Docket No: CWA-10-2021-0035, Filed May 4, 2021 at 11:03 am PST, US EPA Region 10, Regional Hearing Clerk

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)	
	)	DOCKET NO.
Carl Grissom, an Individual,	)	CWA 10-2021-0035
	)	
West Richland, Washington,	)	ORDER ON RESPONDENT'S MOTION TO DISMISS
Respondent.	)	

I. INTRODUCTION

The United States Environmental Protection Agency ("EPA"), Region 10 ("Complainant"), filed a Complaint in this matter on February 11, 2021, thereby initiating an administrative proceeding that is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Complaint or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits ("Rules"), 40 C.F.R. Part 22. Complainant alleges that Carl Grissom ("Respondent") is subject to the assessment of a civil penalty pursuant to Section 309(g)(2)(B) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g)(2)(B), for violations of Section 301(a) of the CWA, 33 U.S.C. § 1311(a). Complaint ¶¶ 1.1, 1.2, 4.2. These violations are the result of an alleged failure of Respondent to comply with a permit issued by EPA pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. Complaint ¶ 4.2.

Respondent filed a Motion to Dismiss the Complaint on the grounds that Complainant lacks authority over the actions of Respondent. The dismissal issues have been briefed by the Parties with Respondent having filed a Memorandum in Support of Motion to Dismiss ("Respondent Memorandum"), followed by the filing of Complainant's Response to Respondent's Motion to Dismiss ("Complainant Response"), and lastly with the filing by Respondent of a Reply to Complainant's Response to the Motion to Dismiss ("Respondent Reply").

According to the Rules, the undersigned Regional Judicial Officer has authority as the Presiding Officer to issue this Order on Respondent's Motion to Dismiss. 40 C.F.R. §§ 22.4(b), 22.16(c), 22.20. Based on the record presented by the Parties, and for the reasons set forth below, the Motion to Dismiss is denied.

II. STANDARD OF REVIEW

The request for dismissal of claims is based on Federal Rules of Civil Procedure ("FRCP") 12(b)(1) and 12(b)(6). Motion to Dismiss. In this regard, Respondent contends there is a lack of subject matter jurisdiction under FRCP 12(b)(1) and a failure to state a claim upon which relief may be granted under FRCP 12(b)(6). *Id*.

Subject matter jurisdiction under FRCP 12(b)(1) refers to the power of a tribunal to hear a case. *Union Pac. R.R. Co. v. Bhd. Of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment Cent. Region*, 558 U.S. 67 (2007) (citations and quotations omitted). Federal question jurisdiction exists when a plaintiff pleads a "colorable" claim arising under the Constitution or laws of the United States. *Bell v. Hood*, 327 U.S. 678, 681-85 (1946). A claim is not "colorable" if it is wholly unsubstantial and frivolous or is immaterial and made solely for purposes of obtaining jurisdiction. *Id*. at 682-83.

Complainant has asserted claims pursuant to the CWA, a federal law, which may be adjudicated under the Rules. *See* 40 C.F.R. § 22.1(a)(6). Respondent has not yet filed an answer to the Complaint and so the undersigned Presiding Officer has the authority under the Rules to preside at this stage of the proceeding. *Id*. at §§ 22.4(b), 22.16(c). As such, there are no grounds for dismissal based on a lack of subject matter jurisdiction. *See, i.e*. *In re Dave Erlanson, Sr*., CWA Appeal No. 20-03, 18 EAD 393, 404 (EAB, Mar. 5, 2021).

The Environmental Appeals Board ("EAB") has determined that a motion to dismiss under the Rules is analogous to a motion to dismiss under FRCP 12(b)(6). *In the Matter of Asbestos Specialists, Inc.,* TSCA Appeal No. 92-3, 4 E.A.D. 819, 827 (EAB, Oct. 6, 1993). A claim "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal* at 678 (citing *Twombly* at 556); *see also McCulloch v. PNC Bank, Inc*., 298 F.3d 1217, 1220 (11th Cir. 2002). This standard for dismissal further requires that the allegations in the complaint be taken as true and that all inferences be drawn in favor of the plaintiff. *See Twombly*, 550 U.S. at 555; *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Considering the factual allegations made in the Complaint and reasonable inferences based on those allegations, Complainant has made plausible claims about the potential for Respondent to be held liable for violations of the CWA and so there are no grounds for dismissal of the instant matter under FRCP 12(b)(6).

