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

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|---|---|
| IDAHO CONSERVATION LEAGUE,<br><br>Plaintiff,<br><br>v.<br><br>SHANNON POE,<br><br>Defendant. | No. 1:18-cv-353-REB<br><br><br><br>**ICL'S BRIEF OPPOSING MOTION TO DISMISS (ECF No. 17)** |

## INTRODUCTION

In this Clean Water Act ("CWA") citizen enforcement action, Plaintiff Idaho Conservation League ("ICL") alleges that Defendant Shannon Poe has engaged in ongoing CWA violations by operating a suction dredge mine and discharging pollutants to the South Fork Clearwater River ("South Fork") on multiple occasions in 2014, 2015, and 2018 without a valid National Pollutant Discharge Elimination System ("NPDES") permit. *See Complaint*, ECF No. 1. ICL only filed suit after sending Poe a detailed 60-day notice of intent to sue by certified mail on May 20, 2016, notifying him of ICL's intent to sue him for his past and future CWA violations. *See* 2016 Notice Letter (ECF No. 17-2, pp. 23–26). Poe initially responded to the 2016 Notice Letter by saying he would not suction dredge in the future without valid permits. ICL sent him reminder letters in 2017 and 2018 of its intent to bring a CWA enforcement action, in hopes of keeping him from dredging without a permit and avoiding litigation. But Poe went back on his word. When Poe continued to suction dredge on days in 2018 without an NPDES permit, ICL filed this action seeking injunctive relief to prohibit him from further suction dredging in Idaho without an NPDES permit and an award of penalties for his prior violations.

Now Poe moves to dismiss the Complaint by claiming he did not receive adequate notice of ICL's intent to sue—based on misreading ICL's 2016 Notice Letter and misconstruing applicable law. Poe argues his initial response asserting he would not conduct further suction dredging somehow moots the 2016 Notice Letter, even though he went back on his word and continued unlawful suction dredging on the South Fork in 2018. The Court may readily reject Poe's arguments as factually and legally wrong. Because ICL's 2016 Notice Letter fully satisfied notice requirements under the CWA, the Court has jurisdiction over ICL's claims.

Additionally, Poe's arguments that ICL's Complaint fails to establish its Article III standing are incorrect as a matter of law; and ICL confirms its standing through the Oppenheimer and Inghram declarations submitted herewith, which show that ICL members regularly visit the South Fork for recreational and aesthetic interests and suffer injuries caused by Poe's illegal suction dredge mining operations. These declarations establish ICL's Article III standing. *See Idaho Rural Council v. Bosma*, 143 F.Supp.2d 1169, 1175–76 (D. Idaho 2001); *ICL v. Atlanta Gold*, 844 F.Supp.2d 1116, 1128–30 (2012). A decision ordering Poe not to dredge in Idaho except in compliance with the terms of a valid NPDES permit will redress ICL's injuries, because NPDES permits impose important effluent limitations, best management practices, and discharge monitoring and reporting requirements. Ordering Poe to pay CWA civil penalties will also redress ICL's injuries by deterring Poe from further illegal conduct.

Accordingly, ICL properly gave notice before bringing this CWA enforcement case and has Article III standing to pursue its claims, and Poe's Motion to Dismiss must be denied.

## APPLICABLE STANDARDS OF REVIEW

Poe moves to dismiss the Complaint under FRCP 12(b)(1), asserting the Court lacks subject matter jurisdiction based on Poe's notice and standing arguments. *See* ECF No. 17, p. 2. However, Poe's brief does not identify what kind of motion he is making under Rule 12(b)(1), *i.e.,* a facial or factual attack. *See White v. Lee,* 227 F.3d 1214, 1242 (9th Cir. 2000). In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction. *Id.*

By submitting his own declaration and numerous exhibits with the motion to dismiss, Poe evidently is mounting a factual challenge under Rule 12(b)(1). "In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Safe Air*, 373 F.3d at 1039. Once the moving party makes a factual attack on jurisdiction by submitting affidavits or other evidence properly before the court, the opposing party must then submit affidavits or any other evidence necessary to satisfy its burden of establishing subject matter jurisdiction. *Id.* But a jurisdictional finding resolving genuinely disputed facts "is inappropriate when the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of the factual issues going to the merits of an action." *Id.* (quotation omitted).

