

INTRODUCTION

Defendant Shannon Poe admits he used a suction dredge on at least 42 days to mine for gold in the South Fork Clearwater River (South Fork) in 2014, 2015, and 2018, but refused to apply for an National Pollutant Discharge Elimination System (NPDES) permit. Each day of dredging, Poe used a motorized suction dredge to suck up riverbed material and water, processed it to separate out gold in a sluice box on the floating dredge, and then discarded the unwanted riverbed material and water off the back of the dredge into the river. Each day of dredging, Poe thus violated the federal Clean Water Act (CWA), 33 U.S.C. § 1311(a), by discharging sediment and other pollutants from a point source to the South Fork without an NPDES permit.

Accordingly, the Court should grant the Idaho Conservation League’s Motion for Summary Judgment on Liability, find Poe committed 42 separate CWA violations for his dredging in 2014, 2015 and 2018, and move to the remedies stage to determine the appropriate civil penalty and injunctive and other relief for Poe’s CWA violations.

LEGAL BACKGROUND

Congress enacted the CWA to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To achieve this objective, the CWA “categorically prohibits any discharge of a pollutant from a point source without a permit.” *Comm. to Save Mokolumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir. 1993) (citing 33 U.S.C. § 1311(a)).

The CWA defines “discharge of a pollutant” to mean the “addition of a pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12). Pollutant is broadly defined to include “dredged spoil, solid waste, . . . rock, sand,” and “industrial . . . waste discharged into

water.” *Id.* § 1362(6). A point source is “any discernible, confined and discrete conveyance.” *Id.* § 1362(14). Navigable waters are defined as “the waters of the United States.” *Id.* § 1362(7).

“The centerpiece of the CWA is the NPDES permitting program.” *Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 990 (D.C. Cir. 1997). Under the program, EPA is authorized to “issue a permit for the discharge of any pollutant, or combination of pollutants,” on condition that the discharge will meet other sections of the CWA. 33 U.S.C. § 1342(a)(1). There are two types of NPDES permit: (1) an “individual permit,” which “authorizes a specific entity to discharge a pollutant in a specific place and is issued after an informal agency adjudication;” and (2) a “general permit,” which “is issued for an entire class of hypothetical dischargers in a given geographical region and is issued pursuant to administrative rulemaking.” *Alaska Cmty. Action on Toxics v. Aurora Energy Servs.*, 765 F.3d 1169, 1171 (9th Cir. 2014) (citations omitted).

In addition to federal enforcement, the CWA authorizes citizen suits to be brought in federal court against any person alleged to be in violation of any “effluent standard or limitation.” 33 U.S.C. § 1365(a)(1). Effluent limitation is defined broadly to include “an unlawful act under subsection (a) of section 1311 of this title,” which prohibits the discharge of pollutants by any person, unless done in compliance with the CWA. *Id.* §§ 1365(f), 1311(a). District courts have jurisdiction to enforce such standards or limitations, and to award injunctive relief, civil penalties, and litigation costs and fees. *Id.* §§ 1365(a), (d).

STATEMENT OF RELEVANT FACTS¹

Suction Dredge Mining

Suction dredge mining is a method of placer mining that uses a floating dredge equipped with motorized equipment to mine gold from riverbeds. *See* Forest Service Environmental

¹ Detailed discussion of the relevant facts and citations to supporting evidence are provided in ICL’s Separate Statement of Undisputed Facts (SOF) filed herewith.

Assessment for Dredge Mining on South Fork (Jun. 2016) (ECF No. 17-4, Ex. 8) (“2016 EA”), p. 1-3, Fig. 1-2 (labeled diagram and photo of typical dredge). Poe uses an underwater nozzle and hose to suck up riverbed material and water to a dredge floating on the river surface. SOF ¶ 8. On the dredge, Poe processes the riverbed material by running it through a sluice box, where gold and other heavy metals are separated out. *Id.* After processing, the unwanted riverbed material and water is then discarded off the back of the dredge into the river. *Id.*

Riverbed materials include rock, gravel, sand, sediment, and silt. SOF ¶ 9. Larger rock, gravel, and cobble tend to settle on the river bottom not far from where they are discarded from the dredge. *Id.* Finer gravel and sand discarded from the dredge may move downstream as bedload. *Id.* Silt and other finer materials discarded from the dredge may become suspended in the water column and carried further downstream. *Id.*

Poe “punches holes” when he dredges, by dredging layers of “overburden” on the river bottom to go down many feet all the way to bedrock. SOF ¶ 11. This requires breaking up and dislodging boulders, smaller rocks and gravels, and compacted sediments using the miner’s hands, dredge nozzle, and other tools like crowbars and high-pressure blaster nozzles. SOF ¶ 12–13. Poe creates tailings piles where he discards processed riverbed material off the dredge. SOF ¶ 14. Poe’s tailings piles can rise to the surface level of the river surface, and can span most of the river’s width. *Id.*

