No. _____

In The Supreme Court of the United States

SHANNON POE,

Petitioner,

v.

IDAHO CONSERVATION LEAGUE,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Clean Water Act forbids the unpermitted "discharge of any pollutant" into "navigable waters." 33 U.S.C. §§ 1311(a), 1362(11). The Act defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters[.]" *Id.* § 1362(12). This Court has twice held that, as a matter of ordinary meaning, there can be no "addition of any pollutant" unless there is an increase of pollutants to a waterbody. *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109–12 (2004); *Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.*, 568 U.S. 78, 82–84 (2013). In conflict with these decisions, as well as rulings from several courts of appeals, the Ninth Circuit below found "addition" ambiguous, applied *Chevron* deference, and held that Petitioner's small-scale suction dredge mining added pollutants to an Idaho river—even though his mining just temporarily resuspended material in the water column that was already present within the waterbody.

The question presented is:

Whether there is a "discharge of a pollutant" under the Clean Water Act when material already within a regulated waterbody is merely moved or resuspended within that waterbody?

PARTIES TO THE PROCEEDING

Petitioner is Shannon Poe. Respondent is the Idaho Conservation League.

STATEMENT OF RELATED CASES

These proceedings are directly related to the above-captioned case under Rule 14.1(b)(iii):

- *Idaho Conservation League v. Poe*, No. 22-35978, 86 F.4th 1243 (9th Cir.), judgment entered on November 20, 2023;
- *Idaho Conservation League v. Poe*, No. 1:18-cv-353-REB, 2021 WL 2316158 (D. Idaho), judgment entered on June 4, 2021;
- *Idaho Conservation League v. Poe*, No. 1:18-cv-353-REB, 2022 WL 4536465 (D. Idaho), judgment entered on September 28, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Shannon Poe respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's panel opinion is reported at 86 F.4th 1243 and is reproduced in the Appendix beginning at 1a. The United States District Court for the District of Idaho's opinion on remedies is unreported but is available at 2022 WL 4536465 and is reproduced in the Appendix beginning at 21a. The United States District Court for the District of Idaho's opinion on liability is unreported but is available at 2021 WL 2316158 and is reproduced in the Appendix beginning at 61a. The Ninth Circuit's denial of rehearing en banc is unreported but is reproduced in the Appendix beginning at 97a.

JURISDICTION

The Ninth Circuit issued its opinion on November 20, 2023, and denied rehearing en banc on January 11, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AT ISSUE

The Clean Water Act provides:

> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful. **33 U.S.C. § 1311(a)**;
>
> Except as provided in sections 1328 and 1344 of this title, the Administrator may,

after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. **33 U.S.C. § 1342(a)(1)**;

The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. **33 U.S.C. § 1362(6)**;

The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft. **33 U.S.C. § 1362(12)**.

INTRODUCTION

This case presents an intractable conflict among the lower courts, as well as between those courts and this Court, over an important issue of statutory interpretation. The Clean Water Act generally prohibits "the discharge of any pollutant" without obtaining a permit from the Environmental Protection Agency or the Army Corps of Engineers. 33 U.S.C. §§ 1311(a), 1342, 1344. The Act defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12)(A). Thus, under the statute's text, if a person does not add pollutants to a "navigable water," then that person has not discharged a pollutant and need not obtain a federal permit before engaging in an activity within that jurisdictional water.

This Court has twice construed "addition" using the traditional tools of statutory construction, found no ambiguity, and held that there is no discharge of a pollutant when water containing suspended pollutants is moved between different parts of the same waterbody. *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109–12 (2004), and *Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.*, 568 U.S. 78, 82–84 (2013). This is because there can be no "addition" of a pollutant unless there *is an increase in pollutants* to the waterbody. *Id.* at 82. Or, as the Court colorfully put it in both cases, "[i]f 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." *Miccosukee Tribe*, 541 U.S. at 110; *L.A. County*, 568 U.S. at 82–83 (both quoting *Catskill Mountains*

Chapter of Trout Unlimited v. City of New York, 273 F.3d 481, 492 (2d Cir. 2001)).

Despite the Clean Water Act's and this Court's clear direction, the Ninth Circuit below followed a different course, creating a conflict with this Court and deepening a conflict among the courts of appeals over the statute's meaning.

Respondent Idaho Conservation League (ICL) sued Petitioner Shannon Poe under the Act's citizen suit provision, 33 U.S.C. § 1365, alleging that his instream mining activities in an Idaho river resulted in the unlawful discharge of pollutants. Mr. Poe practices a form of placer mining.[1] Instream miners like Mr. Poe use an engine-powered hose to dredge streambed materials—rocks, sand, gravel, or other minerals or metals within a waterbody's streambed—and then run those materials through a sluice box. Dredgers separate and trap the dense gold (and similarly heavy metals, such as mercury) from other streambed materials, remove and keep the heavy metals, and let the remaining materials fall back to the streambed, thus *decreasing* material within the waterbody.

The Ninth Circuit nevertheless upheld summary judgment for ICL. But the panel did not apply this Court's precedents in *Miccosukee Tribe* and *L.A. County*—which established, under the Clean Water Act's ordinary meaning, that before there is an

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[1] Placer mining is, broadly speaking, the extraction of valuable minerals from sediment. *See* Nadia H. Dahab, Note, *Muddying the Waters of Clean Water Act Permitting:* NEDC *Reconsidered*, 90 Or. L. Rev. 335, 338 (2011). The specific type of placer mining in this case is small-scale suction dredge mining.

"addition" of a pollutant, there must be an increase in pollutants to a waterbody. The panel instead relied on lower court precedents predating *Miccosukee Tribe* and *L.A. County*, found the term "addition" ambiguous, and applied *Chevron* deference to hold that merely "resuspending" pollutants (here, the riverbed materials) within a waterbody "may be interpreted to be an addition of a pollutant under the Act." App. 8a–10a (citation omitted).

More still, this Court made it plain last Term that when construing the Clean Water Act, not only should courts start "with the text," they should also consider background clear statement principles grounded in federalism and due process before blessing an agency's interpretation. *Sackett v. EPA*, 598 U.S. 651, 671, 679–81 (2023). Yet here, the Ninth Circuit turned those principles on their head: not only is there no clear statement in the Act supporting the Ninth Circuit's judgment, but the court's ruling also directly contradicts the ordinary meaning of the Act's text.

In diverging from this Court's precedents, the panel also deepened a conflict among the courts of appeals. After briefing was completed below, Mr. Poe alerted the panel to *North Carolina Coastal Fisheries Reform Group v. Capt. Gaston LLC*, 76 F.4th 291 (4th Cir. 2023). In *Gaston*, a unanimous Fourth Circuit panel cited *L.A. County*'s holding and applied the ordinary meaning of "addition" to hold that there was no "discharge of a pollutant" when fishing nets "disturb[ed] the [Pamlico] Sound's floor, causing sediment [rocks and sand] to temporarily suspend in the water." *Id.* at 302. Put differently, there was no "addition" of a pollutant when pollutants (ocean-bed materials) were moved within and resuspended in a

single waterbody. That holding directly conflicts with not only the Ninth Circuit's ruling below, but also with the decisions of other circuits finding "addition" ambiguous.

It is important that this Court resolve these conflicts and provide ordinary citizens with the uniformity and clarity they are entitled to under the law. Time and again, this Court has reaffirmed that lower courts must apply the traditional tools of statutory construction before deferring to the executive branch's legal interpretations. Indeed, even in the age of *Chevron* deference, federal agencies are bound by the law as written by Congress—and lower courts must not reflexively defer to an agency's view of a statute's meaning. When courts do so, they abdicate their judicial duty, flout the Constitution's separation of powers, and deprive litigants of due process.

And nowhere are these first principles more critical than when courts construe the Clean Water Act. The Act is a "potent weapon" imposing "crushing consequences." *Sackett*, 598 U.S. at 660, 671 (citation omitted). Yet since the Act's inception, lower courts have often failed to provide meaningful judicial review over the statute's terms. This in turn has exposed ordinary citizens to evolving, expanding, and uncertain legal rules, the violation of which can lead to ruinous citizen suits, crushing civil penalties, and even criminal prosecution for engaging in everyday conduct.

For these reasons, this Court has consistently taken cases to enforce the Act's textual boundaries, including in *Miccosukee Tribe*, *L.A. County*, and *Sackett*. It is also why this Court granted certiorari

over the "addition" issue in *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810, 814–15 (9th Cir. 2001), *aff'd*, 537 U.S. 99 (2002) (affirmance by an equally divided Court)—a precedent relied on by the Ninth Circuit below, App. 9a–10a. In *Borden Ranch* the Ninth Circuit found "addition" ambiguous and held that a farmer added pollutants to a "navigable water" because he "redeposited" soil by plowing his field. As *Borden Ranch* shows, and this case confirms, the extra-textual rule adopted below and followed by several other circuits—that the Act's "addition of any pollutant" element is ambiguous and can be satisfied by the mere movement, resuspension, or redeposit of material within a regulated waterbody—captures various ordinary and environmentally benign activities.

Because of Justice Kennedy's recusal in *Borden Ranch*, this Court did not resolve the question presented. This case is a good vehicle for the Court to finally do so, provide the regulated public with clarity, and ensure that the lower courts apply the law as written by Congress. Certiorari should be granted.

STATEMENT OF THE CASE

A. The Clean Water Act

1. Congress enacted the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To do so, the Act makes illegal, unless otherwise permitted, the "discharge of any pollutant by any person." *Id.* § 1311(a). The statute defines "pollutant" as, among other things, "dredged spoil," "rock," "sand," and "cellar dirt" that is "discharged into water." *Id.* § 1362(6). The Act then defines "discharge

of a pollutant" as "any addition of any pollutant to navigable waters from any point source," *id.* § 1362(12)(A), but it does not define "addition."

The statute divides regulatory authority among federal agencies and the states. Nonexempt discharges to regulated waters (other than those of dredged or fill material, which the Army Corps of Engineers regulates, *see id.* § 1344) require a permit from EPA (commonly called a National Pollutant Discharge Elimination System (NPDES) permit). *Id.* § 1342(a). This permitting authority may be delegated to the states, territories, and Indian tribes.[2] *See* 33 U.S.C. §§ 1342(b), 1344(g), 1362(3), 1377(e). The Act also delegates enforcement authority to private parties: "any citizen" may bring a civil action against any person who is alleged "to be in violation" of specified provisions of the Act, including its NPDES permitting requirement. *See id.* § 1365(a).

2. To prove a violation of the Act, would-be enforcers have the burden to establish five elements: (1) a "pollutant" must be (2) "discharged—there must be an addition of a pollutant—(3) to "navigable waters" (4) from (5) a "point source." *See Comm. to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 308 (9th Cir. 1993) (citing *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982)).

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[2] At the time of the alleged violations at issue here, EPA had not delegated federal NPDES permitting power over suction dredge mining to Idaho but has since done so. *See* EPA, NPDES General Permit for Small Suction Dredge Placer Miners in Idaho, https://www.epa.gov/npdes-permits/idaho-npdes-program-authorization.

If these elements are not met, then a person is not subject to the Act.

3. If a person subject to the Act discharges pollutants without a required permit or violates permit conditions, he risks cease-and-desist orders, compliance orders, administrative penalties, significant civil penalties and injunctions, and criminal liability for even negligent violations. *See* 33 U.S.C. § 1319(a)–(d); 40 C.F.R. § 19.4 tbl.1 (allowing for civil penalties of over $60,000 per day per violation); *Sackett*, 598 U.S. at 660 (persons who "negligently discharge 'pollutants' into covered waters may face severe criminal penalties including imprisonment"); *Rapanos v. United States*, 547 U.S. 715, 721 (2006) ("[T]he Clean Water Act imposes criminal liability, as well as steep civil fines, on a broad range of ordinary industrial and commercial activities.") (cleaned up).

Private enforcers can seek injunctive relief and civil penalties payable to the United States Treasury. 33 U.S.C. § 1319(b), (d). They can also recover attorney fees, expert witness fees, and other litigation costs for successful suits. *Id.* § 1365(d).

B. Factual and Procedural Background

1. Petitioner Shannon Poe is a gold miner who engages in instream suction dredge mining—a form of placer mining.[3] Rather than pan for gold, Mr. Poe uses

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[3] Particularly in comparison to larger types of placer mining, suction dredge mining's environmental impact is limited. *See* Dahab, *Muddying*, *supra*, at 339 ("[S]mall suction dredging is more similar, at least with respect to the magnitude of its impact, to hand panning than it is to large placer mining: with small

a suction dredge, a small engine-powered hose that vacuums materials from the streambed. The suctioned material is made to pass through a floating sluice box, which separates and traps gold and other heavy metals. The miner then removes and keeps the gold while depositing the dangerous mercury at proper disposal sites.[4] The rest of the suctioned material—the left-over rocks, sand, and other material—then falls back into the water, ultimately settling again on its native streambed.

2. In 2018, ICL sued Mr. Poe in the U.S. District Court for the District of Idaho under the Clean Water Act's citizen suit provision.[5] ICL alleged that Mr. Poe's suction dredge mining illegally discharged pollutants into Idaho's South Fork Clear Water River, a navigable-in-fact water, in 2014, 2015, and 2018. App. 6a. It was undisputed below that Mr. Poe mined in the river between 2014 and 2018. App. 22a. It was also

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suction-dredging, the streambed volume disturbed is relatively limited, as is the ancillary effect on sediment upstream and downstream of the mining location.").

[4] Indeed, suction dredge mining often benefits the aquatic environment because miners remove dangerous heavy metals, such as mercury, found within streambeds. *See* Cal. State Water Resources Control Bd., *Mercury Losses and Recovery During a Suction Dredge Test in the South Fork of the American River* 7 (2005) ("The test showed that a typical suction dredge set up to recover gold recovered about 98 percent of the mercury in the high-mercury, test sediment sample.").

[5] Initially, Mr. Poe moved to dismiss the case for lack of subject matter jurisdiction because ICL's required notice of intent to sue under the Clean Water Act's citizen suit provision was defective, *see* 33 U.S.C. § 1365(b)(1)(A), and because ICL lacked standing. The motion was denied, and Mr. Poe did not appeal these issues. *See* App. 6a–7a.

undisputed that the State of Idaho allowed instream suction dredge mining in the river and that Mr. Poe always obtained a permit from the Idaho Department of Water Resources before mining. App. 49a. But on advice from his attorney at the time, Mr. Poe never sought an NPDES permit from EPA. App. 52a.[6]

On cross-motions for summary judgment, Mr. Poe argued that under the ordinary meaning of "addition"—as this Court had established in *Miccosukee Tribe* and *L.A. County*—his dredging did not add pollutants to the river. And he was thus not required to obtain an NPDES permit. This is because suction dredging does not result in the increase of any material within a waterbody. App. 66a–67a. The district court rejected that argument, holding instead that, despite *Miccosukee Tribe* and *L.A. County*, "addition" remains ambiguous, as the Ninth Circuit had held in *Rybachek v. EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990), and *Borden Ranch*, 261 F.3d at 814–15. App. 67a–69a. And based on those precedents, Mr. Poe's suction dredge mining resulted in the "addition" of a pollutant. *Id.*[7]

After granting ICL summary judgment, the court issued a separate opinion and order over remedies,

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[6] In 2014, EPA sent Mr. Poe a notice of violation. Through his attorney, Mr. Poe disputed the notice, and he never heard back from the agency. App. 52a–53a.

[7] Below, Mr. Poe also argued that, even if his dredging added pollutants to the river, those pollutants are "dredged or fill material" regulated exclusively by the Corps, *see* 33 U.S.C. § 1344, so his mining still did not require a permit from EPA. The district court rejected that argument and the Ninth Circuit affirmed. App. 95a, 17a. Petitioner does not seek certiorari on this issue.

enjoining Mr. Poe from suction dredge mining in the river and ordering him to pay $150,000 to the United States Treasury. App. 60a.[8]

3. On appeal, Mr. Poe renewed his argument that *Miccosukee Tribe* and *L.A. County* clarified the statutory meaning of "addition" and that they control over *Rybacheck* and *Borden Ranch*.

Responding to that point, the panel started off on the right foot by acknowledging that "[i]t is well settled that the starting point for interpreting a statute is the language of the statute itself," and "[w]hen interpreting a statute, [courts] use the 'traditional tools of statutory construction,' to determine whether Congress directly addressed the 'precise question at issue.'" App. 7a–8a (citations omitted). But then the panel inexplicably ignored the statutory text and skipped right to the Ninth Circuit's decisions in *Rybachek* and *Borden Ranch*.

Rybachek addressed, among other things, a facial challenge to an EPA regulation that broadly sought to regulate pollution from larger "placer mining" activities under the NPDES permitting regime. 904 F.2d 1276.[9] The challengers argued, among other things, that instream placer mining did not result in

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[8] After the district court issued its remedies opinion and order, ICL filed a motion for attorneys' fees, costs, and other litigation expenses totaling nearly $200,000. ECF Dkt. # 69. Though the district court stayed that motion and held it in abeyance, ECF Dkt. # 75, ICL has now filed a renewed motion for attorneys' fees in the amount of $264,440.25. *See* ECF Dkt. # 81.

[9] The pollution limits set in these regulations do not apply to Mr. Poe's small-scale suction dredge mining. *See* 40 C.F.R. § 440.140(b) (exempting "dredges which process less than 50,000 cu yd of ore per year").

the "addition" of pollutants to regulated waters, and thus EPA could not regulate the activity. *Id.* at 1285. The Ninth Circuit rejected this argument in a single paragraph—with no textual analysis—and held that "if the material discharged originally comes from the streambed itself, such resuspension may be interpreted to be an addition of a pollutant under the Act." *Id.*[10] And so the court "defer[ed] to the EPA's interpretation of the word 'addition.'" *Id.* at 1286. (citing *Chevron v. NRDC*, 467 U.S. 837, 844 (1984)). *Borden Ranch*, in turn, relied on *Rybachek* to hold that deep plowing in regulated wetlands results in the "addition" of pollutants even though it does not "involve the introduction of material brought in from somewhere else" and even though "no new material has been 'added . . . .'" 261 F.3d 814–15. Because "addition" is ambiguous under these precedents, the panel below concluded that the resuspension of rocks and sands from Mr. Poe's suction dredge mining qualifies as the "addition of any pollutant" even though those materials came from the bed of the stream itself. App. 67a.

As for *Miccosukee Tribe* and *L.A. County*, the panel distinguished those cases because they involved "polluted water [] transferred from one location to another within the same waterbody," and Mr. Poe's dredge mining involves "excavat[ing] rocks, gravel,

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[10] The opinion relied on *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983), and *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1506 (11th Cir. 1985). Both decisions, in turn, applied broad deference to the EPA's view that "redeposit"—in contexts the *Rybachek* court found similar to placer mining—may be considered an "addition" of a pollutant. *Rybachek*, 904 F.2d at 1285–86.

sand, sediment, and silt from the riverbed," which are then discharged into the same waterbody. App. 10a–11a. Yet the panel left unexplained why the precise location of pollutants *within* a regulated waterbody should make a legal difference.

Mr. Poe also argued that, even if "addition" is ambiguous, *Rybachek*'s reliance on *Chevron* conflicts with this Court's recent decision in *Sackett*, which precludes deference under supposedly ambiguous statutes that impose significant civil liability and criminal sanctions for ordinary, everyday conduct. App. 10a–13a. Yet the panel did not cite *Sackett*, much less address Mr. Poe's argument based on that ruling.

Mr. Poe then moved for rehearing en banc, which was denied. App. 97a.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's decision conflicts with this Court's precedents construing the Clean Water Act.

A. The Ninth Circuit's decision conflicts with this Court's decisions in *Miccosukee Tribe* and *L.A. County*.

Under the ordinary meaning of "addition," a person does not discharge pollutants under the Clean Water Act unless he *increases* the amount of pollutants in a jurisdictional water. The Court confirmed this commonsense interpretation of the statute in both *Miccosukee Tribe*, 541 U.S. at 109–12, and *L.A. County*, 568 U.S. at 82–84.

In neither case did this Court find "addition" ambiguous; it simply employed traditional tools of statutory construction and then applied the resulting

legal rule—the ordinary meaning of the term. Indeed, the Court held in *Miccosukee Tribe* that "the transfer of polluted water between 'two parts of the same water body' does not constitute a discharge of pollutants under the CWA." *L.A. County*, 568 U.S. at 82 (citation omitted). The Court "derived that determination from the CWA's text, which defines the term 'discharge of a pollutant' to mean 'any *addition* of any pollutant to navigable waters from any point source.'" *Id.* (citing 33 U.S.C. § 1362(12)). And "[u]nder a common understanding of the meaning of the word "add," no pollutants are "added" to a water body when water is merely transferred between different portions of that water body." *Id.* (citing Webster's Third New International Dictionary 24 (2002) ("add" means "to join, annex, or unite (as one thing to another) *so as to bring about an increase* (as in number, size, or importance) or so as to form one aggregate") (emphasis added)).[11] Neither the Ninth Circuit's decision below nor the precedents it relies on can be squared with this Court's rulings.

