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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,)	
)	REPLY TO COMPLAINANT'S
West Richland, Washington)	RESPONSE TO MOTION TO
)	DISMISS
Respondent.)	
_____)	

I. INTRODUCTION

The question before the court is whether small scale suction dredge mining results in a discharge of pollutants requiring an NPDES permit. In this reply, we demonstrate why the EPA is incorrect in their assumption that an NPDES permit is required for suction dredge mining and further show why the EPA does not have authority to regulate this activity under the CWA.

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II. ARGUMENT

A. Rybachek Does Not Apply to This Case

Contrary to the EPA's contention, the discharge of dredged material from small-scale suction dredge mining is not an addition of a pollutant. The EPA relies heavily on *Rybachek v EPA*, 904 F.2d 1276, 1285 (9th cir. 1990) to show that it is, however, this case is not dispositive to the issue at hand. In *Rybachek*, the court considered whether large-scale placer mining was subject to a Section 402 permit in general. The court did not consider whether small-scale suction dredge mining results in an addition of a pollutant. Additionally, the type of placer mining at issue in *Rybachek* involved "excavat[ing] the dirt and gravel in and around waterways, extract[ing] any gold, and discharging the dirt and other non-gold material into the water." *Rybachek* 904 F. 2d 1285 (emphasis added). *Rybachek* challenged the EPA regulations (40 C.F.R. Part 440) that set effluent limitations guidelines and standards for all open cut and mechanical dredge gold placer mines. The regulated effluent limitations did not apply "to any mines or beneficiation processes which process less than 1500 cubic yards (cu yd) of ore per year, or to dredges which process less than 50,000 cu yd of ore per year, or to dredges located in open waters (i.e., open bays, marine waters, or major rivers). 40 C.F.R. § 440.140(b) Small-scale suction dredges move no more than 2 cu yds per hour and closer to 1.5 cu yds per hour on Idaho rivers. A single small-scale suction dredge at the rate of 2 cu yds per hour would move no more than 496 cubic yards when in operation for 8 hours per day over a period of 31 days. Since the regulation applies to dredges that move 50,000 cu yd of ore per year, the regulation challenged in

Rybachek does not apply. Unfortunately, this was also the case that the ALJ explained in *In re Dave Erlanson, Sr.*, CWA Appeal No. 20-03 (EAB, Mar 5, 2021) was “most pertinent to this matter in *Rybachek*.” The EPA also relies heavily on *Erlanson*, however *Rybachek* should not have been applied to that case.

B. Turbidity is Not a Pollutant

The EPA states that the “Respondent resuspends the stream bed material, creating a turbid plume comprised of suspended solids that were not present in the water column before Respondent operated his dredge.” See Complainant’s Response to Motion to Dismiss at 6. These solids came from under the water column. It is the same rock, sand, and sediment that came from under the water column minus heavy metals such as gold, lead, and mercury. Additionally, as discussed previously in the Motion to Dismiss, a pollutant is defined as “dredged spoil, solid waste, incinerator residue, 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.” 33 U.S.C. §1362(6) and 40CFR 122.2 Turbidity is not listed as a pollutant. Additionally, the EPA states, “Turbidity is not a measurement of the amount of suspended solids present or the rate of sedimentation of a stream since it measures only the amount of light that is scattered by suspended particles.” USEPA, <https://archive.epa.gov/water/archive/web/html/vms55.html> (last visited Mar 18, 2021). The United State Geological Services defines turbidity as “the measure of relative clarity of a liquid. It is an optical characteristic of water and is a measurement of

the amount of light that is scattered by material in the water when a light is shined through the water sample. The higher the intensity of scattered light, the higher the turbidity.” USGS, https://www.usgs.gov/special-topic/water-science-school/science/turbidity-and-water?qt-science_center_objects=0#qt-science_center_objects (last visited Mar 18, 2021). The Cambridge Dictionary defines turbidity as “the degree to which a transparent liquid moves light in different directions, usually a measurement of the number of small pieces of matter in the liquid.” Thus, the “turbid plume” referred to by the EPA is not considered a pollutant, and the suspended solids left behind were from the streambed itself. Nothing gets “added” to this material before it is discharged.

