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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

IDAHO CONSERVATION LEAGUE, Plaintiff, v. SHANNON POE, Defendant.	No. 1:18-cv-353-REP **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR REMEDIES**

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INTRODUCTION

In the June 4, 2021 Memorandum Decision (ECF 50) ("Liability Decision"), Magistrate Judge Bush held that Defendant Shannon Poe committed 42 violations of the Clean Water Act (CWA) by operating a suction dredge and discharging pollutants to the South Fork Clearwater River over 42 separate days in 2014, 2015, and 2018 without a required permit. Plaintiff Idaho Conservation League (ICL) now respectfully asks the Court to order the following remedies for those violations: (1) an injunction barring Poe from suction dredge mining in Idaho unless he obtains and complies with a CWA Section 402 permit; and (2) CWA civil penalties of $564,924.00 paid to the U.S. Treasury. Such relief is common in CWA citizen enforcement cases, such as this one. *See*, *e.g.*, *Idaho Conservation League v. Atlanta Gold Corp.*, 879 F. Supp. 2d 1148 (D. Idaho 2012) (injunction and $2,000,000 civil penalty for around 2,000 CWA violations); *Idaho Conservation League v. Magar*, No. 3:12–cv–00337–CWD, 2015 WL 632367 (D. Idaho Feb. 13, 2015) (injunction and $100,000 penalty for five CWA violations).

As set forth below, an injunction is necessary to ensure Poe complies with the CWA—which he intentionally flouted—and to prevent irreparable harm to water quality, fisheries, and other values threatened by his unlawful pollution discharges. Additionally, the CWA mandates civil penalties for each of Poe's 42 violations. *See* 33 U.S.C. § 1319(d). While Poe faces a maximum penalty of nearly $2 million, a $564,924 penalty is appropriate under the CWA's penalty factors and will deter Poe from further violations and disgorge the benefits he realized. On a per violation basis, the requested penalty is in line with, but appropriately larger than, a recent administrative penalty imposed by EPA on another South Fork suction dredge miner (Erlanson) for a single CWA violation in 2015. Poe's vociferous refusal to obtain a permit over several years of dredging and encouraging others to do the same warrant a larger penalty.

LEGAL BACKGROUND

The purpose of the CWA is "to restore and maintain . . . the Nation's waters." 33 U.S.C. § 1251. Central to achieving these goals is the CWA's prohibition on discharging pollutants unless done in compliance with a National Pollutant Discharge Elimination System (NPDES) permit issued under CWA Section 402. *See* 33 U.S.C. §§, 1311(a), 1342. "The most important component of the [CWA] is the requirement that an NPDES permit be obtained." *Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1294 (1st Cir. 1996).

CWA Section 402 authorizes EPA to issue NPDES permits. 33 U.S.C. § 1342(a). EPA can authorize individual states to administer their own Section 402 permitting programs. *Id.* 1342(b). On June 14, 2018, EPA authorized Idaho's Section 402 permitting program: the Idaho Pollutant Discharge Elimination System (IPDES) program administered by the Idaho Department of Environmental Quality (DEQ). 83 Fed. Reg. 27,769 (Jun. 14, 2018).

The CWA citizen suit provision allows a citizen to bring suit in federal court against any person who is alleged to be in violation of any limitation or standard of the CWA, including the CWA's prohibition on discharging pollutants without a Section 402 permit. 33 U.S.C. § 1365. 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 CWA authorizes district courts "to order that relief it considers necessary to secure prompt compliance with the Act. That relief can include, but is not limited to, an order of immediate cessation." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982). *See* 33 U.S.C. §§ 1319(b), 1365(a) (authorizing injunctions). *See also* 33 U.S.C. § 1365(a).

The CWA also mandates that any person who violates the Act "shall be subject to a civil penalty . . . per day for each violation." *Id.* § 1319(d). "If a district court finds a violation, then civil penalties under 33 U.S.C. § 1319(d) are mandatory." *Natural Res. Defense Council v. Sw. Marine*, 236 F.3d 985, 1001 (9th Cir. 2000). This applies in citizen enforcement suits. 33 U.S.C. § 1365(a). The purposes of the CWA civil penalty provision are restitution, deterrence, and retribution. *See Tull v. United States*, 481 U.S. 412, 422 (1987).

STATEMENT OF RELEVANT FACTS

Defendant Shannon Poe is professional miner from California who came to Idaho to suction dredge mine for gold in the bed of the South Fork Clearwater River in 2014, 2015, and 2018. Liability Decision at 1; Poe Decl. (ECF 17-2, Ex. 1), ¶¶ 1–2. Each year, Poe intentionally refused to apply for a CWA Section 402 permit, despite being repeatedly notified by state and federal agencies and ICL that a permit was required. *See* ICL SOF (ECF 38-1) ¶¶ 16–40.

