UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

IN THE MATTER OF	)	**Docket No. CWA-07-2014-0060**
	)	
DR. DANIEL J. McGOWAN,	)	**RESPONDENT'S MEMORANDUM**
	)	**AND POINTS OF AUTHORITY**
Respondent	)	**IN OPPOSITION TO**
	)	**COMPLAINANT'S MOTION FOR**
Proceedings under Section 309(g) of the	)	**ACCELERATED DECISION AS TO**
Clean Water Act, 33 U.S.C. § 1319(g)	)	**LIABILITY AND MOTION TO STRIKE**

Respondent Dr. Daniel J. McGowan respectfully submits the following Memorandum and Points of Authority in Opposition to Complainant's Motion for Accelerated Decision as to Liability and Motion to Strike. Based on the arguments contained herein and the exhibits offered on behalf of Dr. McGowan, he respectfully requests that the Court deny both motions in all respects.

STATEMENT OF FACTS

Dr. McGowan is the owner of property in the NE ¼ of Section 32, Township 32 North, Range 22 West, Brown County, Nebraska. (Exh. 1, Affidavit of Dr. McGowan, ¶ 2). This property is commonly known as Ponderosa Pine Canyon Ranch (hereinafter "Ponderosa Pine"). *Id.* Plum Creek, which is a tributary of the Niobrara River, flows through Ponderosa Pine. (Exh. 1, Affidavit of Dr. McGowan, ¶ 4). Located on Ponderosa Pine is a dam, known commonly as the Ponderosa Pine Canyon Dam (the "Dam"), which created the Ponderosa Pine Canyon Reservoir (the "Reservoir"). *Id.*

In the Spring of 2011, heavy rains caused the Reservoir to rise. (Exh. 1, Affidavit of Dr. McGowan, ¶ 6). Water went around the Dam on the south side and caused a washout. *Id.* Water was evident on the east (downstream) side of the Dam face. *Id.* In addition, the retaining wall

beneath Dr. McGowan's house was washed out, leaving about ten feet between the washout area and the foundation of the house. *Id.*

When water levels dropped during the Summer of 2011, Dr. McGowan patched holes on the upstream side of the dam face with cement. (Exh. 1, Affidavit of Dr. McGowan, ¶ 7). On December 28, 2011, Dr. McGowan partially opened one of the four dam gates to prevent excess pressure from ice build-up around the patched area. (Exh. 1, Affidavit of Dr. McGowan, ¶ 8). The gate was not opened all the way and the water level in the lake only dropped approximately two feet. *Id.* No sluicing took place. *Id.*

On January 18, 2012, the U.S. Army Corps of Engineers ("USACE") issued Dr. McGowan a Cease and Desist letter ordering Dr. McGowan to close the dam gates. (Exh. 1, Affidavit of Dr. McGowan, ¶ 9). Following the receipt of the letter, Dr. McGowan contacted USACE employee Barbara Friskopp. *Id.* Ms. Friskopp told Dr. McGowan that he could leave the gate open. (Declaration of Barbara Friskopp, Attachment 1 to Complainant's Memorandum, ¶ 8). Shortly thereafter, Dr. McGowan closed the dam gate.

When Dr. McGowan contacted the USACE, Ms. Friskopp recommended that Dr. McGowan develop a release schedule with the USACE. *Id.* Ms. Friskopp indicated that she needed to consult with the Environmental Protection Agency ("EPA") to determine whether they would consider the sluicing to fall under their jurisdiction. (Exh. 1, Affidavit of Dr. McGowan, ¶ 9). Dr. McGowan followed up with Ms. Friskopp by phone each month starting in January of 2012 to see if she had received an answer from the EPA. (Exh. 1, Affidavit of Dr. McGowan, ¶ 10).

In July of 2012, Ms. Friskopp informed Dr. McGowan that the EPA considered the sluicing to be a local matter. (Exh. 1, Affidavit of Dr. McGowan, ¶ 11). Dr. McGowan asked if

that meant he could open his gates and Ms. Friskopp indicated that he could. *Id.* On July 18, 2012, after the discussion with Ms. Friskopp, Dr. McGowan opened the gates for the purpose of lowering the water level in the lake to conduct maintenance on the dam, specifically, to fill in the washed out area along the dam supports, and to inspect the cement patches in the dam to determine if additional concrete effacement was needed. (Exh. 1, Affidavit of Dr. McGowan, ¶ 12). Additionally, Dr. McGowan sought to fix the eroding shoreline threatening his house. *Id.* On July 20, 2012, the USACE again issued a Cease and Desist letter to Dr. McGowan, despite prior approval by Ms. Friskopp that he could open his dam gates. *Id.* Consequently, Dr. McGowan was forced to close the dam gates before the Reservoir reached an appropriate water level to utilize heavy machinery necessary to conduct the dam maintenance. *Id.*

The EPA filed a Complaint on March 6, 2014, alleging that Dr. McGowan violated Section 301 of the Clean Water Act ("CWA"), 33 **U.S.C.** § 1311, by discharging dredged material from his dam into Plum Creek without obtaining a permit issued pursuant to Section 404 of the CWA, and seeking a penalty up to the statutory maximum of $177,500. Dr. McGowan filed an answer on April 4, 2014, generally denying the allegations and asserting several defenses. On March 12, 2015, Complainant filed an Amended Complaint. Pursuant to 40 C.F.R. § 22.14. Dr. McGowan filed an Answer to the Amended Complaint on March 30, 2015.