## STATEMENT OF RELEVANT FACTS

As Poe's own submissions demonstrate, suction dredge mining involves using a floating watercraft equipped with a pump to suck water and riverbed sands and gravels through a hand-held intake nozzle, sort out gold, and then discharge water, sand, and gravel back to the river. *See* ECF No. 17-4, p. 11 at Fig. 1-2 (dredge diagram and photo). Because suction dredging discharges sediment and possibly other pollutants to the river, state and federal regulatory agencies acknowledge that suction dredgers must obtain an NPDES permit under the CWA. *See* ECF No. 17-3, pp. 5 (IDWR), 126 (EPA), 166 (DEQ); ECF No. 17-4, p. 29 (Forest Service & BLM). To facilitate NPDES permitting for suction dredge mining in Idaho, the U.S. Environmental Protection Agency ("EPA") issued the "NPDES General Permit" in 2013 and reissued it in 2018. *See* ECF No. 17-3, pp. 39, 81. 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. *Id.*, p. 83.

EPA determined that suspended solids are "the primary pollutant of concern from suction dredge discharges." ECF No. 17-3, p. 136. Suspended solids are evaluated using turbidity. *Id.* "High levels of turbidity can adversely impact water quality and can have direct and indirect effects on fish and other aquatic life." *Id.* Accordingly, 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. *Id.* at 99. On the South Fork, dredgers must also: (1) limit processing to an average of 2 cubic yards per hour over an eight-hour day; and (2) meet additional specific turbidity limits, depending on background turbidity levels. *Id.*

Permittees must display their Miner Number on their dredge and vehicle. *Id.* at 99. The General Permit also requires monitoring and reporting. *Id.* at 100. 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.* 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") addressing the following issues: silt and clay areas; encountering mercury; operating 800 feet apart; fish passage, spawning fish, and spawning habitat; alterations to the active stream channel; erosion and undercutting; dams and diversions; moving natural obstructions; other mechanized equipment in water; refueling and hazardous material storage; invasive species; and screen mesh opening for intake nozzles. *Id.* at 100–103.

According to EPA, these "[p]ermit conditions and restrictions are necessary to prevent harm to aquatic environments," including the following:

> Lethal effects to fish may occur from sucking eggs or young fish out of the gravel; crushing nests (redds) and trampling or disturbing eggs or young fish inside them; or from dispersing sediment through the streambed, which can deplete the oxygen supply to eggs in redds.
>
> Nontlethal effects include causing fish to move out of preferred habitat, disrupting feeding patterns, altering habitat, and disrupting food supplies. Water quality is temporarily impaired when sediment is stirred up.

*Id.* at 84. The BMPs on separation distances, stream channel, erosion, and mechanized equipment are intended to decrease turbidity, water quality impacts, and habitat impacts. *Id.* at 141–44. The refueling and hazardous material BMPs "decrease the potential for contamination of surface water from petroleum products and other potentially harmful substances." *Id.* at 145.

Dredging in Idaho also requires a permit from the Idaho Department of Water Resources ("IDWR"). *See* ECF No. 17-3, pp. 3–7 (IDWR Instructions). 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, pp. 9 & 12.

Since 2005, ICL has devoted staff time and organizational resources every year to protect the South Fork and other Idaho rivers from the adverse impacts of suction dredge mining. *Oppenheimer Decl.*, ¶¶ 19–47. ICL staff, volunteers, and contractors have conducted site visits, gathered and reviewed state and federal agency documents, participated in agency processes, and corresponded and met with local, state, and government officials to advocate for appropriate protections from suction dredge mining in support of ICL's mission. *See id.*

As Poe's own declaration and other submissions to the Court confirm, Poe operated a suction dredge on the South Fork in 2014. ECF No. 17-2, Ex. 1 ("*Poe Decl.*") ¶ 3. *See also Oppenheimer Decl.*, Ex. A (Poe 2014 application to IDWR). After the 2014 dredging season,

EPA sent Poe a notice of violation for operating a suction dredge and discharging pollutants to the South Fork near Highway 14 Mile Marker 39-40 without an NPDES permit in violation of the CWA. ECF No. 17-2, pp. 9–16.

In 2015, Poe again operated a suction dredge on the South Fork. *Poe Decl.* ¶ 8. *See also Oppenheimer Decl.*, Ex. B (Poe 2015 application to IDWR). In July 2015, the Forest Service prepared notices of noncompliance for dredging without Forest Service approval, performed site inspections, and tried to deliver the notices to Mr. Poe and others while they were dredging on the South Fork in 2015. *See Oppenheimer Decl.*, Ex. G.

