

AUG 16 2019

BOISE, IDAHO

To Eric Wilson-Hearing facilitator for Idaho Dept. of Lands
Lincoln Auditorium West Wing Capitol Building Boise, Idaho

August 16, 2019

My interest in the rules are in the riverbed mineral lease program and how the Idaho Department of Water Resources (IDWR) has interpreted some of the rules to veto the rules that are necessary for the economical extraction of minerals on State lands.

As a lessee with the State of Idaho Department of Lands (IDL), it would be advantageous for me to exercise the riverbed mineral lease to its full potential. If IDL rules are utilized, gold production from state trust lands could be significantly increased to the benefit of myself as the lessee and to the state as the lessor. As gold production increases the 5% royalties also increases to the benefit of all Idahoans.

IDAPA rule 20.03.01-012-04 has the component in part (b) to force a lessee into IDWR rules by including that a dredge exploration and mining operation shall comply with the Idaho Stream Channel Protection Act, Title 42, Chapter 38, Idaho Code, and applicable rules as promulgated and administered by Idaho Department of Water Resources.

1. While I acknowledge that Idaho Statute Title 47 Chapter 703A part (6)(a) includes this statement, "All suction dredging on state lands must follow the requirements of the stream protection act, [chapter 38, title 42](#), Idaho Code." It doesn't go as far as the IDL rule that requires applicable rules promulgated and administered by IDWR be complied with. This rule opens the door for IDWR to have complete veto power over IDL riverbed mineral lease rules at agency personnel discretion. Any and all rules for IDL riverbed mineral lease operations should be made by IDL. A lessee should never have to deal with two different state agencies with two different sets of rules. IDWR rules are often promulgated by agency personnel using methods that are not recognized by Idaho statutes governing the rule-making process. IDWR places rules on suction dredge miners that are never approved by the legislature because they are never introduced as rules as required by state law. IDWR is known to act in an arbitrary and capricious fashion in their rule-making and therefor their rules should be considered ultra vires. (Acting or done beyond one's legal power or authority.)
2. Revisiting Title 42 Chapter 38, Idaho Code, the Idaho Stream Channel Protection Act, and looking at definitions. The word "alter" has a definition. "'Alter' means to obstruct, diminish, destroy, alter, modify, relocate, or change the natural existing shape or direction of water flow of any stream channel within or below the mean high watermark thereof." In most streams and rivers in Idaho, a suction dredge is incapable of altering a stream course. When a suction dredge mining operation encounters bedrock, it goes no further. The water will always be kept in a drainage by the physical barrier of bedrock. Forces of nature may erode bedrock and therefor change river channels permanently, but suction dredging operations will not. The rules should acknowledge this reality that the Idaho Stream Channel Protection Act is the wrong statute for the regulation of suction dredge mining in Idaho.
3. Please consider the applicability of rules found in IDAPA 20.03.01 part 013. Section 06. "Suction Dredges. These rules do not apply to dredging operations in streams or riverbeds using suction dredges with an intake diameter of eight (8) inches or less." That statement is not the entire rule

however, I think this rule is appropriate for the riverbed mineral lease program. The problem is that with all the conflicting rules, this rule is not enforced.

IDAPA rule 20.03.01-013-04 states that these rules do not exempt the permittee from obtaining a stream channel alteration permit if required by the Idaho Dept. of Water Resources. Part 04 does not exempt the suction dredge operations from the riverbed mineral lease or state laws regarding exploration on navigable lakes, and streams in Idaho. To eliminate confusion the rule in part 04 should either be rescinded or clarified to exempt the suction dredge operation rules that are inapplicable in part 06.

IDAPA rule 20.03.01 022 07 should clarify that a suction dredge mining operation is not contemplated in this rule. This is necessary because of the physical impossibility of the suction dredge mining operation having the result of "permanent damage to the stream channel." Any rules that have IDWR as a prerequisite for permitting authority should be scrutinized to exempt all suction dredge mining operations that fit the eight (8) inches or less intake diameter.