PROPOSITIONS OF LAW

Motions for accelerated decision under 40 C.F.R. § 22.20(a) are akin to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *In RE: Pepperell Assoc.*, Docket No. CWA-2-I-97-1088 (1998). Explicitly drawing a connection to Rule 56 accomplishes three things: (1) It provides a common vocabulary, easily understandable by litigants, lawyers, and adjudicators; (2) It introduces into an agency's jurisprudence a ready-

made ensemble of decisional precedents associated with Rule 56 (*e.g.*, evidence must be examined in the light most favorable to the nonmovant); and (3) It carries with it certain expectations, conditioned by everyday experience in the federal courts, about the kind and degree of evidence deemed necessary to create a genuine dispute over a material fact. *Puerto Rico Aqueduct & Sewer Auth. v. U.S. E.P.A.*, 35 F.3d 600, 605 (1st Cir. 1994).

The movant has the burden of demonstrating that a material fact cannot be genuinely disputed by "citing to particular parts of materials in the record ..." *In Re: Polo Development, Inc.*, Docket No. CWA-05-2013-0003 (quoting FRCP 56(c)(1)). Under federal case law, a "material" fact is one that may affect the outcome of the case. *Puerto Rico Aqueduct & Sewer Auth. v. U.S. E.P.A.*, 35 F.3d 600, 605 (1st Cir. 1994) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986)).

Courts are required to view the facts and draw reasonable inferences in the light most favorable to the party opposing a summary judgment motion. *Scott v. Harris*, 550 U.S. 372, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007). In ruling on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Tolan v. Cotton*, 134 S. Ct. 1861, 188 L. Ed. 2d 895 (2014).

ARGUMENT

Dr. McGowan did not violate the CWA and there is insufficient evidence to find otherwise. Even if there was sufficient evidence that Dr. McGowan's dam is a "point source" which "discharged pollutants" into Plum Creek, and that the sediment that passed through the Dam constituted "dredged and/or fill material," Dr. McGowan is exempted under multiple affirmative defenses. Any sediment that was released through Dr. McGowan's dam is specifically exempted under the dam maintenance exemption found at 33 **U.S.C.** §

1344(f)(1)(B), and not recaptured by 33. **U.S.C.** § 1344(f)(2). Additionally, release of sediment from behind the dam structure was necessary and prudent to avoid the potential loss of the structure, which would certainly have had negative effects.

I. MCGOWAN DID NOT DISCHARGE ANY POLLUTANTS INTO PLUM CREEK.

The sediment involved in this matter is not a pollutant for purposes of evaluating an alleged "discharge" from a dam structure. Because the sediment was present in the water upstream and downstream of the dam, it cannot be considered a pollutant that was "discharged" from the dam structure.

Pollutant is defined as: "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 **U.S.C.** § 1362(6). "The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." 33 **U.S.C.** § 1362(6). Under the plain language of the statute, no "discharge of a pollutant" occurred because there was no addition of any pollutant. Rather, water flowed from the upstream portion of Plum Creek, through the Dam to the contiguous downstream portion.

a. McGowan did not direct the "discharge of a pollutant" from the dam located on his property into Plum Creek.

None of the actions alleged in this matter constitute the "discharge" of fill material under the Clean Water Act. Under the Clean Water Act, both of the primary permitting programs – Sections 402 and 404 – utilize the term "discharge". Despite the common term, the EPA has

interpreted the term in different ways, particularly when faced with the question of whether a dam can "discharge." In two prominent Section 402 cases, N*ational Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) and *National Wildlife Federation v. Consumers Power*, 862 F.2d 580 (6th Cir. 1988), the EPA urged Courts to adopt a "one water" interpretation in which the water on either side of a dam was considered to be the same body of water. Under that interpretation, a dam that passed pollutants from the upstream side to the downstream side could not be considered to have "discharged" anything into the water, because the pollutants were already present in the water before it passed through the dam.

In *Gorsuch,* the District of Columbia Circuit Court addressed the issue of whether water quality changes caused by dams must be regulated under Section 402. The water quality changes involved in *Gorsuch* were "low dissolved oxygen," "dissolved minerals and nutrients," "temperature changes," "sediment," and "supersaturation," *Id.* at 161-64.

