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**MEMORANDUM\* OPINION, U.S. COURT OF  
APPEALS FOR THE NINTH CIRCUIT  
(APRIL 30, 2024)**

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NOT FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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DAVE WAYNE ERLANSON, SR.,

*Plaintiff-Appellant,*

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,

*Defendant-Appellee.*

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No. 22-35894

Appeal from the United States District Court  
for the District of Idaho

David C. Nye, District Judge, Presiding  
D.C. No. 4:22-cv-00091-DCN

Submitted April 22, 2024\*\*

Before: CALLAHAN, LEE, and FORREST,  
Circuit Judges.

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

## App.2a

Dave Wayne Erlanson, Sr., appeals prose from the district court's judgment dismissing for lack of subject matter jurisdiction his 42 U.S.C. § 1983 action against the United States Environmental Protection Agency. We review de novo, *Prather v. AT&T, Inc.*, 847 F.3d 1097, 1102 (9th Cir. 2017), and we affirm.

The district court properly dismissed Erlanson's action for lack of subject matter jurisdiction because Erlanson failed to establish that the United States waived its sovereign immunity. *See Jachetta v. United States*, 653 F.3d 898, 908 (9th Cir. 2011) (explaining that 42 U.S.C. § 1983 does not waive sovereign immunity for United States agencies).

**AFFIRMED.**

**MEMORANDUM DECISION AND ORDER,  
UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO  
(OCTOBER 14, 2022)**

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

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DAVID ERLANSON,

*Plaintiff,*

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,

*Defendant.*

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Case No. 4:22-cv-00091-DCN

Before: David C. NYE,  
Chief U.S. District Court Judge.

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**MEMORANDUM DECISION AND ORDER**

**I. Introduction**

There are several pending motions before the Court in this case. Plaintiff Dave Erlanson has filed a Motion for Default Judgment (Dkt. 7); a Motion to

Amend Complaint<sup>1</sup> (Dkt. 8); and a Motion for Summary Judgment (Dkt. 9). Defendant, United States Environmental Protection Agency (“EPA”), has responded with a Motion to Dismiss (Dkt. 10). Having reviewed the record and briefs, the Court finds that the facts and legal arguments are adequately presented. Accordingly, in the interest of avoiding further delay, and because the Court finds that the decisional process would not be significantly aided by oral argument, the Court will decide the Motion without oral argument. Dist. Idaho Loc. Civ. R. 7. 1 (d)(1)(B).

Upon review, and for the reasons set forth below, the Court GRANTS EPA’s Motion to Dismiss and DENIES Erlanson’s Motions.

## II. Background

The facts of this case go back to 2016. *See* Dkt. 1. In June of 2016, the EPA filed a complaint against Erlanson with an Administrative Law Judge (“ALJ) alleging that Erlanson violated Section 301(a) of the Clean Water Act (“CWA”), 33 U.S.C. § 1311(a).<sup>2</sup> The ALJ issued a decision and order finding Erlanson had, in fact, violated the CWA and assessed a Class II civil penalty of \$6,600 pursuant to 40 C.F.R. § 22.27 and 33 U.S.C. § 1319(g)(2)(B). *See* Dkt. 10, at Ex. B. Erlanson appealed the decision to the Environmental Appeals Board (“EAB”). *Id.* The EAB dismissed the appeal on procedural grounds while also noting that if they were

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<sup>1</sup> The amended complaint added a damage calculation. Dkt. 8. The Motion, however, is moot given that the Court is dismissing Erlanson’s § 1983 claim.

<sup>2</sup> Subsection (a) states, in relevant part, that “the discharge of any pollutant by any person shall be unlawful.”

to consider the merits, “the ALJ’s determination is well-reasoned and well-supported by the record as to both liability and penalty.” *Id.*

On February 26, 2022, Erlanson filed the instant action pursuant to 42 U.S.C. § 1983, seeking “to defend his 9th Amendment right to his State privileges and immunities.” Dkt. 1, at 3. Moreover, it is Erlanson’s “belief that the Article 3 judge will find here at least one Constitutional nexus upon which to adjudicate the matter.” *Id.*

On May 31, 2022, Erlanson filed a Motion for Default Judgement. Dkt. 7. That same day, he filed an Amended Complaint. Dkt. 8. On June 8, 2022, Erlanson filed a Motion for Summary Judgment mostly reiterating what was stated in his original complaint and Motion for Default Judgment. Dkt. 9. On July 29, 2022, the EPA responded with a Motion to Dismiss. Dkt. 10. The EPA cited Federal Rules of Civil Procedure 12(b)(1), (5), and (6) as grounds to dismiss the complaint.

The Court agrees with the EPA—there are grave procedural shortcomings which warrant the dismissal of Erlanson’s suit. For one, Erlanson has not requested, nor issued, a summons to the EPA as required under Fed. R. Civ. P. 4(i)(1). Moreover, there is no indication that he properly served the EPA. He sent a copy of the complaint to the D.C. office of the EPA, but failed to serve the United States. *See* Fed. R. Civ. P. 4(i)(2) (when serving an agency, “a party must serve the United States and also send a copy . . . to the agency”). Lastly, to the extent that Erlanson wishes to appeal the ALJ’s decision regarding the Class II violation, he is required to file an appeal with either the District of

Columbia Circuit or the Ninth Circuit<sup>3</sup>—not with this Court. 33 U.S.C. § 1319(g)(8).

### **III. Legal Standard**

#### **A. Rule 12(b)(1)**

When subject matter jurisdiction is challenged pursuant to Federal Rule of Civil Procedure 12(b)(1), the plaintiff bears the burden of persuasion. *Indus. Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092 (9th Cir. 1990) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). A party who brings a Rule 12(b)(1) challenge may do so by referring to the face of the pleadings or by presenting extrinsic evidence. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000) (“Rule 12(b)(1) jurisdictional attacks can be either facial or factual. . . .”).

If the jurisdictional attack is facial, the challenger asserts that the allegations contained in a complaint are insufficient on their face to establish federal jurisdiction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). When considering this type of jurisdictional attack, a court must consider the allegations of the complaint to be true and construe them in the light most favorable to the plaintiff. *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1988).

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<sup>3</sup> The Court is aware of a recent filing by Erlanson with the Ninth Circuit. *See* Dkt. 14. Erlanson filed a Writ of Mandamus to the Ninth Circuit seeking an expedited decision by this Court. *Id.* The Court assumes the Circuit will dismiss the writ for lack of jurisdiction. Regardless, it is not something the Court need address at this time.

“By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction.” *Meyer*, 373 F.3d at 1039. In resolving a factual attack on jurisdiction, the court need not presume the truthfulness of the plaintiff’s allegations and may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment. *Id.*

#### **B. Rule 12(b)(6)**

Federal Rule of Civil Procedure 12(b)(6) permits a court to dismiss a claim if the plaintiff has “fail[ed] to state a claim upon which relief can be granted.” “A Rule 12(b)(6) dismissal may be based on either a ‘lack of a cognizable legal theory’ or ‘the absence of sufficient facts alleged under a cognizable legal theory.’” *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121 (9th Cir. 2008) (citation omitted). Federal Rule of Civil Procedure 8(a)(2) requires a complaint to contain “a short and plain statement of the claim showing that the pleader is entitled to relief,” in order to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *See Bell Ad. Corp. v. Twombly*, 550 U.S. 544, 554 (2007). “This is not an onerous burden.” *Johnson*, 534 F.3d at 1121.

A complaint “does not need detailed factual allegations,” but it must set forth “more than labels and conclusions, and a formulaic recitation of the elements.” *Twombly*, 550 U.S. at 555. The complaint must also contain sufficient factual matter to “state a claim to relief that is plausible on its face.” *Id.* at 570.

In deciding whether to grant a motion to dismiss, the court must accept as true all well-pleaded factual allegations made in the pleading under attack. *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). A court is not, however, “required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

In cases decided after *Iqbal and Twombly*, the Ninth Circuit has continued to adhere to the rule that a dismissal of a complaint without leave to amend is inappropriate unless it is beyond doubt that the complaint could not be saved by an amendment. *See Harris v. Amgen, Inc.*, 573 F.3d 728, 737 (9th Cir. 2009).

### **C. Rule 12(b)(5)**

Federal Rule of Civil Procedure 12(b)(5) permits a court to dismiss a claim for insufficient service of process. Pursuant to Federal Rule of Civil Procedure 4(m), it is a plaintiff’s duty to serve each defendant in the case within 90 days after filing the complaint, or to request a waiver of service under Rule 4(d). Fed. R. Civ. P. 4(m).

In the Ninth Circuit, a motion to dismiss based on a plaintiff’s failure to abide by Rule 4(m) requires a two-step analysis: “First, upon a showing of good cause for the defective service, the court must extend the time period. Second, if there is no good cause, the court has the discretion to dismiss without prejudice or to extend the time period.” *In re Sheehan*, 253 F.3d 507, 512 (9th Cir. 2001) (internal citations omitted).

With respect to the first step, the Ninth Circuit has clarified that showing “good cause” is the equivalent

of demonstrating “excusable neglect,” and that, to establish good cause, a Plaintiff may also be required to show “(a) the party to be served personally received actual notice of the lawsuit; (b) the defendant would suffer no prejudice; and (c) plaintiff would be severely prejudiced if his complaint were dismissed.” *Boudette v. Barnette*, 923 F.2d 754, 756 (9th Cir. 1991) (citing *Hart v. United States*, 817 F.2d 78, 8081 (9th Cir. 1987)).

The Ninth Circuit has declined to “articulate a specific test that a court must apply in exercising its discretion” under the second step of the Rule 4(m) analysis. *In re Sheehan*, 253 F.3d at 513. However, it has noted that if a Plaintiff cannot establish good cause, the Court’s discretion to nevertheless extend the prescribed time period for the service of a complaint “is broad.” *Id.* Finally, if a court declines to extend the time period for the service of process, it must dismiss the complaint without prejudice. *See U.S. v. 2,164 Watches, More or Less Bearing a Registered Trademark of Guess?, Inc.*, 366 F.3d 767, 772 (9th Cir. 2004).

#### **IV. Discussion**

##### **A. Lack of Subject Matter Jurisdiction**

In its Motion to Dismiss, the EPA first argues that the Court should dismiss Erlanson’s claims for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). It makes two principle arguments: First, it claims the Court should dismiss the suit because there was no waiver of sovereign immunity. Second, the EPA points out that judicial review of Class II civil penalties should be brought before either the DC

Circuit Court of Appeals or the Ninth Circuit. *See* 33 U.S.C. § 1319(g)(8). The Court agrees on both points.

First, it has long been understood that § 1983 does not waive sovereign immunity for agencies of the United States. *See Jachetta v. United States*, 653 F.3d 898, 908 (9th Cir. 2011) (holding that § 1983 only imposes liability upon persons and a federal agency is not a person); *see also Lyndon v. United States*, 2020 WL 3405530, at \*5 (D. Haw. June 19, 2020) (same). Section 1983 only allows suits against “persons” and the EPA is not a person. *See Jachetta*, 653 F.3d at 908. Erlanson would have the Court believe differently. He asserts that the EPA would fall under the definition of “person.” Dkt. 1, at 4-5. To support this position, Erlanson notes that the Supreme Court “has adopted the position . . . that corporations are persons for purposes of suit.” *Id.* at 4. This argument does not hold any weight. There is no caselaw to suggest that a Federal Agency (*i.e.*, the EPA) is a “corporation” as defined by the Supreme Court that would, therefore, fall under the definition of “person.” The Ninth Circuit has clearly delineated that § 1983 “imposes liability upon a ‘person’, “and a federal agency is not a ‘person’ within the meaning [of § 1983].” *Jachetta*, 653 F.3d at 908. This alone bars Erlanson’s suit.

There is a second, perhaps more obvious reason to dismiss this suit. The EPA has rightly pointed out that any challenge to a Class II Civil Penalty falls under the jurisdiction of either the DC Circuit Court of Appeals or the circuit in which the person resides. 33 U.S.C. § 1319(g)(8). Congress has spoken about which court is the proper avenue for challenging a Class II violation. If Erlanson wishes to challenge the

Class II violation, he must go before the appropriate court.

**B. Failure to State a Claim Under Rule 12  
(b)(6)**

The EPA also asserts that Erlanson has failed to state a claim upon which relief can be granted. Dkt. 10, at 6-8. The Court agrees. In doing so, the Court is cognizant of the fact that *pro se* pleadings are construed liberally. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). However, in construing a *pro se* complaint, a court may not “supply essential elements of the claim that were not initially pled.” *Pena v. Gardner*, 976 F.2d 469, 472 (9th Cir. 1992) (quoting *Ivey v. Board of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir.1982)).

The EPA contends that “[b]ecause federal agencies do not act under color of state law, they are facially exempt from Section 1983 liability.” Dkt. 10, at 8. The Court agrees. In fact, the Ninth Circuit in *Jachetta* dismissed a petitioner’s claims for the very same reason. 653 F.3d at 903, 908. There, the defendant brought a motion to dismiss arguing what the EPA is arguing here—that § 1983 does not waive sovereign immunity. *Id.* The Ninth Circuit agreed with the defendant and dismissed the complaint. *Id.* There is no reason to not do the same here. The Court agrees with the EPA—Erlanson failed to state and articulate any arguable legal theory to support his constitutional claim against the EPA.

**C. Insufficient Service of Process**

There is yet one final reason to dismiss Erlanson’s claim. He did not abide by the rules governing service of process to United States Agencies. *See Fed. R. Civ.*

P. 4(i)(2). When serving a federal agency, a plaintiff is required to serve a summons and a complaint to both the United States and the agency. *Id.* Erlanson never requested a summons and only served the complaint to the EPA without ever notifying the United States.<sup>4</sup> While the Court understands that Erlanson is filing *pro se*, this, in and of itself, does not excuse applicable procedural requirements.

In conclusion, the Court grants the EPA's Motion to Dismiss. Erlanson not only brought this challenge before the wrong Court, he failed to abide by the service requirements outlined in Rule 4. Moreover, the doctrine of sovereign immunity bars his § 1983 claim.

## **V. Order**

The Court HEREBY ORDERS:

1. Dave Erlanson's Motion for Default Judgment (Dkt. 7) is DENIED.
2. Dave Erlanson's Motion for Summary Judgment (Dkt. 9) is DENIED.
3. EPA's Motion to Dismiss (Dkt. 10) is GRANTED.<sup>5</sup>

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<sup>4</sup> To satisfy Rule 4(i), a plaintiff must serve the United States by delivering a copy of the summons and complaint "to the United States attorney for the district where the action is brought" as well as "to the Attorney General of the United States at Washington, D.C." Fed. R. Civ. P. 4(i)(1)-(2). Here, Erlanson only served the complaint to the EPA's DC office.

<sup>5</sup> As noted, *see infra* Section III (B), the Court typically does not dismiss a case without granting leave to amend. Here, however, the Court will not allow leave to amend because Erlanson's shortcomings are procedural in nature and nothing he does can change the fact that this is the wrong court for his grievance and the EPA has not waived immunity. The Court must dismiss with

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4. This case is DISMISSED with PREJUDICE and CLOSED.

5. The Court will enter a separate judgement in accordance with Federal Rule of Civil Procedure 58.

[SEAL]

/s/ David C. Nye  
Chief U.S. District Court Judge

DATED: October 14, 2022

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prejudice.

**JUDGMENT, UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF IDAHO  
(OCTOBER 14, 2022)**

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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO**

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**DAVID ERLANSON,**

*Plaintiff,*

v.

**UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,**

*Defendant.*

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**Case No. 4:22-cv-00091-DCN**

**Before: David C. NYE,  
Chief U.S. District Court Judge.**

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**JUDGMENT**

In accordance with the Court's Memorandum  
Decision and Order entered concurrently herewith.

NOW THEREOF, IT IS HEREBY ORDERED,  
ADJUDGED, AND DECREED that judgment be  
entered in favor of Defendant's and this case closed.

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[SEAL]

/s/ David C. Nye  
Chief U.S. District Court Judge

DATED: October 14, 2022

**ORDER DISMISSING APPEAL,  
ENVIRONMENTAL APPEALS BOARD,  
UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY  
(MARCH 5, 2021)**

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**BEFORE UNITED STATES ENVIRONMENTAL  
APPEALS BOARD, UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**

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**IN RE: DAVE ERLANSON, SR.**

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**CWA Appeal No. 20-23**

**Docket No. CWA-10-2016-0109**

**Before: Aaron P. AVILA, Mary KAY LYNCH, and  
Kathir A. STEIN, Environmental Appeals Judges.**

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**ORDER DISMISSING APPEAL**

**Opinion of the Board by Judge Stein:**

**I. Introduction**

In October 2020, Administrative Law Judge Christine Donelian Coughlin (“ALP”) issued an Initial Decision and Order (“Initial Decision”) assessing a penalty of \$6,600 against Mr. Dave Erlanson, Sr. (“Respondent”) for discharging a pollutant from a point source into navigable waters, the South Fork Clearwater River in Idaho, in violation of Clean Water Act (“CWA”) section 301(a), 33 U.S.C. § 1311(a).

In an earlier Accelerated Decision on liability, issued in September 2018, the ALJ determined that Respondent was liable for the alleged violation. Respondent filed an appeal with the Environmental Appeals Board (“Board”). For the reasons stated below, the Board dismisses the appeal.

## **II. History**

### **A. Statutory and Regulatory History**

The CWA’s objective “is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” CWA § 101(a), 33 U.S.C. § 1251(a). To achieve that objective, the CWA prohibits the discharge of any pollutant into the waters of the United States by any person unless authorized by a CWA permit or other specified CWA provisions. CWA §§ 301(a), 402(a), 33 U.S.C. §§ 1311(a), 1342(a). Section 402(a) of the CWA, 33 U.S.C. § 1342(a), establishes the National Pollutant Discharge Elimination System (“NPDES”), a permitting program that allows for the lawful discharge of pollutants from a point source pursuant to the receipt of, and in compliance with, a valid NPDES permit. CWA § 402(a), 33 U.S.C. § 1342(a). CWA section 309(g)(1)(A), 33 U.S.C. § 1319(g)(1)(A), authorizes the United States Environmental Protection Agency (“EPA” or “Agency”) to assess civil penalties for violations of section 301.

### **B. Relevant Factual and Procedural History**

In 2015, Clinton Hughes, a geologist and Certified Mineral Examiner for the U.S. Forest Service (“Forest Service”), observed Respondent operating a small suction dredge in the South Fork Clearwater River

(“SFCR”) in Idaho. Order on Complainant’s Motion for Accelerated Decision 13-14 (ALJ, Sept. 27, 2018) (ALJ dkt. #38) (“Accel. Dec.”); Complainant’s Exhibit (“CX”) 1, at 000002, 000005-6 (Mineral Inspection Report (July 22, 2015)); CX 2 (Declaration of Clinton Hughes (Sept. 20, 2016)). Suction dredging is a form of placer mining that extracts gold or other heavy metals and minerals from existing stream beds or stream deposits. CX 4 at 000075 (Fact Sheet, *The United States Environmental Protection Agency (EPA) Plans To Issue A National Pollutant Discharge Elimination System (NPDES) General Permit To: Small Suction Dredge Miners in Idaho*) (“Fact Sheet”). A suction dredge recovers gold from the stream bed and discharges leftover stream bed materials and stream water into the waterway. *See Id.*

The discharge of pollutants into the waters of the United States associated with the operation of a small suction dredge in Idaho must be authorized under either the general NPDES permit in Idaho for small suction dredging<sup>1</sup> or, where necessary and as specified by the general permit, an individual permit.<sup>2</sup> CX 3 at

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<sup>1</sup> A small suction dredge—also referred to as a recreational suction dredge—is defined as a dredge with an intake nozzle size of 5 inches in diameter or less and with equipment rated at 15 horsepower or less. Fact Sheet at 000071. Suspended solids are specified as the primary pollutant of concern in the discharges from a small suction dredge. *Id.* at 000076.

<sup>2</sup> NPDES permits may be issued by the EPA or by a State that is authorized to operate an NPDES program. CWA § 402, 33 U.S.C. § 1342. At the time of the violation at issue here, Idaho had not received such authorization. Thus, EPA was the relevant NPDES permitting authority within the State pursuant to CWA § 402(a), 33 U.S.C. § 1342(a).

000030-34 (*Authorization to Discharge under the National Pollutant Discharge Elimination System for Small Suction Dredge Placer Miners in Idaho, General Permit IDG370000* (Mar. 5, 2013)) (“General Permit”). The General Permit contains a list of waterbodies not covered under the permit (unless certain further requirements are met) due to their designation as critical habitat under the Endangered Species Act (“ESA”) and the presence of listed aquatic species.<sup>3</sup> *See Id.* at 000031-32. The list of such waterbodies includes the Clearwater River Basin, of which the SFCR is a part, and in which the alleged violation occurred. *See Id.* at 000032 (listing the Clearwater River Basin); CX 39 at 001535-36 (Appendix G to the General Permit, listing endangered species critical habitat areas and including the SFCR); *see also* Accel. Dec. at 21 (finding the area of dredging not covered under the General Permit); Initial Decision and Order at 6 (ALJ, Oct. 7, 2020) (ALJ dkt. #80) (“Init. Dec.”) (citing ALJ Hearing Transcript at 221-22 (May 14-15, 2019) (ALJ dkt. #70-71) (“ALJ Tr.”)). The U.S. EPA, Region 10 (“Region”) maintains that Respondent’s operations in the SFCR were not authorized under either the General Permit or an individual permit and that he is liable for the CWA violation alleged in the complaint. *See* Complaint ¶¶ 3.1-3.9 (June 20, 2016) (ALJ dkt. #1) (“Compl.”); Accel. Dec. at 21.

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<sup>3</sup> In order to obtain coverage for a waterbody otherwise excluded by the General Permit due to the presence of endangered species, an ESA determination must be made through a separate process by the Forest Service and submitted to the EPA, along with the operator’s Notice of Intent. General Permit at 000031.

### **1. Proceedings Before the Administrative Law Judge**

In its complaint, the Region alleged that Respondent unlawfully operated a small suction dredge on the SFCR on July 22, 2015. *See* Compl. ¶¶ 3.1-3.9. Respondent denied most of the allegations in the complaint and requested a hearing. Answer to Complaint (July 18, 2016) (ALJ dkt. #3) (“Answer”). The parties engaged in the prehearing exchange of information between April and June 2017.<sup>4</sup> At the time of the prehearing exchange, Respondent was represented by counsel. *See* Respondent’s Attorney’s Notice of Appearance (Sept. 23, 2016) (ALJ dkt. #10); Notice of Withdrawal as Representative (Dec. 18, 2018) (ALJ dkt. #48).

In June 2017, the Region filed a motion for accelerated decision on both liability and penalty. Complainant’s Motion for Accelerated Decision and Memorandum in Support of its Motion for Accelerated Decision (June 5, 2017) (ALJ dkt. #31) (“Motion”). Counsel for Respondent timely filed a brief opposing the Region’s motion along with a document titled: “Declaration of Dave Erlanson, Sr.” (“Erlanson Decl.” or “Declaration”).<sup>5</sup> Respondent’s Brief in Opposition to Motion for Accelerated Decision, app. A (Aug. 2, 2017) (ALJ dkt. #34) (“Resp. to Mot.”). As relevant here, a

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<sup>4</sup> *See* Second Prehearing Order (Feb. 24, 2017) (ALJ dkt. #19); Complainant’s Initial Prehearing Exchange (April 7, 2017) (ALJ dkt. #23); Respondent’s Prehearing Exchange (May 8, 2017) (ALJ dkt. #26) (“Resp’t Prehearing Exchange”); Complainant’s Rebuttal Prehearing Exchange (June 5, 2017) (ALJ dkt. #30).

<sup>5</sup> As set forth below in part III.B.2, Respondent later argues that his attorney submitted a fraudulent declaration.

violation of CWA § 301(a), 33 U.S.C. § 1311(a), occurs when (1) a person; (2) discharges a pollutant; (3) from a point source; (4) into a navigable water; (5) without authorization under a NPDES permit.

During the prehearing exchange, Respondent, through his counsel, accepted stipulations<sup>6</sup> that Respondent is a “person” as defined by section 502(5) of the CWA and that the SFCR is a “water of the United States” and is therefore a “navigable water” in accordance with section 502(7) of the CWA. Respondent Prehearing Exchange at 6, 12 (May 8, 2017) (ALJ dkt. #26) (“Resp’t Prehearing Exchange”). He also acknowledged that he did not have an NPDES permit. *Id.* at 12-13. Further, during the prehearing exchange, Respondent maintained that whether a suction dredge is a point source depends on whether the operation resulted in the discharge of a pollutant.<sup>7</sup> *Id.* at 11-12.

The crux of Respondent’s argument on liability before the ALJ was that no NPDES permit was required for his suction dredging activity because it did not involve the discharge of a pollutant within the meaning of the CWA. *Id.* at 4-5; Resp. to Mot. at 14,

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<sup>6</sup> Respondent first denied that he is a person and that the SFCR is a water of the United States in the Answer to the Complaint, then later accepted stipulations proffered by the Region regarding these allegations during the prehearing exchange through his counsel. Answer ¶¶ 3.1-3.2 (denying 3.1-3.2 of the complaint); Resp’t Prehearing Exchange at 6, 12. The ALJ acknowledged Respondent’s Answer to the Complaint and subsequent stipulations in the prehearing exchange and concluded that there was no genuine issue of material facts as to these elements. Accel. Dec. at 6, 21, 22.

