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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 PREHEARING
Swan Valley, Idaho	)	EXCHANGE
	)	
Respondent.	)	

COMES NOW Respondent, pursuant to 40 C.F.R. § 22.19, and the Presiding Officer's Second Prehearing Order and submits its Initial Prehearing Exchange.

I

WITNESSES

Respondent respectfully submits the following list of expert and fact witnesses who will testify at hearing, together with a brief narrative summary of their expected testimony:

1. Joseph Greene, J&K Green Environmental Service, is a research biologist and owner of J&K Greene Environmental Services. He previously worked for approximately 32 years as a research biologist for the United States Environmental Protection Agency, beginning before its name was changed from the Federal Water Quality Agency until he retired from the EPA in 2002. Among other duties at EPA he measured and evaluated water soluble toxicants from Superfund sites. During his tenure at EPA he served as a faculty member at Oregon State University in Corvallis, Oregon on an intergovernmental exchange program. While there he developed a program and a laboratory for the practice of ecotoxicology, which

determines the toxicity of samples of effluents and other environmental contaminants by measuring the reaction of living organism assemblages to such samples. He previously has served as a chairman of testing committees for the American Society for Testing and Materials. He has chaired a number of international symposia, workshops, and congresses in my field and has been as been an invited speaker to numerous national and international professional scientific meetings in my field. He will testify as to the nature and mechanisms of suction dredging relevant to this case and whether such activities result in the addition of pollutants to the rivers in which such dredging occurs, as well as the impact caused or not caused by such activities as well as related subjects. His address is 33180 Dorset Lane, Philomath, Oregon, USA 97370-9555.

2. Dave Erlanson, Respondent herein.

3. Clark Pearson, Northern Director Public lands for the People, Advisor, Minerals and Mining Advisory Council, He is an experienced miner and is expected to testify as to issues going to the nature and manner of small scale suction dredge mining, the manner in which the equipment works, the nature of any discharge from such dredges, and related matters.

4. Ron Miller 675 Wall Creek Road, Clearwater Idaho 83552. 208 983 6546 cell and **legget@gmail.com.** He is a percipient witness to the matters alleged in the complaint.

II.

DOCUMENTS AND EXHIBITS

Copies of the following documents and exhibits Complainant may introduce into evidence

accompany this Prehearing Exchange.

RX01 – *Testimony of J. Greene, J & K Greene Environmental Service, before the Idaho Legislature* February 3, 2014 on small scaled suction dredge mining in Idaho.

RX02 – *Water Quality Summary Report 34: A Recreational Suction Dredge Mining Water Quality Study on South Fork Clearwater River*, Idaho Department of Water Quality, January 13, 2003;

RX03 – *A Review of Research Results that Involved the Use of Gold Suction Dredges*, Joseph C. Greene, Philomath, OR., May 4, 2005, U.S. EPA Biologist - Retired;

RX04 – *Impact of suction dredging on water quality, benthic habitat, and biota in the Fortymile River and Resurrection Creek, Alaska*; Prepared For: US Environmental Protection Agency, Region 10, Seattle, Washington by: Todd V. Royer, Aaron M. Prussian, and G. Wayne Minshall, Department of Biological Sciences, Idaho State University, Pocatello, Idaho, final report, April 1999.

RX05 – *Studies of Suction Dredge Gold-Placer Mining Operations Along the Fortymile River, Eastern Alaska*, USGS Fact Sheet FS–154–97, October 1997.

RX06 – *Effects of Suction Dredging on Streams: a Review and an Evaluation Strategy,* Bret C. Harvey and Thomas E. Lisle, Fisheries HabitatVol. 23 No. 8 (August 1998).

RX07 – *Regarding Dredging, Sluicing, and Panning*, Dr Robert N. Crittenden, (1996).

RX08 – United States Forest Service Mineral Inspection Report, Clint Hughes July 22, 2015.

RX09 – Letter from Gregory J. Martinez, U.S. Army Corps of Engineers, to Mr. Dave Erlanson, February 23, 2016.