Poe is the founder and President of the American Mining Rights Association (AMRA), which he says educates the public and miners on miner rights. Poe Depo Tr. (ECF 38-5), p. 8. Through written and video posts to AMRA's website, Poe boasted about defying EPA, encouraged others to suction dredge mine on the South Fork without a CWA permit, and solicited funds for AMRA. *See* ICL SOF ¶¶ 20, 21, 23, 25, 26, 30, 33 & 34.

The South Fork is a State Protected River (ECF 17-3, Ex. 7, p. 45) and is eligible as a federal wild and scenic river due to its outstandingly remarkable values (ECF 17-4, Ex. 8, p. 3-83). The Idaho Department of Fish and Game recognizes the South Fork as "an important fishery which provides unique opportunities for anglers" and as an "important area for fish species within the broader context of the Columbia River basin." ECF 38-13, p. 1. The South Fork is inhabited by stealhead trout, fall Chinook salmon, and bull trout, each listed as "threatened"

under the federal Endangered Species Act (ESA). ICL SOF ¶ 2. It also provides habitat for native Pacific lamprey, redband trout, and westlope cutthroat trout. *Id.*

Suction dredge miners, like Poe, use an underwater vacuum hose, crowbars, and other tools to excavate (or "punch") holes in the riverbed. *See id.* ¶¶ 7–10. Some excavated materials, like rocks, are moved aside. *Id.* Other materials are sucked up the hose and run through a sluice on a floating dredge, where gold is separated out and other riverbed materials are discharged to the river. *Id.* Discharged sands, sediments, and silts become suspended in the water column and flow downstream as turbid water until settling on the riverbed. *Id.*

The South Fork is an "impaired" river because it fails to meet CWA standards for sediment and other pollution. *Id.* ¶ 3. A 2014 report prepared by the National Marine Fisheries Service found "[s]uction dredge mining directly contributes to [the] degraded baseline and slows restoration" on the South Fork. ECF 38-12, p. 1. When discharged from a dredge, fine sediment reduces oxygen levels in the South Fork, which reduces the survival of fish eggs and alevins. *Id.* Fine sediment also reduces hiding cover and preferred forage, which reduces growth in older and juvenile fish. *Id.* When fine sediment settles to the riverbed, it fills pools or create films of silt that reduce invertebrate production, which in turns reduces feeding opportunities for fish. *Id.* Habitat is also degraded by the holes and tailings piles created by dredging. *Id.* at 2–3.

In 2014, Poe suction dredged on the South Fork on at least 13 separate days, starting on July 15, without a CWA permit. *See* ICL SOF ¶¶ 19–21. He "punched" four or five holes and dredged a total of about 45 to 50 linear feet. *Id.* In an August 5, 2014 AMRA webpage post, Poe bragged about visiting the South Fork "to dredge openly in opposition to the EPA." *Id.* In October 2014, EPA issued Poe a notice of violation for dredging without a CWA permit. *Id.* ¶

22. In 2015, Poe returned to the South Fork to "stand against the EPA again." *Id.* ¶¶ 23–26. He dredged on 12 days without a CWA permit, dredging about 60 linear feet of riverbed. *Id.*

Because of these CWA violations in 2014 and 2015, ICL sent Poe a notice of intent to sue in May 2016. *Id.* ¶ 27. Poe responded 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." *Id.* Prior to the South Fork dredge season in both 2017 and 2018, ICL sent Poe a "courtesy reminder" of the 2016 notice of intent to sue. *Id.* ¶¶ 27 & 29.

In 2018, Poe returned to the South Fork and dredged without a CWA permit on 17 days, starting on July 15, dredging about 70 linear feet total. *Id.* ¶¶ 31, 33, 35–38. Poe boasted in an AMRA post about his plan to dredge without a CWA permit that year. *Id.* ¶ 30. On August 10, 2018, ICL filed this lawsuit while Poe was dredging. *Id.* ¶ 36. Poe continued dredging until August 14. *Id.*¶ 31. In 2019, EPA issued Poe another notice of violation for discharging pollutants to the South Fork in 2018 without CWA permit. SOF ¶ 40.

On September 30, 2019, this Court denied Poe's motion to dismiss. MTD Decision (ECF 26). On June 7, 2021, the Court issued the Liability Decision (ECF 50), holding that Poe violated the CWA on each of the 42 days he suction dredged.