<sup>7</sup> Respondent’s arguments conflate the elements of whether a suction dredge is a point source with whether the operation of suction dredge resulted in the discharge of a pollutant.

16. That is, Respondent argued that the discharge of materials from the streambed of the SFCR into the waterway could not be considered an “addition” of a pollutant and therefore, could not be considered a discharge of a pollutant under the CWA.<sup>8</sup> Resp’t Prehearing Exchange at 5, 6-11; Resp. to Mot. at 14-16. Respondent additionally argued that the discharge was, at most, “incidental fallback” and therefore did not require a NPDES permit. Resp’t Prehearing Exchange at 5, at 8-9; Resp. to Mot. at 16-23. Respondent also questioned the reliability of the photographic and testimonial evidence offered in support of the Region’s claim that his operation of a suction dredge resulted in the discharge of a pollutant. Resp. to Mot. at 10-12. The ALJ concluded there was no genuine issue of material fact on this question and that the record demonstrated that Respondent’s operation of a suction dredge released suspended solids into the SFCR. Accel. Dec. at 11-16. The ALJ further held that the release of suspended solids constitutes an “addition of any pollutant” and, thus, a “discharge of a pollutant” as a matter of law. *Id.* at 16-20.

By Order dated September 27, 2018, the ALJ granted the Region’s motion for accelerated decision as to liability, but denied the motion as to penalty. *Id.* at 1, 25. On December 18, 2018, Respondent’s Counsel withdrew as Respondent’s representative. Notice of Withdrawal of Representative at 1. Thereafter,

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<sup>8</sup> The CWA defines “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source.” CWA § 502(12), 33 U.S.C. § 1362(12). The CWA defines “pollutant” as including, among other things, dredged spoil, rock, and sand. *Id.* § 502(6), 33 U.S.C. § 1362(6).

Respondent proceeded pro se, i.e., without a lawyer, and represented himself.

The ALJ held a hearing on penalty on May 14 and 15, 2019. Init. Dec. at 1. The Region presented five witnesses and numerous exhibits. *Id.* at 1-2. Respondent did not present any evidence (documentary or testimonial) and chose not to testify. *Id.* at 2. He did, however, cross-examine the Region's witnesses. *Id.* Both parties submitted post-hearing briefs.<sup>9</sup> On October 7, 2020, the ALJ issued and served her Initial Decision and Order, assessing a penalty of \$6,600 based on her factual findings, the relevant statutory factors, and EPA penalty policies. Init. Dec. at 43-44. The Initial Decision provided that it would become a final order unless, among other things, "an appeal to the Environmental Appeals Board is taken within 30 days after this Initial Decision is served upon the parties pursuant to 40 C.F.R. § 22.30(a)." *Id.* at 44. The Region had previously served Respondent with a copy of Part 22 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("CROP"), which includes section 22.30, the requirements for filing appeals with the Board. Compl. attach 1 (copy of e-CFR version of 40 C.F.R. Part 22, including 40 C.F.R. § 22.30).

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<sup>9</sup> Complainant's Initial Post-Hearing Brief (Aug. 9, 2019) (ALJ dkt. #75); Respondent's Post-Hearing Brief (Sept. 4, 2019) (ALJ dkt. #76) ("Resp't Post-Hearing Br."); Complainant's Reply Post-Hearing Brief (Sept. 20, 2019) (ALJ dkt. #77); Respondent's Reply Post-Hearing Brief (Sept. 30, 2019) (ALJ dkt. #78) ("Resp't Reply Post-Hearing Br.").

## **2. Proceedings Before the Environmental Appeals Board**

On November 3, 2020, Respondent filed a “Request for Appeal” with the Board.<sup>10</sup> The “Request for Appeal” consisted of two paragraphs. The first stated:

Respondent disagrees with the decision and order handed down by the administrative judge in the matter cited above and seeks an appeal hearing. Respondent sees no reason to re-litigate the matter here in the petition for appeal and even a cursory reading of the record will show any judicially trained mind that an obvious controversy exists between the [R]espondent[‘]s legal position and the EPA’s position.

Request for Appeal 1 (Nov. 3, 2020). That was followed by a one-sentence paragraph, stating that “[t]his

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<sup>10</sup> The Board issued an order declining to review the case on its own initiative after the time for appeal had passed. Order Declining to Exercise *Sua Sponte* Review (Nov. 12, 2020); *see also* 40 C.F.R. §§ 22.30(a), (b). The Order stated that no appeal had been filed and that the Initial Decision and Order would become final on November 23, 2020. Order Declining to Exercise *Sua Sponte* Review at 1. The Board’s statement that no appeal had been filed was based on misinformation from the EPA Mailroom, which erroneously informed the Board that no mail had been received relating to this matter. *See* Order Vacating Decision to Decline *Sua Sponte* Review, Docketing Appeal, and Order to Show Cause 1 (Nov. 20, 2020). On November 17, 2020, shortly after the Board issued its order declining to review the matter, the Board learned that the EPA mailroom had in fact received Respondent’s request for appeal on November 3, 2020, within the time allowed for filing an appeal. *Id.* In light of this information, the Board vacated its Order declining *sua sponte* review and docketed the case. *Id.*

request does not foreclose any other remedies available to [R]espondent but only suffices to establish that the [R]espondent is actively seeking to exhaust his administrative remedies.” *Id.* Because this document did not appear to satisfy the filing and content requirements for appeals to the Board from an Initial Decision under 40 C.F.R. § 22.30(a)(1), the Board ordered Respondent to show cause by December 3, 2020 as to why his appeal should not be dismissed. *See* Order Vacating Decision to Decline *Sua Sponte* Review, Docketing Appeal, and Order to Show Cause (Nov. 20, 2020) (“Show Cause Order”).

On November 23, after the November 6 deadline for filing an appeal in this case,<sup>11</sup> Respondent filed the following documents with the Board by regular mail: (1) an “appellate brief” and five attachments; (2) a “motion to reconsider *sua sponte* review on the grounds of ineffective assistance of [counsel] and other grounds”; and (3) a brief challenging the EPA’s jurisdiction in this matter. Appellate Brief (Nov. 23, 2020) (“Appellate Br.”); Motion to Reconsider *Sua Sponte* Review on the Grounds of Ineffective Assistance of Counsel and Other Grounds (Nov. 23, 2020); Appellant Challenge to the Jurisdiction of the U.S. EPA (Nov. 23, 2020) (“Appellant Jurisdiction Br.”).<sup>12</sup> Respondent’s appellate brief included a copy of his post-

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<sup>11</sup> The ALJ’s Initial Decision and Order was served on October 7, 2020 by regular and electronic mail. The deadline for filing an appeal where an initial decision is served electronically is 30 days after service. 40 C.F.R. § 22.30(a)(1)(i), .27(c).

<sup>12</sup> Because Respondent’s briefs do not contain page numbers, the Board will cite to the physical page numbers of the filing starting with the title page.

hearing brief submitted before the ALJ, with two additional pages added at the end titled “Rebuttal of Initial Decision and Order date 10-7-2020.” Compare Appellate Brief at 1-19 to Respondent Post-Hearing Brief (Sept. 4, 2019) (ALJ dkt. #76). The second brief challenged EPA’s, the ALJ’s, and the Board’s jurisdiction. *See* Appellant Jurisdiction Br. at 2, 8, 12.

On November 30, 2020, Respondent filed his response to the Board’s Show Cause Order. The response included: (1) a “motion to add post-trial brief used as appellate brief”; (2) a “motion to add final post trial brief used as appellate brief #2 to ‘show cause’”; (3) a “motion to add: Brief in support of oral arguments”; and (4) a document containing fifteen exhibits “to ‘show cause.’” Appellant Motion to Add Post-Trial Brief Used as Appellate Brief to Show Cause (Nov. 30, 2020); Appellant Motion to Add Final Post-Trial Brief Used as Appellate Brief #2 to Show Cause (Nov. 30, 2020); Appellant Motion to Add Brief in Support of Oral Arguments to Show Cause (Nov. 30, 2020); Appellant Motion to Add Exhibits 1 through 15 to Show Cause (Nov. 30, 2020). Contrary to the Board’s Show Cause Order, and as discussed below, none of these filings provided any explanation for the deficiencies in Respondent’s November 3, 2020 “Request for Appeal,” specifically his failure to file a notice of appeal and appeal brief in accordance with the content requirements of 40 C.F.R. § 22.30(a)(1).

On December 11, 2020, the Region submitted its reply to Respondent’s response to the Show Cause Order. EPA’s Reply to Appellant’s Response to the Order to Show Cause (Dec. 11, 2020). On December 15, 2020, the Board issued a scheduling order, clarifying that the deadline for any response by the Region to

Respondent's appeal briefs that were filed on November 23, 2020 was January 8, 2021. Scheduling Order (Dec. 15, 2020). The Region submitted its response on January 8, 2021. EPA's Response to Appellant's Appeal (Jan. 8, 2021).

### **III. Analysis**

#### **A. Respondent's Appeal Does Not Comply With 40 C.F.R. § 22.30(a)(1)**

Under 40 C.F.R. § 22.30(a)(1), an appeal from an initial decision requires the filing of a notice of appeal and an appellate brief with the Board. *See* 40 C.F.R. § 22.30(a)(1)(ii). The rules specify that a notice of the appeal "shall summarize the order or ruling" that is being appealed and the accompanying appellate brief "shall contain" a statement of the issues presented for review, argument on the issues presented and the relief sought, among other things. *Id.* § 22.30(a)(1)(iii). Rather than identifying his issues and arguments contesting the Initial Decision, Respondent instead filed a conclusory statement expressing general disagreement with the ALJ's determination and stating that he saw "no reason to re-litigate the matter." Request for Appeal at 1. Thereafter, as stated above, the Board issued its Show Cause Order. In response to the Show Cause Order, Respondent filed four documents.<sup>13</sup> None of the documents confront or

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<sup>13</sup> Appellant Motion to Add Post-Trial Brief Used as Appellate Brief to Show Cause (Nov. 30, 2020); Appellant Motion to Add Final Post-Trial brief Used as Appellate Brief #2 to Show Cause (Nov. 30, 2020); Appellant Motion to Add Brief in Support of Oral Arguments to Show Cause (Nov. 30, 2020); Appellant Motion to Add Exhibits 1 through 15 to Show Cause (Nov. 30, 2020).

explain why Respondent failed to comply with the requirements of section 22.30(a)(1).

In Respondent's motion to reconsider the Board's order declining *sua sponte* review, he stated that he is "untrained in law and was not aware of the filing requirements," that he injured himself, and that he is able to show ineffective assistance of counsel.<sup>14</sup> Motion to Reconsider *Sua Sponte* Review on the Grounds of Ineffective Assistance of Counsel and Other Grounds 1-2 (Nov. 23, 2020).<sup>15</sup> These assertions were not raised in Respondent's request for appeal or in response to the Board's Show Cause Order, and in any event, they are insufficient to justify Respondent's failure to comply with 40 C.F.R. § 22.30(a)(1). The record shows that Respondent was aware of, or at least had notice of, section 22.30—the ALJ explicitly referenced it in the Initial Decision and the Region included a copy of the CROP when it served Respondent with the Complaint. Init. Dec. at 44; Compl., attach 1 (copy of e-CFR version of 40 C.F.R. Part 22, including 40 C.F.R. § 22.30(a)(1)). The rules are also readily

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<sup>14</sup> His allegations of ineffective assistance of counsel do not bear on his failure to comply with 40 C.F.R. § 22.30(a)(1) and, in any event, we address his allegations in part III.B.2, below. *See also*, n.21, below.

<sup>15</sup> On November 20, 2020, Respondent emailed the Board a document titled "Motion to Reconsider *Sua Sponte* Review on the Grounds of Ineffective Assistance of Counsel and Other Grounds and Extension for Appeal Filing Deadline." Except for the title used in the documents submitted by email and filed by hardcopy, the substance of both the email and the hardcopy document is otherwise identical.

available on the Board's<sup>16</sup> and ALJ's<sup>17</sup> websites. Additionally, if Respondent needed more time to file an appeal or a brief due to injury or for other reasons, he could have asked for an extension in advance of the due date, which he did not do.<sup>18</sup>

Respondent's briefs filed after the expiration of the appeal deadline do not cure the failure to comply with 40 C.F.R. § 22.30(a)(1). The Board's Show Cause Order was not an invitation to file a more compelling appellate brief. Rather, the order provided Respondent with an opportunity to explain why his "Request for Appeal" did not comply with the filing and content requirements of 40 C.F.R. § 22.30(a)(1). Show Cause Order at 2. Respondent failed to do so.

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<sup>16</sup> The rules can be found on the Board's website at the following web address: [https://yosemite.epa.gov/oa/EAB\\_Web\\_Docket.nsf/General+Information/Regulations+Governing+Appeals?OpenDocument](https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/General+Information/Regulations+Governing+Appeals?OpenDocument)

<sup>17</sup> The rules can be found on the ALJ's website at the following web address: <https://www.epa.gov/alj/rules-practice-proceedings-administrative-law-judges>

<sup>18</sup> Respondent did not file, in advance of the due date, a motion for extension of time to submit his appellate briefs. 40 C.F.R. § 22.30(e)(3) (stating that any motion for an extension of time shall be filed sufficiently in advance of the due date so as to allow other parties reasonable opportunity to respond and to allow the Board reasonable opportunity to issue an order). The Board has granted well-grounded requests for extensions of time filed before but not after the due date, and strictly construes its filing deadlines. *See In re Tri-County Builders Supply*, CWA 03-04, at 5 (EAB May 24, 2004) (Order Dismissing Appeal) ("The Board typically requires strict compliance with the time limits set forth in the rules of practice governing penalty appeals.") (citing *In re Roger Antkiewicz & Pest Elimination Prod. Of Am., Inc.*, 8 E.A.D. 218, 220 n.2 (EAB 1999)).

While the Board recognizes Respondent is now proceeding pro se, a party's lack of legal representation or sophistication does not excuse a failure to comply with regulatory requirements. *See In re Robert Wallin*, 10 E.A.D. 18, 38 n.16 (EAB 2001) (declining to relax a pro se litigant's burden of production); *In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 320-21 (EAB 1999) (stating that parties who choose to proceed pro se are not excused from compliance with the CROP.); *In re Rybond, Inc.*, 6 E.A.D. 614, 626-27 (EAB 1996) (same). While the Board endeavors to construe filings by pro se litigants liberally, and does not expect such filings to contain sophisticated legal arguments or to employ precise technical or legal terms, the Board nevertheless expects filings to provide sufficient specificity to apprise the Board of the issues being raised and to articulate supportable reasons for allegations of error. *See In re Sutter Power Plant*, 8 E.A.D. 680, 687-88 (EAB 1999) (discussing threshold for pro se litigants in the context of a permit appeal under 40 C.F.R. part 124); *In re To Your Rescue! Services*, FIFRA Appeal No. 04-08, at 3 (EAB Sept. 30, 2005) (Final Order) ("[T]he Board endeavors to construe objections by pro se litigants liberally so as to fairly identify the substance of the arguments being raised.").

Respondent's November 3rd Request for Appeal did not contain any appellate brief or any legal or factual arguments outlining specific issues or objections or basis for his challenges to the ALJ's Initial Decision. Request for Appeal at 1. It instead rested entirely on the conclusory statement that a controversy existed between the parties, giving the Board no insight into what the issues and arguments in controversy on appeal might be. *Id.* Respondent's failure to comply in

any meaningful way with the requirements of 22.30(a)(1) because he saw “no reason to re-litigate the matter,” disregards the importance of the procedural requirements. The filing requirements specified in 40 C.F.R. § 22.30 are not merely procedural niceties that parties are free to ignore. *In re Four Strong Builders, Inc.*, 12 E.A.D. 762, 772 (EAB 2006); *In re Tri-County Builders Supply*, CWA 03-04, at 7 (EAB May 24, 2004) (Order Dismissing Appeal); *see also In re Louisiana-Pacific Corp.*, 2 E.A.D. 800, 802 (CJO 1989) (dismissing appeal where Respondent failed to articulate an explanation for its objections). Rather, they serve an important role in helping to bring repose and certainty to the administrative enforcement process as well as efficient use of the Board’s resources and processing of appeals. *Tri-County Builders*, CWA 03-04, at 7; *see also Four Strong Builders*, 12 E.A.D. at 772.

Appeals that lack the identification of legal or factual issues and arguments that do not contain the specificity necessary to adjudicate a dispute impede the Board’s ability to adjudicate appeals efficiently and fairly. Part 22 is explicit, “[i]n exercising its duties and responsibilities under these Consolidated Rules of Practice, the Environmental Appeals 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,” including denying all relief to a party who, without adequate justification, fails or refuses to comply with the CROP or with an order of the Environmental Appeals Board. 40 C.F.R. § 22.4(a)(2). Under these circumstances, because of the failure to comply with section 22.30(a)(1), the Board dismisses Respondent’s appeal.

**B. The ALJ's Determinations on Liability and Penalty are Supported By the Record**

While a dismissal for failure to meet the filing requirements of section 22.30(a)(1) ends the Board's inquiry, under the unusual combination of circumstances presented here the Board, on its own initiative, reviewed the record in order to further explain a few points for the benefit of all parties. And, as we explain below, even if we were to further consider this case, the Board would find that the ALJ's determination is well-reasoned and well-supported by the record as to both liability and penalty. Accordingly, we address below a few points belatedly asserted by Respondent.

**1. The ALJ's and the Board's Subject Matter Jurisdiction**

Section 309(g), 33 U.S.C. § 1319(g), of the CWA, which establishes EPA administrative penalty assessment authority for, among other things, violations of the section CWA section 301, and the CROP, promulgated at 40 C.F.R. part 22 provide the ALJ and Board with subject matter jurisdiction for this proceeding.<sup>19</sup> In relevant part, the CROP specifies the administrative adjudicatory process for the assessment of penalty under CWA section 309(g). *See* 40 C.F.R. §§ 22.1(a)(6),.4. The CROP authorizes the ALJ to conduct and adjudicate hearings regarding the assessment of penalties arising under various federal

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<sup>19</sup> Respondent also challenges the EPA's permitting and regulatory authority. Appellant Jurisdiction Br. at 8. Because Respondent's challenges to the EPA's authority do not relate to the Board's subject matter jurisdiction, we address these arguments in part III.B.3 and n.24, n.26, below, regarding liability.

environmental laws, including the CWA violation assessed here. *Id.* §§ 22.1 (listing scope of review), .4(c) (explaining powers and duties of presiding officers). And the CROP provides that the Board is to rule on appeals from the initial decision, rulings, and orders of a Presiding Officer, such as an ALJ. *Id.* § 22.4(a) (explaining powers and duties of the Board). Pursuant to the CROP, a respondent waives its right to judicial review unless it exhausts its administrative remedies by appealing to the Board. *Id.* § 22.27(d). Thus, both the ALJ and the Board have jurisdiction in this matter.<sup>20</sup>

## **2. Respondent’s Claim that the Declaration Filed by Respondent’s Former Counsel Was Fraudulent**

In the copy of his post-hearing brief filed with the Board, Respondent asserts, without factual support, that his former counsel submitted a fraudulent declaration before the ALJ and that this merits reversal of the ALJ’s Accelerated Decision regarding liability. *See* Appellate Br. at 7-8. The Declaration was attached to Respondent’s “Brief in Opposition to Motion for Accelerated Decision” filed on Respondent’s behalf on August 2, 2017. *See* Resp. to Mot. attach. A. Respondent did not object to the Declaration until the second day of the hearing on penalty held on May 15, 2019, nearly twenty-one months after its submission and eight

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<sup>20</sup> Following an appeal to, and decision by, the Board, a party may seek judicial review in the appropriate federal court. *See* Administrative Procedure Act, 5 U.S.C. § 704 (providing a right of judicial review of “Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court \* \* \*.”).

months after issuance of the Accelerated Decision. *See* Init. Dec. at 24. The ALJ rejected Respondent's belated attempt to recant his duly submitted Declaration and declined to alter her liability finding on that basis.<sup>21</sup> *Id.* at 24-25.

Moreover, Respondent does not explain how excluding the Declaration would have materially altered the ALJ's liability determination. In fact, the statements in the Declaration that the ALJ relied upon in the Accelerated Decision can be readily confirmed independently in the record. The Accelerated Decision relies on the following undisputed facts in the Declaration:

- (1) Respondent owns a mining claim on the [SFCR] located in the Nez Perce — Clearwater National Forest of north-central Idaho. Erlanson Decl. ¶ 2. It is a region of numerous mineral resources, including gold. *Id.* ¶ 3.
- (2) The [SFCR] ultimately flows to the Snake River. *[Id.]* ¶ 3.
- (3) Respondent engages in the business of gold mining on his claim. *[Id.]* ¶ 3. His interest in mining is not recreational but professional. *Id.*
- (4) On July 22, 2015, Respondent was mining for gold on his claim using an apparatus known as a suction dredge. *See [Id.]* ¶¶ 10, 23.

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<sup>21</sup> The ALJ held that Respondent is bound by his attorney's actions. *See* Init. Dec. at 24-25; *see also In re Burrell*, 15 E.A.D. 679, 688-90 (EAB 2012) (stating that a party "cannot avoid the consequences of the acts or omissions of its freely selected agent").

- (5) While operating his suction dredge, Respondent encountered and conversed with Clinton Hughes, an employee of the United States Forest Service, who subsequently prepared a Mineral Inspection Form documenting his observations of Respondent's activities. *See* [Id.] ¶¶ 23, 28.

Accel. Dec. at 5. The record supports the accuracy of the statements relied upon by the ALJ even absent the Declaration. *See, e.g.*, CX 1 at 000002, 000005-6 (Clinton Hughes's Inspection Report documenting his encounter with Respondent on July 22, 2015); CX 2 (Clinton Hughes's declaration regarding his encounter with Respondent); ALJ Tr. at 46-52, 57-60 (Clinton Hughes's testimony regarding his encounter with Respondent); ALJ Tr. at 35 (Respondent stating on July 22, 2015, he was using a recreational suction dredge); ALJ Tr. at 36 (Respondent stating that he conducted this activity on his mining claim in the SFCR); Answer ¶ 4.8 (Respondent admitting that he received gold as economic benefit from dredging); Resp't Prehearing Exchange at 12 (Respondent accepting Region's stipulation that the SFCR is a navigable water);<sup>22</sup> CX 14 (Region's jurisdictional analysis for the SFCR, which was uncontested by Respondent); Resp't Post-Hearing Br. at 7 (Respondent listing Clinton Hughes's testimony as a "non-disputed fact").

In addition, although the ALJ cited to the Declaration in her assessment of how a suction dredge

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<sup>22</sup> Although Respondent now claims that the SFCR is not navigable due to boulders that interrupt its flow, he has not contested that the SFCR flows to the Snake River. Appellate Br. at 9.

operates, a disputed fact at the time, her assessment was ultimately based on, and supported by, other evidence in the record that is not currently disputed by Respondent. *See* Accel. Dec. at 12-16. Under these circumstances, the record independently supports the ALJ's conclusions even if we were to consider the liability determination without the Declaration Respondent claims was fraudulent. *See, e.g., In re VSS Intl, Inc.*, 18 EAD 372, 389-90 (EAB 2020) (rejecting VSS's claim that a document it had submitted in response to a formal agency information request was incorrect because VSS provided no specific evidence to overcome the facts it originally provided to the Agency).

### **3. The Region's Prima Facie Case of Liability and the ALJ's Liability Determination**

The record supports a finding that the Region established a prima facie case and that the ALJ did not err in her liability determination. As relevant here, a violation of CWA section 301(a), 33 U.S.C. § 1311(a), occurs when (1) a person; (2) discharges a pollutant; (3) from a point source; (4) into a navigable water; (5) without authorization under a NPDES permit.

The record reflects that the Region addressed each element and established its prima facie case for Respondent's liability. In particular, the Region proffered that: (1) Respondent is an individual, and thus, a person as defined by the CWA, Compl. ¶ 3.1; Complainant's Initial Prehearing Exchange at 11 (April 7, 2017) (ALJ dkt. #23) ("Region Prehearing Exchange"); (2) Respondent operated a suction dredge, as witnessed by Clinton Hughes, and such operation

resulted in a discharge of a pollutant pursuant to the CWA and various caselaw, Compl. ¶ 3.6, 3.8; Region Prehearing Exchange at 11-15; (3) the suction dredge's waste disposal system constitutes a discrete conveyance and/or conduit and is thus a point source pursuant to the CWA, Compl. ¶ 3.7; Region Prehearing Exchange at 15-16; (4) the SFCR flows to the Snake River, which flows to the Columbia River, and eventually the Pacific Ocean, and is thus a navigable water, Compl. ¶ 3.2; Region Prehearing Exchange at 16-17; *see also* CX 14 at 000909-912; and (5) Respondent was not authorized under the requisite NPDES permit, Compl. ¶ 3.4, 3.9; Region Prehearing Exchange 17-18; CX 11 (EPA Letter to David Erlanson (Aug. 7, 2015)). As noted in Part II.B.1, above, Respondent accepted stipulations that he is a person and that the SFCR is a navigable water. Resp't Prehearing Exchange at 6, 12. He also acknowledged that he did not have a NPDES permit and conditioned whether a suction dredge is a point source on whether its operation resulted in the discharge of a pollutant. *Id.* at 11-13. And with respect to the principal dispute of whether Respondent's operation resulted in the discharge of a pollutant within the meaning of the CWA, the Region offered sufficient evidence and established the required elements of a *prima facie* case. Motion at 8-15; Complainant's Reply in Support of Motion for Accelerated Decision at 2-9 (Aug. 14, 2017) (ALJ dkt. #35).

