No. 22-35978

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IDAHO CONSERVATION LEAGUE,

Plaintiff – Appellee,

v.

SHANNON POE,

Defendant – Appellant.

On Appeal from the United States District Court
for the District of Idaho
Honorable Raymond E. Patricco, Chief U.S. Magistrate Judge

APPELLANT'S OPENING BRIEF

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INTRODUCTION

This appeal is about two questions of statutory interpretation under the Clean Water Act. First, the Act makes it illegal for any person to discharge a pollutant into the navigable waters from a point source without obtaining a permit, typically a National Pollution Discharge Elimination Permit (NPDES) from the Environmental Protection Agency. *See* 33 U.S.C. §§ 1311(a), 1342. 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, if a person does not add pollutants to jurisdictional waters, then that person need not obtain an NPDES permit and has not violated the law.

But Congress did not further define the "addition" of a pollutant in the Act. The EPA has also never sought to give the term a concrete definition through regulation or otherwise but has applied the term case-by-case. And for several years after Congress passed the Act, some circuit courts of appeals—including the Ninth Circuit—found the term ambiguous and broadly deferred to the agency when it sought to regulate certain activities as the "addition" of a pollutant to the Nation's waters.

In two cases, however, the Supreme Court stepped in to provide guidance. In *S. Florida Water Mgmt. District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109–12 (2004), and *Los Angeles Cnty. Flood Control District v. Natural Res. Def. Council, Inc.*, 568 U.S. 78, 82–84 (2013), the Court found no ambiguity in the term and applied an ordinary meaning analysis to hold that there is no "addition" of a pollutant when water containing suspended pollutants is merely transferred between different parts of that same waterbody.

For several years, Appellant Shannon Poe engaged in instream suction dredge mining—a form of placer mining—in Idaho's South Fork Clearwater River. ER-35–36. This mining practice occurs within the water and uses an engine-powered hose to dredge streambed materials—rocks, sand, gravel, or other minerals or metals within the streambed—and then runs those materials through a sluice box. ER-39–40. Dredgers then separate and trap the dense gold (and similarly heavy metals, such as mercury) from other streambed materials and transfer some of those *same* materials to the stream—no new materials are "added" to the waters that were not already present. *See* ER-39, 41. Indeed, as some studies have shown, this type of mining not only adds no materials to

regulated waters but results in the net removal of pollutants from those waters.[1]

Yet in 2018, Appellee Idaho Conservation League (ICL) sued Mr. Poe under the Clean Water Act's citizen suit provision alleging that he was illegally mining without an EPA-approved NPDES permit because he was adding pollutants to the river. ER-58–80. The District Court agreed and granted ICL summary judgment, issued an injunction preventing Mr. Poe from suction dredge mining in the river without an NPDES permit, and levied a $150,000 fine. ER-3–5. But in doing so, the District Court did not follow the Supreme Court's lead in *Miccosukee Tribe* and *L.A. County* and apply the ordinary meaning of "addition" to Mr. Poe's activities. Instead, the court purported to distinguish those cases and to rely instead on *Rybachek v. EPA*, 904 F.2d 1276, 1285–86 (9th Cir. 1990), in which a panel of this Court applied *Chevron* deference to uphold an EPA rule that broadly sought to regulate placer mining under the NPDES permitting regime. ER-39–42.

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[1] *See* Cal. State Water Resources Control Bd., *Mercury Losses and Recovery During a Suction Dredge Test in South Fork of the American River* 7 (2005) (finding suction dredge mining can benefit the aquatic environment by removing dangerous heavy metals, such as mercury, found within streambeds), *available at* https://bit.ly/33yIise.

This was error, and the District Court should be reversed. Under the ordinary meaning of "addition"—as outlined by the Supreme Court—Mr. Poe's mining activities added nothing to regulated waters not already there, so there was no "discharge of a pollutant" requiring an NPDES permit. The District Court should have followed the Act's ordinary meaning and Supreme Court precedent—not an outdated decision that conflicts with that precedent.

Even so, if this Court finds the District Court was correct to follow *Rybachek*, it should now take the opportunity to formally overrule that decision. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) ("[W]here the reasoning or theory of . . . prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled."). The Supreme Court's rulings in *Miccosukee Tribe* and *L.A. County* satisfy this standard.

The District Court should be reversed for a second reason. Below, Mr. Poe argued in the alternative that, even if instream suction dredge mining constitutes the "addition" of a pollutant under the Act, that

mining activity "discharged" "dredged material"—which is regulated by the Army Corps of Engineers under 33 U.S.C. § 1344's permitting regime (commonly known as Section 404 permitting)—not the NPDES permitting regime under 33 U.S.C. § 1342. ER-36. *See Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 273 (2009) ("Section 402 . . . forbids the EPA from exercising permitting authority that is 'provided [to the Army Corps] in' § 404."). Thus, ICL's claim in its complaint that Mr. Poe was illegally mining without an NPDES permit from the EPA—the only claim it made in its complaint—should have failed. ER-78–79.

Like the term "addition," the Act also does not define "dredged material," but the Army Corps' current regulations seek to define the term and when it applies to require a permit under Section 404. *See* 33 C.F.R. § 323.2(c)–(f). But once again, rather than apply the ordinary meaning of the statutory term—or even the ordinary meaning of the Army Corps' regulations—the District Court broadly deferred to the agencies' current view that instream suction dredge mining should be regulated under the NPDES permitting regime. ER-56–57. That was also error. Under the Clean Water Act's ordinary meaning—and the ordinary

meaning of the Army Corps' regulations—instream suction dredge mining, if it adds pollutants to jurisdictional waters, adds "dredged material." And thus, ICL sued to enforce the wrong provision of the Clean Water Act, and the District Court should not have found Mr. Poe liable for suction dredge mining without an NPDES permit.

* * *

The Clean Water Act is among the most complicated statutes in the federal code, and its "reach and systemic consequences" are a "cause for concern." *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 578 U.S. 590, 602 (2016) (Kennedy, J., concurring). Indeed, the Act's scope is "'notoriously unclear' and the consequences" for violations "can be crushing." *Id.* (citation omitted). ICL's enforcement action is a case in point for this legal pathology; but Mr. Poe's appeal gives the Court the opportunity to remedy these ills by clarifying the meaning of "addition" and thereby appropriately limiting EPA's authority over everyday productive activity.

JURISDICTION

Plaintiff-Appellee ICL alleged that the District Court had federal question jurisdiction under 33 U.S.C. § 1365(a) because the Clean Water

Act vests district courts with jurisdiction over citizen enforcement actions. ER-59.

This Court has jurisdiction under 28 U.S.C. § 1291 because the appeal is from the District Court's October 21, 2022, final judgment, which disposed of all claims. ER-3–5. Defendant-Appellant Mr. Poe filed his notice of appeal on November 18, 2022. ER-81–84. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(A).

ISSUES PRESENTED FOR REVIEW

1. The Clean Water Act generally makes illegal the unpermitted "discharge of any pollutant," which is defined as "any addition of any pollutant to navigable waters from any point source." The District Court held that instream suction dredge mining—in which miners collect streambed material, remove certain metals, and return the remaining material to the water adding no outside material—constitutes a regulated "discharge of any pollutant." Did the District Court err?