First, in *Rybachek*, the Ninth Circuit reflexively deferred to the EPA's view that "resuspension" could be the "addition" of a pollutant. *Rybachek* was a broad challenge to a regulation of many forms of placer mining, including mining that takes place both on

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[11] This Court's construction of "addition" is bolstered by statutory context, which shows that Congress wanted to cabin the statute's scope by including "addition" as a term of limitation. *Cf. S.D. Warren Co. v. Maine Bd. of Env't Prot.*, 547 U.S. 370, 380–81 (2006) ("The triggering statutory term" under NPDES permitting "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*.") (emphasis added).

shore and instream.[12] Reasonably enough, the court held that "if the material discharged is not from the streambed itself, but from the bank alongside, this is clearly the discharge into navigable waters of a pollutant under the Act." 904 F.2d at 1285. And "[b]ecause, under this scenario, the material discharged is coming not from the streambed itself, but from outside it, this clearly constitutes an 'addition.'" *Id.*

Yet *Rybachek* did not stop there. In a single paragraph—without employing the traditional tools of statutory construction—it then found, applying *Chevron* deference, that "even if the material discharged originally comes from the streambed itself, such resuspension *may be interpreted* to be an addition of a pollutant under the Act." *Id.* (emphasis added). This statutory analysis applying broad and reflexive deference, which the panel below relied on, conflicts with this Court's decisions in *Miccosukee Tribe* and *L.A. County* applying the ordinary meaning of "addition" under the Clean Water Act.

Nor can *Borden Ranch* be reconciled with this Court's precedents. Indeed, the Ninth Circuit's holding—that the plowing of wet farm fields results in the "addition" of pollutants because dirt is moved around within those fields—makes no sense under the ordinary meaning of "addition." As Judge Gould observed in dissent, "the return of soil in place after deep plowing is not a 'discharge of a pollutant.'" 261 F.3d at 819 (Gould, J., dissenting). Although through plowing "the hydrological regime is modified," any

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[12] Noticeably absent from 40 C.F.R. § 440.140 is any attempt by EPA to define "addition" of a pollutant.

such ecological impact is irrelevant, because "Congress spoke in terms of discharge or addition of pollutants, not in terms of change of the hydrological nature of the soil." *Id.* at 820. And just as the plowing in *Borden Ranch* involved no movement of "process[e]d" material "to a substantially different location," *see id.,* the same is true of suction dredge mining, which entails merely the passing of gravel and sand through a floating sluice box. *See* David Bernell *et al*., Inst. For Natural Resources, Or. State Univ., *Recreational Placer Mining in the Oregon Scenic Waterways System* 44 (2003) ("There is no discharge of pollutants into the waterways, [and] there are no chemical components being used in the mining process . . . .").[13]

Second, the panel's attempt to distinguish *Rybachek* from this Court's precedents was also misplaced because there is no legal difference between *Rybachek*'s ultimate judgment and this Court's holdings in *Miccosukee Tribe* and *L.A. County*. *See* App. 10a–11a. In both cases, the Court did not hold that "simply transferring water," *id.* at 11a, between two parts of the same waterbody was not an "addition" of a pollutant. Those cases held that transferring water—*which contained pollutants*—between parts of the same waterbody was not an addition of a pollutant. *See L.A. County*, 568 U.S. at 80.

To be sure, *Miccosukee Tribe* and *L.A. County* both concerned the movement of polluted "water"—and suction dredge mining "[p]ick[s] up the bed material," including "rock and sand," from the streambed. App. 11a. But this distinction makes no legal difference,

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[13] *Available at* https://bit.ly/34W5AcW.

and the Ninth Circuit did not even attempt to explain any legal difference. This is for a good reason: as far as Mr. Poe is aware, no court has ever held that a regulated water's streambed and the material on or within it are not part of the "navigable water" itself. *See United States v. Moses*, 496 F.3d 984, 991 (9th Cir. 2007) ("[A]s the Supreme Court has recognized, regardless of any other disagreements, 'no one contends that federal jurisdiction appears and evaporates along with the water in such regularly dry channels.'") (quoting *Rapanos*, 547 U.S. at 733 n.6). That should not be surprising—were the rule otherwise, a person would be free to flout all the Clean Water Act's provisions by simply discharging pollutants when a "navigable water" is dry. *But see Sackett*, 598 U.S. at 671 (adopting the *Rapanos* plurality's view that the Clean Water Act's "use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water'"); *Rapanos*, 547 U.S. at 732 n.5 ("By describing 'waters' as 'relatively permanent,' we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months[.]").

To put a slightly different spin on the analogy the Court used in *Miccosukee Tribe* and *L.A. County*, imagine if soup contained vegetables that are ladled from the bottom of a pot, then the soup with the same vegetables is returned to the pot. No one would think someone increased the amount of vegetables in, or added different vegetables to, the soup or the pot. But if someone then added, say meat to the soup from a

different pot, then there would be an "addition" of materials (or pollutants).[14]

At bottom, this Court's decisions in *Miccosukee Tribe* and *L.A. County* should have controlled the legal analysis below where an instream suction dredge miner takes materials (the soup) from the waterbody (the pot) and moves those materials through his dredge (the ladle) and then returns some of those same materials back to the waterbody (the pot). In both instances, no new materials are added to the "navigable waters"—thus there can be no increase of pollutants. The Ninth Circuit's judgment, applying *Rybachek*'s holding that deference is owed to EPA's view that resuspending pollutants within a waterbody, sharply departs from this Court's precedents and the Clean Water Act's ordinary meaning.

B. The Ninth Circuit's decision conflicts with this Court's application of clear statement rules in *Sackett*.

Mr. Poe argued below that *Chevron* deference was precluded by this Court's recent decision in *Sackett*, which explained that "background principles of construction" require EPA to "provide clear evidence that it is authorized to regulate in the manner it proposes." 598 U.S. at 679. Yet the panel simply ignored Mr. Poe's argument and did not address

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[14] *See* Jeffrey G. Miller, *Plain Meaning, Precedent, and Metaphysics: Interpreting the "Addition" Element of the Clean Water Act Offense*, 44 Envtl. L. Rep. News & Analysis 10770, 10800 (2014) (arguing that *Miccosukee Tribe* rejected the argument that redepositing pollutants from the same regulated water could add new or different pollutants).

Sackett at all in its opinion. The Court should therefore take this case and clarify that *Sackett* means what it says: lower courts should not defer to executive branch agencies' statutory interpretations under the Clean Water Act.

First, background principles of construction "require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power[.]" *Id.* (citation omitted). This is because "[r]egulation of land and water use lies at the core of traditional state authority" and an "overly broad interpretation of the [Act's] reach would impinge on this authority." *Id.* at 679–80. Here, EPA's overbroad view of "addition" has expanded the Clean Water Act's reach to normal productive activities like instream mining (this case) and farming (*see Borden Ranch*) with no clear statement for that authority. Worse still, the Ninth Circuit's blessing of this flawed view of the statute has allowed private enforcers to infringe on the states' (and even the federal government's) enforcement authority with no clear statement. Indeed, in Mr. Poe's case, he annually obtained a permit from the State of Idaho before suction dredge mining, App. 49a, with EPA being fully aware of his activity, yet he is now facing ruinous fines in federal court through a citizen suit based on a supposedly "reasonable" view of the statute.

Second, fair notice and "[d]ue process require[] Congress to define penal statutes with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Id.* at 680 (cleaned up). And "[w]here a penal statute could sweep so broadly as to render criminal a

host of what might otherwise be considered ordinary activities, we have been wary about going beyond what 'Congress certainly intended the statute to cover.'" *Id.* at 681 (quoting *Skilling v. United States*, 561 U.S. 358, 404 (2010)). Under the Ninth Circuit's judgment, whenever materials are removed from a riverbed and resuspended within a regulated water, there is a regulable "addition" of pollutants. That rule contains little to no limiting principle for what conduct could be illegal. For example, imagine if someone scooped sand (pollutants) from the riverbed with a shovel (a point source), picked out the aesthetically pleasing rocks, and "resuspended" (added) the left-over materials back into the water. Federal criminal?

Simply put, after *Sackett*, a clear statement is required from Congress before courts can mechanically accept agencies' interpretations of the Clean Water Act. And these clear statement rules enunciated in *Sackett* mean here that any ambiguity in "addition" should be resolved in favor of the regulated party. Yet the Ninth Circuit's decision below, by effectively creating ambiguity and resolving that ambiguity *against* the regulated party, did not just fail to follow these principles; it turned them on their head. Certiorari is warranted.

II. The Ninth Circuit's decision deepens an already entrenched conflict over the meaning of "addition" under the Clean Water Act.

Besides conflicting with decisions of this Court, the Ninth Circuit's decision below deepens an already entrenched split among lower courts over the statutory meaning of "addition of any pollutant." For many years after the Act's passage—but before this

Court provided guidance over the meaning of "addition"—the various circuit courts often found the term ambiguous, gave broad deference to the executive branch, and issued conflicting decisions over the Act's scope.[15] This Court should grant certiorari and provide clarity and uniformity to the law.

Some courts of appeals, although in a few instances applying broad deference, ultimately issued decisions consistent with the statute's ordinary meaning and this Court's precedent in *Miccosukee Tribe* and *L.A. County*: moving or resuspending pollutants within a navigable water is not the "addition" of pollutants. *See, e.g.*,

- *Gorsuch*, 693 F.2d at 174–75 (giving deference to EPA's position about dams as point sources—and that the "addition from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world");
- *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1404 (D.C. Cir. 1998) ("[T]he straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is

[15] Indeed, most if not all circuit court decisions construing "addition" and deferring to EPA or the Corps' view predated this Court's decisions in *Miccosukee Tribe* and *L.A. County*. *See Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 174–75 (D.C. Cir. **1982**); *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 922–25 (5th Cir. **1983**); *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1506 (11th Cir. **1985**); *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 585 (6th Cir. **1988**); *Rybachek v. EPA*, 904 F.2d 1276, 1285 (9th Cir. **1990**); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 814–15 (9th Cir. **2001**).

removed from the waters of the United States and a small portion of it happens to fall back.");

- *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 585 (6th Cir. 1988) (following *Gorsuch* to hold that "manipulation of water by [a point source that] changes the form of the pollutant from live fish to a mixture of live and dead fish in the process of generating electricity . . . does not mean that the [point source] 'adds' a pollutant to Lake Michigan");
- *Catskill Mountains*, 273 F.3d at 492 ("The *Gorsuch* and *Consumers Power* decisions comport with the plain meaning of 'addition' . . . .");
- *United States v. Law*, 979 F.2d 977, 979 (4th Cir. 1992) ("[W]here 'pollutants' exist[] . . . *in the waters of the United States* before contact with [point sources], the mere diversion in the flow of the waters [does] not constitute 'additions' of pollutants to the waters.").

Other courts of appeals decisions—including the Ninth Circuit's precedent relied on below—often applied broad deference and ultimately came to a decision not reflecting the statute's ordinary meaning or consistent with this Court's precedent. *See, e.g.*,

- *United States v. Deaton*, 209 F.3d 331, 335 (4th Cir. 2000) ("The idea that there could be an addition of a pollutant without an addition of material seems to us entirely unremarkable . . . .");

- *Rybachek*, 904 F.2d at 1285–86 ("[E]ven if the material discharged originally comes from the streambed itself, such resuspension may be interpreted to be an addition of a pollutant under the Act.");
- *Borden Ranch*, 261 F.3d at 814–15 (deep plowing of vernal pool wetlands to plant orchards and vineyards results in the addition of a pollutant (soil) even though "no new material has been 'added'");
- *Ayoyelles Sportsmen's League*, 715 F.2d at 923 ("The word 'addition,' as used in the definition of the term 'discharge,' may reasonably be understood to include 'redeposit.'");
- *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1506 (11th Cir. 1985) (a tugboat propeller's stirring up of sediment onto submerged sea grass beds was an "addition" of "dredged spoil" pollution).

Most recently, the Fourth Circuit in *Gaston* applied this Court's precedent in *L.A. County* and the ordinary meaning of the Act's text. *Gaston* concerned a private enforcement action under the Clean Water Act's citizen suit provision. The suit alleged that the owners of certain shrimp trawlers violated the Clean Water Act because they discharged pollutants into a jurisdictional water without a NPDES permit. 76 F.4th at 302–04. The private-party enforcers in that case argued that the shrimp trawlers' nets "disturb the Sound's floor, causing sediment [*i.e.*, rocks and sand] to temporarily suspend in the water." *Id.* at 302. And thus, the shrimp trawlers added pollutants to the Pamlico Sound. *Id.* But a unanimous Fourth Circuit

panel rejected that claim because the "rocks and sand" allegedly "discharged" from the Sound's floor (the bed of the navigable water) were not added—those materials were already "present in the body of water[.]" *Id.* at 304. "[M]oving that pollutant around inside that same body of water is not discharging it—nothing is added." *Id.* (citing *L.A. County*, 568 U.S. at 82–83).

Gaston directly conflicts with not only the Ninth Circuit's decision here, but many decisions cited above. Indeed, the panel's decision below (and thus *Rybachek*) conflicts with *Gaston* in two ways. *First*, the Fourth Circuit did not find "addition" ambiguous—it followed this Court's precedent in *L.A. County* and applied the term's ordinary meaning. 76 F.4th at 304. *Second*, the Fourth Circuit found that materials suspended in the water coming from the ocean floor did not "add" any pollutants because the materials were "already present in the body of water." *Id.* That holding conflicts with the panel's purported distinction below that Mr. Poe added materials to the river because they came from the riverbed.

This Court should grant certiorari and resolve these conflicts to bring uniformity to the Clean Water Act.

III. This case is a good vehicle for the Court to clarify an exceptionally important issue of statutory interpretation under the Clean Water Act.

1. As this Court's rulings in *Miccosukee Tribe* and *L.A. County* show, the Ninth Circuit's application of *Chevron* deference flouts the Clean Water Act's text. And as many members of this Court have explained,

reflexively granting executive branch agencies broad deference (or any deference at all) is incompatible with the separation of powers and due process of law.[16] That is the primary reason why this Court is now considering whether to overrule or limit *Chevron*. *See Loper Bright Enterprises v. Raimondo*, 143 S. Ct. 2429 (2023) (No. 22-451), *cert. granted in part* May 1, 2023. If this Court does so, then there will be no basis in law for the Ninth Circuit's judgment.[17] And in any event, even under *Chevron*, courts should begin with a statute's text and end there if the meaning is clear. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2153 n.175 (2016) ("*Chevron* told us explicitly that we should employ all the 'traditional tools of statutory construction' to resolve any statutory ambiguity *before* we defer to an agency. . . . [I]n those cases, we would not have to defer to the agency at all."). The Ninth Circuit failed to follow these instructions below and it is important, regardless of *Chevron*'s fate, that the lower courts be

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[16] *See, e.g.*, *Pereira v. Sessions*, 585 U.S. 198, 219–21 (2018) (Kennedy, J., concurring); *Michigan v. EPA*, 576 U.S. 743, 760–64 (2015) (Thomas, J., concurring); *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 109–10 (2015) (Scalia, J., concurring in the judgment); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring); Kavanaugh, *Fixing*, *supra*, at 2150–54.

[17] The Court may wish to hold this Petition until *Loper Bright* is resolved and, if appropriate, grant, vacate, and remand. If this Court overrules *Chevron*—or even if it modifies *Chevron* deference without overruling the doctrine—it will directly affect the Ninth Circuit's opinion and judgment below. *See Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (per curiam) ("[This Court has] GVR'd in light of a wide range of developments, including our own decisions[.]").

prevented from skirting their duty to interpret statutes fully and faithfully.

2. Ensuring that lower courts employ the traditional tools of statutory construction is also vital when the Clean Water Act is at issue. Indeed, because the Act's reach is often unclear, it is unfortunately all too easy for citizens acting in good faith to violate the Act's "regime of strict liability." *Cnty. of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1489 (2020) (Alito, J., dissenting). And the decision below aids this regime by significantly expanding the Act's non-legislative scope, a trend over which this Court has repeatedly expressed concern. *See, e.g.*, *Sackett*, 598 U.S. at 660–61 (noting how the Act's "expansive interpretations" combined with its civil and criminal penalties can be "crushing" and citing as an example *Borden Ranch*'s adoption of EPA's argument that each of 348 passes of a plow by a farmer was a separate offense).

This Court found the "addition" issue cert-worthy in *Borden Ranch*, but the Ninth Circuit's judgment was affirmed by an equally divided Court because of Justice Kennedy's recusal. Yet the reasons for this Court's review now are just as, if not more, strong than they were then. Indeed, commentators have continuously underscored the need for this Court's intervention to narrow how the lower courts have interpreted "addition." *See, e.g.*, Miller, *"Addition*," *supra*, at 10773, 10803 (advocating for construing "addition" to mean "the act of a person adding a pollutant to navigable waters from a point source, when that pollutant would not otherwise be in those navigable waters" and observing that the contrary

"redeposit" decisions "push 'addition' to its outer limit").[18]

3. The question presented is also important because ordinary citizens ought to have the benefit of clarity in the law because they are often subject to private enforcement of extra-textual interpretations of the Act. And the Ninth Circuit's decision below further entrenches the ability of private groups to sue in federal court for often innocent violations, collect money for the United States Treasury, and obtain attorneys' fees for doing so. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 209–10 (2000) (Scalia, J., dissenting) (observing how citizen plaintiffs' "massive bargaining power . . . is often used to achieve settlements requiring the defendant to support environmental projects of the plaintiffs' choosing"). *See also* Marc Robertson, *Environmental Ambulance Chasing: DOJ Urges Court*

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[18] *See also*, Adam Gerber, Casenote, Borden Ranch Partnership v. U.S. Army Corps of Engineers*: A Barge in a Bucket? May Isolated Wetlands Be Considered "Navigable Waters" Under the CWA?*, 15 Vill. Envtl. L.J. 415, 433 (2004) (noting that the rule in cases like *Borden Ranch* "could impose severe regulatory burdens"); Arthur F. Coon, *Is Plowing a Point Source Discharge? The Aftermath of* Borden Ranch, 18-SUM Nat. Resources & Env't 6, 7 (Summer 2003) (arguing that "the Ninth Circuit's holding in *Borden Ranch* is wrong on the law, and should ultimately be overruled by the U.S. Supreme Court if the same issues arise again in another case"). *Cf.* Timothy S. Bishop et al., *Counting the Hands on* Borden Ranch, 34 Envtl. L. Rep. (Envtl. L. Inst.) 10,040 (2004) (noting the parallel between the argument that "moving water around within a single water body cannot amount to an 'addition' of a pollutant" and the *Borden Ranch* petitioners' position that "moving soil around within a wetland cannot be the 'addition' of a pollutant because it adds nothing new to the wetland").

To Scrutinize Clean Water Citizen-Suit Settlements, Forbes (June 26, 2018) (describing a Department of Justice court filing raising concerns about a law firm's abusive use of Clean Water Act citizen suits).[19]

Mr. Poe's plight is a fitting example. He did not seek an NPDES permit because, on advice from his attorney, he believed that he need only obtain a permit from the State of Idaho. App. 52a. That reasonable position, *see Miccosukee Tribe and L.A. County*, has him now facing financially ruinous civil penalties and attorneys' fees under the Act's private enforcement provision.

4. This case is a good vehicle to resolve the conflicts over the Clean Water Act's meaning and scope. The pertinent conflicts are squarely presented, and the Ninth Circuit issued a published decision expressly holding: (1) "addition" is ambiguous and merits *Chevron* deference, and (2) the mere movement or resuspension of materials or pollutants within a waterbody can be considered the "discharge of a pollutant" under the Act, 33 U.S.C. § 1362(12). App 7a–13a. Now is also the right time for the Court to resolve the conflict. This Court decided *Miccosukee Tribe* in 2004 and *L.A. County* in 2013, yet the conflict among the circuits has persisted. There is no need for awaiting further percolation.

At bottom, whether the activity is small-scale mining, normal farming practices, or shrimp trawling, the legal issue raised here concerns thousands of citizens across the nation and merits this Court's review.

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[19] *Available at* https://bit.ly/3R0xFIW.

CONCLUSION

The Clean Water Act is among the most complicated statutes in the federal code. But as this Court's precedents show, its terms and scope can be discerned by applying the traditional tools of statutory construction. Yet lower courts continue to reflexively and broadly defer to the executive branch's view of the statute—which can lead to severe civil penalties and other life altering consequences. This enforcement action and the Ninth Circuit's decision below are prime examples of this backwards regime. But this case gives the Court a chance to remedy these ills by clarifying (once again) the meaning of "addition" and properly limiting EPA's authority over everyday productive activity—and the private enforcement of that authority. The Petition for Writ of Certiorari should be granted.

DATED: March 2024.

Respectfully submitted,

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APPENDIX

Appendix

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IDAHO CONSERVATION LEAGUE, *Plaintiff-Appellee*, v. SHANNON POE, *Defendant-Appellant*.	No. 22-35978 D.C. No. 1:18-cv-00353-REP OPINION

Appeal from the United States District Court
for the District of Idaho
Raymond Edward Patricco, Jr.,
Magistrate Judge, Presiding

Argued and Submitted October 5, 2023
Seattle, Washington

Filed November 20, 2023

Before: KIM McLANE WARDLAW and MILAN D. SMITH, JR., Circuit Judges, and ROBERT L. HINKLE,* District Judge.

Opinion by Judge Milan D. Smith, Jr.

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* The Honorable Robert L. Hinkle, United States District Judge for the Northern District of Florida, sitting by designation.

SUMMARY**

Environmental Law

The panel affirmed the district court's grant of summary judgment in favor of the Idaho Conservation League in the League's action under the Clean Water Act against Shannon Poe, who engaged in instream suction dredge mining, a method of placer mining, in Idaho's South Fork Clearwater River without a National Pollutant Discharge Eliminating System permit.