The ALJ addressed each element of liability and the arguments presented by the parties in her Accelerated Decision<sup>23</sup> and found that no genuine

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<sup>23</sup> Respondent now claims that his due process rights were violated because he was found "guilty" without a trial. Appellate Br. at 11. Under the CROP, a Presiding Officer, here an ALJ,

issue of material fact existed as to whether Respondent violated the CWA and that the Region was entitled to judgment on liability as a matter of law.<sup>24</sup> *See* Accel. Dec. at 6 (determining that Respondent is a “person” pursuant to the CWA); *Id.* at 6-20 (determining that

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may at any time render an accelerated decision 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 issue of material fact exists and a party is entitled to judgment as a matter of law. 40 C.F.R. § 22.20.

<sup>24</sup> In his various filings before the Board, Respondent asserts numerous arguments that were not included in the briefings prior to issuance of the Accelerated Decision on liability, and are thus deemed waived in the liability context. *See* Init. Dec. at 23 (ALJ rejecting Respondent’s arguments on liability in her Initial Decision regarding penalty). A party’s right of appeal is limited to issues timely raised before the ALJ and issues concerning subject matter jurisdiction. 40 C.F.R. § 22.30(c); *see In re Yeldhuis*, 11 E.A.D. 194, 219-20 (EAB 2003) (stating issues not raised before the ALJ are waived on appeal), pet. for review voluntarily dismissed, No. 03-74235 (9th Cir. Mar. 8, 2004); *In re Woodcrest Mfg., Inc.*, 7 E.A.D. 757, 764 (EAB 1998) (citing *In re Lin*, 5 E.A.D. 595, 598 (EAB 1994)), aff’d, 114 F. Supp. 2d 775 (N.D. Ind. 1999). The Board addressed subject matter jurisdiction in part III.B.1, above. Respondent’s assertions that the SFCR is not a navigable water of the United States because of boulders in the river and its alleged interrupted flow go to the merits of the claim, rather than this tribunal’s subject matter jurisdiction. *See* Appellate Br. at 9; *see In re Fulton Fuel Co.*, CWA Appeal No. 10-03, at 18-19 (EAB Sept. 9, 2010) (Final Decision and Order) (citing *In re Adams*, 13 E.A.D. 310, 319 (EAB 2007)). In any event, while Respondent denied that his actions occurred in a navigable water in the answer to the complaint, Respondent subsequently accepted the Region’s stipulation that the SFCR is a navigable water during the prehearing exchange and did not present evidence in the record to dispute that the SFCR is a navigable water before the ALJ. Answer ¶ 3.2; Resp’t Prehearing Exchange at 12. The Board finds no merit in Respondent’s arguments and further finds these arguments waived.

Respondent's actions resulted in a "discharge of a pollutant" and discussing her analysis at length); *Id.* at 20 (determining that Respondent's suction dredge constituted a "point source"); *Id.* at 21 (determining that the SFCR is a navigable water);<sup>25</sup> *Id.* (determining that Respondent was not authorized to discharge pollutants by any NPDES permit).<sup>26</sup> As to whether Respondent's actions resulted in the discharge of a pollutant, the ALJ found that, based on the evidence in the record, Respondent's operation of a suction dredge resulted in the discharge of suspended solids into the SFCR in the form of a plume of turbid water. *Id.* at 16. The ALJ further found that the suction dredge's release of suspended solids, even if it came from the streambed of the waterway itself, resulted in an "addition of a pollutant" and therefore, a "discharge of a pollutant" pursuant to the CWA. *Id.* at 16-20. As noted by the ALJ, the case most pertinent to

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<sup>25</sup> At the time of the violation, "waters of the United States" was defined to include, *inter alia*, "waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide" and tributaries to those waters. 40 C.F.R. § 122.2; 40 C.F.R. § 232.2.

<sup>26</sup> Respondent asserts several belated arguments that he is exempt from EPA's NPDES permitting authority by the State of Idaho and federal laws. Appellant Jurisdiction Br. at 3-6, 8-9. As these arguments were not raised before the ALJ regarding liability, they are deemed waived. *See* n.24, above. As noted in footnote 2, above, at the time of the violation at issue here, EPA was the relevant NPDES permitting authority within the State pursuant to CWA § 402(a), 33 U.S.C. § 1342(a). Further, with respect to enforcing CWA violations, the CWA authorizes EPA to bring an enforcement action against any person in violation of, *inter alia*, section 301. CWA § 309(g)(1)(A), 33 U.S.C. § 1319 (g)(1)(A).

this matter is *Rybachek v. EPA*, a Ninth Circuit case which addresses the type of mining at issue here and where the Court found that “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 [CWA.]” *Id.* at 16; *Rybachek v. EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990). The ALJ also found that the nature of Respondent’s activities here to be distinguishable from “incidental fallback.” Accel. Dec. at 19-20. The Board finds that the ALJ conducted a thorough analysis of the factual and legal issues and did not err in her liability determination.

#### **4. The ALJ’s Penalty Determination**

The Board finds that the ALJ did not err in her assessment of the penalty amount. The statutory penalty factors for a CWA violation include “the nature, circumstances, extent, and gravity of the violation”; the violator’s “ability to pay, any prior history of such violations the degree of culpability, economic benefit or savings (if any) resulting from the violation[; and such other matters as justice may require.” CWA § 309(g)(3), 33 U.S.C. § 1319(g)(3). Pursuant to the CROP, the Presiding Officer, here the ALJ, shall determine the amount of the recommended civil penalty based on the evidence in the record, in accordance with any statutory penalty criteria, and any civil penalty guidelines.<sup>27</sup> 40 C.F.R. § 22.27(b). The CWA

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<sup>27</sup> The Agency has not developed a penalty policy specific to the CWA. *In re City of Marshall*, 10 E.A.D. 173, 189 n.28 (EAB 2001). However, in assessing penalties under the CWA, the agency often relies on EPA’s two general penalty policies: (1) U.S. EPA, EPA General Enforcement Policy #GM-21, Policy on Civil

does not prescribe a precise formula to compute the relevant penalty factors and judges are afforded significant discretion in setting penalties. *In re Phoenix Constr. Serv., Inc.*, 11 E.A.D. 379, 394 (EAB 2004). For a violation assessed under CWA § 309(g)(2)(B) occurring after December 6, 2013, through November 2, 2015, the EPA is authorized to assess an administrative civil penalty in an amount not to exceed \$16,000 per day for each day during which the violation continues, and up to a maximum of \$187,500. CWA § 309(g)(3), (g)(2)(B), 33 U.S.C. § 1319(g)(3), (g)(2)(B); 40 C.F.R. § 19.4. Based on the factors detailed above, the Region calculated and sought a total penalty of \$6,600. Init. Dec. at 30-31.

In determining the penalty, the ALJ fully explained her factual findings based on the record, including hearing testimony, and set forth how her factual findings applied to the relevant penalty factors. *Id.* at 22, 25-43. The ALJ found the penalty sought by the Region to be appropriate based on the record, statutory criteria, and relevant penalty guidance. *See Id.* at 4, 33-43; 40 C.F.R. § 22.27(b). The ALJ's Initial Decision assessing penalty is well-supported by the record.

### **III. Conclusion**

For the foregoing reasons, the Board dismisses the appeal. Accordingly, Respondent is ordered to pay the full amount of the civil penalty assessed by the ALJ, \$6,600, within thirty (30) days of receipt of this Order. Payment shall be made by submitting a

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Penalties (Feb. 16, 1984) and (2) U.S. EPA, EPA General Enforcement Policy #GM-22, A Framework for Statute-Specific Approaches to Penalty Assessments (Feb. 16, 1984). *Id.*

App.42a

certified or cashier's check in the requisite amount, payable to "Treasurer, United States of America," and mailed to:

U.S. Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
P.O. Box 979077  
St. Louis, MO 63197-9000

A transmittal letter identifying the subject case and EPA docket number (CWA-10-2016-0109), as well as the Respondent's name and address, must accompany the check. Respondent may also pay by one of the electronic methods described at the following webpage: <https://www.epa.gov/financial/additional-instructions-making-payments-epa>. If Respondent fails to pay the penalty within the prescribed statutory period after entry of this Order, interest on the penalty may be assessed. *See* 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

**INITIAL DECISION AND ORDER,  
UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY  
(OCTOBER 7, 2020)**

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**UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR**

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**IN THE MATTER OF: DAVE ERLANSON, SR.,**

*Respondent.*

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Docket No. CWA-10-2016-0109

Before: Christine DONELIAN COUGHLIN,  
Administrative Law Judge, U.S. EPA.

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**INITIAL DECISION AND ORDER**

**I. Procedural Background**

The Director of the Office of Compliance and Enforcement at the United States Environmental Protection Agency (“EPA” or “Agency”), Region 10 (“Complainant”), initiated this proceeding on June 20, 2016, by filing a Complaint against Dave Erlanson, Sr. (“Respondent”), pursuant to Section 309(g)(2)(B) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (“Act” or “CWA”), 33 U.S.C. § 1319(g)(2)(B). The Complaint alleged that on July 22, 2015, Respondent unlawfully discharged pollutants from a point source into a navigable water

without authorization under a National Pollutant Discharge Elimination System (“NPDES”) permit, in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a). *See Complaint ¶¶ 3.1-3.9.* On July 18, 2016, Respondent filed an Answer denying the charge and requesting a hearing on the matter. Answer at 1.

Thereafter, the parties engaged in the prehearing exchange of information process. Specifically, Complainant filed its Initial Prehearing Exchange on April 7, 2017; Respondent filed his Prehearing Exchange on May 8, 2017; and Complainant filed its Rebuttal Prehearing Exchange on June 5, 2017. Also on June 5, 2017, Complainant filed a Motion for Accelerated Decision in which it sought entry of an accelerated decision as to Respondent’s liability for the violation alleged in the Complaint and the civil administrative penalty proposed for the charged violation.<sup>1</sup> On September 27, 2018, I issued the Order on Complainant’s Motion for Accelerated Decision (“Order on AD”), in which I granted Complainant’s motion as to Respondent’s liability for the charged violation but denied the motion as to the civil administrative penalty proposed for the violation, allowing for further development of the issue of penalty, particularly with regard to the degree of harm caused by the violation, at an evidentiary hearing.<sup>2</sup> Thereafter, the parties

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<sup>1</sup> Together with the Motion for Accelerated Decision, Complainant filed a memorandum in support. Respondent timely filed its Brief in Opposition to Motion for Accelerated Decision on August 2, 2017, to which Respondent attached the Declaration of Dave Erlanson, Sr. Complainant timely filed its Reply in Support of Motion for Accelerated Decision on August 14, 2017.

<sup>2</sup> *See* 40 C.F.R. § 22.20(b)(2).

engaged in an extensive motions practice in anticipation of hearing, and orders were issued in advance of the scheduled hearing resolving the subject of each motion.<sup>3</sup>

On May 14 and 15, 2019, I conducted a hearing in Rigby, Idaho.<sup>4</sup> Complainant presented the testimony of five witnesses: 1) Clint Hughes, a geologist and mineral examiner and administrator with the U.S. Department of Agriculture (“USDA”) Forest Service; 2) Tara Martich, a CWA enforcement specialist with the EPA, Region 10, Office of Compliance and Enforcement; 3) Cindi Godsey, an environmental engineer with the EPA, Region 10, NPDES permitting section within the division of Water, who was qualified as an expert witness in suction dredge mining permitting, specifically, and CWA permitting, generally<sup>5</sup>; 4) Daniel

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<sup>3</sup> See Order on Complainant’s Motion to Compel Additional Discovery and Compliance with Second Prehearing Order, Complainant’s Motion in Limine, and Respondent’s Motion to Appeal, dated March 18, 2019, and Order on Motions, dated May 2, 2019.

<sup>4</sup> See Notice of Hearing, dated November 5, 2018; Order Rescheduling Hearing, dated January 31, 2019; Notice of Hearing Location, dated March 21, 2019; and Service of Orders by Certified Mail to Respondent Erlanson, dated March 22, 2019. It should be noted that a hearing in this matter was originally scheduled to begin on February 12, 2019; however, due to a lapse of appropriations, Agency operations ceased from December 29, 2018, until January 28, 2019, which interrupted the orderly processing of motions and other logistical arrangements necessary for the hearing to proceed as originally scheduled. Consequently, the hearing was rescheduled. Citations to the corrected transcript of the proceedings are made in the following format: “Tr. [page].”

<sup>5</sup> See Tr. 238-241; CX 31.

Kenney, a North Zone Fisheries Biologist with the USDA Forest Service, who was qualified as an expert witness in Endangered Species Act (“ESA”)-listed species in the South Fork Clearwater River (“SFCR”) and the impacts of suction dredge mining on those species, as well as the ESA consultation process<sup>6</sup>; and 5) David Lee Arthaud, a Fisheries Biologist with the National Marine Fisheries Service (“NMFS”) of the National Oceanic and Atmospheric Administration within the Department of Commerce, who was qualified as an expert witness in ESA-listed species in the South Fork Clearwater River and the impacts of suction dredge mining on those species.<sup>7</sup> Complainant’s Exhibits 1, 1A, 1B, 1C, 2-4, 6-10, 12, 16-22, 27-29, 31, 33-35, and 37-39 were offered and admitted into evidence.<sup>8</sup> Respondent did not present any evidence (documentary or testimonial) on his own behalf and chose not to testify, but he did cross-examine Complainant’s witnesses.

On June 26, 2019, the parties were provided with a certified transcript of the hearing, and on that same day I issued an Order Scheduling Post-Hearing Submissions that established various post-hearing filing deadlines. Consistent with those deadlines, a Motion to Conform the Transcript was filed and

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<sup>6</sup> See Tr. 260, 270; CX 34.

<sup>7</sup> See Tr. 418; CX 33.

<sup>8</sup> The copies admitted into evidence were Bates-stamped. For simplicity, citations to Complainant’s Exhibits (“CX”) utilizing the Bates stamp number (“BSN”) will eliminate the preceding zeros contained in the number and be made in the following format: “CX [exhibit number] at BSN [number].”

granted by Order dated July 31, 2019.<sup>9</sup> Additionally, the parties timely filed their respective initial post-hearing briefs and reply post-hearing briefs.<sup>10</sup>

## **II. Provisions of Applicable Law**

### **A. Prohibition on Discharging a Pollutant Without a Permit**

Codified at 33 U.S.C. §§ 1251-1388, the CWA was enacted by Congress to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). In furtherance of this objective, Section 301(a) of the CWA provides that “[e]xcept as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [33 U.S.C. §§ 1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful.” 33 U.S.C. § 1311(a). Of particular relevance to this proceeding, Section 402 of the CWA establishes the National Pollutant Discharge Elimination System (“NPDES”) permit program, which allows EPA and states qualified by EPA to issue permits for the discharge of pollutants, notwithstanding the prohibition set

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<sup>9</sup> An additional correction is hereby made, *sua sponte*, to identify Mr. Moore, rather than Mr. McLaren, as the EPA counsel who conducted direct examination of Daniel Kenney on May 14 and 15, 2019. *See Tr.* 258-400.

<sup>10</sup> Complainant’s Initial and Reply Post-Hearing Briefs will be cited to, respectively, as “Comp. In. Br.” and “Comp. Rep. Br.” and Respondent’s Initial and Reply Post-Hearing Briefs will be cited to, respectively, as “Resp. In. Br.” and Resp. Rep. Br.” I note that neither Respondent’s Initial Post-Hearing Brief nor Reply Post-Hearing Brief contains numbered pages, thereby necessitating references to physical page numbers.

forth in Section 301(a). 33 U.S.C. § 1342(a)-(b). Thus, those sections of the Act operate to bar any person from discharging a pollutant “without obtaining a permit and complying with its terms.” *EPA v. California*, 426 U.S. 200, 205 (1976).

For purposes of the relevant provisions of the CWA, the phrase “discharge of a pollutant” is defined by the CWA to include “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12). The CWA proceeds to define the term “pollutant” as including, among other meanings, dredged spoil, rock, and sand discharged into water. 33 U.S.C. § 1362(6). In turn, the term “navigable waters” is defined as “waters of the United States.” 33 U.S.C. § 1362(7). The term “point source” is defined as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). The term “person” is defined to include an individual. 33 U.S.C. § 1362(5). Finally, regulations promulgated to implement the CWA defined the phrase “waters of the United States” at the time of the violation to include “[a]ll waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide,” and tributaries of those waters. 40 C.F.R. § 122.2 (1983).<sup>11</sup>

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<sup>11</sup> The Agency has since engaged in rulemaking that amends the definition of the phrase; however, it did not alter the language quoted herein. See The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22,250

### **B. Penalty for Violations of that Prohibition**

The CWA authorizes the Administrator of EPA, upon finding that a person has violated Section 301 of the statute, to assess a civil administrative penalty in an amount not to exceed \$16,000 per day for each day during which the violation continues, up to a maximum of \$187,500, for violations occurring after December 6, 2013, through November 2, 2015. 33 U.S.C. § 1319(g)(1)(A), (g)(2)(B); 40 C.F.R. § 19.4.<sup>12</sup>

For purposes of determining the appropriate amount of penalty to impose, the CWA requires the Administrator to consider the following factors: the nature, circumstances, extent, and gravity of the violation; the violator's ability to pay, prior history of such violations, degree of culpability, and economic benefit or savings resulting from the violation; and "such other matters as justice may require." 33 U.S.C. § 1319(g)(3). As observed by the Environmental Appeals Board ("EAB" or "Board"), however, "[t]he Act does not . . . 'prescribe a precise formula by which these factors must be computed' nor does it provide any guidance regarding the relative weight to be given to any of them." *Phoenix Constr. Servs.*, 11 E.A.D. 379, 394 (EAB 2004) (quoting *Advanced Elecs., Inc.*, 10 E.A.D. 385, 399 (EAB 2002)). Accordingly, penalty

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(April 21, 2020). In any event, any post-violation amendment to the definition does not affect my analysis.

<sup>12</sup> The amounts stated herein are those shown in Table 1, 40 C.F.R. § 19.4, reflecting the statutory penalty amounts adjusted pursuant to Section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 (note), as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701 (note).

calculations under the CWA are “highly discretionary.” *Tull v. United States*, 481 U.S. 412, 426-27 (1987).

The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“Rules of Practice”) that govern this proceeding, in turn, require this Tribunal to determine the appropriate amount of penalty to assess based on the evidentiary record and in accordance with any penalty criteria set forth in the applicable statute, and to consider any civil penalty guidelines issued under the applicable statute in making its determination. 40 C.F.R. § 22.27(b). To that end, Complainant utilized and offered into evidence two Agency guidance documents contained in a single proposed exhibit, CX 35. Specifically, CX 35 included the *Policy on Civil Penalties*, *EPA General Enforcement Policy #GM-21* and *A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA’s Policy on Civil Penalties*, *EPA General Enforcement Policy #GM-22* (collectively referred to as the “Penalty Policy”). Tr. 130; CX 35. I admitted CX 35 into evidence at the hearing and considered it in my penalty evaluation and assessment.<sup>13</sup>

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<sup>13</sup> I note, as a point of clarification, that the guidance document titled *A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA’s Policy on Civil Penalties*, *EPA General Enforcement Policy #GM-22*, was separately proposed as CX 36 but not offered into evidence. As previously stated, this guidance document is also contained within CX 35, which was admitted into evidence and considered in this decision. Tr. 131-32; CX 35, BSN 1439-69.

### **III. Summary of Factual Findings**

As noted above, in my Order on AD, I concluded that no genuine issue of material fact existed and that Complainant was entitled to judgment as a matter of law with respect to each element of statutory liability for the charged violation. Specifically, I determined that (1) Respondent is a “person,” as that term is defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5); (2) his operation of a suction dredge in the SFCR on July 22, 2015, resulted in the “discharge of a pollutant” within the meaning of Section 502(12) and (6) of the CWA, 33 U.S.C. § 1362(12) and (6); (3) the suction dredge constituted a “point source” of the given pollutants, as that term is defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14); (4) the SFCR is a “navigable water,” as that term is defined by Section 502(7) of the CWA, 33 U.S.C. § 1362(7); and (5) Respondent’s operation of the suction dredge was not authorized under any NPDES permit. Thus, I concluded that Respondent’s activity constituted a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a). With liability established, the outstanding issue to be resolved is limited to the appropriate monetary penalty to be assessed for the established violation, which was the subject of the evidentiary hearing in this matter. While the factual summary below relates to my consideration of the monetary penalty to be assessed for Respondent’s violative conduct, certain included facts might also be relevant to liability; however, they are included purely for contextual purposes and to guide my analysis.

### **A. Suction Dredge Operations on South Fork Clearwater River**

The SFCR is located in north-central Idaho, a region that contains numerous mineral resources, including gold. Order on AD at 5. The SFCR is designated as a “critical habitat” under the ESA for Snake River Basin Steelhead Trout, Snake River Fall Chinook Salmon, and Columbia Basin Bull Trout, all listed as threatened under the ESA, and it is designated as an “essential fish habitat” for Pacific Coast Coho Salmon and Snake River Fall Chinook Salmon. Tr. 321, 419-21, 426; CX 17, 18. As a “critical habitat,” it is sensitive to sediment, the pollutant at issue in this proceeding. Tr. 137, 221. Sediment is also discussed, in the context of suction dredging, as turbidity in the water. Tr. 182-84, 199-200, 428. Additionally, the Agency at times has referred to sediment as suspended solids, a more broad and technical term and one that is captured by the limited terminology available to it in its data system. Tr. 182-84, 199-200.

The SFCR has been designated as “impaired” for sediment, meaning that it does not meet state water quality standards with regard to that pollutant.<sup>14</sup> Tr. 137-38, 222. To address the exceedance of those standards, the state of Idaho developed a total maximum daily load (“TMDL”) for sediment for the SFCR. Tr. 137-38, 222-23; CX 6. The TMDL establishes a limitation on “inputs to the [SFCR] . . . to attempt to bring that river back to meeting water quality standards at some later date.” Tr. 138.

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<sup>14</sup> A waterway is listed as “impaired” pursuant to Section 303(d) of the CWA, 33 U.S.C. § 1313(d).

Within the TMDL, the state “developed waste load allocations that were applicable to suction dredging.” Tr. 222-23. These waste load allocations were then considered in the development of a general NPDES permit entitled “Authorization to Discharge Under the National Pollutant Discharge Elimination System for Small Suction Dredge Placer Miners in Idaho, General Permit No.: IDG370000” (“General Permit”), which took effect on May 6, 2013. Tr. 119-120, 217-18, 223-24; CX 3. This General Permit pertains to Idaho operators of placer mining operations using small suction dredge equipment, meaning an intake nozzle size of five inches in diameter or less, and authorized discharges from a maximum of 15 small suction dredge operations in specific waters in Idaho. Tr. 119-120, 217-18, 223-24; CX 3.

The General Permit states that “[a]uthorization to discharge requires written notification from EPA that coverage has been granted to the operation.” CX 3, BSN 30. Further, it makes clear that “[d]ischarges from suction dredges are not covered by this general permit in habitat designated as critical habitat (*see* Appendix G) under the Endangered Species Act (ESA),” which includes the Clearwater River Basin, unless certain requirements are met. CX 3, BSN 31-32. An appendix to the General Permit lists designated critical habitats under the ESA that were conditionally closed under the permit, including the SFCR. Tr. 220-21; CX 39, BSN 1535. Thus, authorization to discharge under the General Permit did not extend to the SFCR. Tr. 120-21, 232; CX 3, BSN 31-32. To reopen such a conditionally closed area for purposes of small suction dredge operations, an ESA consultation must first be conducted. Tr. 221-22; CX 3, BSN 31. This

consultation, which can be a long process, was not completed at the time of the violation in this case. Tr. 222, 271. Although discussions between involved government entities—namely, the NMFS and the U.S. Fish and Wildlife Service (“FWS”)—had been started, a biological assessment had yet to be completed. Tr. 271. Thus, as of the date of the violation in this case, coverage under the General Permit was not available for any small suction dredge operators on the SFCR. *See* Tr. 232.

#### **B. Respondent's Actions Prior to Date of Violation**

Respondent owns a mining claim on the SFCR. Order on AD at 5. He engages in the business of gold mining on his claim, and his interest in mining is professional, not recreational. Tr. 151-53; CX 10, BSN 859; Order on AD at 5.