On May 20, 2016, ICL sent Poe a notice letter by certified mail stating ICL's intent to initiate a federal court CWA citizen enforcement lawsuit against him, seeking injunctive relief and civil penalties, for suction dredge mining and discharging sediment and other pollutants without an NPDES permit to the South Fork in 2014 and 2015, and for any similar future violations on the South Fork or any other Idaho stream. *See* ECF No. 17-2, pp. 23–27 ("2016 Notice Letter"). ICL received a response letter from Poe dated June 14, 2016, acknowledging he received ICL's 2016 Notice Letter, which stated: "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." *Oppenheimer Decl.*, Ex. C. It is unclear whether Poe lied in making that representation, or whether he later changed his mind. As his declaration admits, he again conducted suction dredging on the South Fork in 2018. *Poe Decl.* ¶ 17.

Meanwhile, as part of its mission to protect Idaho streams, fish, and wildlife, ICL continued reviewing state and federal permit applications and conducting on-the-ground visits and investigations of dredging on the South Fork, including hiring an investigator to monitor dredging in summer 2016, 2017, and 2018. *See Oppenheimer Decl.* ¶ 35. 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. ECF No. 17-2, pp. 29–30. In 2018, prior to the July 15 to August 15 dredge season on the South Fork, ICL became aware that Poe planned to return to dredge on the South Fork. *See Oppenheimer Decl.*, Ex. D (Poe 2018 IDWR permit application). On July 3, 2018, ICL sent Poe by regular mail and e-mail another "Courtesy Reminder" of the 2016 Notice Letter. ECF No. 17-2, pp. 32–33.

Despite the 2016 Notice Letter and subsequent ICL reminders, Poe admittedly continued to conduct suction dredging on the South Fork during summer 2018 without obtaining an NPDES permit. *See Poe Decl.* ¶ 17; *Oppenheimer Decl.*, 47; *Hurlbutt Decl.*, Exs. B–M (Poe posts to AMRA website describing his dredging and permitting).

During the 2018 dredge season, on August 2, 2018, IDWR issued Poe a Notice of Violation for violating the terms of his IDWR permit, based on a July 30, 2018 IDWR site inspection finding: (1) Poe was dredging outside the location authorized by his permit; (2) ropes were strung across the stream channel to secure his dredge; and (3) a gas can was stored along the streambank within the stream channel. ECF No. 17-2, pp. 35–37. Poe entered into a Consent Order and Agreement with IDWR on August 7, 2018, admitting to the violations and agreeing to pay a $500 penalty. *Oppenheimer Decl.*, Ex. E. Poe also received a Violation Notice from the Forest Service dated August 10, 2018 for dredging on the South Fork without Forest Service approval. *Oppenheimer Decl.*, Ex. F. *See also Hurlbutt Decl.*, Ex. M (Aug. 11, 2018, Poe post to ARMA webpage). However, neither the IDWR nor Forest Service enforcement action addressed Poe's failure to obtain an NPDES permit.

ICL filed its Complaint on August 10, 2018, alleging Poe was committing ongoing violations of the CWA by operating a suction dredge and discharging sediment and other

pollutants to the South Fork on multiple occasions in 2014, 2015, and 2018 without obtaining an NPDES permit. ECF No. 1, ¶¶ 98–100. ICL alleged these CWA violations were continuing and reasonably likely to recur on more days in 2018 and in future years. *Id.* at ¶ 102. In the Complaint, ICL asks the Court to enjoin Poe from future discharges to the South Fork or any other Idaho waterbody except as authorized by the CWA and in compliance with an applicable NPDES permit. *Id.* at ¶ B. ICL also asks the Court to impose CWA civil penalties on Poe for each CWA violation ICL proves he committed. *Id.* at ¶ C.

## ARGUMENT

### I. ICL PROVIDED POE ADEQUATE NOTICE.

#### A. Citizen Suit Notice Requirements Under the CWA.

The citizen suit provision is "critical" to the enforcement of the CWA. *Friends of the Earth v. Gaston Copper Recycling*, 204 F.3d 149, 152 (4th Cir. 2000). It allows citizens "to abate pollution when the government cannot or will not command compliance." *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 62 (1987). The citizen suit provision is particularly important here because EPA has not pursued any CWA enforcement action against Poe since sending him the 2014 notice of violation for dredging without an NPDES permit. *See Poe Decl.*, ¶ 7.

