

BEFORE THE  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)	
	)	
	)	DOCKET NO.
	)	CWA-10-2016-0109
Dave Erlanson, Sr., Individual	)	
	)	<b>COMPLAINANT'S INITIAL</b>
Swan Valley, Idaho	)	<b>PREHEARING EXCHANGE</b>
	)	
Respondent.	)	

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Pursuant to 40 C.F.R. § 22.19, and the Presiding Officer's Second Prehearing Order of February 24, 2017, Complainant Environmental Protection Agency (EPA or "Complainant") submits its Initial Prehearing Exchange.

**I. WITNESSES**

Complainant respectfully submits the following list of expert and fact witnesses who will testify at hearing, together with a brief narrative summary of their expected testimony:

1. **Clint Hughes** (fact witness): Mr. Hughes has 13 years of experience in the field of Minerals and Geology with the United States Forest Service ("Forest Service") and the Bureau of Land Management (BLM). Mr. Hughes' responsibilities and expertise include conducting inspections of mining operations on Forest Service lands to determine compliance with Forest Service Plans of Operations. The Forest Service reviews and approves Plans of Operations for miners or suction dredgers to conduct mining operations in Forest Service lands.

The Plan of Operations is only issued after a careful evaluation of the proposal (e.g., proper stage of the mining operation) and consideration of the potential environmental consequences.

Mr. Hughes has conducted roughly 400 inspections during his time with the Forest Service and BLM. On July 22, 2015, Mr. Hughes conducted an inspection of suction dredging activity on the South Fork of the Clearwater River and will testify regarding his observations and findings, his communications with Respondent, compliance with Forest Service Plan of Operations requirements and the nature of the Forest Service compliance efforts for suction dredge mining on the South Fork of the Clearwater River. Mr. Hughes's inspection report is Complainant's Exhibit (CX) – 01 (Clint Hughes, USFS Mineral Inspection Report, July 22, 2015), and his associated Declaration is CX – 02.

2. **Tracy Peak** (fact/expert): Ms. Peak works in the United States Environmental Protection Agency's Idaho Operations Office as an Environmental Scientist in both the Office of Water and Watersheds, National Pollutant Discharge Elimination System (NPDES) Permits Unit, as well as the Office of Environmental Review and Assessment, Aquatic Resources Unit. Her resume is attached as CX – 30. Ms. Peak manages permit authorizations for the Clean Water Act (CWA) section 402, 33 U.S.C. § 1342, Idaho Small Suction Dredge Mining NPDES General Permit (hereinafter "Idaho Suction Dredge GP" or "General Permit"; CX – 03). Ms. Peak will testify about EPA's regulation of suction dredging under the Idaho Suction Dredge GP, the specific provisions in the General Permit relating to discharge prohibitions and closed waters, and the current status of the General Permit. *See* CX – 07 (Tracy Peak, Idaho Suction Dredge GP Presentation). She will also testify about EPA's communications with Respondent relating to CWA permit requirements. CX – 08 (EPA letter to D. Erlanson, October 3, 2014);

CX – 09 (Corps letter to D. Erlanson, February 11, 2014); CX – 10 (D. Erlanson, Joint Application for Permits, February 10, 2014); CX – 11 (EPA letter to D. Erlanson, August 7, 2015); CX – 12 (D. Erlanson, Notice of Intent, May 29, 2015).

3. **Cindi Godsey** (fact/expert): Ms. Godsey works in the United States Environmental Protection Agency’s Seattle Office as an Environmental Engineer in the Office of Water and Watersheds, NPDES Permits Unit. Her resume is attached as CX – 31. Ms Godsey received a bachelor of science in Mining Engineering from Michigan Technological University in 1981. Ms. Godsey has worked as a NPDES permits writer for approximately 25 years. In her capacity as a NPDES permit writer, Ms. Godsey has amassed detailed experience with CWA compliance and permitting issues for placer mining operations. Ms. Godsey was the permit writer for numerous individual placer mining permits and the NPDES General Permit for Alaska Mechanical Placer Miners (*See* CX – 13, EPA, Fact Sheet, Alaska Suction Dredge GP). Additionally, Ms. Godsey, since 2009, was assigned as the permit writer for the Idaho Suction Dredge GP. Ms. Godsey will testify regarding the history of EPA Region 10’s CWA regulation of placer mining, including the development and implementation of the Idaho Section Dredge GP. Ms. Godsey may also testify regarding the specific requirements included in the Idaho Small Section Dredge GP.

4. **Tara Martich** (fact): Ms. Martich works in the United States Environmental Protection Agency’s Alaska Operations Office as an Ecologist. Ms. Martich has 13 years’ experience within the CWA Section 402 compliance and enforcement program. If necessary, Ms. Martich will testify regarding the EPA’s evaluation of Mr. Hughes’s Forest Service inspection report and Respondent’s compliance with the CWA.

5. **Heather Dean** (expert): Ms. Dean works in the United States Environmental Protection Agency's Seattle Office as an Environmental Scientist in the Office of Environmental Review and Assessment, Aquatic Resources Unit. Her resume is listed below as CX – 32.