The South Fork of the Clearwater River

The South Fork Clearwater River is located in Idaho County, and flows from its headwaters at the confluence of the Red River and American River near Elk City through the Nez Perce-Clearwater National Forest and the Nez Perce Reservation to its confluence with the

Clearwater River at Kooskia. SOF ¶ 1. The South Fork flows year-round, with mean annual flow of 1,060 cubic feet per second. *Id.*

The South Fork is a “State Protected River” in Idaho and is eligible for designation under the federal Wild and Scenic Rivers Act due to its outstandingly remarkable values. *See* EPA NPDES Fact Sheet for Suction Dredge Miners in Idaho (ECF No. 17-3, Ex. 7) (“2018 Fact Sheet”), p. 45.; 2016 EA, p. 3-83. The South Fork is inhabited by native fish, including steelhead trout, fall Chinook salmon, and bull trout, each of which is listed as “threatened” under the Endangered Species Act. SOF ¶ 2. The river also provides habitat for other native fish, including Pacific lamprey, redband trout, spring Chinook salmon, and westslope cutthroat trout. *Id.*

The South Fork is designated as an “impaired” water body along its entire length, because it fails to meet state water quality standards for sediment and temperature pollution developed under the CWA. SOF ¶ 3. In 2004, the Idaho Department of Environmental Quality (DEQ), Nez Perce Tribe, and EPA prepared the South Fork Clearwater Subbasin Assessment and Total Maximum Daily Loads to address sediment and temperature pollution. *See* 2nd Hurlbutt Decl., Ex. W (“2004 TMDL”). A TMDL is a CWA pollution budget that inventories pollution sources and sets pollution limits for each source at levels that will bring the waterbody into compliance with water quality standards. *See* 33 U.S.C. § 1313(d).

The South Fork TMDL identifies suction dredge mining as a point source of sediment pollution. 2014 TMDL, p. 97, 99–102. According to DEQ: “While the literature is mixed in terms of the nature and severity of effects from dredge mining operations, serious impacts to water quality and habitat have been documented, depending on the size, location and manner in which dredges are operated.” *Id.* at 100. Because suction dredge mining may have adverse effects on both the water column and substrate sediment levels, the South Fork TMDL sets

wasteload allocations that limit the number of dredges allowed on the South Fork, and limit the amount of turbidity (a surrogate for sediment) pollution that dredges can discharge. *Id.* at 218–19. DEQ determined that the effectiveness of these wasteload allocations is contingent upon each dredger complying with all applicable permitting programs, “including those of the USEPA (NPDES permit),” the “USFS (Plan of Operation . . .),” and others. *Id.* at 219.

NPDES Permitting Program for Suction Dredge Mining on the South Fork

EPA has determined that suction dredge mining requires obtaining and complying with an NPDES permit to authorize the discharge of sediment and other pollutants from the dredge. To facilitate NPDES permitting for suction dredge mining in Idaho, EPA issued a “General Permit” in 2013 (ECF No. 17-3, Ex. 5) and reissued the General Permit in 2018 (ECF No. 17-3, Ex. 6). The General Permit is available to dredgers only if they meet certain conditions, including using an intake nozzle 5 inches or less, using an engine rated 15 horsepower or less, and operating only in “open or allowed” streams. 2018 General Permit, p. 3.

EPA determined that suspended solids, which cause turbidity, are “the primary pollutant of concern from suction dredge discharges.” 2018 Fact Sheet, p. 16. “High levels of turbidity can adversely impact water quality and can have direct and indirect effects on fish and other aquatic life.” *Id.* The General Permit includes effluent limits which: (1) prohibit any visible increase in turbidity (any cloudiness or muddiness) above background levels beyond 500 feet downstream while a dredge operates; and (2) require modification, curtailment, or cessation of dredging to stop any such violation. 2018 General Permit, p. 19.

General Permit holders must display their Miner Number on their dredge and vehicle. *Id.* Permittees must visually monitor turbidity at least once per day, note the distance of their turbidity plume, and record monitoring results in a daily log. *Id.* at 20. Permittees must also file

an annual report with EPA, reporting their name, permit number, activity status, waterbody, location where dredging took place, length of longest observed turbidity plume, and dates of operation. *Id.* The General Permit also includes 12 best management practices (“BMPs”) permittees must follow, including operating at least 800 feet apart and other practices to reduce impacts to water quality and river conditions. *Id.* at 80–83. For dredging on the South Fork, the General Permit includes additional measures to reduce sediment pollution even further to comply with the South Fork TMDL, including limiting the number permits to 15 and limiting turbidity plumes more precisely. *See* 2018 Fact Sheet, pp. 17–18.