III
HEARING LOCATION AND ESTIMATED DURATION OF PRESENTATION OF COMPLAINANT'S CASE

Respondent agrees that Bonneville County is the county in which Respondent resides and therefore is an acceptable location for a hearing consistent with 40 C.F.R. §§ 22.21(d) and 22.19(d).

Subject to the length of cross-examination of witnesses, Respondent estimates that it will require approximately two days to present hiss case as well and translation services are not necessary for the testimony of Respondent's witnesses.

IV

FACTUAL AND LEGAL BASIS FOR ALLEGATIONS DENIED IN RESPONDENT'S ANSWER

In accordance with the Presiding Officer's instructions, Respondent sets forth in this section a brief narrative statement of the factual and legal bases for the allegations that he denied in his Answer.

Respondent agrees that, pursuant to CWA section 301(a), 33 U.S.C. § 1311(a), "the discharge of any pollutant by any person shall be unlawful" except as in compliance with CWA section 402, 33 U.S.C. § 1342, among others. Pursuant to 33 U.S.C., EPA may issue a NPDES permit to authorize the discharge of a pollutant which discharge would otherwise be prohibited. Respondent agrees with EPA's assertion that it alleged that Respondent violated CWA section 301(a) because he purportedly discharged a pollutant from a suction dredge into what it alleged is a water of the United States, *i.e.*, the South Fork of the Clearwater River. *See*, Complaint ¶¶ 3.1–3.9. Respondent denied these allegations in his Answer. Answer ¶¶ 3.1-3.9.

However, the facts and law are not so clear, at least in the way characterized by Complainant. The EPA states that it regulates small suction dredges under CWA section 402, but it is more appropriate to say that it attempts to regulate dredging by small suction dredges under section 402, not by the issuance of a regulation adopted properly under the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq*, but by the adoption of a general National Pollutant Discharge Elimination ("NPDES") permit purporting to grant a permit for small suction

dredging subject to certain limitations. As will be seen, however, EPA's authority is not for the activity of dredging. Indeed, it has no authority to regulate dredging at all, but only the authority to regulate discharges of a pollutant into waters of the United States. In sum, it can regulate only discharges of pollutants which is defined as the *addition* of a pollutant to waters of the United States. The evidence at the hearing, should one become necessary, will show that a regulatable discharge of a pollutant did not occur for these reasons: (1) the purported discharge was at most an incidental fall-back and outside the EPA's authority to regulate per *National Mining Association v. Corps of Engineers*, 145 F.3d 1399 (1998); and (2) the purported discharge was not the addition of anything, much less a pollutant under the Supreme Court's decisions in *South Florida Water Management District v. Miccasuke Tribe of Indians*, 541 U.S. 95 (2004) and *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*, 568 U.S. __ (2013). Without the addition of a pollutant there is no point source (as it is the point discharge of a pollutant), no pollutant, and no regulatable discharge. *See also*, e.g., *Froebel v. Meyer*, 13 F. Supp. 2d 843 (E.D. Wis. 1998); *Nat'l Pork Producers v. U.S. EPA*, 635 F.3d 738 (5th Cir. 2011). As a result, no NPDES permit was required. Further, to the extent that this tribunal should find otherwise, the alleged discharge was not more than *de minimus* and caused no adverse environmental effects, a fact relevant to the issues of penalty. Also relevant to the issue of penalty is whether Respondent was up there, acting in good faith reliance on his right to work his vested mining claim. Thus, whether he was up there working his mining claim or was a part of an organized protest being put on by third parties or a combination of the two,[1] and what his understanding of his rights are with respect to his claim are relevant facts to be determined.

[1] Enhancement of the penalty for such a reason would raise first amendment issues.

Respondent, therefore, does not deny that he was operating a small suction dredge of a type classified by the Idaho Department of Water Quality ("IDWQ") as a recreational dredge (not because of the purpose for which it was being operated, but because of its small size, having a hose of 5 inches in diameter or less and a motor of 15 horsepower (hp) or less). Respondent does not deny that he did not have an NPDES permit because he did not require one. That the EPA may have chosen to issue a general permit with limitations on the use of suction dredges does not make use of the dredge regulatable.

