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BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)	
	)	DOCKET NO. CWA-10-2016-0109
Dave Erlanson, Sr., Individual	)	
	)	RESPONDENT'S BRIEF IN OPPOSITION TO
Swan Valley, Idaho	)	MOTION FOR ACCELERATED DECISION
	)	
Respondent /		

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COMES NOW RESPONDENT IN THE ABOVE-CAPTIONED MATTER, Dave Erlanson Sr., and submits his Brief in Opposition to the Motion of Complainant EPA for accelerated decision.

I.
INTRODUCTION

Complainant Environmental Protection Agency ("EPA") filed its complaint in the above-captioned matter seeking penalties against Respondent Dave Erlanson, Sr. ("Respondent" or "Erlanson") alleging that he violated 33 U.S.C. § 1342 of the Clean Water Act ("CWA") by discharging a pollutant into a water of the United States from a point source without first obtaining a National Pollution Discharge Elimination System ("NPDES") permit from the EPA. It asserts that he did that by operating a suction dredge while carrying on mining operations on the South Fork of the Clearwater River located in what is now known as the Nez Perce - Clearwater National Forest in North Central Idaho.

The EPA is particularly unhappy with Respondent because the Corps of Engineers had informed Mr. Erlanson that he *might* need a permit from the EPA although he did not need one from Corps of Engineers because his operation would result in no more than a *de minimis* discharge. *See* discussion*, infra*. Respondent agreed with the Corps that he did not need a Corps permit under Section 404 of the CWA (33 U.S.C § 1344) though he only partly agreed with the Corp's reasoning, However, he disagreed with the assertion that he might need one from the EPA under 33 U.S.C. § 1342 because his operation did not and would not result in a discharge that was subject to either the Corps' or the EPA's jurisdiction. The reasons are set forth in detail below.

He therefore proceeded with his normal operations under the Letter Permit issued to him

by the Idaho Department of Water Resources ("IDWR") in full compliance with the terms and conditions of the permit and the applicable Idaho State regulations. As described below, his operations were even more restricted as the practicalities of working his claim would not allow him to operated even to the limited extent that his permit would allow.

An employee of the United States Forest Service, Mr. Hughes, whose personal statements revealed a hostility toward the activity of suction mining, appeared on the day in question, armed with signed violation orders, claiming that the miners required a plan of operation to carryout mining work, although as a matter of law, persons in Respondent's position needed no such thing. While present, and frustrated in his attempts to get most of the people present to accept his vioaltion orders, or even to give him their names, he talked to Respondent, photographed Respondent's operating dredge and that of another person who owned a claim adjacent to Respondent's, among others, and carried out what he termed an "inspection." A report detailing this "inspection" was then provided to the EPA, with what other communication is unknown. Entirely on the basis of this report and the accompanying photographs, EPA issued complaints against both Respondent and the owner of the neighboring mining claim. No measurements of any kind were made, no samples of water or other materials were collected from behind or around Respondent's suction dredge before, during, or after its operation nor that of the owner of the neighboring claim. No one examined a dredge belonging to either Respondent or the other miner and no evidence of any kind of such collection, observation, measurement, or analysis has been forthcoming or provided to either Respondent or this tribunal. Respondent will discuss in detail the significance of this startling lack of a serious investigation and lack of evidence of a discharge of a pollutant below.

For now, it is sufficient to note that while all discharges of a pollutant are discharges, all discharges are not discharges of a pollutant. The CWA only requires a person to obtain an NPDES permit if he discharges a pollutant into a water of the United States and the definition of the discharge of a pollutant requires that it be the *addition* of a pollutant. 33 U.S.C. § 1311(a). The EPA's reliance on a simple photograph demonstrates that it still presumes that any discharge from a small suction dredge is a discharge of pollutant, even in circumstances where it is self-evident that it can be nothing of the kind.

It is the EPA's burden to show not merely that there was a discharge of some kind, but to show that it is the discharge of a pollutant, *i.e.*, the *addition* of a pollutant. Nothing of what it must do to make a case can be done from a mere photograph, nor can the EPA escape its responsibility by arguing that the discharge could conceivably cause some kind of harm (as it attempts to do). The CWA does not authorize the EPA to prevent harm in the abstract, but to regulate discharges of a pollutant as defined in § 1311(a).[1] *See* discussion *infra* at II.B.; III.A. This kind of presumption, rebuttable or not, is improper and the rules that permitted such presumptions, Tulloch I and Tulloch II, have been invalidated.

II.
SUMMARY

A. Facts

Respondent is the owner of a valid mining claim on the South Fork of the Clearwater

[1] Of course, the prohibition of the addition of a pollutant to a water of the United States without a permit has as its object the prevention of harm from the addition of a pollutant. However, the permitting process provided for recognizes that such additions can happen nothwitstanding harm and the EPA can consider the degree and nature of the potential harm in deciding whether to issue a permit or how it wishes to condition a permit. Still, harm is only relevant in the NPDES and 404 provisions of the CWA when the discharge is the addition of a pollutant.

River located in what is now known as the Nez Perce - Clearwater National Forest in North Central Idaho. Declaration of Dave Erlanson, Appendix ("App.") A hereto ¶ 2. The 62-mile long South Fork empties into the Middle Fork of the Clearwater, which in turn empties into the Clearwater and ultimately the Snake River. The area of the South Fork is a region have numerous mineral resources, including gold, which can often be mined by finding it in river after it is was washed from exposed veins in the rocks by natural forces. *Id.* ¶ 2-3

Respondent operates a gold mining business on the claim at or below the ordinary high water of the South Fork, working an area which is approximately 12' x 50', the stream bed of which is exposed bedrock. *Id*. ¶ 5-6. Because the stream bed consists of exposed rock, he can obtain gold only by removing it from cracks or crevices in the stream bed which comprise roughly 0.2 percent of the entire streambed area he works. *Id*., This process is further restrained by both IDWR regulations and practical considerations. He may work the area only one month out of the year, weather permitting, and only for about four hours per day and for only 5 days per week. *Id*. ¶ 7-9. As a practical matter, of course, Respondent cannot continually work a full 30 days. While IDWR permits allow working from sunrise to sunset, doing so is not feasible and the physical demands of the work (which requires physically moving the apparatus through the water from one crack or crevice to another) prevent Respondent from working more than the described 4 hours on a good day. *Id*. Further, work can only be done on dry days when water flow rates are relatively low. Any increase in rate of flow or depth of water prevents work. For example, if average depth of the water where Respondent work rises as high as two feet, the apparatus needs to be removed to prevent its loss. *Id*. ¶ 9.

