WALDO MINING DISTRICT
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THE CASE AGAINST CLEAN WATER ACT PERMITTING FOR SUCTION DREDGE MINING

Since 2005, Oregon miners have been in court fighting against Oregon Dept. of Environmental Quality's (DEQ) demand that anyone suction dredge mining must obtain a National Pollutant Discharge Elimination System (NPDES) permit issued by DEQ on behalf of the U.S. Environmental Protection Agency (EPA) pursuant to Section 402 of the Clean Water Act (CWA).

WHAT'S SO BAD ABOUT NPDES PERMITTING

Since the 1980's, Oregon DEQ has issued the Suction Dredge Mining Permit (700J, and later 700PM series), in part under State law, and in part through agreement with the U.S. EPA as a "National Pollutant Discharge Elimination System" (NPDES) permit under Section 402 of the Clean Water Act (CWA).

The first 700J permits were all of 3 pages, with the only real restriction being to minimize turbidity if possible. The permit was free for dredges 4" and smaller, covered up to 8" dredges with 40hp engines ($50/yr.), and was good state-wide. The permit was reasonable and workable, and miners did not question it.

However, every time the permit was renewed or replaced (usually every 5 years), more and more restrictions were added, such as "no visible turbidity beyond 300 feet", must be site specific, does not cover the larger dredges, etc.. By the 2000's, the permit had grown from 3 pages to 6-7 pages.

THE CARROT AND THE STICK

No one really challenged DEQ back in the 1980's-90's over the NPDES issue as the permit was originally reasonable. However, NPDES has a provision called the "Anti-Backsliding Provision" which requires that all future permits must be at least as restrictive as the previous permit… never less restrictive; even if a restriction is unfounded. Once it's in the permit, it can never go away, no matter how stupid or prohibitive.

Which brings us to the present with the 2015 700PM permit, now costing a $250 Application Fee and a $250 Annual Fee, has 15 pages of restrictions taking away the 300 foot "mixing zone", large rocks can only be moved "by hand" and must be put back to where they came from. It has gotten to the point now that even if you are not affected by SB 3 (not in Essential Salmon Habitat) and can obtain a permit, it still won't let you prospect, explore, or mine in any meaningful way.

As the 700PM is a General Permit now covering specific user identified areas statewide, DEQ says that no exceptions or variances are allowed. For example: since the 1980's, all permits have had the requirement to follow the "In Water Work Period" guidelines set by ODFW to protect fish eggs. However, previous permits had a provision that if the permittee obtained a waiver or variance from ODFW (to work outside the Work Window) DEQ would honor it. Not anymore; no exceptions!

IT'S THE WRONG AUTHORITY,
UNDER THE WRONG LAW,
AND THUS, *IS WRONG!*

Pursuant to the CWA, a permit from either the EPA or the Army Corps of Engineers is required for the discharge of a pollutant into waters of the United States. Since enactment of the CWA in the 1970's, the phrase "discharge of a pollutant" has been defined by the U.S. Supreme Court (SCOTUS) to mean ***"the addition of a pollutant from the outside world."***
Clearly, those that suction dredge know that suction dredges do not "add" anything to the water. In our view, CWA permitting is unwarranted, unnecessary, and unlawful.

THE LITIGATION

In 2005, Eastern Oregon Mining Association (EOMA), etal filed a challenge to the new 2005 DEQ permit in the Oregon Court of Appeals. Environmental groups got involved and managed to delay a decision until December of 2009. In its 2009 decision, the Oregon court ruled that not only did the CWA apply, but that *both* CWA permits were required (i.e; an Army Corps permit under Sec. 404 is required for the discharge of rocks, gravel and sand that settled immediately; and an EPA NPDES permit is required for the discharge of "turbid wastewater" . . . even though the CWA and SCOTUS says for a single discharge, one permit or the other is required, never both!

The 2009 decision by the Oregon Court of Appeals was appealed to the Oregon Supreme Court; but just weeks before a hearing was held, the 2005 issued permit expired and was replaced with the 2010 permit… and the Miners case was declared moot.

In 2010, EOMA/WMD had to start all over with a new challenge to the new 2010 permit; but because DEQ issued the 2010 permit as an "order," rather than a "rule," we were forced to begin in the District Court of Marion County, where we lost. Only then could we appeal to the Oregon Court of Appeals, who in 2015 once again ruled us moot as the 2010 permit had expired.

We appealed the mootness ruling to the Oregon Supreme Court, who ruled that our case was likely to evade review because DEQ could replace the permit anytime they wanted, and that therefore we were not moot and that the Court of Appeals had to hear our case.

A kangaroo court was held, and the Court of Appeals refused to over-turn their earlier (2009) decision. That decision was then appealed to the Oregon Supreme Court, and on May 10, 2018, a hearing was held in that high court.

OREGON SUPREME COURT DECISION

AFTER A WAIT OF OVER 14 MONTHS, ON JULY 25, 2019, THE OREGON SUPREME COURT ISSUED THEIR DECISION; 6-1 AGAINST THE MINERS, THE RULE OF LAW, AND ALL COMMON SENSE. A complete copy of that Decision can be found on the Waldo Mining District website at: www.waldominingdistrict.org.

(The Decision begins on Page 313 of the Record with the Majority Opinion running to Page 356. The single Dissent Opinion begins on Page 356 and is well worth the read.)

U.S. SUPREME COURT APPEAL

On December 20, 2019, Pacific Legal Foundation (PLF) filed a **PETITION FOR WRIT OF CERTIORARI** on behalf of the Petitioners EOMA/WMD etal, **in the United States Supreme Court.**

Focusing on one main argument (i.e.; THERE IS NO ADDITION), the Petitioners argue that no CWA permit is required for suction dredge mining.

The Petition was docketed (officially accepted) by the high court January 3, 2020, and a period of up to 30 days was allowed for amicus curiae (friend of the court) briefs to be filed. A rare coalition of over 11 western mining organizations and interested parties (including two "counties") have banded together and have hired a highly experienced law firm to write the amicus brief which is expected to be filed by the Feb. 3 deadline.

For some of us, this has been a 16+ year battle to get justice. The U.S. Supreme Court is our last hope short of obtaining new legislation from Congress.

Our biggest hurdle is to convince the U.S. Supreme Court to hear our case (unlike the lower courts, the U.S. Supreme Court picks & chooses which cases they hear… and by far the majority of cases presented are denied a hearing). However, with the plain language of the law, the CWA, and several recent Supreme Court decisions, and considering that suction dredges absolutely and provably do not add pollutants (or anything else); the case "should be" a slam-dunk.

The outcome of this case will directly affect all future suction dredge mining in all states where the U.S. Mining Law of 1872 is still in effect.

Copies of all court documents and more can be found on the Waldo Mining District website at:

www.waldominingdistrict.org

Submitted by:

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