FILED: July 25, 2019

IN THE SUPREME COURT OF
THE STATE OF OREGON

EASTERN OREGON MINING ASSOCIATION;
Guy Michael; and Charles Chase,
Petitioners on Review,

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY;
Dick Pederson, in his capacity as Director of the
Department of Environmental Quality; and
Neil Mullane, in his capacity as Administrator
of the Water Quality Division of the
Department of Environmental Quality,
Respondents on Review.

(CC 10C24263)

WALDO MINING DISTRICT,
an unincorporated association;
Thomas A. Kitchar; and Donald R. Young,
Petitioners on Review,

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY;
Dick Pederson, in his capacity as Director of the
Department of Environmental Quality; and
Neil Mullane, in his capacity as Administrator
of the Water Quality Division of the
Department of Environmental Quality,
Respondents on Review.

(CC 11C19071) (CA A156161) (SC S065097)

On review from the Court of Appeals.*

* On appeal from the Marion County Circuit Court, Courtland Geyer, Judge. 285 Or App 821, 398 P3d 449 (2017).

Argued and submitted May 10, 2018.

James L. Buchal, Murphy & Buchal, LLP, Portland, argued the cause and filed the briefs for petitioners on review.

Michael A. Casper, Assistant Attorney General, Salem, argued the cause and filed the brief for respondents on review. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General, Salem.

Before Walters, Chief Justice, and Balmer, Nakamoto, Flynn, Duncan, and Nelson, Justices, and Kistler, Senior Judge pro tempore.**

KISTLER, S.J.

The decision of the Court of Appeals is affirmed.

Balmer, J., dissented and filed an opinion.

** Garrett, J., did not participate in the consideration or decision of this case.

KISTLER, S. J.

The Clean Water Act, 33 USC §§ 1251-1388, prohibits the discharge of any pollutant into the waters of the United States unless the Environmental Protection Agency (the EPA) or the Army Corps of Engineers (the Corps) has issued a permit authorizing the discharge. 33 USC §§ 1311(a), 1342, 1344. Acting under authority delegated by the EPA, the Oregon Department of Environmental Quality (DEQ) issued a general permit in 2010 for the discharge of certain pollutants resulting from suction dredge mining. Petitioners filed this proceeding arguing, among other things, that only the Corps has authority under the Clean Water Act to permit the discharge of materials resulting from suction dredge mining. The Court of Appeals disagreed and affirmed the trial court's order upholding DEQ's permit. Having allowed review, we now affirm the Court of Appeals decision.

As applicable here, suction dredge mining involves using a small motorized pump mounted on a boat to "vacuum up" water and sediment from stream and river beds.[1] The water and sediment are passed over a sluice tray, which separates out heavier metals, such as gold, and the remaining material is then discharged into the water. In addition to discharging the leftover sediment and water, suction dredge mining creates a turbid wastewater plume and can remobilize pollutants, such as mercury, that

[1] Small suction dredge mining is a type of in-stream placer mining. *See* Nadia H. Dahab, *Muddying the Waters of Clean Water Act Permitting:* NEDC *Reconsidered*, 90 Or L Rev 335, 338-39 (2011) (discussing placer mining generally and small suction dredge mining).

otherwise would have remained undisturbed and relatively inactive in the sediment.

This litigation began when DEQ's predecessor, the Oregon Environmental Quality Commission (EQC), issued a general permit in 2005 authorizing suction dredge mining in Oregon as long as that activity met certain water quality standards. *See Northwest Environmental Defense Center v. EQC*, 232 Or. App. 619, 223 P.3d 1071 (2009). The 2005 permit was challenged by both miners and environmentalists. In considering those challenges, the Court of Appeals reviewed regulations promulgated by the Corps and the EPA, as well as those agencies' application of the regulations to suction dredge mining. *See id.* at 631-42, 223 P.3d 1071. Based on that review, the Court of Appeals concluded that the process of suction dredge mining created both turbid wastewater plumes and dredged spoil. *Id.* at 643-44, 223 P.3d 1071. It reasoned that turbid wastewater plumes are pollutants that may not be discharged into navigable water without a permit from the EPA (or a state agency to which the EPA has delegated its permitting authority) while dredged spoil constitutes dredged material that requires a permit from the Corps before it may be discharged. *Id.* at 644-45, 223 P.3d 1071.