The apparatus used by Respondent is a suction dredge, of which he owns two. Suction

dredges are floating pieces of equipment which are effectively vacuum cleaners. Respondent's dredges have motors of 15 horsepower ("hp") and hoses with a 5" diameter, the class of suction dredges classified by the IDWR as "recreational dredges", so called because of their limited size and power and not because of the use to which they are put. *Id.* ¶¶ *10-15.* Unlike a typical home vacuum, suction dredges of this type only captures heavy materials, including gold. That is to say, instead of capturing all the material that passes into its nozzle, it captures only a portion of the material passing through it, based on gravity, with the heavier material dropping into and remaining in a collector, primarily the desired metals while the remaining material simply flows on through the water column. *Id*. ¶¶ 10-11.

The apparatus is manually pulled through the water. It sucks in water and material in at the nozzles with the water and non-captured matter, mostly gravel, simply passing through the machine to its back end where is returned to within 6-10 feet from where it came, although it can end up further away, though not very much, under certain circumstances. *Id*. Natural processes ensure that the non-captured material ends up back in the cracks and crevices it came from. In short, nothing is added to the water within the meaning of the Clean Water Act as noted below. It is at most simply an incidental part of a net withdrawal represented by the desired captured metals and in reality less even than that. Other than the captured metals, which are removed from the water with the dredge, nothing ever leaves the water column, even briefly. *Id*. ¶¶ 10-11.

Respondent's apparatus complies with IDWR regulations pertaining to the use of suction dredges in Idaho rivers under either of the two form of Idaho permits. *See Id*. ¶¶ 12-22. That is, Respondent's equipment is permissible under IDRWR regulations regardless of which IDWR permit he possesses. His equipment meet the restrictions necessary to qualify for use under the

most restrictive permit, the letter permit. At all times relevant hereto, Respondent possessed, and still possesses, a recreational permit and had it with him on the day of mr. Huges's "inspection". *Id*.

Likewise, at all times relevant hereto, he was carrying out his operations in compliance with and consistent with his IDWR permit and applicable regulations. *Id*. These conditions and limitations explicitly state what activities he may undertake as well as when, where, how and for how long he may do so. That is to say that the permit and the regulations effectively set forth a plan of operation to which Mr. Erlanson must adhere if such a plan could lawfully be required.

The two types of permit issued by the IDWR mentioned above are as follows. One is known as a joint agency permit which applies to large projects or projects having a potential for significant environmental impacts which need to be approved by multiple agencies, as described on IDWR's website. See www.idwr.idaho.gov /streams /stream-channel-alteration-permits.html. A joint agency permit is used by IDWR, the Idaho Department of Lands, and the U.S. Army Corps of Engineers.[2]

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[2] Respondent had actually applied for the greater of the two permits issued by IDWR, the joint agency permit although he did not believe that he needed a permit from either the Corps or the EPA for the reasons discussed herein below. Briefly stated, the operation of his dredge would not result in the addition of a pollutant to the waters at his mining claim. It merely moves that which was already there, *i.e.*, native material, from one place in the water to another place, a short distance away in the same water literally within seconds of entering the hose. In the process, the dredge, using only gravity, holds desired material because the desired material is heavier. Everything else continues to remain in the water column and moves on. This is the operating principle of the dredge.

Notwithstanding his belief, Respondent nevertheless attempted to obtain a 404 joint permit because he thought it necessary to preserve the validity of his mining claim since mining claims are only valid if the claim was made for commercial use, which his is. Though he was aware that a recreational or letter permit is issued not based on the intent of the applicant or his or her ultimate purposes (such as making money or as part of a business as opposed to recreation), but by the type or size of equipment used which the IDWR describes as "recreational

While he was working his claim, Respondent observed that there was a group of other persons present, some of whom, at least, appeared to be miners. When he saw them being talked to by a man who appeared to be a government official, and who turned out be a Forest Service Employee, a Mr. Hughes, his curiosity was aroused so, although he was not part of the group, Respondent walked over to the group to hear was going on. Respondent heard a part of what Mr. Hughes had to say and saw Hughes handing out, or at least attempting to hand out papers to as many minors as would take them. Most of the miners he saw refused to take the papers. He, however, got one and saw that the papers turned out to be previously-prepared Notices of Non-Compliance (NONC) signed by two different District Rangers. *Id*. ¶¶ 23-25.

In EPA's Complaint herein, EPA states that Mr. Hughes was there to conduct an inspection of mining claims; however, Respondent had a brief conversation with Mr. Hughes, who identified himself. The conversation led Respondent to conclude that Mr. Hughes' purpose there was not to make an inspection, but to discourage the miners and to put an end to suction dredge mining with no regard to the validity of the claims or the right of any claimant to work his claim. Hughes explicitly told Respondent that he, Hughes, was going to "put an end" to all dredge mining on the North Fork. *Id.*

While Respondent saw Mr. Hughes take photographs, at no time while Respondent was watching Mr. Hughes did he see Mr. Hughes take any actions which even remotely resembled the taking of samples, the making of measurements, the inspection or analyzing of samples, or any

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equipment," he was concerned that the issuance of a "recreational permit" instead of the joint permit applied for might be argued to invalidate his federal mining claim. Given the Corps' statement that Respondent did not need a 404 permit, the IDWR granted and issued to him a Letter Permit instead. Respondent appealed that decision to protect his mining claim, but no decision on that appeal has been made. *See* discussion *supra*.

other activity that could confirm the presence or amount of any substance, much less a pollutant or which could determine the distance traveled by a plume regardless of what it contained. *Id*.