The panel held that to establish a violation of the Clean Water Act's NPDES requirements, also referred to as Section 402 permitting, a plaintiff must prove that the defendant (1) discharged, i.e., added (2) a pollutant (3) to navigable waters (4) from (5) a point source. As to the first element, the panel held that Poe's suction dredge mining "added" a pollutant to the South Fork. The panel followed *Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990), which upheld Environmental Protection Agency regulations interpreting the Clean Water Act as prohibiting discharges from placer mining sluice boxes unless done in compliance with a Section 402 permit. In two subsequent cases, *S. Fla Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), and *L.A. Cnty. Flood Control Dist. V. Nat. Res. Def. Council, Inc.*, 568 U.S. 78 (2013), the Supreme Court held that the transfer of polluted water from one location to another within the same waterbody did not

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

constitute an "addition" of pollutants. Here, by contrast, Poe excavated from the riverbed materials that were not already suspended in the water. The panel concluded that *Rybachek* was not "clearly irreconcilable" with *L.A. County* or *Miccosukee Tribe*'s holdings, and it therefore was still good law.

The panel further held that the processed material discharged from Poe's suction dredge mining was a pollutant, not dredged or fill material, and therefore required an NPDES permit under Section 402 of the Clean Water Act, rather than a permit from the Army Corps of Engineers under Section 404. Because the meaning of the Act and its implementing regulations was ambiguous, the panel deferred to the official joint conclusion of the EPA and the Corps.

COUNSEL

Frank D. Garrison IV (argued), Pacific Legal Foundation, Arlington, Virginia; Damien M. Schiff, Pacific Legal Foundation, Sacramento, California; Danielle Bettencourt, Fairfield and Woods PC, Denver, Colorado; for Defendant-Appellant.

Bryan Hurlbutt (argued) and Laurence J. Lucas, Advocates for the West, Boise, Idaho, for Plaintiff-Appellee.

OPINION

M. SMITH, Circuit Judge:

This appeal raises questions of statutory interpretation concerning the Clean Water Act (CWA), 33 U.S.C. § 1311(a). For several years, Shannon Poe engaged in instream suction dredge

mining in Idaho's South Fork Clearwater River (the South Fork) without a National Pollutant Discharge Eliminating System (NPDES) permit. Plaintiff Idaho Conservation League (ICL) sued Poe, arguing that he violated the CWA each time he operated a suction dredge on the South Fork without an NPDES permit. Poe countered that (1) his suction dredge mining did not add pollutants to the South Fork and therefore did not require an NPDES permit, and (2) even if his suction dredge mining did add pollutants, those pollutants are "dredged" or "fill" material regulated exclusively pursuant to Section 404, not Section 402, of the CWA. The district court granted summary judgment to ICL. Poe appeals the judgment as to liability. We affirm.

STATUTORY AND REGULATORY BACKGROUND

Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA "categorically prohibits any discharge of a pollutant from a point source without a permit." *Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir. 1993). "[D]ischarge of a pollutant" is defined as the "addition of any pollutant to navigable waters from any point source . . . ." 33 U.S.C. § 1362(12). The CWA defines "pollutant" broadly to include "dredged spoil," "solid waste," "rock," "sand," and "industrial . . . waste discharged into water." 33 U.S.C. § 1362(6). A point source is "any discernible, confined and discrete conveyance . . . ." 33 U.S.C. § 1362(14). Navigable waters are defined as "the waters of the United States . . . ." 33 U.S.C. § 1362(7). The CWA does not define

what constitutes the "addition" of a pollutant. *See* 33 U.S.C. § 1362.

Before discharging any pollutant, one must obtain a permit from either the Environmental Protection Agency (the EPA) or the Army Corps of Engineers (the Corps). *See* 33 U.S.C. §§ 1311(a), 1342, 1344. The NPDES permitting program (also referred to as Section 402 permitting) authorizes the EPA to issue permits "for the discharge of any pollutant, or combination of pollutants," on the condition that the discharge will otherwise comply with the CWA. 33 U.S.C. § 1342(a)(1). Section 404 of the CWA authorizes the Corps to issue permits "for the discharge of dredged or fill material . . . ." 33 U.S.C. § 1344(a). When a discharge requires a Section 404 permit, it does not require a Section 402 permit. *See* 33 U.S.C. § 1342(a)(1); 40 C.F.R. § 122.3(b). The CWA does not define "discharge of dredged material" or "dredged material." *See* 33 U.S.C. §§ 1342, 1362.

FACTUAL AND PROCEDURAL BACKGROUND

Suction dredge mining is a method of placer mining that uses a floating watercraft device with a pump to suck water, riverbed sands, and minerals through a nozzle. The water and riverbed material are run through a "sluice box," where gold and other heavy metals are separated out. Water, sand, and minerals are then discharged back into the river, along with sediments and other pollutants. Dredging creates tailing piles behind the dredge, where larger and heavier processed riverbed materials are discarded and settle to the river bottom nearby. Tailing piles can rise to the surface level of the river and can span most of the river's width.

Dredging overburden and bedrock involves dismantling the riverbed by dislodging and moving rocks and boulders, and breaking up tightly bound sediments using the miner's hands, the dredge nozzle, and other tools, like crowbars. The resulting holes can be several feet deep under the riverbed.

During the 2014, 2015, and 2018 dredge seasons, Poe suction dredge mined forty-two days on the South Fork, a navigable water located in north-central Idaho. Poe never obtained an NPDES permit pursuant to Section 402 of the CWA.

On August 10, 2018, ICL sued Poe, alleging that Poe was violating the CWA by failing to obtain an NPDES permit while dredging and discharging sediment and other pollutants in the South Fork. On December 21, 2018, Poe filed a motion to dismiss arguing that (1) the district court lacked subject matter jurisdiction because, in part, ICL's 2017 and 2018 notice letters were not sent via certified mail as required by the CWA and its implementing regulations; and (2) ICL lacked standing to the bring the suit in the first instance. The district court denied the motion.

ICL then moved for summary judgment on liability. Poe cross-moved for summary judgment. On June 4, 2021, the district court granted summary judgment to ICL, concluding that (1) Poe's suction dredge mining added pollutants to the South Fork, thereby requiring an NPDES permit under Section 402 of the CWA; and (2) the processed material discharged from Poe's suction dredge mining was a pollutant, not dredged or fill material, requiring an NPDES permit under Section 402 of the CWA rather than a permit under Section 404. The court thereafter

enjoined Poe from suction dredge mining in the South Fork without a valid CWA Section 402 permit and imposed a $150,000 civil penalty. Poe appeals the judgment as to liability.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo a district court's decision to grant summary judgment. *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc). We "must determine whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Id.* Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

ANALYSIS

I. Dumping Suction Dredge Mining Waste into the South Fork Is an "Addition" of Pollutants Pursuant to the CWA.

To establish a violation of the CWA's NPDES requirements, "a plaintiff must prove that defendant[] (1) discharged, i.e., added (2) a pollutant (3) to navigable waters (4) from (5) a point source." *Comm. to Save Mokelumne River*, 13 F.3d at 308. The parties dispute the first element—whether Poe's suction dredge mining "added" a pollutant to the South Fork.

What amounts to the "addition" of a pollutant is not defined under the CWA. "It is well settled that the starting point for interpreting a statute is the language of the statute itself." *Olympic Forest Coal. v. Coast Seafoods Co.*, 884 F.3d 901, 905 (9th Cir. 2018)

(quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56 (1987)). "When interpreting a statute, we first use the 'traditional tools of statutory construction,' to determine whether Congress directly addressed the 'precise question at issue.'" *Id.* (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)). "If the precise question at issue is addressed, then the 'unambiguously expressed intent of Congress controls.'" *Id.* (quoting *Chevron*, 467 U.S. at 843). Where a statute is ambiguous, courts defer to the reasonable interpretation of the agency charged with administering that statute. *See Chevron*, 467 U.S. at 844.

Since the 1970s, the EPA has interpreted the CWA as prohibiting discharges from placer mining sluice boxes unless done in compliance with a Section 402 permit. *See Trustees for Alaska v. EPA*, 749 F.2d 549, 552–53 (9th Cir. 1984) (reviewing the EPA's issuance of Section 402 permits to gold placer miners in 1976 and 1977). In 1988, the EPA adopted industry-wide regulations setting effluent limitations for Section 402 permits for gold placer miners, including gold mining from floating dredges. *See* 40 C.F.R. § 440.140.

In *Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990), miners challenged these regulations, arguing that placer mining does not cause the "addition" of a pollutant. We rejected that argument. We noted that "resuspension" of streambed materials "may be interpreted to be an addition of a pollutant under the Act," and we deferred to the EPA's reasonable interpretation that such activity constitutes the "addition" of a pollutant under the CWA. *Id.* at 1285–86 (first citing *Avoyelles Sportsmen's League, Inc. v.*

Marsh, 715 F.2d 897, 923 (5th Cir. 1983) (stating that "[t]he word 'addition,' as used in the definition of the term 'discharge,' may reasonably be understood to include 'redeposit'"); and then citing *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1506 (11th Cir. 1985) (action of digging up sediment and redepositing it on sea bottom by boat propellers constitutes an addition of pollutants), *vacated and remanded on other grounds*, 481 U.S. 1034 (1987)). We further explained: "Because the EPA has been charged with administering the [CWA], we must show great deference to the Agency's interpretation of the Act. We especially defer where the Agency's decision on the meaning or reach of the [CWA] involves reconciling conflicting policies committed to the Agency's care and expertise under the Act." *Id.* at 1284 (citation omitted).

Poe's mining activities fall squarely within the scope of *Rybachek*. Undisputed evidence in the record, including photos and descriptions of Poe's dredge operating on the South Fork, shows that he "excavate[d] the dirt and gravel" in the river using a high-pressure blaster nozzle, "extract[ed] any gold" and other heavy metals, and "discharge[d] the dirt and other non-[heavy metal] materials into the water." *See id.* at 1285. That is, Poe engaged in placer mining "subject to regulation under the [CWA]." *Id.* Poe, therefore, "added" pollutants to the South Fork. *See id.* ("[W]e will not strike down the EPA's finding that placer mining discharges pollutants within the meaning of the Act."); *see also Borden Ranch P'ship v. U.S. Army Corps of Engineers*, 261 F.3d 810, 814 (9th Cir. 2001) (reaffirming *Rybachek*, which "held that removing material from a stream bed, sifting out the gold, and returning the material to the stream bed

was an 'addition' of a pollutant'"), *aff'd*, 537 U.S. 99 (2002).

In response, Poe argues that (1) *Rybachek* is no longer good law in light of subsequent Supreme Court decisions or, in the alternative, (2) the court should not apply *Chevron* deference and overrule *Rybachek*. Neither argument is persuasive.

Poe suggests that the Supreme Court has, since *Rybachek*, twice confirmed the "commonsense interpretation" of the CWA—i.e., that a person does not illegally discharge a pollutant unless he or she adds new material from the outside world. *See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *L.A. Cnty. Flood Control Dist. v. Nat. Res. Def. Council, Inc.*, 568 U.S. 78 (2013). That is, according to Poe, *Miccosukee Tribe* and *L.A. County* eviscerate the logic of *Rybachek*. But these cases are both distinguishable from *Rybachek* and inapposite here. In *Miccosukee Tribe*, polluted water was removed from a canal, transported through a pump station, and deposited into a reservoir a short distance away. *See* 541 U.S. at 98–99. The Court held that pumping polluted water from, and back into, the same body of water, without more, "cannot constitute an 'addition' of pollutants." *Id.* at 109–10 ("As the Second Circuit put it in *Trout Unlimited*, 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." (citing *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 273 F.3d 481, 492 (2d Cir. 2001) (cleaned up)). In *L.A. County*, the Court held that "the flow of water from an improved portion of a navigable waterway into an unimproved portion of the very same waterway does not qualify as a

discharge of pollutants under the CWA." 568 U.S. at 83. In both cases, polluted water was transferred from one location to another within the same waterbody.

Here, by contrast, Poe excavated rocks, gravel, sand, sediment, and silt from the riverbed. Poe punched holes in the riverbed by excavating through layers of riverbed down to the bedrock. Poe then processed the materials by running them through the sluice on his dredge, and then discarded the waste material into the water. This added a plume of turbid wastewater to the South Fork. These materials were not already suspended in the water; they were previously deposited in the riverbed. Poe's dredging was therefore not simple water transfer.

As the district court correctly observed,

> Poe's reliance on [*L.A. County* and *Miccosukee Tribe*] misses the point. Suction dredge mining does not simply transfer water (what the above cases address); to the contrary, it excavates rock, gravel, sand, and sediment from the riverbed and then *adds* those materials back to the river—this time, in suspended form.

See also EPA, 2018 Response to Comments Idaho Small Suction Dredge General Permit (GP) ("If, during suction dredging, only water was picked up and placed back within the same waterbody . . . , no permit would be necessary. However, in suction dredging, bed material is also picked up with water. Picking up the bed material is in fact the very purpose of suction dredging—the bed material is processed to produce gold. This process is an intervening use that causes the addition of pollutants [rock and sand, see

CWA § 502(6)] to be discharged to waters of the United States. As a result . . . an NPDES permit is required for the discharge from this activity." (alteration in original) (citation omitted)). Thus, *Miccosukee Tribe* and *L.A. County* do not disturb our holding in *Rybachek*, which remains good law.

In addition, or in the alternative, Poe asks us not to apply *Chevron* deference and to overrule *Rybachek*. Specifically, Poe argues that (1) the ordinary meaning of "addition" under the CWA is clear, making *Chevron* deference inappropriate, (2) *Chevron* should not be applied where a statute may subject individuals to criminal penalties, and (3) *Chevron* should not be applied where the EPA has taken inconsistent positions on the meaning of "addition" under the CWA. Adopting any of these theories would require us to depart from our ruling in *Rybachek*. A three-judge panel may depart from controlling circuit precedent only if "our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority." *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc). "[T]he 'clearly irreconcilable' requirement 'is a high standard.'" *Fed. Trade Comm'n v. Consumer Def., LLC*, 926 F.3d 1208, 1213 (9th Cir. 2019) (quoting *Rodriguez v. AT&T Mobility Servs. LLC*, 728 F.3d 975, 979 (9th Cir. 2013)). "[I]f we can apply our precedent consistently with that of the higher authority, we must do so." *Id.*

As explained above, *Rybachek*'s holding regarding placer mining is not irreconcilable, let alone "clearly irreconcilable," with *L.A. County* or *Miccosukee Tribe*'s holdings regarding the transfer of water within a single waterbody. We therefore follow *Rybachek* on the issues raised by Poe and hold that Poe's instream

suction dredge mining constitutes the "addition" of a pollutant under the CWA.

II. The Processed Material Discharged from Instream Suction Dredge Mining is a Pollutant that Requires a Section 402 Permit.

Poe also argues that, even if his suction dredge mining adds pollutants to the South Fork, the waste discharged from his operation constitutes "dredged" or "fill material" over which the Corps has exclusive permitting authority.[1] Poe makes this argument pursuant to (1) the ordinary meaning of "dredged material" under the CWA and (2) the ordinary meaning of the Corps' own regulatory definition of "dredged material." Neither argument is persuasive.

Under the CWA, pollution discharges require a Section 402 permit from the EPA, unless the discharge is "dredged or fill material" requiring a Section 404 permit from the Corps. *See* 33 U.S.C. §§ 1342, 1344; 40 C.F.R. § 122.3; *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 274 (2009). The terms "dredged material" and "discharge of dredged material" are not defined under the CWA. *See* 33 U.S.C. § 1362; *Olympic Forest Coal.*, 884 F.3d at 905 ("It is well settled that the starting point for interpreting a statute is the language of the statute itself."). Nor does the statute define whether material

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[1] The Oregon Supreme Court recently addressed this issue. *See E. Or. Mining Ass'n v. Dep't of Env't Quality*, 445 P.3d 251, 274 (2019) (*EOMA*) (deferring to the "EPA's and the Corps' reasonable conclusion that the EPA (or its state delegate) has the authority to issue a permit under section 402 for all the processed waste discharged as a result of suction dredge mining"). We find *EOMA* well-reasoned and persuasive and substantially follow its analysis, as did the district court.

that is dredged from navigable water remains "dredged material" after it has been processed. That is, nothing in the CWA says that once a material has been dredged, it remains a dredged material forever. If, as the district court explained (citing *EOMA*, 445 P.3d 251, 257 (2019)), processing dredged material can change its character, the text of the statute does not identify the point at which the processed material becomes a pollutant other than dredged material that is subject to the EPA's rather than the Corps' permitting authority. The CWA therefore does not, in plain terms, address the question presented here.

We next look to the regulations promulgated to implement the Act. *See Coeur Alaska*, 557 U.S. at 277–78 (explaining that, if the text of the CWA is ambiguous, courts look to the agencies' implementing regulations and, if those regulations are ambiguous, to the agencies' interpretation and application of their regulations to determine what the CWA means)). The CWA regulations define "dredged material" as "material that is excavated and dredged from waters of the United States," but offer no further explanation of the term. *See* 33 C.F.R. § 323.2(c). Like the CWA, the regulations do not specifically address the question of which agency has the authority to permit the discharge of dredged material that has been processed, such as the leftover waste material that is discharged during suction dredge mining.

Absent clear direction from either the CWA or the regulations promulgated thereunder, we look to the agencies' interpretation and application of those regulations. *See Coeur Alaska*, 557 U.S. at 277–78; *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415–18 (2019). The EPA and Corps have long agreed that when materials

are dredged from a waterbody and are subsequently processed, they are no longer dredged materials and have become industrial waste, rock, sand, or other CWA pollutants regulated under Section 402.[2] For example, in their 1986 memorandum of agreement, the EPA and the Corps agreed that "placer mining wastes" were the type of "pollutant" discharged in "liquid, semi-liquid, or suspended form" subject to Section 402, not Section 404. Memorandum of Agreement Concerning Regulation of Discharge of Solid Waste Under the Clean Water Act, 51 Fed. Reg. 8871, 8872 (March 14, 1986). A 1990 Regulatory Guidance Letter from the Corps states that once "dredged material" is "subsequently processed to remove desired elements, its nature has been changed" and "it is no longer dredged material" regulated under Section 404. U.S. Army Corps of Engineers, *Regulation of Waste Disposal from In-Stream Place Mining*, Regulatory Guidance Letter 88-10 (July 28, 1990), https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll9/id/1386; *see also* U.S. Army Corps of Engineers, *Regulatory Guidance Letters*, https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Guidance-Letters (noting that, "unless superseded by specific provisions of subsequently issued regulations or guidance, the content provided in [Regulatory Guidance Letters] generally remains valid after the expiration date"). The Corps explained: "The raw materials associated with placer mining operations are not being excavated simply to change their locations as in a normal dredging operation, but

[2] The district court included a more detailed account of the regulatory history, which Poe does not contest on appeal.

rather to obtain materials for processing, and the residue of this processing should be considered waste."

As the district court noted, "whatever patchwork of permitting authority has existed over time, from *at least 2013* (via the general permitting process, initiated in 2010 and after notice and comment), it is *the EPA* that has required a Section 402 permit for suction dredge mining." "This fact, coupled with the overall approach to and assignment and acceptance of responsibilities under the EPA's and the Corps' interpretation of the applicable regulations to suction dredge mining . . . , confirms that the agencies have taken an official position and made a fair and considered judgment, based on its substantive expertise, that the operation of a suction dredge results in the discharge of processed wastes, thus requiring Section 402 permits." We therefore defer to the agencies' reasonable interpretation of the CWA and implementing regulations that the processed material discharged from Poe's suction dredge mining is a pollutant, not a dredged or fill material, and requires an NPDES permit under Section 402 of the CWA. *See Kisor*, 139 S. Ct. 2400.

Poe's arguments to the contrary are unavailing. Principally, citing the dissent in *EOMA*, Poe argues that (1) the text of Section 404 itself is enough to settle the case: suction dredge mining does "dredge" material, and, in a literal sense, that material is then "discharged" into the water, and (2) the Corps' regulation defining "dredged material" is not genuinely ambiguous as to the question over whether instream suction dredge mining is regulated under Section 404 once ordinary interpretive methods have been applied. However, as explained above, even if the

material starts as dredged material, that fact does not settle the issue of whether material that was dredged remains "dredged material" after it has been processed. Poe processed the materials dredged from the riverbed when he ran them through the sluice on his dredge, extracted heavy metals and other materials, and discharged the remaining waste and sediments into the South Fork.

In any event, the meaning of the CWA and implementing regulations remains sufficiently ambiguous that deference to the agencies' official joint conclusion is appropriate. *See Coeur Alaska*, 557 U.S. at 277–78. As the Oregon Supreme Court noted, "[b]oth the statutes and the regulations are genuinely ambiguous on [this] question." *EOMA*, 445 P.3d at 270. The concern here "is not with the navigability of the water body, a concern that falls within the Corps' expertise; rather, the concern is with the health of the water body, a concern that lies at the heart of the EPA's expertise. The Corps and the EPA reasonably could conclude that the EPA was better suited than the Corps to make th[e]se types of water quality decisions." *Id.* at 272.

CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment to ICL is **AFFIRMED**.

INFORMATIONAL COPY ONLY

Regulatory Guidance Letter 88-10

SUBJECT: Regulation of Waste Disposal from In-Stream Placer Mining

DATE: July 28, 1990
EXPIRES: December 31, 1990

Paragraph B.5. in the Army's 23 Jan 86 Memorandum of Agreement (MDA) with EPA, concerning the regulation of solid waste discharges under the Clean Water Act, states that discharges that result from in-stream mining activities are subject to regulation under Section 402 and not under Section 404.