In *Consumers Power,* the defendant withdrew water from Lake Michigan, along with fish, for hydroelectric power generation. After passing through the hydroelectric turbines, the water returned to the lake along with dead and entrained fish. The Sixth Circuit found that returning the fish to the Lake, even in a different form, was not an "addition" because the fish had already been there. "To be sure, the manipulation of water by the Ludington facility's turbine changes the form of the pollutant from live fish to a mixture of live and dead fish in the process of generating electricity. However, this does not mean that the Ludington facility "adds" a pollutant to Lake Michigan." *Id.* at 585. The Court continued by explaining:

> There can be no doubt that the Ludington facility does not create the fish which become entrained in the process of generating electricity.
> ....
> Storage dams, such as those contemplated in *Gorsuch,* actually transform the essential character of the water for its biological inhabitants. They change water that is high in plant nutrients and organic waste into water that is colder and has

> low dissolved oxygen, as well as increased amounts of sediment and dissolved minerals. The Ludington facility, in the process of generating electricity, transforms water containing live fish into water containing live and dead fish. The fish originate in Lake Michigan, and any resulting pollution in the form of entrained fish is, as in *Gorsuch,* an inherent result of dam operation. Any water quality change resulting from the release of entrained fish at the Ludington facility is simply not, giving proper deference to the EPA definition, from the physical introduction of a pollutant from the outside world.

Id. at 585-86. So too, Dr. McGowan's dam has not introduced any pollutant from the outside world. Rather, some quantity of sand and sediment is inevitably present in the waters of Plum Creek at all times. The increase and decrease in the amount of sediment present in the water is "an inherent result of dam operation." As in *Consumer Powers* and *Gorsuch*, any water quality change resulting from the opening and closing of dam gates is simply not from the physical introduction of a pollutant from the outside world.

This reasoning has been affirmed in later cases. *See, e.g., Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York,* 273 F.3d 481 (2d Cir. 2001) *adhered to on reconsideration,* 451 F.3d 77 (2d Cir. 2006). "The EPA's position, upheld by the *Gorsuch* and *Consumers Power* courts, is that for there to be an 'addition,' a 'point source must *introduce* the pollutant into navigable water from the outside world.' " *Catskill Mountains*, 273 F.3d at 491 (emphasis theirs) (citing *Gorsuch,* 693 F.2d at 165). "Given that understanding of 'addition,' the transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition and thus a 'discharge' that demands an NPDES permit." *Catskill Mountains*, 273 F.3d at 491.

However, in a Section 404 case, *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934 (7th Cir. 2004), the EPA urged a different interpretation, claiming that a dam could be the source of a discharge even if the "pollutant" was present in the water on the upstream side of the dam. In that case, the Seventh Circuit rejected the "one water" rationale at the urging of the EPA, in

substantial part because the "one water" rationale from *Gorsuch* and *Consumers Power* was only a litigation position and not an official agency policy. Instead, the Court found that the movement of dredged material through the dam could be considered a "discharge" under certain circumstances. However, this position was undercut in 2008 when the EPA passed the 2008 Water Transfers Rule, which is discussed in greater detail below.

Greenfield Mills is a factually distinguishable case. The supply pond in *Greenfield Mills* contained what was described as "muck" by the Court and witnesses. This supply pond was used to store and transfer water to be used in a fish hatchery operation. The supply pond, though connected, was adjacent to stream. It appears that the "muck" present in the supply pond as a result of the vegetation and other factors, and was not otherwise present in the stream. That is far different from the sand that is present in Plum Creek upstream and downstream of the Dam.

Additionally, numerous other cases support Dr. McGowan's position that no discharge took place. For instance in a recent case, the Supreme Court was asked to rule on the following question: "Under the CWA, does a 'discharge of pollutants' occur when polluted water 'flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river,' and then 'into a lower portion of the same river'?" *Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.*, 133 S. Ct. 710, 712-13, 184 L. Ed. 2d 547 (2013). The Supreme Court answered with a resounding "No." *Id.* In answering, the Supreme Court looked no further than the plain language of the statute:

> Under a common understanding of the meaning of the word "add," no pollutants are "added" to a water body when water is merely transferred between different portions of that water body. See Webster's Third New International Dictionary 24 (2002) ("add" means "to join, annex, or unite (as one thing to another) so as to bring about an increase (as in number, size, or importance) or so as to form one aggregate"). "As the Second Circuit [aptly] put it ..., '[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not "added" soup or anything else to the pot.' "

Los Angeles Cnty. Flood Control Dist., 133 S. Ct. at 713. (citing *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 106, 124 S. Ct. 1537, 1544, 158 L. Ed. 2d 264 (2004)). Likewise, in *Miccosukee*, the Supreme Court held that if polluted water was removed from a canal, transported through a pump station, and then deposited into a nearby reservoir, that a discharge of pollutants under the CWA would occur only if the canal and the reservoir were "meaningfully distinct water bodies." *Id.,* at 112, 124 S.Ct. 1537. "It follows, *a fortiori,* from *Miccosukee* that no discharge of pollutants occurs when water, rather than being removed and then returned to a water body, simply flows from one portion of the water body to another." *Los Angeles Cnty. Flood Control Dist.*, 133 S. Ct. at 713.