The CWA allows EPA to authorize individual states to administer their own Section 402 permitting programs. 33 U.S.C. § 1342(b). On June 14, 2018, EPA authorized Idaho’s NPDES program: the Idaho Pollutant Discharge Elimination System (IPDES) program administered by the DEQ. 83 Fed. Reg. 27,769 (Jun. 14, 2018). Like EPA, DEQ has determined suction dredges discharge pollutants and, thus, require IPDES permits. *See* 2nd Hurlbutt Decl., Ex. X (DEQ webpage on “Industrial Dischargers”), p. 3. Under the phased transition from NPDES to IPDES, EPA was still issuing NPDES permits to suction dredge miners when Poe dredged in Idaho in 2018. *See* 2018 Fact Sheet, p. 6. Beginning on July 1, 2020, suction dredge miners in Idaho are required to obtain IPDES permits from DEQ, instead of NPDES permits from EPA. 2nd Hurlbutt Decl., Ex. Y (DEQ webpage “Idaho Pollutants Discharge Elimination System Program”), p. 1.

Other Permitting Programs for Suction Dredge Mining on the South Fork

Dredging in Idaho also requires a stream channel alteration permit from the Idaho Department of Water Resources (“IDWR”). *See* ECF No. 17-3, Ex. 2. IDWR has special permitting instructions for dredging on the South Fork. *See* ECF No. 17-3, Ex. 4. IDWR limits the amount of suction dredge mining, allows dredging only during July 15 to August 15 each

year (the “dredge season”), requires each dredge site to be delineated with a fisheries biologist, and imposes other conditions and requirements to meet statutory requirements and state water quality standards and to protect fisheries. *Id.*

Dredging operations on National Forest land along the South Fork further require an approved plan of operations from the Forest Service. *See* ECF No. 17-4, Ex. 8, pp. 9, 12 & 13. In 2016, the Forest Service prepared an Environmental Assessment (EA) and issued a Decision allowing it to authorize up to 15 suction dredge operators per year on the South Fork. *See* ECF No. 17-4, Ex. 8 (EA) & Ex. 9 (Decision). Because dredging on the South Fork impacts listed salmon, steelhead, and bull trout, the Forest Service engaged in Endangered Species Act consultation to develop the protective measures and monitoring requirements needed to obtain Forest Service approval for any dredge mining. *See* 2016 Decision, p. 9. Among other monitoring and reporting requirements and limitations on dredging, the Forest Service requires South Fork dredgers to be spaced at least 800 feet apart and to cease operations if the dredge’s discharged turbidity is observed 150 feet downstream. *Id.* at 9–13.

Defendant Shannon Poe’s Dredging on the South Fork

Shannon Poe is professional miner from California who likes to dredge on the South Fork because it has “[g]ood gold.” SOF ¶¶ 5–6. Poe came to Idaho to dredge in 2014, 2015, and 2018. Poe Decl. (ECF No. 17-2, Ex. 1), ¶¶ 3, 8 & 17. Each year, he applied for and received a letter permit from IDWR. *Id.* at ¶¶ 3, 8 & 14. But he refused to apply for a plan of operations from the Forest Service or an NPDES permit from EPA. *See* Poe Resp. to Interrog. (2nd Hurlbutt Decl., Ex. A) No. 11; Poe Depo. Tr. (2nd Hurlbutt Decl., Ex. B), p. 13.

Poe is the founder and President of the American Mining Rights Association (AMRA), which he describes as a nonprofit that educates the public on public land use and small miners on

small miner rights. Poe Depo Tr., p. 8. Through written and video posts to AMRA's website, Poe has invited and encouraged AMRA members to dredge on the South Fork. *See, e.g.*, 2nd Hurlbutt Decl., Exs. E, F & G (AMRA video series documenting Poe's 2015 dredging, titled "Dredging in Idaho and facing a tyrannical government"). He also boasts about defying the EPA and the Forest Service, taunts those agencies and their personnel, and encourages other dredge miners to do the same. *See* SOF ¶¶ 20, 21, 23, 25, 26, 30, 33 & 34.

In 2014, Poe suction dredged on the South Fork without an NPDES Permit on at least 13 separate days, starting on July 15. SOF ¶¶ 19–21. He dredged at the "Sasquatch 2" area and punched four or five holes and dredged a total of about 45 to 50 linear feet. SOF ¶ 19. Poe wrote an August 5, 2014 AMRA webpage post titled "Out of control EPA, Sasquatch, Ratchilla and dredging for two weeks in Idaho." ECF No. 20-3. In that post, Poe bragged about visiting the South Fork "to dredge openly in opposition to the EPA." *Id.* p. 1.