The Rules provide Respondent with the right to seek dismissal of the Complaint:

> The Presiding Officer, upon motion of the respondent may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of complainant. 40 C.F.R. § 22.20(a)

Complainant has presented a prima facie case and otherwise stated sufficient grounds for the relief requested under the CWA such that there are no grounds for the dismissal of this proceeding under the Rules. *See, i.e*. *Erlanson* at 406-408.

III. CONTESTED ISSUES

Central to this controversy is the suction dredge mining conducted by Respondent in the South Fork Clearwater River for nine days in July and August of 2018. Complaint ¶¶ 3.11 to 3.19. The Parties have each explained what constitutes suction dredge mining and their descriptions are not dissimilar.

Complaint ¶¶ 3.3, 3.4; Respondent Memorandum § II; Complainant Response at 3 footnote 2. What may be deduced from these descriptions is that the suction dredge mining conducted by Respondent involved the use of a vacuum-like device to extract streambed materials which were deposited into a sluice box that filtered out gold and other heavy metals before the rest of the extracted materials were released into the South Fork Clearwater River. *Id*. Respondent does not deny performing suction dredge mining in the South Fork Clearwater River on the days identified in the Complaint.

According to the Complaint, a National Pollution Discharge Elimination System ("NPDES") General Permit No. IDG370000 ("General Permit") has been issued by EPA pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, for the purpose of establishing requirements for small dredge placer mining operations in Idaho. Complaint ¶¶ 2.8, 2.9. It is further stated in the Complaint that small dredge placer miners must notify EPA and obtain EPA approval before initiating small dredge placer mining in Idaho. *Id*. at ¶¶ 3.8, 3.9. Complainant alleges that Respondent failed to notify EPA and obtain EPA approval for coverage under the General Permit but proceeded nonetheless to conduct small dredge placer mining in the South Fork Clearwater River for nine days in July and August of 2018. *Id.* at ¶¶ 3.8, 3.9, 3.11 to 3.19.

Complainant asserts the elements for requested relief under the CWA. *Id*. at ¶¶ 3.1 to 3.4, 3.7 to 3.9, 3.11 to 3.26. In this regard, Complainant alleges Respondent is a "person" who caused the "discharge of pollutants" from a "point source" into "navigable waters" which are "waters of the United States" in violation of permit requirements established in accordance with the CWA. *Id*. at ¶¶ 2.3 to 2.7, 3.1 to 3.4, 3.7 to 3.9, 3.20 to 3.26; 33 U.S.C. §§ 1311, 1342. In making these assertions, Complainant contends, among other things, that the materials released by Respondent into the South Fork Clearwater River included "dredge spoil, rock and sand" which are all defined as "pollutants" in the CWA. Complaint ¶¶ 2.4, 2.5, 3.23; 33 U.S.C. § 1362(6).

Respondent does not contest the charge that it undertook suction dredge mining on the nine days identified in the Compliant without having first notified EPA and obtained coverage under the General Permit. Respondent also does not deny that it is a "person" or that its suction dredge mining qualifies as a "point source" within the meaning of the CWA. Further, Respondent does not disagree that the South Fork Clearwater River is "navigable waters" and "waters of the United States" within the meaning of the CWA.

What Respondent does argue is that the release of materials during suction dredge mining was not the "discharge" of "pollutants" within the meaning of the CWA such that EPA has no authority over this activity under Section 402 of the CWA, 33 U.S.C § 1342. Respondent Memorandum §§ I, II, III. Respondent also contends that its mining is more akin to "dredged or fill material" activity which is regulated jointly by the United States Army Corps of Engineers ("Corps") and EPA under Section 404 of the CWA, 33 U.S.C. § 1344. *Id*. at §§ I, III. Lastly, Respondent argues that even if EPA has authority under Section 402 of the CWA, 33 U.S.C. § 1342, over suction dredge mining, there are exceptions to that authority which apply in the instant matter. *Id*.

The Parties acknowledge that the terms "discharge of a pollutant" and "discharge of pollutants" as defined in the CWA mean "any addition of any pollutant to navigable waters from any point source." Respondent Memorandum § II; Complaint ¶ 2.4; 33 U.S.C. § 1362(12). Respondent maintains, however, that no such "discharge of a pollutant" took place during its suction dredge mining because there was no "addition of any pollutant" when streambed materials removed from the South Fork Clearwater River were released, minus extracted heavy metals, back into the river. Respondent Memorandum §§ II, III.