ARGUMENT

I. AN INJUNCTION IS NEEDED TO ENSURE CWA COMPLIANCE

ICL requests an injunction barring Poe from suction dredge mining in Idaho unless he obtains and complies with a CWA Section 402 permit. Because Poe willfully and repeatedly dredged without a permit in violation of the CWA despite multiple notices, and because he broke his promise to ICL that he would not dredge without a permit in the future, it is important that the Court issue an injunction ordering Poe to cease his violations.

A. Standards for Injunctive Relief

The permanent injunction standard is essentially the same as for a preliminary injunction, but it is not necessary to show a likelihood of success on the merits because actual success has been achieved. *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 546 & n.12 (1987). A plaintiff seeking a permanent injunction must demonstrate: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Monsanto v. Geertson Seed Farms*, 561 U.S. 139, 156–57 (2010).

In crafting the terms of an injunction under the CWA, courts have "broad latitude in fashioning equitable relief when necessary to remedy an established wrong." *Alaska Ctr. for Env't v. Browner*, 20 F.3d 981, 986 (9th Cir. 1994) (citing *Romero-Barcelo*, 456 U.S. at 305). Like in this Court's *Atlanta Gold* and *Magar* cases, cited above, other courts have commonly issued CWA injunctions ordering defendants into compliance. *See, e.g., Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 554 (5th Cir. 1996) ("court enjoined [defendant] from discharging produced water. . . until it obtained a NPDES permit"; *PIRG of New Jersey v. Powell Duffryn Terminals*, 913 F.2d 64, 83 (3rd Cir. 1990) (affirming injunction prohibiting defendant from discharging in violation of its permit).

B. An Injunction Is Necessary to Prevent Irreparable Harm

Irreparable harm encompasses violations of CWA Section 402 permits; violations of Water Quality Standards set to protect aquatic life, recreation, and other uses; and the subsequent environmental damage. *See, e.g., Ore. State Pub. Interest Research Group v. Pac. Coast Seafoods*, 374 F.Supp.2d 902, 904–07 (D. Or. 2005) (finding irreparable harm where defendant's

discharges violated water quality standards and were likely to kill or harm river wildlife). Lack of a permit is *itself* a violation: "[I]t is a violation . . . for a polluter to discharge a pollutant without first obtaining a permit . . . . [O]btaining a permit is itself an important effluent limitation, and private attorneys general may enforce that limitation via citizen suits." *Hudson River Fishermen's Ass'n v. Westchester Cty.*, 686 F.Supp. 1044, 1050 (S.D.N.Y. 1988).

Thus, Poe's decision to suction dredge without a CWA permit alone constitutes a violation that amounts to irreparable harm. Further, the effects of Poe's unpermitted discharges are not harmless. The South Fork Clearwater is a State Protected River, an eligible wild and scenic river, and home to threatened and other native fish. It is also an "impaired" water body because it suffers from high levels of sediment pollution. State and federal officials have found that rock, sand, sediment, and silt discharged from a dredge like Poe's can degrade water quality. *See*, *e.g.*, ECF 38-12; ICL SOF ¶ 10. Indeed, the Ninth Circuit explained that "lighter sand, dirt, and clay particles . . . left suspended in the wastewater released from the sluice box" by miners can have aesthetic and water-quality impacts on waters in the immediate vicinity and downstream. *Rybacheck v. EPA*, 904 F.2d 1276, 1282 (9th Cir. 1990).

The record demonstrates that Poe's unpermitted dredging degrades water quality and disturbs the riverbed, causing irreparable harm. Videos of the turbid plume from Poe's dredge show water quality degradation and thus "pollution" of the sort courts and agencies have found harmful. *See* Finnegan Decl. (ECF 38-23), Ex. D (Jul. 27, 2018 video); 2nd Hurlbutt Decl. (ECF 38-3), Ex. P (Aug. 9, 2018 IDWR video).[1] ICL's expert, Dan Kenney, found Poe's dredging added "previously-unmobilized fine sediment" to the river, which "likely incrementally reduced

[1] ICL submitted these videos (and other oversized filings) on DVD by mail to the Court in May 2020. S*ee* ECF 41.

interstitial hiding cover for fish in the [South Fork] channel for miles downstream." *See* Kenney Report, p. 27.[2] These impacts are not temporary, or quickly remedied: "Even if the adverse effects of Poe's dredging were entirely erased each year by high streamflows (and many are not), these effects would still be manifest for days, weeks, or months." *Id*. at 30–31.

Notably, Poe previously promised not to dredge without a permit when he responded to ICL's CWA notice letter in 2016, but then he returned and illegally dredged again for many days in 2018. ICL SOF ¶ 27. The record thus confirms that Poe has intentionally and repeatedly flouted the CWA permit requirements, warranting an injunction to prevent further irreparable harms from his unlawful dredging.