Dredged material is that material which is excavated from the waters of the United States. However, if this material is subsequently processed to remove desired elements, its nature has been changed; it is no longer dredged material. The raw materials associated with placer mining operations are not being excavated simply to change their location as in a normal dredging operation, but rather to obtain materials for processing, and the residue of this processing should be considered waste. Therefore, placer mining waste is no longer dredged material once it has been processed, and its discharge cannot be considered to be a "discharge of dredged material" subject to regulation under Section 404.

This guidance expires 31 Dec 90 unless sooner revised or rescinded.

[cited in Idaho Conservation League v. Shannon Poe No. 22-35978 archived on November 16, 2023]

US Army Corps of Engineers Headquarters Website

Regulatory Guidance Letters

Regulatory Guidance Letters (RGLs) were developed by the Corps as a system to organize and track written guidance issued to its field agencies. RGL's are normally issued as a result of evolving policy; judicial decisions and changes to the Corps regulations or another agency's regulations which affect the permit program. RGL's are used only to interpret or clarify Regulatory Program policy, but do not provide mandatory guidance to the Corps district offices. RGL's are sequentially numbered and expire on a specific date. However, unless superseded by specific provisions of subsequently issued regulations or guidance, the content provided in RGL's generally remains valid after the expiration date. The Corps incorporates most of the guidance provided by RGL's whenever it revises its permit regulations.

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Filed September 28, 2022

UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

IDAHO CONSERVATION LEAGUE, Plaintiff, vs. SHANNON POE, Defendant.	Case No.: 1:18-cv-353-REP **MEMORANDUM DECISION AND ORDER RE: PLAINTIFF IDAHO CONSERVATION LEAGUE'S MOTION FOR REMEDIES** **(Dkt. 59)**

Pending before the Court is Plaintiff Idaho Conservation League's Motion for Remedies (Dkt. 59). Having carefully reviewed the record and the parties' briefs, the Court finds that the facts and legal arguments are adequately presented. Accordingly, in the interest of avoiding further delay, and because the Court finds that the decisional process would not be significantly aided by oral argument, the Court will decide the Motion without oral argument. Dist. Idaho Loc. Civ. R. 7.1(d)(1)(B).[1] For the reasons that follow, the Motion is granted insofar as the Court will issue injunctive relief and assess civil penalties against Defendant Shannon Poe in the amount of $150,000.

[1] Through correspondence with the Court, the parties confirmed that their briefing did not request oral argument and neither party was otherwise requesting one.

I. RELEVANT BACKGROUND

The circumstances giving rise to this citizen-suit enforcement action are largely undisputed:[2] Mr. Poe suction dredge mined 42 days on the SFCR during the 2014, 2015, and 2018 dredge seasons (running from July 15 to August 15 each year) without ever obtaining an NPDES permit under Section 402 of the CWA.

Through this action, ICL argued that Mr. Poe violated the CWA each of the 42 times he operated a suction dredge on the SFCR without an NPDES permit. Mr. Poe countered that (i) his suction dredge mining did not actually add pollutants to the SFCR and therefore did not require an NPDES permit (or any other CWA permit) in the first place; and even if his suction dredge mining *did* add pollutants, (ii) those pollutants are "dredged" or "fill" material regulated exclusively under Section 404 (not Section 402) of the CWA and therefore did not require an NPDES permit, and (iii) any discharges of dredged or

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[2] In denying Defendant Shannon Poe's Motion to Dismiss on September 30, 2019, the Court generally discussed the characteristics of the South Fork Clearwater River ("SFCR"); recreational suction dredge mining and National Pollutant Discharge Elimination System ("NPDES") permit requirements under the Clean Water Act ("CWA"); Idaho's permitting requirements for suction dredge mining; Mr. Poe's suction dredge mining activities on the SFCR without an NPDES permit in 2014, 2015, and 2018; and Plaintiff Idaho Conservation League's ("ICL") correspondence to Mr. Poe in 2016, 2017, and 2018, advising him of its intention to initiate a CWA citizen suit against him if he continued to suction dredge mine in Idaho without an NPDES permit. *Idaho Conservation League v. Poe*, 421 F. Supp. 3d 983, 986–90 (D. Idaho 2019). This backdrop, while important for perspective, will not be repeated in depth here.

fill material from his suction dredge mining are only "incidental fallback," making them exempt under Section 404 of the CWA anyway. The parties agreed to bifurcate the case into two separate phases: a liability phase decided on the parties' cross-motions for summary judgment, followed by a remedial phase as necessary.

On June 4, 2021, the Court granted summary judgment in ICL's favor. *Idaho Conservation League v. Poe*, 2021 WL 2316158 (D. Idaho 2021). At that time, U.S. Magistrate Judge Ronald E. Bush concluded that (i) Mr. Poe's suction dredge mining added pollutants to the SFCR, thus requiring an NPDES permit under Section 402 of the CWA; and (ii) the processed material discharged from Mr. Poe's at-issue suction dredge mining is a pollutant, not dredged or fill material, and required an NPDES permit under Section 402 of the CWA. *Id.* at *2–12.[3]

With the liability phase now complete, the action shifts to the remedial phase, framed by ICL's pending Motion for Remedies. ICL requests that, owing to Mr. Poe's CWA violations, the Court order (i) an injunction barring Mr. Poe from suction dredge mining in Idaho unless he obtains and complies with an NPDES permit under the CWA, and (ii) civil penalties against Mr. Poe of at least $564,924. Mem. ISO Mot. for Remedies at 3, 7–22 (Dkt. 59-1). Mr. Poe responds that an injunction is unnecessary and moot because there are no longer any illegal discharges to enjoin and that, regardless, a $60,924 civil penalty is

[3] The undersigned inherited this case from Judge Bush on June 11, 2021. Before then, Judge Bush presided over the action and issued rulings on multiple aspects of the case, including the liability phase.

more in line with the environmental impacts of such dredge mining and will sufficiently deter him from ever suction dredge mining on the SFCR without an NPDES permit again. Resp. to Mot. for Remedies at 5, 9–24 (Dkt. 63). These arguments are taken up below.

II. DISCUSSION

A. Legal Standards

The CWA authorizes courts "to order that relief it considers necessary to secure prompt compliance with the Act," including an "order of immediate cessation." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982); *see also* 33 U.S.C. §§ 1319(b),(d) & 1365(a). Discretion is vested in the court to either grant or deny a request for injunctive relief depending upon its view of the range of public interests at issue. *Weinberger*, 456 U.S. at 320. If a court chooses to grant an injunction, however, it must meet the requirements of Federal Rule of Civil Procedure 65(d), which requires that every injunction (i) state the reasons why it was issued, (ii) state its terms specifically, and (iii) describe in reasonable detail—without reference to the complaint or other document—the act or acts restrained or required. Fed. R. Civ. P. 65(d); *see also Reno Air Racing Ass'n. Inc. v. McCord*, 452 F.3d 1126, 1132 (9th Cir. 2006).

The CWA additionally permits courts "to apply any appropriate civil penalties." 33 U.S.C. § 1365(a). Civil penalties are mandated for CWA violations. 33 U.S.C. § 1319(d) (any person who violates the CWA "*shall* be subject to a civil penalty not to exceed $25,000 per day for each violation.") (emphasis added); *see also Natural Res. Def. Council. v. Sw. Marine, Inc.*, 236 F.3d 985, 1001 (9th Cir. 2000) (holding that penalties

are mandatory if violation of CWA is found). The maximum daily penalty has increased periodically to account for inflation. Relevant here, for violations that occurred between December 6, 2013 and November 2, 2015, the maximum penalty is $37,500 per violation; for violations that occurred after November 2, 2015 (where penalties are assessed after January 12, 2022), the maximum penalty is $59,973. 40 C.F.R. § 19.4 at Tables 1 & 2. Unlike damages in other civil cases, these penalties do not inure to the citizen plaintiffs, but are payable to the United States Treasury. *See Friends of the Earth v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 173 (2000).

As between injunctive relief and civil penalties, "the district court has discretion to determine which form of relief is best suited, in the particular case, to abate current violations and deter future ones." *Id.* at 192.

B. Injunctive Relief Is Appropriate to Ensure Compliance With the CWA

ICL requests a permanent injunction barring Mr. Poe from suction dredge mining in Idaho unless he obtains and complies with an NPDES permit under Section 402 of the CWA. Mem. ISO Mot. for Remedies at 7 (Dkt. 59-1).

The standard for a permanent injunction is essentially the same as for a preliminary injunction with the exception that the plaintiff need not show a likelihood of success on the merits because actual success has already been achieved. *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 546 n.12 (1987). Therefore, to demonstrate that a permanent injunction should issue, the plaintiff must establish the following:

"(i) that it has suffered an irreparable injury; (ii) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (iii) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (iv) that the public interest would not be disserved by a permanent injunction." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010).

This traditional balancing of harms applies in the environmental context. *The Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) ("Our law does not . . . allow us to abandon a balance of harms analysis just because a potential environmental injury is at issue."). However, injunctive relief "is not mechanically obligated . . . for every violation of law." *Weinberger*, 456 U.S. at 313. Courts have broad latitude when determining the scope of an injunction and must balance the equities between the parties and give due regard to the public interest. *Geertson Seed Farms v. Johanns*, 570 F.3d 1130, 1136 (9th Cir. 2009). If proper, any injunctive relief should be framed "no broader than required by the precise facts." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974); *see also Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009) ("'Injunctive relief . . . must be tailored to remedy the specific harm alleged.' 'An overbroad injunction is an abuse of discretion.'") (quoting *Lamb-Weston v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991)).

ICL argues that the elements comprising a permanent injunction are met and thereby justify the requested injunctive relief. Mem. ISO Mot. for

Remedies at 3, 8–12 (Dkt. 59-1). Mr. Poe disagrees—not because any of the elemental prerequisites for a permanent injunction do not exist per se, but because a permanent injunction is unnecessary and moot since he is no longer suction dredge mining in Idaho and civil penalties are available to deter future CWA violations. Resp. to Mot. for Remedies at 13–16 (Dkt. 63). Though sensible on their face, Mr. Poe's arguments are ultimately unpersuasive here. An injunction is warranted.

1. An Injunction Prevents Irreparable Injury

"Environmental injury, by its nature . . . is often permanent or at least of long duration, *i.e., irreparable*. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod.*, 480 U.S. at 545 (emphasis added). During the earlier liability phase, the Court concluded as a matter of law that Mr. Poe's suction dredge mining added pollutants to the SFCR, stating in relevant part:

> A Section 402/NPDES permit is required if a person (i) discharged, i.e., added (ii) a pollutant (iii) to navigable waters (iv) from (v) a point source. There is no dispute that rock and sand passing through a suction dredge is a pollutant; that the [SFCR] is a navigable water; and that a suction dredge is a point source. In turn, this reveals a lynchpin issue of the case: whether Mr. Poe's suction dredge mining involves the "discharge" or "addition" of a pollutant to the [SFCR]. ICL says it does. Mr. Poe says it does not.

> . . . .
>
> Suction dredge mining does not simply transfer water . . . ; to the contrary, it excavates rock, gravel, sand, and sediment from the riverbed and then *adds* those materials back to the river—this time, in suspended form. If Mr. Poe's suction dredge just sucked up river water from—and back into—the [SFCR] (along with any pollutants already in the water), he would be transferring water and not adding any pollutants . . . . but that is neither suction dredge mining nor what Mr. Poe did on the [SFCR] during the 2014, 2015, and 2018 dredging seasons.
>
> In sum, the very nature of Mr. Poe's suction dredge mining added pollutants to the [SFCR] [and] require[s] an NPDES permit under Section 402 of the CWA.

Poe, 2021 WL 2316158, at *3, 6–7 (emphasis in original, internal quotation marks and citations omitted). But ICL cannot obtain injunctive relief merely because the Court has made a finding of liability under the CWA; it still must connect the legal dots between Mr. Poe's suction dredge mining and corresponding irreparable injury.

ICL does this by juxtaposing the SFCR's pristine ecosystem with suction dredge mining activity generally. It points out how, on the one hand, the SFCR is a "State Protected River"; is eligible as a federal wild and scenic river; and is a vital fishery, inhabited by many native fish species, including those listed as "threatened" under the Endangered Species

Act ("ESA") (steelhead trout, fall Chinook salmon, and bull trout). Mem. ISO Mot. for Remedies at 5–6, 9 (Dkt. 59-1) (citing Ex. 7 to Poe MTD at 45 (Dkt. 17-3);[4] Ex. 8 to Poe MTD at 3–83 (Dkt. 17-4); Ex. V to 2nd Hurlbutt Decl. at 1 (Dkt. 38-13)). Yet, on the other hand, it emphasizes how the SFCR is still listed as an "impaired" water body because it fails to meet CWA standards for sediment and temperature pollution; how the rock, sand, sediment, and silt discharged from suction dredge mining degrades water quality and impedes river habitat restoration; and how the sediment and fine silt discharged by a suction dredge reduces oxygen levels, aquatic cover, forage, and invertebrate production, which impact the survival of fish eggs and alevins, the growth in older and juvenile fish, and ultimately fish migrations and spawning seasons. Mem. ISO Mot. for Remedies at 6, 9 (Dkt. 59-1) (citing ICL SOF at ¶¶ 3, 10 (Dkt. 38-1); Ex. U to 2nd Hurlbutt Decl. at 1–2 (Dkt. 38-12)).

More specific to Mr. Poe's suction dredge mining on the SFCR, ICL highlights the opinions of its expert, Dan Kenney.[5] Mr. Kenney discusses basic stream

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[4] Though listed as a "State Protected River," the SFCR has exemptions for recreational suction dredge mining. Ex. 7 to Poe MTD at 45 (Dkt. 17-3). Even so, this acknowledgment exists within the "Fact Sheet" to an EPA proposal to reissue an NPDES General Permit to small suction dredgers operating in Idaho. *Id.* at 1.

[5] Mr. Kenney is a former Forest Service fisheries biologist with extensive experience monitoring and assessing suction dredge mining and its impacts in the Clearwater River watershed, including the SFCR. Kenney Rpt., attached as Ex. G to 4th Hurlbutt Decl. at 1–3 (Dkt. 59-9). In addition to scientific papers and state and federal agency studies and reports on suction

morphology and biology, suction dredge mining in relation to the SFCR stream morphology in particular, and Mr. Poe's site-specific suction dredge mining in 2014, 2015, and 2018, before summarizing the physical and biological effects of those same dredging activities on the SFCR. Kenney Rpt. attached as Ex. G to 4th Hurlbutt Decl. at 3–24 (Dkt. 59-9). On that last point, Mr. Kenney notes the following:

- There is ample evidence that Mr. Poe's 2014, 2015, and 2018 activities on the SFCR affected algae, invertebrates, and fish. As described above, a total of up to about 3,400 square feet of surface substrate, predominately algae-covered rocks (gravel and larger), was removed from the SFCR during the 3 dredging seasons and some were either overturned or dropped into the dredge holes, while a separate but at least equal-sized area of the SFCR surface substrate was covered with tailings piles or fine sediment by Mr. Poe's activities.
- Given that the SFCR is already considered "impaired" due to too much fine sediment, some of the dredged and otherwise modified areas likely had too-thick of a layer of fine sediment pre-dredging to allow algae to grow, and so the total amount of attached algae harmed by Mr. Poe may be somewhat less than 3,400 square feet. Attached algae is a food source for many aquatic invertebrates, so, at least locally

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dredge mining and its impacts, Mr. Kenney's opinions are based on photos, videos, and reports of Mr. Poe's suction dredge mining on the SFCR in 2014, 2015, and 2018. Mr. Poe challenges aspects of Mr. Kenney's opinions but not his qualifications.

and temporarily, the primary production of the SFCR was reduced.

- The same surface substrate modified by 2014, 2015, and 2018 dredging by Mr. Poe was habitat for aquatic invertebrates, as was at least a portion of the hyporheic zone, and so the manipulation of the substrate in the dredging process caused an unknown number of individuals to be loosed into the water column, and another unknown number of individuals to be covered by or have their interstitial habitat infiltrated by sand and smaller fines. . . . [I]t seems likely that hundreds of thousands of aquatic insects were displaced, harmed, or killed by Mr. Poe's dredging activities.
- The fine sediment brought to the substrate surface or suspended in the water column by Mr. Poe's dredges would have been mostly scoured away from the substrate surface in direct vicinity of the dredging sites within a few months—these fines did not disappear from the river, however, but did contribute incrementally to degraded aquatic habitat locally for miles downstream on the SFCR and eventually to the mainstem Clearwater River.
- I cannot say with certainty that Mr. Poe's activities would have directly injure or killed any individuals of special status species, however, stream margins are often important habitat for juvenile steelhead and other salmonids and my October 7, 2015 notes for the upper unauthorized dredging site state that the "(b)ank undercut by dredger for length of hole." The downstream Poe dredge hole at the 2018 #1

site was at the stream edge, as were Sites #2 and #3 that year. The Poe primary dredging area in 2014 was in mid-channel, however, and I don't know where Mr. Poe dredged at the downstream (Moose Creek) site.

- I think it likely that direct and indirect adverse effects to aquatic insect growth, survival, and abundance (even if incremental, localized, or temporary) were caused by Mr. Poe's suction dredging in each year he dredged on the SFCR. In regard to 2018 SFCR suction dredging, a report commissioned by IDWR [(Idaho Department of Water Resources)] concluded that "(a)ll disturbed areas will experience a reduction in invertebrate production from fine sediment, leading to a reduction in foraging opportunities for anadromous and resident fish species."
- While some small fish are apparently not repelled by suction dredging operations, it is possible that some SFCR fish were physically or behaviorally excluded from rearing, holding, and migratory habitat by the Poe operations. . . . . [W]hile noise, activity, and turbidity definitely can modify adult fish behavior, the degree to which the Poe operations did so is unknown, but likely minor compared with effects on habitat.
- When Mr. Poe and his assistants suctioned substrate at depth, they were also bringing gravel and finer rock particles to the surface to cover the existing substrate surface in the SFCR channel. These particles, as noted above regarding aquatic invertebrates, infiltrated

interstitial spaces in some portions of the dredging reach. Juvenile and subadult salmonids, including bull trout, often seek out interstitial habitat (especially that among cobbles and boulders) during diel feeding periods (or winter in general). The rearrangement and addition of fine sediment to the stream channel during Mr. Poe's suction dredging activities is likely to have reduced the local quantity or quality of such habitat, even considering that some of these fines would have been scoured from the dredging sites by subsequent high flow events and deposited downstream. The effects of the addition of previously-unmobilized fine sediment from the Poe dredging likely incrementally reduced interstitial hiding cover for fish in the SFCR channel for miles downstream.

- Based on my experience in delineating NPCNF [(Nez Perce-Clearwater National Forest)]-approved dredging reaches, the areas that Mr. Poe dredged and covered with tailings and fines in each relevant year do not appear to be spawning habitat for any special status fish species, and so there was a low likelihood that his activities directly affected salmonid redds, eggs, or pre-emergent fry. On the other hand, there are areas with suitable spawning habitat for steelhead (and to a lesser extent, spring and fall Chinook salmon) within a few hundred feet downstream of at least the Sasquatch 2 sites for each year, and I think that is reasonable to assume that this habitat was incrementally degraded by the excavation of previously immobile fine sediment.

- Excavation and dispersion of previously-sequestered fines by dredging operations can contribute to the pollution in the SFCR that the EPA is attempting to control through the TMDL [(Total Maximum Daily Load)] and the NPDES permitting process which Mr. Poe has defied and encouraged others to defy.
- The effects of suction dredging on water quality, stream channel conditions, and stream biota are real and some of these effects are similar to the effects of natural phenomena such as flooding and erosion.
- Even if the adverse effects of Mr. Poe's dredging were entirely erased each year by high streamflows (and many are not), these effect would still be manifest for days, weeks, or months. These periods constitute a substantial part of a lifetime to many or most aquatic organisms. Similarly, and particularly in 2015 and 2018, even if the adverse effects of each of Mr. Poe's dredging operations are considered as insignificant in isolation (and many are not), Mr. Poe set up his operations nearby other dredgers in a relatively short river reach, such that the cumulative effects of these activities were most likely to be exacerbated.
- The goal of a suction dredge miner is to find gold through the dismantling of a portion of the physical structure of a stream. Because most placer gold will find its way to or near the bedrock surface, typically at least several feet below the substrate surface, this dismantling is essentially an overturning and redistribution of the existing structure of the stream at the

dredging site. Because flowing water, both concurrently with and subsequent to dredging, transmits these physical effects downstream, the effects of the dredging are not confined to the immediate dredge mining area.

- Mr. Poe's dredging operations on the SFCR in 2014, 2015, and 2018 had demonstrable immediate and enduring effects on SFCR water quality and stream channel morphology. Based on my training, experience, and my review of the scientific literature, I believe that these physical effects were harmful to individual aquatic organisms in the SFCR. The degree and duration of Mr. Poe's dredging operations' harm to populations of these organisms or the SFCR biological community cannot be known with certainty but I believe that incremental and cumulate adverse effects should be considered plausible and likely.

Id. at 24–29, 30–31 (internal citations omitted).