Both sides sought review of that decision. After this court allowed review, the 2005 permit expired, and the case was dismissed as moot. *See Northwest Environmental Defense Center v. EQC*, 349 Or. 246, 245 P.3d 130 (2010). In 2010, DEQ issued a new five-year permit for suction dredge mining that complied with the distinction that the Court of Appeals had drawn in *NEDC*. *See Eastern Oregon Mining Assoc. v. DEQ*, 285 Or. App. 821, 826, 398 P.3d 449 (2017).

Petitioners challenged the 2010 permit, which expired while the case was pending in the Court of Appeals, and the Court of Appeals dismissed the case as moot. *Eastern Oregon Mining Assoc. v. DEQ*, 273 Or. App. 259, 361 P.3d 38 (2015). This court reversed that decision, reasoning that the issue was capable of repetition yet evading review. *Eastern Oregon Mining Association v. DEQ*, 360 Or. 10, 376 P.3d 288 (2016). We remanded this case to the Court of Appeals so that it could consider whether to exercise its discretion to hear one or more of the issues that petitioners sought to raise.

On remand, the Court of Appeals exercised its discretion to consider petitioners' first assignment of error—whether DEQ, acting under authority delegated by the EPA, legally could issue a permit for suction dredge mining. *EOMA*, 285 Or. App. at 833, 398 P.3d 449. The Court of Appeals did not exercise its discretion to consider petitioners' other assignments of error. *Id.* at 834, 398 P.3d 449. Specifically, it did not exercise its discretion to consider petitioners' third assignment of error claiming that DEQ's factual findings were not supported by substantial evidence. *Id.* Focusing only on the legal issues raised by the first assignment of error, the Court of Appeals adhered to its decision in *NEDC*; more specifically, it considered and rejected the grounds that petitioners raised for reconsidering that decision. *Id.* at 838-39, 398 P.3d 449. We allowed review to consider the single assignment of error that the Court of Appeals decided.

Before turning to that assignment of error, we note that neither petitioners nor the state disputes that the material discharged as a result of suction dredge mining constitutes a "pollutant" for the purposes of

the Clean Water Act. That act provides that "pollutant" means, among other things, "dredged spoil," "rock," and "sand." 33 USC § 1362(6). The parties' dispute arises over which agency (the EPA or the Corps) has authority under the Clean Water Act to permit the discharge of those pollutants into the waters of the United States. Petitioners raise essentially two arguments on that issue. They argue initially that suction dredge mining does not come within the EPA's authority because that activity does not entail the "discharge" or "addition" of a pollutant to the water. They argue alternatively that, even if discharging material resulting from suction dredge mining adds a pollutant to the waters of the United States, the discharge is "dredged material," which the Corps has exclusive authority to permit. We begin with petitioners' first argument.

I. ADDITION OF A POLLUTANT

Petitioners' first argument starts from the proposition that the EPA's permitting authority applies only to the "discharge of a pollutant," and they note that the statutory phrase "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 USC § 1362(12). Petitioners contend that, because suction dredge mining does not add anything to the water that was not already there, there is no addition of any pollutant and thus no discharge of a pollutant for the EPA to permit.

Petitioners' first argument is problematic. Almost 30 years ago, the United States Court of Appeals for the Ninth Circuit held that, "even if the material discharged [as a result of placer mining] originally comes from the streambed itself, [the] resuspension [of

the material in the water] may be interpreted to be an addition of a pollutant under the [Clean Water] Act." *Rybachek v. EPA*, 904 F.2d 1276, 1285 (9th Cir 1990); *accord National Mining Assoc. v. Army Corps of Engineers*, 145 F.3d 1399, 1406 (DC Cir 1998) (reaffirming *Rybachek* while holding that the "addition" of a pollutant does not include incidental fallback of dredged material). As we read *Rybachek*, the court recognized that the statutory term "addition" is ambiguous, and 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 Clean Water Act.