2. The Clean Water Act gives the Army Corps of Engineers, not EPA, the authority to permit the "discharge of dredged or fill material" under 33 U.S.C. § 1344. The District Court held that instream suction dredge mining, in which material is dredged from a water's streambed, does not

involve the discharge of dredged material and is thus regulated by the EPA's permitting authority under 33 U.S.C. § 1342. Assuming that instream suction dredge mining results in the discharge of a pollutant, did the District Court err in concluding that such discharge is not dredged material and is therefore subject to EPA's permitting authority under 33 U.S.C. § 1342?

STATUTORY AUTHORITIES

All relevant statutory provisions are in the addendum to this brief.

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 authorized, 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). Most relevant here, the Act 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 further define what the

"addition" of a pollutant to navigable waters is.[2] Nor has the EPA ever sought to give the statutory term a comprehensive or generally applicable definition through regulation.

2. The statute's structure divides regulatory authority among different federal agencies and the states. It delegates to the EPA the authority to regulate "discharges" of "pollutants" from "point sources" to "navigable waters." *See* 33 U.S.C. §§ 1311(a), 1362(12). Nonexempt discharges to regulated waters (other than those of dredged or fill material) require a permit from the EPA—an NPDES permit. *Id.* § 1342(a).[3]

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[2] The Act defines "navigable waters" as "the waters of the United States, including the territorial seas." *Id.* § 1362(7). For ease of reference, this brief uses the terms "navigable waters" and "waters of the United States" interchangeably as necessary.

[3] The Act authorizes EPA to transfer NPDES and dredged-or-fill permitting power to the states, territories, and Indian tribes. *See* 33 U.S.C. §§ 1342(b), 1344(g), 1362(3), 1377(e). At the time of the alleged violations at issue in this case, 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/npdes-general-permit-small-suction-dredge-placer-miners-idaho (last visited Mar. 28, 2023).

The statute expressly excludes the discharge of "dredged or fill material" from NPDES permitting requirements. *See id.* § 1342(a)(1). The Act instead separately delegates to the Army Corps of Engineers the authority to permit discharges of "dredged or fill material." *See Coeur Alaska, Inc.*, 557 U.S. at 273. Before discharging dredged or fill material, a person must obtain (with a few exceptions) a permit from the Army Corps. 33 U.S.C. § 1344(a).

The Act also does not define the term "dredged material," but the Army Corps has issued regulations that seek to define the term and when it applies to require a permit. *See* 33 C.F.R. § 323.2(c)–(f). In the Army Corps' view, "dredged material" means "material that is excavated or dredged from waters of the United States." *Id.* § 323.2(c). And the "discharge of dredged material" means "any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States." *Id.* § 323.2(d)(1).

Those same regulations also expressly exclude certain activities from the "discharge of dredged material," such that those activities do not require a Section 404 permit. As relevant here, one of these exceptions contains a carve-out for "[d]ischarges of pollutants into waters of the

United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill)[.]" *Id.* § 323.2(d)(2)(i). Although not subject to Section 404, such "discharges are subject to [S]ection 402 of the Clean Water Act even though the extraction and deposit of such material may require a permit from the [Army] Corps of applicable State [S]ection 404 program." *Id.*

The regulations similarly do not require a Section 404 permit for "[a]ny incidental addition, including redeposit, of dredged material associated with any activity that does not have or would not have the effect of destroying or degrading an area of waters of the United States." *Id.* § 323.2(d)(3)(i). And an activity associated with a discharge of dredged material degrades water of the United States only if it has "more than a de minimis (i.e., inconsequential) effect on the area." *Id.* § 323.2(d)(5).

3. Discharging pollutants without a required permit, or violating permit conditions, risks cease-and-desist orders, compliance orders, administrative penalties, significant civil penalties and injunctions, and even criminal liability. *See generally Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 52–53 (1987); *see also* 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). Under the Act's citizen suit provision, private enforcers can also recover attorney fees, expert witness fees, and other litigation costs for successful suits. 33 U.S.C. § 1365(d).

B. Ninth Circuit and Supreme Court cases interpreting the meaning of "addition" under the Clean Water Act

1. In *Rybachek*, the Ninth Circuit addressed a facial challenge to an EPA regulation that broadly sought to regulate "placer mining" under the NPDES permitting regime. 904 F.2d 1276. As relevant here, the challengers argued that placer mining did not result in the "addition" of pollutants to navigable waters, and thus that EPA could not regulate. *Id.* at 1285. The *Rybachek* Court rejected that argument by first addressing placer mining on a bank alongside navigable water. In the Court's view, "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." *Id.* 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 the Court did not stop there. In a single paragraph, 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.* (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)) (emphasis added). To buttress its application of *Chevron*, the opinion cited *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), which both applied deference to the EPA's view that "redeposit"—in contexts similar to placer mining—may be considered an "addition" of a pollutant under the Act. *Rybachek*, 904 F.2d at 1285–86.

But in ruling this way, *Rybachek* was evidently unaware that the EPA had taken a contrary legal position on the meaning of "addition" in a closely analogous context—namely, activities that result in the movement of polluted water within a waterbody or between linked waterbodies. In *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 174–75 (D.C. Cir. 1982), the EPA argued that for an "addition" of a pollutant to occur, the pollutant must "come from the outside world," which does not occur when water merely passes through a dam from one regulated waterbody to another. And in *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 585 (6th Cir. 1988), the EPA similarly argued that no

"addition" of a pollutant can occur, and no NPDES permit is required, unless the pollutant is introduced to the navigable water "from the outside world." Yet *Rybachek* did not address the EPA's contrary position, as articulated and affirmed in *Gorsuch* and *Consumers Power Co.*, before determining that *Chevron* deference was warranted.

The Ninth Circuit next addressed the meaning of "addition" in *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810 (9th Cir. 2001). There, a landowner sought to convert a ranch into vineyards and orchards but, to do so, needed to deep-plow the land to break up subsurface impermeable layers to allow for adequate root growth. *See id.* at 812. The EPA and Army Corps brought an enforcement action against him, alleging that this "deep ripping" of the soil was an "addition of a pollutant" because it "redeposits" pollutants into jurisdictional waters (wetlands). In ruling against the landowner, the opinion cited *Rybachek* for the proposition that "redeposits" can constitute the "addition of a pollutant" even though "*they do not involve the introduction of material brought in from somewhere else*." *Id.* at 814–15 (emphasis added).[4]

[4] After the Ninth Circuit's decision, the landowner then sought review from the Supreme Court on, among other questions, "[w]hether deep

2. But since *Rybachek* and *Borden Ranch*, the Supreme Court has addressed whether the term "addition" can be applied by looking to its ordinary meaning—and vindicated the position that the EPA took in both *Gorsuch* and *Consumers Power*: before there can be an addition of pollutants, the materials must not already be present and instead must come to the regulated water "from the outside world." In other words, there can be no addition of a pollutant when the materials returned to the water from a point source were already present in the water.

First, in 2004, the Court decided *Miccosukee Tribe*. There, the Supreme Court discussed whether the Clean Water Act requires a permit for the discharge of pollutants if those pollutants originate from a "hydrologically indistinguishable part[] of [the same] water body." 541 U.S. at 109. The Court found that pumping water from a point source—water, that is, which contained suspended pollutants—between two parts

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plowing ranchland to plant deep-rooted crops constitutes the 'addition' of a 'pollutant' . . . so as to fall within . . . the Clean Water Act." Br. for Pet'rs at 1, *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, No. 01-1243, 2002 WL 1990144 (U.S. Aug. 26, 2002). The Court granted the petition in full, *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 536 U.S. 903 (2002), but, because of Justice Kennedy's recusal, *id.*, produced a non-precedential 4–4 affirmance of the decision, *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002).

of the same waterbody is not an "addition" of pollutants because the ordinary meaning of "addition" requires that polluted water be brought in from outside the regulated waterbody. It explained this reasoning through an example from cookery: "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." *Id.* at 110 (quoting *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001)).