On February 10, 2014, roughly nine months after the General Permit took effect, Respondent filed a Joint Application for Permits (“Joint Application”) with the U.S. Army Corps of Engineers (“ACE”), the Idaho Department of Water Resources (“IDWR”), and the Idaho Department of Lands, in which he identified himself as a professional dredger with 20 years of experience mining under five state permits, including Idaho. CX 10, BSN 859. In his Joint Application, Respondent sought approval of anticipated dredging activities to take place in two waterbodies, the SFCR and McCoy Creek, to begin on June 15, 2014, and last until September 15, 2014. Tr. 151-53; CX 10. In response, by letter dated February 11, 2014 (“ACE Letter”), the ACE notified Respondent that “EPA has the lead for recreational suction dredging in Idaho

under the Clean Water Act" and that the ACE sent Respondent's application "to EPA for their review and processing." CX 9, BSN 855; *see also* Tr. 154, 156. The ACE further informed Respondent that his "suction dredging project in the South Fork Clearwater River is located in an area which is designated as critical habitat for bull trout and also has been known to support bull trout and Snake River Basin steelhead which are protected under the Endangered Species Act of 1973, as amended." CX 9, BSN 855; *see also* Tr. 155. Thus, the ACE suggested to Respondent that he "contact the US Fish and Wildlife Service and the National Marine Fisheries Service before [he] begin any work at this site to ensure that [he] compl[ies] with provisions of the Endangered Species Act." CX 9, BSN 855; *see also* Tr. 155-56.

By letter dated October 3, 2014 ("EPA Letter"), EPA replied to Respondent and informed him that the SFCR "contains critical habitat for bull trout, steelhead, and Chinook salmon, requiring an Endangered Species Act (ESA) determination before suction dredging can be permitted (see Part I.D.4 of the [General Permit] on page 5)." CX 8, BSN 853-54; *see also* Tr. 156-57. EPA provided Respondent with the contact information for Clint Hughes to "inquire about ESA Consultation and the U.S. Forest Service's requirements for submitting a Notice of Intent (NOI) and/or Plan of Operations for the South Fork Clearwater River within the Nez Perce-Clearwater National Forests." CX 8, BSN 854. Further, EPA advised, "Please be aware, permit coverage from the EPA and the Idaho Department of Water Resources (IDWR) is required in order to operate a small suction

dredge in Idaho. The EPA and IDWR do not share the exact same list of open and closed waterbodies.” *Id.*

On May 13, 2015, the IDWR issued an “Idaho Recreational Mining Authorization (LETTER PERMIT)” (“IDWR Letter Permit”) to Respondent. CX 29. The IDWR Letter Permit authorized him “to operate recreational mining equipment to alter a stream channel” in the waterways he identified, which included the SFCR, in accordance with local rules and instructions. CX 29, BSN 1415-16. Under a section identified as “Special Conditions,” the IDWR Letter Permit specified that it did “not serve in lieu of other permits that may be required by federal or other state agencies or in any way constitute an exemption of other permit requirements.” CX 29, BSN 1415. Further, in bold font, the IDWR Letter Permit cautioned that “[t]he US Environmental Protection Agency (EPA) now requires an NPDES general permit for small scale suction dredging in Idaho” and added that “[t]he EPA should be contacted on their requirements in Idaho.” *Id.*; *see also* Tr. 163-64.

On May 17, 2015, Respondent completed a form titled “Appendix A, Notice of Intent (NOI) Information Sheet, NPDES General Permit IDG370000, Small Suction Dredge” (“NOI”), which was stamped as received by EPA on May 29, 2015. Tr. 159; CX 12. In that document, Respondent identified several water bodies, including the SFCR, in which he intended to conduct suction dredge operations using equipment with a suction dredge nozzle of five inches and an equipment rating of 13 horsepower [a small suction dredge]. CX 12. For the SFCR specifically, he identified the dates of operation as July 20, 2015, to August 15, 2015. *Id.*

### C. Events on Date of Violation

On July 22, 2015, Respondent mined for gold with his “small suction dredge” on the SFCR.<sup>15</sup> Respondent did not possess an individual NPDES permit authorizing any discharges from his suction dredge into the SFCR on July 22, 2015, nor were such discharges authorized under the General Permit in effect at that time. Tr. 221-22, 232; CX 27.<sup>16</sup> Respondent’s actions were observed by Clint Hughes (“Mr. Hughes”), a geologist and mineral examiner and administrator with the USDA Forest Service, who subsequently prepared a Mineral Inspection Form (“Hughes Report”) documenting his observations of Respondent’s activities. Tr. 41-42, 45-47; CX 1.<sup>17</sup> Notably, Mr. Hughes’ inspection was triggered by information shared about a month earlier from an American Mining Rights Association website posting. Tr. 46-47. Additionally, he received reports from individuals driving along the river, about two days prior to the incident, that dredgers were present. Tr. 47. From these reports, Mr. Hughes was under the impression that there were six to 12 dredgers along the river. Tr. 47. Upon inspection on July 22, 2015, Mr. Hughes observed 11 dredgers on the river. *Id.*

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<sup>15</sup> Respondent’s suction dredge constituted a “point source” within the meaning of the CWA, and his operation of that dredge in the SFCR resulted in the “addition of a pollutant” to the waterway in the form of suspended solids appearing as a plume of turbid water that dispersed the solid materials downstream, such that a “discharge of a pollutant” occurred within the meaning of the CWA. *See Order on AD at 20.*

<sup>16</sup> *See also Order on AD at 5, 21-22.*

<sup>17</sup> *See also Order on AD at 5.*

In the Hughes Report, Mr. Hughes documented his observations of Respondent actively dredging in close proximity to another dredger, including photographs of what he observed, and he identified "Site #2" as the location of such dredging in the SFCR. Tr. 48-51, 59; CX 1, BSN 2, 5-8; CX 1A-C. Mr. Hughes described Site #2 in the Hughes Report as follows:

This site had two dredges working is [sic] close proximity to each other and were both 5" dredges, which was confirmed by the dredgers themselves. The dredgers were [RJR] (upstream dredge with green pontoons) and [Respondent] operating the dredge with blue pontoons. These two were observed actively dredging with the plume from the upstream dredge mixing with the plume of the downstream dredge. Both of these gentlemen were given a [Notice of Non-Compliance] letter (see photos).

CX 1, BSN 2. Mr. Hughes reiterated at the hearing that he observed a large plume emanating from both dredges, and he estimated the distance between the dredges to be approximately 50 feet.<sup>18</sup> Tr. 52, 70, 84.

Mr. Hughes described the plume "coming off" of Respondent's dredge, as shown in a photograph he took from the riverbank looking out over the area, as "a little white speck on the top of the water . . . where the water [was] being disturbed by the water flowing

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<sup>18</sup> Although Respondent was not authorized to discharge from his dredge, notably, neither state nor federal permits allow for a mere 50-foot separation between small suction dredges. Rather, the IDWR requires at least 100 feet and the General Permit mandates 800 feet. Tr. 70-71, 216; CX 3, BSN 40.

over the dredge and back into the river." Tr. 60-61 (referring to CX 1, BSN 5). He explained that a plume "is constantly changing" depending upon the materials being drawn into the dredge at a given moment. Tr. 67. Behind Respondent's dredge, Mr. Hughes noted, "there [was] a lot of sediment . . . , a lot of gravel," and he observed "water . . . actively flowing over the dredge" and "some sediment coming across . . . the sluice box on the dredge" and exiting from the back of the dredge. Tr. 67. Mr. Hughes explained that the sediment and gravel that exits behind a dredge creates what is referred to as a "dredge pile," the formation of which necessitates continuous movement of the dredge to open areas so that the flow of the sediment and gravel through and out of the dredge is not impeded. Tr. 102-03. Mr. Hughes "followed the plume downriver . . . for about 220 [feet]" until the plume "went around the bend of the river" and he was blocked by vegetation and unable to continue to follow the its path. Tr. 67-68. He estimated the width of the plume to be anywhere from five to 15 feet depending upon its proximity to the dredge, as the plume "starts spreading out fairly quickly once it leaves the back of the dredge." Tr. 69.

At the conclusion of his inspection, Mr. Hughes issued Respondent a Notice of Non-Compliance. Tr. 71. According to Mr. Hughes, Respondent did not appear to be "all that surprised" by this notice. *Id.*

#### **D. Notice of Violation and Request for Information**

Thereafter, on January 22, 2016, EPA notified Respondent, via certified mail, of a Notice of Violation ("NOV") and Request for Information ("RFI") concerning

his dredging activity on July 22, 2015, on the SFCR. *See* CX 27. Specifically, the Agency notified Respondent of an alleged violation under the CWA for Respondent's discharge of pollutants from a suction dredge, owned or controlled by Respondent, in the SFCR without authorization under a NPDES Permit, and it requested additional information from Respondent concerning his activities. Tr. 126; CX 27. EPA referenced the earlier October 2014 letter it had sent to Respondent (CX 8) and reiterated much of the pertinent content contained therein regarding the SFCR's critical habitat for threatened species and impaired condition for sediment and temperature. CX 27, BSN 1408. Additionally, the Agency noted that while the U.S. Forest Service had initiated a "combined environmental analysis for small-scale placer mining (suction dredging) in the [SFCR]," it had not yet completed its consultation with the FWS and NMFS, which is a necessary prerequisite for the U.S. Forest Service to approve the Plan of Operations required of suction dredgers operating along streams that contain threatened or endangered species within the Nez Perce-Clearwater National Forest. CX 27, BSN 1408-09. Accordingly, the Agency advised, suction dredging within the SFCR could not be covered under the General Permit. CX 27, BSN 1409. Further, EPA pointed out that Respondent had not, as an alternative to the General Permit, applied for an individual NPDES permit for his operation on the SFCR. *Id.*

Aside from notifying Respondent that the discharge of pollutants from a suction dredge into a water of the United States without authorization under an NPDES permit is a violation of the CWA and

that such violations may “result in liability for statutory civil or administrative penalties,” the Agency sought information from Respondent to evaluate whether Respondent had complied with the CWA requirements. CX 27, BSN 1409. To that end, EPA requested certain details about Respondent’s dredging activities on the SFCR in July and August 2015 and established a 45-day deadline within which to provide the requested information. *Id.* Respondent replied in a letter received by EPA on February 4, 2016, in which Respondent challenged the legal and factual bases for EPA’s NOV and did not respond to the RFI. Tr. 128-29; CX 28.

#### **E. Daniel Kenney’s Opinion**

In early February 2016, Daniel Kenney (“Mr. Kenney”—a Fisheries Biologist with the USDA Forest Service who, as previously noted, was deemed an expert in fisheries species, including ESA-listed species in the SFCR, suction dredge mining impacts on such ESA-listed species, and the ESA consultation process—issued an investigative report entitled “An Investigation of Stream Channel Modifications at Unauthorized Suction Dredging Sites on the South Fork Clearwater River, October 7 and 8, 2015” (“Kenney Report”). Tr. 272-73; CX 37. Mr. Kenney undertook this investigation to evaluate suction dredging, including unauthorized dredging, on the SFCR and to evaluate its subsequent effects through later evaluations in 2016 and 2017. Tr. 264-65, 273-74; CX 37, 38. In 2015, Mr. Kenney was in the process of developing an Environmental Assessment regarding suction dredging on the SFCR, as well as a Biological Assessment for such dredging, and he expected that the information gained

from his investigation would be useful in the development of those assessments. Tr. 264, 273-74, 320-21.

Mr. Kenney and his technicians identified 14 different unauthorized dredging areas during their site visits to the SFCR on October 7 and 8, 2015. Tr. 280; CX 37, BSN 1505. Utilizing the GPS coordinates and photos contained in the Hughes Report, Mr. Kenney identified Respondent's unauthorized dredging site (labeled in the Hughes Report as "Site #2") and labeled it as "Site # 14" in his report. Tr. 280-83; CX 37, BSN 1519, 1523. Specific to the area Respondent dredged on July 22, 2015, Mr. Kenney identified the "dredge hole" that Respondent created as "Hole #5" and the "tailings pile" that Respondent created as "Tailings Pile #7." Tr. 284-86; CX 37, BSN 1519, 1523. As used by Mr. Kenney, the term "dredge hole" is "what a miner constructs to try to find gold," which is "[g]enerally . . . towards the bottom and perhaps even on or within the bedrock." Tr. 275-76. A miner will use his "hands and the dredge to move the bottom substrate to get down to the bottom," essentially "digging a hole in the stream substrate." Tr. 276. Thus, the "dredge hole" is effectively a "hole in the stream bottom" that is "wider at the top than it is at the bottom, and [with] edges." *Id.* A dredge creates a "dredge hole" when the miner, through the use of a gasoline-powered pump, generates suction through a hose, the nozzle of which is then placed on the substrate. Tr. 276. The substrate is then sucked through the hose and across the sluice box of the dredge, which is designed to capture any gold contained therein, and the remaining substrate then exits from the end of the dredge back into the waterway. Tr. 276-77. This exiting material, or "mine

tailings,” is typically comprised of sand and gravel, and it creates the “tailings pile.” Tr. 277. Respondent stipulated, during the evidentiary hearing, that he indeed created Hole #5 and Tailings Pile #7.<sup>19</sup> Tr. 382-83.

During their site visits to the SFCR, Mr. Kenney’s technicians took measurements and photographs of Hole #5 and Tailings Pile #7, from which Mr. Kenney made certain calculations. Tr. 292-96. In particular, Mr. Kenney calculated Hole #5 to be 5.6 meters in length, 4.3 meters in width, 1.1 meters in depth (from the water surface to the deepest portion of the hole), and a roughly calculated volume of 15.4 cubic meters. Tr. 292, 294; CX 37, BSN 1519. Mr. Kenney calculated Tailings Pile #7 to be eight meters in length, 7.8 meters in width, and a roughly calculated volume of five cubic meters. Tr. 295-96; CX 37, BSN 1519.

Based on the information that he and his team collected regarding Hole #5 and Tailings Pile #7, Mr. Kenney offered an opinion as to whether Respondent’s dredging activities caused direct injury to fish and invertebrates. *See* Tr. 296. First, Mr. Kenney opined as follows:

[T]he construction of the hole required the basically disassembly of the stream bottom down-presumably down to the bedrock of the size hole I mentioned. This was habitat undoubtedly for many hundreds or more of aquatic invertebrates, such as aquatic insects.

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<sup>19</sup> While Respondent stipulated that he created Hole #5 and Tailings Pile #7, he later, while reiterating his stipulation, appeared also to question the existence of evidence to establish that he “completed” Hole #5 and Tailings Pile #7. *See* Tr. 390-91.

It's possible that there could have been small fish within that area that was dredged, although I can't say for certain about that.

Similarly, the tailings pile covered up a relatively small [sic] for the river as a whole, but a substantial area of what was predominantly cobbles, and potentially either smothered some invertebrates or at least filled in some of the interstitial spaces between the cobbles. And it's possible that there could have been fish in that area too that might have been affected.

Tr. 296-97.

Mr. Kenney then opined that Respondent's dredging activities adversely impacted multiple habitats in the SFCR. Tr. 297. Mr. Kenney identified three in particular: the first habitat being "in the water column itself," a second habitat being "on the surface of the stream bottom," and a third habitat being "below the surface of the stream bottom and into the substrate for a certain depth." Tr. 297-98. With regard to first impacted habitat—the water column—Mr. Kenney referred to the turbidity created by the operation of the dredge, as reflected in the Hughes Report and related testimony, and opined that it created a subnormal environment for the fish that live and feed in the water column. Tr. 299-300. Elaborating on this point, he highlighted the reduction in visibility caused by the turbidity due to the suspension of clays and fine sediment. Tr. 300.

As to the second impacted habitat—the surface of the stream bottom—Mr. Kenney explained that during the summer months, the dredged area would otherwise

be “in an undisturbed state . . . covered with algae that’s growing” and that it would provide “a place that aquatic invertebrates live either on top of or among the cobbles on the surface.” Tr. 298. The area would “also provide[] at least some habitat for fish.” *Id.* Speaking more specifically as to the impacts created by Respondent’s dredging, Mr. Kenney testified that the creation of the dredge hole resulted in manual manipulation of the habitat by Respondent physically moving and relocating larger cobbles in order to dredge and by the operation of the dredge itself, which moves material, including finer sand material, through the dredge and places it in a different area. *Id.*

Finally, with regard to the third impacted habitat—the stream bottom—Mr. Kenney described the environment as follows:

[O]n the stream bottom, especially where there is relatively high stream flow velocities during certain parts of the year, the material that remains are relatively large cobbles and small boulders. And so, since they don’t fit together exactly, there are spaces as these cobbles and boulders are piled up [referred to as interstitial spaces and habitat], and so there are fishes and aquatic invertebrates that live within these spaces.

Tr. 299. As to the impacts on this habitat from dredging activity, Mr. Kenney opined that these interstitial spaces were “moved in the creation of the [dredge] hole in the first place, and then there were also the potential filling in of these interstitial spaces

with the fine fines<sup>20</sup> mostly in the form of sand that created the tailings pile.” *Id.*

Mr. Kenney opined that the reductions in these habitats can, in turn, impact ESA-listed species, particularly juvenile steelhead trout that are regularly found in the SFCR. Tr. 300. These juveniles (at the “fry” or “parr” stages of development) find refuge “along the stream banks or in eddies or in weed debris piles,” as well as in interstitial spaces. *Id.* Additionally, Mr. Kenney explained, the prey species upon which ESA-listed species rely are impacted by the modification or removal of the subject habitats insomuch as those changes result in “less space for these aquatic invertebrates to live” and/or direct injury to those species during the process. Tr. 301.

Mr. Kenney continued to opine that the process of suction dredging causes a disruption to the stream bottom “armor,” which he described as larger substrates like cobbles and small boulders on the surface of the stream bottom that remain in place despite seasonal water flows and that keep the finer material present underneath from being swept away by the higher flow lines. Tr. 301-02. By causing such a disruption, Mr. Kenney testified, the dredging activity creates an adverse environmental impact by potentially destabilizing the stream channel, particularly around the area of the dredge hole, due to the finer materials now exposed by the dredging activity being picked up and moved farther downstream by high flows, “where those fine materials can then potentially affect the interstitial spaces and the surfaces of materials of

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<sup>20</sup> Mr. Kenney explained that the term “fines” means “fine sediment in the forms of clay particles and silt particles.” Tr. 305.

larger substrate downstream, or accumulate in areas where these fines accumulate and get even thicker.” Tr. 303. Noting that such fine sediments are considered problematic in the SFCR, Mr. Kenney reiterated that “the destabilization of the stream channel has the potential to adversely affect the fine sediment load downstream of the site.” Tr. 304. The movement of these finer materials by virtue of dredging activity leads to their infiltration into interstitial spaces that “will reduce the potential for both the fish to have a sheltering habitat and for the macro invertebrates to live.” *Id.* Additionally, more “fines” are then potentially put into steelhead spawning habitat, “which is an adverse thing for the incubation of the eggs and the fry in the steelhead nest.” *Id.*

Aside from these impacts, the data that Mr. Kenney collected also led to his conclusion that Respondent’s dredging activity caused turbidity in the SFCR. Tr. 304-05. Referring to photographic evidence in the Kenney Report, Mr. Kenney noted “light areas” downstream of two large in-stream boulders that likely were comprised of “small fines in the form of small sand and some silt,” as well as “substrate . . . of a finer quality” around the edges of the dredge pile (as compared to “farther on up”), which is consistent with the gravel and sand dropping out before the fines downstream of the sand. Tr.306-07 (referring to CX 37, BSN 1523). He also referred to the photographs contained in the Hughes Report, highlighting the visibility of “white water” discharging from both RJR’s green dredge and Respondent’s blue dredge and the existence of two separate plumes of turbidity by that dredging activity. Tr. 307-11 (referring to CX 1, BSN 5; CX 1B). According to Mr. Kenney, such increased

turbidity impacts the ESA-listed species in the SFCR, especially young steelhead trout, which are primarily “visual feeders” that “pick[] . . . little invertebrates out of the water column as the water flows past them.” Tr.311. The increased turbidity “can impair their ability to see and catch these food items and, in that manner, reduce at least potentially their growth and inevitably . . . their survival long-term.” Tr. 311-12. Where, as in this case, the plumes of turbidity are “relatively discrete and narrow” and thus easier for fish to avoid, the turbidity still reduces the area in which they can feed. Tr. 312.

On May 12, 2017, Mr. Kenney issued an addendum (“Kenney Addendum”) to the Kenney Report that described observations of Site #14 during a subsequent site visit conducted on September 13, 2016, and how the conditions of Site #14 in 2016 compared to those in 2015. Tr. 312-13; CX 38. As with the initial site visit in 2015, measurements of Hole #5 and Tailings Pile #7 were taken during the 2016 site visit, from which certain calculations were made and compared to the 2015 calculations. Tr. 313-18; CX 38. From the 2016 measurements, Mr. Kenney calculated Hole #5 to be 5.8 meters in length, 3.6 meters in width, with an adjusted depth of 0.8 meters. Tr. 313; CX 38, BSN 1526. After making adjustments “for the ambient water level and for the non-square shape of the hole,” Mr. Kenney determined that about 55 percent of the hole remained in 2016. Tr. 315. In turn, Mr. Kenney calculated Tailings Pile #7 to be 7.8 meters in length and 5.2 meters in width. Tr. 313; CX 38, BSN 1526. Mr. Kenney then determined that “about 63 percent of the area of that tailings pile was still visibly evident.” Tr. 315. Acknowledging the roughness of

those determination, he ultimately estimated that about half of Hole #5 and Tailings Pile #7 remained in 2016. *Id.*

Mr. Kenney determined that “[a] comparison of measurements and photographs shows that the modifications of the stream channel at Site #14 caused by unauthorized suction dredging in the summer of 2015 had substantially reverted toward the pre-dredging condition by September 2016.” CX 38, BSN 1524. As evinced by “both the measurements and photos,” Mr. Kenney noted that “[t]he area and volume of the dredge holes was generally reduced, presumably because small and moderate-sized substrate particles in the form of bedload at high flow velocity had been swept into and lodged into the holes.” *Id.* With regard to the tailings pile, Mr. Kenney noted:

The area and density of fine sediment (sand and small gravel) in the areas identified in 2015 . . . was reduced in 2016 (presumably, again, because of interim occasions of high flow velocity), particularly the ubiquity of the fine sediment within the tailings pile areas and any apparent depth to these fines.

*Id.* He concluded that “the channel modifications caused by the unauthorized dredging at Site #14 in 2015 recovered toward their pre-dredging condition somewhat in the following year, but were still observable.” *Id.* Further, he projected that “[s]ubsequent peak flow events will likely continue to change substrate conditions at the site, but because stream channel conditions are naturally unstable to a greater or lesser extent, the site is unlikely to ever return to the pre-dredging state.” *Id.* When asked at the hearing for the rationale behind this conclusion,

Mr. Kenney explained, “I believe that the way that the hole is being refilled by high flows is not going to result in the same level of stability as . . . was present prior to the dredging.” Tr. 318.

In October 2018, Mr. Kenney returned to the same site and observed that “the hole had been completely filled in” and that “no visible sign of the tailings pile” was left. Tr. 318. While Mr. Kenney suspected that “a higher level of interstitial fines [was still] left over,” he explained that “at-depth sampling” would need to be performed to confirm his suspicions. Tr. 319. Mr. Kenney found that Respondent’s dredging activities on July 22, 2015, likely continued to cause adverse impacts in 2018, but to a lesser extent than the level of adverse impact in 2015 and 2016. *Id.* He summarized that while “the changes may never completely recover,” there likely were incremental improvements in the conditions from year to year. *Id.*

The Biological Assessment (“BA”) that Mr. Kenney began in 2015, prior to his investigation of Respondent’s dredge site, was completed and issued on April 6, 2016. Tr. 320; CX 21. The BA was produced on behalf of the USDA Forest Service to meet obligations under the ESA to analyze potential effects of certain activities on ESA-listed species, Tr. 320-21, and its focus was on the “proposed suction dredging activities during the 2016 through 2025 mining seasons within a specified area of the mainstem of the [SFCR],” CX 21, BSN 1128. Mr. Kenney concluded in the BA that the proposed suction dredging activities would be likely to adversely affect Snake River Basin Steelhead Trout by harming or harassing individuals of that species. Tr. 321; CX 21, BSN 1162. In particular, he

found that the proposed suction dredging in the SFCR created the “potential to directly harm juvenile steelhead,” as well as modify “steelhead habitat, both for juveniles and spawning habitat.” Tr. 322; *see also* CX 21, BSN 1162. In consideration of such potentially adverse effects, the BA discussed that the number of suction dredge operations on the SFCR be limited to 15 operations on an annual basis, and it also included “specific conditions regarding mitigation measures, monitoring, and reporting for proposed suction dredge mining” that were to be followed and that were intended to mitigate the harm caused by suction dredging activities. CX 21, BSN 1138; *see also* Tr. 332-33.