Additionally, the allegations of Complainant that Dr. McGowan sluiced his dam in December, 2011 and January, 2012 are incorrect and contradicted by the statements of Dr. McGowan and the evidence contained in the Plum Creek Ecological Study Report from New Century Environmental, LLC ("New Century Report"). Complainant's Memorandum also cites to statements of Will Williams contained as hearsay within the affidavit of Mike Murphy. It must be noted that these are inadmissible hearsay and must be disregarded for purposes of ruling on this Motion.

For the foregoing reasons, Dr. McGowan did not "discharge dredged and/or fill material" into Plum Creek. Accordingly, the Motion must be denied in all respects.

b. Sediment that passed through McGowan's dam was not "dredged and/or fill material".

As noted above no "discharge" of a pollutant, to include dredged or fill materials, occurred through the Dam into Plum Creek. Additionally, any sediment that passed through the Dam was not "dredged material" or "fill material" as defined in 40 C.F.R. § 232.2. Under the

CWA regulations, "dredged material" is defined as "material that is excavated or dredged from waters of the United States." 40 C.F.R. § 232.2. "Fill material" is defined as:

> (1) Except as specified in paragraph (3) of this definition, the term fill material means material placed in waters of the United States where the material has the effect of:
> (i) Replacing any portion of a water of the United States with dry land; or
> (ii) Changing the bottom elevation of any portion of a water of the United States.
> (2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.
> (3) The term fill material does not include trash or garbage.

Id.

Dredge is defined by Merriam-Webster dictionary as follows: "a: to dig, gather, or pull out with or as if with a dredge —often used with *up* b: to deepen (as a waterway) with a dredging machine". This implies mechanical means of removal. "Specifically, Congress understood 'discharge of dredged material' to mean open water disposal of material removed during the digging or deepening of navigable waterways." *Am. Min. Cong. v. U.S. Army Corps of Engineers*, 951 F. Supp. 267, 273 (D.D.C. 1997) *aff'd sub nom. Nat'l Min. Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998) (citing S.Rep. No. 92–1236, 92d Cong., 2d Sess. 141–42 (1972), U.S.Code Cong. & Admin.News 1972, at p. 3668, (Report of the Conference Committee)).

Fill material, as defined above, does not include the sediment that passed through the Dam and downstream. Although it is clear that sediment and sand may constitute "fill material", it is equally clear that they are excluded under the definition in the context of this case. Similar to the definition of "discharge" discussed in more detail in the preceding subsection, which requires an "addition" to occur, fill material is defined as "material placed" in the water. This language cannot reasonably include sediment and sand that was *already present* in Plum Creek.

Even if *Greenfield Mills* is read to be a change to the plain language in the statute and regulations, it is factually distinguishable. The supply pond in *Greenfield Mills* was completely drained within hours, and took "muck" that was in pond. The pond in *Greenfield Mills* was an adjacent body of water that, although filled by the river, and could be drained into the river, was separated from the river and served a unique purpose. Moreover, it was completely filled in with vegetation in the years leading up to the water release that was the subject of the lawsuit, and was not even navigable by canoe. *See, id.* at 939. That is different than the Reservoir which has no geographic separation from Plum Creek. Additionally, the muck in *Greenfield Mills* is a result of the holding pond's use. The sand and other sediment that passed through the Dam came entirely from the upstream portion of Plum Creek and merely traveled through the Reservoir and Dam to the downstream portion of Plum Creek. As the New Century Report indicates, there is currently and historically a constantly a high presence of sand the water of Plum Creek both upstream and downstream of the Dam.

The case of Dr. McGowan is also distinguishable from the side-casting cases cited in *Greenfield Mills.* Mainly, there is a significant distinction to be made between a continuous flow of water from upstream of a dam to downstream and the mechanical digging and removing of dirt and the redeposit in a different area. Here, there is no redeposit, only a constant flow.

The allegations in Complainant's Memorandum that "evidence shows beyond dispute that Respondent's discharges of sediment... resulted in the conversion of large portions of Plum Creek from water to dry land and changed the bottom elevation of the creek" have no basis in reality and are unsupported by credible evidence. Complainant relies on subjective statements of Andrew Glidden and downstream property owner, Barry Harthoorn, to attempt to prove

significant change in Plum Creek. To the contrary, the only objective and quantifiable evidence is contained in the New Century Report. Indeed, the New Century Report states:

> Downstream accumulations of residual sediment piles were sparse to non-existent and the stream exhibited significant sediment removal since observations of sediment build-up by NCE in September of 2012. As stream ecologists we are confident much of the sediment deposition in Plum Creek below the McGowan dam has been removed by natural flow and fluvial processes in the stream under natural conditions.

(Exh. 2, Affidavit of Dr. Gutzmer, Exhibit B, p. 45).

Because no sediment or any other materials were added or "placed" within Plum Creek, the sediment that passed through Dr. McGowan's dam is simply not "dredged and/or fill material". Rather, the sediment was already present, and any increase in sediment downstream of the dam was incidental to normal dam operations, and not new, or even reintroduced, materials to Plum Creek. For the foregoing reasons, the Motion must be denied in its entirety.