The Court took that example straight from *Catskill Mountains*, 273 F.3d at 492. *Catskill Mountains*, in turn, directly adopted the EPA's previous position in *Gorsuch* and *Consumers Power* as correct under the plain meaning of "addition." *Id.* at 491 ("The EPA's position, upheld by the *Gorsuch* and *Consumers Power* courts, is that for there to be an 'addition,' a 'point source must *introduce* the pollutant into navigable water from the outside world[.]' . . . The *Gorsuch* and *Consumers Power* decisions comport with the plain meaning of 'addition[.]'") (quoting *Gorsuch*, 693 F.2d at 165).

Second, the Court reaffirmed *Miccosukee* in *L.A. County* less than a decade later. The Court addressed whether water, containing suspended

pollutants and flowing from a concrete channel within a riverbank, "[is] a discharge of a pollutant." 568 U.S. at 80. The Court said it is not because "no discharge of pollutants occurs when water . . . simply flows from one portion of the water body to another." *Id.* at 83. The Court emphasized that its holding followed "*a fortiori*, from *Miccosukee*." *Id.* In doing so, the Court once again applied the statute's ordinary meaning to support its decision: "We derived [*Miccosukee*'s holding] 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.* at 82 (quoting 33 U.S.C. § 1362(12)) (emphasis in the original). Under a common understanding of "add," the Court explained, "no pollutants are 'added' to a water body when [polluted] water is merely transferred between different portions of that water body." *Id.* The Court also once again cited *Catskill Mountains*' "apt" analogy that "[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." *Id.* at 82–83 (quoting *Miccosukee*, 541 U.S. at 109–10). In other words, there can be no "addition" of a pollutant (soup) when materials travel through a point

source (ladle) and then are "redeposited" back to the same water or are "resuspended" within the water (the pot).

C. Factual and Procedural Background

1. Appellant Shannon Poe is a miner who, among other activities, engages in instream recreational suction dredge mining. This type of suction dredge mining uses an engine-powered hose to dredge streambed materials, such as rocks, sand, gravel, or other minerals or metals within the streambed. *See* ER-39–40. The materials pass through the suction hose and then through a sluice box which separates and traps the dense gold (and similarly heavy metals, such as mercury) from other streambed materials, transferring the latter back to the stream. *Id.*

It was undisputed below that Mr. Poe suction dredge mined in the South Fork Clearwater River between 2014 and 2018. ER-35–36. It was also undisputed that instream suction dredge mining was allowed in the river and that Mr. Poe always obtained a permit from the Idaho Department of Water Resources before mining in the river. ER-26. But on advice from his attorney, Mr. Poe never sought and did not obtain an NPDES permit before doing so. ER-28.

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, alleging that his suction dredge mining illegally discharged pollutants into the river without an NPDES permit in 2014, 2015, and 2018. ER-78–79. Shortly after the ICL filed its complaint, Mr. Poe moved to dismiss the case for lack of subject matter jurisdiction because ICL gave improper notice, as is required before bringing a citizen suit under the Clean Water Act, *see* 33 U.S.C. § 1365(b)(1)(A), and because ICL lacked standing, but the motion was denied. *See* ER-35 n.1.

After the District Court denied Mr. Poe's motion to dismiss, ICL and Mr. Poe cross-moved for summary judgment. Mr. Poe first argued that under the ordinary meaning of "addition"—as the Supreme Court had construed that term in *Miccosukee Tribe of Indians* and *L.A. County*—his dredging did not add pollutants to the river and he did not have to obtain an NPDES permit. ER-36. He also contended that, even if his dredging added pollutants, those pollutants are "dredged or fill material"

regulated exclusively under Section 404 of the Act, so his mining still did not require an NPDES permit. *Id.*[5]

The District Court granted summary judgment to ICL on both issues. ER-57. First, it held Mr. Poe liable for discharging a pollutant into the river without an NPDES permit because suction dredge mining "added" pollutants to the river. ER-38–45. In doing so, the court relied on *Rybachek,* which, as noted, applied *Chevron* deference to uphold an EPA rulemaking regulating placer mining as adding pollutants to regulated waters. ER-39–42.

In rejecting Mr. Poe's argument that *Miccosukee Tribe* and *L.A. County*—not *Rybachek*—should control, the court distinguished between the "transfer of polluted water between two parts of the same water body," and instream suction dredge mining, which "excavates rock, gravel, sand, and sediment from the riverbed and then adds those materials back to the river" (redeposit materials). ER-43–44. Thus, according to the District Court, Mr. Poe had to obtain an NPDES permit

[5] Mr. Poe also argued that if his mining activities are covered by Section 404, these "discharges" are "incidental fallback," and are exempt from the permitting requirements. ER-7, ER-36 n.2.

before mining in the river and thus he violated the Act when he mined without doing so. ER-45.

Second, the District Court also found that instream recreational suction dredge mining is properly regulated under the Clean Water Act's NPDES regime, not under the Section 404 "dredged or fill" permitting scheme. ER-46–56. Mr. Poe argued that under the ordinary meaning of these terms—and the Army Corps regulations defining the terms—instream suction dredge mining, if it adds any regulable material to jurisdictional waters, adds dredged or fill material. ER-46. And under the Supreme Court precedent in *Coeur Alaska*, Mr. Poe argued, the Army Corps has exclusive jurisdiction over instream suction dredge mining, and no NPDES permit was required before he dredged in the river. *Id.*

In rejecting Mr. Poe's argument, the court reasoned that the Clean Water Act does not define "dredged material" or the "discharge of dredged material," and the EPA and Army Corps interpretation of those terms under other regulations and permitting as applied to recreational suction dredge mining should be afforded broad deference. ER-47. In doing so, the court mainly relied on an Oregon Supreme Court case, *E. Or. Mining Ass'n v. Dep't of Env't Quality*, 445 P.3d 251 (Or. 2019) (*EOMA*), to hold

that other EPA and Army Corps regulations require suction dredge miners to obtain an NPDES permit, and that interpretation is reasonable. ER-47–56. The court did, however, acknowledge that 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." ER-55.

3. After granting ICL summary judgment, the court issued a separate opinion and order over remedies in which it issued an injunction against Mr. Poe from suction dredge mining in the river and ordered him to pay $150,000 to the United States Treasury. ER-6–34.[6]

STANDARD OF REVIEW

This Court reviews "de novo the district court's grant or denial of summary judgment" and "determine[s], viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *First Resort, Inc. v. Herrera*, 860 F.3d

[6] Shortly after the District Court issued its remedies opinion and order, ICL filed a motion for attorneys' fees, costs, and other litigation expenses totaling $196,425.25. ECF Dkt. # 69. The District Court stayed that motion and held it in abeyance until this appeal is resolved. *See* ECF Dkt. # 75. *See* ER-92–93.

1263, 1271 (9th Cir. 2017) (citation omitted). This Court also applies de novo review to questions of statutory interpretation. *See Collins v. Gee W. Seattle, LLC*, 631 F.3d 1001, 1004 (9th Cir. 2011).