Mr. Poe takes issue with certain of Mr. Kenney's opinions, offering up an expert of his own: Andréa Rabe.[6] Ms. Rabe contends that, while suction dredge

[6] Ms. Rabe has a bachelors in genetics and anthropology, a masters in botany, and is a certified professional wetlands scientist. Rabe Rpt., attached as Ex. 1 to Resp. to Mot. for Remedies at 15 (Dkt. 63-2). Ms. Rabe has over 23 years' experience conducting water quality monitoring, stream surveys, habitat assessments, and wetlands delineations; preparing water quality monitoring plans; and preparing and implementing restoration plans. *Id.* Ms. Rabe reviewed Mr. Kenney's report and the documents he relied on, as well as additional photos and videos of Mr. Poe's dredging operations, state and federal permit requirements, and the Forest Service

mining may impact water quality, stream channel conditions, and stream biota due to the movement and release of fine sediments, *small-scale suction dredge mining* (like Mr. Poe's) does not (or at least can be conducted in a manner to reduce and eliminate such impacts). Rabe Rpt., attached as Ex. 1 to Resp. to Mot. for Remedies at 3, 11–12 (Dkt. 63-2). She more directly opines that Mr. Poe's suction dredge mining on the dates in question mostly[7] followed permitting authorities' operating procedures and how Mr. Kenney's claims do not unequivocally establish injury to the SFCR. *Id.* at 3–11, 15. Importantly, she does not ultimately disagree that there are likely impacts from Mr. Poe's dredging operations, just that any such impacts are not occurring to the extent expressed by Mr. Kenney given Mr. Poe's adherence to these operating procedures—even without having ever obtained an NPDES permit. *Id.* at 12, 15 ("This reduction and elimination of impacts will occur whether the operating procedures are implemented as permit conditions *or as best management practices by a suction dredge operator*. . . . Mr. Poe *employed most of these best management practices* in his operations during the dredging seasons in 2014, 2015, and 2018, thereby reducing the impacts from his small-scale

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and Bureau of Land Management's Decision Record for Small-Scale Dredging in Orogrande and French Creeks and South Fork Clearwater River.

[7] Suction dredge operations should not discharge within 800 feet of another suction dredge operation discharge that is occurring at the same time. Rabe Rpt., attached as Ex. 1 to Resp. to Mot. for Remedies at 5 (Dkt. 63-2). Ms. Rabe acknowledges that Mr. Poe was not always at least 800 feet from the next dredge operation, but he did add spacing to maintain lower levels of turbidity. *Id.*

suction dredging operation on water quality, stream channel conditions, and stream biota.") (emphasis added).[8]

From this, it is clear that suction dredge mining (even small-scale, recreational suction dredge mining) disturbs a riverbed's substrate and discharges sediment into the water column, causing aesthetic and environmental harm. This is especially the case in a sensitive environment like the SFCR—a critical habitat for ESA-listed species and an already-impaired river due to the failure to meet state water quality standards for sediment and temperature. Fortunately, steps can be taken to mitigate these harms, including a permitting process that outlines a specific suction dredge mining season and strict operational protocols.

Here, however, Mr. Poe never secured an NPDES permit before suction dredge mining 42 days on the SFCR. These repeated failures constitute CWA violations because his dredging activities added pollutants to the waterway and caused environmental harm. Environmental harm in this sense amounts to irreparable injury. *Amoco*, 480 U.S. at 545 (environmental injury, "by its nature," is irreparable). That Mr. Poe may have obtained other permits with overlapping protections does not upend this conclusion. Otherwise, there would be no purpose to the CWA's application in this setting. The CWA regime exists alongside state permitting requirements

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[8] To be clear, Mr. Poe does not offer Ms. Rabe's opinions to contest ICL's argument that his suction dredge mining on the SFCR caused irreparable injury. Rather, these opinions support his argument that any harm was de minimis and that any civil penalties should reflect that reality. *See infra*.

and applies across all users as a whole, not just Mr. Poe. A contrary position is not supported in the law and the Court will not stake that ground now. This is particularly the case given CWA's straightforward objective: "to restore and maintain the integrity of the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a); *see also Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 602 (2013) ("A central provision of the [CWA] is its requirement that individuals, corporations, and governments secure [NPDES] permits before discharging pollution from any point source into the navigable waters of the United States.").

With irreparable injury established, case law hints that the remaining factors favor injunctive relief to protect the environment. *Amoco*, 480 U.S. at 545 ("If such [irreparable] injury is sufficiently likely, therefore, the balance of harms *will usually favor the issuance of an injunction* to protect the environment.") (emphasis added); *but see Earth Island Inst. v. Carlton*, 626 F.3d 462, 474 (9th Cir. 2010) (declining "to adopt a rule that *any* potential environmental injury *automatically* merits an injunction.") (emphasis in original, internal quotation marks and citation omitted). The Court briefly addresses these factors below for completeness' sake.

2. Legal Remedies Are Inadequate

The Supreme Court has recognized that, in most instances, environmental harms are not readily compensable by money damages. *Amoco*, 480 U.S. at 545 ("Environmental injury, by its nature, *can seldom be adequately remedied by money damages* and is often permanent or at least of long duration, i.e. irreparable.") (emphasis added). Moreover, money

damages are not even available to ICL. The only relief available in a CWA citizen-suit enforcement action is the enforcement of standards, limitations, and orders, or the application of civil penalties paid to the United States Treasury. 33 U.S.C. § 1365(a). As a result, legal remedies are plainly inadequate.

3. The Balance of Hardships Favors an Injunction

Even where environmental injury is established, courts must still engage in the traditional balancing of harms test before entering an injunction. This includes a consideration of all of the competing interests at stake including potential economic harm. *Carlton*, 626 F.3d at 475. Here, there is no counterweight to the irreparable injury caused by Mr. Poe's permitless suction dredge mining on the SFCR. That is, any burden in complying with the CWA by securing the legallynecessary NPDES permit—what the requested injunctive relief requires—is not a hardship, let alone one that would eclipse the above-stated environmental harms. *See Idaho Conservation League v. Atlanta Gold Corp.*, 879 F. Supp. 2d 1148, 1161 (D. Idaho 2012) ("Harm to environment outweighs a defendant's financial interests, particularly where violations are of a longstanding and continual nature.").

4. An Injunction Is in the Public Interest

Courts have recognized that ensuring protection of the environment serves an important public interest. *McNair*, 537 F.3d at 1005 ("[P]reserving environmental resources is certainly in the public's interest."); *Earth Island Inst.*, 442 F.3d at 1177 ("The preservation of our environment . . . is clearly in the

public interest."). Recognizing the public interest in protecting the environment, it is likewise very much in the public interest to expect compliance with the CWA. *See U.S. v. Akers*, 785 F.2d 814, 823 (9th Cir. 1986) ("[C]ourts have noted that the public interest requires strict enforcement of the [CWA] to effectuate its purpose of protecting sensitive aquatic environments."); *Atlanta Gold Corp.*, 879 F. Supp. 2d at 1162 ("Water is the West's most precious resource. Keeping Idaho's waters sufficiently clear of toxic elements so that they can support all the beneficial uses for which the State has designated them is a critical public interest . . . ."). Mr. Poe does not argue otherwise.

5. Other Factors Do Not Undermine the Need for an Injunction

Beyond the customary factors that inform the propriety of an injunction, Mr. Poe's arguments against one take a more practical, big-picture approach. He claims that an injunction is simply (i) unnecessary to secure his compliance with the CWA because he is not currently suction dredge mining in Idaho (and has not done so since 2018) and (ii) moot given the availability of civil penalties. Resp. to Mot. for Remedies at 13–16 (Dkt. 63). These arguments are without merit.

First, it is misleading to suggest that Mr. Poe complied with the CWA once ICL brought this action. *See id.* at 14 (Mr. Poe stating: "[I]f a defendant comes into compliance with the CWA after a complaint is filed, then the principles of mootness prevent maintenance of a suit for injunctive relief . . . ."). It may be true that he has not technically violated the CWA since then, but that is only because he has not suction dredge mined in Idaho and therefore never

needed to pull an NPDES permit. This is *not* because he has proactively secured an NPDES permit before again suction dredge mining in the state. The distinction is important when understanding that the mere cessation of a challenged practice in response to pending litigation "does not moot a case *unless the party alleging mootness can show that the 'allegedly wrongful behavior could not reasonably be expected to recur.'*" *Nat. Res. Def. Council v. Cnty. of Los Angeles*, 840 F.3d 1098, 1104 (9th Cir. 2016) (quoting *Laidlaw*, 528 U.S. at 189) (emphasis added); *see also Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1177 (D. Idaho 2001) (recognizing "a presumption of future injury" when a defendant has voluntarily ceased illegal activity in response to litigation, even if the cessation occurs before a complaint is filed."). Without the exception, "'courts would be compelled to leave [t]he defendant . . . free to return to his old ways.'" *Porter v. Bowen*, 496 F.3d 1009, 1017 (9th Cir. 2007) (quoting *U.S. v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968)).

The standard for determining whether a case has been mooted by a defendant's voluntary conduct is "stringent." *Laidlaw*, 528 U.S. at 189; *Concentrated Phosphate*, 393 U.S. at 203 ("A case might become moot if subsequent events *made it absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.") (emphasis added). "The 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Laidlaw*, 528 U.S. at 189 (quoting *Concentrated Phosphate*, 393 U.S. at 203). This burden "protects plaintiffs from defendants who seek to evade sanction by predictable protestations of repentance and

reform." *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 67 (1987).

The Court previously touched on this issue in relation to Mr. Poe's efforts to dismiss the action at its outset. At that time, Mr. Poe argued that the Court did not have subject matter jurisdiction because ICL failed to meet the CWA's notice requirements. Specifically, Mr. Poe argued that ICL's 2016 notice letter advising him that it intended to initiate a citizen-suit enforcement action relied on wholly past violations, not prospective ones. *Poe*, 421 F. Supp. 3d at 991. The Court disagreed, stating:

> Mr. Poe properly acknowledges that [ICL] must have a good faith allegation of continuing or intermittent violations for a court to have jurisdiction over a suit. . . . Here, ICL made good faith allegations of continuing/ intermittent CWA violations based not only on Mr. Poe's history of suction dredging on the [SFCR], but also his public statements about his past dredging, about his ongoing dredging, and about his plans for dredging in future years (including statements about defying the EPA and the CWA). Indeed, it could reasonably be said that Mr. Poe was intentionally advertising to the world not just the fact of his prior suction dredging activities but also the fact of his intended future suction dredging activities. That Mr. Poe ultimately resumed suction dredging activities on the [SFCR] in 2018 without any NPDES permit substantiates ICL's concerns about

> Mr. Poe's "continuing" and "ongoing" violations back in 2016.

Id. at 993 (citing *Sierra Club v. Union Oil Co. of Cal.*, 853 F.2d 667, 671 (9th Cir. 1988) (agreeing that risk of ongoing violations must be "completely eradicated" for citizen suit to be precluded, holding: "Intermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition.")).

A similar rationale applies now. Yes, Mr. Poe properly stresses how he has not suction dredge mined in Idaho since 2018. And while that fact may suggest he does not intend to pick back up where he left off, it does not satisfy his burden to establish compliance with the CWA in the future. To be sure, in the past, Mr. Poe has simply indicated that he "do[es] not intend to dredge in future years *without the appropriate permits*." Ex. C to Oppenheimer Decl. (Dkt. 20-19) (emphasis added). It is unclear what this commitment means or ever meant. Critically, Mr. Poe suction dredge mined on the SFCR in 2018 without an NPDES permit precisely because he does not believe an NPDES permit is required to do so. *Cf.* Resp. to Mot. for Remedies at 15 (Dkt. 63) (Mr. Poe acknowledging that "he never stated that he would not mine without first obtaining an NPDES permit."). Alas, that is what this entire case has been about.

At bottom, Mr. Poe must show that there is "no reasonable expectation that the wrong will be repeated" and that it is "absolutely clear that the allegedly wrongful behavior would not reasonably be expected to recur." *Gwaltney*, 484 U.S. at 66. Despite no known CWA violations since 2018, Mr. Poe has not met that high burden here. *See Atlanta Gold*, 879 F.

Supp. 2d at 1162 (fact that violations were "of a continual, and long-standing nature" and that defendant "passed up opportunities to fix the problem, strongly suggests that the added impetus of an injunction is necessary."). An injunction is neither unnecessary nor moot.

Second, civil penalties—even considerable ones—do not preclude injunctive relief. These remedies are not mutually exclusive. In fact, the CWA authorizes courts to impose one, the other, or even both. *Supra*; *see also Idaho Conservation League v. Magar*, 2015 WL 632367, at *9 (D. Idaho 2015) ("[T]he Court finds both a substantial civil penalty and an injunction are necessary to remedy Magar's violations of the CWA."); *Atlanta Gold*, 879 F. Supp. 2d at 1171 ("To summarize, the longstanding and serious nature of the violations in this case require injunctive relief. A substantial civil penalty is also necessary in order to have a deterrent effect on future pollution . . . ."); *Bosma*, 143 F. Supp. 2d at 1177 ("[A]n injunction against the Bosmas and their dairy operation will redress, at least in part, the injury of which the IRC complains. Additionally, the civil penalties sought by IRC will likely deter the Bosmas and other NPDES permit violators from polluting the affected waters in the future."). Simply put, whether civil penalties are imposed here (or the amount of such penalties) is immaterial; the factors discussed herein independently support injunctive relief.

6. The Injunction is Limited to the SFCR

As an extraordinary remedy, an injunction's scope must be narrowly and specifically tailored to fit the dispute that gives rise to its issuance, and not more. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th

Cir. 2009) ("'Injunctive relief . . . must be tailored to remedy the specific harm alleged.' 'An overbroad injunction is an abuse of discretion.'") (quoting *Lamb-Weston v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991)).

ICL seeks to enjoin Mr. Poe from suction dredge mining throughout Idaho unless he obtains and complies with an NPDES permit under the CWA. Mem. ISO Mot. for Remedies at 3, 5, (Dkt. 59-1). But this action is tied only to Mr. Poe's suction dredge mining on the SFCR. There is no evidence in the record concerning what Mr. Poe did (or did not do) elsewhere in the state and ICL makes no claims relating to any such conduct. So, a state-wide injunction is not justified.

Mr. Poe counters that no injunction is warranted at all. He complains that one would amount to a disfavored "obey the law" injunction and is "excessively intrusive" because it would require the Court's continual supervision. Resp. to Mot. for Remedies at 13–14 (Dkt. 63). Not so. The injunction is not vague but rather sufficiently specific. It requires Mr. Poe to secure and comply with an NPDES permit before suction dredge mining on the SFCR in the future. These simple and straightforward terms are enough. Further, no judicial oversight is warranted here. Once this action is closed, ICL can move to re-open the case and pursue contempt proceedings as necessary. *See, e.g.*, *Idaho Conservation League v. Atlanta Gold Corp.*, 2017 WL 4099815 at *1 (D. Idaho 2017) ("This decision resolves a Motion for Civil Contempt . . . . This is a re-opened Clean Water Act case, first filed in 2011.").

Consequently, an injunction will be issued barring Mr. Poe from suction dredge mining on the SFCR unless he obtains and complies in good faith with an NPDES permit under the CWA.

C. Civil Penalties in the Amount of $150,000 Are Warranted

ICL asks the Court to impose a civil penalty of at least $564,924 for Mr. Poe's 42 CWA violations. Mem. ISO Mot. for Remedies at 14–22 (Dkt. 59-1). Mr. Poe argues the Court should reject ICL's request as excessive and unduly burdensome, proposing that a $60,924 penalty more accurately addresses his conduct and the surrounding circumstances. Resp. to Mot. for Remedies at 16–24 (Dkt. 63).

Congress has vested courts with the authority to determine an appropriate civil penalty for CWA violations. *Tull v. U.S.*, 481 U.S. 412, 427 (1987). Like other penalties, the purpose of a penalty under the CWA is to provide restitution, punish the violator, and deter similar conduct by the violator and others. *Id.* at 422. "A penalty must be high enough so that the discharger cannot 'write it off' as an acceptable environmental trade-off for doing business." *Hawaii's Thousand Friends v. City and Cnty. of Honolulu*, 821 F. Supp. 1368, 1394 (D. Haw. 1993).

Civil penalties in CWA cases involve "highly discretionary calculations that take into account multiple factors." *Tull*, 481 U.S. at 427. The factors courts must consider are: (i) the seriousness of the violations; (ii) the economic benefit, if any, resulting from the violations; (iii) any history of such violations; (iv) any good faith efforts to comply with the applicable requirements; (v) the economic impact of

the penalty on the violator; and (vi) any other matters as justice may require. 33 U.S.C. § 1319(d).

When considering these statutorily-enumerated factors, courts generally employ either a "top-down" or "bottom-up" approach. *Atlanta Gold*, 879 F. Supp. 2d at 1165 (*comparing Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 573–74 (5th Cir. 1996) (employing top-down approach), *with U.S. v. Smithfield Foods, Inc.*, 191 F.3d 516, 528–29 (4th Cir. 1999) (taking bottom-up approach)). The top-down approach requires the court to first calculate the maximum penalty, and then, if necessary, to adjust the penalty downward in consideration of the six statutory factors. *Cedar Point*, 73 F.3d at 573. The bottom-up method begins with calculating the economic benefit realized by the defendant as a result of his non-compliance, and then adjusts that amount upward or downward based on the court's evaluation of the remaining factors. *Smithfield Foods*, 191 F.3d at 528.

ICL does not insist on either a top-down or bottom-up approach to calculating the proper civil penalties here. It references a $1,957,041 maximum penalty.[9] It settles on a proposed penalty of at least $564,924. ICL's figure is guided in large part by the $6,600 penalty imposed in a similar EPA civil enforcement action (*Erlanson* (discussed *infra*)) relating to a single day of unpermitted suction dredge mining on the SFCR in 2015. Here, citing Mr. Poe's flagrant violations and need for deterrence, the ICL doubled the per-violation penalty to $13,200 and added Mr. Poe's $10,524 economic gain to the total penalty.

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[9] This represents a total of 25 violations in 2014 and 2015 at $37,500 per violation ($937,500) and 17 violations in 2018 at $59,973 per violation ($1,019,541).

Mem. ISO Mot. for Remedies at 13–16 (Dkt. 59-1). Mr. Poe favors a bottom-up approach because, according to him, it better reflects the minimal environmental harm caused by his suction dredge mining. Resp. to Mot. for Remedies at 17 (Dkt. 63).

The Court will employ the bottom-up approach as the most practical to these facts. This case is unique in that Mr. Poe did not outright ignore the need for an NPDES permit in the typical sense. His decision not to secure an NPDES permit was informed, at least in part, by advice from his attorney, coupled with their correspondence with the EPA about whether he even needed an NPDES permit in the first instance. *See infra*. Also, it is not exactly clear how Mr. Poe's suction dredge mining violated NPDES permit standards (aside from not securing an NPDES permit in and of itself). *Id.* These considerations favor a bottom-up approach rather than beginning with a nearly $2 million maximum civil penalty and working down. *See Atlanta Gold*, 879 F. Supp. 2d at 1166 (describing bottom-up approach as "more practical in this scenario, as arsenic and iron differ greatly in terms of the degree of the environmental harm they cause."). With that, the Court turns to the above-referenced statutory factors for calculating CWA-related penalties.

1. The Economic Benefit From Mr. Poe's CWA Violations

Mr. Poe's most obvious economic benefit in suction dredge mining on the SFCR without an NPDES permit is the value of mineral resources (gold) extracted therefrom. Remedial phase discovery revealed that Mr. Poe mined up to six ounces of gold across 2014, 2015, and 2018. Mem. ISO Mot. for

Remedies at 18 (Dkt. 59-1). At an estimated value of $1,754 per ounce, the value of Mr. Poe's unpermitted haul amounts to at least $10,524. *Id.* Mr. Poe does not disagree; he folds this exact amount into his own civil penalty proposal. Resp. to Mot. for Remedies at 17, 24 (Dkt. 63). The civil penalty therefore begins at $10,524 and is subject to adjustment in light of the remaining factors.

2. The Seriousness and History of Mr. Poe's CWA Violations

Congress flatly prohibited "the discharge of any pollutant by any person" except as in compliance with the CWA. 33 U.S.C. § 1311(a). There is no dispute that Mr. Poe violated this prohibition time and again when he suction dredge mined on the SFCR without an NPDES permit in 2014, 2015, and 2018. These violations are unquestionably serious. They not only violated the law, but also caused environmental harm by lowering water quality. *See supra.*

But in assessing the "seriousness" of these violations, it is important to keep in mind that suction dredge mining is allowed on the SFCR. In other words, this is not a case of Mr. Poe suction dredge mining at a time and place where it was not lawfully permitted. His problem is that he *repeatedly* suction dredge mined without an NPDES permit (even if he did have a state IDWR permit with some—though not completely—overlapping best management practices). *See, e.g.*, *Poe*, 421 F. Supp. 3d at 998, n.6 (in denying Mr. Poe's earlier Motion to Dismiss, Judge Bush explaining that "the IDWR and NPDES permits are not identical, as there is some overlap but also numerous differences."). Still, Mr. Poe argues that ICL has not claimed that he violated either his IDWR

permit or any actual NPDES permit requirements (except for the 800-foot separation requirement (*see supra*)). Resp. to Mot. for Remedies at 12, 17–20 (Dkt. 63); *but see* Reply ISO Mot. for Remedies at 11, n.4 (Dkt. 64) (ICL identifying instances where Mr. Poe violated IDWR permit and reporting requirements attached to NPDES permits). If so, how do the environmental impacts of Mr. Poe's unpermitted suction dredge mining stack up against another's permitted suction dredge mining? If they are comparable, how "serious" are Mr. Poe's CWA violations when evaluating a commensurate civil penalty? *See, e.g.*, *Magar*, 2015 WL 632367, at *5 (difficulty in attributing water quality problems to illegal discharges "neither compel nor preclude a reduction to the maximum civil penalty"); *but cf. Atlanta Gold*, 879 F. Supp. 2d at 1168 (finding discharges of arsenic and iron in excess of effluent limitations over three-year period sufficient to justify significant upward adjustment of total civil penalty).