Ms. Dean has a Bachelor of Science degree in Maritime Systems Engineering from Texas A&M University, earned in December 1984. In her role as Environmental Scientist, Ms. Dean has over 15 years' experience as the EPA Region 10 Aquatic Resources Unit lead on analyzing whether a waterbody qualifies a "navigable water" or "water of the United States" under the CWA and EPA's implementing regulations and therefore subject to jurisdiction under the CWA and the permitting and other requirements contained in the CWA. In her role as EPA Region 10 program lead on waters of the United States, Ms. Dean has conducted, assisted on, or reviewed hundreds of CWA jurisdictional analyses for a variety of EPA Region 10 offices, including the Office of Compliance and Enforcement, as well as other EPA Regions and various United States Army Corps of Engineers (Corps) Districts. Ms. Dean will testify regarding EPA's definition of waters of the United States, the various categories of waters of the United States, and her analysis of the CWA jurisdictional status of the South Fork of the Clearwater River. Specifically, Ms. Dean will testify that the South Fork of the Clearwater is waters of the United States because, *inter alia*, it is a tributary of other waters of the United States. CX – 14 (South Fork Clearwater River, CWA Jurisdictional Memo).

6. **David Arthaud** (expert): Mr. Arthaud is a Fishery Biologist in the National Marine Fisheries Service (NMFS) of the National Oceanic and Atmospheric Administration (NOAA). His resume is attached hereto as CX – 33. Mr. Arthaud earned his Master of Science degree in Fisheries Resources from the University of Idaho and a Bachelor of Science degree in

Fish and Wildlife Management from the University of Missouri. Prior to working for NOAA, he was a Fisheries Biologist for the Shoshone-Bannock Tribes in Fort Hall, Idaho. Mr. Arthaud has over two decades of experience as a Fisheries Biologist for both NOAA and the Shoshone-Bannock Tribes, and over four years of experience analyzing the impacts of suction dredging to fish species listed under the Endangered Species Act (ESA) and essential fish habitat designated under the Magnuson-Stevens Act (MSA). See CX – 15 (ESA Section 7 and MSA Consultation for Lolo Creek Suction Dredging Program, July 16, 2013), CX – 16 (ESA and MSA Response for EPA’s Small Placer Miners in Idaho NPDES General Permit, November 20, 2012), CX – 17 (ESA Section 7(a)(2) Biological Opinion and MSA EFH Response for South Fork Clearwater River Suction Dredging Program, June 14, 2016). Mr. Arthaud will testify regarding the salmonid species listed under the ESA and MSA that inhabit the waters of the South Fork of the Clearwater River. He will testify regarding the potential impacts suction dredging activities, and the resulting turbidity, have on the habitat and growth, development, and survival rates of these salmonid species. CX – 18 (Arthaud, Summary of Suction Dredging Impacts, August 1, 2014), CX – 19 (Arthaud et al., “Contrasting life-cycle impacts of stream flow on two Chinook salmon populations,” *Hydrobiologia*, February 19, 2010), CX – 20 (Mebane and Arthaud, “Extrapolating Growth Reductions in Fish to Changes in Population Extinction Risks: Copper and Chinook Salmon,” *Human and Ecological Risk Assessment: An International Journal*, October 12, 2010). Mr. Arthaud will also testify about the importance of the ESA and MSA consultation process and the types of site-specific operating conditions, design features, terms and conditions, and mitigation measures that could be required or recommended to avoid, minimize, or offset potential adverse effects to these protected species.

7. **Dan Kenney** (expert): Mr. Kenney is a Fisheries Biologist for the U.S. Forest Service. His resume is attached hereto as CX – 34. Mr. Kenney earned his Master of Science degree in Fisheries Management from Frostburg State University and a Bachelor of Science degree in Fisheries Management from The Ohio State University. Prior to working for the Forest Service, he was a Fisheries Biologist for NMFS, the Corps, and the Federal Energy Regulatory Commission. Mr. Kenney will testify about the ESA consultation process and the types of site-specific operating conditions, design features, terms and conditions, and mitigation measures that could be required or recommended to avoid, minimize, or offset potential adverse effects to protected species. Specifically, Mr. Kenney will testify regarding the biological assessment he co-authored that addresses the potential effects of suction dredging on protected species in the South Fork Clearwater River and the resulting terms and conditions placed on mining operations and associated activities. *See* CX – 21 (Biological Assessment for Suction Dredging on USFS- and BLM-Managed Lands on the South Fork Clearwater River, April 6, 2016); *see also* CX – 22 (Environmental Assessment, Small Scale Suction Dredging in Orgrande and French Creeks and South Fork Clearwater River, June 2016). Additionally, Mr. Kenney can testify regarding his assessment of specific impacts to the South Fork of the Clearwater that resulted from suction dredge operations during the 2015 dredging season. On October 7, 2015, Mr. Kenney revisited a number of the sites Mr. Hughes inspected on July 22, 2015. On October 8, 2015, based on Mr. Kenney’s direction and training at similar and nearby sites the previous day, National Forest technicians visited and gathered data at 3 additional sites, including the site where Mr. Hughes observed Respondent suction dredging, to document the impacts of suction dredging at the South Fork of the Clearwater River. Mr. Kenney can testify regarding his observations and the side-by-

side comparison he conducted with photographs taken from his revisit and Mr. Hughes' July 22, 2015 inspection.