SUMMARY OF THE ARGUMENT

Both issues presented here turn on a fundamental principle of statutory interpretation: when a statute leaves a term undefined, courts should look to that term's ordinary meaning—observing the traditional tools of statutory construction—and then apply that meaning if it is clear. But rather than follow this traditional course, the District Court credited outdated precedents and applied unjustified deference to agency interpretations on both issues. In doing so, the District Court flouted Supreme Court precedent, expanded the Clean Water Act's reach beyond anything Congress envisioned, and blurred the line between the EPA and Army Corps' jurisdiction under the Act. The District Court's judgment should therefore be reversed.

I. The Clean Water Act requires a person to obtain an NPDES permit before discharging most types of pollutants from a point source into navigable waters. *See* 33 U.S.C. §§ 1311, 1342. The Act defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from

any point source." *Id.* § 1362(12)(A). While the term "addition" is left undefined, the term's plain meaning requires that material be added to jurisdictional waters from the outside world that is not already present within the water, before a person has "discharged a pollutant" and thus must obtain an NPDES permit.

This common-sense interpretation is confirmed by Supreme Court precedent. In both *Miccosukee*, 541 U.S. at 109–12, and *L.A. County*, 568 U.S. at 82–84, the Court relied on the ordinary meaning of the Clean Water Act's text to hold that there is no "addition" of a pollutant when pollutants are merely transferred from navigable waters through a point source and then that polluted water is redeposited into the same water.

Yet rather than look to the Clean Water Act's text and the Supreme Court's precedent, the District Court instead relied on *Rybachek*, 904 F.2d at 1285–86, to conclude that Mr. Poe had added pollutants to the South Fork Clearwater River without an NPDES permit and violated the Clean Water Act. *Rybachek* did not apply the plain meaning of the Clean Water Act or engage in any statutory construction but instead employed *Chevron* deference to uphold an EPA regulation that sought to regulate placer mining under the NPDES permitting regime. In *Rybachek*'s view,

it was reasonable for the EPA to find that the "resuspension" or "redeposit" of materials in navigable waters is the "addition" of pollutants to those waters. And because Mr. Poe's instream suction dredge mining added pollutants under *Rybachek*'s holding, the District Court found Mr. Poe violated the Act.

This Court should reverse. Under the Clean Water Act's ordinary meaning and the Supreme Court's precedent, Mr. Poe's instream suction dredge mining did not require an NPDES permit, and he did not violate the Clean Water Act. Instream suction dredge mining dredges materials from a streambed, separates and removes some of those materials, and then returns the same materials to the water. No new materials are added to the navigable water not already there. This activity is analogous to the movement of the water through point sources—water that contained suspended pollutants—which the Supreme Court found was not an "addition" in *Miccosukee* and *L.A. County*. In those cases, water containing materials was "removed" from the navigable water through a point source and then that water, containing those materials, was "redeposited" back to the water. Thus, Mr. Poe should not have been found liable for violating the Clean Water Act.

But if this Court finds the District Court was right to rely on *Rybachek* as Circuit precedent, *Rybachek* should be overruled for three reasons. First, a panel of this Court may overrule precedent when a past holding, or its mode of analysis, is "irreconcilable with the reasoning or theory of [an] intervening higher authority[.]." *Gammie*, 335 F.3d at 893. *Rybachek* is irreconcilable with *Miccosukee* and *L.A. County*. Both cases applied the ordinary meaning of "addition." They found that no "discharge of a pollutant" occurs unless materials not already present in the jurisdictional water are added to the water.

Second, the Clean Water Act not only allows for civil liability for discharging pollutants into navigable waters without a permit but also allows for criminal sanctions. 33 U.S.C. § 1319(c). Many courts and jurists have questioned whether *Chevron* deference is appropriate when a statute includes civil and criminal liability. *See, e.g.*, *Valenzuela Gallardo v. Barr*, 968 F.3d 1053, 1059 (9th Cir. 2020). This, too, is a reason for abandoning *Rybachek*.

Finally, *Rybachek*'s deployment of *Chevron* was unwarranted when it was decided. When agencies render inconsistent legal positions over a statute's meaning, those interpretations warrant little to no deference.

See I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987), ("agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view") (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)). Yet the EPA had taken a position in both *Gorsuch*, 693 F.2d at 174–75, and *Consumers Power*, 862 F.2d at 585, that conflicted with its interpretation of that statutory term in *Rybachek*.

II. The District Court should also be reversed because even if instream suction dredge mining adds pollutants to navigable waters under the Act, such mining activity discharges "dredged material." Congress gave the Army Corps jurisdiction under Section 404 to issue permits to discharge "dredged or fill material." *See Coeur Alaska*, 557 U.S. at 273. Mr. Poe was thus not required to obtain an NPDES permit from the EPA, as the District Court held, before operating his suction dredge mine in the South Fork Clearwater River. ICL's claim and the District Court's holding that Mr. Poe was illegally mining without an NPDES permit from the EPA were wrong.

First, instream suction dredge mining, and the material it dredges from a streambed—rock, sand, silt, and sediment—falls within the

ordinary meaning of "dredged material." Indeed, under any definition, that activity and the material involved is "dredged material." *See Black's Law Dictionary* (4th 1968) "Dredge: a machine for cleansing canals and rivers. To "dredge" is to gather or take with a dredge, to remove sand, mud, and filth from the beds of rivers, harbors, and canals, with a dredging machine." Under the statute's ordinary meaning, then, if Mr. Poe's instream dredge mining requires a permit, it is a Section 404 permit.

Second, the Army Corps' regulations do define "dredged material." It is "material that is excavated or dredged from waters of the United States." 33 C.F.R. § 323.2(c). Again, instream suction dredge mining "excavates or dredges" streambed materials from jurisdictional waters. The act of instream dredge mining and the materials it collects fall within the Army Corps regulatory definition and jurisdiction.

At bottom, no matter which definition controls, instream suction dredge mining that results in an "addition" of pollutants falls within the Army Corps permitting authority under Section 404. The District Court should not have found Mr. Poe liable for suction dredge mining without

an NPDES permit under Section 402. The District Court should alternatively be reversed on this issue.

ARGUMENT

I. The District Court should be reversed because it incorrectly held that Mr. Poe's instream recreational suction dredge mining resulted in the "discharge of a pollutant" to navigable waters under the Clean Water Act.

The District Court should be reversed because it wrongly found Mr. Poe liable under the Clean Water Act for "discharging pollutants into navigable waters" without an NPDES permit. NPDES permits are not required under the Clean Water Act unless five elements are present: (1) a "pollutant" must be (2) "added" (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 *Gorsuch*, 693 F.2d at 165); *see also Consumers Power*, 862 F.2d at 583. Under the statute's ordinary meaning, there is no "addition" of pollutants to navigable waters unless materials not already present are added to the water from the outside world. Mr. Poe's instream recreational suction dredge mining added no new materials from outside the river not already present and thus did not result in the "addition of any pollutant" under the Act.

A. The ordinary meaning of "addition" under the Clean Water Act requires that materials not already present be added to navigable waters from the outside world before there can be a "discharge of a pollutant."