The record does not neatly confront these questions except to underscore the spectrum of possible CWA violations and corresponding levels of impact (seriousness). What is clear, however, is that Mr. Poe violated the CWA when he suction dredge mined 42 days on the SFCR without the required NPDES permit and that these activities added pollutants to the river and caused environmental harm. *Supra*. Any similarities between properly-permitted mining activities and Mr. Poe's unpermitted (but nonetheless allegedly compliant) mining activities largely miss the point and represent a false equivalence. Mr. Poe should not have been suction dredge mining without an NPDES permit at all. The liability phase confirmed as much. Had he not,

he never would have discharged pollutants into the waterway, even if his activities otherwise complied with a hypothetical NPDES permit (that may not have even been issued). Each of the 42 times he did this represents a serious CWA violation that, together, warrant an upward adjustment of the civil penalty amount.

3. Mr. Poe's Good Faith Efforts to Comply With the CWA

Good faith efforts to comply with applicable requirements may reduce civil penalties. This factor turns on whether Mr. Poe "took any actions to decrease the number of violations or made efforts to mitigate the impact of [his] violations on the environment." *U.S. v. Smithfield Foods, Inc.*, 972 F. Supp. 338, 349–50 (E.D. Va. 1997).

ICL argues that Mr. Poe took no steps to comply with the CWA or to mitigate the effects of his suction dredge mining. Mem. ISO Mot. for Remedies at 20 (Dkt. 59-1) ("Poe's compliance efforts could hardly be less vigorous. In fact, *non-compliance* has often been Poe's stated intention . . . .") (emphasis in original). In response, Mr. Poe does not walk back his belief that suction dredge mining does not require an NPDES permit or that he has openly suction dredge mined in opposition to the EPA. Resp. to Mot. for Remedies at 21 (Dkt. 63). He instead claims that his opinions are protected by the First Amendment, while noting his consistent compliance with IDWR permit requirements to show that he "still respected the conditions that are in place to minimize and eliminate the environmental impacts of his operations." *Id.*

Whatever protections exist via the First Amendment, they do not excuse violations of the law and certainly do not amount to good faith efforts to comply with the CWA. Just the opposite. And while observing state permitting requirements is better than the alternative, its attendant "no harm no foul" logic comes up short when assessing Mr. Poe's good faith efforts to respect a different, albeit parallel, permitting standard that may have applied to preclude his suction dredge mining on the SFCR and foreclosed its environmental impacts altogether. *Supra*. In short, these aspects of Mr. Poe's counterarguments are misplaced.

Despite all this, it is noteworthy that Mr. Poe's insistence against an NPDES permit did not seem to be a knee-jerk reaction to an inconvenient legal requirement getting in the way of his gold mining pursuits. He was told this by his own attorneys before he first suction dredge mined in Idaho in 2014. Poe Dep., attached as Ex. B to 2nd Hurlbutt Decl. at 13:8–20 (Dkt. 38-5) ("Q: When you went to Idaho, did you have an NPDES permit for suction dredging in Idaho in 2014? A: No. Q: Had you applied for one? A: No. Q: And why didn't you have one, Mr. Poe? A: At the advice of my attorney, I didn't. I was informed that I did not need one."); *see also* Poe Decl. ISO MSJ at ¶12 (Dkt. 39-4) ("I did not obtain an NPDES permit from the Environmental Protection Agency (EPA) [in 2014] because I was informed by my attorney that one was not required."). What's more, after receiving notice from the EPA in October 2014 about violating the CWA for suction dredge mining on the SFCR without an NPDES permit, Mr. Poe's counsel wrote back and explained why the EPA's position was wrong. Exs. A & B to Poe Decl. ISO Mot. to Dismiss (Dkt. 17-2). The

EPA never responded, never contacted Mr. Poe or his attorney again, and never took any further action. It was thus no real surprise when Mr. Poe suction dredge mined in Idaho in 2015 and 2018 without an NPDES permit, even after receiving ICL's "intent to sue" notices in 2016, 2017, and 2018. Poe Decl. ISO MSJ at ¶ 15 (Dkt. 39-4) ("I did not obtain an NPDES permit from the EPA [in 2015] because, according to counsel, the IDWR permit was the only permit I was legally required to get."); *id.* at ¶ 19 (same for 2018).

It is therefore possible to argue that this is not a situation where Mr. Poe obviously knew better but acted on his impulses and misguided convictions anyway. His attorney told him that an NPDES permit was not required and this advice aligned with his own subjective view on the matter.[10] That said, it does not establish a good faith effort to comply with the CWA (even if it may countenance against a finding of outright bad faith) or render him legally blameless. Short of actually securing the required NPDES permit before suction dredge mining, the proper course of action in this instance was to administratively engage to resolution or proactively seek relief from the courts. Mr. Poe purposely chose not to, ignored violation notices, and proceeded to repeatedly suction dredge mine on the SFCR without a permit. He ultimately did so to his own detriment. Accordingly, an upward adjustment of the civil penalty amount is in order.

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[10] In this way, ICL's reliance on *Erlanson* is undercut. There, Mr. Erlanson submitted an NPDES permit application to the EPA but was denied. *In re Dale Erlanson, Sr.*, Docket No. CWA-10-2016-0109 (U.S. Environmental Protection Agency) at 7, attached as Ex. D to 4th Hurlbutt Decl. (Dkt. 59-6). He suction dredge mined anyway.

4. The Economic Impact on Mr. Poe

Courts may reduce the civil penalty against a party if the maximum statutory penalty would work an undue hardship. *Atlantic States Legal Found. v. Universal Tool & Stamping Co.*, 786 F. Supp. 743, 753–54 (N.D. Ind. 1992). This factor will not reduce the amount of the penalty unless the violator can show that the penalty will have a "ruinous effect." *Magar*, 2015 WL 632367, at *7 (citing *U.S. v. Gulf Park Water Co.*, 14 F. Supp. 2d 854, 868 (S.D. Miss. 1998)).

ICL argues that a penalty of at least $564,924 (already reduced from the $1,957,041 maximum penalty) is warranted and will not impose an undue burden on Mr. Poe given his personal assets and close affiliation with AMRA.[11] Mem. ISO Mot. for Remedies at 21–22 (Dkt. 59-1). Mr. Poe insists that ICL overstates his financial association with AMRA and that ICL's proposed penalty "places a significant burden" on him individually. Resp. to Mot. for Remedies at 21–23 (Dkt. 63). He submits that a $60,924 penalty is more appropriate. *Id.* at 24.

Mr. Poe is an individual professional miner and claims to have limited annual income and only a limited number of assets. *Id.* at 23. To that end, he states that his main source of income over the last few years comes from his mining operations, a previously-owned rental property, and the small consulting fees received from AMRA. *Id.* He goes on to identify $3,000 in savings, a 2007 truck worth $5,000–$8,000, a 1985

[11] AMRA is a 501(c)(3) non-profit that provides "mining education and assist[s] small miners and public land users with issues that arise when mining on state and federal lands." Poe Decl. ISO MSJ at ¶ 2 (Dkt. 39-4). "AMRA focuses on regulatory initiatives that directly affect small miners." *Id.*

mobile home worth about $15,000, roughly 16 ounces of gold valued at $28,064, and $75,000 in proceeds from a recent sale of a 10-acre parcel of land. *Id.*[12] ICL does not dispute these figures or argue that Mr. Poe is capable of paying its proposed civil penalty from these rather modest income sources and assets; its argument centers on Mr. Poe's alleged access to AMRA's significant financial resources. Reply ISO Mot. for Remedies at 111–12 (Dkt. 64). The economic impact that a penalty will have on Mr. Poe consequently rises and falls with the contours of this relationship.

To begin, Mr. Poe is a founder and the President of AMRA. Resp. to Mot. for Remedies at 5–6 (Dkt. 63). He submits posts and uploads videos to AMRA's webpage about proposed federal and state legislation, general mining activity, and issues impacting water rights. He promotes AMRA during his mining trips. He submits his mining activities as content on AMRA's webpage. *Id.* at 6. Despite this administrative involvement with AMRA, the record reveals that all of Mr. Poe's suction dredge mining on the SFCR in 2014, 2015, and 2018 was done at his own expense, under his own personal IDWR permits, and for his own personal economic benefit—not AMRA's. *Id.* at 6 & 23. In this context, there is no basis to conclude that Mr. Poe and AMRA are effectively one-and-the-same. This action bears that out, with ICL asserting

[12] In comparison, the plaintiff in *Magar* had $11,914.36 deposited in various bank accounts, $3 million in unencumbered assets, and $45,974.58 in monthly income. *Magar*, 2015 WL 632367, at *7 ("Given evidence that *Magar* has substantial income and unencumbered assets, the Court is not persuaded that a substantial civil penalty would lead Magar to financial ruin."). Mr. Poe does not have these same resources.

claims only against Mr. Poe individually, not AMRA institutionally.

At the same time, Mr. Poe concedes that AMRA provides monetary support to miners, *including himself*, that are dealing with legal issues. *Id.* at 6; *see also* Ex. C. to Hurlbutt Decl. (Dkt. 20-4) (AMRA fundraising posting: "We could use some new members, we have legal bills to pay . . . . You can support AMRA with a $5 monthly donation. Remember, this goes to fight for your mining rights . . . ."); Ex. B to 4th Hurlbutt Decl. (Dkt. 59-4) ("We will be doing many outings, fundraisers, dinners and even yes . . . another Walk for Liberty to raise money for this legal fight. . . . If you'd like to make a donation or join AMRA, clink the link below.") (emphasis added); *id.* at Ex. C (Dkt. 59-5) ("[W]e need to spend a large amount of money to get [this case] to appeal. We are looking to raise $150,000 to get there folks. . . . Want to make a cash donation, click the link below."). The true extent of this support, however, and whether it would apply to a civil monetary penalty, is unknown. At the end of the day, the mere possibility of Mr. Poe's access to AMRA's legal defense fund definitely generates "smoke" but not enough "fire" to legitimize ICL's matter-of-fact statement that, owing to his ties to AMRA, "[Mr.] Poe has significant funds to pay a penalty" of at least $564,924. Mem. ISO Mot. for Remedies at 22 (Dkt. 59-1). The record is simply too underdeveloped for such a broad legal conclusion.

All in all, the Court is satisfied that imposing a civil penalty of at least $564,924 would have a more drastic effect on Mr. Poe than is needed to account for his CWA violations and ensure future compliance. This does not mean that Mr. Poe's suggested $60,924

penalty prevails by default either. To the contrary, Mr. Poe fails to explain the basis for this significantly lower amount[13] or how a higher penalty would be ruinous to him. Because Mr. Poe failed to meet this burden, the Court is not limited to the $60,924 penalty he proposes.

5. Other Considerations

It is not unusual to try and determine whether a civil penalty is equitable by drawing comparisons to analogous cases. *See U.S. v. Righter*, 2010 WL 4977046, at *4 (M.D. Pa. 2010) (performing side-by-side comparison of two cases to fashion equitable penalty). Both ICL and Mr. Poe attempt to do this. *Compare* Mem. ISO Mot. for Remedies at 14–16 (Dkt. 59-1), *with* Resp. to Mot. for Remedies at 23–24 (Dkt. 63). These exercises are helpful in the abstract, but rarely supply an "apples to apples" comparison that uncovers an obvious answer. Cases may deal with different facts, different party statuses (individual vs. corporate), different legal proceedings (court vs. administrative), different manners of resolution (settlement vs. finding of liability), or just different methods of calculation (high per violation penalties in low volume cases vs. low per violation penalties in high volume cases) that frustrate comparison. *Id.* The following chart incorporates the parties' cases and confirms as much:

[13] More specifically, Mr. Poe has not supplied the basis for his suggested $1,200 per day violation of the CWA. This figure, multiplied by Mr. Poe's 42 CWA violations, and then added to his $10,524 economic benefit, amounts to $60,924.

Case[14]	**Status**	**Max Penalty**	**Imposed Penalty**	**Violations**	**Per violation**
Atlanta Gold	C	$75,150,500	$2 million (~3%)	2,000	$1,000/per
Magar	I	$187,500	$100,000 (~53%)	5	$20,000/per
Erlanson	I	$16,000	$6,600 (~41%)	1	$6,600/per
Rice	I	$16,000	$3,600 (~23%)	1	$3,600/per
Grissom	I	$203,256	$24,000 (~12%)	9	$2,667/per
Rogue Riverkeeper	I	$99,525,000	$96,150 (~1%)	2,654	$37.50/per
Poe	C	$1,957,041	??	42	??

[14] ICL cites to *Atlanta Gold*, *Magar*, and *Erlanson*; Mr. Poe cites to *Rice*, *Grissom*, and *Rogue Riverkeeper*.

Of note, *Erlanson*, *Rice*, and *Grissom* dealt with suction dredge mining on the SFCR without an NPDES permit which the Court considers relevant when evaluating the seriousness of Mr. Poe's CWA violations. However, only *Erlanson* included a finding of liability (albeit administratively); the *Rice* and *Grissom* penalties resulted from settlements with the EPA. In all, the cases are difficult to reconcile and fact-dependent. Accordingly, they provide only limited comparative guidance.

Suffice it to say, and mindful of the complexities inherent in cases like this, the Court exercises its discretion and assesses a total civil penalty of $150,000 for Mr. Poe's 42 CWA violations. This amount includes (i) the $10,524 direct economic benefit that Mr. Poe received from his CWA violations and (ii) $139,476 ($3,320.86 per violation) following the Court's evaluation of the remaining § 1319(d) factors. *Supra*.

This penalty represents less than 8% of the maximum possible penalty, yet can still be read consistently with the penalties imposed in analogous cases. It recognizes on the one hand the serious nature of Mr. Poe's 42 violations over three years; on the other hand, it does not ignore the fact that suction dredge mining is allowed on the SFCR (when properly permitted) and that Mr. Poe is an individual suction dredge miner, mines for his own personal benefit, and has limited resources (though receives financial support—to some degree—from AMRA). With these overarching considerations in mind, the Court is satisfied that this penalty accounts for the harm involved, deters future violations, and represents an equitable application of the law.

III. ORDER

Based on the foregoing, IT IS HEREBY ORDERED that ICL's Motion for Remedies (Dkt. 59) is GRANTED as follows:

1. An injunction consistent with this Memorandum Decision and Order shall issue as part of a separate judgment.

2. Defendant Shannon Poe shall pay a civil penalty of $150,000 to the United States Treasury.

3. Within 14 days of this Memorandum Decision and Order, the parties are instructed to submit a joint proposal to the Court, addressing (i) the terms of the injunction and (ii) a deadline for the $150,000 payment and any corresponding payment schedule/logistics.

DATED: September 28, 2022

/s/ Raymond F. Patricco
Honorable Raymond E. Patricco
Chief U.S. Magistrate Judge

Filed June 4, 2021

UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

IDAHO CONSERVATION LEAGUE, Plaintiff, vs. SHANNON POE, Defendant.	Case No.: 1:18-cv-353-REB **MEMORANDUM DECISION AND ORDER RE:** **IDAHO CONSERVATION LEAGUE'S MOTION FOR SUMMARY JUDGMENT ON LIABILITY (Dkt. 38)** **SHANNON POE'S MOTION FOR SUMMARY JUDGMENT (Dkt. 39)**

Pending before the Court is Plaintiff Idaho Conservation League's Motion for Summary Judgment on Liability (Dkt. 38) and Defendant Shannon Poe's Motion for Summary Judgment (Dkt. 39). Having carefully considered the record, participated in oral argument, and otherwise being fully advised, the Court enters the following Memorandum Decision and Order:

I. RELEVANT BACKGROUND

The pertinent facts that now frame the legal issues involved in this case (and as presented in the parties' cross-motions for summary judgment) are largely

undisputed[1]—namely, that Mr. Poe suction dredge mined 42 days on the South Fork Clearwater River during the 2014, 2015, and 2018 dredge seasons (running from July 15 to August 15 each year), without ever obtaining an NPDES permit under Section 402 of the CWA. ICL argues that Mr. Poe violated the CWA each time he operated a suction dredge on the South Fork Clearwater River without an NPDES permit. Mr. Poe disagrees, countering that (1) his suction dredge mining did not add pollutants to the South Fork Clearwater River and therefore did not require an NPDES permit (or any other CWA permit) in the first instance; and (2) even if his suction dredge mining did add pollutants, those pollutants are "dredged" or "fill" material regulated exclusively under Section 404 (not Section 402) of the CWA and therefore did not require an NPDES permit.[2] This Memorandum Decision and Order confronts these

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[1] Within its September 30, 2019 Memorandum Decision and Order denying Defendant Shannon Poe's Motion to Dismiss, the Court generally discussed the characteristics of the South Fork Clearwater River; recreational suction dredge mining and National Pollutant Discharge Elimination System ("NPDES") permit requirements under the Clean Water Act ("CWA"); Idaho's permitting requirements for suction dredging; Mr. Poe's suction dredge activity on the South Fork Clearwater River without an NPDES permit in 2014, 2015, and 2018; and Plaintiff Idaho Conservation League's ("ICL") correspondence to Mr. Poe in 2016, 2017, and 2018 advising him of its intention to initiate a CWA citizen suit against him if he continued to suction dredge in Idaho without an NPDES permit. *See generally* 9/30/19 MDO, pp. 1–8 (Dkt. 26). This backdrop, while important for context, will not be repeated here.

[2] Mr. Poe further argues that any discharges from his suction dredge mining are only "incidental fallback," making them exempt from Section 404 of the CWA in any event.

positions, resolving the question of whether Mr. Poe's suction dredge mining is governed under Section 402 or Section 404 of the CWA.

II. LEGAL STANDARD

Summary judgment requires a showing that, as to any claim or defense, "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A principal purpose of summary judgment "is to isolate and dispose of factually unsupported claims . . . ." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). It is "not a disfavored procedural shortcut"; rather, it is the "principal tool[ ] by which factually insufficient claims or defenses [can] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources." *Id.* at 327. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). There must be a genuine dispute as to any material fact—a fact "that may affect the outcome of the case." *Id.* at 248.

The evidence must be viewed in the light most favorable to the non-moving party, and the court must not make credibility findings. *See id.* at 255. Direct testimony of the non-movant, however implausible, must be believed. *See Leslie v. Grupo ICA*, 198 F.3d 1152, 1159 (9th Cir. 1999). However, the court is not required to adopt unreasonable inferences from circumstantial evidence. *See McLaughlin v. Liu*, 849 F.2d 1205, 1208 (9th Cir. 1988).

In deciding cross-motions for summary judgment, the court considers each party's evidence. *See Las Vegas Sands, LLC v. Nehme*, 632 F.3d 526, 532 (9th Cir. 2011); *see also Fair Hous. Council of Riverside Cnty., Inc. v. Riverside Two*, 249 F.3d 1132, 1134 (9th Cir. 2001) ("[W]hen simultaneous cross-motions for summary judgment on the same claim are before the court, the court must consider the appropriate evidentiary material identified, and submitted in support of both motions, and in opposition to both motions, before ruling on each of them."). The court must independently search the record for factual disputes. *See Fair Hous. Council of Riverside Cnty., Inc. v. Riverside Two*, 249 F.3d 1132, 1134 (9th Cir. 2001). Even though the filing of cross-motions for summary judgment means that both parties essentially assert that there are no material factual disputes, the Court nonetheless must decide whether disputes as to material fact are present. *See id.*

The moving party bears the initial burden of demonstrating the absence of a genuine dispute as to material fact. *See Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001). Affirmative evidence (such as affidavits or deposition excerpts) is not required to meet this burden, as the movant may simply point out the absence of evidence supporting the non-moving party's case. *See Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 532 (9th Cir. 2000). Doing so shifts the burden to the non-movant to produce evidence sufficient to support a favorable jury verdict. *See Devereaux*, 263 F.3d at 1076. The non-movant must go beyond the pleadings and show "by [his] own affidavits, or by the depositions, answers to interrogatories, or admissions on file" that a genuine dispute of material fact exists. *Celotex*, 477 U.S. at

324. Where reasonable minds could differ on the material facts at issue, summary judgment should not be granted. *See Anderson*, 477 U.S. at 251.

III. DISCUSSION

The CWA prohibits the discharge of any pollutant into the waters of the United States unless the Environmental Protection Agency ("EPA") or the Army Corps of Engineers (the "Corps") has issued a permit authorizing the discharge. *See* 33 U.S.C. §§ 1311(a), 1342 (EPA and "[NPDES]" permits),[3] 1344 (Corps and "Permits for dredged and fill material"). Neither ICL nor Mr. Poe disputes that the material passing through Mr. Poe's suction dredge and into the South Fork Clearwater River falls within the definition of a "pollutant"[4] under the CWA; instead, the parties dispute which agency—the EPA via Section 402 of the CWA or the Corps via Section 404 of the CWA—has authority under the CWA to permit the discharge, if any, of such pollutants into the South Fork Clearwater River. For the reasons that follow, the Court concludes that the EPA and Section 402 of the CWA control the circumstances giving rise to the instant action.