II. MCGOWAN'S DAM DID NOT ACT AS A "POINT SOURCE" UNDER THE CLEAN WATER ACT.

Clean Water Act jurisprudence has held that under certain circumstances, a dam can be considered a point source under the relatively broad definition found at 33 U.S.C. § 1362(14). However, this case does not present one of those circumstances as the alleged sluicing event only passed material from the upstream side of the dam to the downstream side of the dam. Therefore, no "pollutants are or may be discharged" from the dam as required by the definition. As already discussed in the previous section, no discharge of a pollutant occurred, and in this case, the Dam is not a point source. No pollutants moved from the reservoir into the stream though a "discernable, confined and discrete conveyance." *See, e.g., Catskill Mountains, supra.* Accordingly, because Dr. McGowan's dam was not a point source, the Motion must be denied in its entirety.

III. THE US ARMY CORPS OF ENGINEERS REPRSENTED TO MCGOWAN THAT A CWA SECTION 404 PERMIT WAS NOT NECESSARY.

Complainant alleges that Dr. McGowan did not apply for a Section 404 permit. However, as already stated above, there was no need for a Section 404 permit for any of the actions that Dr. McGowan has taken in relation to the Reservoir or Plum Creek. Nevertheless, the evidence is undisputed that Dr. McGowan contacted the USACE and maintained communication with them throughout the process. Indeed, Ms. Friskopp admitted that she told Dr. McGowan that "he could keep his gate open" on the Dam. (Declaration of Barbara Friskopp, Attachment 1 to Complainant's Memorandum, ¶ 8). Moreover, evidence is uncontradicted that Dr. McGowan maintained monthly communication with the USACE through Ms. Friskopp until he was told in July of 2012 that opening the gates on his dam was a "local matter" that did not necessitate a Section 404 permit. Based on the advice of Ms. Friskopp that he develop a release schedule, and her recommendation that doing so was a "local matter" that required no permit, Dr. McGowan opened the gates, in good faith reliance on the aforementioned statements and representations. Because of these statements, the USACE represented that no Section 404 permit was necessary.

IV. THE EPA "WATER TRANSFERS RULE" IS A DEFENSE TO MCGOWAN.

The 2008 Water Transfers Rule provides a defense to Dr. McGowan for any alleged discharge through the Dam. This rule, promulgated by the EPA, severely undercuts the rationale in *Greenfield Mills, Inc. v. Macklin*. Although the Rule pertained to transfers of water in the Section 402 context, it strongly reaffirmed the "one water" rationale of *Gorsuch* and *Consumers Power* in an official agency policy that was subject to APA Notice and Comment Procedures – exactly the policy that the Seventh Circuit Court could not find in *Greenfield Mills, Inc. v.*

Macklin. In that rule, the EPA strongly reaffirmed its position that water on both sides of a dam is considered "one water." In giving an example of how the water transfer rule would work when passed through a dam, the Agency stated, "The first example is the release from Reservoir A to River A. This does not constitute a water transfer under EPA's definition because the water on both sides of the dam is part of the same water of the U.S." Fed. Register, vol. 73, No. 115, p. 33699 (June 13, 2008). In response to comments on the rule, the Agency states:

> Some commenters, including State agencies with hydroelectric resources, utilities, and water districts expressed concern that if hydroelectrical operations incidental to a water transfer were considered an intervening use, the water transfer would be disqualified from the exemption. . . . Today's ruling does not affect the longstanding position of the EPA and the Courts that hydroelectric dams do not generally require NPDES permits. See, *Gorsuch*, 693 F.2d 156; *Consumers Power,* 862 F.2d 580. EPA agrees that the transfers described in California are excluded from the NPDES permitting requirements unless, as discussed below, the hydroelectric facility itself introduces a pollutant such as grease into the water passing through the dam."

Fed. Register p. 33705. Again, in response to a question about naturally occurring changes to water, the Agency stated, "The Agency views these changes the same way it views changes to water quality caused by water moving through dams (*National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982)); they do not constitute an 'addition' of pollutant subject to the permitting requirements of section 402 of the Act."

By promulgating a rule that defined the term "discharge" extremely narrowly in the context of dams, the EPA reaffirmed the "one water" rationale of *Gorsuch* and *Consumers Power* and, in a carefully constructed policy that was subject to APA Notice and Comment, they clearly undercut the rationale of *Greenfield Mills, Inc. v. Macklin*. The fact that the 2008 Water Transfers Rule is in the context of Section 402 is irrelevant -- it does not matter if the "pollutant" being passed through a dam is a Section 402 pollutant or Section 404 dredged and fill material, if

the water on the upstream side of a dam and the downstream side of a dam are considered to be one water, there can be no "discharge" of a pollutant to that water by a passive dam structure.

A dam presents a unique situation for Clean Water Act analysis. It is clear that through the 2008 Water Transfers Rule and related official comments, the EPA has acknowledged this unique situation and correctly found that a dam cannot be considered to have "discharged" anything unless it literally adds a pollutant to the water of its own making. As such, the Motion must be denied.

