is insufficiently pleaded or when the defense is insufficient as a matter of law. *In the matter of Carbon Injection Systems LLC, Scott Forster, and Eric Lofquist*, Docket No. RCRA-05-2011-0009, 2012

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2016 WL 7488188, at *15 (December 21, 2016); *In the matter of B&L Plating, Inc.*, 11 E.A.D. 183, 188 (EAB Oct. 20, 2003); *In the matter of Euclid of Va., Inc.*, 13 E.A.D. 616, 657-658 (EAB 2008).



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WL 756519, at *2 (February 14, 2012). To survive a motion to strike, an affirmative defense need not be plausible, but must be sufficiently pleaded to provide fair notice. *Id.* (citing *Tyco Fire Prods. LP v. Victaulic Co.*, 777 F. Supp. 2d 893, 900 (E.D. Pa. 2011). "[A] mere rote recitation of generally available affirmative defenses without citation to any other fact or premise from which an inference may arise that the stated defense is logically related to the case in any way," is insufficient pleading to satisfy fair notice, and is appropriately struck upon a motion to strike made pursuant to Rule 12(f). *Id.* (quoting *Mifflinburg Tel, Inc. v. Criswell*, 80 F. Supp. 3d 566, 574 (M.D. Pa. 2015)) (internal quotation marks omitted).

Although courts generally disfavor motions to strike because they may be used as a dilatory tactic, *Dearborn Refining Company*, 2003 WL 21213218, at *3 (quoting *Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316, 347 (4th Cir. 2001), motions to strike are not disfavored when they "remove unnecessary clutter from the litigation." *Sun Life Assurance Co. of Can. v. Great Lakes Bus. Credit LLC*, 968 F. Supp. 2d 898, 902 (N.D. Ill. 2013). Where a defense is insufficient as a matter of law, a motion to strike serves to expedite, not delay, the proceedings. *See Isringhausen Import, Inc. v. Nissan North America, Inc.*, 2011 WL 6029733, No. 10-CV-3253, at *1 (C.D. Ill. Dec. 5, 2011) (citing *Heller Financial, Inc. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286, 1294 (7th Cir. 1989). Finally, courts enjoy "considerable discretion" to strike filings under Federal Rule 12(f) as they deem appropriate. *Delta Consulting Group, Inc. v. R. Randle Constr.*, Inc., 554 F.3d 1133, 1141 (7th Cir. 2009).



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## IV. ARGUMENT

### A. The Tribunal should deny Respondent's Motion to Dismiss.

#### 1. The Tribunal should deny Respondent's Motion to Dismiss because Respondent failed to comply with the procedural requirements set forth in the Rules of Practice.

Respondent's Motion to Dismiss fails to comply with two of the four motion requirements set forth in 40 C.F.R. § 22.16(a). The Rules require that "[a]ll motions, except those made orally on the record during a hearing shall: (1) [b]e in writing; (2) [s]tate the grounds therefor, with particularity; (3) [s]et forth the relief sought; and (4) [b]e accompanied by any affidavit, certificate, other evidence or legal memorandum relied upon." 40 C.F.R. § 22.16(a).

While Respondent's Motion to Dismiss is in writing and sets forth the relief sought, it fails to state the grounds for dismissal with any particularly, as required by 40 C.F.R. § 22.16(a)(2), and fails to include any affidavit, certificate, other evidence or legal memorandum relied upon, as required by 40 C.F.R. § 22.16(a)(4). Respondent indeed includes a "Preamble," but in it he fails to state any readily discernible legal or factual argument to undermine EPA's prima facie case. Rather, Respondent repeatedly asserts, with no legal or factual support, that EPA has no basis for an enforcement action against him and that he is not "culpable." Similarly, Respondent's purpose in attaching Exhibit A, which includes two maps of platted property, a Certificate of Ownership and Dedication of Bunsek Estates, a Bunsek Estates Subdivision Agreement, and a map that identifies several roads in the area of Respondent's alleged violations, is entirely unclear. None of the documents provide support for Respondent's Motion to Dismiss, as required by 40 C.F.R. § 22.16(a)(4). Respondent should not be able to tack an irrelevant exhibit onto his Answer to fulfill the requirements of the Rules of Practice.