Although Respondent’s suction dredging activities on the SFCR on July 22, 2015, were not authorized, Mr. Kenney noted that Respondent failed to meet various Mitigation Measures (“MMs”) contained in the BA that would have otherwise been required. Tr. 333-39; CX 21, BSN 1138-41. In particular, Mr. Kenney addressed MMs #1, 3, 7-9, 13, and 15. Tr. 333-339. MM #1 requires that each miner submit a plan of operations, including various specifications regarding their mining plan, and agree to abide by all MMs and other terms and conditions. Tr. 333; CX 21, BSN 1139. MM #3 requires a USDA Forest Service or Bureau of Land Management biologist to inspect the proposed dredge operation site prior to any mining to protect against or mitigate any potential harm to ESA-listed species and other sensitive fish and invertebrate species in the area. Tr. 334; CX 21, BSN 1139. The harm being mitigated by this measure, Mr. Kenney explained, is that mining activities inherently disrupt habitat and sometimes the actual bodies of

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organisms due to the digging up of the stream bottom and discharge of materials to a different place in the stream channel. Tr. 334-35. MMs #7-9 require, among other things, that dredge holes be filled with the material that was removed (manually or by use of the suction dredge), and that tailings piles be treated to reduce the amount of stream bottom that they cover by, for example, suctioning the finer tailings and returning them to the dredge hole. Tr. 335-37; CX 21, BSN 1139-40. Mr. Kenney explained that the intention behind these measures is to “have the miner restore the site to as close to the . . . original condition as possible . . . to reduce the long-term impacts of the dredging.” Tr. 336. MM#13 requires operators to “visually monitor the stream for 150 feet downstream of the dredging or sluicing operation,” CX 21, BSN 1140, in order to monitor and minimize turbidity and cease operations as necessary to reduce the volume of any plume, Tr. 338; CX 21, BSN 1140. MM#15 requires operators to “maintain a minimum spacing of at least 800 linear feet of stream channel between active mining operations.” CX 21, BSN 1140. Mr. Kenney explained that the intention behind this measure is to “reduce the cumulative effects of the mining” and to “space things out such that the effects are not concentrated.” Tr. 339. Mr. Kenney opined that failing to comply with these and other MMs would lead to increased harm to ESA-listed species in the SFCR. Tr. 340.

In addition to the BA, Mr. Kenney also contributed to the development of the Environmental Assessment (“EA”) issued in June 2016 that addressed small scale suction dredging in the SFCR. Tr. 266-67; CX 22. Specifically, he “did all the aquatics analysis and

biological analysis, and [he] also provided a lot of the proposed mitigation measures and research analysis.” Tr. 266-67. Similar to the BA, the EA proposed a limit of 15 suction dredging operations in the SFCR and various mitigation measures to reduce the harm caused by suction dredging activities. CX 22, BSN 1226, 1269-76.

#### **F. David Lee Arthaud’s Opinion**

David Lee Arthaud (“Mr. Arthaud”)-a Fisheries Biologist with the NMFS of the National Oceanic and Atmospheric Administration who, as noted above, was deemed an expert in ESA-listed species in the SFCR and the impacts of suction dredge mining on those species—reviewed the evidence presented in this case, as well as “dozens of... primary literature on scientific literature on sediment, sedimentation, turbidity, [and] those types of things,” in forming his expert opinion that was offered in this matter. Tr. 410. Mr. Arthaud has authored 15 biological opinions—all relating to the impacts of particular activities on salmonids—as well as letters of concurrence that, collectively, were utilized in the ESA Section 7 consultation process, and he has published scientific papers on such topics. Tr. 413-16, 418, 438-40; CX 16, 17, 19, 20.

Notably, one such biological opinion prepared as part of the ESA consultation process was issued on June 14, 2016, and addressed the effects of the SFCR suction dredging program (“BiOp”). Tr. 415, 475-77; CX 17. As Mr. Arthaud recounted, the purpose of this BiOp was “to summarize the existing science and knowledge on an issue that could have adverse effects to fish and to provide our opinion on it and offer ways

to mitigate the harms, the potential harms and adversity and those usually fall under terms and conditions in the monitoring plan.” Tr. 419.

Mr. Arthaud explained that the entire main stem of the SFCR, as well as most of the tributaries and links to them, have been designated as endangered species “critical habitat” for Snake River Basin Steelhead Trout, an ESA-listed species with “threatened” status. Tr. 420-22; CX 17, BSN 977, 1004; CX 18. Use of the term “critical habitat” signifies that the species needs such areas “to maintain [its] population numbers . . . and for [its] recovery.” Tr. 422. In the SFCR, this critical habitat is considered to be “degraded” by factors that impose limitations on the habitat—namely, riparian and floodplain conditions, temperature, migration barriers, sediment, and habitat complexity—all of which embody excesses of sediment that contribute to their limiting nature. Tr. 422-24; CX 17, BSN 1007. Mr. Arthaud noted that the SFCR “has a high amount of sediment from legacy mining, placer mining that has occurred in the past and that has taken 50 to 100 years to begin to recover.” Tr. 424-25. Aside from its designation as a critical habitat, the entire SFCR watershed is also classified as an “essential fish habitat,” or “EFH,” for Pacific Coast Coho Salmon and Snake River Fall Chinook Salmon. Tr. 426; CX 18. As explained by Mr. Arthaud, it carries this classification because the area is deemed “essential” for these species’ “productivity and survival.” Tr. 426.

Mr. Arthaud opined that, in general, suction dredge mining causes adverse environmental impacts in the SFCR. Tr. 426, 443; CX 18. In particular, he concluded that such mining causes direct disturbances

to the river's substrate and to the organisms in the area, Tr. 426-428; the suspension of sediments and sedimentation affecting aquatic invertebrates and habitat of ESA-listed species, Tr. 428-33; and fluvial geomorphic impacts, Tr. 434-35. Mr. Arthaud elaborated on each of these adverse environmental impacts as follows.

First, suction dredging is a repetitive activity that involves heavy movement across the substrate, disturbing gravels, aquatic invertebrates, small fish, and eggs. Tr. 426-27. The creation of a dredge hole has a direct effect on the once intact, functioning habitat that existed there prior to the creation of the hole, and the very process of suction dredging—that is, digging through the substrate and suctioning a “slurry of mixed cobbles and stones and sand” that is then raised above the water and dropped onto other functioning habitats—“causes [the] crushing of invertebrates and small fish” and results in “a burial and suffocation from the clogging of interstitial spaces” of impacted habitats. Tr. 427; *see also* CX 17, BSN 1014-17; CX 18, BSN 1065. According to Mr. Arthaud, scientific studies that have examined this direct disturbance to substrate and organisms by suction dredging have generally concluded that such disturbances are “highly lethal to eggs and the very young embryos, larval fish,” as well as to “younger stages of aquatic invertebrates like first instars and the very young larvae.” Tr. 428.

Next, the suspension of sediments created by suction dredging forms “a plume or cloudy turbidity plume below the dredge.” Tr. 428. As the dredge hole is being excavated to access bedrock under the stream bed in the miner's search for gold, a mixture of

cobbles, sand, and fines are lifted out of the water, moved through the sluice box, and emptied off the end of the dredge. *Id.* While the larger, heavier, and denser material remains at the exit point to form the “tailings,” the “finer particles are caught by the current and . . . do not fall out of suspension immediately,” thereby forming the turbid plume. *Id.* This suspension of sediments causes behavioral changes in some aquatic invertebrates, the preferred food for salmonids, and it affects the salmonids themselves, which are “highly sensitive to suspended solids and suspended grains of sand,” as well as algae. Tr. 429. Increasing levels of turbidity cause increasingly intense behavioral impacts, like more fish leaving the plume and more detrimental effects, such as coughing or development of mucous of the gills, to the fish that remain within it. Tr. 429-30. Sedimentation, which occurs when the sediments fall out of suspension in the water column and rest on “cobbles or fill up interstitial spaces,” can impact mollusks and snails and even cause mortality in those species. Tr. 430-31. Sedimentation can also impact plant life—namely, algae, which “cling[s] to rocks very tightly along the cobbles”—when “the turbidity shades their photosynthesis [and] reduces their primary production and growth.” Tr. 431. This, in turn, impacts the amount of algae available as a food source for those species that feed upon it, which then impacts other species “up the food chain to fish.” Tr. 432. The most intensive effects that sedimentation has upon ESA-listed species is to incubating eggs, which are dependent upon subsurface water flow for aeration and oxygenation. Tr. 432; CX 18, BSN 1064. Sedimentation “reduces a diffusion across the membranes for the eggs to even breathe

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oxygen,” thereby reducing their growth and survival. Tr. 432-33; *see also* CX 18, BSN 1064.

Turning to the fluvial geomorphic impacts of suction dredge mining, Mr. Arthaud explained that the term “fluvial” means “running water” and the term “geomorphic” relates to the properties of the channel through which the water flows, which can include the type, shape, substrate, and bedrock. Tr. 434. He opined that suction dredge mining causes fluvial geomorphic impacts as follows:

It digs right into the geomorphology of the stream. It digs holes, excavates down to bedrock. It exposes bedrock that wasn’t exposed before. It piles. The holes can entrain current laterally and against the bank and cause erosion. The tailings piles can be piled up, and they form dams and can drop increased sedimentation above them, where they slow the velocity of the water, and they can also steer laterally the current.

Tr. 434-35. Mr. Arthaud then characterized these impacts as adverse because “they are unnaturally caused, oftentimes during low-flow base flow seasons,” noting that “if they would have been caused by natural flows, they would have been sorted and graded by the flood.” Tr. 435. He also found that suction dredge mining effectively simplifies a habitat, meaning that “instead of having naturally deep pools and naturally shallow riffles of various sizes and diversity of rocks and other types of cover,” the habitat “just becomes a medium glide of sand like a sandbox,” with its form simple in appearance from above and below. Tr. 442-43.

From past search studies specific to salmon populations that Mr. Arthaud conducted, and from which research papers or articles were produced that he authored or co-authored, he learned that “any degradation or improvement of early rearing, spawning, early rearing and the first year of over-wintering habitat are very important for survival of salmon.” Tr. 438-42 (referring to CX 19, 20). He concluded that suction dredging in the SFCR “simplifies early rearing and spawning habitat” and “clogs . . . the interstitial spaces.” Tr. 442. Noting that during “the first year or two of overwintering, the juveniles have to go under the ground all day long every day of the winter, and then . . . come out at night [to] feed,” he explained that if sediment or sand has created a bridge over interstitial spaces, even if not entirely clogging those spaces, then the juveniles may be prevented from accessing them, resulting in a very low survival rate. Tr. 442. He elaborated that the juveniles “will either have to move and find habitat that’s clean enough to get under the cobbles for a whole winter or they will die.” *Id.*

Based upon his personal visits to Respondent’s dredge site in the SFCR beginning in August 2014 with subsequent visits every year thereafter, review of photographs of the location, and review of the Hughes Report and related testimony, Mr. Arthaud concluded that the location in which Respondent conducted his operations on July 22, 2015, was an area that could serve as habitat for endangered species and that the species present were highly likely to have been impacted by Respondent’s dredging activities. Tr. 444-45, 467-68 (referring to CX 1; CX 1A-C). In particular, Mr. Arthaud noted the photographic

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evidence of “primary production” in the form of algae on the rocks, which serves as a “food base and refugia habitat for invertebrates,” as well as a “good mix of large cobbles throughout the area,” which “provide some stability and physical structure in a sand run stream” and increase the likelihood of mussels and fish being present. Tr. 456-57, 467-68 (referring to CX 1B-C). As for the plumes depicted in the photographic evidence, Mr. Arthaud described the plume generated by RJR’s dredging activity as “quite turbid” and estimated its level of turbidity as 30-40 Nephelometric Turbidity Units (“NTUs”), while he estimated the level of turbidity of the plume generated by Respondent’s dredging activity as 25-30 NTUs, each exceeding the threshold at which more serious displacement occurs. Tr. 429-30, 457-61 (referring to CX 1A-C), 464-66. For context, Mr. Arthaud explained that as turbidity exceeds 20 NTUs and approaches 50 NTUs, there are increasingly intense sublethal impacts. Tr. 430.

As to the impacts from the size of the dredge hole that Respondent created (Hole #5), Mr. Arthaud explained that the excavation of roughly 15 cubic meters of material adversely impacted the species that were present in the excavated area and that the excavated material was then released from the dredge to form the tailings pile and to be suspended in the water column, creating turbid conditions, which then traveled downstream with the current. Tr. 466-68 (referring to CX 38, BSN 1527). As to the impacts from the tailings pile that Respondent created (Tailings Pile #7), Mr. Arthaud explained that the area covered by the tailings, about five cubic meters in adjusted volume, had been a functioning habitat before being

covered and that the tailings created a “dam[] or a barrier for a portion of the stream” given that the pile “extend[ed] above the surface of the water.” Tr. 469-70 (referring to CX 38, BSN 1527). Mr. Arthaud elaborated that such a barrier creates an impediment to the flow of water through that area and redirects it. Tr. 471 (referring to CX 38, BSN 1527). He further explained that the tailings pile also created an adverse impact wherever its depth exceeded one inch, as such depths result in higher mortality of mussels. Tr. 471. Mr. Arthaud then proceeded to note that Hole #5 and Tailings Pile #7 “take up roughly half the width of the stream,” and when taken together with other dredge holes and tailings piles in that stretch of the SFCR, he considered “over half of the stream [to have] been disturbed in this reach.” Tr. 472-73 (referring to CX 37, BSN 1519). Noting that this area and habitat is already only in “fair” condition and still recovering, he explained that “each new activity is a successive degradation of a degraded habitat . . . making the overall vehicle of a functioning habitat go further downward.” Tr. 473.

While Mr. Arthaud agreed with Mr. Kenney that by 2018 some restoration of the dredged area had taken place, his review of the photographs taken by Mr. Kenney that year led him to conclude that there was still “a higher proportion of fines and sand mixed in with those gravels” than what would have otherwise existed had the channel remained open and the dredging had not occurred. Tr. 474. Mr. Arthaud testified that the continued presence of those fine sediments, even an increase of just one percent, “can reduce egg survival by 16 percent.” *Id.* Further, “all successive broods that come in to spawn for a number

of years will be affected and have lower egg survival and lower early rearing survival." Tr. 474-75.

In addressing the BiOp, Mr. Arthaud recounted that with proper protective measures in place, a monitoring plan implemented, and specified terms and conditions followed, it was the conclusion of the NMFS that allowing suction dredging on the SFCR would not likely jeopardize the continued existence of Snake River Basin steelhead and Snake River fall Chinook salmon and would not likely destroy or adversely modify designated critical habitat for Snake River Basin steelhead. Tr. 475-78 (referring to CX 17). He also concurred with Mr. Kenney's opinion that Respondent, while dredging in the SFCR without permit authorization, failed to mine in a manner that was consistent with specified mitigation measures. Tr. 477.

#### **G. Tara Martich's Calculation of the Proposed Penalty**

Utilizing the Agency's Penalty Policy, the goals of which are to deter violations, provide fair and equitable resolution of any violations, and provide equitable treatment of the regulated community, Tara Martich ("Ms. Martich") calculated the proposed penalty for the charged violation in this matter. Tr. 118, 129, 131-32; CX 35. She described the general process of calculating a proposed penalty pursuant to the Penalty Policy as follows. First, a preliminary deterrence amount is established, which is derived from two components, namely, an economic benefit component and a gravity component. Tr. 132-33; CX 35, BSN 1438, 1443-44. Each of those components has sub-components for consideration. For example, the economic benefit component includes, *inter alia*, an

examination of any benefit from delayed or avoided costs from the noncompliance. CX 35, BSN 1448-50. In measuring the seriousness of the violation, the gravity component includes an examination of considerations such as the actual or possible harm from the noncompliance, as well as the importance to the regulatory scheme. Tr. 134; CX 35, BSN 1444. Once a preliminary deterrence amount is determined, then various adjustment factors are considered and, as appropriate, applied to the valuation of the gravity component, to reach an end result that is termed the initial penalty target figure. CX 35, BSN 1443, 1458. These adjustment factors, which may lead to an increase or decrease in the overall penalty amount, include an examination of the degree of willfulness and/or negligence of the violator; the extent of cooperation, or lack thereof, by the violator; any history of noncompliance; the violator's ability to pay the penalty; and any other unique factors. Tr. 146-47; CX 35, BSN 1444-45. The adjustment ranges consist of a zero to 20 percent adjustment of the gravity component based on usual circumstances and the discretion of the Agency case developer, that is, Ms. Martich. Tr. 148; CX 35, BSN 1458. The remaining adjustments of 21 to 30 percent or in excess of 30 percent are reserved for unusual and extraordinary circumstances, respectively. Tr. 148; CX 35, BSN 1458.

Following this process, Ms. Martich calculated the proposed penalty in this case as follows. In determining the preliminary deterrence amount, she first considered the economic benefit component. Since she did not have any information concerning what, if any, economic benefit Respondent gained from his noncompliance, she applied a "zero" for that component and, in doing

so, gave Respondent the benefit of doubt that he did not obtain any benefit. Tr. 133-34.

In evaluating the gravity component, Ms. Martich considered the actual or possible harm from Respondent's noncompliance. Tr. 134. To that end, she considered several factors in evaluating actual or possible harm, namely, factors including the amount and toxicity of the pollutant(s), sensitivity to the environment, the duration of the violation, and the size of the violator. *Id.* In the absence of any additional information previously requested but not supplied from Respondent,<sup>21</sup> Ms. Martich relied on the Hughes Report to determine that the amount of sediment—the pollutant at issue—was a moderate amount, and while not considered highly toxic, sediment can be harmful when introduced into the environment in high quantities. Tr. 135-36. With regard to sensitivity to the environment, Ms. Martich considered the fact that the SFCR is listed as an impaired waterbody for sediment and has a developed TMDL for inputs into that waterbody in an effort to bring the river back to meeting water quality standards, as well as the fact that ESA-listed species are present in the SFCR. Tr. 137-42 (referring to CX 6, 18). This information led her to conclude that the SFCR "is a particularly sensitive water body, especially for discharge of sediment. . . ." Tr. 140. As to the duration of the violation, the Hughes Report documented one day of violation, on July 22, 2015, so Ms. Martich used one day for the duration period in her penalty assessment. Tr. 142-43. Regarding the size of the violator, Ms. Martich recognized that Respondent is an individual

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<sup>21</sup> See Tr. 135; CX 27, 28.

and accounted for such in her penalty evaluation. Tr. 144.

In evaluating the gravity component, Ms. Martich also considered the importance to the regulatory scheme and any harm done to it by the noncompliance. Tr. 144. She explained that the applicable regulatory scheme that is involved is the NPDES program, specifically the General Permit under that program, which became effective on May 6, 2013, but did not extend to the SFCR.<sup>22</sup> She testified that the Agency had provided public notice of the General Permit in 2010 and had conducted educational outreach to the regulated community, including holding workshops, to notify the community of the requirement for a permit, how to apply for coverage under the General Permit, and how to comply with its conditions. Tr. 144-45. In reaching the preliminary deterrence amount of penalty, she thus considered the eroding impacts that unauthorized dredging in the SFCR has on the NPDES regulatory scheme. Tr. 145. According to Ms. Martich, although the statutory maximum would have permitted a preliminary deterrence amount of \$16,000, she determined “a more conservative amount” of \$5,500 to be appropriate given that Respondent “is an individual, . . . that there was one day of violations, and [that] EPA had an interest in settlement in this case.” Tr. 146.

From this preliminary deterrence amount of \$5,500, Ms. Martich next considered the adjustment factors, namely, the degree of cooperation and willfulness, that she found to be relevant to this case.

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<sup>22</sup> See CX 3.

Tr. 146-47, 149. In so doing, she considered Respondent's "failure to respond to any of the questions that EPA had presented him" in the RFI. Tr. 149. However, in an effort to encourage settlement, this lack of cooperation did not lead Ms. Martich to make an adjustment to the proposed penalty. *Id.*

As to the willfulness factor, Ms. Martich considered:

how much control [Respondent] had over the violations, his foreseeability for knowing that they were violations, whether [Respondent] took reasonable precautions against violating, whether [Respondent] knew or should have known the hazards associated with the violation, his level of sophistication, and whether [Respondent] knew of the legal requirement that was violated.

Tr. 149-50 (referring to CX 35, BSN 1459). As part of her consideration, Ms. Martich reviewed various documents. Specifically, Ms. Martich considered the Joint Application in which Respondent identified himself as a professional dredger who had been "mining in at least five different states for the past 20 years," which collectively suggested to Ms. Martich that Respondent would have known about the regulatory requirements governing the necessary permits to suction dredge. Tr. 152-53 (referring to CX 10, BSN 859). Additionally, Ms. Martich considered the ACE Letter that, in February 2014, alerted Respondent to the regulatory requirements for dredging in the SFCR, noted the presence of ESA-listed species within that river, and directed Respondent to other agencies, including EPA, for any dredging-related

activities. Tr. 153-56 (referring to CX 9. Further, in the EPA Letter in 2014, Ms. Martich noted:

EPA was very explicit in this letter, letting [Respondent] know that dredging in the [SFCR] was not available under the [General Permit], and explaining that the [SFCR] also contained endangered species, and that . . . an additional process . . . needed to happen before permitting would be allowed under the [General Permit].

Tr. 156-57 (referring to CX 8). Ms. Martich also considered the NOI that Respondent submitted to seek coverage under the General Permit, which suggested to her that he was aware of the obligation to apply for permit coverage in the SFCR. Tr. 158-59 (referring to CX 12). The IDWR Letter Permit that was issued to Respondent close to the time of the violation and that put Respondent on notice that EPA requires NPDES general permit coverage for all small-scale suction dredging in Idaho was also considered by Ms. Martich. Tr. 162-64 (referring to CX 29).

Considering all this information, Ms. Martich determined that an upward adjustment of 20 percent was warranted in this case and both reasonable and conservative given the particular circumstances of the case and the degree of willfulness on the part of Respondent. Tr. 165-66 (referring to CX 35, BSN 1458). Even though Ms. Martich found Respondent's degree of willfulness to be "extraordinary," she did not seek a greater upward adjustment in the interest of potential settlement of the case. Tr. 165-66. She noted that in all of the CWA cases she had developed, she had not previously come across a case "where the entity was notified several times by different agencies of their

legal requirement to obtain permit coverage and yet proceeded with the activity of discharging without a permit." Tr. 165-66. Nevertheless, adhering to a 20 percent upward adjustment, she determined the Initial Penalty Target Figure of \$6,600 to be appropriate. Tr. 166.

#### **IV. Penalty Discussion**

##### **A. Preliminary Matters**

Prior to addressing the penalty-related arguments advanced by the parties, it is necessary to first address certain other matters raised in the post-hearing briefing for purposes of reiterating the scope of this decision and that which will be considered in reaching this decision.

First, Respondent attempts to introduce new evidence during post-hearing briefing by referring to purported scientific studies that were not introduced at hearing, making arguments based on those purported studies, and by making reference, for the first time, to purported statements of another agency.<sup>23</sup> *See* Resp. In. Br. at 16-19. Complainant objects to the introduction of new evidence at this stage, citing multiple prior rulings by this Tribunal that provided Respondent

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<sup>23</sup> I note that Respondent's reference to a study he was not permitted to introduce at hearing appears to refer to another purported study from 1988, the contents of which Respondent stated he lacked, save the conclusion. *See* Resp. In. Br. at 18. In the absence of having the entire study available for possible review by the expert witness testifying at the time, Mr. Arthaud, Complainant's objection to Respondent cross-examining Mr. Arthaud about this purported study was sustained. *See* Tr. 505-07.

with the opportunity to submit proposed evidence prior to an evidentiary hearing, as well as rulings explaining the limited scope of the hearing. *See Comp. Rep. Br. at 5.* The extensive procedural history of this case and numerous orders issued prior to hearing illustrate that Respondent was given ample opportunity to prepare for hearing and to submit proposed evidence for consideration in advance of hearing.<sup>24</sup> The Rules of Practice specifically set forth requirements for the parties to exchange proposed evidence in advance of hearing,<sup>25</sup> and provide notice to a party that the failure to do so may result in the exclusion of such undisclosed proposed evidence at hearing, absent certain exceptions in 40 C.F.R. § 22.22(a) that I found inapplicable here. Respondent was specifically and repeatedly reminded of these provisions in various prehearing orders,<sup>26</sup> and he has not provided a compelling rationale to support his attempt to introduce

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<sup>24</sup> *See, for example, the following orders: Second Prehearing Order, dated February 24, 2017; Order on Complainant's Motion to Compel Additional Discovery and Compliance with Second Prehearing Order, Complainant's Motion in Limine, and Respondent's Motion to Appeal, dated March 18, 2019; and Order on Motions, dated May 2, 2019.*

<sup>25</sup> *See 40 C.F.R. § 22.19(a).*

<sup>26</sup> *See, for example, the following orders: Prehearing Order, dated August 11, 2016; Second Prehearing Order, dated February 24, 2017; Order on Complainant's Motion to Compel Additional Discovery and Compliance with Second Prehearing Order, Complainant's Motion in Limine, and Respondent's Motion to Appeal, dated March 18, 2019 (which included the following warning to Respondent, in bold font: Respondent is warned that failure to submit documents in compliance with Rule 22.8 may result in their exclusion from the record.); and Order on Motions, dated May 2, 2019.*

new evidence at this stage in the proceedings. Consequently, no new evidence will be considered in this decision.