1. The Clean Water Act makes unlawful "the discharge of any pollutant" by any person into the navigable waters unless the Act authorizes those discharges. *See* 33 U.S.C. §§ 1311(a), 1342. Congress, however, did not define "addition." When Congress leaves a statutory term undefined, well-established rules of statutory construction require courts to "begin with the statutory text and end there if the statute's language is plain." *United States v. Lopez*, 998 F.3d 431, 435 (9th Cir. 2021) (citing *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020)). Similarly, a statutory term receives its "ordinary, contemporary, common meaning." *Id.* (quoting *Perrin v. United States*, 444 U.S. 37, 42, (1979)).

And where that meaning is clear, "that is also where the inquiry should end." *Puerto Rico v. Franklin California Tax-Free Tr.*, 579 U.S. 115, 125 (2016) (cleaned up). This is because "only the words on the page constitute the law adopted by Congress and approved by the President." *Bostock*, 140 S. Ct. at 1738. "If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources

and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives." *Id.*

In establishing the meaning of undefined statutory terms, courts should follow the "'common practice of consulting dictionary definitions to clarify their ordinary meaning[]' and look to how the terms were defined 'at the time [the statute] was adopted.'" *United States v. TRW Rifle 7.62X51mm Caliber, One Model 14 Serial 593006*, 447 F.3d 686, 689 (9th Cir. 2006) (quoting *United States v. Carter*, 421 F.3d 909, 911 (9th Cir. 2005)); *see also MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 228 (1994) (stating "the most relevant time for determining a statutory term's meaning" is when the statute became law and relying on dictionaries to determine the term's meaning).

Here, the ordinary meaning of "addition" is "the result of adding: anything added: *increase*, augmentation." *Webster's Third New International Dictionary of the English Language Unabridged* 24 (1968) (emphasis added); *see also Webster's New World Dictionary of the American Language* 16 (2d College ed. 1970 and 1972) ("a joining of a thing to another thing"). These definitions show that "addition" cannot mean merely a discharge of materials from a point source that just

"resuspends" or "redeposits" materials to jurisdictional waters, but instead that there must be new materials added from the outside world not already present in those waters. In other words, there must be an *increase* in materials to the water not already present.

2. As noted, the Supreme Court adopted and applied the ordinary meaning of "addition" in both *Miccosukee Tribe* and *L.A. County* to find that transferring polluted water through a point source back to the same water does not qualify as the "discharge of a pollutant" requiring an NPDES permit. Indeed, both *Miccosukee* and *L.A. County* simply applied the ordinary meaning of "addition" by construing the Act's text: "We derived [*Miccosukee*'s holding] 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." *L.A. County*, 568 U.S. at 82 (quoting 33 U.S.C. § 1362(12)).

The Court in *L.A. County* also applied a dictionary definition of "add" almost identical to the definition in dictionaries contemporaneous to the Act's passage to find that there is no "addition" of pollutants to a waterbody when polluted water is merely transferred between different parts of that waterbody. *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).

Even more, the Court in both *Miccosukee* and *L.A. County* adopted the reasoning from *Catskill Mountains,* which held that the EPA's interpretation of "addition" adopted in *Gorsuch* and *Consumers Power*—*viz.*, for there to be an "addition" of a pollutant, that material must add new material from the outside world not already present in the water—fits the Act's ordinary meaning. *See Miccosukee*, 541 U.S. at 109–10 (quoting *Catskill Mountains*, 273 F.3d at 492); *L.A. County*, 568 U.S. at 82–83 (quoting *Catskill Mountains*, 273 F.3d at 492). Indeed, one can draw a straight line from *Gorsuch* and *Consumers Power* to *Catskill Mountains* and to the Supreme Court's reasoning in *Miccosukee* and *L.A. County*.

3. Statutory context and the Act's structure also confirm that Congress meant "discharge of a pollutant" to have a narrow meaning within the NPDES permitting scheme. Words should be given their "contextually appropriate ordinary meaning." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 70 (2012). In this

context, Congress placed an important limitation on what a discharge of a pollutant is under NPDES permitting: "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." *S.D. Warren Co. v. Maine Bd. of Env't Prot.*, 547 U.S. 370, 380–81 (2006).

B. The ordinary meaning of "addition" unambiguously does not apply to instream recreational suction dredge mining because no new materials are added to navigable waters from the outside world.

Mr. Poe's instream suction dredge mining does not fall under the ordinary meaning of "addition" of a pollutant as construed by the Supreme Court—an essential element of a discharge under the NPDES permitting requirement. Thus, no NPDES permit was required for Mr. Poe to dredge in the South Fork Clearwater River. *Cf. Comm. to Save Mokelumne*, 13 F.3d at 308; 33 U.S.C. §§ 1342(a)(1), 1362(12). The District Court erred in holding otherwise and should be reversed.

Mainly relying on *Rybachek*, the District Court sought to distinguish *Miccosukee* and *L.A. County* by finding that "[s]uction dredge mining does not simply transfer water [what *Miccosukee* and *L.A. County* 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." ER-44. (citation omitted).

The District Court was wrong. The movement of materials from the streambed during instream recreational suction dredge mining is just like the movement of the water—water that contained suspended pollutants—which the Supreme Court found was not an "addition" in *Miccosukee* and *L.A. County*. Those cases provide a straightforward analogy. Indeed, in both cases, the Court found that a movement of water—and the suspended pollutants present in the water—through point sources like dams, pump stations, and other drainages does not result in the "addition" of a pollutant to navigable waters when that polluted water merely moves through the point source and then is redeposited back to the water.

So too here. Instream recreational suction dredge mining involves the loosening, moving, and dredging of rocks, silt, and sand within a streambed. These materials already exist *within the waterbody*. These materials are merely moved through the point source (the suction dredge) and are then redeposited without introducing or adding any new pollutants into the water—as the polluted water moved in *Miccosukee*

Tribe of Indians and *L.A. County* was redeposited back to the same water-bodies in those cases.

These suction-dredged materials, already within the waterbody, do not magically become new materials or new pollutants because they come from the streambed. *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1404 (D.C. Cir. 1998) ("Regardless of any legal metamorphosis that may occur at the moment of dredging, we fail to see how there can be an addition of dredged material when there is no addition of *material*."); *see also* Jeffrey G. Miller, *Plain Meaning, Precedent, and Metaphysics: Lessons in Statutory Interpretation from Analyzing the Elements of the Clean Water Act Offense*, 46 Envtl. L. Rep. News & Analysis 10297, 10306 (2016) (observing in the "redeposit" cases the employment of "a fanciful metamorphosis [that] suggests that the argument that a violation has occurred may be equally fanciful").

At bottom, an instream recreational suction dredge miner does not add water or streambed material to the river or stream in which he dredges, as one does not add new ingredients to a pot of soup when he pours the ladle of soup back into the same pot. Instead, instream recreational

suction dredge mining removes materials and returns some of those same materials to the same water from which they came.

C. The District Court's reliance on *Rybachek* was misplaced.

The District Court should not have relied on *Rybachek* because subsequent Supreme Court rulings have undermined its reasoning. That conclusion is strengthened because *Rybachek*'s reasoning is founded upon *Chevron* deference, yet subsequent jurisprudential developments establish that reliance on such deference was improper.

1. Supreme Court precedent undercuts *Rybachek*'s reasoning and holding and it should be overruled.

The Ninth Circuit takes a "pragmatic approach," allowing panels (rather than the court sitting en banc) to overrule prior circuit precedent based on later Supreme Court cases. *Gammie*, 335 F.3d at 899–900. This approach does not require a later Supreme Court case to be "directly on point." Instead, the Court's decision need only "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Id.* at 900. *See also id.* ("[L]ower courts [are] bound not only by the holdings of higher courts' decisions [(Supreme Court decisions)] but also by their 'mode of analysis.'" (quoting Antonin

Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1177 (1989)).