IDAPA rule 20.03.01 022 05 should exempt the same category of suction dredge mining operations (intake diameter of eight (8) inches or less) from this rule to prevent IDWR from denying necessary permits. If this action should be insufficient to fix part 07, then part 07 should be amended with the same exemption for suction dredge mining operations. (intake diameter of eight (8) inches or less)

IDAPA rule 20.13.01 060 02 has statutory authorization. Withdrawn lands and water bodies raises concern over whether or not these lands are within the jurisdiction of federal land managers. It is going to be of concern if IDWR uses the rules for making withdrawals unilaterally. Do we rely on the Bureau of Land Management for proper withdrawals? Mineral exploration and location should be going forward on federally managed lands that are more valuable for such mineral deposits. This should be of strategic national interest for economic and military security.

Thank you for allowing my comments today,

Donald G. Smith

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Prove356@frontiernet.net

August 12, 2019

U.S. Environmental Protection Agency
Attn: Chris Hladick, Region 10 Administrator
1200 Sixth Ave., Suite 155
Seattle, WA 98101-3188

RE: Administrative Appeal & Petition for Rulemaking under 5 U.S.C. A. § 553

Dear Administrator Hladick,

I, Donald G. Smith, hereinafter referred to as “Appellant” or “Petitioner,” am in receipt of a July 24, 2019 letter and decision authored by Cindi Godsey (attached) that Appellant’s proposed regulated activities under the authority of the Army Corps. (under section 10 of the Rivers & Harbors Act) may be subject to additional permitting by your agency under section 402 of the Clean Water Act (CWA).

Appellant is very aware of the cases cited by the decision of Cindi Godsey’s July 24, 2019 letter. However, because of the fact the EPA has not addressed the facts and court decisions set forth below, Appellant sets forth and Appeals said decision of the July 24, 2019 letter.

Appellant’s activities do not *add* a pollutant within the meaning of the CWA

It is within the province of the Environmental Protection Agency (EPA), as contemplated by the Clean Water Act (CWA), to impose a duty to apply for a National Pollutant Discharge Elimination System (NPDES) permit, pursuant to the Clean Water Act (CWA), on individuals who are discharging pollutants, given that the primary purpose of the NPDES permitting scheme is to control pollution through regulation of discharges into navigable waters. Clean Water Act, § 402, 33 U.S.C.A. § 1342.

In [*National Pork Producers v. EPA* 635 F.3d 738 \(5th Cir. 2011\)](#) the court held:

...The 2003 Rule’s “duty to apply” required all CAFOs to apply for an NPDES permit or demonstrate that they do not have the potential to discharge. 68 Fed.Reg. at 7266. In *Waterkeeper*, the Second Circuit held that the 2003 Rule’s “duty to apply” was ultra vires because the EPA exceeded its statutory authority. *Waterkeeper*, 399 F.3d at 504. The court explained that the CWA is clear that the EPA can only regulate the discharge of pollutants. To support its interpretation, the Second Circuit examined the text of the Act. The court noted: (1) 33 U.S.C. § 1311(a) of the CWA “provides ... [that] the discharge of any pollutant by any person shall be unlawful,” (2) section 1311(e) of the CWA provides that “[e]ffluent limitations ... shall be applied to all point sources of discharge of pollutants,” and (3) section 1342 of the Act gives “NPDES authorities the power to issue permits authorizing the discharge of any pollutant or combination of pollutants.” *Waterkeeper*, 399 F.3d at 504. Accordingly, the Second Circuit concluded that in the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations for point source

discharges, and no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance. (Emphasis added.)

Id. at 505. The Second Circuit's decision is clear: without a discharge, the EPA has no authority and there can be no duty to apply for a permit. (Note: this holding was multi-circuit, including the 9th Circuit Court of Appeals.)