V. MCGOWAN ACTED PRUDENTLY TO AVOID POTENTIAL LOSS OF THE DAM STRUCTURE.

The alleged sluicing event at issue in this matter was necessary and prudent to protect the McGowan dam structure. At the time of the alleged sluicing event, the reservoir behind the Dam contained a large amount of silt, due primarily to flooding during the previous year. The substantial amount of recent build-up presented a threat to the dam, and any alleged passage of sediment through the Dam was necessary to relieve the stress on the structure itself.

In addition, Dr. McGowan has completed repair work to both the face of the Dam and around the structural supports for the Dam. Water was released in December of 2011 to relieve pressure on the dam, including the repairs to the dam face. Water was released in July 2012 with the full knowledge of the EPA to make further repairs possible, including filling in a washed out area along dam supports and inspecting the cement patches in the dam to determine if additional concrete effacement was needed. Previous dam inspection reports indicate the disrepair of the dam and the need for maintenance. (Exh. 1, Affidavit of Dr. McGowan, Exhibits A and B). Additionally, the New Century Report makes clear the need for repairs that have been delayed by this proceeding. (Exh. 2, Affidavit of Dr. Gutzmer, Exhibit B).

In its Memorandum, Complainant again makes references to inadmissible hearsay by Will Williams in an attempt to analogize Dr. McGowan with the defendants in *Greenfield Mills*. The alleged statements by Will Williams, as already stated, are inadmissible and must be excluded. There is no evidence that Dr. McGowan released water from the Reservoir as a cost-effective alternative to removing any sediment by mechanical means. Dr. McGowan's statements, corroborated by Ms. Friskopp, is that water was released from the Dam in December, 2011, and January, 2012, to preserve the dam structure from building pressure due to ice, and to conduct maintenance, and again in July, 2012, to conduct maintenance on the Dam.

As further discussed in following sections, the alleged sluicing event would be exempt from the requirements of Section 404 under the maintenance exception found at 33 U.S.C. § 1344(f)(1)(B). The alleged sluicing event took place with the full knowledge of the EPA and USACE and was only undertaken after Ms. Friskopp, an employee with the USACE, informed Dr. McGowan that the EPA considered this to be a local matter. In addition, the alleged sluicing event was done to protect the safety of the Dam and to allow for repairs to be done to the dam structure and other water control devices surrounding the reservoir. Because of this defense, the Motion must be denied in all respects.

VI. THE US ARMY CORPS OF ENGINEERS AUTHORIZED MCGOWAN'S ACTIONS.

Dr. McGowan reopened the gates in July 2012 after consulting with Ms. Friskopp in January, 2012, and following up each month until July 2012 when he was told by Ms. Friskopp that the EPA considered the alleged sluicing to be a local matter and that he could open his gates. This factor has both substantive implications and should also be considered in mitigation of any

potential fee, particularly in light of the EPA's claim that Dr. McGowan is more culpable because of the July 2012 event.

During the December 2011/January 2012 event, Dr. McGowan did not open the gates on the Dam all the way and Dr. McGowan has stated that the reservoir was not sluiced at that time. One gate was partially opened for the express purpose of relieving pressure on the Dam. The efforts of Dr. McGowan in communicating with the USACE and Ms. Friskopp have been documented and discussed in preceding sections. Accordingly, the Motion must be denied.

VII. MCGOWAN'S ACTIONS ARE EXEMPT UNDER THE CWA SECTION 404 "MAINTENANCE EXEMPTION."

a. McGowan's timely asserted the "Maintenance Exemption" found in Section 404(f) as a defense.

Complainant states in its Memorandum that an Amended Complaint was filed on March 12, 2015. Dr. McGowan thereafter filed an Answer to the Amended Complaint. Curiously, Complainant now claims that "Respondent failed to assert the Section 404(f) 'maintenance' exemption as an affirmative defense in his Answer." Complainant apparently believes that Dr. McGowan is not entitled to answer to allegations of Complainant in its Amended Complaint. However, the rules of procedure are clear on this. "Respondent shall have 20 additional days from the date of service of the amended complaint to file its answer." 40 C.F.R. § 22.14. The dam maintenance exemption was pled in Dr. McGowan's Answer to the Amended Complaint. He is, without question, entitled to rely on it as a defense.

b. McGowan's actions fit within the clear exemption found at Section 404(f)(1).

Section 404(f) provides that discharge of dredge or fill material for the purpose of dam maintenance is exempt from permit requirements. Specifically, the exemption states:

> Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material—
> ....
> (B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;
> ....
> is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).

33 U.S.C.A. § 1344. The plan language of the statute allows for discharges of dredged or fill material, if the purpose of the discharges, is to conduct maintenance of a dam.