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[3] Of note, an NPDES permit is not required for discharges of dredged or fill material into navigable waters. *See* 33 U.S.C. § 1342(a)(1) ("*Except as provided in section[ ] . . . 1344 of this title*, the Administrator may . . . issue a permit for the discharge of a pollutant . . . .") (emphasis added); *see also infra* (discussing question of whether suction dredge mining is dredge or fill activity). The CWA defines "navigable waters" as "the waters of the United States, including territorial seas." 33 U.S.C. § 1362(7)

[4] The CWA provides that "pollutant" means, among other things, "dredged spoil," "rock," "sand," and "cellar dirt" "discharged into water." 33 U.S.C. § 1362(6).

A. Mr. Poe's Suction Dredge Mining Added Pollutants to the South Fork Clearwater River, Thus Requiring an NPDES Permit Under Section 402 of the CWA

A Section 402/NPDES permit is required if a person "(1) discharged, i.e., added (2) a pollutant (3) to navigable waters (4) from (5) a point source." *Comm. to Save Mokelumne River v. East Bay Mun. Utility Dist.*, 13 F.3d 305, 308 (9th Cir. 1993) (citing *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982)); *see also* 33 U.S.C. §§ 1311(a), 1342(a)(1), 1362(12) (CWA defining "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source"). There is no dispute that rock and sand passing through a suction dredge is a pollutant; that the South Fork Clearwater River is a navigable water; and that a suction dredge is a point source. *Compare* ICL's Mem. ISO MSJ, pp. 13–16 (Dkt. 38-2), *with* Poe's Opp. to ICL's MSJ, p. 8 (Dkt. 43). In turn, this reveals a lynchpin issue of the case: whether Mr. Poe's suction dredge mining involves the "discharge" or "addition" of a pollutant to the South Fork Clearwater River. ICL says it does. Mr. Poe says it does not.

According to Mr. Poe, "suction dredge mining adds nothing to the dredged streambed material that is returned to the river or stream," essentially arguing that, because suction dredge mining does not add anything to the water *not already there to begin with*, there can be no addition of any pollutant and thus no discharge of a pollutant for the EPA to permit. Poe's Opp. to ICL's MSJ, p. 10 (Dkt. 43); *see also* Poe's Mem. ISO MSJ, pp. 9–12 (Dkt. 39-2). The CWA does not resolve the issue by clearly defining (or defining at all)

what the term "addition" means in this setting. But the EPA has, interpreting it to include the "resuspension" of rocks and sands from a placer mining sluice box to a stream, even when those materials came from the bed of the stream itself—an interpretation the Ninth Circuit adopted in *Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990).

In *Rybachek*, miners challenged the EPA's CWA regulations that required treating sluice box discharge water from placer mining, arguing that placer mining does not cause the "addition" of a pollutant. The Ninth Circuit rejected that argument, explaining:

> In the sluicing process, a miner places the ore in an on-site washing plant (usually a sluice box) which has small submerged dams (riffles) attached to its bottom. He causes water to be run over the paydirt in the sluice box; when the heavier materials (including gold) fall, they are caught by the riffles. The lighter sand, dirt, and clay particles are left suspended in the wastewater released from the sluice box.
>
> Placer mining typically is conducted directly in streambeds or on adjacent property. The water usually enters the sluice box through gravity, but may sometimes also enter through the use of pumping equipment. At some point after the process described above, the water in the sluice box is discharged. The discharges from placer mining can have aesthetic and water-quality impacts on waters both in the immediate vicinity and downstream. Toxic

metals, including arsenic, cadmium, lead, zinc, and copper, have been found at a higher concentration in streams where mining occurs than in non-mining streams.

. . . .

[W]e will not strike down the EPA's finding that placer mining discharges pollutants within the meaning of the [CWA]. Placer miners excavate the dirt and gravel in and around waterways, extract any gold, and discharge the dirt and other non-gold material into the water.

On the one hand, if the material discharged is not from the streambed itself, but from the bank alongside, this is clearly the discharge into navigable waters of a pollutant under the [CWA]. Congress defined "pollutant" as meaning, among other things, "dredged spoil . . ., rock, sand, [and] cellar dirt . . . ." 33 U.S.C. § 1362(6) (1982). The term "pollutant" thus encompasses the materials segregated from gold in placer mining. Congress defined "discharge" as any "addition [ ] to navigable waters from any point source." 33 U.S.C. § 1362(12) (1982). Because, under this scenario, the material discharged is coming not from the streambed itself, but from outside it, this clearly constitutes an "addition."

And on the other hand, even if the material discharged originally comes from the streambed itself, such resuspension may be

> *interpreted to be an addition of a pollutant under the [CWA]. See Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983) (stating that "[t]he word 'addition,' as used in the definition of the term 'discharge,' may reasonably be understood to include 'redeposit'"); *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1506 (11th Cir. 1985) (action of digging up sediment and redepositing it on sea bottom by boat propellers constitutes an addition of pollutants). We will follow the lead of the Fifth and Eleventh Circuits and defer to the EPA's interpretation of the word "addition" in the [CWA].

Id. at 1282, 1285–86 (certain internal citations omitted, emphasis added); *see also Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 814–15 (9th Cir. 2001) (upholding *Rybachek* in context of "deep ripping" in protected wetlands, stating: "[A]ctivities that destroy the ecology of a wetland are not immune from the [CWA] merely because they do not involve the introduction of material brought in from somewhere else. . . . [B]y ripping up the bottom layer of soil, the water that was trapped can now drain out. While it is true, that in so doing, no new material has been 'added,' a 'pollutant' has certainly been 'added.'"); *E. Or. Mining Assoc. v. Dep't of Envtl. Quality*, 445 P.3d 251, 254–55 (Or. 2019) ("*EOMA*") (though acknowledging a federal Court of Appeals decision does not bind state court interpreting federal law, nonetheless "agree[ing] with *Rybachek* that the EPA reasonably has concluded that the suspension of solids and the remobilization of heavy metals resulting from suction dredge mining constitutes the

'addition' of a pollutant that requires a permit under the [CWA].").[5]

Because the court in *Rybachek* recognized that the statutory term "addition" is ambiguous, it deferred to the EPA's reasonable conclusion that the suspension of solids resulting from placer mining—a practice that includes suction dredge mining—constitutes the "addition" of a pollutant within the meaning of the CWA. *See Rybachek*, 904 F.2d at 1284–86 (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 844 (1984); *EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 83 (1980) (stating that "this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration")). The undersigned agrees—not only that the CWA (was and) remains ambiguous on this point, but also that the EPA (did and) continues to reasonably interpret "addition" of a pollutant to include the byproduct of suction dredge mining that likewise warrants agency deference.

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[5] Mr. Poe argues that "[o]nly the Supreme Court of Oregon has relied on *Rybachek* to conclude that the resuspension of and the remobilization of heavy materials from suction dredge mining constitute an 'addition' of a pollutant under the CWA requiring a Section 402 permit." Poe's Opp. to ICL's MSJ, p. 17 (Dkt. 43). Even if true, Poe fails to also note that no other court has specifically addressed whether suction dredge mining causes an "addition" of a pollutant. Moreover, he similarly says nothing about that fact that there are no cases that reject *Rybachek's* holding or its application to these (or similar) facts. Though *EOMA's* holding is not binding on this Court, the undersigned finds that its consideration of and decision upon the very same issues comprehensive and persuasive, such that this Memorandum Decision and Order largely tracks the analysis contained therein and is to be read consistently where appropriate.

For example, in 2018, responding to comments regarding the reissuance of the General Permit for suction dredge mining in Idaho, the EPA's regional office reaffirmed that the suspension of solid materials caused by suction dredge mining constitutes the "addition" of a pollutant to the water. *See* Resp. to Comments Idaho Small Dredge General Permit (GP) at p. 5, attached as Ex. Z to Second Hurlbutt Decl. (Dkt. 38-17) (citing and discussing *Rybachek*). In response to a different comment, the EPA explained:

> If, during suction dredging, only water was picked up and placed back within the same water body, the commenter would be correct that no permit would be necessary. However, in suction dredging, bed material is also picked up with water. Picking up the bed material is in fact the very purpose of suction dredging—the bed material is processed to produce gold. This process is an intervening use that causes the addition of pollutants [rock and sand, see CWA § 502(6)] to be discharged to waters of the United States. As a result, . . . an NPDES permit is required for the discharge from this activity.

Id. at p. 6 (internal citation omitted); *see also infra* (noting same response's consideration and rejection of *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95 (2004)). Then, when later reissuing the General Permit for suction dredge mining in Idaho, the EPA again decided that suction dredge mining adds pollutants to the river, explaining further:

> Dredging systems are classified as hydraulic or mechanical (including bucket dredging),

> depending on the methods of digging. Suction dredges, the most common hydraulic dredging system, are popular with small scale and recreational gold placer miners. Suction dredges consist of a supporting hull with a mining control system, excavating and lifting mechanism, gold recovery circuit, and waste disposal system. All floating dredges are designed to work as a unit to extract, classify, beneficiate ores, and discharge. The disposal system is a discrete conveyance, or point source, from which pollutants are or may be discharged.
>
> Because suction dredges work the stream bed, the discharges from suction dredges consist of stream water and bed material. The primary pollutant of concern in the discharges from a suction dredge is suspended solids, defined as total suspended non-filterable solids. The suspended solids discharged from suction dredges result from the agitation of stream water and stream bed material in the dredge while processing the material. The discharged suspended solids result in a turbidity plume, or cloudiness, in the receiving water. *This discharge, when released into waters of the United States, constitutes the addition of a pollutant from a point source that is subject to NPDES permitting.*

2018 Fact Sheet at p. 8, attached as Ex. 7 to MTD (Dkt. 17-3) (emphasis added); *see also EOMA*, 445

P.3d at 254–55 (noting, and giving deference to additional (1) restrictions that reflect "EPA's considered conclusion that suction dredge mining can result in the addition of pollutants to navigable waters in the form of suspended solids and 'remobilized' heavy metals," and (2) Corps and EPA regulations "recogniz[ing] that redepositing materials dredged from stream and river beds constitutes a regulable discharge or addition of a pollutant").

Mr. Poe insists, however, that suction dredge mining cannot introduce or add any new pollutants into the water because "[t]hese materials already exist within the water body . . . ." Poe's Opp. to ICL's MSJ, p. 11 (Dkt. 43). He claims that "[t]his movement is similar to the Supreme Court cases holding that a movement of water and pollutants through dams, pump stations, and other drainages does not result in the 'addition' of a pollutant into waters of the United States." *Id.* (citing *Los Angeles Cnty. Flood Control Dist. v. Nat. Res. Def. Council, Inc.*, 568 U.S. 78, 80–82 (2013) ("*L.A. County*"); *Miccosukee Tribe*, 541 U.S. at 109–112 (2004)). But these cases do not speak to the situation at hand and thus do not operate to overturn *Rybachek*.

In *L.A. County*, the Supreme Court reaffirmed that "the transfer of polluted water between 'two parts of the same water body' does not constitute a discharge of pollutants under the CWA." *L.A. County*, 568 U.S. at 82. "No pollutants are 'added' to a water body," the Court said, "when water is merely transferred between different portions of that water body." *Id.* Similarly, in *Miccosukee Tribe*, polluted water was removed from a canal, transported through a pump station, and then deposited into a nearby reservoir.

See Miccosukee Tribe, 541 U.S. at 100. The Court held that, if the canal and reservoir were simply two parts of the same water body, then there is no "addition" of pollutants, analogizing to ladling soup from a pot and simply pouring the ladled soup back into the pot. *See id.* at 109–112 ("[I]f C-11 and WCA-3 are simply two parts of the same water body, pumping water from one into the other cannot constitute an 'addition' of pollutants. . . . '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.'") (internal citation omitted, quoting *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d, 481, 492 (2nd Cir. 2001)).

Mr. Poe's reliance on these cases misses the point. Suction dredge mining does not simply transfer water (what the above cases address); to the contrary, it excavates rock, gravel, sand, and sediment from the riverbed and then adds those materials back to the river—this time, in suspended form. *See EOMA*, 445 P.3d at 255 (distinguishing *L.A. County* and *Miccosukee Tribe*, pointing out: "[T]he EPA reasonably could find that suction dredge mining does more than merely transfer polluted water from one part of the same water body to another. Rather, the EPA reasonably could find that suction dredge mining adds suspended solids to the water and can 'remobilize' heavy metals that otherwise would have remained undisturbed and relatively inactive in the sediment of stream and river beds.") (internal quotation marks omitted). If Mr. Poe's suction dredge just sucked up river water from—and back into—the South Fork Clearwater River (along with any pollutants already in the water), he would be transferring water and not adding any pollutants

under *L.A. County* and *Miccosukee Tribe*.[6] But that is neither suction dredge mining, nor what Mr. Poe did on the South Fork Clearwater River during the 2014, 2015, and 2018 dredging seasons.[7]

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[6] The EPA stated as much when responding to a comment submitted as part of the reissuance of the General Permit for suction dredge mining in Idaho. *See* Resp. to Comments Idaho Small Dredge General Permit (GP) at p. 6, attached as Ex. Z to Second Hurlbutt Decl. (Dkt. 38-17) ("The soup ladle example referenced by the commenter refers to a water transfer, which means 'an activity that conveys or connects waters of the U.S. without subjecting the transferred water to intervening industrial, municipal, or commercial use' (40 C.F.R. § 122.3(i)). Notably, '[t]his exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred.' *Id.* If, during suction dredging, only water was picked up and placed back within the same water body, the commenter would be correct that no permit would be necessary. *See South Florida Water Management Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). However, in suction dredging, bed material is also picked up . . . ."); *see supra*.

[7] The EPA has also pursued CWA administrative enforcement actions against two other dredge miners on the South Fork Clearwater River for their unpermitted dredging in 2015. *See* ICL SOF No. 41 (Dkt. 38-1). In one action, the miner and the EPA entered into a Consent Agreement, with that miner agreeing to pay a civil penalty. *See id.* In the other, the EPA prevailed before an ALJ in proving CWA liability for discharging pollutants from a suction dredge without an NPDES permit, with the ALJ characterizing that miner's reliance on *L.A. County* and *Miccosukee Tribe* as "misplaced because:

> [T]he operation of Respondent's suction dredge involves the removal of otherwise latent materials from the bed of the South Fork Clearwater River, the separation of the materials by weight as they travel through the dredge, and the reintroduction of the leftover lighter materials to the waterway in a physically altered form, namely, suspended solids,

In sum, the very nature of Mr. Poe's suction dredge mining added pollutants to the South Fork Clearwater River. *Rybachek* therefore applies to require an NPDES permit under Section 402 of the CWA.[8]

> thereby transforming those materials into "pollutants" and altering the base of the river where the materials are both removed and redeposited. This process can hardly be likened to the simple transfer of water.

Id. (citing 9/27/18 Order on Complainant's Motion for Accelerated Decision, pp. 18–19, attached as Ex. BB to Second Hurlbutt Decl. (Dkt. 38-19)).

[8] Mr. Poe questions the scope of Rybachek's holding, claiming that (1) it did not speak to the issue of whether recreational suction dredge mining results in the discharge of dredged or fill material, and that (2) its position on whether suction dredge mining absolutely adds pollutants to a water body was more equivocal than not. *See* Poe's Opp. to ICL's MSJ, pp. 14–18 (Dkt. 43). However, *Rybachek* is not being cited here to claim that suction dredge mining does not involve dredge or fill material; rather, Rybachek supports the conclusion that suction dredge mining adds pollutants to a waterbody, alongside agency deference. *See infra* (discussing dredge or fill material vis à vis suction dredge mining). Second, any traction gained by pointing out that *Rybachek* only held that a resuspension of materials "may be interpreted to be an addition of a pollutant under the [CWA]," recedes when, at the very least, the comparisons to be drawn from *Rybachek*'s analysis to the instant action are nonetheless obvious and compelling, and that, other than *EOMA*, no other court has confronted whether suction dredge mining adds pollutants to the water body. And, on that score, *EOMA* unquestionably applied *Rybachek* to hold that it does. *See supra*.

B. The Processed Material Discharged From Mr. Poe's Suction Dredge Mining on the South Fork Clearwater River Is a Pollutant, not Dredged or Fill Material, and Requires an NPDES Permit Under Section 402 of the CWA

Mr. Poe alternatively argues that, even if his suction dredge mining adds pollutants to the South Fork Clearwater River, the waste discharged from his operation constitutes dredged or fill material over which the Corps has exclusive permitting authority. *See* Poe's Mem. ISO MSJ, pp. 4–9 (Dkt. 39-2) (citing *Coeur Alaska, Inc. v. S.E. Alaska Conservation Council*, 557 U.S. 261, 273–74 (2009) (if single discharge constitutes "dredged or fill material" and another "pollutant," only Corps has authority under CWA to issue permit authorizing discharge of that material into navigable water)).[9] He contends that the Corps' regulations implementing the CWA (in

[9] The initial issue in Coeur Alaska was whether the EPA or the Corps had authority under the CWA to issue a permit for the discharge of mining slurry into a lake. *See Coeur Alaska*, 557 U.S. at 273. The parties agreed that the slurry constituted *both* "fill" (which was subject to the Corps' permitting authority) *and* a "pollutant" (which was subject to the EPA's permitting authority). *See id.* at 275. The Court concluded that, in those circumstances, the CWA gave the Corps sole authority to issue a permit for the discharge of the slurry into the lake. *See id.* at 273–74. Therefore, to be clear, *Coeur Alaska* only decided who—between the Corps or the EPA—had permitting authority in instances where a discharge simultaneously involved fill and a pollutant; it did not address whether suction dredge mining actually discharged either fill or a pollutant (because, again, the parties agreed that both existed). Here, however, the parties disagree over whether the material discharged from Mr. Poe's suction dredge mining constitutes dredged material or a pollutant/processed waste. *See, e.g.*, *EOMA*, 445 P.3d at 256–57.

particular, its definitions for "discharge of dredged material" and "dredge material") equivocally establish that suction dredge mining falls under the Corp's Section 404 authority as a discharge of either dredged or fill material—full stop. *See* Poe's Mem. ISO MSJ, pp. 8–9 (Dkt. 39-2) ("Under any reading of the regulations, suction dredge mining involves the discharge of dredged or fill material regulated by the Corps under Section 404. The regulations provide an answer and, therefore, 'there is no plausible reason for [agency] deference' in this case.") (quoting *Kisor v. Wilke*, 139 S.Ct. 2400, 2415 (2019)). The undersigned is not so convinced.

To begin, the CWA does not define the phrases "dredged material" or the "discharge of dredged material." *See EOMA*, 445 P.3d at 257 ("More specifically, it does not define whether material that was dredged from navigable water remains 'dredged material' after it has been processed. And, if processing dredged material can change its character, the text does not identify the point at which the processed material becomes a pollutant other than dredged material that is subject to the EPA's rather than the Corps' permitting authority."). "[I]f Congress has not spoken directly to that issue, then the Corps and the EPA's reasonable interpretation of the [CWA] both in issuing regulations and interpreting their regulations is entitled to deference in determining whether a discharge constitutes 'fill,' 'dredged material,' or some other 'pollutant.'" *Id.* (citing *Coeur Alaska*, 557 U.S. at 277–78 (explaining that, if text of CWA is ambiguous, courts look to agencies' implementing regulations and, if those regulations are ambiguous, to agencies' interpretation and application of their regulations to determine what

CWA means)). Except, as *EOMA* highlights (after setting out the regulatory history in "mind-numbing" detail), the regulations implementing the CWA—while persuasive and dispositive to Mr. Poe (*see supra*))—do not specifically address which agency has authority to permit the discharge of material resulting from suction dredge mining and, to that end, are not free of ambiguity themselves. Tracking *EOMA*, the issue's landscape in that respect unfolds as follows:

- In 1975, the Corps adopted definitions of "dredged material" and the "discharge of dredged material."

  The regulations defined (1) "dredged material" as "material that is excavated or dredged from navigable waters," and (2) "discharge of dredged material" as:

  > any addition of dredged material, in excess of one cubic yard when used in a single or incidental operation, into navigable waters. The term includes, without limitation, the addition of dredged material to a specified disposal site located in navigable waters and the runoff or overflow from a contained land or water disposal area. Discharges of pollutants into navigable waters resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill) are not included within this term and are subject to Section 402 of the [CWA].

33 C.F.R. §§ 209.120(d)(4),(5) (1976). These definitions have remained largely unchanged. *Compare id.*, *with* 33 C.F.R. §§ 323.2(c),(d); *see also* Poe's Mem. ISO MSJ, p. 5 (Dkt. 39-2).

Importantly, the definition of "discharge of dredged material" identified an exception to that definition, providing that "[d]ischarges of pollutants into navigable waters resulting from the onshore subsequent processing of dredged material extracted for any commercial use (other than fill) are not included within the term and are subject to Section 402 of the [CWA]." 33 C.F.R. § 209.120(d)(5) (1976); *compare id.*, *with* 33 C.F.R. § 323.2(d)(2)(i); *see also* Poe's Mem. ISO MSJ, p. 6 (Dkt. 39-2). In explaining the exception, the Corps stated that "[d]ischarges of materials from land based commercial washing operations are regulated under Section 402 of the [CWA]" by the EPA. 40 Fed. Reg. 31320, 31321 (July 25, 1975); Poe's Mem. ISO MSJ, p. 6 (Dkt. 39-2).[10]

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[10] In *EOMA*, the court found that "[t]he exception makes clear that *the act of processing* dredged material can result in the discharge of a 'pollutant' that requires a permit from the EPA under Section 402 rather than the discharge of 'dredged material' that requires a permit from the Corps under Section 404." *EOMA*, 445 P.3d at 259 (emphasis added); *see also id.* at n.8. Even so, the petitioners there (like Mr. Poe here) relied on the exception to argue that it distinguished between discharges resulting from processing dredged material on land (subject to the EPA's permitting authority), and discharges resulting from

- In 1977, the Corps considered when the discharge of "waste materials such as sludge, garbage, trash, and debris in water" would constitute "fill" that was subject to the Corps' permitting authority and when they would constitute another pollutant that was subject to the EPA's permitting authority. *See* 42 Fed. Reg. 37122–30 (July 19, 1977).