Second, as reflected in the majority of argument in his post-hearing briefs, Respondent attempts to reopen the issue of liability despite repeated instructions through prehearing orders,<sup>27</sup> as well as those provided during the evidentiary hearing,<sup>28</sup> that the issue of liability before this Tribunal was previously decided in my Order on AD, that the issue of liability would not be revisited, and that the only outstanding issue to be decided by this Tribunal is that of the amount of any assessed penalty. Moreover, in the Order on Complainant's Motion to Compel Additional Discovery and Compliance with Second Prehearing Order, Complainant's Motion in Limine, and Respondent's Motion to Appeal, dated March 18, 2019, Respondent was provided with the regulatory background found in the Rules of Practice and the process by which to seek review of my denial of his Motion for Appeal, but he elected not to seek such review. Consequently, I will not consider the arguments raised by Respondent regarding his liability for the charged violation, as I have previously decided that issue and any further review rests with the EAB.

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<sup>27</sup> See, for example, the following orders: Order on Complainant's Motion for Accelerated Decision, dated September 27, 2018; Order on Complainant's Motion to Compel Additional Discovery and Compliance with Second Prehearing Order, Complainant's Motion in Limine, and Respondent's Motion to Appeal, dated March 18, 2019; and Order on Motions, dated May 2, 2019.

<sup>28</sup> See, for example, the following citations to the transcript of proceedings: Tr. 8-9, 14, 62-65.

Third, and related to Respondent's apparent desire to relitigate the issue of liability, I must address Respondent's Declaration previously filed with this Tribunal, which was the subject of some discussion at hearing. As noted in the Order on AD dated September 27, 2018, Respondent, through then counsel Mark L. Pollot ("Mr. Pollot"), filed a responsive Brief in Opposition to Complainant's Motion for Accelerated Decision on August 2, 2017, to which the Declaration of Dave Erlanson, Sr. ("Respondent's Declaration" or "Resp. Decl.") was attached.

By way of background, the Rules of Practice require that a response to a motion "shall be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon." 40 C.F.R. § 22.16(b). In the context of motions for summary judgment in federal court, which are analogous to motions for accelerated decision in administrative enforcement proceedings such as this matter, the Federal Rules of Civil Procedure<sup>29</sup> state that "[a]n affidavit or declaration used to support or oppose [such] a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). Consistent with this guidance, Respondent's Declaration begins, "I am the respondent in the above entitled matter and have personal knowledge of the matters declared

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<sup>29</sup> As advised by the EAB, the Federal Rules of Civil Procedure may serve as a source of guidance in this proceeding. *See, e.g., Euclid of Va., Inc.*, 13 E.A.D. 616, 657 (EAB 2008) ("[I]t is appropriate for Administrative Law Judges and the EAB to consult the Federal Rules of Civil Procedure and Federal Rules of Evidence for guidance. . . .").

herein, and if called upon to testify, can testify competently thereto.” Resp. Decl. ¶ 1. It then concludes, “I hereby declare that the foregoing is true and correct to the best of my knowledge and recollection under penalty of perjury of the laws of the United States,” and it is dated August 1, 2017, and bears the name of Respondent on the signature line. Resp. Decl. at 8.

By the submission and filing of Respondent’s Declaration to this Tribunal by Respondent, through then counsel, Mark Pollot, representation was made to this Tribunal that the contents of Respondent’s Declaration were based on personal knowledge, set out facts that would be admissible in evidence, and show that Respondent is competent to testify on the matters stated therein. At the hearing, Respondent, though sworn early on in the proceeding in anticipation of providing testimony on his own behalf, elected not to testify or present other evidence, and while under oath, he chose not to attest to the truthfulness and accuracy of the contents of Respondent’s Declaration when Complainant sought its introduction into evidence. *See* Tr. 527-40. Consequently, Respondent’s Declaration was not accepted into evidence. Noteworthy is the fact that the contents of Respondent’s Declaration of August 1, 2017, were not questioned by Respondent until the second day of hearing, on May 15, 2019, more than one year and nine months later. Such an eleventh-hour attempt to recant aspects of Respondent’s Declaration, which Respondent, through counsel, previously represented to be truthful, is inconsequential to this decision or my prior determination as to liability. Indeed, it can only reasonably be construed as purely self-serving in nature and lacking in merit. In furtherance of such self-serving goals, Respondent now,

in post-hearing briefs, attempts to characterize Respondent's Declaration as a "fraudulent document" and, relying upon his characterization, suggests that my previous determination of his liability for the charged violation now "[lay] in ruin" and is therefore open to be relitigated. Resp. In. Br. at 2; Resp. Rep. Br. at 10. Such tactics are unavailing and will not be entertained. Moreover, the only questions raised by such recently fabricated claims take aim at Respondent's integrity and credibility, not the legal sufficiency of the Order on AD.

## **B. Parties' Arguments**

### **1. Complainant's Initial Brief**

In its initial brief, Complainant argues that the "testimony and evidence demonstrate that Respondent's illegal discharge caused both a significant environmental harm and a harm to an integral regulatory scheme" that justifies the reasonableness of the \$6,600 proposed penalty. Comp. In. Br. at 5.

With regard to the gravity component of the penalty evaluation, specifically as it relates to actual or possible harm, Complainant argues that it presented evidence at the hearing to demonstrate that "Respondent's activity resulted in an unpermitted discharge that caused serious, long-lasting environmental harm." Comp. In. Br. at 6. In addressing the "significant environmental harm" caused by Respondent's violation, Complainant points out that the violation occurred in a sensitive environment, the SFCR, which is impaired due to the failure to meet state water quality standards for sediment and temperature, necessitating the establishment of a TMDL to limit the discharge of

pollutants into the SFCR so as to bring it into compliance with water quality standards. *Id.* Complainant further argues that Respondent's unpermitted discharge by his suction dredging activities on July 22, 2015, introduced sediment into the SFCR, thereby compromising the effort to return it to a level of compliance. Comp. In. Br. at 6-7. Additionally, Complainant highlights that Respondent's dredging activity occurred in an area of the SFCR that otherwise provided a "viable habitat for ESA-listed species," noting that, based on expert testimony, sediment is a primary factor in limiting the population of such ESA-listed species, and that the introduction of "excess sediment from mining activity reduces habitat quality, juvenile rearing, and spawning." Comp. In. Br. at 7 (citing CX 17, BSN 1007; Tr. 423-25, 455-57, 487.)

Complainant makes the point that sediment, while not toxic, can nevertheless adversely impact the environment, particularly through activities like suction dredge mining. Comp. In. Br. at 8 (citing CX 35, BSN 1444; CX 18; Tr. 135). In particular, recalling the expert testimony of Mr. Arthaud, Complainant notes the impacts of suction dredge mining that "often causes immediate lethal impacts for fish eggs, larval fish, and aquatic invertebrates that are buried, crushed, or entrained by the mining process." Comp. In. Br. at 8 (citing Tr. 427-28). Further, Complainant points out that turbidity, that is, the suspension of sediments in varying levels of concentration caused by suction dredging, results in behavioral and physiological changes in fish and invertebrates that are exposed to such conditions, and that the deposits of such sediment when it falls out of suspension "can reduce the growth and survival of fish eggs, limit

habitat for rearing juvenile ESA-listed species, and reduce photosynthesis in plant life, impacting the production of the entire food web.” Comp. In. Br. at 8 (citing Tr. 428-34). As a supporting reference, Complainant points to the BiOp that Mr. Arthaud authored, which outlines the adverse environmental impacts of suction dredging, as well as the BA authored by Mr. Kenney. Comp. In. Br. at 9 (citing CX 17; CX 21).

Complainant reiterates that while many of these potential impacts were described by Mr. Arthaud as “sublethal,” they nevertheless have serious implications for populations of ESA-listed species. Comp. In. Br. At 9. In support, Complainant points to two scientific studies conducted by Mr. Arthaud as demonstrating a correlation between nursery habitat conditions and the number of salmon that survive adulthood and spawn. Comp. In. Br. at 9 (citing CX 19; CX 20; Tr. 437-42). In other words, Complainant urges, nursery habitats degraded by the impacts of suction dredging, in turn, “inhibit[] juvenile salmon growth, which reduces migration survival, and ultimately reduces spawning numbers.” *Id.* Relying on Mr. Arthaud’s expert testimony and conclusions drawn from the evidence he reviewed, Complainant argues that “it was ‘highly likely’ that species were present to experience the direct impacts of Respondent’s activity.” Comp. In. Br. at 9 (quoting Tr. 467-68). Complainant notes that Mr. Arthaud also “estimated that the turbid plume caused by Respondent’s dredge was 25 to 30 NTUs, resulting in displacement and physiological impacts to nearby fish and invertebrates.” Comp. In. Br. at 9 (citing CX 1C; Tr. 311-12, 459-66). As a result of such displacement, the impacted fish and invertebrates

“are thereafter ‘very vulnerable to predation.’” Comp. In. Br. at 9-10 (quoting Tr. 465-66). Complainant then argues that the extent of turbidity and resulting adverse effects were exacerbated by the fact that Respondent operated within 50 feet of RJR’s dredge, a circumstance that would have violated a best management practice contained in the General Permit had Respondent’s operation been covered under it. Comp. In. Br. at 10 (citing CX 1B; CX 3; Tr. 70, 461).

Turning to Mr. Kenney’s expert testimony, Complainant contends that the adverse impacts from Respondent’s dredging activities were long-lasting. Comp. In. Br. at 10. In support, Complainant points to the site visits conducted by Mr. Kenney and his team members in October 2015, and thereafter in 2016 and 2018, that demonstrate that “approximately 55% of Hole #5 and 63% of Pile #7 remained” in 2016, “nearly 14 months after Respondent’s violation,” and that the adverse impacts of his dredging continued in 2018, three years after the violative conduct. Comp. In. Br. at 10-11 (citing CX 38, BSN 1524; Tr. 315, 319, 474-75). Addressing the long-term impacts of excess sediment from suction dredging on ESA-listed species, Complainant refers to Mr. Arthaud’s expert testimony that “all successive broods that come into spawn for a number of years will be affected and have lower egg survival and lower early rearing survival than if this had not occurred.” Comp. In. Br. at 11 (quoting Tr. 474-75).

Relying on the expert testimony of Mr. Kenney, Complainant urges that while the disruption caused by Respondent’s small-scale individual suction dredging may appear small “when compared to the entire river

system," the actual impacts, when examined "[a]t the site-specific level," are in fact profound. Comp. In. Br. at 11 (citing CX 37, BSN 1502; Tr. 303, 343-44). Further, Complainant argues, its "experts agreed that Respondent eliminated habitat for ESA-listed species and the invertebrates on which they rely." Comp. In. Br. at 10 (citing Tr. 297-301, 469). Specifically, Complainant asserts that "Respondent reduced habitat quality, not only in the footprint of Hole #5 and Pile #7, but also further downstream, because he 'destabilized the area,' activating fine sediment that was once buried and allowing it to infiltrate interstitial spaces that ESA-listed species use for juvenile sheltering, incubation, and spawning." Comp. In. Br. at 10 (quoting Tr. 303-04). Based on the foregoing, Complainant maintains that Respondent's violative conduct "significantly and permanently altered the area surrounding the dredge activity, impeded the effectiveness of the TMDL, impacted ESA-listed species, and accordingly warrant[s] a sufficiently deterrent penalty." Comp. In. Br. at 11.

Complainant argues that with regard to other penalty considerations, such as the amount of pollutant discharged and the duration of the violation, it was conservative in its proposed penalty assessment. Specifically, it notes that, in the absence of information from Respondent, Ms. Martich determined that a "moderate" amount of pollutant (sediment) was discharged after reviewing the Hughes Report and the photographic evidence contained therein. Comp. In. Br. at 11-12 (citing Tr. 134-35). Complainant argues that this determination was also supported by the evidentiary record, pointing to, among other evidence, the testimony of Mr. Arthaud regarding the "swell factor" of

displaced sediment that leads to an increase in its volume and his testimony as to the harmful concentration of sediment discharged by Respondent's dredge that resulted in a plume estimated to be in the 25-30 NTU range. Comp. In. Br. at 12-13 (citing, e.g., CX 1, BSN 5-6; CX 2, BSN 24; Tr. 67-68, 459-60, 461-63, 466-67). Further, Complainant points out that it calculated the proposed penalty using one day of violation—the minimum duration allowed under the CWA—even though circumstantial evidence suggests that Respondent dredged in the SFCR before and after the July 22, 2015 Hughes inspection, and Complainant explains that it chose this conservative approach in the interest of settlement and in spite of the continuing impacts from Respondent's dredging activity. Comp. In. Br. at 13-15.

With regard to the second aspect of the gravity component—importance to the regulatory scheme—Complainant argues that “Respondent’s violation warrants a substantial penalty not just for its adverse environmental impacts, but also for the harm it caused to the regulatory scheme.” Comp. In. Br. at 15. Complainant urges that “one of the most critical aspects of the CWA statutory scheme is the prohibition on discharges of pollutants from a point source into waters of the United States unless expressly authorized and regulated through the issuance of a CWA permit,” *id.* (citing 33 U.S.C. § 1311(a)), and it notes that violations of that prohibition have been recognized by federal courts and the EAB alike as causing significant harm to the regulatory program, even where no actual harm to the environment occurs, *id.* (citing *United States v. Pozsgai*, 999 F.2d 719, 725 (3rd Cir. 1993); *Phoenix*, 11 E.A.D. at 400). Here, Complainant argues,

Respondent discharged pollutants into the SFCR without an NPDES permit, and even if he had been covered under the General Permit, he failed to adhere to “even the most basic Best Management Practices listed in the General Permit” by, for example, failing to maintain the required minimum distance from other dredging operations. Comp. In. Br. at 15-16. Further, relying on the testimony of experts witnesses Mr. Kenney and Mr. Arthaud, Complainant points out that “Respondent failed to consult with Forest Service biologists to ensure that the location of his proposed mining operation did not present an inordinate potential to harm ESA-listed species; failed to deconstruct tailing piles and fill dredge holes at the end of the dredge season to minimize impacts on habitat and fish migration; and failed to limit his turbidity plume to 150 feet.” Comp. In. Br. at 16-17 (citing Tr. 333-40, 477-78). Thus, Complainant argues, “Respondent’s violation was not merely a paperwork violation; instead, he mined in a manner inconsistent with regulatory programs intended to protect water quality and ESA-listed species.” Comp. In. Br. at 17.

Moreover, and by way of background, Complainant explains that “[i]n the years leading up to Respondent’s violation, the General Permit was relatively new, and EPA’s implementation met widespread noncompliance.” Comp. In. Br. at 17 (citing Tr. 145, 232-33). Complainant notes the inherent difficulty in regulating suction dredging given “its portable and temporary nature,” *id.* (citing Tr. 235), and recounts that “EPA made substantial efforts to educate and inform the mining community regarding their obligations under the General Permit,” *id.* (citing Tr. 145, 228-29). In spite of such efforts, Complainant asserts, “Respondent

joined miners from the American Mining Rights Associations to openly and knowingly violate the General Permit, arguing that their dredging activities should not be subject to its terms,” and in doing so exhibited a “flagrant disregard for the General Permit” and “frustrated its purpose.” Comp. In. Br. at 17-18 (citing Tr. 71-73). Given such circumstances, Complainant argues that its “penalty assessment is reasonable, and arguably exceptionally conservative, in light of the harm of Respondent’s violation to the regulatory scheme.” Comp. In. Br. at 18.

As to the economic benefit component of the penalty assessment, Complainant asserts that Respondent “financially gained from his violation” given that Respondent treats his mining activity as a profession that he uses to help with paying his bills. Comp. In. Br. at 19 (citing CX 10, BSN 857, Tr. 36, 152). Further, Complainant argues that “Respondent benefited through the avoidance of costs associated with suction dredging without applying for and complying with an individual NPDES permit and the associated regulatory measures that are required to ensure that suction dredge mining is conducted in a manner that will limit impacts to aquatic resources.” Comp. In. Br. at 19. Nevertheless, Complainant asserts, it did not increase the proposed penalty based on the economic benefit resulting from Respondent’s violation, Comp. In. Br. at 19 (citing Tr. 133-34), a decision that “resulted in a conservative penalty assessment,” *id.* Based on the foregoing, Complainant explains that the preliminary deterrence amount came to \$5,500. Comp. In. Br. at 18 (citing Tr. 146).

Turning to the remaining statutory penalty factor that it considers relevant to this case—namely, Respondent's degree of culpability, which the Penalty Policy looks to break down into two considerations, degree of willfulness and degree of cooperation<sup>30</sup>—Complainant argues that an upward adjustment of “at least 20% is warranted” and supported by the evidentiary record. Comp. In. Br. at 19-21. Based on that upward adjustment, Complainant argues that a total penalty of \$6,600 is “the minimum reasonable adjustment under the circumstances and as shown by the evidence and testimony presented to the Court.” Comp. In. Br. at 26.

Specifically, Complainant notes that Respondent failed to provide any of the information requested in the RFI that was sent to him, instead choosing to challenge EPA's legal authority and factual basis for the NOV. Comp. In. Br. at 21 (citing Tr. 128; CX 28). In spite of this apparent lack of cooperation that might have justified an increase in the penalty sought, Complainant nevertheless opted not to impose an upward adjustment for this behavior. *Id.* (citing Tr. 149). Turning to the willfulness component of

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<sup>30</sup> With regard to the other statutory penalty factors, Complainant argues that “[n]o adjustment to the proposed penalty is necessary based on Respondent's ability to pay or history of violations” since “no information, evidence, or testimony appears to warrant . . . an . . . adjustment . . . with regard to either of those factors.” Comp. In. Br. at 20. Additionally, Complainant “does not propose any upward adjustment on the basis of ‘other matters as justice may require.’” *Id.* As Complainant explains, “[n]o evidence or testimony in the record warrants the use of the justice factor to reduce the penalty amount because the application of the other penalty factors to this matter will produce a penalty that is fair and just.” *Id.*

Respondent's degree of culpability for the violation, Complainant refers to the Penalty Policy as it sets forth several factors to be considered that were previously relied upon by the Environmental Appeals Board and this Tribunal. Comp. In. Br. at 22 (citing, e.g., *Phoenix*, 11 E.A.D. at 418). In particular, Complainant observes, the Penalty Policy identifies the following factors as relevant: (1) how much control the violator had over the events constituting the violation; (2) the foreseeability of the events constituting the violation; (3) whether the violator took reasonable precautions against the events constituting the violation; (4) whether the violator knew or should have known of the hazards associated with the conduct; (5) the level of sophistication within the industry in dealing with compliance issues; and (6) whether the violator in fact knew of the legal requirement which was violated. Comp. In. Br. at 22 (citing CX 35, BSN 1459).

Regarding factor (1), Complainant points out that Respondent's control over his actions and commission of the violation is clear from the evidence, noting that it is undisputed that "Respondent was responsible for operating his suction dredge and . . . causing the discharges at issue." Comp. In. Br. at 22 (citing Tr. 382-83). As to factors (2) and (6), Complainant argues that Respondent was well aware of the requirement to obtain permit authorization prior to operating his suction dredge and discharging pollutants into the SFCR, as evidenced by the submission of his Joint Application and representation as a professional suction dredger authorized over a 20-year period to dredge in five states. Comp. In. Br. at 22-23 (citing Tr. 152; CX 10 at 859-60). Indeed, Complainant urges,

one of the states in which Respondent attested to obtaining permit coverage—Alaska—“has had a CWA NPDES permit for suction dredge operations in place for the entirety of Respondent’s attested period of professionally dredging.” Comp. In. Br. at 23 (citing Tr. 213).

Turning to factor (3), Complainant argues that while Respondent applied for permit coverage, he failed to “heed[] the responses by relevant regulatory entities to his application.” Comp. In. Br. at 23. In particular, Complainant points to the ACE Letter that “informed Respondent in 2014 that his proposed dredging was in critical habitat for ESA-listed species,” *id.* (citing CX 9, BSN 855), and the EPA Letter that informed Respondent “later that same year, and nine months prior to his violation, . . . of the same,” *id.* (citing CX 8, BSN 853). Complainant also highlights the testimony of Ms. Martich, which confirmed EPA’s explicit notice to Respondent in its letter that suction dredging in the SFCR was not available under the General Permit. Comp. In. Br. at 23 (citing Tr. 157). Complainant asserts that “his choice to wholly ignore multiple regulatory warnings [is] evidence of Respondent’s lack of reasonable precautions taken against the events constituting the violation.” Comp. In. Br. at 24. Complainant adds that, aside from lacking the necessary permit authorization to engage in suction dredging, Respondent also “failed to operate his dredge in a manner that multiple agencies have determined necessary to protect water quality and ESA-listed species,” which, it argues, lends further support to satisfy factor (3). Comp. In. Br. at 24.

As to factor (4), Complainant asserts that Respondent’s Joint Application indicates that “he has

obtained permit authorizations in five states over the past two decades—lending not only to Respondent’s awareness of the legal requirements associated with the activity, but also to his knowledge of best management practices necessary to avoid the environmental harms caused by suction dredging.” Comp. In. Br. at 24 (referring to CX 10). Additionally, Complainant points to the ACE Letter of 2014 that not only “informed Respondent that the area in which he dredged is designated as critical habitat for the protection of species listed under the ESA” but also “recommended [he] follow up with various agencies to ensure his compliance with the ESA.” Comp. In. Br. at 24 (citing CX 9, BSN 855). Further, Complainant argues, the EPA Letter of October 2014 reiterated the presence of ESA-listed species and notified Respondent that his IDWR Letter Permit “did not substitute as or supplant the need for NPDES coverage.” Comp. In. Br. at 24 (citing CX 8, BSN 853).

Finally, with regard to factor (5) and its inquiry into the level of sophistication in the suction dredging industry in dealing with compliance issues, Complainant highlights Respondent’s representation that “he is a professional suction dredge miner with twenty years of experience, as opposed to a hobbyist.” Comp. In. Br. at 25 (citing CX 10, BSN 859). Referring to Ms. Godsey’s testimony concerning the best management practices contained in EPA’s General Permit, which she authored, Complainant contends that these practices are “not logically demanding,” nor do they “force technology” or “require the employment of an environmental consultant,” and it argues that compliance with these practices as conditions to the General Permit “requires minimal sophistication.”

Comp. In. Br. at 25 (citing Tr. 224-28). Further, Complainant points to the “outreach attempts carried out by EPA generally, and Ms. Godsey and her team specifically,” to the regulated community and in venues geographically convenient to Respondent. Comp. In. Br. at 25 (citing Tr. 228-30).

In consideration of the foregoing, Complainant argues that, although Ms. Martich described Respondent’s culpability as “extraordinary”—a conclusion she reached based on her “15 years of experience developing CWA enforcement cases,” during which time she had never encountered another case in which the party was notified on multiple occasions by different regulatory agencies of the legal obligation to obtain permit coverage and yet proceeded with the subject activity without such coverage—she nevertheless “applied only a 20% upward adjustment to the gravity amount so as to craft a conservative penalty amount in the interest of efficiency and with a goal of settlement.” Comp. In. Br. at 26 (citing Tr. 165-66, 202-03; CX 35, BSN 1458). Accordingly, Complainant urges that I assess a penalty that includes an increase of “at least 20% to the initial gravity amount of \$5,500 to account for Respondent’s culpability, for a total penalty of \$6,600.” Comp. In. Br. at 26.

## **2. Respondent’s Initial Brief**

In his initial brief, Respondent largely responds throughout the brief by challenging the basis for and determination of liability for the charged violation in this case—an issue that has already been decided and will not be revisited by this Tribunal. As to the issue of environmental harm and lasting effects, Respondent appears to challenge the extent of harm, if any, by

his suction dredging activities on July 22, 2015, since the SFCR was already an impaired waterbody at that time with an established TMDL. Resp. In. Br. at 17, 19. Additionally, Respondent appears to challenge references to “sediment” and “suspended solids,” and the meanings associated with such terms, in the evidence presented by Complainant. Resp. In. Br. at 17-18. In this regard, Respondent seemingly questions the persuasiveness of Complainant’s evidence in the absence of any evidence or discussion concerning “particle size” and “the speed of the flow of the river.” Resp. In. Br. at 17-19. Respondent also argues that he demonstrated compliance “by applying for a ‘general’ permit [referring to the NOI completed on May 17, 2015,] which was required by the IDWR permitting process.” Resp. In. Br. at 20 (referring to CX 12). As to the economic benefit resulting from the violation, Respondent contends that he “was in the water less than 20 minutes.” Resp. In. Br. At 21. Lastly, Respondent asserts he was “given an exemption from the State of Idaho for his recreational activities.” *Id.*

### **3. Complainant’s Reply Brief**

In its reply, Complainant argues that Respondent “fails to persuade that a penalty less than \$6,600 is justified” and that “to the extent that Respondent’s Brief addresses the penalty for his Clean Water Act (CWA) violations, it fails to demonstrate that EPA’s proposed penalty should be reduced.” Comp. Rep. Br. at 1-2. As to the penalty-related points ascertained from Respondent’s initial brief, Complainant argues that “the fact that the South Fork Clearwater River is an impaired waterbody, pursuant to CWA Section 303(d), weighs in favor of a higher penalty, not a lower penalty as Respondent contends.” Comp. Rep. Br. at 4.