The CWA requires citizens to provide 60-days' notice to the alleged violator prior to filing suit. 33 U.S.C. § 1365(b)(1)(A). The EPA adopted regulations specifying the requirements of adequate notice. 40 C.F.R. § 135.3(a). The EPA regulations on "Service of notice" require serving an individual alleged violator by certified mail and sending copies to the EPA Administrator, the relevant EPA Regional Administrator, and head of the water pollution

pollution control agency of the relevant State. 40 C.F.R. § 135.2(a)(1). Regulations on "Contents of notice" state in relevant part:

> *(a) Violation of standard, limitation or order*. Notice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto, shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.

40 C.F.R. § 135.3. The regulations also require the notice to identify and provide information about legal counsel, if any, representing the person giving notice. 40 C.F.R. § 135.3(c).

While Ninth Circuit courts have "strictly construed" the notice requirements, the CWA notice regulations do not require "that plaintiffs list every specific aspect or detail of every alleged violation." *San Francisco BayKeeper v. Tosco Corp.*, 309 F.3d 1153, 1157–1158 (9th Cir. 2002) (quotation and citation omitted). "The key language in the notice regulation is the phrase 'sufficient information to permit the recipient to identify' the alleged violations and bring itself into compliance." *Id.* at 1158 (quoting 40 C.F.R. § 135.3(a)). The touchstone of proper notice is, thus, whether "it is specific enough to give the accused . . . the opportunity to correct the problem." *Id.* (internal quotation marks omitted).

**B. ICL's 2016 Notice Letter Satisfied All CWA Notice Requirements.**

ICL's May 20, 2016 Notice Letter satisfied all requirements of the CWA and EPA's notice regulations. ICL's counsel sent the letter by certified mail to, and the letter was received by, Poe (the alleged violator), the EPA Administrator, the EPA Regional Administrator for Region 10 (which includes Idaho), and the Director of the Idaho Department of Environmental Quality. *Hurlbutt Decl.,* ¶ A (certified mail receipts and return receipts). *See also Poe Decl.* ¶ 9 (admitting Poe received the 2016 Notice Letter). This satisfied the service of notice requirements at 40 C.F.R. § 135.2.

The 2016 Notice Letter also satisfied the content of notice requirements at 40 C.F.R. § 135.3. The letter provided the full name, address, and telephone number of ICL and ICL's counsel. ECF No. 17-2, pp. 25–26. The Notice Letter provided specific information to inform Poe of how he was violating the CWA and how he could correct the problem. The first sentence stated that ICL was providing notice of its intent to file suit against Poe "for conducting suction dredge mining and discharging pollutants in Idaho without obtaining a required National Pollutant Discharge Elimination System ("NPDES") permit, in violation of the CWA." *Id.* at 23. The second sentence stated: "Unless you take the steps necessary to remedy your ongoing CWA violations (including by obtaining any required NPDES permit(s) before engaging in any further suction dredge mining in Idaho and by complying with the terms of the permit(s)), ICL intends to file suit . . . seeking injunctive, relief, civil penalties and other relief for your past and ongoing CWA violations. . . ." *Id.*

Contrary to Poe's argument that the 2016 Notice Letter only addressed Poe's past CWA violations in 2014 and 2015, the letter expressly advised that "ICL is also informed and reasonably believes that your Clean Water Act violations <u>are likely to continue</u>" based on Poe's involvement as President of the American Mining Rights Association (AMRA), his past dredging on the South Fork, and his public statements, all of which indicated that Poe "<u>will continue to suction dredge mine in the South Fork Clearwater River and/or other Idaho rivers and streams without a valid NPDES permit, in violation of the Clean Water Act.</u>" *Id.* at 24–25 (emphasis added).

This information was reasonably specific so Poe could understand ICL's allegations (dredging on the South Fork without an NPDES permit) and know how he could correct the problem (by not dredging again without an NPDES permit). Poe wrote back to ICL in June 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." *Oppenheimer Decl.*, Ex. C; *Poe Decl.*, ¶ 10. Poe's response thus confirms he understood the alleged violations and how to avert them in the future. *See Poe Decl.*, ¶¶ 11 & 13. Poe's response underscores that the 2016 Notice Letter adequately advised him of the alleged CWA violations. *See NRDC v. Southwest Marine*, 236 F.3d 985, 997 (9th Cir. 2000) (courts consider defendant's actions subsequent to receipt of notice when considering adequacy of notice); *Puget Soundkeeper Alliance v. Cruise Terminals of Am.*, 216 F.3d 1198, 1212–13 (W.D. Wash. 2015) (finding adequate notice based on defendants' actions after receiving notice showing defendant understood the alleged violations).