## **II. DOCUMENTS AND EXHIBITS**

Copies of the following documents and exhibits Complainant may introduce into evidence accompany this Prehearing Exchange.

- CX – 01 Clint Hughes, USFS, Mineral Inspection Report, July 22, 2015
- CX – 02 Clint Hughes, Declaration
- CX – 03 Idaho Suction Dredge GP
- CX – 04 Fact Sheet, Idaho Suction Dredge GP
- CX – 05 Response to Comments, Idaho Suction Dredge GP
- CX – 06 South Fork Clearwater River TMDL, October 2013
- CX – 07 Tracy Peak, Idaho Suction Dredge GP Presentation
- CX – 08 EPA letter to D. Erlanson, October 3, 2014
- CX – 09 Corps letter to D. Erlanson, February 11, 2014
- CX – 10 D. Erlanson, Joint Application for Permits, February 10, 2014
- CX – 11 EPA letter to D. Erlanson, August 7, 2015
- CX – 12 D. Erlanson, Notice of Intent, May 29, 2015
- CX – 13 Fact Sheet, Alaska Suction Dredge GP
- CX – 14 South Fork Clearwater River, CWA Jurisdictional Memo
- CX – 15 ESA Section 7 and MSA Consultation for Lolo Creek Suction Dredging Program, July 16, 2013
- CX – 16 ESA and MSA Response for EPA's Small Placer Miners in Idaho NPDES General Permit, November 20, 2012

- CX – 17      ESA Section 7(a)(2) Biological Opinion and MSA EFH Response for South Fork Clearwater River Suction Dredging Program, June 14, 2016
- CX – 18      Arthaud, Summary of Suction Dredging Impacts, August 1, 2014
- CX – 19      Arthaud et al., “Contrasting life-cycle impacts of stream flow on two Chinook salmon populations,” *Hydrobiologia*, February 19, 2010
- CX – 20      Mebane and Arthaud, “Extrapolating Growth Reductions in Fish to Changes in Population Extinction Risks: Copper and Chinook Salmon,” *Human and Ecological Risk Assessment: An International Journal*, October 12, 2010
- CX – 21      Biological Assessment for Suction Dredging on USFS- and BLM-Managed Lands on the South Fork Clearwater River, April 6, 2016
- CX – 22      Environmental Assessment, Small Scale Suction Dredging in Orgrande and French Creeks and South Fork Clearwater River, June 2016
- CX – 23      Documentation of Service
- CX – 24      Public Notice Form
- CX – 25      Public Notice, Idaho County Free Press Article
- CX – 26      Public Comments
- CX – 27      Erlanson NOV & 308 Information Request, Jan. 22, 2016
- CX – 28      Erlanson Response to NOV & 308 Information Request, Feb. 4, 2016
- CX – 29      Erlanson IDWR Letter Permit, 2015
- CX – 30      Tracy Peak’s Resume
- CX – 31      Cindi Godsey’s Resume
- CX – 32      Heather Dean’s Resume
- CX – 33      David Arthaud’s Resume
- CX – 34      Daniel Kenney’s Resume



### **III. HEARING LOCATION AND ESTIMATED DURATION OF PRESENTATION OF COMPLAINANT'S CASE**

In its March 29, 2017 Status Report, Complainant identified Bonneville County, Idaho for the location of hearing in this matter should one be required. In his Answer, Respondent also requested that any hearing in this matter be conducted in Bonneville County. Bonneville County is the county in which Respondent resides and therefore is an acceptable location for a hearing consistent with 40 C.F.R. §§ 22.21(d) and 22.19(d).

Subject to the length of cross-examination of witnesses, Complainant estimates that it will require approximately two days to present its case. Translation services are not necessary for the testimony of Complainant's witnesses.

### **IV. DOCUMENTATION OF SERVICE**

In accordance with the Presiding Officer's instructions, Complainant submits the following documentation that service of the Complaint was completed in accordance with 40 C.F.R. §22.5(b)(1). On June 23, 2016, Complainant sent Respondent, via U.S.P.S. certified mail, a true and correct copy of the Complaint and a copy of the Part 22 Consolidated Rule of Practice Governing the Administrative Assessment of Civil Penalties and hand delivered a certificate of service to the Regional Hearing Clerk. On June 30, 2016, Respondent received and signed for the certified mailing of the Complaint.<sup>1</sup>

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<sup>1</sup> CX – 23.

**V. FACTUAL AND LEGAL BASIS FOR ALLEGATIONS DENIED IN  
RESPONDENT’S ANSWER**

In accordance with the Presiding Officer’s instructions, Complainant sets forth in this section a brief narrative statement of the factual and legal bases for the allegations that Respondent denied in his Answer.