Specifically, the United States Supreme Court explained:

[T]he National Pollutant Discharge Elimination System [requires] a permit for the “discharge of any pollutant” into the navigable waters of the United States, 33 U.S.C. § 1342(a). The triggering statutory term here is not the word “discharge” alone, but “discharge of a pollutant,” a phrase made narrower by its specific definition requiring an “addition” of a pollutant to the water. *D. Warren Co. v. Maine Bd. of Env'tl. Protection*, 547 U.S. 370, 380–81, 126 S.Ct. 1643, 164 L.Ed.2d 625 (2006).

Appellant acknowledges that much of the reasoning behind the EPA's request for a section 402 permit is to address turbidity stirred up from the act of suction dredging, **not the actual addition prerequisite Congress mandated**. Turbidity from a suction dredge is not a product of an addition, rather, it is the relatively insignificant movement of native substance of local rock, sand and sediment in contrast to that which is carried on at much greater volumes by natural weathering processes every season by acts of God.

To illustrate this point the court in *Froebel v. Mever* 13 F.Supp.2d 843 (E.D. Wisconsin, 1998) held:

...Movement of indigenous sediment through a dam was not a “discharge of a pollutant” that would require National Pollutant Discharge Elimination System (NPDES) permit pursuant to Clean Water Act (CWA). *Federal Water Pollution Control Act, §§ 402, 502(12), as amended, 33 U.S.C.A. §§ 1342, 1362(12).*

The court added:

Redepositing of indigenous sediment caused by state agency's removal of dam did not result in any “discharge of dredged material” that would require permit from Army Corps of Engineers under Clean Water Act (CWA) and either possible version of implementing regulations, even if manner in which dam was removed created a “scouring action” that disturbed sediment and funneled it downstream. *Federal Water Pollution Control Act, § 404(a), as amended, 33 U.S.C.A. § 1344(a); 33 C.F.R. § 323.2(d).*” (Emphasis added)

Unlike the EPA, Appellant does not rely on Dave Erlanson's proceeding by EPA's own administrative law judge, rather, a de nova review proceeding by an Article III Federal District Court judge on appeal from a federal magistrate. The decision in *USA v. Godfrey, Eastern District CA 2:14-cr-00323 JAM* (2015) illustrates that a suction dredge sluice box is not a point source discharge within the meaning of the CWA. The District Court found as a matter of law and fact the following:

Defendant is alleged to have violated 36 C.F.R. § 261.11, which prohibits “[p]lacing in or near a stream, lake, or other water any substance which does or may pollute a stream, lake, or other water[.]” 36 C.F.R. § 261.11(c). Defendant argues that his conviction on this count must be

reversed because “[p]utting materials from the creek back into the creek does not constitute the ‘placing’ of a ‘pollutant’ into the creek.” (Opening Brief at 17.)

Defendant cites language from a Supreme Court case concerning the Clean Water Act: “If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not ‘added’ soup or anything else to the pot.” Opening Brief at 16-17 (citing *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 110 (2004)). Defendant contends that the evidence offered at trial shows that he “did not introduce pollutants such as chemicals, oils, outside dirt, other liquids, or trash into Poorman Creek.”

...The legal issue of whether the release of materials found within the high-water mark of Poorman Creek constitutes “placing a pollutant” into the creek remains. As this is an issue of statutory construction, the Court’s review is de novo. United States v. Montes-Ruiz, 745 F.3d 1286, 1289 (9th Cir.2014). (*Emphasis added.*)

As an initial matter, the structure of 36 C.F.R. § 261.11 is informative. The subsection is labeled “Sanitation” and 36 C.F.R. § 261.11(c) is surrounded by prohibitions on (1) depositing in a toilet or plumbing fixture a substance which could interfere with its operation; (2) leaving refuse, debris, or litter in an unsanitary condition; 3) failing to properly dispose of all garbage; and (4) improperly dumping refuse, debris, trash, or litter. 36 C.F.R. § 261.11(a)-(e). Thus, the provisions surrounding 36 C.F.R. § 261.11(c) lend support to Defendant’s argument that “any substance which does or may pollute” must be a foreign substance, not a substance which is already found within the high-water mark of the river. (*Emphasis added.*)

