

Dear Administrator Pruitt,

I am writing to you to request regulatory relief for myself and thousands of other small-scale suction dredge miners in the western states. State regulators—including those in my home state of Idaho—are regulating suction dredge mining under the false premise that this mining process involves the introduction or addition of a pollutant that requires a National Pollution Discharge Elimination System (NPDES) permit. Even though many of these state regulators are fully aware there is no introduction or addition of a pollutant in these cases, they are fearful the funding they receive from the EPA could be jeopardized if they do not require such a permit.

I have become encouraged by the release of your interview with Rob Bluey. I feel you “hit the nail on the head” in that interview. My request also deals with both weaponization of the agency and a common-sense-based approach to regulations.

In 2013, the U.S. Environmental Protection Agency (EPA), Region 10, overstepped their statutory authority by requiring a NPDES permit for small-scale suction dredge mining in Idaho. The Obama administration bypassed all case law (including Supreme Court cases) and policy guidance to expand its interpretation of the Clean Water Act (CWA) to say they had the authority to determine what constitutes “pollution” even when no foreign substance was added.

Region 10 even invoked the Endangered Species Act (ESA) to force a prohibition on my operations on the Salmon River of Idaho. The National Marine Fisheries Service and the U.S. Fish and Wildlife Services consider this river to be critical habitat for aquatic species; however, the State of Idaho disagrees with this determination and considers this river to be a transportation corridor. The Boise field office for the U.S. Army Corps of Engineers (Corps) agrees with Idaho and determined this is merely in a transportation corridor that does not affect listed species.

It is our understanding that the Corps and EPA are under a court-ordered national injunction due to their loss of the lawsuit in *American Mining Congress v. United States Army Corps of Engineers*, No. 93-1754 SSH. One quote from the United States District Court, District of Columbia (D.D.C.) stands out: “*The appropriate remedy for what the agencies now perceive to be an imperfect statute, however, is Congressional action; defendants' authority is limited to adopting regulations that effect the will of Congress as expressed in the statute.*”

The Court’s reading of the statute was that the meaning of Section 301 CWA is clear. The Court said: “The ‘discharge of any pollutant by any person’ is unlawful except in compliance with, inter alia, § 404 of the Act. 33 U.S.C. §§ 1311(a) (“§ 301(a)”) and 1344.” The Corps has concluded that the discharge of bed material from a small-scale suction dredge may constitute “incidental fallback” not subject to Section 404 CWA. To this day the EPA is requiring a permit for small-scale suction dredge mining in Idaho under Section 301 of the CWA, inapposite where the district court held, “...neither § 301 nor § 404 covers incidental fallback.”

The Corps lost on appeal. The Appeals Court ruled in *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1339 (D.C. Cir. 1998), that a national injunction would make duplicative litigation less of a burden for the regulated public. They held that “*Issuance of a broad injunction obviates such repetitious filings.*” The underlying rule in this case was the Tulloch rule, which was appropriately found “... in excess of statutory jurisdiction”, “held unlawful” and “set aside.”

This appeal also brought us the “Silberman Standard,” which states that if the material in question is moved to another geographic location or is held out of the receiving waters for an extended period of time it might well result in a regulatable deposit. But rock and sand only become pollutants, according to the statute, once they are discharged into or are added to water. (See 33 U.S.C. § 1362(6) (1994).) The Corps' approach thus just leads right back to the definition of a discharge, and a discharge that has no foreign substance should not be regulated.

It is for precisely this reason that we need regulatory relief.

To sum up the argument formed in the two court cases mentioned above, in *National Association of Home Builders v. U.S. Army Corps of Engineers* the District Court concluded on appeal “...the straightforward statutory term [addition] cannot

reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back." The Court further stated, "...[b]ecause incidental fallback represents a net withdrawal, not an addition, of material, it cannot be a discharge" and questioned "How there can be an addition of dredged material when there is **no addition** of material." [Id. at 1404] (Emphasis added). The point the Court was making is the dredge was not the regulating trigger, but rather the dredge discharge of material off-site or to another location (relocating foreign materials).

Small-scale suction dredge miners do not add or import foreign substances, rather they reclaim and remove heavy metals from the environment—something the CWA was not intended to regulate.

- Exhibit A: Letter by Barbara Benge of the Corps of Engineers Regulatory Project Manager to Edward Kelly (July 23, 1998).
- Exhibit B: Pre-Obama policy that lists "recreational" suction dredgers as potentially exempt from the application of CWA permitting by instruction of the District Court ruling.


From a common-sense approach, the EPA's desire to permit recreational (small-scale) suction dredge mining should have looked to the CWA itself, and Congress has spoken directly to this issue. It is clear Congress only wished to regulate activities that added pollutants. EPA employees claimed the new requirement for permitting was a response to the threat of lawsuit by a radical environmentalist organization. If the truth be known, small-scale suction dredges clean the environment by removing lead, discarded materials, car parts from automobile accidents, and sometimes even elemental mercury from our rivers and streams. A suction gold dredge is a reclamation device, with no cost to the public. The same machine has been utilized for revitalizing spawning gravels to perpetuate fish propagation. The small-scale suction dredge miner is alone in this field—no other user does anything beneficial in the waterways that is remotely comparable. The EPA and the true environmentalists should be applauding this effort.

The EPA and Corp share administering the CWA and jointly administer regulatory guidance policy. Most of the problems miners have been enduring come from strange incarnations from the EPA—trying to regulate something that does not exist. To make matters worse, they threaten those who oppose them with criminal penalties. Under current EPA guidance, cleaning the environment in this manner is deemed a crime! That's how many small miners see it.


I would be happy to avail myself and my operations to inspection by any delegation your agency should feel appropriate to demonstrate that there is no addition of pollutant(s). The Attorney General for the State of Idaho, Lawrence Wasden, inspected my operations when they were ongoing. When he returned later, he reported to the Land Board that there was no evidence of any negative impact nor lasting evidence that anyone had ever used a dredge in that location.


It is for these reasons that we are appealing to you for regulatory relief and humbly ask for you to issue the appropriate guidance to federal and state agencies regarding the lack of the addition of a pollutant by suction dredge miners and the unwarranted requirement for an NPDES permit.

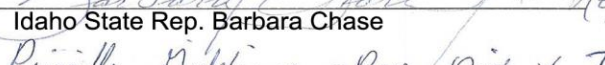
Sincerely,



Don Smith, Riggins, Idaho
(208) 628-2718

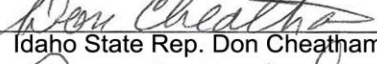
With the support of the following legislators:



Idaho State Senator Carl Crabtree

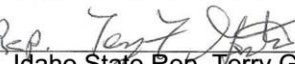

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