Subsequent to the events at the site of Respondent's mining claim, Mr. Hughes completed what purports to be an "inspection report." The report contains numerous errors and deficiencies, not all of which need be discussed herein, and concluded that Respondent had no permit for his activities (though the report never mentions exactly what permit he was looking for) because the "inspector" did not see a permit "posted" and he therefore checked the box on the form indicating that Respondent had no permit although the text admitted that Hughes did not know whether a permit existed. As already noted, Respondent had one in his possession as required by the IDWR but was never asked by Mr. Hughes to show it.

B. Summary of the Argument

1. Scope of the CWA Pertaining to EPA and Corps Authority to Regulate Discharges in the Relevant Provisions.

The CWA authorizes the EPA and, in certain cases, the U.S. Army Corps of Engineers, to regulate discharges into what the CWA navigable waters, defined as waters of the United States. However, the CWA does not authorize the EPA or the Corps to regulate all discharges into waters of the United States nor does it authorize the EPA or the Corps to regulate the general activities that may result in regulable discharges. Thus, the CWA does not authorize either the Corps or the EPA to regulate dredging, landclearing, earth moving, ditching or similar activities *per se,* or even discharges generally, even in waters of the United States. They can regulate only discharges of pollutants into waters of the United States and the CWA defines the discharge of pollutants as the *addition* of a pollutant into a water of the United States. 33 U.S.C. § 1311(a).

Further, whether a NPDES or a Section 404 permit is required does not depend on whether the discharge activity has caused, or might or will cause harm, although the EPA relies heavily on the question of harm in almost every instance. If the discharge is an addition of a pollutant it is regulable without regard to its harm, although harm or the potential for it may form a part of the permitting decision under the NPDES program or the 404 program. If it is not an addition of a pollutant, the potential for the discharge to do harm might or might not be the province of another statute or agency, but it is not relevant here.

As the law had developed and it now stands with respect to the question of whether a discharge into a water of the United States, the principle is as clear as it can be. The transfer of water, however polluted it may be, from one part of a distinct water body to another part of the same water body is not the discharge of a pollutant into that water body because it is not an addition of a pollutant. Addition, as the Supreme Court pointed out, means something specific and definable.

> Under a common understanding of the meaning of the word "add," no pollutants are "added" to a water body when water is merely transferred between different portions of that water body. See Webster's Third New International Dictionary 24 (2002) ("add" means "to join, annex, or unite (as one thing to another) so as to bring about an increase (as in number, size, or importance) or so as to form one aggregate").

Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc., et al., 568 U.S. 78, 82 (2013),

Two other cases, each one of which invalidate a rule by the Corps and EPA which would improperly have allowed the Corps and EPA to presume discharges like the one in this case to be treated as a violation of CWA, Tulloch I and Tulloch II. *See Nat'l Mining Ass'n v. U.S. Army*

Corps of Eng'rs, 145 F.3d 1399, 1404 (D.C.Cir.1998); and *National Association of Homebuilders v. Corps*, 2007 WL 259944 (D. D.C. Jan. 30, 2007)., *App. Dism'd* 2007 WL 1549109 (D.C. Cir. May 25, 2007), respectively. The *Nat'l Homebuilders* court, in fact, delivered a rebuke to the Corps for its attempt to finesse its way around *Nat'l Homebuilders*. *See* discussion *infra*, Section III.

2. EPA Fails to Sustain its Burden

Taken together, these cases make it abundantly clear that the EPA has overstepped its authority in this case, both because it ignores the real import of these cases in assuming a blanket authority to regulate small suction dredge mining and because it continues, despite *Nat'l Mining Ass'n* and *Nat'l Homebuilders Ass'n* to simply presume that any discharge into a water of the United States is a discharge of a pollutant into said water. Like a law school exam blue book, the EPA goes through the elements of a violation of the CWA's NPDES provisions. Is it a water of the United States? Check. Is it a discharge? Check. Is it a point source? Check. Does it contain pollutants as we defined them? Check. Conclusion? It is a discharge of a pollutant into a water of the United States from a point source for which an NPDES permit it required. However, the critical question is not whether it is a discharge, a point source, a water of the United States , or contains a pollutant or pollutants, but whether it adds a pollutant to the water in which the alleged discharge took place. On this element, (and others) there cannot be a check mark.

Notwithstanding the number of documents appended to Complainant EPA's motion, it fails to carry its burden even if the Declaration of Mr. Erlanson were deemed not to create a triable issue of fact since it definitively demonstrates that his mining operation using a small

suction dredge (though he owns two, he can, and does, use only one at a time) sucks up water from the river including sand, rock, gravel, and whatever other pollutants (as defined by the EPA, and the CWA), pulls it into the dredge, saves the heavy material and allows the lighter material to move without hindrance through the apparatus where it settles out within feet of its original location within an extremely brief period of time, never leaving the water column in the process. As will be seen this is well within the parameters set down by the cases cited herein.

Before discussing the evidence that Complainant does have, it is worth mentioning what it does not have. Neither Complainant nor Mr, Hughes made any measurements of any time, including the dimensions of the asserted plumes, the time it took for them to disperse or the distance they traveled before dispersing. Neither, it would appear, did Mr, Hughes, use any instrument to take an actual measure of the amount of turbidity. No samples of water or other materials were collected from behind or around Respondent's suction dredge before, during, or after its operation nor that of the owner of the neighboring claim. No one examined a dredge belonging to either Respondent or the other miner and no evidence of any kind of such collection, observation, measurement, or analysis has been forthcoming or provided to either Respondent or this tribunal.

