To the honorable members of this Natural Resources Interim Committee:

My first battle in suction dredge mining came in the year 2000, the last year of the Clinton Administration. Early in the year the National Marine Fisheries Service shut down the Salmon River to suction dredge mining. Before the season opened, the State of Idaho got us back in the water. The new program included consultations and we had to declare where each suction dredge miner would be operating. This was the beginning of the "Letter Permit."

The consultations didn't last very long and one meeting that we had with the fisheries people is worth mentioning. The biologists were concerned about us working in an eddy and we informed them that we didn't intend to work in that eddy. They said that the little salmon would need that eddy to rest in as they swam up the river. We informed them that the little salmon don't swim up the river, but instead they are carried to the ocean by high water. The biologists didn't acknowledge that we had said anything at all and the next year the river was in one of the biggest flood stages that I can remember. We didn't have any consultations after that year.

We did meet with the staff of Idaho Department of Water Resources annually with the "Letter Permit," but eventually we went back to a more open system. We would tell them where we wanted to work our dredges and they wanted us to let them know at the end of the season if we had worked anywhere else.

In February of 2012, I filed an exploration/location with the Idaho Department of Lands to lease a ½ mile of Salmon River riverbed.

The U.S. EPA opened a 30 day comment period for making the rule National Pollution Discharge Elimination System General Permit for

Small Scale Suction Dredge Mining in Idaho in the spring of 2012. When we made our comments we made it clear that we wanted a public hearing. I included in my comments that I wasn't operating a municipal sewer treatment plant or manufacturing with chemicals that need treatment, I therefore had no need of a NPDES permit.

In the summer of 2012, after I began my suction dredge mining operations the EPA notified all of the people who had commented on the NPDES that they would not hold public hearings. They chose to go ahead with the final rule. I actually thought that if they didn't hold hearings then we could make them start over and redo it because The Administrative Procedure Act codifies the comment and public hearings process.

The Administrative Procedure Act (APA), Pub. L. 79-404. 60 Stat. 237, enacted June 11, 1946, is the United States federal statute that governs the way in which administrative agencies of the federal government of the United States may propose and establish regulations. The Administrative Procedure Act also sets up a process for the United States federal courts to directly review agency decisions. It is one of the most important pieces of United States Administrative Law.

The New Deal Legislation from the Great Depression Era caused the U.S. Congress to be concerned with the expanded powers of the federal agencies. World War Two interrupted the process of an exhaustive investigation into the development of rules to guide the rule-makers.

Two quotes stand out from the work of Professor George Shepard as he discussed the political atmosphere in which the Administrative Procedure Act was passed. In his 1996 review Shepard claimed that opponents and supporters fought over passage of the Administrative Procedure Act "in a pitched political battle for the life of the New Deal itself." The result is said to be a legislative balance in the Administrative

Procedure Act expressing "the nation's decision to permit extensive government, but to avoid dictatorship and central planning."

It has been said that President Franklin Delano Roosevelt commented that the practice of creating agencies with the authority to perform both legislative and judicial work "threatens to develop a fourth branch of government for which there is no section in the Constitution."

The first rule in rule-making is that the rule be science based. To date the only science that the EPA can come up with is that the suction dredge miner "could affect" listed species. My research has concluded that the Endangered Species Act section 7. Consultations should have been done by the EPA before the proposed rule went forward. I have seen the EPA work in total disregard for administrative law and the Clean Water Act.

I will read a summary decision from a court case known as Tullock 1.

American Mining Congress, et al., Plaintiffs, V. United States Army Corps of Engineers, et al., Defendants and National Wildlife Federation, et al., Defendants-Intervenors.
Civil Action No. 93-1754 SSH.
United States District Court,
District of Columbia.
January 23, 1997.

Mining organization and others sued Army Corps of Engineers and environmental organizations, challenging Tullock rule that incidental fallback that accompanies dredging is "discharge" within Clean Water Act permitting provision for discharge of dredge or fill material. Motions for summary judgment were brought. The District Court, Stanley S. Harris, J., held that Tullock rule exceeded scope of governmental agencie's statutory authority, was invalid, and was no

more to be applied or enforced by Army Corps of Engineers or Environmental Protection Agency.

This was also a clear-cut win for the suction dredge miner in Idaho because the outflow from an operating suction dredge is actually less disturbing to aquatic habitats than incidental fallback. The agencies made the rule Tullock 2 next and the the industry sued, and the courts sided with industry again, and ruled that Tullock 2 was the same as Tullock 1.
The rule NPDES for Small Scale Suction Dredge Mining in Idaho is the re-written Tullock 1 rule which has previously been struck down at least two times.