B. Suction Dredging is Not the Same as Sidecasting

The EPA also addresses the distinction of “sidecasting” in their argument quoting *U.S. v Deaton*, 209 F.3d 331, 335-36 (4th Cir. 2000). Sidecasting is the process of excavating, or digging ditches where the excavated soil is cast to the side of the ditch created. The U.S. Dist. Ct. for the E. Dist. of Cal. in *Duarte Nursery, Inc. v. United States Army Corps of Eng'rs*, No. 2:13-cv-02095-KJM-AC, 2016 U.S. Dist. LEXIS 76037 (E.D. Cal. June 10, 2016) explained sidecasting, “whereby excavated dirt is piled on either side of a ditch, through the use of a backhoe, front-end loader, and bulldozer is a point source.” Indeed, this is what happened in *Deaton*. Earth and vegetation were removed from a wetland and deposited on that wetland. This is not the same as suction dredging where small amounts of soil and sediment are vacuumed up from a riverbed, passed over a sluice and released back to the water.

D. The 1986 MOA Does Not Apply

The EPA's argument that the 1986 MOA creates an understanding between the Corps and EPA on suction dredge, or "placer mining wastes" is misleading as it was written in the scope of materials that are from single industry waste, and from a fixed conveyance or trucked from a single site. The paragraph reads, "On the other hand in the situation in paragraph B.3., a pollutant (other than dredged material) will normally be considered by EPA and the Corps to be subject to section 402 if it is a discharge in liquid, semi-liquid, or suspended form or if it is a discharge of solid material of a homogeneous nature normally associated with single industry wastes, and from a fixed conveyance, or if trucked, from a single site and set of known processes. These materials include placer mining wastes, phosphate mining wastes, titanium mining wastes, sand and gravel wastes, fly ash, and drilling muds." 51 Fed. Reg. 8871 (Mar. 14, 1986). Small-scale suction dredging does not fit in this description as it is not an "industry waste." The material released from a suction dredge is the same material that had just been removed from the streambed a few moments earlier. The EPA states that the material gets "processed" when it goes over the sluice box. The only thing that happens when this material is passed over the sluice box is gravity causes the heavier materials such as lead, gold, and mercury, to be trapped in the sluice thereby actually making the sediment material then released less polluted with heavy metals.

Further, the 1986 MOA referred to in the EPA's argument was an interim agreement set forth to be active until the EPA had information from an ongoing study related to the Hazardous and Solid Waste Amendments (HSWA) and the Resource Conservation and Recovery Act (RCRA). "The agreement published today provides an interim arrangement between the agencies for controlling discharges. In the longer term, EPA and Army agree that consideration given to the control of discharges of solid waste both in waters of the United States and upland should take into account the results of studies being implemented under the 1984 Hazardous and Solid Waste Amendments (HSWA) to the Resource Conservation and Recovery Act (RCRA), signed into law on November 8, 1984." 51 Fed. Reg. 8871 (Mar. 14, 1986). Additionally, the Corps regulatory guidance letter the EPA states supported the MOA expired in December of 1990 as noted at the top of the letter. Corps Regulatory Guidance Letter 88-10 (July 28, 1990).

E. Suction Dredge Mining is Not Onshore Processing

The EPA states the Corps regulatory definition of "discharge of dredged material" supports their point that the 1986 MOA and Corps' Regulatory Guidance Letter do cover suction dredging requiring Section 402 permits for that activity, because this definition does not include the "discharge of pollutants resulting from the onshore processing of dredged material." 33 C.F.R §323.2(d)(2)(i). However, it doesn't apply to small-scale suction dredging as this is an instream activity rather than onshore processing. Additionally, the EPA argues that the "discharges that are subject to the effluent limitation guideline and standard will continue to be regulated under section 402

of the CWA.” 67 Fed. Reg. 31135 (May 9, 2002). This is true, however, again it doesn't apply to small-scale suction dredging because it moves less than 50,000 cu yards of material per year (see *Page 2 supra*).

IV. Conclusion

The EPA makes several arguments in their response to the Motion to Dismiss. However, as the information above shows, these arguments do not apply to small-scale suction dredge mining. The EPA cannot show that a pollutant was added by Mr. Grissom and therefore, the complaint against him should be dismissed.



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Carl Grissom, an Individual,)	
)	CERTIFICATE OF SERVICE
West Richland, Washington)	
)	
Respondent.)	
_____)	

The undersigned certifies that the original REPLY TO COMPLAINANT'S RESPONSE TO MOTION TO DISMISS in the above-captioned action was delivered via email to:

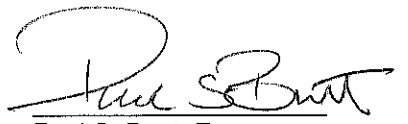
Teresa Young, Regional Hearing Clerk,
U.S. Environmental Protection Agency, Region 10
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Further the undersigned certifies that true and correct copies of the REPLY TO COMPLAINANT'S RESPONSE TO MOTION TO DISMISS was delivered to:

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Dated this day of 22nd of March 2021


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