Under CWA section 301(a), 33 U.S.C. § 1311(a), “the discharge of any pollutant by any person shall be unlawful” except as in compliance with, *inter alia*, CWA section 402, 33 U.S.C. § 1342, whereby EPA may issue a NPDES permit. In its Complaint, EPA alleges that Respondent violated CWA section 301(a) because 1) Respondent is a person; 2) that discharged; 3) pollutants (suspended solids); 4) from a point source (a suction dredge); 5) into a water of the United States (South Fork of the Clearwater River); 6) without authorization under a NPDES permit. Complaint ¶¶ 3.1–3.9. Respondent denies these allegations in the Complaint. Answer ¶¶ 3.1-3.9. As briefly described below, the facts and law are clear: the EPA regulates under CWA section 402 discharges resulting from the operation of small suction dredges, Respondent operated a suction dredge on the South Fork of the Clearwater River without a CWA section 402 NPDES permit.

The primary documents relevant to Respondent’s alleged violations of the CWA are: 1) the Idaho Small Suction Dredge GP, along with related documents, such as the Idaho Suction Dredge GP Technical Fact Sheet<sup>2</sup>; and 2) the Mineral Inspection Report (“Inspection Report”) authored by Forest Service Geologist Clint Hughes and his associated Declaration.<sup>3</sup>

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<sup>2</sup> CX – 03; CX – 04. Documents related to the Idaho Suction GP can be found at the following EPA weblink: <https://yosemite.epa.gov/r10/water.nsf/NPDES+Permits/idsuction-gp>.

<sup>3</sup> CX – 01; CX – 02.

### **A. Person**

Under CWA section 502(5), 33 U.S.C. §1362(5), the term person means, *inter alia*, “an individual.” Respondent denies that he is a person. Answer ¶¶ 3.1, 3.9. Despite this denial, Complainant does not believe this allegation is in dispute and hereby proffers its stipulation to this fact.

Respondent is an individual with a place of residence in Swan Valley, Bonneville County, Idaho. If a hearing is necessary, Complainant’s witness Clint Hughes will testify that on July 22, 2015, he observed Respondent operating a suction dredge on the South Fork of the Clearwater River and that he hand delivered Respondent a Notice of Noncompliance associated with the U.S. Forest Service mining regulations.<sup>4</sup>

### **B. Discharge**

Under CWA section 502(12), 33 U.S.C. § 1362(12), the term “discharge of a pollutant” means any addition of any pollutant to navigable waters from any point source. Respondent denies that he discharged pollutants, Answer ¶¶ 3.8, 3.9, and, in a document attached to his Answer, claims that the EPA lacks the legal authority to regulate Respondent’s in-water suction dredge activity. Respondent’s argument rests on the basis that said activity does not result in a “discharge” because there is no “addition” of pollutants. This is flawed.

The EPA has determined that the operation of a suction dredge results in the “discharge of a pollutant” which EPA regulates under the CWA, as detailed by the Idaho Suction Dredge

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<sup>4</sup> CX – 01, p.02 (Site #2 description), p.07 (picture of Notice of Noncompliance); CX – 02, ¶ 6. Note that all CX page numbers cited in Complainant’s Prehearing Exchange are based on the pdf Bates stamps for ease of reference.

GP. The Idaho Suction Dredge GP Technical Fact Sheet includes a description of suction dredging, a type of placer mining, and the discharges involved in the regulated activity:

Suction dredges consist of a supporting hull with a mining control system, excavating and lifting mechanism, gold recovery circuit, and waste disposal system. All floating dredges are designed to work as a unit to dig, classify, beneficiate ores and dispose of waste. Because suction dredges work the stream bed rather than stream banks, the discharges from suction dredges consist of stream water and bed material.

The primary pollutant of concern in the discharges from a suction dredge is suspended solids. The suspended solids in the effluent discharged from suction dredge outlets result from the agitation of stream water and stream bed material in the dredge. The discharged suspended solids result in a turbidity plume, or cloudiness, in the receiving water.<sup>5</sup>

EPA has long considered placer mining, such as suction dredging, to result in discharges of pollutants (i.e., suspended solids) regulated under the CWA, thus requiring a CWA section 402 NPDES permit,<sup>6</sup> and the United States Court of Appeals for the Ninth Circuit has upheld EPA's interpretation. In *Rybachek v. EPA*, the Ninth Circuit considered an EPA final rule, developed in the 1980s, regarding regulation under the CWA for placer mining activities in Alaska.<sup>7</sup> The court upheld the EPA's interpretation of the CWA that placer mining results in a "discharge [i.e., addition] of pollutants," stating "even if the material discharged originally comes from the streambed itself, such resuspension may be interpreted to be an addition of a pollutant under the Act."<sup>8</sup>

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<sup>5</sup> CX – 04, pp. 75–76.

<sup>6</sup> See e.g., CX – 13 (Fact Sheet, Alaska Suction Dredge GP). Pages 874-75 provide a brief history of EPA's regulation and permitting of suction dredge placer mining in Alaska.

<sup>7</sup> 904 F.2d 1276 (9th Cir. 1990).

<sup>8</sup> *Id.* at 1285; see also *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983) (stating that "the word 'addition,' as used in the definition of the term 'discharge,' may reasonably be understood to include 'redeposit'"); *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1506 (11th Cir. 1985) (action of digging up sediment and redepositing it on sea bottom by boat propellers constitutes an addition of pollutants).