In October 2014, EPA issued Poe a notice of CWA violation for discharging pollutants to the South Fork without an NPDES permit. SOF ¶ 22. In response, Poe's attorney stated that Poe does not believe he needs an NPDES permit. *Id.*

In 2015, Poe returned to the South Fork to "stand against the EPA again." SOF ¶ 23. He suction dredged without an NPDES permit on 12 separate days, starting on July 16. SOF ¶¶ 24–26. He dredged mostly at the Sasquatch 2 site and dredged for a couple days at the "Forgotten Patriot" site. SOF ¶ 24. Poe estimates that he punched at least one or two holes and dredged for a total of about 60 linear feet. *Id.* During the 2015 dredge season, the Forest Service performed site inspections, notified Poe and others of their failure to have a plan of operations, and tried to deliver the notices of violations to Poe and others. *See* ECF No. 20-22 & 20-23. In a September 1, 2015 post, Poe stated: "The 2015 Idaho suction dredge season began as another year with

AMRA standing up to the EPA and their illegal schemes to ban suction dredging, but it soon became a fight with the USFS” SOF ¶ 25.

Because of these ongoing violations of the CWA, Plaintiff ICL sent Poe a notice of intent to sue on May 20, 2016. SOF ¶ 27. Poe responded on June 14, 2016, stating: “I have no plans, or intent to dredge the SF Clearwater this year, and do not intend to dredge in future years without the appropriate permits.” *Id.* On July 12, 2017, prior to the South Fork dredge season, ICL sent Poe, by regular mail and e-mail, a “courtesy reminder” of the 2016 Notice Letter. *Id.*

Although EPA did not take formal action on its 2014 notice of violation against Poe, EPA pursued CWA administrative enforcement actions against two other South Fork dredge miners who the Forest Service documented operating their dredges during the 2015 site inspections. *See* SOF ¶ 41. *See also* ECF No. 20-23 (Forest Service inspection report). In one action, the miner and EPA entered into a Consent Agreement. SOF ¶ 41. In the other, EPA prevailed before an ALJ in proving CWA liability for discharging pollutants (riverbed sediments) from a point source (suction dredge) to a navigable water (the South Fork) without an NPDES permit. *Id.*

In 2018—despite his 2016 response to ICL saying he would not dredge again on the South Fork without all required permits—Poe returned and suction dredged without an NPDES permit on 17 separate days, starting on July 15. SOF ¶ 31, 33, 35–38. Poe boasted in an AMRA post about his plan to dredge without an NPDES permit. SOF ¶ 30. Poe dredged mostly at the Sasquatch 2 site, but also dredged at the “Golden Anne 2” site and estimates that he dredged 70 linear feet total. SOF ¶ 31. On July 18 and July 24, the Forest Service issued Poe notices of non-compliance for dredging without an approved plan of operations. SOF ¶ 32. On August 2, IDWR issued Poe a notice of violation for dredging outside his authorized location, improperly stringing ropes across the stream channel, and storing gas on the streambank. SOF ¶ 34.

Because Poe continued dredging without an NPDES permit in 2018, ICL filed this lawsuit on August 10, 2018, while Poe was still dredging without an NPDES permit. SOF ¶ 36. That same day, the Forest Service issued Poe a violation notice for dredging without an approved plan of operations. *Id.* Poe continued operating his dredge, both to mine and to backfill his dredge holes, until August 14, 2018. Poe Resp. to Interrog. No. 1.

On July 11, 2019, EPA issued Poe another notice of violation for discharging pollutants to the South Fork from his suction dredge without an NPDES permit, this time for his dredging in 2018. SOF ¶ 40. In April 2020, when asked if he had any plans to come to Idaho to suction dredge in 2020, Poe was unwilling to answer. Poe Depo. Tr., p. 31.

STANDARD OF REVIEW

Summary judgment is appropriate when the evidence contained in pleadings and admissible testimony and documents demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party has the initial burden of demonstrating for the court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the burden shifts to the nonmoving party to provide specific facts evidencing a need for trial. Fed. R. Civ. P. 56(e). The opposing party, thus, “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The nonmoving party cannot stand on its pleadings, nor simply assert that it will be able to discredit the movant’s evidence at trial. *T.W. Elec. Serv. v. Pacific Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

Summary judgment is especially appropriate on the issue of liability for violations of the CWA because “NPDES enforcement actions are based on strict liability.” *Student Pub. Interest*

Research Group v. Monsanto Co., 600 F. Supp. 1479, 1485 (D.N.J. 1985). As such, consideration of issues such as negligence or knowledge of wrongdoing is not required for a court to award civil or other relief, and neither good faith, lack of knowledge, nor supposed inability to comply with the NPDES permit requirement will provide a defense. *California Pub. Interest Research Group v. Shell Oil Co.*, 840 F. Supp. 712, 714–18 (N.D. Cal. 1993).