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The Rules of Practice "are not procedural niceties that parties are free to ignore," particularly in cases where, as here, a party is represented by a licensed attorney. *In re Polo Dev., Inc.*, 17 E.A.D. 100, 103 (EAB 2016); *In re Four Strong Builders, Inc.*, 12 E.A.D. 762, 772 (EAB 2006); *In re JHNY, Inc.*, 12 E.A.D. 372, 382 (EAB 2005). EPA does not suggest that every pleading filed be dismissed for even the smallest diversion from the Rules. *See, e.g.*, *In re VSS International, Inc.*, CWA Appeal No. 20-02, at 10, n.2 (EAB Dec. 16, 2020) (slip opinion). In *VSS International*, for example, the EAB allowed an appeal to proceed despite a procedural defect because the appellant filed a brief with readily discernible "legal and factual arguments" and because the Board "may do all acts and take all measures as are necessary for the efficient, fair, and impartial adjudication of issues arising in a proceeding." *Id.* (quoting 40 C.F.R. § 22.4(a)(2)) (internal quotation marks omitted). Likewise, in proceedings before this Tribunal, "[t]he Presiding Officer shall conduct a fair and impartial proceeding, assure that the facts are fully elicited, adjudicate all issues, and avoid delay." 40 C.F.R. § 22.4(c).

Here, unlike in *VSS International*, Respondent fails to comply with the Rules of Practice in any meaningful way. Respondent's bare assertions do not meet the requirements of 40 C.F.R. § 22.16(a) because they fail to provide EPA adequate notice of the basis for Respondent's request or legal argument to which EPA can respond. As such, granting Respondent's motion would not support the purpose of the Rules of Practice, nor the Presiding Officer's duty to conduct a fair and impartial proceeding, assure that the facts are fully elicited, and adjudicate all issues. 40 C.F.R. § 22.4(c). Accordingly, the Tribunal should deny Respondent's Motion to Dismiss.



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**2. The Tribunal should deny Respondent's Motion to Dismiss because EPA sufficiently stated a claim upon which relief can be granted and Respondent failed to identify any deficiency with EPA's prima facie case.**

Even if the Tribunal construes Respondent's Answer as a motion to dismiss that properly satisfies the procedural requirements of 40 C.F.R. § 22.16(a), EPA properly pleaded a "claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). EPA included in its Complaint "direct or inferential allegations respecting all the material elements necessary to sustain recovery" for a violation of Section 301(a) of the CWA, Complaint at ¶¶ 3.1-3.26; *see Twombly*, 550 U.S. at 562 (quoting *Car Carriers, Inc.*, 745 F.2d at 1106); *see also McCulloch*, 298 F.3d at 1220, and the Tribunal must take every allegation contained in EPA's Complaint as true and draw all inferences in EPA's favor. *See Twombly*, 550 U.S. at 555; *Erickson*, 551 U.S. at 94.

**(i) EPA properly pleaded its prima facie case.**

To state a prima facie violation of Section 301(a) of the CWA in this case, EPA must demonstrate that Respondent: (1) is a person (2) who discharged a pollutant (3) from a point source (4) into a navigable water (5) without a Section 404 permit. *See* 33 U.S.C. §§ 1311(a), 1344 and 1362 (definitions); *see also U.S. v. RGM Corp.*, 222 F.Supp.2d 780, 786 (E.D. Va. 2002).

Section 502(5) of the CWA defines "person" to include an "individual." 33 U.S.C § 1362(5). In its Complaint, EPA alleged that Respondent is a "person" as defined by Section 502(5) of the CWA because he is "an individual." Complaint at ¶ 3.1.

Section 502(12) defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Section 502(6) of the CWA defines "pollutant" to include, *inter alia*, dredged spoil, solid waste, garbage, biological materials, rock, sand, and industrial waste discharged into water. 33 U.S.C. § 1362(6).



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"Fill material" includes material placed in waters of the United States where the material has the effect of replacing any portion of a water of the United States with dry land or changing the bottom elevation of any portion of a water of the United States. Examples of fill material include rock, sand, soil, clay, construction debris, wood chips, overburden from excavation activities, and materials used to create any structure or infrastructure in the waters of the United States, 40 C.F.R. § 232.2, and each of which constitutes a "pollutant" within the meaning of CWA Section 502(6), 33 U.S.C. § 1362(6).