If a hearing is necessary in this matter, Complainant's witnesses Tracy Peak and Cindi Godsey will testify regarding EPA's regulation of discharges from suction dredges under CWA section 402 NPDES permits, including the Idaho Suction Dredge GP. Complainant's witness Clint Hughes will also testify regarding his observations of Respondent's suction dredging activity on July 22, 2015, including photographic evidence, and the visible plume he observed from Respondent's suction dredge.<sup>9</sup>

Unlike the activity in question here, certain types of dredging activity may not result in an addition of pollutants. For example, in *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, the D.C. Circuit struck down the United States Army Corps' (Corps) regulation of "incidental fallback"<sup>10</sup> because it exceeded the Corps' authority under Section 404 of the CWA. There, the court held that "the straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it *happens* to fall back. Because incidental fallback represents a net withdrawal, not an addition, of material, it cannot be a discharge."<sup>11</sup> The incidental release of material that happens to fall back in waters is easily distinguished from the intentional release of processed wastewater resulting from placer mining activity, including suction dredging. The D.C. Circuit highlighted this critical distinction in *Nat'l Mining Ass'n*:

Perhaps the strongest authority for the agencies' position is *Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990). There the Ninth Circuit found that the Act permitted EPA to regulate placer mining, a process in which miners excavate dirt and gravel

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<sup>9</sup> CX – 01, pp.05–07 (photographs); CX – 02, ¶ 5.

<sup>10</sup> 145 F.3d 1399 (D.C. Cir. 1998). A common example of "incidental fallback" occurs during traditional dredging, when a bucket used to excavate material from the bottom of a river, stream, or wetland is raised and soils or sediments fall from the bucket back into the water.

<sup>11</sup> *Id.* at 1404 (emphasis added).

in and around waterways, and, after extracting the gold, discharge the leftover material back into the water. *Rybachek* held that the material separated from gold and released into the stream constituted a pollutant, and, to the extent that “the material discharged originally comes from the streambed itself, [its] resuspension [in the stream] may be interpreted to be an addition of a pollutant under the Act.” *Id.* at 1285. *Rybachek* would help the agencies if the court had held that imperfect extraction, i.e., extraction accompanied by incidental fallback of dirt and gravel, constituted “addition of a pollutant,” but instead it identified the regulable discharge as the discrete act of dumping leftover material into the stream after it had been processed.<sup>12</sup>

The discharge at issue here is precisely “the discrete act of dumping leftover material after it had been processed,” as evinced in the photographic evidence provided by, and testimony to be proffered by, Clint Hughes.

### **C. Pollutant**

Under CWA section 502(6), 33 U.S.C. § 1362(6), the term “pollutant” includes, *inter alia*, dredged spoil, rock, and sand. Respondent denies that the dredged spoil, rock, and sand contained in the turbid plume discharged from Respondent’s suction dredge were pollutants. Answer ¶¶ 3.6, 3.9.

As noted above, the Technical Fact Sheet for the Idaho Suction Dredge GP describes the type of pollutants discharged from suction dredges:

The primary pollutant of concern in the discharges from a suction dredge is suspended solids. The suspended solids in the effluent discharged from suction dredge outlets result from the agitation of stream water and stream bed material in the dredge. The discharged suspended solids result in a turbidity plume, or cloudiness, in the receiving water.<sup>13</sup>

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<sup>12</sup> *Id.* at 1406.

<sup>13</sup> CX – 04, p.76.

Suspended solids are considered a conventional pollutant under the CWA section 304(a)(4), 33 U.S.C. § 1314(a)(4).<sup>14</sup> The Idaho Suction Dredge GP references the Idaho Department of Environmental Quality's established turbidity water quality standards for, among other things, protection of aquatic life, and contains turbidity limits and monitoring requirements applicable to all suction dredge discharges covered under the GP.<sup>15</sup>

If a hearing is necessary in this matter, Complainant's witnesses Tracy Peak and Cindi Godsey will testify regarding EPA's regulation of pollutants discharged from suction dredges under CWA section 402 NPDES permits, including the Idaho Suction Dredge GP. Complainant will demonstrate through the testimony of Clint Hughes that on July 22, 2015, he observed Respondent operating his suction dredge in the South Fork Clearwater River and the resulting turbid wastewater from the processed tailings coming off of the dredge.<sup>16</sup>

#### **D. Point Source**

Under CWA section 502(14), 33 U.S.C. § 1362(14), the term "point source" means "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit . . . or vessel or other floating craft, from which pollutants are or may be discharged." Respondent denies that his suction dredge is a point source. Answer ¶¶ 3.7, 3.9. Despite this denial, Complainant does not believe this allegation is in dispute and hereby proffers its stipulation to this fact.

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<sup>14</sup> See also *Rybachek v. U.S. EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990) (stating that the term "pollutant" encompasses "the materials segregated from gold in placer mining").

<sup>15</sup> CX – 04, pp.82–84.

<sup>16</sup> CX – 01, p.02, pp.05-07; CX – 02, ¶ 5.

