

US Army Corps of Engineers - 1994

In 1993 the U.S. Army Corps of Engineers (Corps) and U.S. Environmental Protection Agency (EPA) were subject to a court decision that forced them to issue new rules regarding suction dredging in Alaska. A challenge to this decision has resulted in a new decision of May 1999 that the Corps, at least, was not required to regulate suction dredging in most cases, and so this issue is under review. Unfortunately, the same decision states that because of another court decision, *Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990) resuspension of materials by placer miners as part of gold extraction operations is an "addition of a pollutant" under the CWA (Clean Water Act) subject to EPA's regulatory authority. The main reason this SPECIAL PUBLIC NOTICE 94-10 is presented here is to show the Corps finding of de minimis (i.e., inconsequential) effects on aquatic resources for suction dredges with nozzle openings of 4 inches or less. This is an official recognition of what suction dredgers have long claimed; that below a certain size, the effects of suction dredging are so small and so short-term as to not warrant the regulations being imposed in many cases. The U.S. Environmental Protection Agency (EPA), in particular, has ignored this concept, although numerous studies, including the EPA's own 1999 study of suction dredging, repeatedly and consistently support the Corps finding de minimis effects. The reports consistently find no actual impact of consequence on the environment, and so almost always fall back to the position that "potential for impact exists".

However, showing potential for harm, and showing that actual harm exists are two different things, and the studies to date have not shown any actual effect on the environment by suction dredging except for those that are short-term and localized in nature. Current regulatory efforts are proceeding despite this lack of evidence showing that harm to the environment is taking place. The regulatory agencies should be consistently and continually challenged by the dredging community to produce sound, scientific evidence that support their proposed regulations. To regulate against a "potential for harm", where none has been shown to exist, is unjustifiable and must be challenged.

Public Notice
US Army Corps of Engineers

Alaska District Regulatory Branch
Post Office Box 898
Anchorage, Alaska 99506-0898

Date: 13 SEPTEMBER 1994
Identification No.: SPN 9410
In reply refer to above Identification Number

SPECIAL PUBLIC NOTICE 94-10

APPLICATION OF THE "EXCAVATION RULE" TO RECREATIONAL PLACER MINING ACTIVITIES IN ALASKA FOR THE PURPOSE OF THE CORPS' SECTION 404 REGULATORY PROGRAM

Changes to regulations of the U.S. Army Corps of Engineers (Corps) and U.S. Environmental Protection Agency published August 25, 1993, in the FEDERAL REGISTER (FR) at 58 FR 45008 are affecting regulation of recreational placer mining activities in Alaska. The new regulations, referred to as the "excavation rule" became effective on September 24, 1993, and were described in a joint Alaska District Corps the United States and Environmental Protection Agency, Region X, Special Public Notice (93-15) dated September 17, 1993.

The Department of the Army (DA) exerts regulatory jurisdiction over waters of the United States, which includes wetlands, pursuant to Section 404 of the Clean Water Act. For regulatory purposes, the Corps

defines waters of the United States as those waters below the high tide line of any tidal water body (ocean, estuary, etc.), and those waters below the ordinary high water mark of non-tidal water bodies (creeks, rivers, ponds, lakes, etc.). Wetlands are defined as those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. The law requires that any individual or entity that proposes to discharge dredged and/or fill material into or excavate material from wetlands or other waters of the United States must obtain a DA permit (sometimes called "404 permits") prior to conducting the work. Under the new regulations, this means that recreational placer mining by means of suction dredging, hand mining, or other excavation in non-navigable waters now requires DA authorization.

The preamble for the new regulations stated that some excavation activities may generally (except in extraordinary situations) have de minimis (i.e., inconsequential) effects on aquatic resources including their associated functions and values and therefore would not degrade or destroy waters of the United States and would not be regulated.