In its Complaint, EPA alleged that Respondent "discharged a pollutant" when he constructed a gravel road through wetlands and when he repaired, expanded, and directed others to repair and expand the previously constructed road. Specifically, EPA alleged that beginning in the fall of 2013, Respondent discharged approximately 1,180 cubic yards of fill material into wetlands to construct a road. Complaint ¶ 3.12. EPA also alleged that between the approximate dates of July 26 through July 27, 2014, Respondent and/or persons acting on his behalf discharged approximately 400 cubic yards of fill material into wetlands to repair and expand the previously constructed road. Complaint at ¶¶ 3.13-16; 3.25. EPA further alleged that Respondent excavated a drainage ditch along the east side of the road, sidecasting overburden, which constitutes fill material, into wetlands, *id.*, and that the gravel road fill, and native on-site material excavated from the ditch and sidecast into wetlands are "pollutants" as defined by Section 502(6) of the CWA that were discharged within the meaning of Section 502(12) of the CWA. *Id.* at ¶¶ 3.24-25.

Section 502(14) of the CWA defines "point source" to include, inter alia, "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, [or] container . . . from which pollutants are or



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may be discharged." 33 U.S.C. § 1362(14). In its Complaint, EPA alleged that Respondent operated a dump truck and excavator and directed others to use dump trucks to discharge fill material into wetlands to construct, repair, and expand the road. *Id.* at ¶¶ 3.9, 3.14. EPA alleged that heavy earthmoving equipment, such as dump trucks and excavators, constitute point sources as defined by Section 502(14) of the CWA. *Id.* at ¶ 3.23.

Section 502(7) of the CWA defines "navigable waters" as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). In its Complaint, EPA alleged that at the time of Respondent's discharge, "waters of the United States" was defined to include, *inter alia*, all waters that were currently used, were used in the past, or that were susceptible to use in interstate or foreign commerce, including all waters which were subject to the ebb and flow of the tide; tributaries to such waters; and wetlands adjacent to the foregoing waters. 40 C.F.R. § 230.3 (2014); Complaint ¶ 2.8. EPA alleged that the wetlands impacted by Respondent's unauthorized activities share a surface hydrological connection to Tolsona Lake, a traditional navigable water, and are therefore "waters of the United States" as defined by 40 C.F.R. § 230.3 (2014), and thus "navigable waters" as defined by Section 502(7) of the CWA. Complaint ¶ 3.3.

In its Complaint, EPA alleged that Respondent did not obtain the required CWA permit issued by U.S. Army Corps of Engineers (Corps) for the activity conducted to repair the road. Complaint ¶ 3.6. Accordingly, EPA alleged Respondent's activity was not authorized by any permit issued pursuant to Section 404 of the CWA.

Finally, EPA alleged in its Complaint that, pursuant to Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), EPA is authorized to assess administrative penalties against any person who violates Section 301 of the CWA or any permit condition or limitation implementing



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Section 301 of the CWA, 33 U.S.C. § 1311, in a permit issued pursuant to Section 404 of the CWA, 33 U.S.C. § 1344.

**(ii) Respondent's counterclaims, allegations, and affirmative defenses fail to undermine EPA's prima facie case.**

The preceding allegations, assumed true, clearly establish that EPA properly pleaded its claim that Respondent violated Section 301(a) of the CWA. Respondent does not even attempt to explain how EPA failed to properly plead a case for a violation of Section 301(a) of the CWA and thus fails to identify a single deficiency in EPA's prima facie case. Instead, Respondent repeatedly states that "there is no basis for any actual findings of a violation in this matter," Answer at 3, and similar statements. He equally as often fails to provide any legal or factual argument that would undermine EPA's prima facie case.

Respondent's vague references to EPA's and others' alleged violations of his constitutional rights, Answer at 2-7, fail to undermine EPA's prima facie case. Moreover, it is unclear how such allegations preclude EPA from taking any enforcement action against him and Respondent provides no factual support or legal argument for such a bar on enforcement. Respondent sometimes refers to the alleged bar on EPA enforcing against him as "estoppel." Answer at 2, 3, ¶¶ 2.11, 3.4, 3.26, 7.4, 7.7. However, Respondent includes no facts to support his assertion that EPA or its staff have acted inappropriately, and such allegations are wholly unfounded. Moreover, Respondent must plead and prove affirmative defenses, 40 C.F.R. § 22.24(a). Even if Respondent properly pleaded an affirmative defense of estoppel, which he has not, affirmative defenses are not grounds for dismissal on the pleadings.

Respondent also repeatedly asserts that EPA is precluded from enforcement against him because EPA has failed to join necessary parties. Answer at 2, 5-7. Respondent's assertions are bare, unsupported by fact or legal argument. Even if Respondent's allegations were correct,

which they are not, failure to join a necessary party is an affirmative defense that must be properly pleaded and proved and is thus not an appropriate ground for dismissal on the pleadings.

