Suction Dredge Mining/Clean Water Act: Federal Appellate Court Addresses Applicability of NPDES Permit System

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The United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") in a November 20th Opinion addressed an issue involving the applicability of the Section 402 Clean Water Act National Pollutant Discharge Elimination System ("NPDES") permitting system. See I*daho Conservation League v. Shannon Poe*, No. 22-35978.

The question considered was whether a Clean Water Act NPDES permit was required for engaging in instream suction dredge mining.

A Clean Water Act NPDES permit must be obtained if five jurisdictional elements are met:

- A person
- adds a pollutant
- to navigable waters (waters of the United States)
- from a point source.

The absence of any one of these jurisdictional definitions eliminates Clean Water Act NPDES permitting requirements.

Shannon Poe ("Poe") is stated to have engaged in instream suction dredge mining in Idaho's South Fork Clearwater River ("South Fork") for several years without an NPDES permit.

Suction dredge mining is described as a method of placer mining using a floating watercraft device with a pump to suck water, riverbed sands, and minerals through a nozzle.

As further described in the Opinion:

"The water and riverbed material are run through a sluice box," where gold and other heavy metals are separated out. Water, sand, and minerals are then discharged back into the river, along with sediments and other pollutants. Dredging creates tailing piles behind the dredge, where larger and heavier processed riverbed materials are discarded and settle to the river bottom nearby. Tailing piles can rise to the surface level of the river and can span most of the river's width.

Dredging overburden and bedrock is stated to involve dismantling the riverbed by dislodging and moving rocks and boulders and breaking up tightly bound sediments using the miner's hands, the dredge nozzle, and other tools, like crowbars. Holes will result that are described as potentially several feet deep under the riverbed.

The Idaho Conservation League ("ICL") filed a Clean Water Act citizen suit against Poe. The organization alleged that Poe was violating the Clean Water Act by failing to obtain an NPDES permit while dredging and discharging sediments and other pollutants in the South Fork.

The United States District Court granted ICL summary judgment holding:

1. Poe's suction dredge mining added pollutants to the South Fork which triggered an NPDES permit requirement.
2. The processed material discharged from Poe's suction dredge mining was a pollutant as opposed to dredge or fill, requiring an NPDES permit under Section 402 of the Clean Water Act as opposed to Section 404.

The Ninth Circuit first addressed the following question:

Is dumping suction dredge mining waste into the South Fork an "addition" of pollutants pursuant to the Clean Water Act?

The Ninth Circuit noted that since the 1970s the United States Environmental Protection Agency ("EPA") has interpreted the Clean Water Act as prohibiting discharges from placer mining sluice boxes unless an NPDES permit is obtained in accordance with Section 402, citing Trustees for Alaska v. EPA, 749 F.2d 549, 552-553 (9th Cir. 1984).

EPA adopted industry-wide regulations imposing effluent limitations for Section 402 permits for gold placer miners. This included gold mining from floating dredges.

Rybachek v. EPA was also referenced. The Ninth Circuit in that decision rejected a challenge to regulations addressing placer mining because of the alleged absence of the "addition" of a pollutant. It held that "resuspension" of streambed materials may be interpreted to be an addition of a pollutant.

Poe's mining activities were deemed to:

. . . fall squarely within the scope of Rybachek.

Evidence cited was the excavation of dirt and gravel in the river using a high-pressure blaster nozzle which extracted any gold and other heavy metals and discharged the dirt and other non-heavy metal materials into the water.

The Ninth Circuit rejected the argument that the United States Supreme Court decision in S. Fla Water Mgmt. Dist. V. Miccosukee Tribe of Indians, 541 U.S. 95 (2044) is applicable to this scenario. Poe argued that this and related decisions overruled Rybachek.

The argument was rejected by the Ninth Circuit because of its belief that these cases were distinguishable from Rybachek because polluted water was transferred from one location to another within the same waterbody. This was due to the fact that Poe added a plume of turbid wastewater to the South Fork. Such materials were not already suspended in the water – they were previously deposited in the riverbed. As a result, the Ninth Circuit held that Poe's dredging was not simple water transfer.

The following question was also addressed:

Does the processed material discharged from instream suction dredge mining constitute a pollutant that requires a Section 402 NPDES permit?

Poe argued that even if suction dredge mining adds pollutants to the South Fork, the waste discharged from the operation constituted "dredged" or "fill material." If so, the United States Corps of Engineers ("Corps") was argued to have exclusive permitting authority pursuant to Section 404 of the Clean Water Act.

The arguments put forth by Poe included:

1. The ordinary meaning of “dredged material” under the Clean Water Act
2. The ordinary meaning of the Corps’ own regulatory definition of “dredged material.”

The Ninth Circuit rejects these arguments, noting that the Clean Water Act does not provide that once a material has been dredged it remains this class of material forever. Neither the Clean Water Act nor the implementing regulations were deemed to consider the question of which federal agency has the authority to permit the discharge of dredged material that has been processed (i.e., the leftover waste material that is discharged during suction dredge mining).

EPA and the Corps are stated to have historically determined that when materials are dredged from a waterbody and subsequently processed, they no longer constitute dredged materials. Instead, they have become industrial waste, rock, sand, or other Clean Water Act pollutants regulated under Section 402.

A 1986 Memorandum of Agreement between EPA and the Corps is cited which provides that placer mining wastes are the type of pollutant discharged in liquid, semi-liquid, or suspended form subject to Section 402 as opposed to Section 404. See Memorandum of Agreement Concern Regulation of Discharge of Solid Waste Under the Clean Water Act, 51 Fed. Reg. 8871 (March 14, 1986). See also a 1990 Corps Regulatory Guidance Letter titled Regulation of Waste Disposal from Instream Place Mining, Rgl. 88-10 (July 28, 1990).

The Ninth Circuit held that both federal agencies had taken an official position and made a fair and considered judgment:

. . . based on its substantive expertise, that the operation of a suction dredge results in the discharge of processed wastes, thus requiring Section 402 permits.

As a result, the Ninth Circuit held that the meaning of the Clean Water Act and implementing regulations remain sufficiently ambiguous that deference to the federal agencies’ official joint conclusion is appropriate.

A copy of the Opinion can be downloaded here.