C. Remedies at Law Are Inadequate

The second injunctive relief question asks whether remedies at law (e.g., money damages) are adequate. It is well established that "[e]nvironmental injury can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." *Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (9th Cir. 2007) (quoting *Amoco*, 480 U.S. at 545). In this case, ICL has no adequate remedy at law. Money damages are not available, and, even if they were, monetary relief would not redress the environmental injuries.

D. Balancing the Hardships Shows Equitable Relief Is Warranted

In assessing the balance of hardships, the Court must weigh "the competing claims of injury . . . and the effect on each party of the granting or withholding of the requested relief."

[2] ICL is submitting the Kenney Report and its attachments as Exhibits G through O to the accompanying Fourth Hurlbutt Declaration. Mr. Kenney is a former Forest Service fisheries biologist with extensive experience monitoring and assessing suction dredge mining and its impacts in the Clearwater River watershed, including on the South Fork. *See* Kenney Report (4th Hurlbutt Decl., Ex. G), pp. 1–3. In addition to scientific papers and state and federal agency studies and reports on suction dredge mining and its impacts, the Kenney Report is based on many photos, videos, and reports of Poe's dredging on the South Fork in 2014, 2015, and 2018.

Nat'l Wildlife Fed'n v. Espy, 45 F.3d 1337, 1343 (9th Cir. 1995). And "if environmental injury is sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Sierra Club*, 510 F.3d at 1033 (quoting *Amoco*, 480 U.S. at 545). Here, as established in the irreparable harm discussion, environmental degradation from Poe's continued dredging is likely, and so the balance of harms tips in favor of issuing an injunction. The lone countervailing "harm" Poe could complain of is the burden of coming into compliance with the law, which is all the requested relief requires.

E. An Injunction Is in the Public Interest

In assessing the public interest, courts have recognized that ensuring protection of the environment is an important public purpose. *The Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) (en banc) ("preserving environmental resources is certainly in the public's interest"); *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1177 (9th Cir. 2006) ("The preservation of our environment . . . is clearly in the public interest"); *Sierra Club*, 510 F.3d at 1033 (similar). Here, the public interest in environmental protection is served by barring Poe from suction dredge mining in Idaho unless he obtains and complies with a CWA permit.

F. Other Factors Support Injunctive Relief to Prevent Future Poe Violations

In granting an injunction in an earlier Idaho CWA citizen suit, this Court cited factors relevant beyond the four considerations discussed above—including the fact that violations were "of a continual, and long-standing nature," and that the defendant "passed up opportunities to fix the problem, strongly suggesting that the added impetus of an injunction is necessary." *See Atlanta Gold*, 879 F. Supp. 2d at 1162.

Here, too, Poe's violations are long-standing, as they occurred over several years. Further, despite repeated notices from government authorities and from ICL, Poe refused to cease his activities or apply for a permit. *See*, *e.g.*, ICL SOF ¶¶ 22, 27, 29, 32–34, 36. Without an

injunction, Poe may well continue unpermitted dredging, given his history of willful non-compliance—including breaking his promise in 2016 not to dredge without a permit. Notably, while dredging on the South Fork in 2018, Poe stated in an AMRA post and video that planned to return to dredge the South Fork the following year. *Id.* ¶¶ 34–35. And in his 2020 deposition, Poe kept open the possibility of dredging on the South Fork without a CWA permit in the future. Poe Depo Tr., p. 31. These examples of Poe's past violations, broken promises, and desire to return to the South Fork reinforce the need for an injunction.

II. CIVIL PENALTIES MUST BE ASSESSED TO REDRESS THE VIOLATIONS FOUND AND TO DETER FUTURE VIOLATIONS.

A defendant found to have violated the CWA "shall be subject to a civil penalty [up to a maximum amount] for each violation." 33 U.S.C. § 1319(d). The CWA identifies six factors courts must consider in determining the amount of the civil penalty:

> [1] the seriousness of the violation or violations, [2] the economic benefit (if any) resulting from the violation, [3] any history of such violations, [4] any good-faith efforts to comply with the applicable requirements, [5] the economic impact of the penalty on the violator, and [6] such other matters as justice may require.

33 U.S.C. § 1319(d). The Supreme Court has explained that "Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties." *Tull*, 481 U.S. at 422.

The authority of courts to calculate penalties is "highly discretionary." *Id*. at 427. "To the extent that they encourage defendants to discontinue current violations and deter them from committing future ones, [penalties] afford redress to citizen plaintiffs [injured by] ongoing unlawful conduct." *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 186 (2000). "To achieve the goal of deterrence, a penalty must be high enough so that the discharger cannot 'write it off' as

an acceptable environmental trade-off for doing business." *Hawaii's Thousand Friends v. City and Cty. of Honolulu*, 821 F.Supp. 1368, 1394 (D. Haw. 1993).