Since *Rybachek*, the EPA has confirmed that conclusion. In 2018, in responding to comments regarding the reissuance of a general permit for suction dredge mining in Idaho, the regional office of the EPA reaffirmed that the suspension of solid materials caused by suction dredge mining constitutes the "addition" of a pollutant to the water. EPA, Response to Comments on Idaho Small Suction Dredge General Permit 5 (May 2018).[2] Similarly, the EPA explained in response to another comment:

> "If, during suction dredging, only water was picked up and placed back within the same waterbody, 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 [124 S.Ct. 1537, 158

[2] Both petitioners and the state ask us to take judicial notice of various documents, permits, and explanations that the Corps and the EPA have issued. We do so.

> L.Ed.2d 264] (2004). 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."

Id. at 6 (bracketed material in original).

We also note that, when the EPA reissued a general permit for suction dredge mining in Idaho in 2018, it prohibited suction dredge mining that resulted in visible turbidity "above background [levels] beyond any point more than 500 feet downstream of the suction dredge operation," directed operators to avoid "concentrated silt and clay," which could cause "a significant increase in suspended solids resulting in increased turbidity and downstream sedimentation," and provided that, if mercury is found during suction dredge mining, the operator must stop suction dredge mining "immediately if that is the only way to prevent remobilization of the collected mercury." EPA, General Permit for Small Suction Dredge Miners in Idaho 19-20 (April 25, 2018). Those restrictions reflect the 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.

Beyond that, the Corps and the EPA have issued numerous regulations in which they have recognized that redepositing materials dredged from stream and river beds constitutes a regulable discharge or addition of a pollutant. *See, e.g.*,

(2001); 40 Fed Reg 31321 (July 25, 1975) (explaining the types of redeposits of dredged material that would constitute a "discharge of dredged material" under the regulations).[3] Those regulations implementing the Clean Water Act, as well as the agencies' consistent interpretation of them, warrant deference as a matter of federal law. *See Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 277-78, 129 S. Ct. 2458, 174 L. Ed. 2d 193 (2009) (setting out standards for deferring to agency regulations that interpret ambiguous statutes and the agencies' interpretation of their own regulations).

Petitioners contend, however, that *Los Angeles County Flood Control District v. Natural Resources Defense Council*, 568 U.S. 78, 133 S. Ct. 710, 184 L. Ed. 2d 547 (2013), requires a different conclusion. In that case, the 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 [Clean Water Act]." *Id.* at 82, 133 S. Ct. 710 (summarizing *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109-112, 124 S. Ct. 1537, 158 L. Ed. 2d 264 (2004)). As the Court explained, "no pollutants are 'added' to a water body when [polluted] water is merely transferred between different portions of the same

---

[3] Both the Corps' and the EPA's permitting authority extends only to the discharge of pollutants into navigable water. *See* 33 USC §§ 1342, 1344. If the EPA lacks authority to issue a permit for the pollutants resulting from suction dredge mining because there is no addition of pollutants to the water, then the Corps lacks that authority too—a conclusion that is contrary to numerous regulations issued by the Corps treating the redeposit of dredged material into navigable waters as the addition of a pollutant.

water body." *Id.* In this case, by contrast, the EPA reasonably could find that suction dredge mining does more than "merely transfe[r]" 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. We agree with the Oregon Court of Appeals that the reasoning in *Los Angeles County Flood Control District* and *Miccosukee* does not call *Rybachek*'s holding into question. To be sure, a federal Court of Appeals decision does not bind a state court interpreting federal law.[4] However, we agree 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 Clean Water Act.

II. POLLUTANTS RESULTING FROM SUCTION DREDGE MINING

Petitioners mount a second, more substantial argument. They contend that, even if suction dredge mining adds pollutants to the water, the material discharged as a result of suction dredge mining constitutes "dredged material" over which the Corps has exclusive permitting authority.[5] Petitioners

---

[4] Only the United States Supreme Court's interpretations of federal law bind state courts.