EPA's implementing regulations at 40 C.F.R. § 122.28 authorize EPA to issue general NPDES permits if there are a number of point sources operating in a geographic area with similar operations and impacts. As described above, "[s]uction dredges consist of a supporting hull with a mining control system, excavating and lifting mechanism, gold recovery circuit, and waste disposal system." The suction dredge itself, and the waste disposal system in particular, constitute a discrete conveyance and/or conduit that discharges suspended solids after processing streambed material for recovery of gold through the suction dredge's sluice box. In issuing the Idaho Suction Dredge GP, EPA determined that "a general permit to authorize discharges from small suction dredge miners in Idaho is appropriate due to the similarity of operations, pollutants discharged, management practices, and need for similar limitations and monitoring requirements."<sup>17</sup>

If a hearing is necessary in this matter, Complainant's witnesses Tracy Peak and Cindi Godsey will testify regarding EPA's regulation of the point source category of suction dredges under CWA section 402 NPDES permits, including the Idaho Suction Dredge GP. Complainant will demonstrate through the testimony of Clint Hughes that on July 22, 2015, he observed Respondent operating his suction dredge (i.e., point source) in the South Fork of the Clearwater River.<sup>18</sup>

### **E. Navigable Waters**

Under Section 502(7), 33 U.S.C. § 1362(7), the term "navigable waters" means the waters of the United States. In accordance with 40 C.F.R. § 122.2, "waters of the United States"

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<sup>17</sup> CX – 04, p.75.

<sup>18</sup> CX – 01, p.02; pp.05-07; CX – 02, ¶ 5.



includes, *inter alia*, traditional navigable waters (waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce” and all tributaries of these waters.<sup>19</sup> Respondent denies that the South Fork of the Clearwater River is a water of the United States. Answer ¶¶ 3.2, 3.9. Despite this denial, Complainant does not believe this allegation is in dispute and hereby proffers its stipulation to this fact.

The South Fork of the Clearwater River is a tributary to the Clearwater River which flows to the Snake River which flows to the Columbia River and eventually to the Pacific Ocean. Thus, the South Fork of the Clearwater River is a “water of the United States” as defined in 40 C.F.R. § 122.2 and a “navigable water” as defined in Section 502(7) of the CWA. If a hearing is necessary in this matter, Complainant’s witness Heather Dean will testify that the South Fork of the Clearwater is a water of the United States because, *inter alia*, it is a tributary of other waters of the United States.<sup>20</sup>

#### **F. Without Authorization Under a NPDES Permit**

As discussed above, pursuant to its authority under the CWA, in 2013, the EPA issued the Idaho Suction Dredge GP. Section I.D.4.a of the Idaho Suction Dredge GP states:

Discharges from suction dredges are not covered by this general permit in habitat designated as critical habitat under the Endangered Species Act (ESA), or areas occupied by listed aquatic species (see Section I.D.4.b-c) unless an ESA determination has been made [after consultation with the National Marine Fisheries Service or United States Fish and Wildlife Service, as appropriate] and the decision is provided with the Notice of Intent.<sup>21</sup>

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<sup>19</sup> 40 C.F.R. § 122.2 contain EPA’s definitions applicable to NPDES permitting, including the definition of “waters of the United States.” The organization of this section is somewhat confusing. For reference, the definition of waters of the United States can also be found at 33 C.F.R. § 328.3 in a more organized fashion (traditional navigable waters, 33 C.F.R. § 328.3(a)(1); tributaries, 33 C.F.R. § 328.3(a)(5)).

<sup>20</sup> CX – 14 (South Fork Clearwater River, CWA Jurisdictional Memo).

<sup>21</sup> CX – 03, p.31.

In July 2015, when Respondent's alleged CWA violation occurred, discharges into the South Fork of the Clearwater River were not covered under the Idaho Suction Dredge GP due to the presence of ESA protected critical habitat, including habitat for bull trout, Chinook salmon, and steelhead trout.<sup>22</sup> Therefore, in order to comply with the CWA, Respondent would have had to obtain an individual NPDES permit in order to discharge into the South Fork of the Clearwater.

If a hearing is required, Complainant's witness Tracy Peak will testify regarding the Idaho Suction Dredge General Permit, the specific provisions in the General Permit relating to discharge prohibitions and closed waters, that Respondent did not and could not have CWA coverage under the General Permit for the alleged suction dredging activity on the South Fork of the Clearwater River, and that Respondent did not have coverage under an individual NPDES permit.

**VI. FACTUAL INFORMATION AND SUPPORTING DOCUMENTATION RELEVANT TO ASSESSMENT OF A PENALTY**

In accordance with the Presiding Officer's instructions, Complainant sets forth in this section all factual information and supporting documentation relevant to the assessment of penalty.