Although “pollute” is not defined within Part 261, the dictionary definition of “pollute” is instructive. See *Phillips v. AWH Corp.*, 415 F.3d 1303, 1319 (*Fed. Cir. 2005*) (noting that “dictionaries, encyclopedias and treatises are particularly useful resources to assist the court in determining the ordinary and customary meanings of [relevant] terms”). The Merriam-Webster Dictionary offers two definitions of “pollute:” (1) “to make physically impure or unclean;” and (2) “to contaminate (an environment) especially with man-made waste.” As with the structure of the regulation, these definitions suggest that “placing any substance which does or may pollute” necessarily entails the introduction of a foreign substance, possibly even a man-made substance. (*Emphasis added.*)

Returning to the Supreme Court’s “one ladle of soup” example, the Court agrees that the present case is not closely analogous. *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 110 (2004)). Defendant did not merely remove water from one location in Poorman Creek and return that same water to another location in Poorman Creek. Rather, he diverted the water through his mining operation, and returned it, along with “sands, silts and clays and bottom deposits” to Poorman Creek, downstream of his operation. However, as noted by the Magistrate Judge and as emphasized now by Defendant, the entire mining operation occurred beneath the high-water mark of Poorman Creek. Importantly, there is no evidence that any foreign substance (such as a chemical) was introduced to Poorman Creek. See RT2 at 2-44 – 2-45 (Note: the Magistrate Judge, noting that “there wasn’t any evidence that I’m aware of that any of those broken up rocks or chemicals ended up in the creek”); see also RT1 at 182 (Testimony of Huggins, noting that “chemicals getting into the water” was “not the major concern in this case”).

In this sense, a more apt analogy may be that of a bowl of cereal. At its low point, Poorman Creek is much like a bowl of Cheerios with very little milk in it, with a number of Cheerios pieces “stranded” up on the sides of the bowl. Filling the bowl with milk releases those “stranded” Cheerios pieces back into the milk, but nothing foreign has been added to the bowl. Similarly, Defendant’s operation merely released sediment that was already part of the creek-bed back into the creek. (*Emphasis added.*)

...the Government’s evidence was insufficient to sustain Defendant’s conviction under 36 C.F.R. § 261.11 for polluting the creek. Accordingly, Defendant’s conviction on Count 5 is reversed.” (*Emphasis added*)

Appellant believes the analysis of the facts and law by District Judge John Mendez of the Eastern District of California in *U.S. v. Godfrey, supra* is directly on point controlling the important factors of CWA law and its application in relation to Appellant’s situation. Appellant is not legally bound to submit a 402 EPA permit when there is no “addition” to report, nor is he bound to report that which does not exist in violation of the basic tenets of the body of law on the maxims of impossibilities—the law does not require the impossible.

Appellant is informed and believes that the EPA is outside its authority regulating non-addition producing activities such as suction dredging. This is misplaced and in contradiction of the Congressional mandate of the CWA, i.e., to only regulate “additions” and foreign introduced substances.

Appellant wishes to point out the fact that if all materials coming off a suction dredge are to be deemed a point source pollutant rather than reclamation to remove heavy metal toxins would be made a legal impossibility, creating no incentive for reclamation on water-covered lands of the United States nor improving spawning habitat for spawning salmon. See:

<https://www.publiclandsforthepeople.org/reclaiming-our-waterways>

Finally, Appellant is informed and believes that the EPA may have already violated the Administrative Procedures Act (APA) under 5 U.S.C.A. 553 by identifying and singling out a suction dredge as a point source without a proper rulemaking in the Federal Register with notice to the public. This places Appellant at a disadvantage to address the science and expertise in finding that a suction dredge is, or is not, a point source or a cause of pollution. This also places the July 24th, 2019 decision by Cindi Godsey in a position that a future court may conclude the EPA is acting in an arbitrary and capricious fashion for failure to comply with the APA.