Respondent's repeated references to a private Alaska State Court civil action to which he is a party, *see* Answer at 4, 7, similarly do nothing to undermine EPA's prima facie case. References to the pending state action, including statements regarding costs of that litigation, issues of state law, such as trespass, property rights and easement law, and information regarding any individual involved in that litigation have no bearing on Respondent's liability for a violation of Section 301(a) of the CWA.

Respondent's claims that his activities were authorized because he has previously obtained permits mischaracterize the nature of the CWA Section 404 regulatory scheme and fail to undermine EPA's prima facie case. Respondent falsely claims that:

> [He] previously obtained appropriate EPA permits and/or EPA permission regarding certain of his real property (including permitted activity as to the airstrip depicted in Exhibit A), and alleged wetlands, near the alleged wetlands now at issue and the work he did and/or was approved, pursuant to those EPA permits and/or EPA permissions have rendered the remaining property, which is alleged to be wetlands, not impacted wetlands so as not to be the subject of necessary enforcement action.

Answer at 8.

EPA has no authority to issue permits pursuant to Section 404 of the CWA and has never issued a Section 404 permit to Respondent. Nor has EPA otherwise authorized any action regarding activities on Respondent's property. Moreover, the CWA Section 404 regulatory



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process is project-specific – a previous permit does not remove Respondent's duty to obtain a CWA Section 404 permit for future activities.[4]

Additionally, even if the scope of some previous permit was, as Respondent contends, able to "render[] the remaining property . . . not impacted wetlands so as not to be the subject of necessary enforcement action," Answer at 8, the activity to which Respondent refers was not properly permitted. Complaint ¶ 4.7.4. Rather, Respondent constructed the referenced airstrip without a permit issued pursuant to Section 404 of the CWA. *Id.* Respondent's activity was identified as a violation of Section 301(a) by the Corps and permitted only "after-the-fact." Complaint ¶ 4.7.9. That an after-the-fact CWA Section 404 permit was required indicates that Respondent illegally discharged into wetlands that were waters of the United States. The Corps issues after-the-fact permits for a variety of reasons, none of which alters the jurisdictional status of other wetlands on the property or diminishes the government's authority to enforce new violations of the CWA on the property.

Finally, EPA previously acknowledged that Respondent attached an exhibit to his Answer and noted that the purpose of the documents in Exhibit A is entirely unclear. The documents serve only to establish that Respondent owns certain property that is the subject of the instant enforcement action. But Respondent's ownership of the property is not relevant to his liability for a violation of Section 301(a) of the CWA because ownership is not an element of the violation. 33 U.S.C. § 1311(a).

[4] Such a system, under which a polluter could obtain a single permit to discharge pollutants in one area of his property and then pollute indefinitely on the remainder of his property, would undermine the very purpose of the CWA Section 404 regulatory scheme.



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In sum, EPA properly pleaded a case for a violation of Section 301(a) of the CWA and nothing in Respondent's Answer, including Exhibit A, demonstrates that EPA's allegations, assumed to be true, could not prove a violation of Section 301(a) of the CWA. To the extent that any of Respondent's assertions could be construed as affirmative defenses, Respondent must plead and prove affirmative defenses, 40 C.F.R. § 22.24(a). Accordingly, the Tribunal should deny Respondent's Motion to Dismiss.

**B. The Tribunal should deny Respondent's Motion for Accelerated Decision.**

**1. The Tribunal should deny Respondent's Motion for Accelerated Decision because Respondent failed to comply with the procedural requirements set forth in the Rules of Practice.**

Here again, on his Motion for Accelerated Decision, Respondent fails to comply with the requirements of the Rules of Practice. As described in section IV.A.1, *supra*, the Rules require that "[a]ll motions, except those made orally on the record during a hearing shall: (1) [b]e in writing; (2) [s]tate the grounds therefor, with particularity; (3) [s]et forth the relief sought; and (4) [b]e accompanied by any affidavit, certificate, other evidence or legal memorandum relied upon." 40 C.F.R. § 22.16(a).

In his Answer, Respondent makes a single reference to a "Motion for Summary Judgment." EPA interprets this statement under a lenient standard of competence and assumes that Respondent intends to move for accelerated decision. Still, Respondent fails to state any grounds for his motion for accelerated decision, as required by 40 C.F.R. § 22.16(a)(2), and fails to accompany the motion with any affidavit, certificate, other evidence, or legal memorandum relied upon, as required by 40 C.F.R. § 22.16(a)(4).