ARGUMENT

I. THE COURT HAS JURISDICTION OVER THIS CWA CITIZEN SUIT

As this Court already held when it rejected Poe’s motion to dismiss on September 30, 2019, ICL’s 2016 notice letter provided Poe adequate notice of the alleged violations, as required for a CWA citizen suit. *See* Mem. Decision & Order (ECF No. 26). The Court also held that ICL has Article III standing to bring this action based on declarations from ICL staff and member Jonathan Oppenheimer and ICL member Janice Inghram. *Id.* Those declarations still show ICL suffers injury in fact traceable to Poe’s unlawful dredging, and a favorable ruling will redress ICL’s injuries. *See* Inghram Decl. (ECF No. 20-15); Oppenheimer Decl. (ECF No. 20-16). ICL’s standing is further supported by the Second Oppenheimer Declaration filed herewith, which confirms that Poe’s unlawful suction dredge mining harms Oppenheimer’s and ICL’s interests, and that a favorable decision will redress those injuries.

Additionally, ICL’s Complaint properly alleges that Poe is “in violation” of the CWA, as required for jurisdiction in a CWA citizen suit, 33 U.S.C. § 1365(a)(1), because his unpermitted discharges are “ongoing” and are not “wholly past.” *See Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 64 (1987). In *Gwaltney*, the Supreme Court held that a CWA citizen suit may not be premised on unlawful conduct that occurred entirely before filing the lawsuit. *Id.* at 67. But it explained that the CWA “does not require that a defendant ‘be in violation’ of the

Act at the commencement of the suit; rather, the statute requires that a defendant be ‘alleged to be in violation.’” *Id.* at 64. Applying *Gwaltney*, the Ninth Circuit recognizes that “a citizen plaintiff may prove ongoing violations either (1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations.” *Sierra Club v. Union Oil*, 853 F.2d 667, 671 (9th Cir. 1988) (quoting *Gwaltney*, 844 F.2d at 171–72).

While ICL needs to satisfy only one of these two bases for proving ongoing violations, ICL satisfies both here. First, the evidence shows Poe’s violations continued on and after August 10, 2018, when ICL filed the complaint. Poe admits that, after taking some days off in August 2018, he “resumed dredge mining on August 8” and “continued to dredge up and until August 14,” including three days during that period where he operated a dredge to “backfill” dredge holes. Poe Resp. to Interrog. No. 1. This is confirmed by other evidence, including Poe’s videos and web posts showing and discussing his activities on August 10 and on days after, and other’s photographs and videos showing Poe’s dredge in the water on August 10 and August 12. SOF ¶¶ 36–38. Poe’s violations are thus ongoing, satisfying *Gwaltney*.

Second, *Gwaltney*’s ongoing violations requirement is met based on the evidence showing that Poe—who admits he dredged the South Fork without a permit in 2014, 2015, and 2018—might continue dredging in future years. “Intermittent or sporadic violations do not cease to be ongoing until the date when there is *no real likelihood of repetition*.” *Sierra Club v. Union Oil*, 853 F.2d at 67 (emphasis in original). *See also ICL v. Magar*, No. 3:12-cv-00337-CWD, 2014 WL 2533769, at *6 (D. Idaho Jun. 5, 2014) (finding “ongoing” violations for intermittent violations that occurred every 4 to 5 years). Right before ICL filed suit, in an August 8, 2018 AMRA post and in an August 9, 2018 video, Poe discussed his plans to come back to dredge the

South Fork next year. SOF ¶ 34; 2nd Hurlbutt Decl. Ex. L. In his April 2020 deposition, Poe kept open the option to suction dredge on the South Fork in the future without an NPDES permit. Poe Depo Tr., p. 31. Based on this evidence, there was a continuing likelihood of a recurrence in intermittent or sporadic violations on the day ICL filed suit, satisfying *Gwaltney*.

II. POE VIOLATED THE CWA BY OPERATING A SUCTION DREDGE ON THE SOUTH FORK WITHOUT AN NPDES PERMIT

“The CWA prohibits the discharge of any pollutant from a point source into navigable waters of the United States without an NPDES permit.” *N. Plains Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155, 1160 (9th Cir. 2003) (“*Northern Plains*”); *Comm. to Save Mokelumne River*, 13 F.3d at 308. As set forth below, the undisputed facts before the Court show that each of these elements is met, and Poe violated the CWA each day that he operated a suction dredge on the South Fork in 2014, 2015, and 2018.