**C. Poe's Notice Arguments Are Unsupported And Would Lead to Absurd Results.**

1. ICL's 2016 Letter Notified Poe of Both Past And Future Violations, And ICL's Complaint Makes Good-Faith Allegations of Ongoing Violations.

Poe's first notice argument is that the 2016 Notice Letter is inadequate because it relies on "past violations and assumption of future violations that did not occur." ECF No. 17-1 (*Poe Br.*), p. 18. This is a curious statement, because Poe admits in his declaration to dredging again in 2018. *Poe Decl.*, ¶ 17. It appears that Poe's argument is that, because he responded to ICL by saying he did not intend to dredge in the future without required permits, he somehow voided ICL's 2016 Notice Letter—even though he later went back on his word and dredged in 2018 without an NPDES permit. *Id.* at 17–18. Poe cites no legal authority for the proposition that a violator can void a CWA notice letter by asserting that they do not intend to violate any more and/or by taking a two-year break before resuming their violations.

The Ninth Circuit has held that while a defendant's actions after receiving proper notice may affect mootness and other issues, such actions do not divest a court of jurisdiction so long as the notice letter was sufficient on the date it was mailed. *NRDC v. Southwest Marine,* 236 F.3d

at 997. This is for good reason. If Poe had his way, he could simply void any CWA notice letter by stating he does not intend to dredge; then, after taking a short break, he could resume his allegedly illegal activity without ever facing the possibility of CWA citizen enforcement.

The only cases Poe cites in this section of his argument all concern the separate CWA "ongoing violations" requirement from *Gwaltney of Smithfield v. Chesapeake Bay Foundation,* 484 U.S. 49, 64–65 (1987). As *Gwaltney* held, the CWA "does not permit citizen suits for wholly past violations"; rather, the statute "confers jurisdiction over citizen suits when the citizen-plaintiffs make a good-faith allegation of continuous or intermittent violation." *Id.* at 64. But the *Gwaltney* ongoing violations requirement has nothing to do with the CWA's separate requirement to provide adequate notice 60 days prior to filing suit. *See*, *e.g.*, *Idaho Rural Council*, 143 F.Supp.2d at 1177–78 (holding CWA citizen suit not moot because defendant failed to meet "heavy burden" of showing violations were not ongoing). Poe's argument confuses and improperly conflates the two requirements.

The Ninth Circuit has held that intermittent pollution violations are "ongoing" when either: (1) violations "continue on or after date that complaint is filed;" or (2) there is a "continuing likelihood of recurrence in intermittent or sporadic violations." *NRDC v. Southwest Marine,* 236 F.3d at 998 (quotations omitted).

In the Complaint here, ICL made good faith allegations that Poe's violations were continuing on the day the case was filed and that they were likely to resume in the future. *See* ECF No. 1, ¶ 101. ICL made these allegations based on Poe's history of dredging on the South Fork 2014, 2015, and 2018—which he now admits to doing. *Poe Decl.* ¶¶ 3, 8 & 17. ICL also made these allegations based on Poe's public statements about his past dredging, about his ongoing dredging around the day the Complaint was filed, and about his plans in future years,

including statements about defying the EPA and CWA. *See*, *e.g.*, *Hurlbutt Decl.*, Exs. B–L (Poe web posts in 2014, 2015, and 2018 referenced in ICL *Complaint*).

Poe is wrong in claiming that his CWA violations in 2014 and 2015 are "wholly past" violations, given the undisputed fact that he continued suction dredging without any NPDES permit in 2018. The defendant faces a "heavy burden" when alleging that all violations are in the past. *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 189 (2000). The risk of an ongoing violation must be "completely eradicated" for a citizen suit to be precluded by the ongoing violations doctrine. *Sierra Club v. Union Oil Co. of Calif.*, 853 F.2d 667, 671 (9th Cir. 1988).

Poe has not met the "heavy burden" of showing he has "completely eradicated" the risk of dredging again without a permit. All Poe points to is the two-year break he took from dredging (at least in Idaho) after receiving ICL's 2016 Notice Letter. However, "[i]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its right to determine the legality of the practice." *Idaho Rural Council*, 143 F.Supp.2d at 1177. Furthermore, Poe's voluntary cessation was only temporary—he admittedly resumed suction dredging without a CWA permit in 2018. *Poe Decl.*, ¶ 17. The Court should thus deny Poe's notice and/or mootness arguments.