Complainant asserts in its Memorandum that this exemption is *narrow*. Indeed, it is limited to narrowly defined activities, such as maintenance of currently serviceable structures. When read with the Section 404(f)(2) recapture provision, it is also narrowly limited to existing uses. The exemption specifically lists dams as structures to be included. Dr. McGowan released water from the Dam because the nature of the maintenance required such. The repair of concrete required that the water to be lowered to properly inspect and patch the damaged portions. Additionally, the use of heavy machinery was required to repair erosion on the exposed south side of the dam. Dr. McGowan's intended maintenance was cut short by the USACE prior to the water level in the Reservoir dropping enough for any significant maintenance, other than an inspection of the partially exposed concrete. If Congress had intended to make the exemption any narrower than it already is, or to exclude such maintenance activities, it would have. "In short, Congress and everyone involved in the water pollution problem knew that water flowed out of dams, and that such water was often not pristine. To the extent that no more has been shown than that unclean water flows out of the dam, Congress clearly displayed an intention to exempt dams from the Clean Water Act." *Consumers Power*, 862 F.2d at 586.

Complainant points to the legislative history of the CWA, indicating that "[t]hroughout the legislative history, Congress repeatedly stressed that the § 1344(f)(1) exemptions were intended to cover only a very narrow class of exemptions for activities 'that cause little or no adverse effects either individually or cumulatively.' " *Greenfield Mills,* 361 F.3d at 951. Indeed, there has been no proof offered to show significant adverse effects. Instead, there are subjective observations by layman landowners and dubious claims by a wildlife biologist that there are far less trout in Plum Creek then there have been historically. This evidence is contradicted by Mr. Glidden's own statements. In an email from Mr. Glidden, he stated that after having checked three different downstream properties after Dr. McGowan released water from the Reservoir in July, 2012, he "observed no dead or stress fished (sic)". (Exh. 3, Affidavit of Stephen D. Mossman, Exhibit A). The claim is further contradicted by an expert report that shows a moderate "relative abundance of fish in the Plum Creek." (Exh. 2, Affidavit of Dr. Gutzmer, Exhibit B, p. 44). Hand-drawings over photographs showing where "old shorelines" were located and a completely unqualified estimate that 130,000 cubic yards of sediment passed from Dr. McGowan's reservoir in the course of a few days do not demonstrate significant adverse effects, yet alone causation of any changes that may have occurred in Plum Creek over the last 3 years. There is no evidence that any release of water had the effect to "convert more extensive areas of water into dry land or impede circulation or reduce the reach and size of the water body." *See, Greenfield Mills*, 361 F.3d at 950 (quoting *United States v. Huebner*, 752 F.2d 1235, 1440-41 (7th Cir. 1985)). Rather the evidence is quite contrary. "Although the bathymetric and sediment surveys showed sediment has been removed from the reservoir since 2010, the effect of opening the low level discharge appeared limited and extended only up to the first upstream meander of the reservoir." (Exh. 2, Affidavit of Dr. Gutzmer, Exhibit B, p. 41).

Complainant relies heavily on *Greenfield Mills* in concluding that the dam maintenance exemption does not apply. However, *Greenfield Mills* is distinguishable for the simple fact that the defendants in *Greenfield Mills* did not intend to complete any dam maintenance when they opened the dam gates. Rather, the evidence led the Court to the conclusion that "dam maintenance" was a pretext to drain decades of accumulated muck in the supply pond. "In determining the 'purpose' of the defendants' actions, 'reviewing courts have consistently looked beyond the stated or subjective intentions and determined the effect or 'objective' purpose of the activity conducted.'" *Greenfield Mills,* 361 F.3d at 950 (quoting *United States v. Sargent County Water Res.,* 876 F.Supp. 1090, 1101 (D.N.D.1994)). In *Greenfield Mills,* the defendants drained the supply pond and showed no intention or effort to complete repairs in a timely manner. After the supply pond drained, they ate lunch, purchased supplies, and went about other business until a downstream landowner demanded the gates be closed. Additionally, the defendants had expressed an intention to dredge the supply pond. Moreover, the stated maintenance was completed at a later date without lowering the water level at all. To the contrary, Dr. McGowan showed clear intent to complete repairs to the dam, and undisputed evidence that the dam was in need of such repairs. Further, Dr. McGowan contacted the USACE, maintained communication at all relevant times, and acted in good faith. However, Dr. McGowan was prevented from completing all of the repairs because the USACE ordered him to cease and desist and to close the dam gates. Consequently, the Reservoir was never at a low enough point to reasonably conduct maintenance with the required machinery.

The next requirement under *Greenfield Mills* is that "only dredging that is reasonably necessary to the proposed maintenance is exempt from the permit requirement." *Id.* at 952. In *Greenfield Mills*, the Court found that a trier of fact to conclude that the dredging of the pond

was not reasonably necessary to either maintenance of the pump or the alleged inspection of the gates. In the case of Dr. McGowan, Complainant's Memorandum again alleges that Dr. McGowan released 130,000 cubic yards of sediment from the Reservoir, which had "devastating impacts to Plum Creek". Mr. Glidden's calculations and characterizations have already been discussed above. As for the reasonable necessity of releasing water, there is no real dispute that water had to be released to properly conduct maintenance activities on the Dam. It does not require explanation that concrete cannot be patched and repaired when submerged under water. Complainant does not address that point, but rather attacks Dr. McGowan's intentions.