The Presiding Officer also instructed Complainant to provide a copy of any policy or guidance that Complainant relied on in calculating a proposed penalty. EPA has never issued a penalty policy for use by EPA in administrative litigation or Presiding Officers in determining

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<sup>22</sup> In 2016, the USFS and Bureau of Land Management completed ESA consultation with the Services for the South Fork of the Clearwater River, which allowed the EPA to grant limited coverage under the Idaho Suction Dredge GP for the first time since its effective date. Information regarding the USFS's ESA consultation process for the South Fork of the Clearwater River is available at <https://www.fs.usda.gov/project/?project=46844>. See also CX – 17 (NMFS Biological Opinion); CX – 21 (Biological Assessment).

penalties under the CWA.<sup>23</sup> Consequently, Presiding Officers rely on the wording of the statutory penalty factors set out in CWA section 309(g)(3), 33 U.S.C. § 1319(g)(3), and Complainant’s proposed penalty is based on these applicable penalty factors: 1) the nature, circumstances, extent, and gravity of the violation, or violations, and with respect to Respondent, 2) ability to pay, 3) any prior history of such violations, 4) the degree of culpability, 5) economic benefit or savings (if any) resulting from the violations, and 6) such other matters as justice may require. In its rebuttal prehearing exchange, Complainant will provide the amount of the proposed penalty and a detailed explanation of the factors considered in accordance with the criteria set forth above in accordance with CWA.

**A. Information and Documentation Regarding the Environmental and Aquatic Resource Impacts from Suction Dredging Activities**

Prior to issuing the Idaho Suction Dredge GP, EPA consulted with NMFS pursuant to the ESA section 7.<sup>24</sup> NMFS concluded that small-scale suction dredging as a general activity would adversely affect ESA-listed salmon and steelhead and their habitat. As a result, most of the drainages, such as the Clearwater River drainage, containing listed salmon and steelhead and their designated critical habitat were excluded from suction dredging activities of the Idaho Suction Dredge GP. Accordingly, in July 2015, when Respondent’s alleged CWA violation

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<sup>23</sup> Because EPA has no CWA penalty pleading policy, *In re Pepperell Associates*, 2000 WL 576426 n.22 (ALJ Gunning 1999), *aff’d in part, rev’d in part*, 9 E.A.C. (2000), aff’d, 246 F.3d 15 (5th Cir. 2001), the Agency does not argue the application of penalty policy calculations at hearing. *See* EPA, “Interim Clean Water Act Settlement Penalty Policy” (March 1, 1995) at 3 (“This Policy is not intended for use by EPA, violators, courts, or administrative judges in determining penalties at a hearing or trial.”); *see also* EPA, “Clean Water Act Distinctions Among Pleading, Negotiating and Litigating Civil Penalties For Enforcement Cases” (January 19, 1989) at 1 (“[EPA] Counsel should support its arguments for the ‘litigation amount’ based on upon reasoned application of the statutory penalty assessment criteria and citation of precedent, not through arithmetic calculations derived according to the CWA penalty settlement policy.”)

<sup>24</sup> CX – 16; CX – 17, pp.983-84 (documenting consultation history).

occurred, discharges into the South Fork of the Clearwater River were not covered under the Idaho Small Suction Dredge GP.<sup>25</sup>

Complainant's witness, Mr. Arthaud, a NMFS Fishery Biologist, has studied and published reports about the impacts of suction dredging on listed species.<sup>26</sup> In a 2014 report summarizing the impacts to salmonid species, such as steelhead trout, and their habitat from suction dredging on the South Fork of the Clearwater River, Mr. Arthaud wrote the following:

Generally the [South Fork of the Clearwater River] is shallow river habitat. Spawning and rearing quality varies from good to poor with habitat quality throughout reduced by physical substrate habitat alterations, fine sediment/siltation, and warm temperatures (CWA 303d listed), largely caused by mining. Suction dredge mining directly contributes to this degraded baseline and slows restoration.

Suspended fine sediments can directly cause a full range of injuries with denser, wider and longer plumes generally increasing adverse effects. Fine sediments in plumes settle in slower velocity substrates, filling pools or creating a film of silt in shallow areas that reduces invertebrate production, which limits the growth and production of steelhead. Reduced growth in young fish transfers small size to later life stages and significantly reduces survival during smolt migration and ocean entry.<sup>27</sup>

In July 2016, the NMFS completed ESA section 7 consultation, including a Biological Opinion, on the effects of the Forest Service's and BLM's allowance of suction dredging on the South Fork of the Clearwater River. In the Biological Opinion, NMFS determined that suction dredging is likely to adversely affect steelhead and Chinook salmon, but not likely to jeopardize the continued existence of those species.<sup>28</sup> The Biological Opinion includes an "incidental take

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<sup>25</sup> CX – 01, Section I.D.4.a.

<sup>26</sup> See e.g., CX – 15; CX – 17; CX – 18.

<sup>27</sup> CX – 18, p.1064.

<sup>28</sup> A Biological Assessment completed by the Forest Service similarly concludes that the proposed activity is likely to adversely affect steelhead. CX – 21.

statement” that describes the reasonable and prudent measures NMFS considers necessary or appropriate to minimize impacts.<sup>29</sup> As a result of the 2016 consultation, suction dredge operators may now seek CWA coverage under the Idaho Suction Dredge GP for operations on the South Fork of the Clearwater River, subject to the reasonable and prudent measures outlined in the Biological Opinion.