Referring to the Penalty Policy, Complainant reiterates that “the sensitivity of the environment is an aggravating factor in assessing the environmental harm caused by the violation.” *Id.* (citing CX 35, BSN 1444, 1456). Complainant contends that “Respondent discharged sediment into a waterbody that is impaired for the same pollutant,” *id.* (citing CX 6, BSN 178; Tr. 137-38), and, in doing so, “exacerbated an existing environmental problem and frustrated EPA’s procedure to remedy it (i.e., total maximum daily load (“TMDL”)),” *id.* at 4-5 (citing Tr. 344-45, 430). For these reasons, Complainant urges that an “upward penalty adjustment” is justified. Comp. Rep. Br. at 5 (citing *Service Oil, Inc.*, Docket No. CWA-08-2005-0010, 2007 WL 3138354, at \*49 (Aug. 3, 2007)).

Turning to another point raised in Respondent’s brief—“that the degree of environmental harm caused by his violation is somehow dependent on the size of the sediment particles he discharged and the flow rate of the receiving water”—Complainant contends that such an argument fails given that Respondent “falls short” of providing any basis for this point or even any explanation for how it should influence an analysis of environmental harm. Comp. Rep. Br. at 6. Pointing to the evidence it presented, Complainant notes that its “experts demonstrated that Respondent’s discharge of sediment caused environmental harm both by remaining in suspension and ultimately settling to the river bottom.” *Id.* Specifically, with respect to “smaller sediment particles that remain in suspension,” Complainant points to Mr. Arthaud’s testimony “that turbidity causes behavioral and physiological changes in fish and invertebrates at levels as low as 20 NTUs” and that “the turbid plume

caused by Respondent's dredge was approximately 25 to 30 NTUs." Comp. Rep. Br. at 6 (citing Tr. 429-30, 459-60). Regarding "larger particles that fall from suspension sooner," Complainant refers again to Mr. Arthaud's testimony, namely, his explanation that "sedimentation covers fish eggs, reducing their growth and survival rate, limits habitat for rearing juvenile salmon, and reduces photosynthesis," and that "[t]he stretch of river that Respondent dredged exhibited excess sediment until at least 2018, three years after the violation." Comp. Rep. Br. at 6 (citing Tr. 430-34, 474).

Turning to Respondent's level of culpability, Complainant asserts that "[a]lthough not expressly stated, portions of Respondent's Brief could be construed to contend that he was unaware that suction dredge mining was prohibited in the [SFCR]." Comp. Rep. Br. at 7. However, it maintains that "evidence in the record demonstrates that Respondent was fully aware that his activities violated the CWA, and he acted with substantial culpability." Comp. Rep. Br. at 7. In response to Respondent's argument that his suction dredging activity was exempted by the IDWR Letter Permit issued to him, Complainant points out that the language of that permit "clearly states in bold font that it is not an exemption from EPA regulation: 'The U.S. Environmental Protection Agency (EPA) now requires an NPDES general permit for small scale suction dredging in Idaho.'" Comp. Rep. Br. at 7 (citing CX 29, BSN 1415). Further, Complainant argues, the EPA Letter issued to Respondent in 2014 notified him that "his [IDWR] Letter Permit did not substitute as or supplant the need for NPDES coverage," *id.* (citing CX 8, BSN 853-54), and the ACE Letter, also issued

in 2014, notified Respondent that “EPA ‘has the lead for recreational suction dredging in Idaho under the Clean Water Act’ and the [ACE] has no permitting responsibilities for Respondent’s proposed suction dredging activity,” *id.* at 7-8 (citing CX 9, BSN 855). Complainant also notes that in the ACE Letter to Respondent, the ACE addressed the area that Respondent dredged as “designated critical habitat for species protected under the [ESA] and recommended Respondent contact various federal agencies to ensure his compliance.” *Id.* at 8 (citing CX 9, BSN 855).

In response to Respondent’s contention that he demonstrated compliance by submitting his NOI to seek coverage under the General Permit, Complainant argues that Respondent’s actions only confirm “his awareness that permit coverage was required for suction dredging” and that prior to his seeking coverage “EPA had explicitly informed Respondent that suction dredging in the [SFCR] could not be permitted until an ESA determination was completed.” Comp. Rep. Br. at 8 (citing CX 8, BSN 853-54; Tr. 158-59). Complainant further points to the language of the General Permit, which “specifies that [a]uthorization to discharge requires written notification from EPA that coverage has been granted to the operation.” *Id.* (citing CX 3, BSN 30). Thus, Complainant argues, “Respondent’s submission of an NOI does not mitigate his culpability for the violations.” *Id.*

Finally, with regard to Respondent’s reference to “economic benefit” and his assertion concerning the amount of time he spent in the water, Complainant argues that such assertions are unsubstantiated and contradicted by other evidence in the record, as

discussed in its initial brief. Comp. Rep. Br. at 9 (citing Comp. In. Br. at 13-14). In any event, Complainant notes, “EPA did not increase the proposed penalty based on the economic benefit of the violation,” and “[t]herefore, no penalty reduction is warranted” based on these unsubstantiated allegations. *Id.* (citing Tr. 133-34).

#### **4. Respondent’s Reply Brief**

In his reply brief, apart from restating claims unrelated to penalty that this Tribunal will not revisit or entertain, Respondent appears generally to take exception to much of the argument presented by Complainant. Among other contentions, Respondent argues that “we have went from rock and sand, to suspended solids, to sediment and were told at trial they are all the same thing,” which Respondent urges is unsupported. Resp. Rep. Br. at 3-4. Further, Respondent appears to argue that the use of different terms such as rock, sand, suspended solids, and sediment demonstrates EPA’s failure to isolate the pollutant at issue in this case. Resp. Rep. Br. at 4.

#### **C. Analysis**

The Rules of Practice provide that, after having determined that a violation of law occurred for which a penalty is sought, as presented here, I must then “determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act,” and that I must “consider any civil penalty guidelines issued under the Act.” 40 C.F.R. § 22.27(b). Further, I must “explain in detail in the initial decision how the penalty to be assessed corresponds to any

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penalty criteria set forth in the Act.” *Id.* In accordance with these rules, I have considered the evidence presented at hearing,<sup>31</sup> the statutory penalty factors set out in Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3),<sup>32</sup> and the Penalty Policy, which is utilized by the Agency as a general policy and approach toward penalty assessments (though not specifically with respect to CWA cases and the NPDES program,<sup>33</sup> *see CX 35, BSN 1432*). I have also considered the post-hearing arguments of the parties as they relate to the assessment of a civil monetary penalty.<sup>34</sup>

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<sup>31</sup> As previously noted, at the evidentiary hearing in this matter that was limited to the issue of penalty, Complainant presented testimonial and documentary evidence to support the penalty proposed for the violation in this case, while Respondent chose not to testify or to present any other evidence in support of his position regarding penalty.

<sup>32</sup> As discussed above, those factors are as follows: the nature, circumstances, extent, and gravity of the violation; the violator’s ability to pay, prior history of such violations, degree of culpability, and economic benefit or savings resulting from the violation; and “such other matters as justice may require.” 33 U.S.C. § 1319(g)(3).

<sup>33</sup> EPA has not developed a penalty policy specific to litigation under the CWA. *See, e.g., Smith Farm Enterprises, LLC*, 15 E.A.D. 222, 282 (EAB 2011). In the absence of such a policy, the EAB has advised that “it is appropriate for the presiding officer to analyze directly each of the statutory factors.” *Stevenson*, 16 E.A.D. 151, 169 (EAB 2013) (citing *Phoenix*, 11 E.A.D. at 395 (EAB 2004)). The EAB has also deemed it appropriate to consider EPA’s general civil penalty policies. *See id.* (citing *Smith Farm, LLC*, 15 E.A.D. at 282; *Phoenix*, 11 E.A.D. at 395).

<sup>34</sup> As stated several times, Respondent continues to challenge liability for the charged violation—a determination previously

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Considering the statutory penalty factors and the Penalty Policy collectively, the factors that are relevant to this case and that both sources address are “the nature, circumstances, extent, and gravity of the violation” and the respondent’s “degree of culpability.”<sup>35</sup> I note, as Complainant has pointed out, that the additional penalty considerations as to the violator’s ability to pay, prior history of such violations, and other matters as justice may require, are not germane as no evidence was presented with respect to those factors. Similarly, although some arguments have been made post-hearing with regard to the factor of “economic benefit,” Complainant maintains it chose to exclude any economic benefit in its penalty analysis in an effort to reach a conservative assessment. In doing so, Respondent received the benefit of any doubt about this factor and, from the evidence presented, I see no reason to depart from that methodology. Accordingly, I turn now to my analysis of the nature, circumstances, extent, and gravity of the violation found in this matter and Respondent’s degree of culpability in committing it.

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made in my Order on AD and a determination of which I find no basis to reconsider. Respondent has been repeatedly advised that further review of my determination may exist beyond the level of this Tribunal.

<sup>35</sup> The “nature, circumstances, extent, and gravity of the violation” is found in 33 U.S.C. § 1319(g)(3) and is addressed in the Penalty Policy under the “gravity component” at CX 35, BSN 1433-34, 1438, 1444, 1454-57. The respondent’s “degree of culpability” is found in 33 U.S.C. § 1319(g)(3) and is addressed in the Penalty Policy under the adjustment factors “degree of willfulness” and “degree of cooperation/noncooperation” at CX 35, BSN 1435, 1438, 1458-62.

**1. The nature, circumstances, extent, and gravity of the violation**

As to the “nature, circumstances, extent, and gravity of the violation,” the Penalty Policy provides some additional context for evaluating and quantifying this multi-faceted factor as it relates to a particular program and to the seriousness of the violation. In doing so, the Penalty Policy identifies several factors for consideration when assessing the gravity of a violation, including the actual or possible harm caused by the violative activity, the importance of the subject requirements to the regulatory scheme, and the size of the violator. CX 35, BSN 1455-56. With regard to assessing actual or possible harm, the Penalty Policy recognizes that such an assessment “is a complex matter” and consequently sets forth additional areas for consideration, namely, the amount and the toxicity of the pollutant, the sensitivity of the environment, and the duration of the violation. CX 35, BSN 1456-57.

The pollutant at issue in this matter, sediment, while not considered toxic, can still cause harm to the environment. Here, based on the Hughes Report and in particular the photographic evidence contained therein, a moderate amount of sediment was deemed to have been discharged by Respondent’s dredging activities on July 22, 2015. This assessment is supported by other evidence in the record, namely, the expert testimony by Mr. Arthaud, who evaluated the photographic evidence contained in the Hughes Report regarding the plume that Respondent’s dredging activities created, noting it to be “quite turbid” and estimating it to be in the 25-30 NTU range, a range that exceeds the threshold at which more serious

displacement of aquatic life occurs. The expert testimony of Mr. Kenney concurred in this assessment by concluding, from the Hughes Report and testimony offered at hearing, that Respondent's operation of his dredge created turbid conditions within the water column that, in turn, created a sub-normal environment for the fish that live and feed within the water column due to the reduction of visibility from the suspension of clays and fine sediment. Additionally, it is important to note that information was requested from Respondent that may have shed light as to the amount of sediment discharged, but Respondent chose not to respond. For example, if Respondent had responded to the RFI to provide information about how long he dredged in the SFCR or how much soil he moved on the date of the violation,<sup>36</sup> then that information could have been considered in assessing the amount of sediment involved in the violation. Under such circumstances and based on the collective evidence in the record, the use of a "moderate" amount of sediment in the assessment of a penalty is appropriate and supported by the evidence.

The SFCR is an impaired waterbody for sediment and as such has an established TMDL in an attempt to bring it back into compliance with water quality standards. Notably, accounted for within this TMDL are state developed waste-load allocations applicable to suction dredging that, in turn, were considered in the development of the General Permit. Further, the SFCR is designated as a "critical habitat" under the ESA for Snake River Basin Steelhead Trout, Snake River Fall Chinook Salmon, and Columbia Basin Bull

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<sup>36</sup> See Tr. 135; CX 27; CX 28.

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Trout, all of which are listed as threatened under the ESA. As a “critical habitat” for endangered species, it is sensitive to sediment. Additionally, the SFCR is designated as an “essential fish habitat” for Pacific Coast Coho Salmon and Snake River Fall Chinook Salmon. It is clear from the evidence that the area in which Respondent dredged is a sensitive environment. Thus, it was appropriate for Complainant to conclude, as explained by Ms. Martich, that the SFCR “is a particularly sensitive water body, especially for discharge of sediment.”<sup>37</sup> I, too, find it appropriate to give significant consideration to this important factor in the assessment of any penalty.

Significant and informative expert testimony, by Mr. Arthaud and Mr. Kenney, was presented as to the adverse environmental impacts that are caused by suction dredging generally and that were caused by Respondent’s suction dredging activities specifically within the SFCR. The SFCR’s designation as “critical habitat” for Snake River Basin Steelhead Trout, an ESA-listed species with “threatened” status, signifies that the species requires areas for recovery and to maintain its population. Additionally, the SFCR’s classification as an essential fish habitat for Pacific Coast Coho Salmon and Snake River Fall Chinook Salmon signifies that the area is deemed essential for the survival and productivity of these species. According to Mr. Arthaud, this critical habitat is degraded by factors that impose limitations upon it, such as riparian and floodplain conditions, temperature, migration barriers, sediment, and habitat complexity,

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<sup>37</sup> Tr. 140.

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all of which embody excesses of sediment that contribute to their limiting nature.

The testimony of these expert witnesses revealed that suction dredge mining in the SFCR causes adverse environmental impacts by creating disturbances to the river's substrate and to the organisms in the area, the suspension of sediments and sedimentation affecting aquatic invertebrates and habitat of ESA-listed species, and fluvial geomorphic impacts. Through the operation of a suction dredge, there is repetitive digging through the substrate—effectively a manual manipulation of the existing habitat—and then a suctioning of mixed cobbles, stones, and sand that is raised above the water and dropped onto other functioning habitats, which can crush invertebrates and small fish and lead to the burial and suffocation of impacted habitats by the clogging of interstitial spaces from that material. Indeed, according to Mr. Arthaud, various scientific studies have generally concluded that these disturbances are lethal to fish eggs and young embryos and to younger stages of aquatic invertebrates.

The expert testimony explained that the excavation of cobbles, sand, and fines that travel through the dredge and are emptied off the end of the dredge to form the plume (the finer particles that do not fall out of suspension immediately and remain within the water column) and the tailings pile (the heavier or more dense material that remains at the exit point of the dredge) pose adverse environmental impacts to ESA-listed species. The suspension of sediments that form the turbid plume create behavioral changes, and increased levels of turbidity cause more intense behavioral impacts. These behavioral changes include

adverse impacts on feeding (and, in turn, on growth and development of the species) due to reduced visibility caused by the turbid plume, and the development of detrimental effects, like coughing or gill mucous, by fish that remain within the plume. Additionally, the formation of the tailings pile causes otherwise existing habitat to be covered up or filled by the material that is deposited to form the pile.

Mr. Arthaud also spoke to the impacts from the “sedimentation” caused by suction dredging, meaning when sediments fall out of suspension in the water column and come to rest on cobbles or fill interstitial spaces. He explained that sedimentation can impact mollusks and snails in the area and even cause their mortality, and that it can also impact plant life, like algae, when their photosynthesis is shaded from turbidity, which then reduces their primary production and growth, and thus reduces the availability of it as a food source. He noted that the most intensive effects of sedimentation on ESA-listed species is with incubating eggs that are dependent upon subsurface water flow for aeration and oxygenation because sedimentation reduces the ability of eggs to breathe oxygen, thereby hindering their growth and survival.

Lastly, evidence was presented with regard to the fluvial geomorphic impacts—that is, the type, shape, valley, substrate and bedrock, and state of the channel within which running water flows—from suction dredging. Both experts seemed to agree that such impacts are adverse, citing, for example, disruptions caused to the stream bottom armor that potentially destabilize the stream channel and the creation of unnatural conditions, like the formation of

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dams from tailings piles, that impact the natural flow and velocity of the water.

The evidence presented is both compelling and convincing in establishing the adverse environmental impacts from suction dredging in the SFCR. Particularly significant is that the SFCR is a critical habitat and essential fish habitat with regard to ESA-listed species and that the water body is impaired from sediment, the pollutant in this case. Also noteworthy, as Mr. Arthaud made clear, is that the SFCR has a high concentration of sediment from legacy placer mining that has taken "50 to 100 years to begin to recover."<sup>38</sup>

Turning from the general impacts of suction dredging in the SFCR to the more specific impacts from Respondent's dredging activity on July 22, 2015, evidence was presented to establish the harmful effects of Hole #5 and Tailings Pile #7 that Respondent created during the subject dredging activity. On October 7 and 8, 2015, less than three months after the violation, Mr. Kenney and his team of technicians visited the site. Measurements were taken from which Mr. Kenney was able to make certain calculations concerning the holes and tailings piles that they observed and evaluated. Mr. Kenney calculated Hole #5 to be 5.6 meters in length, 4.3 meters in width, 1.1 meter in depth, and roughly 15.4 cubic meters in volume. He calculated Tailings Pile #7 to be eight meters in length, 7.8 meters in width, and roughly five cubic meters in volume. From this information, Mr. Kenney concluded that Respondent's dredging activities caused direct

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<sup>38</sup> Tr. 424-25.

injury to fish and invertebrates. He reached this conclusion because he found that the creation of Hole #5 effectively disassembled the stream bottom down to the bedrock, which had undoubtedly been a habitat for hundreds or more of aquatic invertebrates and possibly a habitat for small fish. He also found that the creation of Tailings Pile #7 covered up a substantial area of what was predominantly cobbles, potentially smothering invertebrates by such covering or by filling the interstitial spaces between the cobbles that had existed prior to dredging and impacting fish that may have been present in those areas. Mr. Kenney found that, through Respondent's dredging activities, the habitats for impacted ESA-listed species, notably juvenile steelhead trout, were modified or removed entirely, creating less space in which to live and/or directly injuring them by the dredging process. Mr. Arthaud, based upon his own visits to the site beginning in August 2014 and each year thereafter and his review of documentary and testimonial evidence at the hearing, concurred that it was highly likely that ESA-listed species were impacted by Respondent's suction dredge activities. Mr. Arthaud also noted that Hole #5 and Tailings Pile #7 occupied about half of the stream width, thereby impacting the fluvial geomorphology of the stream by creating a disturbance to large proportions of the stream from bank to bank. Acknowledging the "fair" and recovering condition of the area and habitat, he highlighted the fact that each successive degradation of a degraded habitat causes the habitat to decline further.<sup>39</sup>

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<sup>39</sup> Tr. 422, 473.

On September 13, 2016, Mr. Kenney returned to the site in order to compare the conditions he observed in 2016 to those he observed in 2015. As before, measurements were taken from which Mr. Kenney was able to make certain calculations about the holes and tailings piles that they observed and evaluated. At that time, Mr. Kenney calculated Hole #5 to be 5.8 meters in length and 3.6 meters in width, with an adjusted depth of 0.8 meters. He calculated Tailings Pile #7 to be 7.8 meters in length and 5.2 meters in width. He estimated that roughly half of Hole #5 and Tailings Pile #7 remained in 2016. He also noted that the channel modifications that he had observed and that were caused by Respondent's unauthorized dredging in 2015 had recovered somewhat by 2016 but were still visible.

In October 2018, Mr. Kenney returned to the site of Respondent's dredging activity and observed that Hole #5 had been completely filled in and that no visible sign of Tailings Pile #7 remained. He concluded that although Respondent's dredging activity likely continued to cause adverse impacts in 2018 and that the impacted habitat may never completely recover, there were incremental improvements in conditions from year to year. While Mr. Arthaud agreed with Mr. Kenney that by 2018 some restoration of the dredged area had taken place, his review of the photographic evidence led him to conclude that "a higher proportion of fines and sand mixed in with those gravels" existed than would have otherwise been present had the channel not been dredged by Respondent.<sup>40</sup> He highlighted that the continued presence of those fine

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<sup>40</sup> Tr. 474.

sediments, even an increase of as little as one percent, could not only result in the reduction of egg survival by 16 percent, but it could also negatively affect all successive broods that enter the area to spawn by lower egg and early rearing survival rates.

The evidence presented illustrates that Respondent's dredging activity on July 22, 2015, namely, its creation of Hole #5 and Tailings Pile #7, had adverse environmental impacts, including adverse impacts on ESA-listed species in the SFCR, and that those impacts had a lasting effect, years beyond their creation. Consequently, it was appropriate and is well-supported by the evidentiary record to consider these adverse environmental impacts in the assessment of a penalty in this case.

Respondent argues, apparently to mitigate the extent of harm caused by his suction dredging activity in the SFCR, that the waterbody was already impaired, with an established TMDL, prior to his dredging activity. Complainant counters that the designation of the SFCR as an impaired waterbody weighs in favor of assessing a higher penalty, not a lower penalty, noting that the sensitivity of the environment is an aggravating factor under the Penalty Policy. Complainant's position is persuasive. Apart from the guidance reflected in the Penalty Policy that would support Complainant's position, sound reasoning suggests that adding harmful activity to an impaired environment does not make the added activity any less harmful. Rather, it serves to exacerbate the impairment. Indeed, Mr. Arthaud touched on this very point when, after noting the condition of the SFCR to be only "fair," he testified that successive degradation of an already degraded habitat causes the

habitat to decline further.<sup>41</sup> Thus, I find no merit in Respondent's argument, and it does not serve to lessen the gravity of the violation or otherwise reduce the amount of penalty to be assessed for his violative conduct.

Respondent also appears to argue that the lack of evidence or discussion regarding particle size and speed of the water flow in the SFCR discredits Complainant's case against him. In response, Complainant argues that Respondent has failed to provide any basis for his assertions or explain how those assertions should influence an analysis of environmental harm. Complainant relies on the evidence presented by its expert witnesses that established environmental harm from Respondent's discharge of sediment, both by the smaller sediment particles in suspension and by the larger sediment particles that more swiftly settled on the river bottom. I am inclined to agree with Complainant. The expert testimony by Mr. Kenney and by Mr. Arthaud discussed, in great detail and length, the extent of environmental harm caused by Respondent's suction dredging activity and discharge of sediment. Within this expert testimony was detailed explanation regarding the various habitats that were adversely impacted by such discharges. For example, in his expert testimony, Mr. Kenney identified three forms of impacted habitat: one habitat being "in the water column itself," a second habitat being "on the surface of the stream bottom," and a third habitat being "below the surface of the stream bottom and into the substrate for a certain depth."<sup>42</sup> In

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<sup>41</sup> See Tr. 473.

<sup>42</sup> Tr. 297-98.

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his discussion of each habitat, Mr. Kenney made distinctions between smaller “fine sediment,” or “fines,” that “are carried off and not deposited” and larger “fines” that “generally drop out fairly quickly below the dredge and [are] not [] suspended for very far in the water column.”<sup>43</sup> He also spoke of destabilization of the stream channel when finer material from the dredging process can be picked up by high river flow events and moved farther downstream, potentially adversely affecting the fine sediment load downstream of the site.<sup>44</sup> Mr. Arthaud, too, made distinctions throughout his expert testimony regarding particle size. For example, Mr. Arthaud testified that while the larger, heavier, and denser materials remain at the exit point of the dredge to form the “tailings,” the “finer particles are caught by the current and do not fall out of suspension immediately” to form the turbid plume.<sup>45</sup> He also spoke of “sedimentation,” whereby sediments fall out of suspension in the water column and rest on “cobbles or fill up interstitial spaces,” which can adversely impact mollusks and snails and cause mortality.<sup>46</sup> Mr. Arthaud also addressed the fluvial geomorphic impacts from suction dredging, including the simplification of habitat, and he discussed, for example, changes in the velocity of water flow and current direction from the creation of

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<sup>43</sup> Tr. 305-06.

<sup>44</sup> Tr. 302-04.

<sup>45</sup> Tr. 428.

<sup>46</sup> Tr. 430-31.

tailings piles.<sup>47</sup> As noted, while Respondent chose not to testify or present evidence, he did conduct extensive cross-examination of Complainant's witnesses, including Mr. Kenney and Mr. Arthaud. To the extent Respondent wished to challenge aspects of Complainant's case, he had ample opportunity to do so. While I have considered Respondent's arguments, I see no merit in them and find no deficiencies within the evidentiary record to question the reliability of the evidence offered by Complainant.

With regard to the duration of the violation in this case, I note that Complainant has made the argument post-hearing that additional days of violation may have occurred beyond the single day of July 22, 2015, but that it conservatively assigned one day as the duration period in its penalty evaluation. I am inclined to agree with this conservative approach and find that it is supported by the evidentiary record.

Another consideration in this evaluation is the importance to the regulatory scheme that the NPDES program holds and the impact that Respondent's violation had upon it. Complainant asserts that Respondent's violation caused harm not only to the environment but also to the regulatory scheme at issue. It asserts that, in spite of knowing the legal requirements for permit authorization to dredge and the limitations of the General Permit, Respondent joined miners from a mining rights association<sup>48</sup> to openly and knowingly violate the terms of the General Permit and frustrate its purpose and intent. Indeed,

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<sup>47</sup> Tr. 434-35, 442-43.