2. ICL's 2017 & 2018 Reminder Letters Do Not Negate the Valid 2016 Notice Letter.

Poe's second notice argument is that ICL's 2017 and 2018 courtesy "reminder" letters were not sent by certified mail, and thus do not qualify as formal notice letters under the CWA notice regulations. ECF No. 17-1 (*Poe Br.*), pp. 18–27. This is a red herring. ICL already gave proper notice of Poe's alleged CWA violations in the 2016 Notice Letter. The subsequent "reminder" letters simply reaffirmed to Poe that ICL was watching and would sue if he again suction dredged without a CWA permit. Nothing in the CWA or the EPA regulations prevent a

party from giving such reminders, which were intended by ICL as an informal way to (hopefully) avoid litigation. And nothing in the CWA or the regulations required ICL to provide Poe with any subsequent letters after the valid 2016 Notice Letter.

**D. ICL's 2016 Notice Letter Reasonably Specified The Location of Poe's Violations.**

Poe's third and final notice argument is that ICL's 2016 Notice Letter lacked "mandatory specificity" by failing to state exactly where Poe dredged on the South Fork previously and by stating ICL intended to sue Poe if he dredged without an NPDES permit in the future anywhere in Idaho. ECF No. 17-1 (*Poe Br.*), pp. 19–20. In making this argument, Poe mischaracterizes the CWA notice regulations, which do not require ICL to specify the exact location of his violations; rather, the regulations require ICL to provide "sufficient information to permit the recipient"—Poe—to identify the location of the alleged violations. *See* 40 C.F.R. § 135.3.

Contrary to Poe's reading, courts have found adequate notice when specific locations were not provided in a notice letter. In *Ecological Rights Foundation v. Pacific Gas & Electric*, 713 F.3d 502, 519 (9th Cir. 2013), the Ninth Circuit held notice was adequate where plaintiff did not provide exact locations of preservative-treated utility poles, but identified representative poles and referenced defendant's superior knowledge of other pole locations. In *Puget Soundkeeper Alliance*, 216 F.Supp.3d at 1209–10, the court rejected defendant's argument that plaintiff failed to identify the location of the alleged violation, stating "a notice letter need not identify every specific discharge point at a facility: the crux of proper notice is whether Defendants were sufficiently informed so as to be able to remedy the alleged violations."

And as already explained above, Poe cannot plausibly argue he was unable to identify the alleged CWA violations identified in ICL's 2016 Notice Letter or how he could avert the violations in the future. The 2016 Notice Letter specifically advised Poe that he was violating

the CWA by conduction suction dredging on the South Fork without a valid NPDES permit. Poe knows where he operated a suction dredge on the South Fork in 2014 and 2015, and after receiving the Notice Letter, Poe knew he could remedy the violations by not conducting further suction dredging on the South Fork or anywhere else in Idaho without a valid NPDES permit.

Further, Poe ignores the fact that suction dredges are mobile. If ICL notified Poe it would sue him over his past and future violations at a specific location, such as at/or near mile marker 39 on the South Fork, then Poe could simply move to a different segment of the South Fork, or to a different stream, the next year, and claim inadequate notice. He could repeat this process year after year forever insulating himself from CWA citizen enforcement and forever dredging throughout Idaho without an NPDES permit. His attempt to have this Court erect a new requirement for CWA notice letters must be rejected.

## II. ICL HAS ARTICLE III STANDING.

To have Article III standing, a plaintiff must show "(1) it suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth*, 528 U.S. at 180–81. "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted, nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 181.

Poe claims that the Complaint does not adequately allege facts showing ICL has Article III standing; but in fact the Complaint contains specific allegations to satisfy the three standing prongs. *See* Complaint, ¶¶ 9–15, 40–53, 91–102 & Prayer for Relief. Moreover, to confirm its

allegations and establish Article III standing at this phase, ICL files herewith the declarations of Jonathan Oppenheimer (ICL staff person and member) and Janice Inghram (ICL member). This Court has found conservation groups have standing to pursue CWA violations based on similar declarations from members. *See Idaho Rural Council*, 143 F.Supp.2d a 1175–76; *Atlanta Gold*, 844 F.Supp.2d 1128–30.

