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MEMORANDUM

DATE: August 3, 2010

TO: Annette Liebe, Surface Water Manager
Department of Environmental Quality

FROM: Larry Knudsen, Senior Assistant Attorney General
Natural Resources Section

SUBJECT: Applicability of NPDES Permit Requirements to Recreation Suction Dredge Mining

DEQ is preparing to renew the recently expired 700-J permit. This is a National Pollutant Discharge Elimination System (NPDES) general permit issued pursuant to CWA Section 402 [33 USC § 1342], that covers the operation of small suction dredges and in-water use of non-motorized sluice boxes and similar devices. This memorandum addresses a number of legal issues relating to the permit renewal.

Procedural Background

The expired permit was issued in July of 2005 using rulemaking procedures in accordance with previous advice from the Oregon Department of Justice that general permits should ordinarily be issued using rulemaking procedures. Some months prior to this time, the Legislature amended ORS 468B.050 to allow general permits to be issued by order or by rule. 2005 Oregon Laws, ch. 523, § 4. This change was in accordance with a recommendation from the "Blue Ribbon Committee" that advised the Department with respect to increasing the efficiency of DEQ's water quality permitting program. The 2005 amendments to ORS 468B.050 did not become effective, however, until January 1, 2006.

In keeping with the recommendations of the Blue Ribbon committee and as authorized by the amendments to ORS 468B.050 and OAR 340-045-0033, DEQ is proposing to renew the 700 PM as an order and not as rule. This is legally authorized. Further, rulemaking procedures are not necessary to "repeal" the old permit as it expires on its own accord as specified in OAR 340-045-0033(1).

Permit Challenge

Shortly after the permit was issued in 2005, petitions for judicial review were filed by the Northwest Environmental Defense Center and other environmental groups and by the Eastern

Oregon Mining Association and two of its members. The environmental groups argued that the permit was insufficiently protective of water quality and that the permit had been adopted without following all of the required procedures. The latter group argued, among other things, that DEQ did not have legal authority to regulate suction dredge mining under the CWA section 402 permitting program. In December of 2009, the Court of Appeals issued a decision finding that the permit was overly broad. As discussed in more detail below, the Court concluded that DEQ has authority under Section 402 of the CWA to regulate those discharges from suction dredges that become suspended in the water column, but that dredge spoils not suspended in the water column are subject to exclusive regulation by the U.S. Army Corps of Engineers under Section 404 of the CWA. *NEDC v. EQC*, A129732 (12/23/09). The Court of Appeals thus concluded that the DEQ permit is invalid because it does not distinguish between the two types of discharges. Petitions for Oregon Supreme Court review of the Court of Appeals decision are currently pending.

CWA Regulation under Section 402

Under CWA Section 402, an NPDES permit is required for the discharge of a pollutant from any point source to waters of the United States. The suction dredges at issue in the 700 PM permit are legally required to have such a permit to operate. This conclusion clearly follows from the applicable statutory and regulatory definitions, as well as the federal and Oregon court decisions interpreting these definitions.

Point Source. The CWA defines a point source as "any discernible, confined, and discrete conveyance," including pipes and conduits. CWA Section 502(14) [33 USC § 1362(14)]. There does not appear to be any reasonable argument that discharges from a suction dredge are not discharges from a point source. *See League of Wilderness Defenders v. Forsgren*, 309 F3d 1181, 1184-1185 (9th Cir 2002); *Rybachek v. United States Environmental Protection Agency*, 904 F2d 1276, 1285 note 8 (9th Cir 1990).

Pollutant. The term "pollutant" is broadly defined and includes dredge spoils, rock, sand, and almost all other forms of waste. CWA Section 502(6). The federal Environmental Protection Agency (EPA) has determined that the re-introduction of waste materials from the stream bed into the water column through the process of suction dredging and sluicing constitutes the addition of a pollutant. The federal Ninth Circuit Court of Appeals has reviewed and upheld EPA's decision. *See Rybachek, supra,* at 1285-1286; *see also Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F3d 810, 814 (9th Cir 2001). *See also, Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F Supp 983, 988 (ED Wash) (and authorities cited therein).

Some have asserted that a permit is not appropriate in this instance because the discharges from small suction dredges are relatively insignificant. There is, however, no exception to CWA Section 402 permitting requirements based on the relative significance of the discharge. *Sierra Club v. Union Oil Co.*, 813 F2d 1480, 1490-1491 (9th Cir 1986), *rev'd on other grounds, Union Oil Co. v. Sierra Club*, 108 S Ct. 1102 (1988); *Save our Bays & Beaches v. City and County of Honolulu*, 904 F Supp 1098, 1105 (D. Hawaii, 1994). Similarly, under the CWA,

the determination of the need for permit effluent limits or other regulatory conditions must be made in the context of the water quality of the specific receiving water and the standards applicable to the receiving water. CWA Sections 301, 303, and 402.

Further, based on the materials discussed in the record for this general permit it does not appear that unregulated discharges from suction dredges would in all cases be insignificant. Consequently, DEQ likely would not have substantial evidence upon which to base a determination that **all** of the covered discharges are in fact insignificant. *See also, Natural Resources Defense Council, Inc. v. United States EPA*, 966 F2d 1292, 1306 (9th Cir 1992).

Waters of the U.S. The precise meaning of the definition of waters of the U.S. has been the focus of considerable debate in recent years following the U.S. Supreme Court's decision in Rapanos v. United States, 547 U.S. 715 (2006). But under *Rapanos,* as well as a number of more recent cases from the federal Ninth Circuit, it is clear that all tributaries of navigable rivers are covered within the definition. *See, e.g., Moses v. United States*, 496 F.3d 984 (9th Cir, 2007). Thus suction dredging, even on the headwaters of an Oregon river, ordinarily would take place in waters of the U.S.