Complainant's only "real" evidence on this crucial question is entirely irrelevant to the central issue in this proceeding. Despite any objection to the contrary, the evidence of a "discharge of a pollutant" as defined in the CWA, the addition of a pollutant, rests entirely on photographs taken by an apparent amateur that shows water streams from the back ends of two separately owned and operated suction dredges which are mixing, one bing operated by Respondent, the other by his neighboring claim owner. There is no way of telling from the

photographs how much turbidity is actually present or which dredge is producing what percentage of the observed turbidity. Given that much of the stream bed is rocky and bare in Respondent's mining claim (App. A at. ¶ 6) and we do not know to what extent the same can be said as to Mr. Rice's upstream mining claim – since it is quite possible for a stream to have heavily silted or sand-barred beds and another to be bare – is quite possible that most or all of the observed coloration was generated by one apparatus. The pictures cannot tell us that either. In short, the pictures cannot tell us much except the most crucial information of all. The discharges at issue are of "polluted" water from the stream in question, the material in the discharges were returned to the same place, or a relatively few feet, of where the suctions dredges obtained them and the whole process for each volume of water passing through the dredges was a near enough to instantaneous as to make no difference. Applying the cases discussed herein below demonstrates that Respondent's activities do not give rise to liability as a violation of 33 U.S.C. § 1342.. This case must be dismissed or, in the alternative, go to an evidentiary hearing.

III
ARGUMENT

A. Introduction.

The Clean Water Act ("CWA"), 33 U.S.C. § 1251, *et seq*., authorizes Complainant EPA to regulate particular events, specifically, discharges of pollutants in certain contexts. The complaint in this action alleges, in particular, violations of 33 U.S.C. § 1342, a provision which establishes a permitting program known commonly as the National Pollution Discharge Elimination System or NPDES. A related, very similar provision, 33 U.S.C. § 1344, requires a permit for the disposal of dredged or fill material, commonly referred to as a 404 Permit. Though 404 permits are not directly involved in the above-captioned matter, in fact the Corps

expressly informed Respondent that he did not need a 404 permit, the provisions of the CWA are applicable to both the NPDES and the 404 programs. Therefore, cases which have dealt with cases involving the 404 permitting program are relevant for exploring the issues before this tribunal.

As already discussed, the provisions of the CWA relevant to this matter authorize both the United States Army Corps of Engineers ("the Corps") and the EPA in their relevant spheres to regulate a particular events, specifically, the discharge of pollutants from point sources or disposal of dredged or fill material into waters of the United States. Both the NPDES program and the 404 Program are bound together by certain relevant definitions and provisions that define the scope of their jurisdiction and authority and the definitions of the CWA, found at 33 U.S.C. § 1362, in particular paragraphs 6, 12, and 16, which define and limit the reach of the authority granted by 33 U.S.C. § 1311(a), which provides that "[e]xcept as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful."

In short, the CWA does not authorize the EPA or the Corps to regulate general categories of activities *per se* simply because those activities *may* under some circumstances result in a discharge of a pollutant into a water of the United States. For example, the activity of dredging might result in the discharge of a pollutant into a water of the United States and the activity of using mechanized equipment in and around a water of the United States might result in a discharge of a pollutant into a water of the United States. However, as will be seen, the EPA and the Corps have presumed that any discharge into the waters of the United States by such equipment in the course of the activity is the deposit of a pollutant into such waters without

regard to the amount or source of the pollutant, In so doing, the Corps and EPA have essentially created a presumption that such activities *will* so result and treat all discharges are regulable, in effect reading the definition of such a discharge, requiring he addition of a pollutant, out of the statute. However, courts, including the United States Supreme Court have rejected this rewriting of the CWA.

B. The Discharge of a Pollutant Within the Meaning of the CWA Does Not Occur When Water, However Polluted, is Moved From One Place in a Distinct Water Body to a Different Place in The Same Water Body.

Until relatively recently, the Corps and the EPA appear simply to have presumed, while not explicitly so saying, that any discharge into waters of the United States was regulable, although lip service was paid to the idea that a pollutant had to be added to the water. Corps and EPA regulations were drafted that allowed pollutants from a water to be treated as an addition of a pollutant even if was deposited back into the same water from which it had come. Some of these regulations remain.

However, serious attention has now been to the requirement that the discharge, to qualify as a discharge of a pollutant must be a genuine addition of a pollutant, not a mere reshuffling of the position of material from a water to a different location in the same water, even if the water contains pollutants.

The first such notable decision from the United States Supreme Court, *South Florida Water Management District v. Miccosukee Tribe*, 541 U.S. 95, 109-110 (2004), made it clear that transfers of waters containing pollutants do not constitute a discharge of a pollutant in a water of the United States for which an NPDES permit could be required.

In *Miccosukee*, polluted water was removed from a canal, transported through a pump

station, and then deposited in a nearby reservoir. *Id*. at 112. In short, it was physically removed from a flood control canal, into a pump station, and then transported from the pump station to a reservoir. However, the *Miccosukee* Court found that the fact that the water at issue was physically removed from the water body (which consisted of at least the flood control canal and the reservoir) made no difference so long as the water body it was taken from and the one it was deposited in were not meaningfully distinct water bodies. *Id*. at 112. In its holding, it adopted the analogy adopted by a lower court. ("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." *Id*. Emphasis added.) Specifically, the *Miccosukee* Court held that a transfer of polluted water between "two parts ofthe same water body" does not constitute a discharge of pollutants under the CWA. *Id.* at 109-112.

The United States Supreme Court reinforced this understanding in a subsequent case, *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc., et al.*, 568 U.S. 78, 83 (2013). Unlike the situation in *Miccosukee*, the water in this case was simply allowed to continue from an improved part of a stream to an unimproved one after passing through pollution monitors. It was not lifted from the water body and then replaced in another part of the same water body. The court reasoned that if lifting polluted water from one part of a water body only to place it in another part of the same water body was not the addition of a pollutant, then simply allowing its flow to continue could not be an addition of a pollutant. The *Las Angeles County Flood District* Court rested its decision in the case, as it did in *Miccosukee*, on the language of 33 U.S.C. § 362(12) which defines discharge of a pollutant as an *addition* of a pollutant. *Id*. Specifically, the Court noted that:

> Under a common understanding of the meaning of the word "add," no pollutants are "added" to a water body when water is merely transferred between different portions of that water body. See Webster's Third New International Dictionary 24 (2002) ("add" means "to join, annex, or unite (as one thing to another) so as to bring about an increase (as in number, size, or importance) or so as to form one aggregate").