[5] Petitioners suggest that the material discharged as a result of suction dredged mining can be viewed alternatively as "fill material," over which the Corps also has exclusive permitting authority. *See* 33 USC § 1344. Petitioners, however, did not raise that issue before the Court of Appeals and may not raise it here

recognize that the Clean Water Act does not define the phrases "dredged * * * material" or the "discharge of dredged * * * material," but they argue that the regulations implementing the Act necessarily lead to the conclusion that material discharged as a result of suction dredge mining qualifies as "dredged material." The state, for its part, argues that the EPA reasonably has concluded that suction dredge mining results in the discharge of processed waste that is subject to the EPA's permitting authority. In the state's view, the statutes and the implementing regulations are ambiguous on that issue; that is, the state recognizes that the material discharged as a result of suction dredge mining reasonably could be characterized either as dredged material or processed waste. The state maintains, however, that, in interpreting and administering their regulations, the Corps and the EPA reasonably have concluded that the material is processed waste subject to the EPA's permitting authority rather than unprocessed dredged material subject to the Corps' permitting authority and that we should defer to those agencies' reasonable interpretation.

In considering the parties' arguments, we note, as a preliminary matter, that the United States Supreme Court addressed a related but separate question in *Coeur Alaska*. Because that decision resolves some of the issues in this case, we begin by briefly describing

---

as a basis for reversing the Court of Appeals decision. Moreover, even if they had raised it, we note that petitioners' argument is difficult to square with the preamble to the current regulatory definition of "fill," which the Court quoted in *Coeur Alaska*. *See* 557 U.S. at 289, 129 S.Ct. 2458 (quoting 67 Fed Reg 31135 (May 9, 2002)).

the Court's reasoning in *Coeur Alaska.* The initial issue in *Coeur Alaska* was whether the EPA or the Corps had authority under the Clean Water Act to issue a permit for the discharge of mining slurry into a lake. 557 U.S. at 273, 129 S.Ct. 2458. Coeur Alaska planned to use a process known as "froth flotation" to remove gold bearing minerals from rock taken from a defunct gold mine; specifically, it planned to churn crushed rock from the mine in chemically treated water, which would cause gold-bearing minerals in the rock to rise to the surface of the water. *Id.* at 267, 129 S.Ct. 2458. After skimming off those minerals, the company planned to discharge the resulting slurry (the leftover rock and chemically treated water) into a lake, where the mine tailings would sink to the bottom of the lake and the chemically treated water would be purified before it left the lake and drained into an adjacent creek.[6] *Id.*

Given regulations issued by both the EPA and the Corps, no party in *Coeur Alaska* disputed that the slurry constituted "fill," which was subject to the Corps' permitting authority. *Id.* at 275, 129 S Ct 2458; *see* 33 USC § 1344(a) (authorizing the Corps to issue permits for the discharge of "dredged or fill material").

---

[6] There were two discharges that required a permit in *Coeur Alaska*. The first involved the discharge of slurry into the lake. The second involved the discharge of the purified water from the lake into the adjacent creek, which was a separate water body. *Cf. Los Angeles County Flood Control District*, 548 US at 82 (explaining that the transfer of polluted water from one part of a water body to another part of the same water body would not implicate the Clean Water Act). The parties disagreed in *Coeur Alaska* whether the EPA or the Corps had authority to issue a permit for the first discharge. They agreed that the EPA had exclusive permitting authority over the second discharge.

However, there was also no dispute that the chemically treated slurry constituted a "pollutant" that was subject to the EPA's permitting authority. *See* 33 USC § 1342(a)(1) (authorizing the EPA to issue permits for the discharge of pollutants other than dredged or fill material). The Court concluded that, in those circumstances, the Clean Water Act gave the Corps sole authority to issue a permit for the discharge of the slurry into the lake. 557 U.S. at 273-74, 129 S.Ct. 2458.[7] The Court then turned to a second issue, which this case does not present; specifically, the Court considered the extent to which the Corps had to follow or, at a minimum, accommodate the water quality standards that the EPA had established for froth flotation mining in deciding whether to permit discharging the slurry into the lake. *Id.* at 277-91, 129 S Ct 2458.