**A. ICL Members Suffer Injury in Fact.**

Poe argues ICL fails to show how its members' recreational activities and aesthetic values are diminished by Poe's dredging. ECF No. 17-1 (*Poe Br.*), p. 24. But "environmental plaintiffs adequately allege injury in fact when they aver that the use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Friends of the Earth*, 528 U.S. at 183. "The alleged injury need not be large: an actual and genuine loss, even if a trifle, will suffice for standing purposes." *Waste Action Project v. Draper Valley Holdings*, 49 F.Supp.3d 799, 802 (W.D. Wash. 2014).

Inghram and Oppenheimer both attest that they use the South Fork and their aesthetic and recreational values have been and will be lessened by Poe's dredging. Inghram is a long-time ICL member who has always lived near the South Fork and has regularly visited the South Fork every year of her life. *Inghram Decl.*, ¶¶ 1–11. Her declaration details how she has encountered Poe's dredging operations at and near Mile Marker 39 approximately four times each year in 2014, 2015, and 2018 while driving along the South Fork. *Id.* at ¶ 12. Poe's unlawful dredging has degraded and impaired her aesthetic and recreational experiences in numerous ways and caused her to avoid doing things she would otherwise like to do. *Id.* a ¶ 13–18.

Oppenheimer regularly visits the South Fork for both personal reasons and professional reasons as an ICL staff member. *Id.* at ¶¶ 3–18. He cares deeply about the protection and

restoration of the South Fork and likes to enjoy nature when he is there. *Id.* His experiences are degraded by sediment pollution, the alteration of streambanks and riverbeds, and other impacts of suction dredge mining. *Id.* at 49–57. His use and enjoyment of the South Fork is likewise impaired by Poe's unlawful suction dredging. *Id.*

The detailed factual allegations suffice to show injury in fact. For example, in *NRDC v. Southwest Marine*, 236 F.3d at 994, the Ninth Circuit found injury in fact where "members of the plaintiff organizations, and [an] individual plaintiff [] testified that they have derived recreational and aesthetic benefit from their use of the Bay (including areas of the Bay next to Defendant's shipyard), but that their use has been curtailed because of their concerns about pollution, contaminated fish, and the like." Likewise, this Court has found injury in fact where plaintiff member declarations aver their enjoyment is altered or they curtail their activities because of environmental concerns. *Idaho Rural Council*, 143 F.Supp.2d at 1175–76; *Atlanta Gold*, 844 F.Supp.2d at 1128–29. Similarly here, Inghram and Oppenheimer derive recreational and aesthetic benefit from their use of the South Fork including near Poe's dredging and other locations affected by it, and their enjoyment has been altered and their use has been curtailed because of their concerns about the damaging impacts of Poe's suction dredge mining.

**B. ICL's Injuries Are Fairly Traceable to Poe's Unpermitted Dredging.**

Poe also argues that ICL's injuries are not fairly traceable to his dredging without an NPDES permit. ECF No. 17-1 (*Poe Br.*), pp. 24–25. For an injury to be fairly traceable there must be "a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation omitted).

The Ninth Circuit has explained that, in the CWA context, "[r]ather than pinpointing the origins of particular molecules, a plaintiff must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged in the specific geographic area of concern." *NRDC v. Southwest Marine, Inc.*, 236 F.3d at 995 (citations and quotations omitted). ICL alleges Poe discharged sediment to the South Fork while suction dredge mining in 2014, 2015, and 2018. These discharges cause or contribute to the kinds of injuries Inghram and Oppenheimer suffer on the South Fork, including injuries due to decreased water quality, altered streambanks and riverbeds, and disturbance of fish, birds, and wildlife described above.

That Poe's discharges and related dredging activities contribute to these kinds of injuries is supported by the Forest Service's 2016 Environmental Assessment (EA) for its proposal to authorize up to 15 plans of operation for suction dredging on the South Fork. ECF 17-4, pp. 3–144. The EA identifies how dredging—even when done in compliance with an approved Forest Service plan of operations, IDWR permit, and NPDES permit—causes or contributes to the kinds of injuries Inghram and Oppenheimer allege. *Id.* at 87–93 (direct and indirect effects to steelhead), 93–94 (Chinook salmon), 94–102 (bull trout), 103–04 (other aquatic species, including cutthroat, redband trout, and Pacific lamprey), 105–07 (wildlife), 108–109 (water quality and soils), 114–18 (botany), 118–19 (recreation) & 119–23 (wild and scenic river eligibility for outstandingly remarkable values). Poe himself has submitted these materials to the Court, which confirm ICL's allegations of injury caused by his unlawful conduct.