A. The South Fork Is a “Navigable Water”

“Congress views broadly the words ‘navigable waters’ in the Clean Water Act: it has defined them simply as ‘the waters of the United States, including the territorial seas.’” *Rybachek v. EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990) (quoting 33 U.S.C. § 1362(7)). The precise definition of “water of the United States” has been the subject of U.S. Supreme Court cases and rulemakings by EPA and the U.S. Army Corps of Engineers and continues to evolve. *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001); *Rapanos v. U.S.*, 547 U.S. 715 (2006); 80 Fed. Reg. 37,054 (Jun. 29, 2015) (2015 Clean Water Rule); 85 Fed. Reg. 22,250 (Apr. 21, 2020) (2020 Navigable Waters Protection Rule). But under all definitions, perennial (meaning continuously flowing) streams that are tributaries to other navigable waters are included in “waters of the United States.”

The Ninth Circuit recognized that CWA navigable waters include all interstate waters as well as all “tributaries” of these waters, where a tributary is any “stream which contributes its flow to a larger stream or other body of water.” *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001) (quotation omitted). Even the restrictive definition adopted by plurality in *Rapanos* includes “relatively permanent, standing or continuously flowing” bodies of water that form geographic features described in ordinary parlance as streams, oceans, river, and lakes. *Rapanos*, 547 U.S. at 739 (quotations omitted). Most recently, the 2020 Navigable Waters Protection Rule defines tributaries as navigable waters, so long as they are perennial or intermittent in a typical year. 85 Fed. Reg. at 22,340–41.

Here, the South Fork constitutes a “navigable water” under the CWA. The South Fork is a perennial stream, with flows ranging from a high of 3,370 cubic feet per second (cfs) in May to a low of 258 cfs in September. SOF ¶ 1. It is also a tributary to the Clearwater River, which is in turn a tributary to the Snake River, an interstate river that flows to the Columbia River and the Pacific Ocean. *Id.* Furthermore, Poe admits the South Fork is a navigable water under the CWA. *See Answer* (ECF No. 28), ¶¶ 40 & 90.

B. Poe’s Suction Dredge Is a “Point Source”

The CWA defines “point source” as “any discernable, confined and discrete conveyance, including but not limited to any pipe, . . . conduit, . . . container, . . . or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). By contrast, nonpoint source pollution “arises from many dispersed activities over large areas,” “is not traceable to any single discrete source,” and due to its “diffuse” nature, “is very difficult to regulate through individual permits.” *Ecological Rights Found. v. Pac. Gas & Elec.*, 713 F.3d 502, 502–08 (9th Cir. 2013) (citations omitted).

A suction dredge is a “vessel or other floating craft” from which pollutants are or may be discharged (*see* 2016 EA, p. 1-3, Fig. 1-2), and is thus an example of a point source under the CWA’s definition of the term. *See* 33 U.S.C. § 1362(14). A suction dredge is also a discernable, defined, discrete conveyance, and thus a point source, because it is a machine that floats on top of the river, sucks up riverbed material and water through an intake nozzle and hose, runs the material across a sluice box on top of the dredge to obtain gold, and then discharges wastewater with riverbed materials off the back of the dredge into water. *See Trustees for Alaska v. EPA*, 749 F.2d 549, 557–58 (9th Cir. 1984) (holding placer mines are point sources because “discharge water is released from a sluice box, a confined channel within the statutory definition”).

C. Poe’s Discharged Riverbed Materials Are “Pollutants”

The CWA defines “pollutant” to include, among other things, “rock” and “sand” and “industrial . . . waste” discharged to water. 33 U.S.C. § 1362(6). Riverbed material processed and then discarded from Poe’s suction dredge includes primarily rock, gravel, cobble, sand, sediment, and silt. SOF ¶ 9. These materials are all different sizes and shapes of “rock” and “sand,” which are specifically listed as CWA pollutants. 33 U.S.C. § 1362(6). Numerous courts have held that sediment and its components are pollutants under the Act. *See, e.g., Driscoll v. Adams*, 181 F.3d 1285, 1291 (11th Cir. 1999); *Rybachek*, 904 F.2d at 1285–86; *Pronsolino v. Marcus*, 91 F.Supp.2d 1337, 1351 (N.D. Cal. 2000); *Hudson River Fishermen’s Ass’n v. Arcuri*, 862 F.Supp. 73, 76 (S.D.N.Y. 1994); *N. Carolina Shellfish Growers Ass’n v. Holly Ridge Associates, LLC*, 278 F.Supp.2d 654, 676 (E.D.N.C. 2003).

