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Donald G. Smith
[redacted]
Riggins, ID 83549

August 12, 2019

U.S. Environmental Protection Agency
Attn: Chris Hladick, Region 10 Administrator
1200 Sixth Ave., Suite 155
Seattle, WA 98101-3188

RE: Administrative Appeal & Petition for Rulemaking under 5 U.S.C. A. § 553

Dear Administrator Hladick,

I, Donald G. Smith, hereinafter referred to as "Appellant" or "Petitioner," am in receipt of a July 24, 2019 letter and decision authored by Cindi Godsey (attached) that Appellant's proposed regulated activities under the authority of the Army Corps. (under section 10 of the Rivers & Harbors Act) may be subject to additional permitting by your agency under section 402 of the Clean Water Act (CWA).

Appellant is very aware of the cases cited by the decision of Cindi Godsey's July 24, 2019 letter. However, because of the fact the EPA has not addressed the facts and court decisions set forth below, Appellant sets forth and Appeals said decision of the July 24, 2019 letter.

Appellant's activities do not *add* a pollutant within the meaning of the CWA

It is within the province of the Environmental Protection Agency (EPA), as contemplated by the Clean Water Act (CWA), to impose a duty to apply for a National Pollutant Discharge Elimination System (NPDES) permit, pursuant to the Clean Water Act (CWA), on individuals who are discharging pollutants, given that the primary purpose of the NPDES permitting scheme is to control pollution through regulation of discharges into navigable waters. Clean Water Act, § 402, 33 U.S.C.A. § 1342.

In *National Pork Producers v. EPA 635 F.3d 738 (5th Cir. 2011)* the court held:

> …The 2003 Rule's "duty to apply" required all CAFOs to apply for an NPDES permit or demonstrate that they do not have the potential to discharge. 68 Fed.Reg. at 7266. In *Waterkeeper*, the Second Circuit held that the 2003 Rule's "duty to apply" was ultra vires because the EPA exceeded its statutory authority. *Waterkeeper*, 399 F.3d at 504. The court explained that the CWA is clear that the EPA can only regulate the discharge of pollutants. To support its interpretation, the Second Circuit examined the text of the Act. The court noted: (1) 33 U.S.C. § 1311(a) of the CWA "provides ... [that] the discharge of any pollutant by any person shall be unlawful," (2) section 1311(e) of the CWA provides that "[e]ffluent limitations ... shall be applied to all point sources of discharge of pollutants," and (3) section 1342 of the Act gives "NPDES authorities the power to issue permits authorizing the discharge of any pollutant or combination of pollutants." *Waterkeeper*, 399 F.3d at 504. Accordingly, the Second Circuit concluded that **in the absence of an actual addition** of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations for point source

> discharges, and no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance. (*Emphasis added*.)
>
> Id. at 505. The Second Circuit's decision is clear: without a discharge, the EPA has no authority and there can be no duty to apply for a permit. (*Note: this holding was multi-circuit, including the 9th Circuit Court of Appeals*.)

Specifically, the United States Supreme Court explained:

> [T]he National Pollutant Discharge Elimination System [requires] a permit for the "discharge of any pollutant" into the navigable waters of the United States, 33 U.S.C. § 1342(a). The triggering statutory term here is not the word "discharge" alone, but "discharge of a pollutant," a phrase made narrower by its specific definition requiring an "addition" of a pollutant to the water. *S.D. Warren Co. v. Maine Bd. of Envtl. Protection, 547 U.S. 370, 380–81, 126 S.Ct. 1843, 164 L.Ed.2d 625 (2006).*

Appellant acknowledges that much of the reasoning behind the EPA's request for a section 402 permit is to address turbidity stirred up from the act of suction dredging, **not the actual addition prerequisite Congress mandated**. Turbidity from a suction dredge is not a product of an addition, rather, it is the relatively insignificant movement of native substance of local rock, sand and sediment in contrast to that which is carried on at much greater volumes by natural weathering processes every season by acts of God.