Courts usually use a "top-down" or "bottom-up" approach to apply these six factors. *Compare Cedar Point.*, 73 F.3d at 573–74 (top-down), *with United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 528–29 (4th Cir. 1999) (bottom-up). A top-down approach calculates the maximum penalty, then reduces the penalty in light of statutory factors. *Cedar Point*, 73 F.3d at 573. The bottom-up method uses a defendant's economic benefit of non-compliance as a starting point, then adjusts up after evaluating the six factors. *Smithfield Foods*, 191 F.3d at 528. Either approach requires assessment of the factors, neither is mutually exclusive, and the maximum penalty serves as a guide: "If [a district court] chooses not to impose the maximum, it must reduce the fine in accordance with the factors spelled out in section 1319(d), clearly indicating the weight it gives to each of the factors in the statute and the factual findings that support its conclusions." *Atl. States Legal Found. v. Tyson Foods*, 897 F.2d 1128, 1142 (11th Cir. 1990)

Here, under any method, the Court must impose a penalty sufficient to redress Poe's flagrant, repeated violations of the CWA and to deter future violations.

A. The Maximum Penalty for Poe's 42 CWA Violations is $1,957,041.

Again, the CWA imposes a maximum penalty "per day for each violation." 33 U.S.C. § 1319(d). Where a defendant lacks a permit altogether, as in Poe's case, "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).

The CWA's maximum per-violation penalty is adjusted periodically to account for inflation. For violations that occurred after Dec. 6, 2013, and through Nov. 2, 2015, the maximum penalty is $37,500 per violation. 40 C.F.R. § 19.4 at Table 2. For violations that

occurred after November 2, 2015, where penalties are assessed on or after January 12, 2022, the maximum statutory civil monetary penalty is $59,973 per violation. *Id.* at Table 1.

During the liability stage, it was undisputed that Poe dredged without a permit on 42 separate days, including: 13 days in 2014; 12 days in 2015; and 17 days in 2018. Liability Decision at 1; ICL SOF ¶¶ 19, 24, 31. All dredging occurred in July or August. *Id.* Thus, the maximum penalty for Poe's 25 violations in 2014 and 2015 is $937,500 (25 x $37,500), and the maximum for his 17 violations in 2018 is $1,019,541 (17 x $59,973). Altogether, the maximum total penalty Poe faces for his 42 adjudicated CWA violations is $1,957,041.

B. The Penalty Factors Indicate a Penalty of at Least $564,924 Is Warranted.

ICL requests a reasonable penalty of $564,924.00 (less than 30% of the maximum) to effectuate the goals of the CWA. ICL calculated this penalty by adding: (1) a $13,200 penalty per violation (42 violations times $13,200 equals $554,400); plus (2) the direct economic benefit Poe realized from his violations by mining gold worth an estimated $10,524 (*see* gold discussion *infra* Part II.B.2).

The penalty of $13,200 per violation is based largely on the $6,600 penalty that an EPA Administrative Law Judge (ALJ) ordered in an EPA civil enforcement action against Dale Erlanson for a single CWA violation: dredging on the South Fork without a permit on one day in July in 2015. *See In Re Dale Erlanson, Sr.*, Docket No. CWA-10-2016-0109 (U.S. Environmental Protection Agency) (the Oct. 7, 2020 "Erlanson Liability Decision" is attached as Exhibit D to the 4th Hurlbutt Declaration filed herewith).

There, an EPA enforcement specialist first calculated a preliminary deterrence penalty of $5,500 based on: assuming Erlanson did not obtain any economic benefit from noncompliance; finding that the sediment Erlanson discharged can be harmful in high quantities; noting the South

Fork is an impaired waterbody for sediment and ESA-listed species are present; and considering that unauthorized dredging erodes the CWA's regulatory scheme. Erlanson Liability Decision at 20–21. Next, in assessing aggravating factors, the specialist determined that an upward adjustment of 20 percent, resulting in a $6,600 penalty, "was warranted in this case and both reasonable and conservative given the particular circumstances of the case and the degree of willfulness." *Id*. at 22. The EPA specialist "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.'" *Id*. The ALJ heard testimony from the EPA penalty specialist, as well as fisheries experts, and ordered the $6,600 penalty. *Id.* at 43.

Erlanson's single CWA violation largely mirrors each of Poe's violations in many respects. Erlanson and Poe polluted the same river, performed the same type of mining, lacked the same required permit, and were notified several times that a permit was required. However, key differences warrant a higher penalty per violation for Poe.