A. Person

Under CWA section 502(5), 33 U.S.C. §1362(5), the term person means, *inter alia*, "an individual." Respondent denies that he is a person. Answer ¶¶ 3.1, 3.9. Respondent concurs that respondent is a legal person within the meaning of 33 U.S.C. § 502(5) and so stipulates.

B. Discharge

Under CWA section 502(12), 33 U.S.C. § 1362(12), the term "discharge of a pollutant" means any addition of any pollutant to navigable waters from any point source. Respondent denies that he discharged pollutants, Answer ¶¶ 3.8, 3.9, and, in a document attached to his Answer, claims that the EPA lacks the legal authority to regulate Respondent's in-water suction dredge activity. Complainant EPA suggests that Respondent's denial that he discharged a pollutant into a water of the United States is "flawed" *per* se. This suggestion is, however, simplistic and tends to dismiss out of hand Respondent's assertion that he did not discharge, not because there was no addition of pollutants. However, Respondents assertion is not at all flawed for more than two reasons. First and foremost, as the *NMA* court, *supra*, noted, the CWA does not authorize the government, in this case the EPA instead of the Corps of Engineers, in the

exercise of its authority over the NPDES program to regulate the activity of dredging or of "discharges" *per se*, but only the discharge of a pollutant as defined in the statute and only if that discharge is into a water of the United States. As also already pointed out in connection with the brief discussion of *Froebel v. Meyer*, 13 F. Supp. 2d 843 (E.D. Wis. 1998) and *Nat'l Pork Producers v. U.S. EPA*, 635 F.3d 738 (5th Cir. 2011), *supra*, a discharge, to require an NPDES permit, must not only be of a pollutant, it must actually *add* a pollutant to the water. This finding is further reinforced and expanded by the Supreme Court's decisions in *South Florida Water Management District v. Miccasuke Tribe of Indians*, 541 U.S. 95 (2004) and *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*, 568 U.S. __ (2013), *supra*.

It is the burden of Complainant EPA to demonstrate not merely that there was a "discharge" of some type, that it was into a water of the United States, and that is was a point source, but that it was the discharge of a pollutant properly defined that resulted in the "addition" of a pollutant into the water, not merely the plopping down of something already there a short distance from where it started. As the Supreme Court cases previously discussed made clear, transferring water and whatever it contains from one place in a single body of water (and there is no reasonable debate as to whether the South Fork of the Clearwater River is a single water body, it is). Evidence at trial will show that small scale suction dredges of the type involved do nothing more that pull water in, drop heavy metals and rocks from the water into a sluice attached to the dredge which are later removed from the river, allowing the water and remaining material to go right back into the water, adding nothing. No commercial or industrial processing occurs and the remaining solid material is dispersed back to the stream bed it came from, as the

evidence will show, no further away than 30-40 feet from where it started though in more extreme cases the lighter matter may go as far as 200 feet.

Nevertheless, the Complainant in its violation notice, complaint, and initial exchange appears to simply presume that operation of a small scale suction dredge invariably and inevitably results in the discharge of a pollutant, that is to say adds something new. However it does not. Several of Complainant's Exhibits pertain to the amount, duration and nature of the discharge and the distances it travels before settling back onto the stream bed. All of the witnesses named by Respondent will do likewise.

Complainant argues that "the operation of a suction dredge results in the 'discharge of a pollutant' which EPA regulates under the CWA, as detailed by the Idaho Suction Dredge GP" and asserts that its determination is upheld by the Ninth Circuit Court in *Rybachek v. EPA*. However, *Rybacheck*, decided by the Ninth Circuit in 1993 cannot withstand scrutiny under the flood of latter decided cases, cited above, including, but not limited to, *Miccasuke*, *Los Angeles Country Flood District v. NRDC*, *National Mining Association*, *Froebel,* and *Nat'l Pork Ass'n.* Indeed, these latter cases, especially *NMA*, reveal the flaw in *Rybachek*. If taken seriously, *Rybachek* removes all restraints from the CWA since literally anything that moves in a stream, even a person or animal wading across it, will cause turbulence and turbidity in the stream.[2] Just as the *NMA* court found that Complainant's view of incidental discharge in that case altered EPA's authority to the regulation of dredging instead of discharge, so too the expansive view of

[2] As will be demonstrated through experts and exhibits at trial, turbidity is a measure of opacity and total suspended solids ("TSS"), referred to by Complainant, is a measure of how much and what kind of material is suspended in the water. The two bear no necessary relation to each other an one cannot be extracted from the other.