<sup>48</sup> See Tr. 71-73.

the evidentiary record shows that Respondent was well aware of the legal requirements to obtain permit authorization before engaging in suction dredging activity. Not only has Respondent represented himself to be a professional dredger, but he has also represented his knowledge of the necessity for permit authorization to dredge by obtaining state permits to do so in five states.<sup>49</sup> With respect to the SFCR, the evidence is clear that permit authorization or coverage was not available for suction dredging at the time of this violation. There is no ambiguity here. Respondent was well informed of the limitations within the SFCR and EPA's permitting authority, as explicitly stated in written correspondence by the EPA, ACE, and IDWR, as well as by the language contained in the General Permit.<sup>50</sup> Yet he chose to disregard such requirements and dredge without authorization in a waterbody designated as an essential fish habitat and critical habitat for certain ESA-listed species, causing harm by his activities. Respondent's actions clearly frustrated federal authority and federal regulatory requirements set out in the NPDES program, and they contributed to the challenges that the Agency already faced with achieving compliance with a portable activity like suction dredge mining.<sup>51</sup> Consequently, it was appropriate and is well-supported by the evidentiary record to consider this element in the assessment of a penalty in this case.

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<sup>49</sup> See CX 10.

<sup>50</sup> See CX 3, 8, 9, 29.

<sup>51</sup> See Tr. 145, 228-29, 232-33, 235.

Respondent argues in his initial brief that his submission of the NOI on May 17, 2015, demonstrated an effort toward compliance. I disagree. The NOI stated that the applicant, *i.e.*, Respondent, is required to contact the IDWR to obtain a permit and determine whether additional restrictions apply.<sup>52</sup> The IDWR Letter Permit issued to Respondent around the same time explicitly stated, and in bold typeface, “The US Environmental Protection Agency (EPA) now requires an NPDES general permit for small scale suction dredging in Idaho.”<sup>53</sup> Moreover, in February of 2014, the ACE notified Respondent in the ACE Letter of EPA’s authority over suction dredge permitting pursuant to the CWA, as well as the potential for ESA provisions to impact suction dredging activity in the SFCR given its designation as a critical habitat for certain ESA-listed species, and it suggested that Respondent contact the FWS and NMFS before beginning any work in the SFCR.<sup>54</sup> By way of the EPA Letter in October of 2014, EPA also advised Respondent that his Joint Application for suction dredging on the SFCR could not be authorized before a required ESA determination was made given the effluent limitations for the SFCR and its designation as a critical habitat for ESA-listed species.<sup>55</sup> The EPA Letter also reiterated that “permit coverage from the EPA and the IDWR is required in order to operate a small

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<sup>52</sup> See CX 12.

<sup>53</sup> See CX 29.

<sup>54</sup> See CX 9.

<sup>55</sup> See CX 8.

suction dredge in Idaho.”<sup>56</sup> Finally, the General Permit contained language stating that written notification from EPA of coverage having been granted to an operation was required in order for that operation’s discharges to be authorized.<sup>57</sup> No such authorization by EPA to Respondent was provided. Thus, I find Respondent’s argument unconvincing and contradicted by the evidentiary record.

In sum, the evidence presented is compelling and convincingly establishes that Respondent’s unauthorized suction dredge mining in the SFCR on July 22, 2015, caused serious harm, not only by its adverse environmental impact on the SFCR but also to the regulatory scheme.

The size of the violator is another element for consideration in this penalty evaluation. Here, Complainant recognized that Respondent is an individual and accounted for such in its proposed penalty calculation. There is no dispute on this point, and it is supported by the evidentiary record.

Based on the foregoing evidence, Complainant calculated a preliminary deterrence amount of \$5,500. Complainant asserts that this amount represents a very conservative approach given that the statutory maximum would have permitted a preliminary deterrence amount of \$16,000, but it urges that that amount be maintained as the base from which adjustment factors are to be applied. My review finds

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<sup>56</sup> See CX 8.

<sup>57</sup> See CX 3, BSN 853-54.

this preliminary deterrence amount to be well supported by the credible evidence presented, and I find no basis to depart from this preliminary figure.

## **2. Respondent's degree of culpability**

Embodied in the evaluation of a violator's degree of culpability are adjustment factors that are described in the Penalty Policy, which Complainant considered in its proposed penalty assessment and which I, too, will consider. The Penalty Policy sets forth certain elements to consider in assessing the degree of willfulness of the violator, namely: (1) how much control the violator had over the events constituting the violation; (2) the foreseeability of the events constituting the violation; (3) whether the violator took reasonable precautions against the events constituting the violation; (4) whether the violator knew or should have known of the hazards associated with the conduct; the level of sophistication within the industry in dealing with compliance issues; and whether the violator in fact knew of the legal requirement which was violated. CX 35, BSN 1459.

As to element (1) regarding the extent of control by the violator, Complainant correctly points out that the evidence is both clear and undisputed that Respondent alone had control over the operation of his suction dredge and the discharge that occurred, thereby satisfying this element. The evidentiary record illustrates that the remaining elements are also satisfied. The Joint Application that Respondent submitted, in which he identified himself to be a professional dredger with permit authorization in five states over a 20-year period, including Alaska, demonstrated his knowledge of permitting requirements and, as

Complainant points out, specific knowledge and possession of a CWA NPDES permit for suction dredging in Alaska. Further, Respondent's submission of the NOI also demonstrated his knowledge of the need to obtain permit coverage prior to engaging in suction dredging activities. Thus, elements (2) and (6) are satisfied. Both the ACE Letter of February 2014 and the EPA Letter of October 2014 put Respondent on notice that the SFCR is a designated critical habitat for ESA-listed species and that ESA requirements thus apply to the area, which, in turn, impacts the ability to suction dredge in that waterbody. The EPA Letter further specified that coverage under the General Permit was not authorized and that an ESA determination had to be made prior to authorizing any suction dredging activity on the SFCR. In addition, the EPA Letter explicitly stated that permit coverage was required by both EPA and IDWR, noting that the entities "do not share the exact same list of open and closed waterbodies."<sup>58</sup> The IDWR Letter Permit issued to Respondent in May 2015 confirmed this requirement and reiterated EPA's authority over the permitting process, stating, "The US Environmental Protection Agency (EPA) now requires an NPDES general permit for small scale suction dredging in Idaho. The EPA should be contacted on their requirements in Idaho."<sup>59</sup> In spite of receiving such explicit and advance notice, Respondent chose to ignore the permitting requirements and engage in suction dredging activity on the SFCR on July 22, 2015, without authorization and in violation of federal

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<sup>58</sup> CX 8, BSN 854.

<sup>59</sup> CX 29, BSN 1415.

requirements. Evidence in the record also reveals that, apart from Respondent's unauthorized suction dredging activity on the SFCR, he failed to adhere to the best management practices upon which the General Permit is conditioned.<sup>60</sup> Complainant notes that the best management practices contained within the General Permit are not unduly burdensome (e.g., not logically challenging or requiring technical expertise) and do not require a heightened level of sophistication. Moreover, EPA provided educational outreach to the regulated community in venues conveniently located to Respondent. Thus, the evidence demonstrates that elements (3), (4), and (5) are satisfied.

It should be noted that Respondent also demonstrated a lack of cooperation by his failure to respond to the RFI that EPA sent him, instead responding by challenging EPA's legal authority and factual basis for the NOV. Complainant, while pointing out this behavior, chose not to impose an upward adjustment for Respondent's lack of cooperation. I am not compelled to depart from Complainant's assessment in this regard.

Based on the foregoing discussion, the credible and substantial evidence presented demonstrates that the degree of willfulness that Respondent exhibited in committing the violation in this case warrants an upward adjustment of the gravity component of the preliminary deterrence amount of penalty. The record shows that Complainant maintained its conservative approach in its calculation of a proposed penalty by

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<sup>60</sup> See CX 3, BSN 39-42.

upwardly adjusting the gravity component of the preliminary deterrence amount by 20 percent—a category of adjustment that Ms. Martich described as consistent with “usual” circumstances and that the Penalty Policy identifies as being within the “absolute discretion of the case development team”—even though Ms. Martich construed the degree of Respondent’s willfulness to be in an “extraordinary” category of behavior that may have justified a higher upward adjustment.<sup>61</sup> While I, too, recognize the extent of willfulness that Respondent exhibited and the deliberateness of his actions in disregarding federal law and permitting requirements, I am reluctant to depart from Complainant’s sound and well supported proposed adjustment of 20 percent. Accordingly, I conclude that the evidence presented supports a civil monetary penalty for Respondent’s violation of the CWA in the amount of \$6,600, as proposed.

## V. Order

1. Respondent is hereby assessed a civil monetary penalty in the amount of \$6,600 for his violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).
2. Payment of the full amount of this civil monetary penalty shall be made within 30 days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below:

Payment shall be made by submitting a certified or cashier’s check<sup>62</sup> in the requisite

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<sup>61</sup> See CX 35, BSN 1458; Tr. 165-66.

<sup>62</sup> Respondent may also pay by one of the electronic methods described at the following webpage: <https://www.epa.gov/financial/>

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amount, payable to "Treasurer, United States of America," and mailed to:

U.S. Environmental Protection Agency Fines and Penalties  
Cincinnati Finance Center  
P.O. Box 979077  
St. Louis, MO 63197-9000

A transmittal letter identifying the subject case and EPA docket number (CWA-10-2016-0109), as well as the Respondent's name and address, must accompany the check.

If Respondent fails to pay the penalty within the prescribed statutory period after entry of this Initial Decision, interest on the penalty may be assessed. *See* 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

3. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order 45 days after its service upon the parties and without further proceedings unless (1) a party moves to reopen the hearing within 20 days after service of this Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals Board is taken within 30 days after this Initial Decision is served upon the parties pursuant to 40 C.F.R. § 22.30(a); or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, under 40 C.F.R. § 22.30(b).

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additional-instructions-making-payments-epa.

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SO ORDERED.

/s/ Christine Donelian Coughlin  
Administrative Law Judge

Date: October 7, 2020  
Washington, D.C.

**IDAHO STATE WATER PLAN,  
SOUTH FORK CLEARWATER RIVER BASIN,  
EXECUTIVE SUMMARY, RELEVANT EXCERPT**

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**III. Issues, Analysis and Considerations**

**3.1 ISSUE: Recreational dredge mining**

**A. Issue Statement: Recreational dredge mining permit/regulation process is adequate in the South Fork Clearwater River basin.**

**Discussion**

Recreational dredge mining is defined as mining with power sluices small recreational suction dredges with a nozzle 5 inches in diameter or less and equipment rated at a maximum of 15 horsepower. Recreational dredge mining is regulated in Idaho under the Stream Channel Protection Act. This statute requires dredge miners to obtain a permit from IDWR before recreational dredge mining can be started. The state's One Stop Recreational Dredge Mining Permit does not require a National Pollution Discharge Elimination System (NPDES) permit. State regulations also specify the streams where recreational dredging is prohibited. Suction dredging that is not considered "recreation" is currently considered a "point source" of pollution requiring a National Pollution Discharge Elimination System permit from the U.S. Environmental protection agency. Recreational dredge mining is only allowed on the mainstem South Fork Clearwater River. Due to budgetary constraints of the Stream Channel Unit of the Resource Protection Bureau at IDWR, and to possible dredge mining

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limitation from the TMDL for the South Fork Clearwater River, current management and regulation of recreation dredge mining on the South Fork Clearwater River may be changing in 2005.

- The State of Idaho forbids use of recreational dredge within 500 feet of a developed campground, and the USFS prohibits their use in national recreation areas and protected rivers.
- Recreational suction dredges or sluices operated properly in a stream channel do not cause a great deal of environmental damage unless they are used in fish spawning beds (redds) at the wrong time of year. Redd could be damaged or totally destroyed by dredging. Eggs of salmonids prior to the eyed-up stage and sac fry would suffer high mortality if entrained by dredging (Griffith and Andrews 1981).
- Operation of recreational dredges in the South Fork Clearwater River would have some minor impacts on aquatic invertebrates (Griffith and Andrews 1981). Fe insects would be killed but some would likely be displaced downstream. Thomas (1985) found lower abundance of aquatic insects in a 35-meter section of dredged stream. Recolonization was complete in a month after dredging.
- The South Fork Clearwater River may be dredged from Jul 15 to Aug 15 under the Recreational Dredging Permit if request is made on the special supplement. The site must also be inspected by IDWR with a

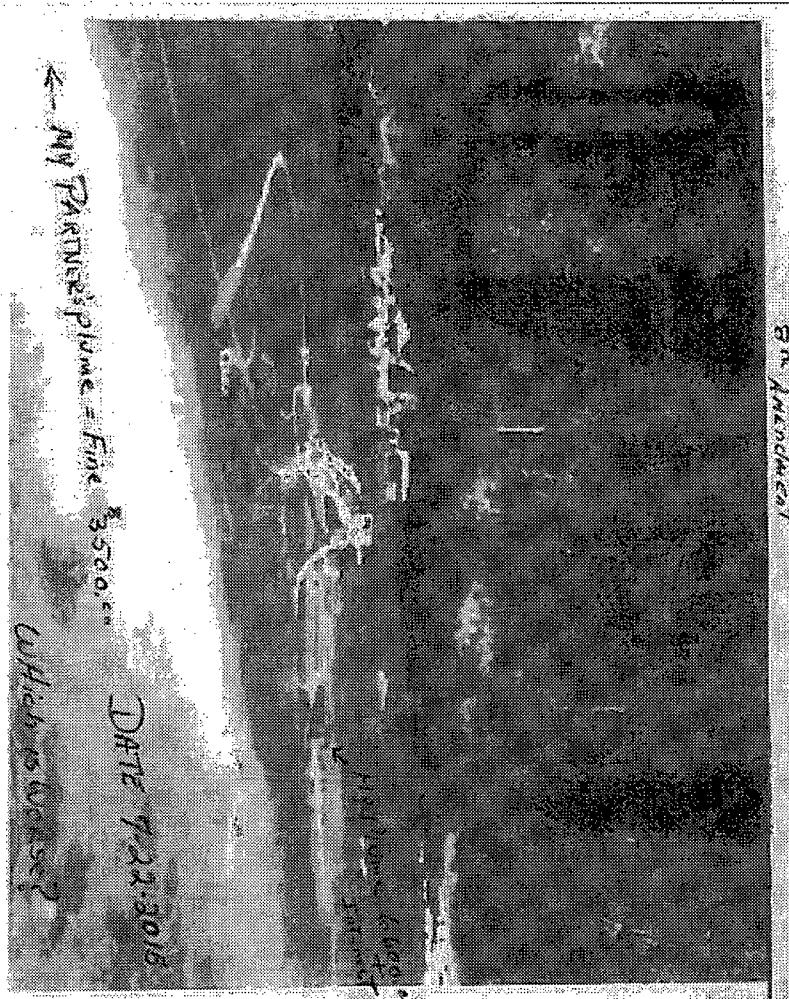
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fishery biologist. With that authorization, IDWR will issue a letter of approval. The rest of the drainage is closed under the Recreational Dredging Permit, but approval may be granted to dredge in the waters not open under the recreational permit if application is made using form 3804-B (Joint Application for a Permit). The limited season and permit minimize the impacts discussed under the two previous bullets.

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## IMAGE OF THE DREDGING OPERATION



**FEDERAL REGISTER, VOL. 78, NO. 65**

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**ENVIRONMENTAL PROTECTION AGENCY  
[FRL-9798-1]**

**Final Issuance of General NPDES Permits (GP)  
for Small Suction Dredges in Idaho**

**Agency:** Environmental Protection Agency, Region 10.

**Action:** Final Notice of reissuance of a general permit.

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**Summary:**

EPA is issuing a National Pollutant Discharge Elimination System (NPDES) General Permit (IDG-37-0000) to placer mining operations in Idaho for small suction dredges (intake nozzle size of 5 inches in diameter or a diametric equivalent or less and with equipment rated at 15 horsepower or less). On January 22, 2010, EPA proposed the GP and there was a 45 day comment period. Public Informational Workshops were held in Grangeville, Boise, Salmon and Idaho Falls the week of February 22. During the comment period, EPA received many comments and decided to make changes to the draft based on the comments received. On May 1, 2012, EPA re-noticed the GP with a new Fact Sheet requesting new comments. The comment period ended on June 1, 2012.

**Dates:**

The issuance date of the GP is April 4, 2013, the date of publication of this notice. The GP will be effective May 6, 2013. Facilities may start submitting Notices of Intent (NOI) to receive coverage under the GP.

**Addresses:**

Copies of the GP and Response to Comments are available upon request. Written requests may be submitted to EPA, Region 10, 1200 Sixth Avenue, Suite 900, OWW-130, Seattle, WA 98101. Electronic requests may be mailed to: *washington.audrey@epa.gov* or *godsey.cindi@epa.gov*.

**For Further Information Contact:**

The GP, Fact Sheet and Response to Comments along with detailed maps may be found on the Region 10 Web site at <http://yosemite.epa.gov/r10/water.nsf/npdes+permits/idsuction-gp>.

Requests by telephone may be made to Audrey Washington at (206) 553-0523 or to Cindi Godsey at (907) 271-6561.

**Supplementary Information:**

EPA requested final certification under the Clean Water Act § 401 from the State of Idaho and Tribal governments. EPA received certification from the Idaho Department of Environmental Quality in a letter dated March 8, 2013 that the subject discharges comply with the applicable provisions of Sections 208(e), 301, 302, 306 and 307 of the Clean Water Act.

EPA received letters from the Coeur d'Alene Tribe (May 23, 2012) and the Shoshone Bannock Tribe (March 20, 2013) denying certification. As a result of Tribal government-to-government consultation and coordination, the GP does not cover any of the five Reservations with land within the boundaries of the State of Idaho.

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EPA prepared a Biological Evaluation for consultation with the US Fish and Wildlife Service and the National Marine Fisheries Service. EPA received concurrence from both Services on a Not Likely to Adversely Affect determination.

*Executive Order 12866:* The Office of Management and Budget has exempted this action from the review requirements of Executive Order 12866 pursuant to Section 6 of that order.

*Regulatory Flexibility Act:* Under the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, a Federal agency must prepare an initial regulatory flexibility analysis “for any proposed rule” for which the agency “is required by section 553 of the Administrative Procedure Act (APA), or any other law, to publish general notice of proposed rulemaking.” The RFA exempts from this requirement any rule that the issuing agency certifies “will not, if promulgated, have a significant economic impact on a substantial number of small entities.” EPA has concluded that NPDES general permits are permits, not rulemakings, under the APA and thus not subject to APA rulemaking requirements of the RFA. Notwithstanding that general permits are not subject to the RFA, EPA has determined that these general permits, as issued, will not have a significant economic impact on a substantial number of small entities.

Dated: March 28, 2013.

Daniel D. Opalski,  
Director, Office of Water & Watersheds, Region 10.

[FR Doc. 2013-07752 Filed 4-3-13; 8:45 am]  
BILLING CODE 6560-50-P

**FED. REG. 85-FR-23985,  
RELEVANT EXCERPT**

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**ACTION:** Proposed rule.

**SUMMARY:**

This rule would revise National Park Service regulations to comply with the decision of the U.S. Supreme Court in *Sturgeon v. Frost*. In the *Sturgeon* decision, the Court held that National Park Service regulations apply exclusively to public lands (meaning federally owned lands and waters) within the external boundaries of National Park System units in Alaska. Lands which are not federally owned, including submerged lands under navigable waters, are not part of the unit subject to the National Park Service's ordinary regulatory authority.

**DATES:**

Comments on the proposed rule must be received by June 29, 2020.

**ADDRESSES:**

You may submit comments, identified by Regulation Identifier Number (RIN) 1024-AE63, by either of the following methods:

- (1) *Electronically*: Go to the Federal eRulemaking Portal: <http://www.regulations.gov> (<http://www.regulations.gov>) and search for "1024-AE63". Follow the instructions for submitting comments.
- (2) *By hard copy*: Mail or hand deliver to: National Park Service, Regional Director,

Alaska Regional Office, 240 West 5th Ave.,  
Anchorage, AK 99501.

*Instructions:* Comments will not be accepted by fax, email, or in any way other than those specified above. All submissions received must include the words “National Park Service” or “NPS” and must include the RIN 1024-AE63 for this rulemaking. Bulk comments in any format (hard copy or electronic) submitted on behalf of others will not be accepted. Comments received may be posted without change to [www.regulations.gov](http://www.regulations.gov) (<http://www.regulations.gov>), including any personal information provided.

*Docket:* For access to the docket to read background documents or comments received, go to [www.regulations.gov](http://www.regulations.gov) (<http://www.regulations.gov>) and search for “1024-AE63”.

**FOR FURTHER INFORMATION CONTACT:**

Donald Striker, Acting Regional Director, Alaska Regional Office, 240 West 5th Ave., Anchorage, AK 99501. Phone (907) 644-3510. Email: [AKR\\_Regulations@nps.gov](mailto:AKR_Regulations@nps.gov) ([mailto:AKR\\_Regulations@nps.gov](mailto:AKR_Regulations@nps.gov)).

**SUPPLEMENTARY INFORMATION:**

**Background**

***Sturgeon v. Frost***

In March 2019, the U.S. Supreme Court in *Sturgeon v. Frost* (139 S. Ct. 1066, March 26, 2019) unanimously determined the National Park Service’s (NPS) ordinary regulatory authority over National Park System units in Alaska only applies to federally owned “public lands” (as defined in section 102 of the Alaska National Interest Lands Conservation Act, 16

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U.S.C. 3102 (<https://www.govinfo.gov/link/uscode/16/3102>)—and not to State, Native, or private lands—irrespective of unit boundaries on a map. Lands not owned by the federal government, including submerged lands beneath navigable waters, are not deemed to be a part of the unit (slip op. 17). More specifically, the Court held that the NPS could not enforce a System-wide regulation prohibiting the operation of a hovercraft on part of the Nation River that flows through the Yukon-Charley Rivers National Preserve (Preserve). A brief summary of the factual background and Court opinion follow, as they are critical to understanding the purpose of this proposed rule.

The Preserve is a conservation system unit established by the 1980 Alaska National Interest Lands Conservation Act (ANILCA) and administered by the NPS as a unit of the National Park System. The State of Alaska owns the submerged lands underlying the Nation River, a navigable waterway. In late 2007, John Sturgeon was using his hovercraft on the portion of the Nation River that passes through the Preserve. NPS law enforcement officers encountered him and informed him such use was prohibited within the boundaries of the Preserve under 36 CFR 2.17(e) ([https://www.ecfr.gov/current/title-36/section-2.17#p-2.17\(e\)](https://www.ecfr.gov/current/title-36/section-2.17#p-2.17(e))), which states that “[t]he operation or use of a hovercraft is prohibited.” According to NPS regulations at 36 CFR 1.2(a)(3) ([https://www.ecfr.gov/current/title-36/section-1.2#p-1.2\(a\)\(3\)](https://www.ecfr.gov/current/title-36/section-1.2#p-1.2(a)(3))), this rule applies to persons within “[w]aters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters” without any regard to ownership of the submerged lands. *See* 54 U.S.C. 100751(b) (<https://www.govinfo>.

gov/link/uscode/54/100751) (authorizing the Secretary of the Interior to regulate “boating and other activities on or relating to water located within System units”).

Mr. Sturgeon disputed that NPS regulations could apply to his activities on the Nation River, arguing that the river is not public land and is therefore exempt from NPS rules pursuant to ANILCA section 103(c) (16 U.S.C. 3103(c) (<https://www.govinfo.gov/link/uscode/16/3103>)), which provides that only the public lands within the boundaries of a System unit are part of the unit, and that State-owned lands are exempt from NPS regulations, including the hovercraft rule. Mr. Sturgeon appealed his case through the federal court system.

In its March 2019 opinion, the Court agreed with Mr. Sturgeon. The questions before the Court were: (1) Whether the Nation River in the Preserve is public land for the purposes of ANILCA, making it indisputably subject to NPS regulation; and (2) if not, whether NPS has an alternative source of authority to regulate Mr. Sturgeon’s activities on that portion of the Nation River. The Court answered “no” to both questions.

Resolution turned upon several definitions in ANILCA section 102 and the aforementioned section 103(c). Under ANILCA, 16 U.S.C. 3102 (<https://www.govinfo.gov/link/uscode/16/3102>), “land” means “lands, waters, and interests therein”; “Federal land” means “lands the title to which is in the United States”; and “public lands” are “Federal lands,” subject to several statutory exclusions that were not at issue in the *Sturgeon* case. As such, the Court found “public lands” are “most but not quite all [lands, waters, and interests therein] that the Federal Government owns” (slip op.

10). The Court held that the Nation River did not meet the definition of "public land" because: (1) "running waters cannot be owned"; (2) "Alaska, not the United States, has title to the lands beneath the Nation River"; and, (3) federal reserved water rights ("not the type of property interests to which title can be held") do not "give the Government plenary authority over the waterway" (slip op 12-14).

[ . . . ]

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