



UNITED STATES ENVIRONMENTAL PROTECTION  
AGENCY  
REGION 10

1200 Sixth Avenue, Suite 155  
Seattle, WA 98101-3188

WATER  
DIVISION

July 24, 2019

Reply to

Attn of: 19-H16

CERTIFIED MAIL- RETURN RECEIPT REQUESTED

Mr. Donald G. Smith  
PO Box 144  
Riggins, Idaho 83549-0144

Dear Mr. Smith:

The EPA is in receipt of the letter that the Army Corps of Engineers recently sent to you. The EPA was pleased when you reconfigured your dredge operation to comport with the requirements of the General Permit. As stated in the letter, the Corps has also shared your letter to them saying you would not apply for coverage under the General Permit suction dredge operation on the Salmon River.

I would like to take this opportunity to address the concerns raised in your June 6, 2019, letter to the Corps regarding the EPA regulation of suction dredging. These include OMB approval of the NOI Information Sheet and incidental fallback.

The General Permit regulations at 40 CFR 122.28(b)(2)(ii) require that:

The contents of the notice of intent shall be specified in the general permit and shall require the submission of information necessary for adequate program implementation, including at a minimum, the legal name and address of the owner or operator, the facility name and address, type of facility or discharges, and the receiving stream(s)

The EPA listed the information required for the NOI in Permit Part I.G.1. Notification Requirements (<https://www.epa.gov/sites/production/files/2018-05/documents/r10-npdes-idaho-suction-dredge-gp-idg370000-final-permit-2018.pdf>). This Part also states that the information is presented in table format in Appendix A. The Fact Sheet (<https://www.epa.gov/sites/production/files/2017-12/documents/r10-npdes-idaho-suction-dredge-gp-idg370000-fact-sheet-2017.pdf>) which provided the technical basis for the conditions in the permit further explained the relationship between the NOI requirements and Appendix A in Section V.:

EPA will accept the above information in any format as long as it contains a signature above the required certification language. Appendix A, which contains the above information in table format, has been provided for convenience, but applicants are not required to use it. NOIs are not considered Information Collection Requests (ICRs) and do not have to be cleared with OMB. The use of NOIs was incorporated in the generic ICR submission covering the NPDES permit program.

Therefore, the NOI information sheet is not a form so an OMB number is not required.

The EPA explained in the Response to Comments (<https://www.epa.gov/sites/production/files/2018-05/documents/r10-npdes-idaho-suction-dredge-gp-idg370000-rtc-2018.pdf>) on the 2018 reissuance of the Small Suction Dredge General Permit for Idaho that the discharge from a suction dredge is not incidental fallback. The Response to Comment #5 states:

Understandably, commenters often confuse the “discharge of dredged material” with the “discharge of pollutant”. Discharges of dredged or fill material are authorized by the U.S. Army



Corps of Engineers (Corps) under CWA § 404 and the Rivers and Harbors Act § 10. Discharges of all other pollutants are authorized by the EPA through the NPDES program under CWA § 402. 33 U.S.C. §§ 1311(a) requires compliance with CWA § 402, in addition to requiring compliance with CWA § 404.

CWA § 404 authorization is not required for “incidental fallback,” which is “the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal.” 40 CFR 232.2(3). The discharge from a sluice box is not incidental fallback because it is the discrete act of dumping leftover material into the stream after it has been processed. *Nat’l Mining Ass’n v. U.S. Army Corps of Engineers*, 145 F.3d 1339-1404-06 (D.C. Cir. 1998).

As explained above and in response to Comment #1, 33 U.S.C. § 1311(a), in addition to requiring compliance with CWA § 404, requires compliance with CWA § 402. The EPA is required to regulate the discharge of a pollutant from a point source through an NPDES permit. There is no exception for de minimus discharges either in statute or EPA’s implementing regulations.

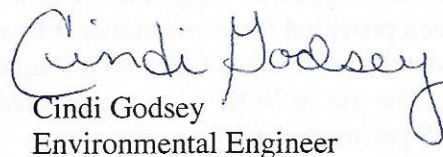
While the EPA is not in the position to speak to the letter referenced by the commenter, EPA notes that this letter predates the Corps’ current definition of incidental fallback, which was developed in response to *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998). In that case, the D.C. Circuit held that incidental fallback is not subject to regulation under the CWA. In so holding, the court distinguished placer mining as “the discrete act of dumping leftover material into the stream after it has been processed,” which is subject to regulation pursuant to *Rybachek*, from incidental fallback, which is not. *Id.* at 1406.

After the reissuance of the 2018 General Permit, on September 27, 2018, an EPA Administrative Law Judge issued an *Order on Complainant’s Motion for Accelerated Decision* in the matter of Dave Erlanson, Sr. (Docket No. CWA-10-2016-0109). This Order is the most recent and pertinent to your operation since it specifically addresses the discharge from a small suction dredge in the South Fork Clearwater River in Idaho. The Order addressed the argument that the discharge from a suction dredge is incidental fallback and determined that it is not. I have enclosed a copy of the Order for your information.

In permitting suction dredge operations, especially in waters where Endangered Species are of concern, as is the case in the Salmon River, the federal agencies attempt to work together so any required ESA consultations with the USFWS and NMFS are done concurrently and address the project as a whole.

Thank you for your time and attention. If you have questions regarding the content of this letter, please feel free to email or call me at godsey.cindi@epa.gov or (206) 553-1676.

Sincerely,

  
Cindi Godsey  
Environmental Engineer

Enclosure

cc: *via electronic mail*  
Duane Mitchell, Army Corps of Engineers, Walla Walla District  
Kat Sarensen, US Fish and Wildlife Service  
David Arthaud, National Marine Fisheries Service  
Aaron Golart, Idaho Department of Water Resources