**B. Information and Documentation Regarding Respondent’s Knowledge of the Requirement to have NPDES Permit Coverage for His Suction Dredging Activities**

In 2014, Respondent submitted a CWA section 404, 33 U.S.C. § 1344, permit application to the Corps for suction dredging in the South Fork of the Clearwater River. Both the Corps and EPA informed Respondent of the requirement to obtain a CWA Section 402 permit and notified Respondent that, “the South Fork Clearwater River contains critical habitat for bull trout, steelhead, and Chinook salmon, requiring an Endangered Species Act (ESA) determination before suction dredging can be permitted.”<sup>30</sup>

On May 13, 2015, Respondent signed an Idaho Department of Water Resources Recreational Mining Authorization (Letter Permit), which authorized Respondent to operate recreational mining equipment in accordance with Idaho law and provided clear notification in bold font that EPA requires NPDES permit coverage for small scale suction dredging in Idaho.<sup>31</sup> On May 17, 2015, Respondent submitted a Notice of Intent to EPA to obtain coverage under the General Permit for placer mining operations in three waterbodies, including the South Fork

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<sup>29</sup> CX – 17.

<sup>30</sup> CX – 08 (EPA letter to D. Erlanson, October 3, 2014); CX – 09 (Corps letter to D. Erlanson, February 11, 2014); CX – 10 (D. Erlanson, Joint Application for Permits, February 10, 2014).

<sup>31</sup> CX – 29.

Clearwater River. EPA permitted dredging operations on two of the waterbodies and sent a letter to Respondent explaining that the South Fork of the Clearwater River was still closed to suction dredging activities.<sup>32</sup> The letter stated that Respondent's proposed small suction dredge operation on the South Fork Clearwater River was not eligible for coverage under the General Permit.

### **C. Information and Documentation Regarding Respondent's Unauthorized Dredging Activities on July 22, 2015**

On July 22, 2015, the U.S. Forest Service inspector Clint Hughes conducted a field inspection on the South Fork Clearwater River in Idaho. Mr. Hughes completed an inspection report and signed a declaration documenting his investigation and observations on July 22, 2015.<sup>33</sup> At approximately 11:00 a.m., Mr. Hughes arrived at or near Mile Post 39 along the South Fork of the Clearwater River. Mr. Hughes walked the bank of the South Fork of the Clearwater River and documented Respondent operating a suction dredge with a 5-inch hose in the South Fork Clearwater River. Mr. Hughes observed Respondent operating his dredge approximately 50 feet downstream from another suction dredge that was also in operation. Mr. Hughes observed Respondent "actively dredging with the plume from the upstream dredge mixing with the plume of the downstream dredge."<sup>34</sup> Mr. Hughes estimates that the combined plume extended 220 feet downstream from Respondent's dredge before it went beyond his field of vision.

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<sup>32</sup> CX – 11 (EPA letter to D. Erlanson, August 7, 2015); CX – 12 (D. Erlanson, Notice of Intent, May 29, 2015).

<sup>33</sup> CX – 01, p.02 (Site #2), pp.05-07 (photographs); CX – 02, ¶ 5.

<sup>34</sup> CX – 01, p.02.

#### **D. Information and Documentation Regarding Respondent's Ability to Pay**

Complainant has no information indicating that Respondent is unable to pay a penalty up to the statutory maximum penalty for this violation. Complainant will consider any information submitted by Respondent in his prehearing exchange related to his ability to pay a penalty.

#### **E. Information and Documentation Regarding Respondent's Economic Benefit**

Respondent, in his Answer, admits that he received an economic benefit by dredging and removing naturally occurring metals, including gold, from the South Fork Clearwater River. Answer ¶ 4.8. Complainant does not have specific information at this time regarding the amount of Respondent's economic benefit. If Respondent does not provide additional information in Respondent's Prehearing Exchange, Complainant reserves the right to seek such information through a motion for additional discovery pursuant to 40 C.F.R. §22.19(e).

### **VII. PROOF OF PUBLIC NOTICE**

In accordance with CWA section 309(g)(4)(A), 33 U.S.C. § 1319(g)(4)(A), and 40 C.F.R. § 22.45(b), Complainant provided public notice of the Complaint via the internet and afforded the public thirty days to comment on the Complaint and proposed penalty.<sup>35</sup> At the expiration of the notice period, EPA received two comments from the public that meet the requirements of 40 C.F.R. § 22.45(c)(1)(i).<sup>36</sup>

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<sup>35</sup> CX – 24. EPA maintains an active public notice website at the following link: <https://www.epa.gov/publicnotices/notices-search>. The public comment period for this matter commenced on June 29, 2016 and ended on July 29, 2016. Because the comment period is ended on July 29, 2016, it is no longer available on EPA's public notice website. EPA's public notice for this matter also received some press coverage. See CX – 25, available at <http://www.idahocountyfreepress.com/news/2016/jul/13/dredgers-fight-sf-clearwater-river-mining-regulati/>.

<sup>36</sup> CX – 26.

### VIII. RESERVATIONS

Complainant reserves the right to call all witnesses named or called at hearing by Respondent and to introduce as evidence at hearing any exhibit identified in Respondent's prehearing information exchange. Complainant further reserves the right to submit the names of additional witnesses and to submit additional exhibits prior to the hearing of this matter upon timely notice to the Presiding Officer and to Respondent, in accordance with 40 C.F.R. § 22.22(a) and the Presiding Officer's Prehearing Order of August 11, 2016.

Dated this 7<sup>th</sup> day of April, 2017.

Respectfully submitted,

*/s/ Endre M. Szalay*

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