

Before the EPA appeals board

In the matter of

Dave Erfanson Sr

Docket # CWA-10-2016-0109

Respondent

Motion to add:
Final post trial
brief used as Appel-
late brief #2.

of words contained
therein = 1858



To "Show Cause"

**Before the EPA,
an Administrative Agency with Territorial Jurisdiction**

In the matter of:)
Dave Erlanson Sr. Respondent,) **Docket No.CWA-10-2016--0109**

Table of Authorities

1. (Docket No. 38).
2. Order on Motion for Accelerated Decision (Docket No. 38).
3. CWA Section 301(a), 33 U.S.C. § 1311(a).
4. NPDES permitting scheme/ dredges 5"/exempt.
5. Individual permit time-frame/South Fork Clearwater Basin Plan/pg. 22/
exemption.
6. SCOTUS Brady v. Maryland
7. See Trial Transcript/**Docket No.CWA-10-2016--0109.**
8. Rock, sand, suspended solids, sediment/ definitions/Merriam Webster
9. Tara Martich's testimony/trial.
10. In re Service Oil, Inc., Docket No. CWA-08-2005-0010, 2007/
WL 3138354, at *49, ALJ (Aug. 3, 2007).
11. IDEQ Integrated Water Report (Approved by EPA 6-25-2019)
12. EPA responsibility/Section 301(a), @33 U.S.C. § 1311(a).
13. SCOTUS opinions, ruled on this matter. (referenced in Respondent's Briefs)

14. 402 NPDES Permitting Scheme/5" dredges 5"/The South Fork of the Clearwater River/ Idaho state exemption i.e. dredges 5" (and under), 'recreational' dredges.
15. 10th Amendment/U.S. Constitution
16. 16 U.S.C. at 480-U.S. Code/Civil and Criminal Jurisdiction
17. Trial Transcript, Cited TR 71:5 – 73:6.
18. Trial Transcript, Pg 73, lines 2 – 12.

Summary of Arguments

Respondent has already asserted that the Administrative system creates an atmosphere of blatant due process violations for every citizen caught in its web but there is far more to it. The EPA still believes it has won this on process because it received a ruling on an accelerated decision (Docket No. 38). (1) The EPA asserts that "Rather than address the appropriateness of the proposed penalty, Respondent's Brief focuses primarily on his liability for the violations, an issue that this Court resolved in Complainant's favor in the Order on Motion for Accelerated Decision (Docket No. 38). (2) The EPA claims that the EPA counsels attempted admission of a fraudulent document still stands as agreed upon material facts between the parties. Respondent claims the EPA lacks Jurisdictional authority because the state of Idaho gave dredges 5" and under an exemption from the NPDES permitting scheme.

I. Argument

The EPA asserts that a determination has already been made and that they were awarded the accelerated decision which meant that they have won the case on process, "presenting evidence that satisfied each element of

statutory liability for violations of CWA Section 301(a), 33 U.S.C. § 1311(a)." (3) The EPA gets ahead of itself here, if the Judges determination relied heavily upon a fraudulent document as was stated at trial then the Respondent is confused by the EPA's position. If the material facts now lie in ruin then this matter IS able to be re-litigated

and Respondent would be remiss in not seizing the opportunity but even that is a moot point when the prosecution lacks legal authority to prosecute Mr. Erlanson for an activity they have no jurisdiction over (dredges 5" and under being exempt from the NPDES permitting scheme). (4) Just because the Respondent couldn't navigate the administrative procedures by himself in the time frame allotted, and because of the situation thrust upon him by departing counsel, doesn't mean the EPA gained a jurisdiction it never had over an activity it cannot regulate. The EPA is still required to submit, by law, all exculpatory evidence on the record (ie. individual permit time-frame, South Fork Clearwater Basin Plan, page 22- exemption). (5) and, SCOTUS Brady v. Maryland (6)

The arguments presented by counsel for the EPA simply attempt to assert a jurisdiction it doesn't possess all the while violating due process ad nauseam, and the only crime committed by Mr. Erlanson was paying for counsel that wouldn't follow instruction, filed a fraudulent document with a forged signature, and then abandoned the case after leaving the Respondent vulnerable to liability when none was there. Respondent was left to attempt to pick up the pieces and march onward with little to no direction and zero legal training.

II. Argument

Counsel for the EPA decided to attempt a refutation of the merits anyway revealing they are not secure with their position above, and rightly so. The EPA asserts in part; "Respondent's Brief attempts to argue that the environmental harm caused by Respondent's suction dredge activity was insignificant because (1) the South Fork Clearwater River is already impaired; (2) certain studies have suggested the harm caused by suction dredging is minimal; and (3) the impact of sediment pollution is somehow related to particle size and the flow rate of the River. These arguments are unpersuasive." See Trial Transcript/ Docket No.CWA-10- 2016--0109 (7)

The arguments we have made in post trial argument are merely an educational assistance for the EPA counsel because if they can't figure out how to attain a static terminology Congress will most likely do it for them, as we already see the SCOTUS doing so. In this case we have went from rock and sand, to suspended solids, to sediment and were told at

trial they are all the same thing, a more preposterous statement this Respondent has never heard and wholly unsupported by the case law or even standard definitions out of

Merriam Webster. (8) Further, the EPA begins the prosecution stating the Respondent was in violation of 33 USC 1311(a) for not possessing a 2015 **general** NPDES permit (none being available by the EPA), then stating he didn't have an **individual** permit, then going on to state that Respondent could have attained an **individual** permit while withholding the information that the individual permit takes a minimum lead time of 180 days to obtain and you aren't allowed to apply until April 1st annually (see Tara Martich's testimony in the transcript of the trial). (9)