That standard is met here. *Miccosukee* and *L.A. County* undermine both *Rybachek*'s reasoning and holding. In a single paragraph, *Rybachek* reflexively deployed *Chevron* deference to find that placer mining could reasonably be found to add pollutants to regulated waters—even though no materials were ever added from outside that water. 904 F.2d 1276.[7]

As explained in detail *supra*, that mode of analysis conflicts with the Supreme Court's precedent applying the ordinary meaning of "addition." And the District Court's attempt to distinguish *Miccosukee* and *L.A. County* based on *Rybachek* is wrong. The Clean Water Act's definition of "discharge of a pollutant" cannot constitute the "addition" of a pollutant

[7] Indeed, *Rybachek* appears to be the type of "reflexive deference" Justice Kennedy warned against shortly before leaving the Court. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring); *see also id.* at 2120–21 (Kennedy, J., concurring) ("And when deference is applied to other questions of statutory interpretation, such as an agency's interpretation of the statutory provisions that concern the scope of its own authority, it is more troubling still.") (citing *Arlington v. FCC*, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting) ("We do not leave it to the agency to decide when it is in charge.")).

if the material was already there, as with instream suction dredge mining.[8]

2. Other canons of statutory construction support overruling *Rybachek* and not applying *Chevron* deference.

Besides *Miccosukee* and *L.A. County* undercutting *Rybachek*'s use of deference instead of the statute's ordinary meaning, *Chevron* should not be applied in this specific context for another reason: the Clean Water Act includes criminal liability for adding pollutants to regulated waters without a permit. *See generally Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality op.) ("[The] Act 'impose[s] criminal liability,' as well as steep civil fines, 'on a broad range of ordinary industrial and commercial activities.'") (quoting *Hanousek v. United States*, 528 U.S. 1102, 1103 (2000) (Thomas, J., dissenting from denial of certiorari)).

Indeed, many judges, including judges within this Circuit, have increasingly questioned whether *Chevron* should apply when a statute

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[8] For the same reasons, the Ninth Circuit's rationale in *Borden Ranch* is also fundamentally flawed after *Miccosukee* and *L.A. County* and should have no persuasive value in this case. "Deep ripping," like instream suction dredge mining, "adds" no materials from outside jurisdictional waters that is not already there. *Cf. Borden Ranch*, 261 F.3d at 820–21 (Gould, J., dissenting) (finding "deep ripping" did not add pollutants to jurisdictional waters.).

includes both civil and criminal penalties. *See Valenzuela Gallardo*, 968 F.3d at 1059 ("[D]eferring to the BIA's construction of a statute with criminal applications raises serious constitutional concerns."). *See also, e.g.*, *Whitman v. United States*, 574 U.S. 1003, 1003 (2014) (Scalia, J., respecting denial of certiorari) (citing the principle that "if a law has both criminal and civil applications, the rule of lenity governs its interpretation in both settings"); *Cargill v. Garland*, 57 F.4th 447, 465–68 (5th Cir. 2023) (en banc); *Gun Owners of Am. v. Garland*, 19 F.4th 890, 915–25 (6th Cir. 2021) (Murphy, J., dissenting from affirmance by equally divided court); *Aposhian v. Wilkinson*, 989 F.3d 890, 899 (10th Cir. 2021) (Tymkovich, J., dissenting from denial of en banc rehearing).

Nor should courts apply deference without a clear statement from Congress when a statute may subject individuals to criminal penalties. *See, e.g.*, *Guedes v. ATF*, 920 F.3d 1, 41–42 (D.C. Cir. 2019) (Henderson, J., concurring in part) (arguing a clear statement rule like the major questions doctrine should apply when there are ambiguities in statutes with criminal penalties). The Clean Water Act contains no such clear statement. Thus, *Rybachek*'s unwarranted employment of *Chevron*

deference is another reason supporting this Court's acknowledgment of its having been overruled by subsequent jurisprudential development.

3. *Rybachek* should be overruled because the Court should not have applied *Chevron* deference where the EPA had taken inconsistent positions on what constitutes an "addition."

Before *Rybachek*, the EPA took inconsistent positions on the meaning of "addition" under the Clean Water Act and the Court should not have applied *Chevron* deference to the agency's rule. This is also another reason the decision should be abandoned. This Court has determined that when an agency renders inconsistent interpretations of the same statutory language, its interpretation is owed no deference. *See Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441 (9th Cir. 1992) (refusing to give the U.S. Forest Service's interpretation any deference because of the agency's reversal of position in how it was interpreting the Arizona-Idaho Conservation Act); *see also Wilshire Westwood Assocs. v. Atlantic Richfield Corp.*, 881 F.2d 801, 809 (9th Cir. 1989) (courts should consider "the thoroughness of the agency's consideration, the validity of its reasoning, and the consistency of its position over time").

As noted *supra*, to buttress its application of *Chevron*, *Rybachek* cited *Avoyelles Sportsmen's League, Inc.*, 715 F.2d at 923, and *M.C.C. of*

Florida, Inc., 772 F.2d at 1506, which both applied deference to the EPA's view that "redeposit" may be considered an "addition" of a pollutant under the Clean Water Act. 904 F.2d at 1285–86. But *Rybachek* did not even acknowledge that the EPA had taken a contrary position in determining whether the movement of pollutants from point sources within regulated water-bodies constitutes the "addition" of pollutants under the Act in both *Gorsuch*, 693 F.2d at 174–75, and *Consumers Power Co.*, 862 F.2d at 585. In both cases, the EPA argued that for the addition of a pollutant from a point source to occur, the point source must introduce pollutants to navigable water "from the outside world." Yet *Rybachek* did not confront these inconsistent positions.

At bottom, *Rybachek* and the cases relying on it are no longer good law after *Miccosukee* and *L.A. County*. And courts should not apply *Chevron* deference where a statute could subject people to criminal prosecution. Nor was deference even owed in *Rybachek* where the EPA was flip-flopping on what "addition" means in similar contexts. Thus, this Court should abandon *Rybachek*, apply the plain meaning of "addition" to instream recreational suction dredge mining, and reverse the District Court.

II. In the alternative, the District Court should be reversed because, even if instream recreational suction dredge mining adds pollutants to navigable waters, it adds dredged material which does not require an NPDES permit.

The District Court also erred because, even if instream recreational suction dredge mining adds materials to regulated waters, it adds "dredged material" covered by Section 404 permits—regulated by the Army Corps—not the NPDES permitting regime under Section 402, which the EPA regulates. In *Coeur Alaska*, the Supreme Court clarified that the distinction between which federal agency has jurisdiction under the Act is central to the statute's structure. "The regulatory scheme discloses a defined, and workable, line for determining whether the [Army] Corps or the EPA has the permit authority." 557 U.S. at 277. The District Court's judgment blurs this line and should be rejected.

First, instream recreational suction dredge mining falls within the ordinary meaning of "dredged material." Second, that activity also falls within the ordinary meaning of the Army Corps' own regulatory definition of "dredged material." Yet the District Court did not follow the statute's ordinary meaning or the Army Corps' definition. Instead, it relied on a non-binding Oregon Supreme Court case applying deference to EPA's contradictory interpretation of recreational suction dredge

mining and concluding that EPA has jurisdiction over that activity. ER-45–56. And if Mr. Poe's activities fall within the Army Corps' jurisdiction, then he was not required, as ICL's complaint alleged, to obtain an NPDES permit. Thus, the District Court should be reversed on this issue if the Court finds that Mr. Poe added pollutants to the South Fork Clearwater River.