Respondent's single mention of summary judgment, coupled with his Motion to Dismiss, may indicate that he intends to state the same grounds for his Motion for Accelerated Decision as



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for his Motion to Dismiss. This is problematic because Respondent fails to adequately state the grounds for his Motion to Dismiss and because the motions are evaluated under entirely different standards. Not only does Respondent fail to provide evidence that no genuine dispute of material fact exists, Respondent does not even assert a lack of genuine dispute of material fact, thereby failing to comply with 40 C.F.R. § 22.16(a)(2).

And again, as noted in section IV.A.1, *supra*, Respondent must not be able to tack an irrelevant exhibit onto his Answer to fulfill the requirements of 40 C.F.R. § 22.16(a)(4). The maps contained in Exhibit A, which, at best provide proof of property ownership, do not provide support or grounds for a motion for accelerated decision because they do not establish an absence of dispute of any material fact, nor that Respondent is entitled to judgment as a matter of law. The fact of Respondent's ownership remains immaterial because, under the governing substantive law, it will not affect the outcome of this proceeding. *See Anderson*, 477 U.S. at 248.

Respondent also fails to specify the relief sought from his Motion for Accelerated Decision, as required by 40 C.F.R. § 22.16(a)(3). Specifically, Respondent fails to state whether he seeks accelerated decision as to all or only part of EPA's claim, leaving EPA to speculate and without adequate information to respond appropriately.

Respondent's bare assertion that his Answer should be treated as a "Motion to Dismiss for Failure To State A Complaint and/or a Motion for Summary Judgment" does not meet the requirements of 40 C.F.R. § 22.16(a) for a Motion for Accelerated Decision and fails to provide any grounds to which EPA can respond. Granting Respondent's Motion for Accelerated Decision would not support the purpose of the Rules of Practice, nor the Presiding Officer's duty to conduct a fair and impartial proceeding, assure that the facts are fully elicited, and adjudicate



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all issues. 40 C.F.R. § 22.4(c). Accordingly, the Tribunal should dismiss Respondent's Motion for Accelerated Decision for failure to comply with the requirements of the Rules of Practice.

**2. The Tribunal should deny Respondent's Motion for Accelerated Decision because Respondent failed to meet his burden to demonstrate that no genuine dispute of material fact exists and because a Motion for Accelerated Decision is premature.**

Even if Respondent properly asserted grounds his Motion for Accelerated Decision, which he does not, the Tribunal should deny Respondent's motion because it is premature. The Tribunal need not determine whether a reasonable factfinder could find in favor of EPA or Respondent because Respondent fails to meet his initial burden, as the moving party, to demonstrate that no genuine dispute of any material fact exists. *See* Fed. R. Civ. P. 56(a); *see Adickes*, 398 U.S. at 157. Respondent does not cite to any particular parts of materials, such as depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, interrogatory answers, or any other materials. Fed. R. Civ. P. 56(c)(1). Respondent cannot cite to the evidentiary record before the Tribunal, because EPA has not yet had the opportunity to present to Respondent, through the prehearing exchange process, the evidence upon which it will rely to demonstrate Respondent's liability. Respondent also does not – and cannot – show that any materials cited by EPA do not establish the presence of a genuine dispute because, as previously noted, EPA has not yet had the opportunity to add materials to the evidentiary record. Even under Respondent's "lesser burden of 'showing' or 'pointing out' that there is an absence of evidence in the record" to support EPA's case, *BWX Techs.*, 9 E.A.D. at 76, Respondent cannot succeed because, again, there is no record established before the Tribunal. The Tribunal must not allow Respondent to "meet [his] burden of production by resting on mere allegations, assertions, or conclusions" that accelerated decision is warranted. *BWX Techs.*, 9 E.A.D. at 75.



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Because Respondent's motion was not properly supported, the burden has not shifted to EPA and EPA is not required to provide even "a scintilla of evidence" on a disputed factual issue to show that it is entitled to an evidentiary hearing." *Id.* EPA need not demonstrate that a genuine dispute of material fact exists by citing to the record or by showing that the materials cited by Respondent do not establish the absence of a genuine dispute. *See Id.; BWX Techs.*, 9 E.A.D. at 76.