Id.

The obviousness of the principle stated in *Miccosukee* and *Los Angeles County Flood Control District* should provide a definitive answer the question of what discharges may be regulated under 33 U.S.C. §§ 1342 and 1344, but old ideas and the innate tendencies of regulatory bodies to cling hard to authority are often hard to overcome. In the above captioned matter Complainant EPA insists that Respondent was required to obtain an NPDES permit from the EPA because he was allegedly discharging a pollutant into a water of the United States. It should also be remembered that, although Respondent did not believe he was required to obtain a 404 permit either, he nevertheless applied for one in the joint agency permit application to protect his valid mining claim. App. A ¶¶ 16-22. He was told that no 404 permit was required on the ground the the impact of his actions would and the amount moved would be *de minimis*. He was also told, however, that he *might* be required to obtain an NPDES permit from the EPA (*Id.* at ¶ 16), this despite the fact that his activities would not, on first or any glance, result of the addition of a pollutant to a water of the United State and therefore cannot require an NPDES permit under either *Miccosukee* or *Los Angeles County Flood Control District*.

C. The Result is the Same Even If The Question is Framed as Whether The Discharge Was Incidental Fallback.

As we have seen, Complainant has claimed that Respondent should have obtained and NPDES permit because he discharged a pollutant into a water of the United States from a point

source. We have also seen that under the decisions discussed *supra*, this claim cannot be sustained. The United States has not claimed that he violated 33 U.S.C. § 1344, which would be difficult since the Corps itself said a 404permit was unnecessary. *Id*. at ¶ 16. Nevertheless, it is instructive to look at the cases pertaining to § 1344 as they illustrate that, should Complainant attempt to switch gears, it would fare no better.[3]

In typical dredging operations the desired material is captured using a bucket (mechanical or otherwise) to both capture and remove the dredged material from the water. The material is then kept out of the water, at least for a period of time, by placing it on a barge and transporting it elsewhere, sidecasting it, or by some other method such as removing material from the water, processing it for some purpose, and then replacing it in the water. In suction dredging, however, the non-captured material never leaves the water, but leaves the rear of the apparatus and returns directly to or within a relatively few feet of the precise spot from which it was dredged. App. A at ¶ 10. It does not add anything to the water nor does it change the use or condition of the land or water or, for that matter, the material not captured other than to remove the captured material. There is neither a temporal or geographic separation between a removal of material from water and a disposal or redeposit of it into water that would take the operation out of the category of incidental fallback.

In short, a small suction dredge is completely unlike a traditional dredge in which everything is lifted out, moved to some other place and processed or used for some other purpose except for what is known as incidental fallback. The solid material so removed may eventually

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[3] The same definition of the discharge of a pollutant applies both to 33 U.S.C. § 1342 or 33 U.S.C. § 1344. It should be noted here that the CWA includes dredged spoil in the definition of pollutants. 33 U.S.C. § 1362(6).

be returned to the water, not as part of the water stream in which it was contained, but separately. As will be seen, the Corps and EPA have sought to treat such fallback as a regulable discharge of a pollutant or as the deposit of dredged and fill material.

1. The Presumption That The Use of Mechanized Equipment for Dredging and Other Activities Will Result in The Discharge of Pollutants Into Waters of the United States is Improper.

The Corps and the EPA itself have been taken to task by courts of the United States at least twice for indulging in the presumption, in both senses of the word, of categorically regulating the activity of dredging, among other things instead of confining itself to regulating actual discharges of pollutants as defined by the CWA. *See*, e.g., *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1404 (D.C.Cir.1998); and *National Association of Homebuilders v. Corps*, 2007 WL 259944 (D. D.C. Jan. 30, 2007), *App. Dism'd* 2007 WL 1549109 (D.C. Cir. May 25, 2007),.

In the case of *Nat'l Mining Ass'n*, the court held that the Corps transgressed into the field of dredging regulations as opposed to discharge regulations when it attempted to regulate discharges from dredging activity that were not within the contemplation of Congress when it enacted the CWA. The court noted that –

> The plaintiffs claim that the Tulloch Rule exceeds the Corps's statutory jurisdiction under § 404, which, as we have noted, extends only to "discharge," defined as the "addition of any pollutant to navigable waters." 33 U.S.C. §§ 1344, 1362(12). It argues that fallback, which returns dredged material virtually to the spot from which it came, cannot be said to constitute an addition of anything. Therefore, the plaintiffs contend, the Tulloch Rule conflicts with the statute's unambiguous terms and cannot survive even the deferential scrutiny called for by *Chevron U.S.A., Inc. v. NRC*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The "jurisdictional" character of the issue has no effect on the level of deference, *Oklahoma Natural Gas Co. v. FEC.*, 28 F.3d 1281, 1283-84 (D.C.Cir.1994), as the plaintiffs seem to acknowledge by their silence on the

subject.

Nat'l Mining Ass'n, supra, 145 F.3d at 1404.

By some legal legerdemain, the Corps attempted to avoid the limitations of the CWA, which requires that an addition of a pollutant is required for a regulable discharge of a pollutant to occur, by arguing that dredged material does not become a pollutant until it is first dredged. Thus, in this view, any incidental fallback of material right back where it came from was nevertheless an addition of a pollutant. *Id.* at 1403. In sum, the *Nat'l Mining Ass'n* court relied, as did the Supreme Court in *Miccosukee* and *Los Angeles County Flood Control District* on the CWA's requirement that the discharge be an addition of a pollutant not a withdrawal or removal of material. ("[W]e fail to see how there can be an addition of dredged material when there is no addition of material.") *Id.* at 1404.