Respondent does not deny the allegations that "dredge spoil, rocks, and sand" are "pollutants" under the CWA and that these materials were released by Respondent into the South Fork Clearwater River. Rather, Respondent advocates for an interpretation of the CWA which finds there was no "discharge" or "addition" of such pollutants to navigable waters from a point source when the origin of the released materials was the streambed of the same navigable waters. Respondent Memorandum §§ II, III.

Respondent further argues that while suction dredge mining may be subject to Section 404 of the CWA, 33 U.S.C. § 1344, this activity may not be addressed under Section 402 of the CWA, 33 U.S.C. § 1342. Respondent Memorandum § III. As a contingent position, Respondent maintains that even if EPA does have the authority to impose requirements on suction dredge mining under Section 402 of the CWA, 33 U.S.C. § 1342, the activities of Respondent amounted to "incidental feedback" or the discharge only of extracted water which are both exempt from such requirements. Respondent Memorandum § III.

IV. ANALYSIS

This is not a matter of first impression. The Ninth Circuit Court of Appeals has held that EPA has the authority to issue a permit for the purpose of establishing placer mining requirements under Section 402 of the CWA, 33 U.S.C. § 1342. *Rybachek v. EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990). The Ninth Circuit agreed with EPA that the "resuspension" in surface water of rock and sand extracted during placer mining constituted the "addition" of "pollutants" within the meaning of the CWA even though these materials were released to the same water body from which they had originated. *Id*.

In *Rybachek*, the Ninth Circuit considered a final rule promulgated by EPA that regulated placer mining activities in Alaska under the CWA. *Id*. Miners challenged EPA's regulations, arguing placer mining does not cause the "addition" of a pollutant. *Id*. The Ninth Circuit rejected the miners' argument, explaining that "[p]lacer miners excavate the dirt and gravel in and around waterways, extract any gold, and discharge the dirt and other non-gold material into the water." *Id*. "The lighter sand, dirt, and clay particles are left suspended in the wastewater released from the sluice box." *Id*. at 1282. The Ninth Circuit held that "even if the material discharged originally comes from the streambed itself, such resuspension may be interpreted to be an addition of a pollutant under the [CWA]." *Id*. at 1285.

The ruling in *Rybachek* was affirmed by the Ninth Circuit *in Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810 (2001), a wetlands case where it was restated that "removing material from a stream bed, sifting out the gold, and returning the material to the stream bed was an 'addition' of a 'pollutant.'" *Id*. at 814. *Rybachek* was also found to be applicable to an administrative

proceeding under the Rules in a matter like the current case when the EAB upheld an Administrative Law Judge ("ALJ") decision in *Erlanson*. *Id*. at 408.

As with the instant matter, *Erlanson* involved a small dredge suction operation in the South Fork Clearwater River. *Id.* at 395, 408. The ALJ had ruled that the suction dredge release of suspended solids, even if it came from the streambed of the waterway itself, resulted in the "addition of a pollutant" and therefore, a "discharge of a pollutant" pursuant to the CWA. *Initial Decision and Order* at 16-20 (ALJ, Oct. 7, 2020) (ALJ dkt. #80). The ALJ also found that *Rybachek* was the most pertinent case to *Erlanson. Id.*

Respondent raises challenges to the opinions in *Rybachek* and *Erlanson*. Respondent Memorandum § III. Respondent cites the United States Supreme Court decisions in *S. Florida. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) and *Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council.,* 568 U.S. 78 (2013), for a contrary proposition to *Rybachek* and *Erlanson,* i.e. that suction dredge mining does not involve the "discharge of a pollutant." Respondent Memorandum § III.

In *Miccosukee*, the defendant transferred water from a canal into a nearby reservoir. 541 U.S. at 100. The Supreme Court held that the transfer of polluted water between "two parts of the same water body" does not constitute a discharge of pollutants under the CWA. *Id*. at 110. Similarly, in *L.A. County,* the Supreme Court held that the flow of water from an improved portion of a navigable waterway to an unimproved portion of the same waterway does not qualify as a "discharge of a pollutant" under the CWA. 568 U.S. at 80.