The Alaska District Corps has reviewed recreational placer mining using suction dredges and hand mining (pick and shovel, panning, etc.) activities in light of the new "excavation rule" and has determined, except in extraordinary circumstances, that recreational suction dredge mining using an intake nozzle size equal to or less than 4 inches and hand mining in waters of the United States would have de minimis effects on the aquatic environment, provided the State of Alaska Department of Fish and Game requirements for fish-bearing waters are met. Therefore, these activities, as described above, will generally not be regulated by the Corps and no permit is required. However, the Alaska District Corps retains the discretion to require authorization on a case-by-case basis. (emphasis added)

The fact that no authorization or permit is required from the Corps for recreational placer mining, as described above, does not relieve any miner from the necessity to obtain any other permits or authorizations required by other entities. Consequently, the Alaska Department of Fish and Game and any applicable land management agency (Bureau of Land Management, National Park Service, U.S. Forest Service, Alaska Department of Natural Resources, etc.) should be contacted prior to conducting recreational placer mining to identify any possible requirements or restrictions on mining activities.

OPERATION OF LARGER SUCTION DREDGES

Operation of suction dredges with an intake nozzle size greater than 4 inches generally has more than de minimis effects on the aquatic environment and therefore requires authorization from the Corps under Section 404 of the Clean Water Act. At the current time, an individual DA permit is required for these activities, unless the mining is "ongoing" and a request for the operation to be grandfathered was received by August 25, 1994 (as described in the excavation rule published on August 25, 1993)

GRANDFATHER PROVISION OF THE "EXCAVATION RULE". Section 404 authorization is not required for discharges of dredged material associated with ditching, channelization, or other excavation activities in waters of the United States, including wetlands, where such discharges were not previously regulated and where such activities had commenced or were under contract to commence prior to August 25, 1993, and where such activities were completed before August 25, 1994. The Corps retains the authority to grant, on a case-by-case basis, an extension of this 12-month grandfather provision subject to the following conditions:

1. The excavation activity is of the type that occurs on an "ongoing" basis, either periodic or continuously (e.g., mining operations);
2. The discharger had submitted to the Corps, within the 12-month period between August 25, 1993, and August 25, 1994, an individual permit application seeking a Section 404 authorization for such excavation activity; and
3. In no event can the grandfather provision be extended beyond August 25, 1996.

****Note:** The deadline for filing an extension for an operation under the grandfather provision of the excavation rule was August 25, 1994. All rights under the grandfather provision were forfeited if an application was not submitted by that date. The Alaska District Corps has accepted the 1994 State of Alaska Annual Placer Mining Applications (APMAs) on file for the purpose of reserving grandfathering rights in accordance with the excavation rule. Any placer miner conducting excavation activities that have not been determined to have de minimis effects, as described above, must contact us at the address below and specify in writing those excavation activities in the 1994 APMA that they wish to continue as an "ongoing" operation. Interested parties should contact us by March 31, 1995, if they intend to do so.

As stated, currently all suction dredge operations, with an intake nozzle diameter greater than 4 inches, that do not qualify for or have forfeited their grandfather rights, require Corps authorization before proceeding. The Alaska District is in the process of modifying its placer mining general permit (GP 88-02M) to include suction dredge mining operations. At this time, we have not determined if there will be a size limitation to suction dredges that would be covered under the modified placer mining general permit. However, the Corps anticipates that many suction dredge mining operations may qualify for the modified general permit. A Special Public Notice advertising and requesting comments on the proposed placer mining general permit (GP 88-02M) changes will be issued in the near future.

FOR FURTHER INFORMATION

Additional information may be obtained by contacting the Corps at (907) 753-2712, or toll-free in Alaska at (800) 478-2712, or at the following address:

U.S. Army Corps of Engineers
Alaska District Regulatory Branch
Post Office Box 898
Anchorage, Alaska 99506-0898

BY AUTHORITY OF THE SECRETARY OF THE ARMY:

Date: 13 Sep 94

Peter A. Topp
Colonel, Corps of Engineers
District Engineer

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