Section 404. CWA Section 404 [33 USC § 1344] is a companion provision in the Clean Water Act that authorizes the Army Corps of Engineers to issue permits for the discharge of dredged or fill materials into navigable waters. The relationship between Section 402 and Section 404 with respect to suction dredging has historically been perplexing. However, under the U.S. Supreme Court's recent decision in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S Ct 2458 (2009), as interpreted by the Oregon Court of Appeals in *NEDC v. EQC*, *supra*, the broad outlines of the roles of the two statutes is clear: Section 402 covers discharges that are suspended in the water column and typically measured in terms of turbidity or total suspended solids and Section 404 covers sand, gravel and cobbles that are directly redeposited in the stream bed.

While the *Coeur Alaska* decision involved conventional mine tailings rather than suction dredging, the opinion of Oregon Court of Appeals applying the holding to dredging is consistent with the position taken by EPA in states where it administers the NPDES program. *See* Proposed General Wastewater Permit for Small Suction Dredge Mining in Idaho.[1]

State Permitting Authority

The Court of Appeal's decision in *NEDC v. EQC*, *supra*, only analyzed DEQ's legal authority under Section 402 of the Clean Water Act. Oregon law, however, authorizes DEQ to regulate suction dredges under both the Clean Water Act's NPDES permit program and under independent provisions of state law.

Oregon statutes dating back to the 1950's, and, in some cases earlier, have declared water pollution to be contrary to public policy and have authorized DEQ to take all those actions necessary to protect, maintain and improve water quality. ORS 468B.010, 468B.015 and

[1] Available at http://yosemite.epa.gov/r10/water.nsf/NPDES+Public+Notices/pn_id_gen_permit_ssdm_10/.

468B.020. For more than four decades, Oregon Law has expressly required DEQ permits for any discharge of wastes into waters of the state from any industrial or commercial activity or any disposal system. ORS 468B.050.

In 1973, the states water quality statutes were amended to authorize the Environmental Quality Commission to adopt all rules and take any other actions necessary to implement the Clean Water Act. ORS 468B.035. This includes all actions required for EPA approval to operate the NPDES permit program established by CWA Section 402.

With a few exceptions not relevant here, federal agencies and federal lands are subject to both the requirements of the federal Clean Water Act and state water quality requirements arising under state law. CWA Section 313 [33 USC § 1323]; CWA Section 401 [33 USC § 1341]. EPA determines whether a state will administer the NPDES permit program established by CWA Section 402. If EPA delegates the NPDES permit program to a state, it suspends its own permitting program. EPA also decides which lands within the state are subject to the state program, but typically, a state program must include all discharges, even those arising on federal lands. 40 CFR § 123.2(g)(1). And in Oregon, EPA did not reserve permitting authority except with respect to Tribal lands.

Further, and as discussed in more detail below, the U.S. Supreme Court has held that federal mining laws and the federal regulations implementing those statutes and federal land management statutes and the federal regulations implementing those statutes do not pre-empt state environmental regulation of mining activities. *California Coastal Comm'n v. Granite Rock Co.*, 480 US 572, 581-586 (1987). This includes both the laws applicable to U.S. Forest Service lands and lands under the jurisdiction of the Bureau of Land Management.

Mining Law of 1872

The Mining Law of 1872, 30 USC § 21 *et seq.* does not pre-empt CWA or state regulation of water quality. This includes regulations that are implemented through permitting requirements. The U.S. Supreme Court has held that the Mining Act of 1872 "expressed no legislative intent on the....subject of environmental regulation." *California Coastal Comm'n, supra*, at 581 (1987). The Court also held that the subsequent amendments to federal mining law known as the Multiple Use Mining Act (30 USC § 601 *et. seq.*) and federal agency implementing regulations did not pre-empt state or federal environmental regulation. *Id.* at 582.

Further, the Oregon Court of Appeals has expressly rejected the notion that the federal mining laws create **any** right to use waters of the state for the purpose of waste disposal, at least for mining claims made after 1877. *Kinross Copper Corp v. State of Oregon* , 163 Or App 357 (1999), *cert den*, 531 US 960 (2000).

Finally, there is nothing in text, context or legislative history of the more recent CWA that suggests a general exemption from permitting requirements for mining on federal lands. CWA Sections 313 and 402. Subsequent amendments to federal mining, environmental and land

management statutes all provide strong evidence against any inference of pre-emption. *See, e.g.*, 30 USC § 21(a); 30 USC §§ 601 *et seq.*; 42 USC §§ 4321 to 4370d.

Constitutional Takings

The requirement to obtain a permit (or coverage under a general permit) before discharging wastes into waters of the state does not constitute a taking of private property in violation of the state or federal constitutions. As discussed above, operators of suction dredges do not have a property right to discharge wastes into waters of the state. *Kinross Copper Corp., supra.* Similarly, the inability to qualify for such permit coverage would not constitute a taking. Simply put, the water quality regulations in question do not condition or prohibit mining, *per se*. Rather, they address the disposal of wastes into a public resource.

Self Incrimination

NPDES permit provisions requiring monitoring and reporting do not violate constitutional rights against self incrimination. DEQ may, and is in fact required by the Clean Water Act to require monitoring and reporting of permit violations. 40 CFR § 122.41. Generally, a permittee can be required to comply with such reporting requirements and, typically at least, any enforcement of violations would be administrative in nature and not implicate a person's rights against self-incrimination in a criminal proceeding. *See Trustees for Alaska v. EPA*, 749 F2d 549, 560 (9th Cir 1984). Conceivably, there could be situations where self-reported violations compelled by permitting requirements may not be used against a permittee in a criminal case, but that is a different issue than whether DEQ can include monitoring and reporting requirements in the permit.

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