A. If instream recreational suction dredge mining adds materials to navigable waters, it adds "dredged material" under the statute's ordinary meaning.

The District Court recognized that, as with the definition of "addition," the Clean Water Act does not define "dredged material." ER-47. The court thus should have started its analysis by construing the statute's text and its ordinary meaning and stopping there if the meaning was clear. *Lopez*, 998 F.3d at 435. Yet the court failed to do so.

By its very terms, instream suction *dredge* mining should result in (if anything) "dredged material." *See Black's Law Dictionary* (4th 1968) "Dredge: a machine for cleansing canals and rivers. To "dredge" is to gather or take with a dredge, to remove sand, mud, and filth from the beds of rivers, harbors, and canals, with a dredging machine." *See also*, "dredge, n.1," OED Online, Oxford University Press, 1989 ("An

instrument for collecting and bringing up objects from the bed of a river, the sea, etc. . . . A dredger for clearing the beds of rivers and navigable waters."). This type of mining, as the name implies, and as the dictionary definitions similarly describe, excavates (removes) streambed material—rock, sand, silt, and sediment—from waters.

As the *EOMA* majority (the primary authority on which the District Court relied) described it, instream suction dredge mining is "using a small[,] motorized pump . . . to 'vacuum up' water and sediment from stream and river beds." 445 P.3d at 252–53. Or, as *Rybachek* described "placer mining," it is "excavat[ing] the dirt and gravel in and around waterways, extract[ing] any gold, and discharge[ing] the dirt and other non-gold material into the water." 904 F.2d at 1285. These descriptions of suction dredge mining also show that the activity and the material it dredges fall within the ordinary meaning of "dredged material."

The dissent in *EOMA* noted, "[i]t could be argued that this text [the discharge of dredged or fill material into the navigable waters] is enough to settle the case. After all, suction dredge mining does 'dredge' material. And, in a literal sense, that material is then 'discharged' into water." 445 P.3d at 356 (Balmer, J., dissenting). Just so, and that should have been

the starting point for the District Court before even looking at the Army Corps or EPA regulations. *Lopez*, 998 F.3d at 435. And because instream recreational suction dredge mining fits within the ordinary meaning of "dredged material," that should have been the court's stopping point too. *Franklin California Tax-Free Tr.*, 579 U.S. at 125.

B. Instream recreational suction dredge mining falls within the Army Corps regulatory definition of "dredged material."

But even if the ordinary meaning of "dredged material" did not resolve the issue, the correctly interpreted Army Corps regulations do. Despite Justice Balmer's suggestion in *EOMA* about the Clean Water Act's text possibly being enough to settle the issue, he ultimately found the statutory text ambiguous. 445 P.3d at 356–57 (Balmer, J., dissenting). But he then turned to the Army Corps regulations, which largely track the statutory text's ordinary meaning, to find that the regulatory definition of "dredged material" places instream recreational suction dredge mining within the Army Corps' jurisdiction. *Id.* at 364, 367–68.

And he was exactly right on this score; this Court should follow his lead if it finds the statutory text does not control. The *EOMA* majority and the District Court manufactured ambiguity in the Army Corps

regulations based on a "metamorphosis" theory that somehow material dredged and processed during instream suction dredge mining is thereby transformed into some new and regulable pollutant when it is deposited into the same jurisdictional water. *See* ER-47 ("[The Clean Water Act] 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[.]") (quoting *EOMA*, 445 P.3d at 257). This, in both the *EOMA* majority and District Court's view, makes the Army Corps' regulations ambiguous because they do not "specifically address which agency has authority to permit the discharge of [the metamorphized] material resulting from suction dredge mining[.]" *Id.*

Yet as Justice Balmer cogently explained, this theory—and thus the manufactured ambiguity that comes with it—has no place in the Army Corps' regulations defining "the discharge of dredged material." First, he looked to the regulation's text, which defines "dredged material" as "material that is excavated or dredged from waters of the United States." *EOMA*, 445 P.3d at 357 (Balmer, J., dissenting) (quoting 33 C.F.R.

§ 323.2(c)). This regulatory definition is "defined based solely on the source of the material—the waters of the United States—and the process by which it is removed—excavation or dredging." *Id.* "There is no temporal caveat, and no qualification based on subsequent processing or environmental effects." *Id.* Indeed, to find otherwise would require a "judicial addition" to the "rule's text" and defy the Supreme Court's command that courts deploy the traditional rules of statutory interpretation when interpreting regulations. *Id.* at 357–58 (citing *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 161 (2012)).

Second, Justice Balmer then applied the traditional rules of statutory construction by returning to the text and analyzing the exceptions to what constitutes the "discharge of dredged material" within the Army Corps' regulations. *Id.* at 358–59 One of these exceptions, he found, directly refutes that "processed" material, and thus instream suction dredge mining, falls outside Section 404's ambit. Excluded from the definition of "discharge of dredged material" are:

> [d]ischarges of pollutants into waters of the United States resulting from *the onshore subsequent processing* of dredged material that is extracted for any commercial use (other than fill). These discharges are subject to [S]ection 402 of the Clean Water Act even though the extraction and deposit of such

> material may require a permit from the Corps or applicable State [S]ection 404 program.

See id. at 359 (Balmer, J., dissenting) (quoting 33 C.F.R. § 323.2(d)(2)(i)) (emphasis added). This exception triggers two separate canons of construction that show instream recreational suction dredge mining, if it adds pollutants to navigable waters, falls under the Army Corps' Section 404 permitting jurisdiction.

The first of these is the canon against superfluities: if processed dredge material did not fall under the Army Corps definition of "dredged material," then there would be no reason to exclude from the definition *onshore* processed dredged material—which is then explicitly reserved by the regulation to be regulated under the NPDES regime under Section 402. *See id.* (Balmer, J., dissenting) (emphasis added) (citing *Corley v. United States*, 556 U.S. 303, 314 (2009) (recognizing the rule against superfluities as "one of the most basic interpretive canons")).

The second is the *expressio unius* canon. *See In re Clean Water Act Rulemaking*, 60 F.4th 583, 595 (9th Cir. 2023) (recognizing "the basic canon of construction establishing that an 'explicit listing' of some things 'should be understood as an *exclusion of others*' not listed") (citation omitted). If onshore processed dredged material is excluded from Section

404 and regulated under the NPDES permitting regime under Section 402, then *instream* suction dredge mining is retained within the Section 404 permitting regime. Or as Justice Balmer put it: "To fall under subparagraph (d)(2)(i), and thus be subject to permitting under [S]ection 402 rather than [S]ection 404, the processing must be 'onshore' . . . . Suction dredge mining typically involves processing that is not 'onshore[.]'" *EOMA*, 445 P.3d at 359 (Balmer, J., dissenting).

In sum, the Army Corps' rule 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." *Id.* at 364 (Balmer, J., dissenting). Thus, instream suction dredge mining is regulated, if at all, by the Corps under Section 404, and Mr. Poe was not required to obtain an NPDES permit from the EPA for his instream suction dredge mining. *See Coeur Alaska*, 557 U.S. at 273.