The correctness of the court's decision is manifest. If something must be added for there to be a discharge of a pollutant, the fact that something that was already there ends up remaining there cannot be considered an addition and nothing in the case of *Rybachek v. EPA*, 904 F.2d 1276 (9th Cir.1990), relied on by the government in *Nat's Mining* to no avail helps it here either. *Rybacheck* involved the removal of material from the stream bed, taking it to shore, processing it to remove the gold, and then engaging in a discrete act of throwing the leftover material back into the stream. *Nat'l Mining Ass'n, supra*, 145 F.3d at 1406. In this case, of course, no such discrete act occurs. The suction dredge sucks up water and its pollutants, moves them continuously through the apparatus, allows the heavy materials to drop in a collector while the lighter materials simply continue on and never leave the water column. Nothing is processed nor is the uncollected material ever removed from the stream.

Since the *Nat'l Mining Ass'n* court invalidated Tulloch I, the Corps and the EPA needed to formulate a new rule and a new definition of "incidental fallback". The new regulation provided:

> The Corps and EPA regard the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, in-stream mining or other earth-moving activity in the waters of the United States as resulting in a discharge of dredged material unless project-specific evidence shows that the activity results in only incidental fallback. This paragraph does not and is not intended to shift any burden in any administrative or judicial proceeding under the CWA.

66 Fed. Reg. 4550, 4575 (codified at 33 C.F.R. § 323.2(d)(2)(I) and 40 C.F.R. § 232.2(2)(I)). The new definition of incidental fallback provided that:

> Incidental fallback is the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal. Examples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that comes off a bucket when such small volume of soil or dirt falls into substantially the same place from which it was initially removed.

Id. (codified at 33 C.F.R. § 323.2(d)(2)(ii) and 40 C.F.R. § 232.2(2)(ii)). Together, these provisions became known as Tulloch II.

Unsurprisingly, the Homebuilders Association and the other plaintiffs challenged these regulations. Initially, the case was dismissed on ripeness grounds, but the dismissal was reversed by the District of Columbia Circuit Court. *National Homebuilder's Ass'n, et al. v. U.S. Army Corps of Engineers*, 440 F.3d 459 (D.C. Cir. 2006). Equally unsurprisingly, the EPA and Corps focused on the portions of *Nat'l Mining Ass'n* that, more or less as illustrative examples, seemed to suggest that incidental fallback was to be defined in terms of the amount, and not even relative amounts, but absolute amounts, ignoring the actual principle that material which falls back or is allowed to fall back into the same place from which it was removed, without more, was not the

addition of a pollutant.

On remand, the trial court's decision, which invalidated the Tulloch II, again chastised the Corps for its attempt at overreach which the court viewed as intentional.

> [I]ts statement that it "regards" the use of mechanized earth-moving equipment as resulting in a discharge of dredged material unless project-specific evidence shows otherwise . . . followed by the coy explanation that it "is not intended to shift any burden," [ ] essentially reflects a degree of official recalcitrance that is unworthy of the Corps.

National Association of Homebuilders, *supra*, 2007 WL 259944 at 3.

The *National Homebuilders* court first noted the admonition of the Judge in the trial court proceedings that led to the appeal in *Nat'l Mining Ass'n* warning the agencies not to ""pars[e] the language of [prior] decisions...to render a narrow definition of incidental fallback that is inconsistent with an objective and good faith reading of those decisions", citing *American Mining Cong. v. Army Corps of Eng.*, 120 F. Supp.2d 23, 31 (D.D.C. 2000)(Harris, J.). The court then noted that the agencies had done precisely what they had been warned not to do by focusing in part on the volume of the material that is said to have fallen back in absolute terms although, the court noted, a focus on relative terms would be equally wrong. *Id*. at 3 and n.4. Instead, the court held,

> In determining whether fallback is incidental -- i.e., not an addition within the meaning of the Clean Water Act -- the volume of material being handled is irrelevant. The difference between incidental fallback and redeposit is better understood in terms of two other factors: (1) the time the material is held before being dropped to earth and (2) the distance between the place where the material is collected and the place where it is dropped.

Id. at 3.

Both *Nat'l Mining Ass'n* and *National Homebuilders Association* are entirely consonant

with the provisions of the CWA and decisions of the Supreme Court, appellate courts and the District Court discussed herein. The *National Homebuilders* decision is especially *appropo* in this case. As the *National Homebuilders* Court held, the volume being handled, whether in absolute or relative numbers, is irrelevant to the determination of whether the "discharge" constitues incidental fallback, so any argument by the EPA to the effect that the volume of material collected was outstripped by that which was discharged by the suction dredge fails both because it is irrelevant *and* because no evidence was produced by the EPA upon which such a comparison could be made in any event. that United States Supreme Court, discussed in detail below.

Likewise, any argument by the EPA that the discharges involved in this case are not incidental fallback because of temporal and geographic factors must also fail on their face. The discharge of the uncollected material was instantaneous and the location of the discharged material in the stream was close enough to where it was sucked up as to be virtually identical for these purposes. The EPA's own photographs show both the contemporaneous and spacial identity needed to avoid any claim that the discharge was not incidental fallback. In short, by the test discussed in *National Homebuilders*, *supra*, the discharges to which the EPA objects undeniably and unequivocally qualify as incidental fallback if the complaint of the EPA was that Respondent violated 33 U.S.C. § 1344 instead of § 1342.

In sum, the EPA in this case is repeating its prior sins and the sins of the Corps which led to the invalidation of Tulloch I and Tulloch II. It seeks to regulate the activity of small suction dredge mining with a presumption, apparently unrebuttable this time, that the use of such dredges results in a discharge of a pollutant (i.e., the addition of a pollutant) into a water of the United

States with no actual evidence that it does so, in fact it does so in the face of evidence that respondent's mining activities do not, and could not, by the very nature of the design of his apparatus, and the nature of his operations, do anything of the kind.