To illustrate this point the court in *Froebel v. Meyer 13 F.Supp.2d 843 (E.D. Wisconsin, 1998)* held:

> …Movement of indigenous sediment through a dam was not a "discharge of a pollutant" that would require National Pollutant Discharge Elimination System (NPDES) permit pursuant to Clean Water Act (CWA). *Federal Water Pollution Control Act, §§ 402, 502(12), as amended, 33 U.S.C.A. §§ 1342, 1362(12).*

The court added:

> Redepositing of indigenous sediment caused by state agency's removal of dam did not result in any "discharge of dredged material" that would require permit from Army Corps of Engineers under Clean Water Act (CWA) and either possible version of implementing regulations, even if manner in which dam was removed created a "scouring action" that disturbed sediment and funneled it downstream. *Federal Water Pollution Control Act, § 404(a), as amended, 33 U.S.C.A. § 1344(a); 33 C.F.R. § 323.2(d)."* (Emphasis added)

Unlike the EPA, Appellant does not rely on Dave Erlanson's proceeding by EPA's own administrative law judge, rather, a de nova review proceeding by an Article III Federal District Court judge on appeal from a federal magistrate. The decision in *U.S. v. Godfrey, Eastern District CA 2:14-cr-00323 JAM (2015)* illustrates that a suction dredge sluice box is not a point source discharge within the meaning of the CWA. The District Court found as a matter of law and fact the following:

> Defendant is alleged to have violated 36 C.F.R. § 261.11, which prohibits "[p]lacing in or near a stream, lake, or other water any substance which does or may pollute a stream, lake, or other water[.]" 36 C.F.R. § 261.11(c). Defendant argues that his conviction on this count must be

reversed because "[p]utting materials from the creek back into the creek does not constitute the 'placing' of a 'pollutant' into the creek." (Opening Brief at 17.)

Defendant cites language from a Supreme Court case concerning the Clean Water Act: "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." Opening Brief at 16-17 *(*citing *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 110 (2004)).* Defendant contends that the evidence offered at trial shows that he "did not introduce pollutants such as chemicals, oils, outside dirt, other liquids, or trash into Poorman Creek."

…The legal issue of whether the release of materials found within the high-water mark of Poorman Creek constitutes "placing a pollutant" into the creek remains. As this is an issue of statutory construction, the Court's review is de novo. United States v. Montes-Ruiz, 745 F.3d 1286, 1289 (9th Cir.2014). *(Emphasis added.)*

As an initial matter, the structure of 36 C.F.R. § 261.11 is informative. The subsection is labeled "Sanitation" and 36 C.F.R. § 261.11(c) is surrounded by prohibitions on (1) depositing in a toilet or plumbing fixture a substance which could interfere with its operation; (2) leaving refuse, debris, or litter in an unsanitary condition; 3) failing to properly dispose of all garbage; and (4) improperly dumping refuse, debris, trash, or litter. 36 C.F.R. § 261.11(a)-(e). Thus, the provisions surrounding 36 C.F.R. § 261.11(c) lend support to Defendant's argument that "any substance which does or may pollute" **must be a foreign substance**, not a substance which is already found within the high-water mark of the river. *(Emphasis added.)*

Although "pollute" is not defined within Part 261, the dictionary definition of "pollute" is instructive. *See Phillips v. AWH Corp., 415 F.3d 1303, 1319 (Fed. Cir. 2005)* (noting that "dictionaries, encyclopedias and treatises are particularly useful resources to assist the court in determining the ordinary and customary meanings of [relevant] terms"). The Merriam-Webster Dictionary offers two definitions of "pollute:" (1) "to make physically impure or unclean;" and (2) "to contaminate (an environment) especially with man-made waste." As with the structure of the regulation, these definitions suggest that "placing any substance which does or may pollute" necessarily entails the introduction of a foreign substance, possibly even a man-made substance. *(Emphasis added.)*

Returning to the Supreme Court's "one ladle of soup" example, the Court agrees that the present case is not closely analogous. *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 110 (2004)).* Defendant did not merely remove water from one location in Poorman Creek and return that same water to another location in Poorman Creek. Rather, he diverted the water through his mining operation, and returned it, along with "sands, silts and clays and bottom deposits" to Poorman Creek, downstream of his operation. However, as noted by the Magistrate Judge and as emphasized now by Defendant, the entire mining operation occurred beneath the high-water mark of Poorman Creek. Importantly, there is no evidence that any foreign substance (such as a chemical) was introduced to Poorman Creek. *See RT2 at 2-44 – 2-45 (Note: the Magistrate Judge, noting that "there wasn't any evidence that I'm aware of that any of those broken up rocks or chemicals ended up in the creek"); see also RT1 at 182 (Testimony of Huggins, noting that "chemicals getting into the water" was "not the major concern in this case".)*

> In this sense, a more apt analogy may be that of a bowl of cereal. At its low point, Poorman Creek is much like a bowl of Cheerios with very little milk in it, with a number of Cheerios pieces "stranded" up on the sides of the bowl. Filling the bowl with milk releases those "stranded" Cheerios pieces back into the milk, but nothing foreign has been added to the bowl. Similarly, Defendant's operation merely released sediment that was already part of the creek-bed back into the creek. *(Emphasis added.)*
>
> …the Government's evidence was insufficient to sustain Defendant's conviction under 36 C.F.R. § 261.11 for polluting the creek. Accordingly, Defendant's conviction on Count 5 is reversed." *(Emphasis added)*