C. Because instream recreational suction dredge mining falls within the ordinary meaning of "dredged material," Mr. Poe was not required to obtain an NPDES permit, and ICL's claim should have failed.

If instream recreational suction dredge mining is regulated by the Army Corps under Section 404, then Mr. Poe was never required to

obtain an NPDES permit from the EPA. Yet the only claim ICL made against Mr. Poe in its complaint was that he suction dredge mined in the South Fork River without an NPDES permit. *See* ER-78 ("Defendant SHANNON POE has violated and continues to violate section 301 of the Clean Water Act, 33 U.S.C. § 1311(a), by owning and/or operating a suction dredge(s) and discharging pollutants, including sediment, from this point source to the South Fork Clearwater River without an NPDES permit."). Nowhere in ICL's complaint did it claim that Mr. Poe violated Section 404 of the Clean Water Act.

The District Court's judgment finding Mr. Poe liable for violating the Clean Water Act for operating his suction dredge mine on the South Fork Clearwater River without a Clean Water Act Section 402 NPDES permit should therefore be reversed.

CONCLUSION

This Court should hold that Mr. Poe's instream suction dredge mining did not constitute the "discharge of a pollutant" under the Clean Water Act, that he was not required to obtain an NPDES permit, and reverse the District Court's judgment. This Court should alternatively reverse the District Court and hold Mr. Poe's instream suction dredge mining, if

it added pollutants to navigable water, discharged "dredged material" and thus he still was not required to obtain an NPDES permit.

DATED: March 29, 2023.

Respectfully submitted,

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/s/ Frank D. Garrison
FRANK D. GARRISON

Attorneys for Defendant – Appellant Shannon Poe

STATEMENT OF RELATED CASES

Under Circuit Rule 28-2.6, Defendant-Appellant states he is unaware of any related pending cases before this Court.

Form 8. Certificate of Compliance for Briefs
9th Cir. Case Number 22-35978

I am the attorney or self-represented party.

This brief contains 10,468 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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Signature /s/ Frank D. Garrison **Date** March 29, 2023.
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CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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/s/ Frank D. Garrison
FRANK D. GARRISON

ADDENDUM

TABLE OF CONTENTS

33 U.S.C. § 1311(a)

(a) Illegality of pollutant discharges except in compliance with law

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. § 1342(a)–(b)

(a) Permits for discharge of pollutants

(1) 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.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which--

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast

Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

33 U.S.C.A. § 1344(a), (g)

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete

an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

* * * * *

(g) State administration

(1) The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program.

(2) Not later than the tenth day after the date of the receipt of the program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall provide copies of such program and statement to the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service.

(3) Not later than the ninetieth day after the date of the receipt by the Administrator of the program and statement submitted by any State, under paragraph (1) of this subsection, the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such program and statement to the Administrator in writing.

33 U.S.C.A. § 1362(12)

(12) 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 C.F.R. § 323.2

For the purpose of this part, the following terms are defined:

(a) The term waters of the United States and all other terms relating to the geographic scope of jurisdiction are defined at 33 CFR part 328.

(b) The term lake means a standing body of open water that occurs in a natural depression fed by one or more streams from which a stream may flow, that occurs due to the widening or natural blockage or cutoff of a river or stream, or that occurs in an isolated natural depression that is not a part of a surface river or stream. The term also includes a standing body of open water created by artificially blocking or restricting the flow of a river, stream, or tidal area. As used in this regulation, the term does not include artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water for such purposes as stock watering, irrigation, settling basins, cooling, or rice growing.

(c) The term dredged material means material that is excavated or dredged from waters of the United States.

(d)(1) Except as provided below in paragraph (d)(2), the term discharge of dredged material means any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States. The term includes, but is not limited to, the following:

(i) The addition of dredged material to a specified discharge site located in waters of the United States;

(ii) The runoff or overflow from a contained land or water disposal area; and

(iii) Any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

(2) The term discharge of dredged material does not include the following:

(i) Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill). These discharges are subject to section 402 of the Clean Water Act even though the extraction and deposit of such material may require a permit from the Corps or applicable State section 404 program.

(ii) Activities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chainsawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material.

(iii) Incidental fallback.

(3) Section 404 authorization is not required for the following:

(i) Any incidental addition, including redeposit, of dredged material associated with any activity that does not have or would not have the effect of destroying or degrading an area of waters of the United States as defined in paragraphs (d)(4) and (d)(5) of this section; however, this exception does not apply to any person preparing to undertake mechanized landclearing, ditching, channelization and other excavation activity in a water of the United States, which would result in a redeposit of dredged material, unless the person demonstrates to the satisfaction of the Corps, or EPA as appropriate, prior to commencing the activity involving the discharge, that the activity would not have the effect of destroying or degrading any area of waters of the United States, as defined in paragraphs (d)(4) and (d)(5) of this section. The person

proposing to undertake mechanized landclearing, ditching, channelization or other excavation activity bears the burden of demonstrating that such activity would not destroy or degrade any area of waters of the United States.

(ii) Incidental movement of dredged material occurring during normal dredging operations, defined as dredging for navigation in navigable waters of the United States, as that term is defined in part 329 of this chapter, with proper authorization from the Congress and/or the Corps pursuant to part 322 of this Chapter; however, this exception is not applicable to dredging activities in wetlands, as that term is defined at section 328.3 of this Chapter.

(iii) Certain discharges, such as those associated with normal farming, silviculture, and ranching activities, are not prohibited by or otherwise subject to regulation under section 404. See 33 CFR 323.4 for discharges that do not required permits.

(4) For purposes of this section, an activity associated with a discharge of dredged material destroys an area of waters of the United States if it alters the area in such a way that it would no longer be a water of the United States.

Note: Unauthorized discharges into waters of the United States do not eliminate Clean Water Act jurisdiction, even where such unauthorized discharges have the effect of destroying waters of the United States.

(5) For purposes of this section, an activity associated with a discharge of dredged material degrades an area of waters of the United States if it has more than a de minimis (i.e., inconsequential) effect on the area by causing an identifiable individual or cumulative adverse effect on any aquatic function.

(6) [Redesignated as subsection (d)(5) by 73 FR 79645]

(e)(1) Except as specified in paragraph (e)(3) of this section, the term fill material means material placed in waters of the United States where the material has the effect of:

(i) Replacing any portion of a water of the United States with dry land; or

(ii) Changing the bottom elevation of any portion of a water of the United States.

(2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.

(3) The term fill material does not include trash or garbage.

(f) The term discharge of fill material means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; placement of overburden, slurry, or tailings or similar mining-related materials; and artificial reefs. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products (See § 323.4 for the definition of these terms). See § 323.3(c) concerning the regulation of the placement of pilings in waters of the United States.

(g) The term individual permit means a Department of the Army authorization that is issued following a case-by-case evaluation of a specific project involving the proposed discharge(s) in accordance with the procedures of this part and 33 CFR part 325 and a determination that the proposed discharge is in the public interest pursuant to 33 CFR part 320.

(h) The term general permit means a Department of the Army authorization that is issued on a nationwide or regional basis for a category or categories of activities when:

(1) Those activities are substantially similar in nature and cause only minimal individual and cumulative environmental impacts; or

(2) The general permit would result in avoiding unnecessary duplication of regulatory control exercised by another Federal, State, or local agency provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal. (See 33 CFR 325.2(e) and 33 CFR part 330.)