The *Miccosukee* and *L.A. County* decisions are distinguishable from *Rybachek* and *Erlanson* in that the former two United States Supreme Court cases focused on water rather than solids being re-introduced into a water body. The Oregon Supreme Court held that *L.A. County* and *Miccosukee* do not affect the Ninth Circuit's opinion in *Rybachek*, and that the resuspension of stream bed material by suction dredging constitutes an "addition" of a pollutant subject to regulation under Section 402 of the CWA, 33 U.S.C. § 1342.. *E. Oregon Mining Ass'n v. Dep't of Envtl. Quality*, 365 Or. 313, 317-320, 445 P.3d 251 (Or. 2019), *cert denied*, 2020 WL 3146697 (Jun. 15, 2020). In *Erlanson*, the ALJ explained that *Miccosukee* and *L.A County* are not analogous because "the operation of Respondent's suction dredge involves the removal of otherwise latent materials from the bed of the South Fork Clearwater River, the separation of the materials by weight as they travel through the dredge, and the reintroduction of the leftover lighter materials to the waterway in a physically altered form, namely suspended solids, thereby transforming those materials into "pollutants" and altering the base of the river where the material are both removed and redeposited. This process can hardly be likened to the simple transfer of water." *In re Dave Erlanson, Sr.,* Docket No. CWA-10-2016-0109, *Order on Complainant's Motion for Accelerated Decision* at 18 (ALJ, Sep. 27, 2018) (ALJ dkt. #38).

The undersigned agrees with the assessments in *E. Oregon* and *Erlanson* and finds them to be applicable here. Given that Respondent is alleged to have discharged solid materials to the South Fork Clearwater River, the decisions in *Miccousukee* and *L.A. County* are not on-point or controlling in the instant matter.

Respondent next characterizes its suction dredge mining as "incidental fallback" which is exempt from permits under Section 404 of the CWA, 33 U.S.C. § 1344. Respondent Memorandum § III. Respondent argues that even if EPA has the authority to regulate suction dredge mining under Section 402 of the CWA, 33 U.S.C. § 1342, there should be an "incidental fallback" exception to that authority. *Id*. Respondent relies on the D.C. Circuit's opinion in *Nat'l Mining Assoc. v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998), in support of this position. Respondent Memorandum § III.

In *Nat'l Mining* it was held that "incidental fallback" is any incidental addition, including redeposit, of dredged material associated with any activity that does not have or would not have the effect of destroying or degrading waters of the United States, and therefore would not require authorization under Section 404 of the CWA, 33 U.S.C. § 1344. *Nat'l Mining* at 1403; 33 C.F.R. § 323.2(d)(3)(i). The ruling in *Nat'l Mining* analyzed regulations promulgated under the authority of Section 404 of the CWA, 33 U.S.C. § 1344, exempting certain de minimus or inconsequential discharges from dredged or fill material permitting requirements so long as those discharges did not destroy or degrade any waters of the United States. *Nat'l Mining* at 1403; Respondent Memorandum § III.B; 33 C.F.R. §§ 323.2(d)(3)(i), (d)(5).

The *Nat'l Mining* decision and associated regulations issued by the Corps do not apply to permits issued by EPA under the authority of Section 402 of the CWA, 33 U.S.C. § 1342. But even if *Nat'l Mining* and the associated regulations were interpreted to cover NPDES permits issued by EPA, Respondent has failed to show that its activities qualify for a permit exemption because the impacts from such activities did not degrade or destroy the South Fork Clearwater River. Further, the D.C. Circuit explained the "incidental fallback" exception in a way that disfavors the position of Respondent. In this regard, the D.C. Circuit indicated that "incidental fallback" occurs when a bucket used to excavate material from the bottom of a river is raised and soils or sediments fall from the bucket back into the water. 145 F.3d at 1403. Distinguishing *Rybachek*, the D.C. Circuit went on to explain that "incidental fallback" is "imperfect extraction, i.e., extraction accompanied by incidental fall back of dirt and gravel," while placer mining involves "the discrete act of dumping leftover material into the stream after it had been processed." *Id*. at 1406.