Appellant believes the analysis of the facts and law by District Judge John Mendez of the Eastern District of California in *U.S. v. Godfrey, supra* is directly on point controlling the important factors of CWA law and its application in relation to Appellant's situation. Appellant is not legally bound to submit a 402 EPA permit when there is no "addition" to report, nor is he bound to report that which does not exist in violation of the basic tenets of the body of law on the maxims of impossibilities—the law does not require the impossible.

Appellant is informed and believes that the EPA is outside its authority regulating non-addition producing activities such as suction dredging. This is misplaced and in contradiction of the Congressional mandate of the CWA, i.e., to only regulate "additions" and foreign introduced substances.

Appellant wishes to point out the fact that if all materials coming off a suction dredge are to be deemed a point source pollutant rather than reclamation to remove heavy metal toxins would be made a legal impossibility, creating no incentive for reclamation on water-covered lands of the United States nor improving spawning habitat for spawning salmon. See:
https://www.publiclandsforthepeople.org/reclaiming-our-waterways/

Finally, Appellant is informed and believes that the EPA may have already violated the Administrative Procedures Act (APA) under 5 U.S.C.A. 553 by identifying and singling out a suction dredge as a point source without a proper rulemaking in the Federal Register with notice to the public. This places Appellant at a disadvantage to address the science and expertise in finding that a suction dredge is, or is not, a point source or a cause of pollution. This also places the July 24th, 2019 decision by Cindi Godsey in a position that a future court may conclude the EPA is acting in an arbitrary and capricious fashion for failure to comply with the APA.

Therefore, pursuant to the holding in *Sackett v. United States Environmental Protection Agency, 566 U.S. 120 (2012)*, Appellant requests that the decision made by Mrs. Godsey be rescinded under proceedings protected by the Administrative Procedures Act with a decision informing appellant that he is free to pursue permitting exclusively under the Army Corp and section 10 of the Rivers & Harbors Act respectively without the need for a 402 CWA permit from the EPA.

Request for Rulemaking under 5 U.S.C.A. § 553

Don G. Smith, hereinafter referred to as "Petitioner," requests that pursuant to 5 U.S.C.A § 553(e) that the EPA and the Army Corp jointly promulgate regulations clarifying that suction dredges do not as a matter of practice constitute a point source discharge of a pollutant namely because they *do not add a pollutant* within the meaning of the CWA. The EPA strictly regulates activities that add pollutants to the nation's navigable waterways but exempts those activities (non-additions) where it has no expressed or implied jurisdiction from Congress.

Petitioner wishes to point out the fact that if all materials coming off a suction dredge are to be deemed a point source pollutant rather than reclamation to remove heavy metal toxins would be made a legal impossibility, creating no incentive for reclamation on water-covered lands of the United States nor improving spawning habitat for spawning salmon. See:
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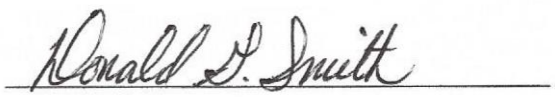
"A Federal Strategy to Ensure Secure and Reliable Supplies of Critical Minerals" has now been released by an interagency report. This strategy was set in motion by President Trump's Executive Order 13817. Call to action item #5.16 states:

> 5.16 Evaluate Sections 404 and 408 of the Clean Water Act and Sections 10 and 14 of the Rivers and Harbors Act and develop recommendations to streamline and improve the permitting process. (DOD [USACE]; 2-4 years)

This would be an ideal time to make Appellant's recommendations into a clarified rulemaking.

This rulemaking should make consistent that which has been found by numerous courts in the last 20 years (partially cited above) that not all activities such as sluicing and suction dredging constitute a regulatable event subject to CWA permitting. It would also provide regulatory certainty to the reclamation and suction dredge mining industry of the United States.

Respectfully submitted,



Donald G. Smith

Enclosure

Cc: Via electronic mail
Duane Mitchell, Army Corps of Engineers, Walla Walla District
Kat Sarensen, U.S. Fish & Wildlife Service
David Arthaud, National Marine Fisheries Service
Aaron Golart, IDWR
Andrew R. Wheeler, EPA Administrator Washington D.C. c/o Cathy Milbourne
Public Lands for the People c/o Clark Pearson
Scott Harn, ICMJs Prospecting and Mining Journal