As relevant here, *Coeur Alaska* holds that, if a single discharge constitutes "dredged or fill material" and another "pollutant," only the Corps has authority under the Clean Water Act to issue a permit authorizing the discharge of that material into navigable water. As noted, this case differs from *Coeur Alaska* primarily in one respect. Although no party disputed that the slurry in *Coeur Alaska* constituted

---

[7] In reaching that conclusion, the Court relied on the text of section 402(a)(1), which gave the EPA permitting authority over pollutants "[e]xcept as provided in" section 404 of the Act—the section that gave the Corps permitting authority over dredged and fill material. (Sections 402 and 404 are the Public Law sections, which have been codified respectively as 33 USC § 1342 and 33 USC § 1344.) The Court reasoned that, even if the statutory text was ambiguous, EPA's regulations reasonably established that the Corps had exclusive permitting authority over dredged or fill material. *Coeur Alaska*, 557 U.S. at 273-74, 129 S.Ct. 2458.

"fill," which was subject to the Corps' permitting authority, the parties in this case disagree whether the material discharged as a result of suction dredge mining constitutes "dredged material" over which the Corps has permitting authority or processed waste over which the EPA has permitting authority.

Coeur Alaska teaches that, if Congress has not spoken directly to that issue, then the Corps and the EPA's reasonable interpretation of the Clean Water Act 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." *See id.* at 277-78, 129 S Ct 2458 (describing when the agencies' regulations and interpretation of their regulations will bear on the meaning of the Clean Water Act). As Justice Breyer explained, the majority opinion in *Coeur Alaska*:

> "recognizes a legal zone within which regulating agencies might reasonably classify material either as 'dredged or fill material' subject to [regulation under section 404 of the Clean Water Act by the Corps] or as a 'pollutant' subject to [regulation under section 402 of the Clean Water Act by the EPA]. Within this zone, the law authorizes the environmental agencies to classify material as one or the other, so long as they act within the bounds of the relevant regulations, and provided that the classification, considered in terms of the purposes of the statutes and relevant regulations, is reasonable."

Id. at 291-92 (Breyer, J., concurring) (citations omitted); *see also id.* at 295-96, (Scalia, J., concurring in part and concurring in the judgment) (describing

the majority's opinion as reflecting a form of deference to the agencies' interpretation and administration of the Clean Water Act). Following *Coeur Alaska*, we consider the text of the Clean Water Act, the implementing regulations, and the agencies' interpretation of those regulations. Finally, we consider what deference, if any, we owe to the agencies' interpretation of the Act and their regulations.

A. *Text*

Section 404 of the Clean Water Act authorizes the Corps "to issue permits, after notice and an opportunity for a public hearing, for the discharge of dredged or fill material." 33 USC § 1344(a). Unlike the term "pollutant," the Clean Water Act does not define what the phrase "discharge of dredged *** material" means. 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.

It follows that the text of the Clean Water Act does not speak directly to the issue that this case presents; it does not answer whether the material discharged as a result of suction dredge mining is "dredged material" over which the Corps has permitting authority or some other pollutant over which the EPA has permitting authority. We accordingly turn first to the regulations promulgated to implement the Act and then to the agencies' interpretation and application of

those regulations. *See Coeur Alaska*, 557 U.S. at 277-78, 129 S.Ct. 2458 (explaining that, if the text of the Clean Water Act 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 Act means).

B. *Regulation and administration of the Clean Water Act*

The regulations issued by the Corps and the EPA to implement the Clean Water Act do not specifically address which agency has authority to permit the discharge of material resulting from suction dredge mining. However, in later interpreting the regulations, the Corps and the EPA explained first in 1986 and later in 1990 that the EPA, not the Corps, is authorized under the Clean Water Act to issue permits for the discharge of material resulting from suction dredge mining. More importantly, since that time, the EPA has issued general permits after notice and comment for the discharge of material resulting from suction dredge mining, and the Corps has acted consistently with the EPA's permitting authority. As we discuss below, last year, the EPA reaffirmed that allocation of authority in issuing a general permit for suction dredge mining in Idaho.