First, the maximum penalty in EPA's enforcement action against Erlanson was only $16,000 per violation (*see id.* at 3); whereas Poe faces much higher maximums: $37,500 per violation in 2014 and 2015; and $59,973 per violation in 2018. Second, Poe's violations were substantially more willful. Although it was not granted for the South Fork, Erlanson at least submitted a permit application to EPA in 2015 before dredging. *Id.* at 7. By contrast, Poe purposefully refused to apply for a permit each year and encouraged others to join and support him. *See* ICL SOF ¶¶ 20, 21, 23, 25, 26, 30, 33 & 34. Furthermore, Poe's violations, unlike Erlanson's, were repeated over multiple years, despite many notices of violation and other notifications that he was required to have a CWA permit. *Id.* ¶¶ 22, 27, 29, 32–34, 36.

ICL, thus, asks the Court to adopt a penalty of $13,200 per violation—twice the Erlanson penalty—and add to that the value of the gold Poe mined from the South Fork. This $564,924 penalty is supported by the CWA penalty factors, discussed in the sections below. This penalty is also in line with penalties this Court levied in other CWA citizen suit enforcement actions.

In *Magar*, Magistrate Judge Dale ordered a $100,000 penalty (reduced from a $187,500 maximum) for five CWA violations—or $20,000 per violation—for discharging wastewater from sewage lagoons to the South Fork Palouse River without an NPDES permit, even where there was no evidence of acute water quality problems from the discharges and even though Magar made efforts to obtain a CWA permit and treat some of his discharges. 2015 WL 632367 at *5, *7. In *Atlanta Gold*, Magistrate Judge Williams imposed a minimum $2 million penalty for around 2,000 violations for discharging pollutants from a mining site to a headwater tributary to the Boise River in excess of the limits in its CWA permit. 879 F. Supp. 2d at 1169. He recognized an even higher penalty might be appropriate but wanted to give Atlanta Gold the opportunity to spend money to upgrade its wastewater treatment facility and comply with the Court's deadline meet its permit limits instead of paying more in civil penalties. *Id.*

1. Poe's Discharges Were Serious Violations of the CWA.

In evaluating the first statutory factor, seriousness of violations, courts consider frequency and severity, as well as the effect violations have on the environment and the public. *United States v. Smithfield Foods*, 972 F. Supp. 338, 343 (E.D. Va. 1997), *aff'd in part, rev'd in part on other grounds* 191 F.3d 516 (4th Cir. 1999). Proof of specific environmental harm is not required to impose substantial penalties, as it would encourage a permittee to ignore permit requirements "with impunity so long as it discharged into already polluted [areas]." *Gulf Park Water Co.*, 14 F.Supp.2d at 860.

Here, Expert Dan Kenney's report establishes the severity of Poe's 42 violations: "There is ample evidence that Poe's 2014, 2015, and 2018 activities in the SFCR [(South Fork Clearwater River)] affected algae, invertebrates, and fish." Kenney Report at 24. That evidence includes photographs, videos, and other materials already before the Court, which Mr. Kenney reviewed for his expert report, documenting sediment plumes behind Poe's dredge, as well as dredge holes and piles on the bed of the South Fork.

Poe's violations are even more serious in light of an Idaho Department of Water Resources report that Kenney cited on 2018 suction dredging in the river, which concluded that "all disturbed areas will experience a reduction in invertebrate production from fine sediment, leading to a reduction in foraging opportunities for anadromous and resident fish species." *Id*. at 26. And while the scientific "literature . . . shows that many effects of suction dredging on organisms may be local and of temporary duration, the period of freshwater residence of a particular [threatened] juvenile steelhead or Chinook salmon following the dredging seasons may also be relatively brief, so a reduction of prey availability for a period of only a few weeks or months may be a significant factor in the survival and growth of some individuals." *Id*.

Mr. Kenney concluded that "Poe's dredging operations on the SFCR in 2014, 2015, and 2018 had demonstrable immediate and enduring effects on SFCR water quality and stream channel morphology," and "I believe that these physical effects were harmful to individual aquatic organisms in the SFCR." *Id*. at 31. Mr. Kenney's findings here are supported by the ALJ's findings in *In Re Erlanson*, as well as the extensive expert testimony in that action from Mr. Kenney and from David Lee Arthaud, a Fisheries Biologist with the National Marine Fisheries Service, about the harmful effects of Erlanson's unpermitted discharges. Erlanson Liability Decision at 10–18. Thus, Poe's discharges were serious violations of the CWA.