IV.
CONCLUSION

Respondent has already discussed in detail the relevant evidence presented by the parties , and how that evidence either creates a triable issue of fact or, if viewed as uncontested, not only fails to establish the EPA's claim but actively undermines his claim. *See* Section II.B.2., *supra.* Respondent will not repeat that discussion here, but merely incorporates by reference as though fully set forth a second time. The above discussion establishes that Respondent cannot be held liable for a failure to obtain and NPDES permit as his discharges, such as have been shown to have occurred, did not constitute the deposit of a pollutant into water of the United States from a point source because the activities merely resulted in the movement of water and its pollutants from one location in a meaningfully distinct body of water to another location in the same water, a location that was virtually identical for all purposes to the place it was brought into the apparatus and was moved so from one to the other instantaneously.

Respondent therefore respectfully requests that this tribunal dismiss the Complaint of the EPA.

Respectfully submitted this 2d day of August, 2017,

/s/ Mark L. Pollot
Mark L. Pollot
Counsel for Respondent,
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Appendix “A”

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BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)	
	)	DOCKET NO. CWA-10-2016-0109
Dave Erlanson, Sr., Individual	)	
	)	DECLARATION OF DAVE ERLANSON, SR.
Swan Valley, Idaho	)	
	)	
Respondent /		

COMES NOW RESPONDENT IN THE ABOVE-CAPTIONED MATTER, Dave Erlanson Sr., and declares as follows:

1. I am the respondent in the above entitled matter and have personal knowledge of the matters declared herein, and if called upon to testify, can testify competently thereto.

2. I own a valid mining claim on the South Fork of the Clearwater River located in what is now known as the Nez Perce - Clearwater National Forest in North Central Idaho, at which mining claim the actions asserted by Complainant Environmental Protection Agency to have give rise to a need to obtain an NPDES permit occurred. I am a member of professional mining associations and groups. I attend meetings, programs, and other proceedings, pertaining to mining in which, among other things, regulatory matters relevant to mining and related activities are regularly discussed.

3. I am personally and intimately familiar with the location and geography of the area in question, having traveled there innumerable times to work my mining claim, among other things. I have studies maps of the area and have familiarized myself extensively with the area. .

The 62-mile long South Fork empties into the Middle Fork of the Clearwater, which in turn empties into the Clearwater and ultimately the Snake River. The area of the South Fork is a region have numerous mineral resources, including gold, which can often be mined by finding it in river after it is was washed from exposed veins in the rocks by natural forces.

4. Likewise, I am intimately familiar with the instruments, equipment, and techniques of mining, and particularly so with respect to suction dredge mining. I own such equipment and am knowledgeable about their operation, use, and the principles on which they operate.

5. My interest in mining is not recreational, but is professional mining. I am engaged in the business of mining, albeit on a small scale. Indeed, I operate a gold mining business on my claim at or below the ordinary high water of the South Fork.

6. The area I work is approximately 12' x 50' or about 600 square feet. The stream bed in this area is exposed bedrock. Because the stream bed does consist of exposed rock, I can obtain gold only by removing it from narrow cracks or crevices in the stream bed. These cracks and crevices comprise roughly 0.2 percent (1.2 square feet) of the entire streambed area I work.

7. This process is further restrained by both IDWR regulations and practical considerations, both of which I observe. As a result of my compliance with the regulations the practical constraints imposed on me, I may work the area only one month out of the year, weather permitting. In this month-long period I work only for about four hours per day and for only 5 days per week. As a practical matter, of course, I cannot continually work a full 30 days.

8. While IDWR permits allow working from sunrise to sunset, doing so is not feasible and the physical demands of the work (which requires physically moving the apparatus through the water from one crack or crevice to another) prevent me from working more than the

described 4 hours on a good day. I have no employees or contractors who work for me in working the claim.

9. Further, work can only be done on dry days when water flow rates are relatively low. Any increase in rate of flow or depth of water prevents work. For example, if average depth of the water where I work rises as high as two feet, the apparatus needs to be removed to prevent its loss.

10. The apparatus I use and had been using at the times relevant to this case is a suction dredge. A suction dredge is a floating piece of equipment which is effectively a vacuum cleaner which, unlike a typical home vacuum, only captures heavy materials, including gold. That is to say, during operation uncaptured material remains in the water column. The apparatus is manually pulled through the water. It sucks in water and material in at the nozzles with the water and non-captured matter, mostly gravel, simply passing through the machine to its back end where is returned to within six to ten feet from where it came, never leaving the water column.

11. Natural processes ensure that the non-captured material ends up back in the cracks and crevices it came from. In short, nothing is added to the water within the meaning of the Clean Water Act as noted below. It is simply an incidental part of a net withdrawal represented by the desired captured metals. Other than the captured metals, which are removed from the water with the dredge, nothing ever leaves the water column, even briefly.

12. I am familiar with the regulations put into place by the Idaho Department of Water Resources ("IDWR") as they pertain to the use of suction dredges in Idaho rivers. These regulations require a person or business to obtain one of two permits before the person or buiness can use suction dredges in Idaho rivers.

13. One permit is known as a joint agency permit which applies to large projects or

projects having a potential for significant environmental impacts which need to be approved by multiple agencies, as described on IDWR's website. I have visited that website on multiple occassions (www.idwr.idaho.gov/streams/stream-channel-alteration-permits.html) and read the contents thereof.

14. A joint agency permit is used by IDWR, the Idaho Department of Lands, and the U.S. Army Corps of Engineers. It is my understanding that this is done as a convenience for the permit applicant so that he, she, or it, can fill out one form which is shared by IDWR with the other two agencies who each act independently of the others.

15. The second class of permit, is referred to as a "recreational" or "letter" permit. A recreational or letter permit is issued not based on the intent of the applicant or his or her ultimate purposes (such as making money or as part of a business as opposed to recreation). but by the type or size of equipment used which the IDWR describes as "recreational equipment." Letter permits, like any other permit, have other time, place and manner restrictions which are deemed to minimize any potential for significant impacts. I was aware of this second category of permit by reviewing the IDWR regulatory scheme on www.idwr.idaho.gov/streams/recreational-mining-permits.html.