Complainant herein can be used to justify regulation of any activity regardless of its connection to legislative intent and judicial decisions. In short, the numerous cases cited above and decided after *Rybachek*, say that an NPDES permit cannot be required unless a pollutant is *added*, while *Rybachek* says addition is not required, which does not square with the statute or later decisions including those of the Supreme Court. Complainant attempts to argue a distinction between *NMA* and *Rybachek* by stating that "[t]he incidental release of material that happens to fall back in waters is easily distinguished from the intentional release of processed wastewater resulting from placer mining activity, including suction dredging." However as the testimony that will occur at trial will establish, there is no processing of waste water or anything else in small suction dredging. Nothing is added to the material, including water, sucked up by the dredge, it simply flows across a plate which removes the heavy material while the light material simply remains with the water and returns to the bottom. In regular dredging, as the testimony at trial will establish, a large bucket is dipped into the water, matter is scooped up and as the bucket is lifted from the water. The bucket is usually overfull, and both water and some of the dredged material will drop back from the bucket right back where it came from. No processing is done. The remaining dredged material is simply moved elsewhere, usually onshore. Complainant cannot show how the two, regular dredging and suction dredging are different for these purposes with one exception. The water never leaves the stream and in suction dredging, unlike traditional dredging, no processing takes place. In traditional dredging, however, the dredged material is taken ashore or into a facility and the gold extracted by mechanical and chemical means. The remaining dredged material is then placed elsewhere, sometimes back where it came from and sometimes elsewhere. In suction dredging, as testimony will show, the remaining

material goes back within feet or several yards of where it started without any kind of processing, classically a net withdrawal. Complainant attempts to avoid this conclusion by asserting that suction dredging results is "precisely the discrete act of dumping leftover material after it had been processed" described by *Rybachek*, although this is far from being correct. There is a continuous flow of water and materials as the machine operates. Pieces of heavy material are removed in that process, the remainder never leaves the river, unlike traditional dredging.

Complainant states that, "[i]f a hearing is necessary in this matter, Complainant's witnesses Tracy Peak and Cindi Godsey will testify regarding EPA's regulation of discharges from suction dredges under CWA section 402 NPDES permits, including the Idaho Suction Dredge GP." This would appear to be presenting legal argument as evidence. Complainant's witness Clint Hughes will also testify regarding his observations of Respondent's suction dredging activity on July 22, 2015, including photographic evidence, and the visible plume he observed from Respondent's suction dredge.

C. Pollutant

Complainant notes that pursuant to CWA section 502(6), 33 U.S.C. § 1362(6), the term "pollutant" includes certain classes of material such as, among other things, "dredged spoil, rock, and sand." Respondent denies that the dredged spoil, rock, and sand contained in the turbid plume discharged from Respondent's suction dredge were pollutants. Answer ¶¶ 3.6, 3.9. Accepting Complainant's characterization, it is not surprising that Respondent denies the allegations. What is missing from Complainant's understanding, however, is the understanding supplied from the post-*Rybachek* cases that recognizes that "added" is an integral part of what

make a pollutant a pollutant. Rock and sand, for example, are found in streams. The sand and rock contained in a stream in its normal state cannot be said to be a pollutant, but if it is added to the stream, so say the post-*Rybachek* cases and the CWA, then it becomes a pollutant. Picking a rock up from a stream and then putting it back in the stream it came from can hardly be said to be adding a pollutant. Testimony at a hearing and the bulk of the documentary evidence to proffered at a hearing will establish that this is precisely what happens during small scale suction dredging. A focus on the class of things that can be a pollutant does not resolve the question of whether or more of those, even if present, constitutes a pollutant in this case.