2. Poe Derived Economic Benefit from the Violations.

Under the second factor, courts must consider "the economic benefit (if any) resulting from the violation." 33 U.S.C. § 1319(d). Here, courts must endeavor to reach a "rational estimate of [the violator's] economic benefit, resolving uncertainties in favor of a higher estimate." *United States v. Mun. Auth. of Union Township*, 929 F. Supp. 800, 806 (D. Pa. 1996). Such an analysis is required "to keep violators from gaining an unfair competitive advantage by violating the law." *Smithfield Foods*, 191 F.3d at 529. *See also United States v. Mun. Auth. of Union Township*, 150 F.3d 259, 263 (3d Cir. 1998) (the goal is "to remove or neutralize the economic incentive to violate environmental regulations."). Because of the difficulty assessing economic benefit, courts have recognized "reasonable approximations of economic benefit will suffice." *Powell Duffryn*, 913 F.2d at 80. Courts have imposed civil penalties even without a showing that the violator benefitted economically. *See United States v. Key West Towers*, 720 F.Supp. 963, 965–66 (S.D. Fla. 1989); *United States v. Smith*, No. 12-00498-KD-C, 2014 WL 3687223, *13 (S.D. Ala. 2014).

Here, Poe's most direct economic benefit is the value of gold he mined from the South Fork without a CWA permit. Poe estimates, roughly, that he (and partners who helped him) mined up to six ounces of gold. *See* Poe Resp. to Remedial Interrog. No. 1 (4th Hurlbutt Decl., Ex A). In his response to interrogatories, Poe estimated the value of gold as $1,754 per ounce. *Id.* No. 11. Applying that value, Poe's unpermitted haul was worth up to $10,524. This a rough estimate, because of the fluctuating price of gold and the lack of specific information provided by Poe. But "[i]t would eviscerate the [CWA] to allow violators to escape civil penalties on the ground that such penalties cannot be calculated with precision." *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of N.Y.,* 244 F. Supp. 2d 41, 50 (N.D.N.Y. 2003) (internal citations and

quotations omitted). Keeping in mind the practice of "resolving uncertainties in favor of a higher estimate," *Mun. Auth. of Union Township*, 929 F. Supp. at 806, ICL relies on the high-end estimated value of gold Poe mined without a permit: $10,524.

Indeed, this is still conservative, in that it accounts only for the gold value without including the added value of expenditures Poe avoided or delayed through his violations by not applying for and complying with the terms of a CWA permit. It also does not account for any economic benefit that Poe gained through his affiliation with AMRA.

Poe is founder and President of AMRA, an organization that raises money primarily through donations, membership, and other fundraising. *See* AMRA Form 990s (4th Hurlbutt Decl., Exs. R–U). From 2015 to the present, Poe posted numerous blogs, videos, and interviews to the AMRA website and Facebook page, publicizing his acts of defiance on the South Fork and soliciting AMRA membership and financial support. *See*, *e.g.*, ICL SOF ¶¶ 17, 20–21, 23, 25, 30, 33; 4th Hurlbutt Decl., Exs. O–Q. Poe benefited economically from AMRA during that time. Poe Resp. to Remedial Interrog. No. 7 (showing $22,514 in consulting fee income from AMRA). AMRA benefited too, reporting revenues from $102,154 to $235,265 per year while Poe was engaging in and publicizing his unpermitted dredging on the South Fork. *See* AMRA 990s.

While difficult to precisely quantify, especially because Poe refused to turn over documents related to AMRA during discovery (*see* Poe Resp. to Remedial Interrog. Nos. 13–16 and RFPs Nos. 9, 10), he and his organization gained at least some—if not very substantial—economic benefit from his illegal activities, further supporting ICL's requested penalty.

3. Poe Has a Substantial History of Violation.

Under the third factor, Poe's track record of violating the CWA is substantial. Poe admitted throughout these proceedings that he did not have a CWA Section 402 permit

authorizing any pollutant discharges from his dredge to the South Fork on 42 days over a period spanning more than four years in 2014, 2015, and 2018. Liability Decision at 1; ICL SOF ¶ 18.

4. Poe Demonstrated Bad Faith in His Efforts to Comply.

Good faith efforts to comply with applicable requirements may reduce civil penalties. However, good faith should not be found when "defendant's efforts at compliance could have been more vigorous." *Smithfield Foods*, 972 F. Supp. at 352. Poe's compliance efforts could hardly be less vigorous. In fact, *non-compliance* has often been Poe's stated intention, and his bad faith is worth recounting here.

Poe intentionally refused to apply for a CWA permit, ignored violation notices for his unpermitted dredging, and encouraged others to support and join him in defiance of CWA permit requirements. *See* ICL SOF ¶¶ 17, 20–23, 25, 27, 30. In online posts as the President of AMRA, he boasted about defying EPA and the Forest Service, taunted agencies and personnel, and encouraged others to do the same. *See Id.* ¶¶ 20, 21, 23, 25, 26, 30, 33, 34.

