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BEFORE THE

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)	Docket No. CWA-10-2021-0035
Carl Grissom, an Individual,	)	
West Richland, Washington	)	**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**
Respondent.	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS COMPLAINT PURSUANT RULE OF CIVIL PROCEDURE 12(b)(1) and 12(b)(6)

Respondent Carl Grissom submits this memorandum in support of its motion to dismiss the Complaint filed by the Complainant United States Environmental Protection Agency (EPA) (the "Complaint").

I. INTRODUCTION

The complaint alleges that Respondent violated Section 402 of the Clean Water Act (CWA) for failing to obtain a National Pollution Discharge Elimination System (NPDES) permit for suction dredge mining occurring on the South Fork of the Clearwater River in Idaho. Complainant, however, does not have the authority to bring this claim, because Section 402 does not apply to suction dredge mining. The CWA has divided the authority over permitted discharges between two agencies. The EPA has authority to regulate the discharge of pollutants under Section 402. Whereas the Army Corp of Engineers (Corps) has the authority to regulate discharges of dredge or fill material under Section 404. Further, The Corps has held suction dredge mining using a 5" or smaller hose size as *de minimus*, ie. "Incidental fallback." Additionally, both agencies were enjoined from bringing such complaints in regards to what is called "incidental fallback" in *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998). The CWA, its regulations, and Supreme Court decisions on the scope of Section 402 contradict the EPA's position of authority in regards to Section 402.

The Complaint must be dismissed, because the EPA lacks the authority to regulate suction dredge mining under Section 402.

II. BACKGROUND

A NPDES permit is required for the discharge of any pollutant. 33 U.S.C. 1344(a)(1). The CWA defines "discharge" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). § 1362(6) of the code and 40

CFR 122.2 define a pollutant as dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. Section 402 does not apply if the discharge is an addition of dredged or fill material.

The process of suction dredge mining uses a vacuum hose along the streambed to remove a limited amount of alluvial streambed material and water which then runs over a sluice box and is released back into the water. The sluice box contains riffles which collect heavy materials such as gold, lead, and mercury using gravity. The water is then returned to the river or stream. At no point during this process is anything added to the water. It is the same water and sediment released as was removed momentarily before except it does not contain those heavy materials caught in the sluice box as described above.

EPA alleges that the Respondent "discharged" a "pollutant" into the South Fork Clearwater River, which by their definition is a navigable water way, from a point source, a suction dredge, without a NPDES permit. However, the "discharge" of a "pollutant" portion of their claim lacks validation under the CWA, its regulations, and its treatment by the Supreme Court as discussed infra.

III. ARGUMENT

A. Suction Dredge Mining Does Not Discharge or Result in an "Addition" of Pollutants Under Section 402

Suction dredge mining does not involve the "discharge" of a pollutant under Section 402. As discussed above, the CWA defines "discharge" as an "addition". The CWA does not define "addition". ""Addition" is defined by Webster's New International Dictionary (2002) as "the act or process of adding." *Sierra Club v. El Paso Gold Mines, Inc*, 421 F.3d 1133, 1143 (10th Cir. 2005) Just as described above, the process of suction dredging does not "add" anything to the water. The water and sediment is removed momentarily from the streambed, passed over the sluice box and released on the other side such that the water is moved from one place in the river and then returned to nearly the same spot in the same river.

The Supreme Court held that the flow of water from an improved portion of a navigable waterway into an unimproved portion of the same waterway does not qualify as a discharge of pollutants under the CWA, *L.A. Cnty. Flood Control Dist. v Natural Res, Def. Council, Inc.*, 568 U.S. 78, 184 L. Ed. 2d 547, 133 S. Ct. 710 (2013)

The court used the common meaning of the word "addition" to make this determination and cited *S. Florida Water Mgmt Dist. v. Miccosukee Tribe of Indians,* 541 U.S. 95 (2004) In that opinion, Justice Ginsburg quoted the analogy, "if one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not "added" soup or anything else to the pot." (*Miccosukee Tribe*, 541 U.S. at 110)

In *ORNC Action v U.S. Bureau of Reclamation*, 798 F3d 933, 937 (9th Cir 2015) the court found there was no "addition" of pollutants under the CWA where a drain (Klamath Straits Drain) connected the Lower Klamath Lake and the Klamath River. The two bodies of water were not "meaningfully distinct." "No pollutants are "added" to a water body when water is merely transferred between different portions of that water body."

L.A. Cnty. Flood Control Dist. was also relied upon by the Eastern District of Pennsylvania in its opinion on whether an oil leak from an impoundment into surrounding polluted wetlands was an "addition." *Tri-Realty Co v Ursinus Coll.,* 124 F. Supp. 3d 418, 471-472 (E.D. Penn. 2015). The court found that it was not. "Because the Impoundment is located within the alleged wetland, any oil that escapes the Impoundment first reaches the alleged wetlands via groundwater (i.e., via nonpoint source pollution) and eventually returns to the same alleged wetlands after passing through the Impoundment." *Id.* at 472.