EPA intends to produce evidence through the prehearing exchange process as required by the Rules of Practice and the Prehearing Order and in accordance with the Presiding Officer's scheduling deadlines, and to introduce such evidence at hearing to support each element of its claim. Accordingly, accelerated decision is premature, inappropriate, and sound judicial policy supports development of the record and the Tribunal's denial of Respondent's motion for accelerated decision. *See Roberts*, 610 F.2d at 536.

**C. The Tribunal should grant EPA's Motion to Strike.**

**1. The Tribunal should strike Respondent's counterclaims because the Tribunal lacks jurisdiction to adjudicate any claim other than a penalty action brought by EPA, and it is an improper forum for Respondent's claims.**

The Rules of Practice do not provide the Agency with any means to dismiss Respondent's counterclaims for failure to establish a prima facie case. *See* 40 C.F.R § 22.20(a); *In the matter of MTJ American, LLC*, Docket No. FIFRA-04-2014-3009, at 2, n.2 (Nov. 17, 2015). Consequently, EPA moves to strike Respondent's counterclaims on the grounds that the Tribunal does not have the ability or jurisdiction to hear Respondent's counterclaims.

As a threshold matter, the burden of establishing a federal tribunal's limited jurisdiction falls on the party asserting jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Respondent fails to make any attempt to demonstrate that the Tribunal is



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authorized to adjudicate his counterclaims or issue relief and therefore fails to establish jurisdiction. *See Id.* Moreover, Respondent would fail in any such attempt because the Tribunal lacks jurisdiction to hear Respondent's counterclaims.

By filing an administrative complaint, EPA initiated an administrative adjudicatory proceeding to assess a Class II penalty under Section 309(g) of the CWA. *See* 40 C.F.R. § 22.l(a)(6). Such proceedings lead to a final order that "shall resolve only those causes of action alleged in the complaint." 40 C.F.R. § 22.31(a). The Rules of Practice, and the end result of the proceedings governed, do not contemplate the existence of any claims brought by a party other than the Agency. The Presiding Officer need not look to the Federal Rules for guidance in this instance because, unlike the counterclaim provisions in Federal Rule 13, which expressly provide a mechanism for counterclaims, the Rules of Practice presume that only the Agency, and not a respondent, will assert a right to relief in these proceedings. *See e.g.*, 40 C.F.R. § 22.20(a) (providing that the "Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding . . . on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.") (emphasis added); *compare with* Federal Rule 12(b)(6) (providing that "a party may assert" the defense of "failure to state a claim upon which relief can be granted.") (emphasis added). Nothing in the Rules of Practice governing this penalty proceeding provides – or allows for – Respondent's counterclaims. Nor does the CWA contemplate or provide authority by which a respondent can raise a counterclaim within an administrative penalty action brought pursuant to CWA Section 309(g). *See* 33 U.S.C. § 1319(g).

Even if Respondent's counterclaims were proper and he could establish jurisdiction, which he cannot, Respondent alleges his "counterclaims" merely to obfuscate the issues. Respondent's repeated allegations that EPA and its staff, another federal agency, which is not a



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party to this proceeding, and its staff, as well as a private citizen have violated Respondent's rights are wholly unfounded. Respondent fails to provide any explanation or factual support for his allegations nor any indication of the relevance of such allegations to the issue of his liability for violations of the CWA. Accordingly, the Tribunal should strike Respondent's counterclaims from his Answer.

**2. The Tribunal should strike redundant, immaterial, and impertinent matter from Respondent's Answer.**

Respondent interweaved redundant, immaterial, and impertinent matter[5] throughout his Answer in a manner that serves only to confuse the issues and prolong this proceeding. As described in Section IV.A.2.ii, *supra*, statements and information pertaining to pending state litigation, and information regarding any individual involved in that litigation, are immaterial and impertinent. The state litigation and Respondent's allegations bear no relationship to the claim for relief or the defenses being pleaded, *see Greenwich Ins. Co.*, 729 F. Supp. at 1162, and include unnecessary particulars, *see Wilkerson*, 229 F.R.D. at 170. No fact alleged regarding the state litigation is necessary or relevant to determining Respondent's liability for a violation of Section 301(a) of the CWA. References and allegations to the state litigation are therefore immaterial, impertinent, and to the extent that Respondent needlessly repeats them, redundant. S*ee Greenwich Ins. Co.*, 729 F. Supp. at 1162; *Wilkerson*, 229 F.R.D. at 170, *Fantasy, Inc.*, 984 F.2d at 1527; *Sagan,* 874 F. Supp. at 1079.