Among other examples, Poe wrote an August 5, 2014 AMRA web post titled "Out of control EPA, Sasquatch, Ratchilla and dredging for two weeks in Idaho," in which he bragged about visiting the South Fork that first year "to dredge openly in opposition to the EPA." ECF No. 20-3. In October 2014, after EPA issued Poe a notice of CWA violation for discharging pollutants to the South Fork without an NPDES permit, Poe could have sought to comply with the law. Instead, Poe returned in 2015 to "stand against the EPA again" by yet again dredging without a CWA permit. ICL SOF ¶ 23. Similarly, in 2018, after receiving ICL's notice of intent to sue, the day before he left California to return to the South Fork to dredge again, he boasted in a post, "[w]e are not obtaining [Forest Service authorization], nor a permit the EPA states is also needed." ICL SOF ¶ 30.

This extensive record—including Poe's repeated admissions of willful, unpermitted dredging, his taunting of ICL and regulatory agencies, his calls for other dredgers to join him in disobeying the law—reinforce that a substantial penalty is needed to address Poe's bad faith.

5. The Penalty Will Not Impose an Undue Burden on Poe.

Finally, a court may reduce a civil penalty against a party if the court determines that imposing the maximum statutory penalty would work an undue burden. *Atlantic States Legal Found. v. Universal Tool & Stamping Co.,* 786 F. Supp. 743, 753–54 (N.D. Ind. 1992). Conversely, courts may increase the penalty if loss of the economic benefit alone would not deter the defendant or others from future CWA violations. *Id*. at 753. This factor will not reduce the amount of a civil penalty unless the violator can show the penalty will have a ruinous effect. *Gulf Park Water Co*., 14 F. Supp. 2d at 868. It is a defendant's burden to prove its inability to pay a civil penalty. *PIRG v. Powell Duffryn Terminals*, 720 F.Supp. 1158, 1165–66 (D.N.J. 1989).

A penalty would not punish or deter violations if it "could simply by absorbed as a cost of doing business." *Magar*, 2015 WL 632367, at *7 (citing *ICL v. Atlanta Gold Corp.*, 879 F. Supp. 2d 1148,1170 (D. Idaho 2012)). And while a court would not require a penalty that would put someone out of business, *see Waste Action Project v. Astro Auto Wrecking*, 274 F. Supp. 3d 133, 1140 (W.D. Wash. 2017), courts have found a reasonable penalty to be "a significant portion of the proceeds" made from the violative conduct. *United States v. Bunn*, CV 20-107-M-DLC, 2020 WL 6798939, at *2 (D. Mont. Nov. 19, 2020).

In addition to his personal assets, Poe's ability to pay is boosted by AMRA's miner legal defense fund, which is funded by AMRA memberships and donations. *See* 4th Hurlbutt Decl., Ex. P (AMRA "About" webpage, stating "click on 'join us' to make a donation to your legal fund and mine on our claims"), Ex. Q (AMRA "Join Us" webpage, stating "donate to us to help us to

build up our defenses against over burdensome regulations, laws and restrictions and to keep your rights"), Ex. R (news release about organization donating $50,000 to AMRA's "legal fund"). Again, Poe refused to provide information during discovery regarding AMRA's finances and his access to AMRA's legal fund, but available documents show AMRA generated from $102,154 to $235,265 in revenue each year from 2015 through 2019. AMRA 990s.

Recently, AMRA sought to raise funds specifically for Poe's use in this case. In a June 30, 2021 Facebook post, AMRA stated about this lawsuit: "Last week we had a Board meeting at AMRA and they unanimously decided this needs to be fought, and fought hard." 4th Hurlbutt Decl., Ex. B. The AMRA post added: "We will be doing many outings, fundraisers, dinners and even yes . . . another Walk for Liberty to raise money for this legal fight." *Id.* The post ended with a link to donate to AMRA. In a July 7, 2021 Facebook post, AMRA stated that it is "looking to raise $150,000" to appeal this case and again posted a link soliciting donations to AMRA. 4th Hurlbutt Decl., Ex C.

Thus, Poe has significant funds to pay a penalty. A penalty less than $564,924 would allow Poe, as a professional miner and President of AMRA, to absorb the penalty as a cost of doing business without deterrent effect. A lesser penalty also runs the risk that Poe and AMRA will *profit* from his 42 CWA violations and the damage he did to the South Fork Clearwater.

CONCLUSION

For the foregoing reasons, the Court should grant ICL's Motion for Remedies.

DATED this 4th day of February 2022.

Respectfully Submitted,

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