In *Erlanson,* the ALJ found that the nature of respondent's activities was also distinguishable from "incidental fallback." CWA-10-2016-0109, *Order on Complainant's Motion for Accelerated Decision* at 13-14, 19-20 (ALJ. Sept. 27, 2018) (ALJ dkt. #38). The ALJ relied on *Nat'l Mining* to explain the distinction between "incidental fallback" and discharges resulting from suction dredging. *Id*. at 19-20, *aff'd*, CWA Appeal No. 20-03 (EAB, Mar. 5, 2021). The ALJ reasoned, and the EAB agreed, that suction dredges create turbid plumes emanating many feet from the dredge's outlet, and "[t]he redeposit of a material such a distance from the point of removal does not appear to be 'fallback' as described by the D.C. Circuit." *Id*. at 20 (citing *Nat'l Mining Assoc*., 145 F.3d at 1401).

Nat'l Mining does not stand for the proposition that suction dredge mining is exempted from requirements under the CWA. Respondent does not deny performing such mining in the South Fork Clearwater River and the same activity on the same river was held in *Erlanson* not to be "incidental fallback." *Id*. at 20. The "incidental fallback" regulations cited by Respondent were issued under the authority of Section 404 of the CWA, 33 U.S.C. § 1344, and there is no basis to find that these regulations apply to matters under Section 402 of the CWA, 33 U.S.C. § 1342. But even if it were assumed that the regulations do apply to NPDES permits, Respondent has not shown how its activities qualify for the permitting exemption provided by those regulations. In total, Respondent has not demonstrated that it is entitled to an "incidental fallback" exception to alleged liability under the CWA for purpose of dismissal of the Complaint.

Respondent also characterizes its suction dredge mining as "small-scale" based on dredge amounts and cites 40 C.F.R. § 440.140(b) to distinguish its activity from *Rybachek* and *Erlanson.* Respondent Reply at 2. Neither *Rybachek* nor *Erlanson* identify amount thresholds in establishing their holdings and both cases considered small placer mining operations. *Rybachek.* at 1284-85; *Erlanson* at 394-95. While the size of Respondent's operation may not subject it to national effluent limitations and guidelines set forth in regulations, small suction dredge miners may still be required to obtain NPDES permits which include discharge limitations. *See* 50 Fed. Reg. 47,982, 48,001 (1985); 33 U.S.C. § 1342(a); 40 C.F.R. § 122.28, General Permit ¶ 3.5.

Another disagreement of Respondent concerns the contention that its suction dredge mining caused turbidity plumes comprised of suspended sediments. Respondent Reply at 3-4; Compliant ¶¶ 3.4; Complainant Response at 6, 14. Respondent asserts that turbidity is not a pollutant under the CWA as a further attempt to undermine the claims in this matter. Respondent Reply at 3-4.

Complainant has explained that an objective of the CWA "is to restore and maintain the chemical, **physica**l, and biological integrity of the Nation's waters." Complaint ¶ 2.1; 33 U.S.C. § 1251(a) (emphasis added). It is also true that "pollution" under the CWA is defined to include "man-made or man-induced alteration of the chemical, **physical**, biological, and radiological integrity of water." 33 U.S.C. § 1362(19) (emphasis added). The CWA focus on human-caused physical impacts to water may be extrapolated to underly the concern about turbidity which has been defined by EPA as the degree to which water loses transparency due to suspended particles. General Permit ¶ 34.

EPA views turbidity as a nonconventional pollutant under the CWA which may be controlled by best available treatment limitations on discharges or indirectly through limitations on other pollutant parameters, i.e. solids in the discharge. 50 Fed. Reg. 47,982, 47,996 (1985). As "suspended solids" are a conventional pollutant under the CWA, the turbidity which may result from the discharge of such solids appears to be a valid concern for EPA. *Id*.; 33 U.S.C. § 1314(a)(4).

In the instant matter, the suspended solids which are alleged to have caused turbidity are comprised of the very pollutants, dredge spoil, rock, and sand, that Complainant contends were discharged by Respondent. Complaint ¶¶ 2.5, 3.4, 3.7, 3.20, 3.23. EPA has placed certain limitations in the General Permit on small suction dredge mining activities which are known to cause turbidity and considers turbidity to be potentially harmful to the aquatic environment. *Id*.; General Permit ¶¶ 19, 21.

Complainant alleges that Respondent caused turbidity plumes of about 250 to 1,000 feet downstream of the suction dredge mining. Complaint ¶¶ 3.12, 3.13, 3.16, 3.17. There is a 500-foot downstream limitation on turbidity for suction dredge miners in Idaho. General Permit ¶ 19. All in all, there are sufficient allegations made by Complainant and reasonable inferences which may be drawn from those allegations, in combination with CWA authorities and reasonable interpretations of those authorities, to establish that turbidity, while itself not a named toxic or conventional pollutant under the CWA, is nonetheless a potential harm which may result from prohibited activities involving such pollutants and so is a relevant factor in this matter.