Water mixed with sediment and other riverbed material discarded by Poe’s suction dredge is also “industrial waste.” The Ninth Circuit has held that salty groundwater pumped to the surface and discharged to a river during coal bed methane (CBM) extraction activities is

“industrial waste.” *Northern Plains*, 325 F.3d 1155 (9th Cir. 2003). Rejecting the argument that industrial waste is limited to “sludge oozing from manufacturing or processing plants, barrels filled with toxic slime, and raw sewage floating in a river,” *Northern Plains* considered the ordinary meanings of “industrial” and “waste,” and held that “industrial waste” is “any useless byproduct derived from the commercial production and sale of goods and services.” *Id.* at 1160–61 (citations omitted). Poe is a professional miner, who suction dredge mines on the South Fork to obtain gold to make a living. SOF ¶ 5. Once riverbed materials are processed on his dredge, by sorting out gold, the discharged water and riverbed materials are a useless byproduct of his gold production and are, thus, industrial waste and a CWA pollutant.

Northern Plains also found that treating mining wastewater as a pollutant was consistent with the CWA’s definition of “pollution,” which is the “man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.” *Id.* at 1161–62 (quoting 33 U.S.C. § 1362(19)). Here, EPA, the Forest Service, Idaho DEQ, and IDWR have all found that rock, sand, sediment, and silt discarded from a dredge can degrade water quality. *See* 2018 Fact Sheet, p. 16; SOF ¶ 10; ECF No. 17-3, Ex. 4. Furthermore, videos of the turbid plume emanating from Poe’s dredge show water quality degradation and thus “pollution.” *See* Finnegan Decl., Ex. D (Jul. 27, 2018 video); 2nd Hurlbutt Decl., Ex. P (Aug. 9, 2018 IDWR video).

D. Poe Discharges—or Adds—Pollutants to the South Fork

The CWA broadly defines “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12). The CWA does not define “addition.” But EPA has interpreted “addition” to include the release and “resuspension” of rocks and sands from a placer mining sluice box to a stream, even when those materials came

from the bed of the stream itself—an interpretation the Ninth Circuit upheld in *Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990).

In *Rybachek*, miners challenged EPA’s CWA regulations that required treating sluice box discharge water from placer mining, arguing placer mining does not cause the “addition” of a pollutant. The Ninth Circuit rejected that argument, explaining: “Placer miners excavate the dirt and gravel in and around waterways, extract any gold, and discharge the dirt and other non-gold material into the water.” *Id.* at 1285. “The lighter sand, dirt, and clay particles are left suspended in the wastewater released from the sluice box” and can have aesthetic and water-quality impacts on waters in the immediate vicinity and downstream. *Id.* at 1282. Based on these facts, the Ninth Circuit deferred to EPA, holding it was reasonable to interpret “addition” under the CWA as including the “resuspension” of materials such as sand and dirt discharged from a placer mining sluice box, “even if the material discharged originally comes from the streambed itself.” *Id.* at 1285–86.

The Ninth Circuit reaffirmed its holding from *Rybachek* in *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810 (2001). It explained that, in *Rybachek*, “[w]e held that removing material from a stream bed, sifting out the gold, and returning the material to the stream bed was an ‘addition’ of a ‘pollutant.’” *Id.* at 814. The court concluded that deep ripping can constitute the discharge of a pollutant because even though “no new material has been ‘added’, a ‘pollutant’ has certainly been ‘added.’” *Id.* at 815.

EPA continues to interpret “addition” this way. Suction dredge mining is a method of placer mining, and when EPA issued the General Permit for suction dredging in Idaho, the agency determined that by sucking up, processing, and then discarding riverbed materials mixed with water, a dredge adds pollutants to the river, explaining:

Because suction dredges work the stream bed, the discharges from suction dredges consist of stream water and bed material. The primary pollutant of concern in the discharges from a suction dredge is suspended solids, defined as total suspended non-filterable solids. The suspended solids discharged from suction dredges result from the agitation of stream water and stream bed material in the dredge while processing the material. The discharged suspended solids result in a turbidity plume, or cloudiness, in the receiving water. This discharge, when released into waters of the United States, constitutes the addition of a pollutant from a point source that is subject to NPDES permitting.

2018 Fact Sheet (ECF No. 17-3), p 8. *See also* 2nd Hurlbutt Ex. Z (EPA May 2018 response to comments), p. 5–6 (response to comment 3).

EPA’s interpretation is supported by the Forest Service’s similar conclusion that, far from simply sucking up river water (and any pollutants already present in the water) in one location and transferring the water back into the same waterbody at another location, suction dredge mining causes sediment and turbidity in the river. *See* 2016 EA, p. 3-71–3-72. The Forest Service explained: “The act of placer mining inherently modifies some portion of the stream channel or riparian zone, because substrate, sediment, or soil is moved from one place to another and sorted.” *Id.* at 3-41. Similarly, DEQ’s TMDL for the South Fork stated: “While the literature is mixed in terms of the nature and severity of effects from dredge mining operations, serious impacts to water quality and habitat have been documented, depending on the size, location and manner in which dredges are operated.” 2004 TMDL, p. 100.