Words have meaning;
Under Section 402 of the Clean Water Act, an NPDES permit is required for:

1. The discharge (i.e.; "addition") of...
2. ...a pollutant...
3. ...from a point source...
4. ...into waters of the United States.

The Courts have ruled that all four of these criteria must be met before NPDES permitting is required.
The Courts have further ruled that "addition" means "from the outside world", i.e.; adding something to the water that wasn't already in the water, such as materials from shore.

Judge Laurence Silberman presided over some of the cases that are relevant to this issue and provided a standard in which we can determine what deposits are regulable and what is incidental fallback. Under that standard, two primary factors should be considered:

1. The time the material is held before being dropped back to earth; and;

2. The distance between the place where the material is collected and the place where it is dropped.

The point here is that the suction dredge mining operation is not holding any material other than what we call the "heavies" and everything else is passed through and is dropped in essentially the same place as where it was just mere seconds before. The suction dredge is incapable of anything else.

The State of Alaska is in EPA Region 10 and has NPDES for small scale suction dredge mining. It's my understanding that the placer miners in Alaska were working outside the rivers and putting the tailings into rivers and streams for disposal. The State of Alaska took over this permitting process through their Department of Environmental Quality. There is no corresponding NPDES in Washington State even though it is also in Region 10. Oregon is also in Region 10. and has NPDES for Small Scale Suction Dredge Mining through State DEQ. This program has been contentious since the implementation and is being actively litigated by Oregon miners.

Idaho now has NPDES through EPA Region 10 and is the only State in the Union with this particular permitting scheme.

You may suction dredge mine in Montana, Wyoming, Colorado, Arizona, Nevada, California, and of course Washington State with no NPDES whatsoever.

At one time an EPA employee referenced a case called Karuk tribe v. U.S. Forest Service. This was in response to a question and is supposed to demonstrate precedence has been set in case law.

C. Procedural Background

The Tribe brought suit in federal district court alleging that the Forest Service violated the Endangered Species Act, The National Environmental Policy Act, and the National Forest Management Act when it approved four Notice of Intents to conduct mining in and along the Klamath River in the Happy Camp District.

The Tribe sought declaratory and injunctive relief.
The result of this case is that the U.S. Forest Service must now consult with fisheries before authorizing suction dredge mining in the Klamath District in Northern California.

The Clean Water Act was not mentioned in this case. To make the argument that this is a precedent setting case would be to divulge the thinking of EPA that they needed a reason to bring the Endangered Species Act Section 7. Consultations into Idaho waters.

When the activities of an agency of the federal government may jeopardize the further existence of an endangered species, the agency is required to consult with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, depending on which agency is responsible for listed species.
No real concern for endangered species existed when the NPDES for Small Scale Suction Dredge Mining in Idaho General Permit rule was promulgated, but it would appear that the EPA used the proposal to force their own hand in Endangered Species Act consultations.
Furthermore they went to the fisheries services and asked them "what is easy," and the response from the services was to prohibit suction dredging in the Salmon River and they would provide a favorable "not likely to adversely affect" determination.
Case law supports none of this reasoning by the EPA because, in the Tullock 1 case that I referenced earlier, "agencies cannot require 'project specific evidence' from projects which they have no regulatory authority."

To wrap up this argument, I would like to challenge the jurisdictional authority of the EPA to regulate suction dredge mining in Idaho on the grounds that the activity adds nothing "into" the waters of the U.S.
I want you to be aware of the use of the words "in" and "to" by the EPA where the correct word in The Clean Water Act is "into." I say this

because I am under the impression that this misuse of language is designed to be purposefully misleading and makes the case for EPA to regulate any work that takes place in water.

I will also point out that a common meaning of "dredged spoil" at the time of the passage of the Clean Water Act was from navigational and harbor deepening reclamation dredging as well as excavations for piers and other construction in the nation's rivers. Big Bucket Line dredges are no longer operating in the waters of the U.S.

During the 1972 debates, Senator Ellender stated: "The disposal of dredged material does not involve the introduction of new pollutants; it merely moves the material from one location to another."
The Clean Water Act was passed and signed into law and now I am asking that we respect the Congress's true intent and meaning for waters of the U.S. and reject EPA re-writing the Act for which there is no apparent reason.
Thank you for this opportunity to present a dredge miner's perspective.