The EPA goes on to assert, "21. Respondent's additional contributions of pollutants to a polluted waterbody justify an upward penalty adjustment. See *In re Service Oil, Inc.*, Docket No. CWA-08-2005-0010, 2007 WL 3138354, at *49, ALJ (Aug. 3, 2007)." (10) Concerning The SFCR, IDEQ Integrated Water Report (Approved by EPA 6-25-2019), continues to list that the SFCR as a polluted water body. (11) The transfer of pollutants within the same water body are not a regulated and/or enforceable activity under the CWA, and as such, the SCOTUS has already, in other opinions, ruled on this matter. (referenced in Respondent's Briefs) (12)

The EPA should have isolated the pollutant so as to at least attempt a rational reason for exceeding their authority under the law, so we ask was the pollutant in the rock and sand? Suspended solids? Or sediment? Which pollutant? The testing procedures for doing so are laid out in the CFR's but the EPA thought itself above having to prove the existence of any pollutant at all probably due to the significant pollution already in the water column as they admit openly. The EPA does a great job at giving proper details in written argument until it comes to discharging their responsibility under the law to test for pollutants in order to charge a citizen with violations in accordance with Section 301(a), @33 U.S.C. § 1311(a). (13)

Conclusion

From the beginning of this prosecution to this day the EPA lacks the jurisdiction to apply the 402 NPDES permitting scheme to dredges 5" and under (which is the exact size of the Respondents dredge 5") on The South Fork of the Clearwater River due to a state exemption given to dredges 5" and under, and the designation of those dredges as 'recreational'. (14) Further attempts to prosecute Respondent may generate a state response as The State of Idaho's 10th Amendment status is ultimately at stake. See 10th Amendment of the United States Constitution. (15)

ADDENDUM

RESPONDENT REFUTES, for the court record, the following EPA POST-TRIAL BRIEF STATEMENTS AS FALSEHOODS:

- 1) Pg. 5-Post Trial Brief 2, Paragraph 1. EPA states, "that Erlanson brief cites new evidence", this is a false statement. Evidence admitted by Pollot to the court many years ago, under the heading "Joe Green EPA Biologist Studies on Suction Dredging".
- 2) Pg. 6. EPA stated that "Complainant experts demonstrated.... " are all false statements. (WHY?) NO BIOLOGICAL OR SCIENTIFIC STUDIES WERE OFFERED BY THE EPA. FURTHER, THEY HAD NO MONITORING DEVICES ON SITE. (see transcript)
- 3) Pg. 6. EPA Counsel states, "Mr. Arthaud said that sediment covers the fish eggs, thereby impacting their survival". Under cross examination Mr. Arthaud explained that 'no fish eggs are present during the suction dredge season allowed by IDWR, that is why the season is limited to those dates.'
- 4) Pg. 6. EPA Counsel states, "the stretch of river (SFCR) that Respondent dredged exhibited excess sediment until at least 2018". **The SFCR was before, and remains to this day, an impaired water body due to excessive sediment . Since there was no monitoring device present on site of Respondent's dredging operation, the EPA failed to quantify the amount of excessive sediment, that they claim that the Respondent allegedly added to the waterbody. The EPA failed to quantify the amount of excessive sediment (if any) that they claim the Respondent allegedly added to the water body, therefore they have failed to their case in all aspects (i.e. long lasting environmental harm to the SFCR).**
- 5) Pg 7. EPA states, "that evidence in the record demonstrates that the Respondent was fully aware that his activities violated the Clean Water Act." **FALSE. SEE TRANSCRIPT, RESPONDENT'S OPENING STATEMENT. NOT REFUTED.**
- 6) Pg 7. EPA states, "the letter permit (IDWR) clearly states in bold font that it is not an exemption from EPA regulation". This is an erroneous statement, **as at the time of the Respondent's dredging activity on the SFCR, there was no general permit available. See 10th Amendment, (i.e. in the case absence of any federal regulation, all determination/permitting falls to the responsibility and the duty of THE STATE'S determination.) See, 16 U.S.C. at 480-U.S. Code/Civil and Criminal Jurisdiction.**

7) Pg. 8. EPA states, “the general permit specifies that authorization to discharge **requires written notification** from the EPA that coverage has been granted to the operation”. My answer, must I remind the EPA Counsel and The Court that the Respondent never received a general permit concerning the case at bar?

8) Pg 9. EPA states, “the testimony of Clint Hughes indicates that Respondent’s CWA violation was part of a concerted effort to purposely frustrate the EPA regulation of suction dredge mining on the SFCR.” See Trial Transcript, Cited TR 71:5 - 73:6. ⁽¹⁷⁾

Respondent’s Response: No evidence of fact was ever provided or proven by the EPA concerning Respondent’s membership in the American Mining Rights Association, see pg. Trial Transcript, lines 15 – 21. This statement is an EPA subjective opinion of determination and is not a fact.

9) Trial Transcript, Pg 73, lines 2 – 12. ⁽¹⁸⁾ EPA asks question of Fact witness Clint Hughes. “Can you explain what would lead you to believe that he (The Respondent) knew about those (regulatory and permitting requirements)?”. Fact Witness Hughes answers, “he had been sent letters from the Forest Service (USFS) as far back as 2008 that said he needed a notice – or not a notice, but a NPDES Permit.” **(no letters were ever received by the Respondent)**

Respondent’s Answer. **EPA Fact witness Clint Hughes does not know his facts!** As testified by numerous EPA witnesses (see Trial Transcript noted above) there was no NPDES Permit until 2013, i.e. the waters in Idaho for suction dredge activities.

Certificate of Service

I certify that the foregoing Appellate Brief #2 were sent to the following parties on Monday November 30 by USPS overnight mail, return receipt!

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