D. Point Source

Complainant states that pursuant to 33 U.S.C. § 1362(14), "the term 'point source' means 'any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit . . . or vessel or other floating craft, from which pollutants are or may be discharged'," and they properly notes that Respondent denies that his suction dredge is a point source. Answer ¶¶ 3.7, 3.9. And while Complainant does not believe this allegation is in dispute and proffers its stipulation to this fact, Respondent does mean what he says, again relying on the cases and provisions already cited because, while one may attempt in law school fashion, to sort out the elements of an offense or a tort, in this case the elements are tangled in a manner not conducive to such neat sorting. A point source is only of importance if it is a point source discharging a pollutant. This may be seen as splitting hairs, but it suffices to emphasize the importance of the requirement that a pollutant must be added to the water for it to be regulatable. Once that is resolved, the only importance in whether there is a point source is to determine what

regulatory scheme and what permits if any, are needed.

E. Navigable Waters

Under Section 502(7), 33 U.S.C. § 1362(7), the term "navigable waters" means the waters of the United States. In accordance with 40 C.F.R. § 122.2, "waters of the United States" includes, *inter alia*, traditional navigable waters (waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce" and all tributaries of these waters. Respondent accepts the stipulation proffered by Complainant.

F. Without Authorization Under a NPDES Permit

When the EPA adopted a general permit for Idaho Suction Dredging, it excluded certain areas from the general permit. Specifically, it provides that:

> Discharges from suction dredges are not covered by this general permit in habitat designated as critical habitat under the Endangered Species Act (ESA), or areas occupied by listed aquatic species (see Section I.D.4.b-c) unless an ESA determination has been made [after consultation with the National Marine Fisheries Service or United States Fish and Wildlife Service, as appropriate] and the decision is provided with the Notice of Intent.

Complainant then goes on to say that the alleged CWA violation occurred, discharges into the South Fork of the Clearwater River were not covered under the Idaho general due to the presence of ESA protected critical habitat. Therefore, according to Complainant, Respondent needed an individual NPDES permit "in order to comply with the CWA. Then Complainant describes how one of its witnesses, Tracy Peak, will testify that Respondent "did not and could not have CWA coverage under the General Permit for the alleged suction dredging activity on the South Forth of the Clearwater River, and that Respondent did not have coverage under an individual NPDES permit.

Respondent, however, does not argue that he had an NPDES permit and such testimony

would be superfluous. His contention is that no NPDES permit could be required at all since he did not discharge a pollutant at all for reasons already discussed.

V

FACTUAL INFORMATION AND SUPPORTING DOCUMENTATION RELEVANT TO ASSESSMENT OF A PENALTY

Because of unforseen difficulty in obtaining documents and contacting potential witnesses needed to adequately and completely prepare Respondent's Initial Exchange for filing as of this date, counsel for Respondent consulted with Counsel for Complainant by exchange of emails. Because counsel for Respondent has required extensions of time recently because of illness, he has been reluctant to request another extension of time although he has been working diligently on this document. Therefore, after discussing the matter with counsel for Complainant and agreeing with his suggestion, it was determined that the best course of action was to file this initial exchange as scheduled and move this court for an order granting leave to revise or amend the initial disclosure as the necessary documents and information is provided. In this manner, the parties may continue to prepare for the hearing, if one is held, or such dispositive motions as either party feels fit. Complainant has authorized Respondent to represent that Complainant has no objection provided the revised or supplemental document is filed prior to the time Complainant's rebuttal is due.

On that understanding, Respondent is filing contemporaneously herewith the referenced motion and will complete this remaining section upon receipt of the further documents and information and, if all does not come available in time, to complete the last two sections to the extent possible and to fill in such other information as is appropriate to other sections herein.

Respectfully submitted this 8th Day of May, 2017

/s/ Mark L. Pollot
Mark L. Pollot
Counsel for Respondent, Dave Erlanson