16. Contrary to the assertions of the EPA, I completed and filed a joint agency application. However, I was subsequently informed in writing by the United States Army Corps of Engineers regulatory branch that no permit was required by them for mining activities using what the IDWR referred to as a recreational dredge, which I describe later in this declaration, as the impact of such a dredge was *de minimis* at its worst. The letter also stated that while the Corps might not require a permit, the EPA *might* do so.

17. I submitted the joint agency application even though I believed then, as now, for

reasons that will be discussed in the brief that this declaration is to be appended to, that no 404 permit from the Corps nor an NPDES permit from the under Section 401 of the Clean Water Act can be required either by the Corp or the EPA for two reasons.

18. First, I do not believe now, and did not believe then, based on my reading of the statute and the cases dealing with it that niether the EPA or the Corps was authorized to require a pemit from me beacause the operation of a small suction dredge does not discharge a pollutant for which a permit can be required for the simple reason that the dredging activity does not involve the *addition* of a pollutant to the water but merely moves that which was already there, *i.e.*, native material, from one place in the water to another place, a short distance away in the same water. In the process, the dredge, using only gravity, holds desired material because the desired material is heavier. Everything else continues to remain in the water column and moves on. This is the operating principle of the dredge.

19. Second, the operation of the dredge I was operating would result only in an incidental fallback, also something which the Corps and, by the same reasoning, the EPA, does not have the authority to regulate.

20. My decision to submit the joint application despite my belief that no federal CWA permit was required was based on a concern I had to preserve the validity of my mining claim. It is my understanding that mining claims are only valid if the claim was made for commercial use, not recreational use. Though I was aware that a recreational or letter permit is issued not based on the intent of the applicant or his or her ultimate purposes (such as making money or as part of a business as opposed to recreation), but by the type or size of equipment used which the IDWR describes as "recreational equipment." Letter permits, like any other permit, have other time, place and manner restrictions which are deemed to minimize any potential for significant

impacts. This was my understanding based on my study of the material contained on the IDWR website, www.idwr.idaho.gov/streams/recreational-mining-permits.html. Nevertheless, I was concerned that the issuance of a "recreational permit" instead of the joint permit applied for might be argued to invalidate my federal mining claim despite the fact that my activities are part of my business.

21. This concern led me to submit the joint application notwithstanding my objection to any assertion that a CWA permit could be required for my small scale suction dredging activities. When the Corps indicated that no Corp permit would be required, the IDWR issued a letter permit based on the size of the dredge I was using (not more than 15 horsepower, no more than a 5-inch hose). Because I was worried about someone arguing against my mining claim because I was given a “recreational” permit, I appealed the decision.

22. The appeal is still pending. Unless the appeal is granted, however, I remain in possession of a valid letter permit from Idaho and was in possession of them at the time and place of the alleged violation of the EPA’s permitting requirements. At that time and place I was carrying out his operations in compliance with and consistent with my IDWR permit and applicable regulations. These conditions and limitations explicitly said what activities he may undertake as well as when, where, how and for how long I could do so.

23. On July 22, 2015, a Mr Hughes, an employee of the United States Forest Service came to the area in which my mining claim is located. I was present as were a number of other miners. I was not there as part of a group or for any other purpose than working my mining claim, which is necessary both to carry out my business and to maintain the validity of my claim.

24. However, I observed the person who turned out to be Mr. Hughes talking to other miners who had gathered in a group around him. My curiosity was aroused so I walked over to

the group to hear was was going . I heard a part of what he had to say and I observed him handing out, or at least attempting to hand out papers to as many minors as he could take them. Most of the miners I saw refused to take the papers. These papers turned out to be previously-prepared Notices of Non-Compliance (NONC) signed by two different District Rangers. They werafter I approached the groupit was were present as well. Though the Report he prepared after his visit is denominated an "inspection report", his apparent purpose was to hand out to as many individuals as would accept them Notices of Non-Compliance (NONE) which had previously been prepared and signed by two District Rangers.

25. In EPA's Complaint herein, EPA states that Mr. Highes was there to conduct an inspection of mining claims; however, my observations and my brief conversation with him led me to conclude that his purpose there was not to make an inspection, but to discourage the miners and to put an end to suction dredge mining with no regard to the validity of the claims or the right of any claimant to work his claim. He indicated as much to me. In fact, he explicitly told me that he was going to "put an end" to all dredge mining on the North Fork, which seemed to me, based on his tone, choice of words, and general attitude of disdain, to represent a personal goal of the employee.

26. I reviewed Mr. Hughes's Report on which EPA apparently relies to bring the current Complaint against Respondent. I found it to be long on disparaging comments as to the persons to which Mr Hughes spoke, largely portraying them as recalcitrant, or at least badly informed, individuals, unreasonably flouting Forest Service regulations.

27. Mr. Hughes indicated in his report that I did not possess any permit authorizing me to operate a suction dredge. This was untrue. I carried with me the Letter permit granted by the IDWR and was never asked by Mr. Hughes whether I had a permit.

28. My review of the Report showed that it said little about me. It says that Mr. Hughes observed me operating a suction dredge downstream of another individual, a Mr. Rice. It likewise states that the "plume" from Mr. Rice's suction dredge was mingling with a "plume" from Respondent's dredge. Nothing in the report, however, indicates that the so-called plumes were anything other than the discharge of water from the rear of the devices or that the observer ever got close enough to discern the "contents" of the asserted plumes. I did not see any instrument, collection, apparatus, or anything else that could be used to collect samples or to test for the presence of a pollutant in Mr. Hughes possession. In the time I was there and observed Mr. Hughes he took no actions which even remotely resembled the taking of samples, the making of measurements, the inspection or analyzing of samples, or any other activity that could confirm the presence or amount of any substance, much less a pollutant or which could determine the distance travelled by a plume regardless of what it contained.

I hereby declare that the foregoing is true and correct to the best of my knowledge and recollection under penalty of perjury of the laws of the United States.

Dated this 1st Day of August, 2017.

/s/ Dave Erlanson, Sr.