That regulatory history goes a long way toward answering the second issue that petitioners raise. Petitioners, however, argue that regulations adopted in 1975 and 2001 support their view that the Corps has exclusive permitting authority. We accordingly set out the regulatory history in greater (some might say mind-numbing) detail below. *Cf. Save Our Rural Oregon v. Energy Facility Siting*, 339 Or. 353, 363, 121

P.3d 1141 (2005) (providing similar trigger warning). We begin with the Corps' promulgation of regulations defining "dredged material" and the "discharge of dredged material" in 1975. We then turn to a separate but related dispute over the difference between "fill" and "waste," which led to the Corps' express statement in 1990 that the EPA had exclusive authority to permit the discharge of waste resulting from suction dredge mining. After that, we consider the EPA's efforts from 1999 to 2001 to comply with a federal decision that "incidental fallback" of dredged material does not constitute the "discharge of dredged material," efforts that petitioners contend led to a 2001 regulation that supports their position. We also consider the Corps' 2008 rules, which the dissent views as dispositive. Finally, we look to the EPA's and the Corps' history of issuing permits for suction dredge mining.

1. *"Dredged material" and the "discharge of dredged material"*

On May 6, 1975, the Corps published four alternative sets of proposed regulations in response to a federal district court decision issued less than two months earlier. *See* 40 Fed Reg 31320 (July 25, 1975) (recounting that history). The district court had ruled that the statutory phrase "navigable waters" to which the Clean Water Act applies was broader than the Corps had understood, and it directed the Corps to adopt final regulations within 30 days (later extended to 80 days) that applied to "the entire aquatic system, including all of the wetlands that are part of it, rather than only those aquatic areas that are arbitrarily distinguished by the presence of an ordinary or mean

high water mark." *See* 42 Fed Reg 37124 (July 19, 1977) (recounting the regulatory history).

In carrying out that task, the Corps adopted definitions of "dredged material" and the "discharge of dredged material" in 1975 that, in relevant part, have remained largely unchanged. The regulations defined "dredged material" as "material that is excavated or dredged from navigable waters." 33 CFR § 209.120(d)(4) (1976). That definition, however, did not add much to the statutory phrase "dredged * * * material." The regulatory definition essentially restated the statutory term and left unanswered when, if ever, dredged material that has been processed will become some other form of a pollutant that is subject to the EPA's permitting authority rather than the Corps'.

The 1975 definition of "discharge of dredged material" shed more light on the issue. It provided:

> "The term 'discharge of dredged material' means 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 402 of the [Clean Water Act] ***."

33 CFR § 209.120(d)(5) (1976).

Not surprisingly, that definition makes clear that, if unprocessed dredged material is reintroduced into navigable water, it remains "dredged material," which is subject to the Corps' permitting authority. In explaining its proposed regulations, the Corps observed:

> "The types of activities encompassed by this term [discharge of dredged material] would include the depositing into navigable waters of dredged material if it is placed alongside of a newly dredged canal which has been excavated in a wetland area. It would also include maintenance of these canals if excavated material is placed in navigable waters. Also included is the runoff or overflow from a contained land or water disposal area."

40 Fed Reg 31321 (July 25, 1975). All those activities focused on the placement of unprocessed dredged material adjacent to or in navigable waters, and the commentary to the regulations makes clear that the Corps' focus was on the discharge of dredged material in wetlands. That focus is hardly surprising since the district court's order had directed the Corps to include, for the first time, wetlands as part of the navigable waters to which the Clean Water Act applies.

The definition of "discharge of dredged material" also identified an exception to that definition. It provided 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 [Clean Water] Act." 33 CFR § 209.120(d)(5) (1976). 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 [Clean Water Act]" by the EPA. 40 Fed Reg 31321 (July 25, 1975).