**C. A Favorable Decision Will Redress ICL's Injuries.**

ICL's Complaint asks the Court to enjoin Poe from future discharges to the South Fork and any other Idaho waterbody except in compliance with an NPDES permit. *See Complaint*, Prayer for Relief, ¶ B. ICL also asks the Court to impose CWA civil penalties on Poe for each

violation he committed. *Id.* at ¶ C. Granting either type of requested relief will redress ICL's injuries, as courts have consistently recognized in CWA cases.

"A plaintiff who seeks injunctive relief satisfies the requirement of redressability by alleging a continuing violation or the imminence of a future violation of an applicable statute or standard." *NRDC v. Southwest Marine, Inc.*, 236 F.3d at 995 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 108 (1998)). In *Laidlaw*, the Supreme Court held that civil penalties sought by citizen plaintiffs "carried with them a deterrent effect that made it likely, as opposed to merely speculative, that the penalties would redress [plaintiffs'] injuries by abating current violations and preventing future ones." 528 U.S. at 187. In both *Idaho Rural Council*, 143 F.Supp.2d at 1177, and *Atlanta Gold*, 844 F.Supp.2d at 1131, this Court held that plaintiffs' injuries would be redressed by injunctive relief and by CWA civil penalties.

Poe baldly asserts in his redressability argument that there is no continuing violation or the imminence of a future violation in this case. ECF No. 17-1 (*Poe Br.* at 26). But as already explained above, the Complaint makes good-faith allegations that Poe's dredging without an NPDES permit was continuing on the day the case was filed (August 10), was likely to continue through August 15, 2018, and was likely to resume during dredge season in future years. *See* Complaint, ¶¶ 54–94 (factual allegations regarding Poe's past and ongoing dredging without an NPDES permit) & 101 (allegations of ongoing violations). Poe cannot reasonably argue there is no chance he will return to Idaho to dredge without an NPDES permit.

Granting injunctive relief ordering Poe not to dredge in Idaho except in compliance with a valid NPDES permit will redress ICL's injuries. After such an order, Poe might choose to not dredge on the South Fork or anywhere in Idaho, or he might seek coverage under the NPDES General Permit (or an individual NPDES permit). Either way, his unlawful dredging will not

recur and ICL's injuries will be redressed because the General Permit requires compliance with important effluent limitations, BMPs, and monitoring and reporting requirements that protect both water quality and aquatic environments. *See* ECF No. 17-3 (*General Permit*), pp. 99–103.

Poe argues that he received an IDWR permit each year he dredged, that he complied with IDWR permit, and that if he had an NPDES General Permit his activities would not have been any different. ECF No. 17-1 (*Poe Br.*), p. 25. Poe, however, did not comply with his IDWR permit. *Oppenheimer Decl.*, Ex. E (IDWR Consent Order) & G (Forest Service photos of Poe undercutting and eroding bank in 2015). And while the two permits have some overlapping requirements, there are numerous differences—as Poe admits in his brief. *See* ECF No. 17-1 (*Poe Br.*), pp. 11–13 (detailing many differences between requirements of General Permit and IDWR permit). Compared to IDWR's permit, the NPDES General Permit imposes stricter operating, monitoring, and reporting requirements, as described above. These NPDES requirements will redress ICL's injuries caused by the environmental degradation from Poe's suction dredge mining. *See Inghram Decl.* ¶¶ 19–21; *Oppenheimer Decl.* ¶¶ 58–66.

Ordering Poe to pay CWA civil penalties for each of his violations will also redress ICL's injuries, because civil penalties will deter Poe from continuing to engage in unlawful dredging. Civil penalties are mandatory where a court finds CWA violations, 33 U.S.C. § 1319(d), and the substantial penalties Poe faces will have a much stronger deterrent effect than the notices and warnings he has so far refused to heed. Imposing CWA penalties on Poe will redress ICL's injuries by deterring him from further unlawful dredging in Idaho.

## CONCLUSION

For the foregoing reasons, the Court should deny Poe's Motion to Dismiss.

DATED this 22nd day of January, 2019.

Respectfully Submitted,
/s/ *Bryan Hurlbutt*
Bryan Hurlbutt
Laurence ("Laird") J. Lucas

*Attorneys for Plaintiff ICL*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on January 22, 2019, I filed the foregoing ICL'S BRIEF OPPOSING MOTION TO DISMISS and the accompanying DECLARATION OF BRYAN HURLBUTT (and all exhibits thereto), DECLARATION OF JANICE INGHRAM, and DECLARATION OF JONATHAN D. OPPENHEIMER (and all exhibits thereto) electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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