The third requirement under *Greenfield Mills* is that the maintenance "does not include any modification that changes the character, scope, or size of the original fill design." Whether discussing Plum Creek upstream or downstream of the Dam, there is no indication that the character, scope, or size of the original fill design was changed.

In *Sargent*, the Court cites to several of the cases that narrowly construe the Section 404(f) exemptions and highlights the factual distinctions. For instance, *Huebner* dealt with farmers who had entered into a consent decree with the USACE regarding the maintenance of wetlands on their property. *United States v. Huebner*, 752 F.2d 1235 (7th Cir.), *cert. denied*, 474 U.S. 817, 106 S.Ct. 62, 88 L.Ed.2d 50 (1985). The Court construed the exemption to not include certain activities after the farmers later violated the decree and were found in contempt by the lower court.

In another case, the defendants acquired real estate located in the floodplain of a creek, and after acquisition of the property, dug drainage ditches, cut timber, blasted beaver dams, and began building dikes and levees, and filling low spots on the land. *United States v. Larkins,* 657 F.Supp. 76 (W.D.Ky.1987), *aff'd,* 852 F.2d 189 (6th Cir.1988), *cert. denied,* 489 U.S. 1016, 109

S.Ct. 1131, 103 L.Ed.2d 193 (1989). The Court stated that the defendants' actions were "for the purpose of bringing the wetlands adjacent to Obion Creek under cultivation, a use to which the site was not previously subject." *Id.* at 85-86. Accordingly, these activities were outside of the "normal farming" exemption found in Section 404.

In *Brace*, the Third Circuit dealt with both the "normal farming" and "maintenance of a drainage ditch" exemptions also found in Section 404(f)(1). *United States v. Brace,* 41 F.3d 117 (3rd Cir.1994). The Court concluded that the "normal farming" exemption did not apply where the defendant converted a thirty-acre site that was not suitable for farming into one that is after the defendant buried four miles of plastic tubing for drainage. The Court also found that the excavation of the site and burying of four miles of pipe to facilitate drainage did not constitute "continuing maintenance" under the CWA.

The Court in *Akers* dealt with the "normal farming" exemption after the defendant constructed a three mile long dike through certain wetland areas and attempted to characterize his actions as the construction of an irrigation facility under 33 **U.S.C.** § 1344(f)(1)(C). *United States v. Akers*, 785 F.2d 814, 820 (9th Cir.), *cert. denied*, 479 U.S. 828, 107 S.Ct. 107, 93 L.Ed.2d 56 (1986).

Each of these cases that have given narrow construction of the Section 404(f)(1) exemptions did so because the actions of the defendants brought an area into new use or involved improvement, rather than maintenance. That is contrary to the present case where there is no evidence of any new uses or improvements beyond restoration of the original dam structure. For the foregoing reasons, Dr. McGowan's activities are exempt from the Section 404 permit requirements. Accordingly the Motion must be denied in its entirety.

c. McGowan's actions are not "recaptured" by Section 404(f)(2).

There is no basis under the text of Section 404(f)(2) that Dr. McGowan's actions are "recaptured." If an activity falls within an exemption under Section 404(f)(1), such as the dam maintenance exemption which covers Dr. McGowan, it may still be recaptured under Section 404(f)(2). The recapture provision states:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C.A. § 1344 (f)(2). Thus, there is a two prong test that must be met. First, the discharges must be "incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject," and second, "the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced". Because neither prong applies, Dr. McGowan's activities are not recaptured. There is no showing, or even an allegation that the purpose of Dr. McGowan's releases were to bring Plum Creek, or any area of navigable waters, into a use to which it was not previously subject. Dr. McGowan released water from the Reservoir to conduct maintenance on his Dam. There is no evidence or allegations that he did this with the purpose of bringing Plum Creek into a new use. Accordingly, this prong is not met. Additionally, there is no evidence that the flow or circulation of the waters of plum creek has been impaired. Moreover, Complainant has alleged that the reach of Plum Creek has *increased*. Thus, the second prong also fails. As such, Dr. McGowan's activities are not recaptured and he is entitled to the dam maintenance exemption.

CONCLUSION

For the reasons set forth herein, Respondent Dr. Daniel McGowan respectfully requests that Complainant's Motion for Accelerated Decision as to Liability and Motion to Strike both be denied in their entirety

Dated this 18th day of May, 2015.

DR. DANIEL J. McGOWAN, Respondent

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CERTIFICATE OF FILING

The undersigned certifies that the original Memorandum and Points of Authority in Opposition to the Motion for Accelerated Decision as to Liability and Motion to Strike was served via the OALJ E-filing system to Sybil Anderson, the Office of Administrative Law Judges Hearing Clerk and a true and correct copy was served via email to Chris Muehlberger, Assistant Regional Counsel at muehlberger.christopher@epa.gov on the 18th day of May, 2015.

_____
Attorney of Record