[5] EPA contends that sections of Respondent's Answer contain scandalous matter, but that those sections may and the Tribunal should strike them as immaterial and impertinent.



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Respondent's allegations regarding the state litigation also do not constitute the basis of any legitimate affirmative defense. Courts have consistently rejected attempts to avoid liability in enforcement actions because of pending challenges in other courts – even when the pending action is directly related to the enforcement action. *California Pub. Interest Res. Grp v. Shell Oil Co.*, 840 F. Supp. 712, 719 (N.D. Calif. 1993) (holding that the fact that the defendant was challenging its [CWA] permit in state court did not preclude an enforcement action in federal court for violations of that permit.). Here, Respondent is a party to a private civil lawsuit – a controversy over property that bears no relationship to EPA's enforcement action. No possible outcome in the pending state case would alter Respondent's ability to present any defense in this enforcement action, nor would any outcome affect the Tribunal's ability to make a determination as to Respondent's liability for a violation of Section 3101(a) of the CWA.

Further, references in those parts, and in part "i" of the "Preamble" in particular, to Complainant's attempts to negotiate a settlement with Respondent contain information that Respondent gained in the context of settlement discussions with EPA, which would not be admissible at a hearing. *See Dearborn Refining Company*, 2003 WL 21213218, at *3. Pursuant to the Rules of Practice, evidence relating to settlement, which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence, Fed. R. Evid. 408, is not admissible. 40 C.F.R. § 22.22(a)(1); *In the Matter of San Pedro Forklift*, Docket No. CWA-09-2009-0006, 2010 WL 3324916, at *1 (Aug. 4, 2010) (granting motion to strike as to information from confidential settlement negotiations pursuant to 40 C.F.R. § 22.22(a)(1) and admonishing counsel). Moreover, even if such information could be admitted, EPA's prefiling negotiations with Respondent have no bearing on Respondent's CWA liability and therefore would not assist



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the Tribunal in resolving the issues before it. *See e.g.*, *Cole*, 2014 WL 1303143, *7. Information related to negotiations is thus immaterial and impertinent and the Tribunal should strike it.

**3. The Tribunal should strike Respondent's defenses of laches/undue delay and statute of limitations as insufficient.**

Respondent's Answer fails to sufficiently plead the affirmative defenses of "latches [*sic*] and/or undue delay and/or the statute of limitations" to provide fair notice and, even if properly pleaded, such defenses are insufficient as a matter of law the Tribunal should strike them. *See* Fed. R. Civ. P. 12(f). Although not clearly identified as affirmative defenses, in Section IX of his Answer entitled "Additional Appropriate Information as to Respondent's Position," Respondent appears to assert laches/undue delay and statute of limitations as affirmative defenses. Respondent provides no further explanation. Instead, Respondent includes a "mere rote recitation" of generally available affirmative defenses "without citation to any other fact or premise from which an inference may arise that the stated defense" applies. *In the matter of Eagle Brass Company*, Docket No. EPCRA-03-2015-0127, 2016 WL 7488188, at *17 (December 21, 2016) (quoting *Mifflinburg Tel, Inc.*, 80 F. Supp. 3d at 574) (internal quotation marks omitted). Respondent therefore fails to describe "[t]he circumstances or arguments which are alleged to constitute the grounds of [his] defense[s]," as required by 40 C.F.R. § 22.15(b), and fails to provide EPA with fair notice of the nature of the defense. *See Eagle Brass Company*, Docket No. EPCRA-03-2015-0127, 2016 WL 7488188, at *17 (finding a general assertion of statute of limitations insufficient).

Moreover, any affirmative defense based on laches/undue delay or statute of limitations is insufficient as a matter of law. First, laches, described as "[u]nreasonable delay in pursuing a right or claim – almost always an equitable one – in a way that prejudices the party against whom relief is sought" is not an affirmative defense that can be raised against the United States



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government. *In the Matter of Ram Inc.*, Docket No. SWDA-06-2005-5301, 2008 WL 4140364, at *21 (Jul. 12, 2008) (citing Black's Law Dictionary); *In re Tennessee Valley Authority*, 9 E.A.D. 357, 415 n.56 (EAB 2003); *see also Bostwick Irrigation Dist. v. United States*, 900 F.2d 1285, 1291 (8th Cir. 1990) (holding that the equitable defense of laches was unavailable because the court "recognized the long-standing rule that laches does not apply in actions brought by the United States.").