Poe admits that finer sands, sediments, and silts discarded from the back of his dredge become suspended in the water column and travel downstream. Poe Resp. to Interrog. No. 8. Videos show this occurring from Poe’s dredge. Finnegan Decl., Ex. D (Jul. 27, 2018 video); 2nd Hurlbutt Decl., Ex. P (Aug. 9, 2018 IDWR video). When Poe dredges, he punches holes by dredging through multiple feet of “overburden” to access bedrock. SOF ¶ 11. This requires using six-foot crowbars, high-pressure blaster nozzles, and other tools to break up highly compacted silt, sediment, sands, and rocks, and to dislodge rocks and boulders from where they are bound in

the riverbed to access deeper riverbed and to access bedrock cracks. SOF ¶¶ 12–13. Therefore, far from being found in the water column already, most of these silts, sediments, and sands were buried, bound together, and/or locked in place beneath the surface of the riverbed until Poe excavated, processed, and discarded them from his dredge, thereby *adding* them into the river.

Accordingly, when Poe discards riverbed silts, sands, sediments and water from his dredge to the South Fork, that is the “addition” of a pollutant under the CWA.

E. Poe’s Pollution Discharges Are Not Authorized by an NPDES Permit

Poe admits he did not have an NPDES permit authorizing the pollution discharges from his dredge to the South Fork in 2014, 2015, or 2018, and that he still does not have a permit. SOF ¶ 18. In fact, Poe has refused to apply for an NPDES permit, ignored EPA violation notices for dredging without a permit, ignored ICL’s notice of intent to sue, and encouraged others to dredge the South Fork in defiance of the CWA’s permit requirement. *See* SOF ¶¶ 17, 20–23, 25, 27, 30.

III. POE IS LIABLE FOR AT LEAST 42 CWA VIOLATIONS SO FAR.

Each day Poe dredged in Idaho without an NPDES permit is a separate CWA violation. The CWA requires the Court to impose civil penalties “per day for each violation.” 33 U.S.C. § 1319(d). *See also Borden Ranch*, 261 F.3d at 817 (“each distinct violation is subject to a separate daily penalty assessment”). Where a defendant, like Poe, does not have an NPDES permit authorizing their pollution discharges, “the number of violations is readily calculated by simply counting the number of days of illegal discharges.” *U.S. v. Gulf Park Water Co.*, 14 F. Supp. 2d 854, 857–58 (S.D. Miss. 1998).

In CWA citizen enforcement actions, there is a “five-year statute of limitations period,” which “is tolled sixty days before the filing of the complaint to accommodate the statutorily-mandated sixty-day notice period.” *Sierra Club v. Chevron*, 834 F.2d 1517, 1524 (9th Cir. 1987).

Here, Poe’s first day of dredging on the South Fork in July 2014 is within the 5-year statute of limitations for ICL’s complaint, which was filed on August 10, 2018. Additionally, all similar violations that occur after notice is sent, including while the lawsuit is underway, count too. *See, e.g., ICL v. Atlanta Gold Corp.*, No. 1:11-cv-00161-REB, 2017 WL 4099815, *11 (D. Idaho Sep. 15, 2017) (finding CWA violations from 2013 into 2017 in second round of litigation filed in 2011). In 2016, ICL notified Poe of its intent to sue him under the CWA citizen suit provision for past and future violations by operating a suction dredge on the South Fork and discharging sediment and other pollutants without an NPDES permit. *See Poe Decl.*, Attach. C. Thus, Poe is also liable for each of the days he dredged in 2018 after ICL sent notice.

Poe admits that each day he dredged on the South Fork, he released riverbed materials off the back of his dredge, including fine sediments that float downstream. Poe Resp. to Interrog. Nos. 6 & 8. The record before the Court, including Poe’s admissions during discovery, show that he dredged on 13 days in 2014, 12 days in 2015, and 17 days in 2018, or 42 days in total. SOF ¶¶ 19–21, 24, 31. The Court should thus enter summary judgment for ICL, holding that Poe violated the CWA 42 times for suction dredge mining on the South Fork without an NPDES permit in 2014, 2015, and 2018.

CONCLUSION

For the foregoing reasons, the Court should grant ICL’s Motion for Summary Judgment on Liability, hold that Defendant Shannon Poe violated the CWA 42 times to date for his dredging in 2014, 2015 and 2018, and proceed to the remedies stage of the case.

DATED this 18th day of May, 2020.

Respectfully Submitted,

/s/ Bryan Hurlbutt
Bryan Hurlbutt
Laurence (“Laird”) J. Lucas

Attorneys for Plaintiff ICL