The final contention of Respondent is that EPA lacks authority in this matter because suction dredge mining involves the discharge of dredged or fill material which is subject to joint regulation by the Corps and EPA under Section 404 of the CWA, 33 U.S.C. § 1344, not the discharge of pollutants subject to regulation only by EPA under Section 402 of the CWA, 33 U.S.C. § 1342. Respondent Memorandum § III. Complainant does not debate the premise that there is a division of these regulatory authorities but instead explains why it is EPA who has jurisdiction over suction dredge mining under Section 402 of the CWA, 33 U.S.C. § 1342.

EPA and the Corps entered into a Memorandum of Agreement to clarify the scope of "fill" materials subject to the permitting authority in Section 404 of the CWA, 33 U.S.C. § 1344. Complainant. Response at 9-12; 51 Fed. Reg. 8871 (Mar. 14, 1986). In so doing, EPA and the Corps included criteria to determine when a discharged pollutant is subject to EPA authority under Section 402 of the CWA, 33 U.S.C. § 1342, and specifically named "placer mining wastes" as a pollutant regulated solely by EPA under that authority. *Id*. Since that time, the regulation of suction dredge mining has consistently been the purview of EPA. *Id*. Among the reasons for maintaining this approach is that suction dredge mining involves dredged material that is processed in a way where there is a change in the nature of the is material such that what is re-introduced to a water body should be considered waste, which is best addressed by EPA, as opposed to raw material which is more in line with the work of the Corps. *Id*.; Corps Regulatory Guidance Letter 88-10 (July 28, 1990).

EPA has been regulating suction dredge mining in Idaho under the General Permit since 2013. Complainant ¶¶ 2.8, 2.9; Complainant Response at 12. In reissuing the General Permit in 2018, EPA responded to public comments that asserted some of the same arguments as Respondent. *Id*. EPA reaffirmed that suction dredge mining caused the "discharge of a pollutant" that is subject to regulation under Section 402 of the CWA, 33 U.S.C. § 1342. *Id.; EPA Response to Comments, Idaho Small Suction Dredge General Permit No IDG370000* at 7 (May 2018). EPA also administered permits for suction dredge mining in Alaska from 1994 to 2015 at which point the Alaska Department of Environmental Conservation began to issue such permits pursuant to Section 402 of the Clean Water Act, 33 U.S.C. § 1342. Complainant Response at. 12.

The prior practices of EPA and the Corps in implementing Sections 402 and 404 of the CWA, 33 U.S.C. §§ 1342 & 1344, are entitled deference, so long as their practices represent a reasonable interpretation of the statutory scheme. *Coeur Alaska, Inc., v. Southeast Alaska Conservation Council*, 557 U.S. 261, 277-78 (2009); *see also Chevron U.S.A., Inc v. NRDC* 467 U.S 837, 844 (1984), *EPA v. National Crushed Stone Ass'n,* 449 U.S. 64, 83 (1980) (stating that "this Court shows great deference to the interpretation given the statute by the officials or agency charged with its administration"). Such deference should be afforded EPA in the instant matter given that the

regulation of suction dredge mining by EPA has been a long standing, consistent, and reasonable reading of CWA authority.

V. HOLDING

Complainant has alleged sufficient facts and elements of liability and cited applicable laws and other supporting authorities which, when taken as a whole, directly and by inference create a foundation for the Complaint and the potential liability of Respondent under Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 & 1342. The decisions in *Rybachek* and *Erlanson* provide precedent for the claims made by Complainant in the instant matter. As a result, Complainant has presented a prima facie case based on colorable claims and a statutorily authorized request for relief. The Motion to Dismiss is therefore denied.

Respondent has 10 days from service of this Order on Respondent's Motion to Dismiss to seek an interlocutory appeal before the EAB. 40 C.F.R. § 22.29(a). Otherwise, Respondent shall have 30 days from service of this Order on Respondent's Motion to Dismiss to file an answer to the Complaint.

It is so ORDERED.

____
Date

____
Richard D. Mednick
Regional Judicial Officer
Presiding Officer
United States Environmental Protection Agency
Region 10