Second, for the purposes of penalty – the remedy EPA seeks in this proceeding – the statute of limitations period applicable to Respondent's alleged CWA violations is five years. 28 U.S.C. § 2462. In its complaint, EPA alleges that Respondent violated Section 301(a) of the CWA when he discharged dredged and/or fill material into wetlands that are waters of the United States and seeks relief in the form of civil administrative penalties for those discharges that occurred in July 2014. Complaint ¶ 4.2-3. On July 11, 2019, before the 5-year statute of limitations period had run, Respondent signed a tolling agreement (Exhibit 1) with the United States for "certain activities beginning in February 2014, including discharges of dredged or fill material, without a permit issued pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344, to waters of the United States." Exhibit 1 at 1. The first tolling agreement, of which Respondent's counsel was aware at the time of filing Respondent's Answer, provides, in relevant part, that the period beginning on July 10, 2019, and ending on February 10, 2020 (Tolling Period), "shall not be included in computing the running of the statute of limitations," that "[a]ny defenses of laches, estoppel, or waiver, or other similar equitable defenses based upon the running or expiration of any time period shall not include the tolling period," and that "Respondent shall not assert, plead, or raise against the United States in any fashion, whether by answer, motion, or otherwise, any defense of laches, estoppel, or waiver, or other similar



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equitable defenses based on the running of any statute of limitations or the passage of time during the Tolling Period." *Id.*

On January 30, 2020, Respondent signed a new tolling agreement (Exhibit 2), of which Respondent's counsel was aware at the time of filing Respondent's Answer, which extended the Tolling Period through September 30, 2020. Exhibit 2 at 1. On September 30, 2020, before the expiration of the tolling period, Complainant initiated the present action. Accordingly, Respondent is barred from asserting statute of limitations and any defense of laches, estoppel, or waiver, or other similar equitable defenses based on the running of any statute of limitations or the passage of time during the Tolling Period. Such defenses are therefore insufficient as a matter of law and the Court should strike them from Respondent's Answer to remove "unnecessary clutter," *Sun Life Assurance Co. of Can.*, 968 F. Supp. 2d at 902, and avoid delay in these proceedings.

EPA acknowledges that courts generally disfavor motions to strike. Still, EPA contends that a motion to strike is the appropriate remedy in this instance because the purpose of a motion to strike under Rule 12(f) of the Federal Rules of Civil Procedure is to avoid spending time and money litigating spurious issues. *Cole*, 2014 WL 1303143, at *2 (citing *Whittlestone, Inc. v. Handi–Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010); *see also Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev'd on other grounds by Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). Respondent consistently and needlessly confuses the issues by inserting claims for which the Tribunal has no jurisdiction to adjudicate and which serve no purpose to resolve the issues before the Court; repeating unnecessary particulars and information that does not pertain to and bears no relationship to EPA's claim for relief or Respondent's defenses; and attempting to plead defenses which are insufficient as a matter of law.



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## V. CONCLUSION

For the reasons stated above, Complainant respectfully requests that the Tribunal deny Respondent's "Motion to Dismiss for Failure to State A Complaint and/or Motion for Summary Judgement." Additionally, Complainant requests that the Tribunal strike Respondent's counterclaims; redundant, immaterial, and impertinent matter; and the affirmative defenses of laches/undue delay and statute of limitations from Respondent's Answer.

Dated this 15th day of January 2021.

Respectfully submitted,
*/s/ Caitlin M. Soden*

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BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

| | | |
|---|---|---|
| In the Matter of: | ) | DOCKET NO. |
| | ) | CWA-10-2020-0181 |
| Kirk Wilson, an Individual, | ) | |
| | ) | **CERTIFICATE OF SERVICE** |
| Glennallen, Alaska, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

The undersigned certifies that the original **Complainant's Opposition to Respondent's Motion to Dismiss and/or Accelerated Decision and Complainant's Motion to Strike, and Exhibits 1 and 2 In Support of Complainant's Motion to Strike** in the above-captioned action, dated January 15, 2021, 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 a true and correct copy of the aforementioned documents were served on Respondent Kirk Wilson via electronic mail at kirkakfish@yahoo.com and Respondent's counsel via electronic mail at phillippaulw@me.com and phillippaulw@gmail.com.

Dated this 15th day of January 2021.

Respectfully submitted,
*/s/ Shannon K. Connery*
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