  Initially, the Corps took the position that the answer to that question turned on the

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processing dredged material over water (subject to the Corps' permitting authority). *See id.*; *compare with* Poe's Mem. ISO MSJ, p. 7 (Dkt. 39-2) ("Suction dredge mining also does not involve 'onshore processing' under 33 C.F.R. § 323.2(d)(2)(i), because mining and any discharge occur entirely in-stream. The exclusion for Section 404 regulation does not apply since the discharged dredge material is also not processed nor commercially washed on the land, it simply passes through the dredge and over a sluice box back into the same river."). The court in *EOMA* disagreed with the distinction, noting that (1) the exception applies to discharges from onshore processing of dredged material that is extracted for a commercial use, but that if dredged material is extracted for some other use (a recreational one, for example), then the exception does not apply regardless of whether the dredged material is processed over land or water; and (2) the reference to a single exception to the definition of "discharge of dredged material" does not *ipso facto* mean that the Corps intended that all other discharges resulted from land-based and water-based processing of dredged material would be subject to the Corps', rather than the EPA's, permitting authority. *EOMA*, 445 P.3d at 259–60 ("Because the 1975 regulatory definition of 'discharge of dredged material' either does not address or does not unambiguously resolve whether discharges resulting from suction dredge mining are subject to the Corps' or the EPA's permitting authority, we look to the ways in which the Corps and the EPA subsequently resolved that issue.").

purpose for which those materials were discharged into the water. *See id.* It modified the definition of "fill" in the 1977 regulations to "exclude those pollutants that are discharged into water primarily to dispose of waste," with the result being that the EPA would have permitting authority over waste discharged primarily for that purpose, while the Corps would have permitting authority over waste that was discharged primarily to convert wetlands into dry land. *See id.*; *compare with* 33 C.F.R. §§ 323.2(e)(1)(i-ii),(2),(f) ("Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood ships, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.").

- In 1986, the EPA and the Corps entered into a Memorandum of Agreement "to resolve a difference (since 1980) between Army and EPA over the appropriate CWA program for regulating certain discharges of solid wastes into waters of the United States." 51 Fed. Reg. 8871 (March 14, 1986). Among other things, the Agreement established criteria to determine when waste would be considered "fill" subject to the Corps' authority, and when it would be considered another pollutant subject to the EPA's authority. *See id.* at 8872 ("Whereas the definitions of the term "fill material" contained in the aforementioned regulations

have created uncertainty as to whether Section 402 of the [CWA] or Section 404 is intended to regulate discharges of solid waste materials into waters of the United States for the purpose of disposal of waste . . . .").

The Agreement identified four criteria for determining when waste discharged into water ordinarily would be regarded as fill subject to the Corps' authority. *See id.* (at ¶¶ B(4)(a–d)). Relevant here, the Agreement then described when waste discharged into the water would be considered a pollutant subject to the EPA's authority:

> [A] pollutant (other than dredged material) will normally be considered by EPA and the Corps to be subject to Section 402 if it is a discharge in liquid, semi-liquid, or suspended form or if it is a discharge of solid material of a homogenous nature normally associated with single industry wastes, and from a fixed conveyance, or if trucked, from a single site and set of known processes. These materials include *placer mining wastes*, phosphate mining wastes, titanium mining wastes, sand and gravel wastes, fly ash, and drilling muds. As appropriate, EPA and the

> Corps will identify additional such materials.

Id. at ¶ B(5) (emphasis added).[11]

- Also in 1986, the Corps issued a regulation defining the term "discharge of dredged material," as used in Section 404, to mean "any addition of dredged material into the waters of the United States," but expressly excluding "*de minimis*, incidental soil movement occurring during normal dredging operations." 51 Fed. Reg. 41,206, 41,232 (November. 13, 1986).
- In 1990, the Corps issued a regulatory guidance letter that interpreted the 1986 Memorandum of Agreement and stated that the material discharged as a result of placer mining is subject to the EPA's exclusive permitting authority:

> Paragraph B.5 in the Army's 23 Jan 86 Memorandum of Agreement (MDA) with EPA, concerning the

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[11] In *EOMA*, the Court found the first sentence of paragraph B(5) to be broad enough to include *unprocessed* dredged material within EPA's permitting authority (explaining why it was explicitly excepted), whereas its second sentence identifies specific examples of *processed* waste that will be subject to the EPA's authority. *See EOMA*, 445 P.3d at 261–62 ("Not only does the second sentence expressly name the specific types of processed waste over which the EPA will have permitting authority, but it lists 'placer mining wastes,' which includes waste from suction dredge mining, as one of the wastes that will fall within the EPA's authority. Put differently, the second sentence makes clear that placer mining wastes are pollutants other than dredged material and thus subject to the EPA's permitting authority.").

> regulation of solid waste discharges under the [CWA], states that discharges that result from in-stream mining activities are subject to regulation under Section 402 and not under Section 404.
>
> Dredged material is that material which is excavated from the waters of the United States. *However, if this material is subsequently processed to remove desired elements, its nature has been changed; it is no longer dredged material*. The raw materials associated with placer mining operations are not being excavated simply to change their location as in a normal dredging operation, *but rather to obtain materials for processing, and the residue of this processing should be considered waste*. Therefore, placer mining waste is no longer dredged material *once it has been processed, and its discharge cannot be considered to be a "discharge of dredged material" subject to regulation under Section 404*.

Corps' Regulatory Guidance Letter 88-10, SUBJECT: Regulation of Waste Disposal from In-Stream Placer Mining, attached as Ex. A to Third Hurlbutt Decl. (Dkt. 44-2) (emphasis added).

- In 1993, the Corps excluded "*de minimus*, incidental soil movement occurring during

normal dredging operations" from the definition of "discharge of dredged material" and expanded the regulatory definition to include "'[a]ny addition, including any redeposit of dredged material, including excavated material, into waters of the United States.'" *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1402 (D.C. Cir. 1998) (quoting 33 C.F.R. § 323.2(d)(1)(iii) (1993)). Responding to challenges that this expanded definition now included "incidental fallback" that occurred during dredging, the Court of Appeals for the District of Columbia Circuit held that "incidental fallback" did not require a permit under the CWA. *See Nat'l Mining Ass'n*, 145 F.3d at 1404 ("[T]he straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back."). The Court of Appeals therefore directed the Corps to exclude "incidental fallback" from the definition of "discharge of dredged materials." *See id.* at 1406 (reconciling direction to exclude "incidental fallback" from definition of "discharge of dredged materials" with *Rybachek*, reasoning: "[*Rybachek* addressed] "the discrete act of dumping leftover material into the stream after it had been processed," not "imperfect extraction, i.e., extraction accompanied by incidental fallback of dirt and gravel.").

- In 1999, the Corps initially declined to define "incidental fallback" and explained that it would identify it on a case-by-case basis. *See* Fed. Reg. 25120, 25121 (May 10, 1999) ("[W]e have promulgated today's rule to comply with the injunction issued in [*Nat'l Mining Ass'n*], and as described below, will expeditiously undertake notice and comment rulemaking that will make a reasoned attempt to more clearly delineate the scope of CWA jurisdiction over redeposits of dredged material in waters of the U.S. In the interim, we will determine on a case-by-case basis whether a particular redeposit of dredged material in waters of the United States requires a Section 404 permit, consistent with our CWA authorities and governing case law.").
- In 2000, the Corps issued a proposed rule in the form of a rebuttable presumption that identified the types of mechanized earth-moving activities that ordinarily would result in the discharge of dredged material. *See* 65 Fed. Reg. 50108, 50111–12 (August. 16, 2000) ("Today's proposed rule would modify our definition of "discharge of dredged material" by establishing a rebuttable presumption that regulable discharges result from certain types of activities in waters of the U.S. In particular, the proposal would apply the rebuttable presumption to mechanized land clearing, ditching, channelization, in-stream mining, or other mechanized excavation activity in waters of the U.S., including wetlands.").

> The effect of the proposed rule was to shift the burden of persuasion to the regulated party to prove that any discharge was only incidental fallback. *See id* at 50113 ("Persons proposing to conduct activities subject to today's proposal may rebut the presumption that a regulable discharge of dredged material would occur by showing that the activity is planned and conducted so as to result only in incidental fallback. . . . Today's proposal would state our expectation that, absent a demonstration to the contrary, the activities addressed in the proposed rule typically will result in more than incidental fallback and thus result in regulable redeposits of dredged material.").[12]

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[12] In the preamble to the 2000 proposed rule, the Corps again recognized the apparent distinction between processes and unprocessed dredged material when citing to *Rybachek*. *See* 65 Fed. Reg. at 50110 (explaining *Rybachek* as: "removal of dirt and gravel from a streambed and its subsequent redeposit in the waterway after segregation of minerals in an 'addition of a pollutant' under the CWA subject to EPA's Section 402 authority"). That description is consistent with *Nat'l Mining Ass'n*'s earlier-referenced explanation that *Rybachek* had addressed "the discrete act of dumping leftover material into the stream after it had been processed," not "imperfect extraction, i.e., extraction accompanied by incidental fallback of dirt and gravel." *See supra* (citing *Nat'l Mining Ass'n*, 145 F.3d at 1406). The court in *EOMA* suggests that the explanation for the 2000 proposed rule goes even further than *Nat'l Mining Ass'n*, and (together with the 2001 final rule (*see infra*)) is "consistent with the Corps' and the EPA's earlier conclusion that the discharge of placer mining waste is not the discharge of dredged material and that, as a result, the EPA is authorized to issue permits under

- In 2001, the Corps issued a final rule that retained the substance of the presumption, but stated that the burden of proof would not shift. *See* 33 C.F.R. § 323.2(d)(2)(i). The 2001 rule sought to define the phrase "incidental fallback" in two ways: (1) by identifying the types of activities that ordinarily will result in something more than incidental fallback; and (2) by specifically defining the phrase:

> (i) The Corps and the EPA regard the use of mechanized earthmoving equipment to conduct land clearing, ditching, channelization, in-stream mining or other earth-moving activity in waters of the United States as resulting in a discharge of dredged material unless project-specific evidence shows that the activity results in only incidental fallback. This paragraph (i) does not and is not intended to shift any burden in any administrative or judicial proceeding.
>
> (ii) *Incidental fallback* 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.

Section 402 of the [CWA] for the processed waste discharged as a result of suction dredge mining" (and decidedly "[not] an intent to depart from the conclusion in the 1986 Memorandum of Agreement"). *EOMA*, 445 P.3d at 265.

> Examples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that comes off the bucket when such small volume of soil or dirt falls into substantially the same place from which it was initially removed.

Id. at §§ 323.2(d)(2)(i–ii) (2001).[13]

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[13] Like Mr. Poe here, the petitioners in *EOMA* argued that the reference to "in-stream mining" in paragraph (i) includes suction dredge mining which establishes that suction dredge mining ordinarily results in the discharge of dredged material subject to the Corps' authority. *Compare EOMA*, 445 P.3d at 264, *with* Poe's Mem. ISO MSJ, p. 8 (Dkt. 39-2) (citing and quoting 66 Fed. Reg. 4550, 4560–4561 (January 17, 2001)). But the court in *EOMA* highlighted how the petitioners "focus[ed] on only half the sentence," since the rule applies only to "the use of mechanized earth-moving equipment to conduct . . . in-stream mining." *EOMA*, 445 P.3d at 264 ("The small shop-vac-like equipment used to conduct suction dredge mining hardly qualifies as 'mechanized earth-moving equipment,' unless one views vacuum cleaners and other small suction devices as 'mechanized earth-moving equipment.' Were there any doubt about the matter, the explanation for the 2001 rule removes it. It explains that the phrase 'mechanized earth-moving equipment' refers to 'bulldozers, graders, backhoes, bucket dredges, and the like.'") (quoting 66 Fed. Reg. 4552 (January 17, 2001)). Additionally, the court declared that "[t]he 2001 rule was not intended to determine, nor did it determine, whether discharges resulting from processing dredged material were subject to the Corps or the EPA's permitting authority," and "[w]hen both the entire rule and the reason for promulgating it are considered, we cannot agree with petitioners that the 2001 rule signaled a departure from the Corps and the EPA's stated position in the 1986 Memorandum of Agreement." *Id.* Regardless, in 2008, the Corps repealed the 2001 rule listing the type of earth-moving activities that ordinarily would result in the discharge of dredged material

Against this scrim, the undersigned finds that the CWA's text and the agencies' implementing regulations leave open another critical question: whether *other* instances of processing dredged material (beyond the one instance identified in the regulations for onshore processing (*see supra*)) will result in the discharge of a pollutant subject to Section 402 or the discharge of dredged material subject to Section 404. *See, e.g.*, *EOMA*, 445 P.3d at 270 ("[T]he regulations do not resolve whether the discharges resulting from suction dredge mining constitute a pollutant subject to Section 402 or dredged material subject to Section 404. *Both the statutes and the regulations are genuinely ambiguous on that question*.") (emphasis added); *see also id.* at 271 (same). This uncertainty necessitates an examination of the history, both of the EPA and the Corps, of issuing permits for suction dredge mining. *See id.* at 266 ("It is precisely because the regulations leave that question open that the EPA and the Corps' *application of the statute and regulations* matters.") (emphasis added).

Addressing the same issue, *EOMA* examined the historical issuance of EPA general permits (and the Corps' corresponding acknowledgment) for suction dredge mining in Alaska and Idaho. *See id.* at 266–68. In each instance, the court found a shared understanding between the two agencies that acknowledged the EPA's permitting authority as to

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and simply excepted "incidental fallback" from the definition of discharge of dredge material. *See id.* at 263 (citing 33 C.F.R. § 323.2(d)(2)(iii) (2008)); *see also id.* at n.16 (Not relying too heavily on fact of repeal when "[n]either the 1986 Memorandum of Agreement or the Corps' 1990 guidelines letter . . . are currently in force.").

suction dredge mining. *See id.* at 267 (for Alaska: "As the Corps' and the EPA's joint exercise of authority in Alaska demonstrates, those agencies have adhered to the distinction reflected in the 1986 Memorandum of Agreement and stated in the Corps' 1990 regulatory guidance letter. The EPA has issued permits for discharges resulting from small scale suction dredge mining, and the Corps has recognized the EPA's authority to do so."); *see also id.* at 268 (for Idaho: "The EPA thus reaffirmed that the material discharged as a result of suction dredge mining is a pollutant that requires a permit from the EPA under Section 402 and not dredged material that requires a permit from the Corps under Section 404.") (citing and quoting Resp. to Comments Idaho Small Dredge General Permit (GP) at p. 7, attached as Ex. Z to Second Hurlbutt Decl. (Dkt. 38-17) (discussing (1) commenters' confusion between "discharge of dredged material" and "discharge of pollutant," while reaffirming its position that material discharged as result of suction dredge mining is "discharge of pollutant" subject to regulation under Section 402 and not incidental fallback, and (2) how Corps "routinely informs applicants who request a [Section] 404 permit for small suction dredging in Idaho that, unless a regulable discharge of dredged or fill material will occur, the EPA is the lead agency for the activity.")). After rejecting other possibly-consistent applications between the agencies on the issue (one of which Mr. Poe also cites here (*see* Poe Mem. ISO MSJ, pp. 17–18 (Dkt. 39-2))), *EOMA* ultimately concluded:

> In our view, the regulatory history reveals that, from 1986 to 2018, the EPA and the Corps *have been on the same page*. From the 1986 Memorandum of Agreement between

> the EPA and the Corps to the general permits issued by the EPA in 2018 and the Corps in 2017, both agencies consistently have recognized that processed waste discharged as a result of suction dredge mining is a pollutant that requires a permit from the EPA under Section 402. Similarly, they consistently have concluded that the discharge resulting from suction dredge mining is not "dredged material" that requires a permit from the Corps under Section 404.

EOMA, 445 P.3d at 269 (emphasis added); *see also id.* at 273 (same).

ICL urges the Court to follow *EOMA*'s lead here. *See generally* ICL's Opp. to Poe's MSJ, pp. 6–16 (Dkt. 44). ICL references how, in 2004, the Idaho Department of Environmental Quality, Nez Perce Tribe, and EPA prepared the South Fork Clearwater Subbasin Assessment and Total Maximum Daily Loads ("2004 TMDL") to address sediment and temperature pollution, and stated therein that suction dredge mining requires a Section 402 permit. *See id.* at p. 10 (citing 2004 TMDL at p. 100, attached as Ex. W to Second Hurlbutt Decl. (38-14) ("Suction dredges are considered to be point sources, and therefore are required to obtain an NPDES permit to discharge . . . .")).

The Court acknowledges that even with such additional context, as with the regulations themselves (*see supra*), there is space to argue otherwise—specifically, that the EPA and the Corps have not consistently applied Sections 402 and 404 to suction dredge mining activity over the years—an argument

that Mr. Poe puts forward. *See* Poe's Mem. ISO MSJ, pp. 16–18 (Dkt. 39-2); *but see* ICL's Opp. to Poe's MSJ, pp. 9–13 (Dkt. 44).[14] But whatever patchwork of permitting authority has existed over time, from *at least 2013* (via the general permitting process, initiated in 2010 and after notice and comment), it is *the EPA* that has required a Section 402 permit for suction dredge mining. This fact, coupled with the overall approach to and assignment and acceptance of responsibilities under the EPA's and the Corps' interpretation of the applicable regulations to suction dredge mining (*see supra*), confirms that the agencies have taken an official position and made a fair and considered judgment, based on its substantive

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[14] Moreover, responding to Mr. Poe's claim that the EPA previously endorsed the Idaho Department of Water Resources' ("IDWR") permit program as sufficient, ICL points out that such an argument not only overlooks the undisputed *current state* of the EPA's and the Corps' permitting authority (in Idaho and elsewhere), it also fails to reconcile the distinctions between the IDWR and Section 402 permitting programs. *See* ICL's Opp. to Poe's MSJ, pp. 10–11 (Dkt. 44) ("IDWR's permitting program was not and is not an authorized CWA program; IDWR's program implements Idaho's state law for protecting streambeds and streambanks from alterations. . . . EPA's view on the environmental adequacy of a non-CWA state program like IDWR's simply has no bearing on whether CWA permits are required."); *see also* ICL's Reply ISO MSJ, pp. 9–10 (Dkt. 46) (same); Resp. to Comments Idaho Small Dredge General Permit (GP) at p. 6, attached as Ex. Z to Second Hurlbutt Decl. (Dkt. 38-17) (discussing distinction between IDWR and EPA permits in response to commenter question: "The EPA permit and the [IDWR] permit are issued under two different authorities for two different reasons. The EPA NPDES permit is issued pursuant to the [CWA] and is an authorization to discharge wastewater to waters of the United States. IDWR regulates the alteration of stream channels from the use of recreational mining equipment in a stream under the Idaho Stream Channel Protection Act.").

expertise, that the operation of a suction dredge results in the discharge of processed wastes, thus requiring Section 402 permits. *See, e.g.*, *EOMA*, 445 P.3d at 272 ("The concern is not with the navigability of the water body, a concern that falls within the Corps' expertise; rather, the concern is with the health of the water body, a concern that lies at the heart of the EPA's expertise. The Corps and the EPA reasonably could conclude that the EPA was better suited than the Corps to make those types of water quality decisions. The risks posed by the cumulative effects of multiple suction dredge mining operations on the overall health of a stream differ from the sort of engineering issues that the Corps typically addresses."). The Court therefore defers to the interpretation by these agencies that the processed material discharged from Mr. Poe's suction dredge mining on the South Fork Clearwater river is a pollutant, not dredged or fill material, and requires an NPDES permit under Section 402 of the CWA.

IV. ORDER

Based on the foregoing, IT IS HEREBY ORDERED that (1) Plaintiff Idaho Conservation League's Motion for Summary Judgment on Liability (Dkt. 38) is GRANTED; and (2) Defendant Shannon Poe's Motion for Summary Judgment (Dkt. 39) is DENIED.

Within two weeks of the date of filing of this Memorandum Decision and Order, the parties are to file a joint status report, speaking to any subsequent

stages left to be decided in the case and proposed briefing schedules, for such remaining issues, if any.

DATED: June 4, 2021

/s/ Ronald E. Bush
Ronald E. Bush
Chief U.S. Magistrate Judge

Filed January 11, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IDAHO CONSERVATION LEAGUE, Plaintiff-Appellee, v. SHANNON POE, Defendant-Appellant.	No. 22-35978 D.C. No. 1:18-cv-00353-REP District of Idaho, Boise ORDER

Before: WARDLAW and M. SMITH, Circuit Judges, and HINKLE,* District Judge.

Judges Wardlaw and M. Smith vote to deny the petition for rehearing en banc, and Judge Hinkle so recommends. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED.

* The Honorable Robert L. Hinkle, United States District Judge for the Northern District of Florida, sitting by designation.