Under the meaning the court gives to "addition," suction dredge mining also does not "add" pollutants or anything else to the water. "The disposal of dredged material does not involve the introduction of new pollutants; it merely moves the material from one location to another." *Am. Mining Congress v. U.S. Army Corps of Eng'rs*, 951F. Supp. 26, 273 (D.D.C. 1997), *aff'd sub nom. Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998) q*uoting* Senate Debate on S. 2770, 92d Cong., *reprinted in* 1972 Leg. Hist. at 1386) (emphasis added)). "Regardless of any legal metamorphosis that may occur at the moment of dredging, we fail to see how there can be an addition of dredged material when there is no addition of material." *National*

Mining Ass'n v. U.S. Army Corps of Engineers, 145 F.3d 1399, 1404 (D.C. Cir. 1998) Without the "addition" of material there is no "discharge" under the CWA definition.

B. The EPA Has Been Enjoined From Regulating Incidental Fallback and Lacks Authority to Regulate Suction Dredge Mining.

The EPA was enjoined from regulating "incidental fallback" in 1997, and the United States Court of Appeals, District of Columbia Circuit Court affirmed this decision in *Nat'l Mining Ass'n v U.S. Army Corp of Eng'rs,* 145 F3d 1399, (1998).

EPA lacks authority to regulate discharges of dredge and fill material. Under 33 USC §1344(b) EPA only has authority to write guidelines for Corps regulation of discharge of dredge or fill material and 33 USC §1344(c) to veto Corps permitting decisions.

"Section 402 gives the EPA authority to issue "permit[s] for the discharge of any pollutant," with one important exception: The EPA may not issue permits for fill material that fall[s] under the Corps' §404 permitting authority. Section 402(a) states:

"Except as provided in . . . [CWA §404, 33 U. S. C. § 1344], the Administrator may ... issue a permit for the discharge of any pollutant, . . . notwithstanding [CWA § 301(a), 33 U. S. C. § 1311(a)], upon condition that such discharge will meet either (A) all applicable requirements under [CWA §301, 33 U. S. C. § 1311; CWA §302, 33 U. S. C. § 1312; CWA §306, 33 U. S. C. § 1316; CWA §307, 33 U. S. C. § 1317; CWA §308, 33 U. S. C. § 1318; CWA § 403, 33 U. S. C. § 1343], or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter." 33

U. S. C. § 1342(a)(1) (emphasis added). Section 402 thus prohibits the EPA from exercising permitting authority that is "provided [to the Corps] in" § 404." - *Coeur Alaska Inc, v S.E. Alaska Conservation Council*, 557 U.S. 261, 273

Section 404 of the CWA grants the Corps the authority to issue permits for the "discharge of dredged or fill material in navigable waters." 33 U.S.C. § 1344(a). The CWA divides jurisdiction over discharges between the EPA and the Corps. The Corps controls the discharges of dredged and fill material under Section 404, and Section 402 grants EPA no authority to regulate the discharges of dredged and fill material, but rather the discharge of pollutant.

Additionally, the Corps will also not require a Section 404 permit for "[a]ny 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 an area of waters of the United States." 33 C.F.R. § 323.2(d)(3)(i). An activity associated with a discharge of dredged material degrades water of the United States if it has "more than a de minimis (i.e. inconsequential) effect on the area." Id. § 323.2(d)(5) Further, the Corps had only required Section 404 permits for dredge operations with a nozzle greater than five inches and has concluded that small-scale suction dredge mining has a de minimis impact on the waters of the United States. Corps Alaska District SPN 2004-06.

As mentioned above, a suction dredge removes water and material from the streambed by vacuum. The material is washed over a sluice box which removes heavy materials and then released in virtually the same spot that it was removed from. According to the *Nat'l Mining Ass'n v U.S. Army Corp of Eng'rs, 145 F3d 1399, 1403*, "incidental fallback ". . . returns dredged material virtually to the spot from which it came'

and also describes incidental fallback as occurring "when redeposit takes place in substantially the same spot as the initial removal." Id. 1401 As noted above, the EPA was enjoined from regulating "incidental fallback," and in 1999, the EPA specifically excepted incidental fallback from requiring a Section 404 permit 64 FR 25120, 25121 (May 10, 1999).

IV. Conclusion

The EPA lacks authority to bring this claim because, as proven above, suction dredge mining does not result in an "addition" or "discharge" of any "pollutant" under Section 402 of the CWA. Further, any authority to regulate this activity was given to the Corps under Section 404. Moreover, the Corps would consider this activity de minimus and not requiring a permit under Section 404. For these reasons, the EPA does not have subject matter jurisdiction to bring this complaint and cannot meet the requirements of the law to bring a claim under the CWA.

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