Therefore, pursuant to the holding in [*Sackett v. United States Environmental Protection Agency, 576 U.S. 120 \(2015\)*](#), Appellant requests that the decision made by Mrs. Godsey be rescinded under proceedings protected by the Administrative Procedures Act with a decision informing appellant that he is free to pursue permitting exclusively under the Army Corp and section 10 of the Rivers & Harbors Act respectively without the need for a 402 CWA permit from the EPA.

Request for Rulemaking under 5 U.S.C.A. § 553

Don G. Smith, hereinafter referred to as “Petitioner,” requests that pursuant to 5 U.S.C.A § 553(e) that the EPA and the Army Corp jointly promulgate regulations clarifying that suction dredges do not as a matter of practice constitute a point source discharge of a pollutant namely because they *do not add a pollutant* within the meaning of the CWA. The EPA strictly regulates activities that add pollutants to the nation’s navigable waterways but exempts those activities (non-additions) where it has no expressed or implied jurisdiction from Congress.

Petitioner wishes to point out the fact that if all materials coming off a suction dredge are to be deemed a point source pollutant rather than reclamation to remove heavy metal toxins would be made a legal impossibility, creating no incentive for reclamation on water-covered lands of the United States nor improving spawning habitat for spawning salmon. See:

<https://www.publiclandsforthepeople.org/reclaiming-our-waterways/>

“[A Federal Strategy to Ensure Secure and Reliable Supplies of Critical Minerals](#)” has now been released by an interagency report. This strategy was set in motion by President Trump’s Executive Order 13817. Call to action item #5.16 states:

5.16 Evaluate Sections 404 and 408 of the Clean Water Act and Sections 10 and 14 of the Rivers and Harbors Act and develop recommendations to streamline and improve the permitting process. (DOD [USACE]; 2-4 years)

This would be an ideal time to make Appellant’s recommendations into a clarified rulemaking.

This rulemaking should make consistent that which has been found by numerous courts in the last 20 years (partially cited above) that not all activities such as sluicing and suction dredging constitute a regulatable event subject to CWA permitting. It would also provide regulatory certainty to the reclamation and suction dredge mining industry of the United States.

Respectfully submitted,



Donald G. Smith

Enclosure

Cc: Via electronic mail

Duane Mitchell, Army Corps of Engineers, Walla Walla District

Kat Sarensen, U.S. Fish & Wildlife Service

David Arthaud, National Marine Fisheries Service

Aaron Golart, IDWR

Andrew R. Wheeler, EPA Administrator Washington D.C. c/o Cathy Milbourne

Public Lands for the People c/o Clark Pearson

Scott Harn, ICMJs Prospecting and Mining Journal

From: [Eric Wilson](#)
To: [Kourtney Romine](#); [Amy Johnson](#)
Subject: FW: EPA letter to Smith dated July 24, 2019
Date: Monday, August 19, 2019 01:14:57 PM
Attachments: [Scan0027.pdf](#)

Please attach to Mr. Smith's other written comments from Friday. Thank you.

Eric Wilson
Resource Protection and Assistance Bureau Chief

From: prove356@frontiernet.net <prove356@frontiernet.net>
Sent: Friday, August 16, 2019 9:00 PM
To: Eric Wilson <EWilson@idl.idaho.gov>
Subject: EPA letter to Smith dated July 24, 2019

Eric,
I am forwarding a letter that was attached to my appeal and petition that was sent certified mail to the Region 10 U.S. EPA Administrator Chris Hladick.

This letter is also the decision that I have appealed.

Please enter this into the official comments for this rule making period.

Thank you,
Don Smith

please see attached;



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.

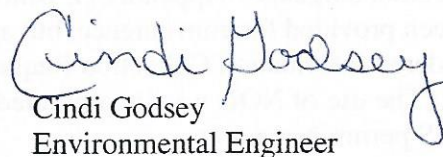
While the EPA is not in the position to speak to the letter referenced by the commenter, EPA notes that this letter predates the Corps’ current definition of incidental fallback, which was developed in response to *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 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