That exception resolves a question that the statutory text and the regulatory definition of "dredged material" had left unanswered. The 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.[8]

Petitioners, however, rely on that exception to argue that the definition of "discharge of dredged material" draws a broad distinction between discharges resulting from processing dredged material on land, which will be subject to the EPA's permitting authority, and discharges resulting from processing dredged material over water, which will be subject to the Corps' permitting authority.[9] Because

---

[8] Dredged material, of course, is a subset of the broader statutory term pollutant. However, in this context, the exception's reference to "pollutants" that are subject to section 402 establishes that the act of processing dredged material can result in pollutants other than dredged material.

[9] In making that argument, petitioners contrast the exception to the definition of "discharge of dredged material," which was enacted in 1975, with a rule defining "incidental fallback," which was enacted in 2001 and repealed in 2008. Not only does the repeal of the 2001 rule call into question the contrast on which petitioners' argument depends, but, as explained below, petitioners misperceive the effect of the 2001 rule. In considering petitioners' argument, we analyze the 1975 rule and the repealed 2001 rule separately.

dredged material is typically processed over water during suction dredge mining, it necessarily follows, petitioners reason, that the material discharged as a result of suction dredge mining is "dredged material," which requires a permit from the Corps rather than the EPA.

Petitioners' argument is problematic for at least two reasons. First, the exception to the definition of "discharge of dredged material" does not draw the distinction that petitioners perceive. The exception does not distinguish between discharges that result from processing dredged material over water and discharges that result from processing dredged material over land. Rather, the exception applies to discharges from the onshore processing of dredged material that is extracted for a commercial use. If, however, 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.[10]

Second, petitioners' argument depends on drawing a negative inference from the existence of a single exception to the definition of "discharge of dredged material." That is, petitioners' argument depends on the proposition that, by recognizing that discharges resulting from the onshore processing of dredged

---

[10] To the extent that petitioners intended to draw a distinction between discharges resulting from onshore and offshore processing of dredged material extracted for a commercial use, that distinction does not advance their argument. The EPA has deemed suction dredge mining a recreational activity, not a commercial one. *See* EPA, Response to Comments on Idaho Small Suction Dredge General Permit at 13 (explaining that the EPA deemed suction dredge mining as a "recreational activity").

material extracted for a commercial use are pollutants subject to the EPA's permitting authority, the rule implies that all other discharges resulting from processing dredged material will be dredged material that is subject to the Corps' permitting authority. Apparently, in petitioners' view, that is true however the dredged material is processed and regardless of the type of chemicals that are discharged into the water as a result of processing.

Ordinarily, the sort of negative inference upon which petitioners' argument depends is appropriate when there is "a series of terms from which an omission bespeaks a negative implication." *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81-82, 122 S. Ct. 2045, 153 L. Ed. 2d 82 (2002) (declining to infer that, by identifying a single statutory exception, Congress had precluded an agency from recognizing other exceptions). When, as in this case, a statute or a rule identifies only a single exception, a negative inference is unlikely. *See id.* (explaining that the canon of construction for negative inferences "depends on identifying a series of two or more terms or things that should be understood to go hand in hand"). Beyond that, nothing in the Corps' explanation for recognizing the exception suggests that the Corps intended that all other discharges resulting from land-based and water-based processing of dredged material would be subject to the Corps' rather than the EPA's permitting authority.

In our view, the better reading of the 1975 definition of "discharge of dredged material" is as follows: First, as a general rule, the redeposit of unprocessed dredged material into navigable water will constitute the "discharge of dredged material" and

require a permit from the Corps. Second, some onshore processing of dredged materials will result in discharges of pollutants that require a permit from the EPA under section 402 rather than the Corps under section 404. Third, that exception to the definition of discharge of "dredged material" does not go further than identifying a single exception. That is, in recognizing an exception for one category of onshore processing (discharges from dredged material extracted for commercial uses), the rule leaves unanswered whether other categories of water-based or land-based processing operations will result in the "discharge of dredged material" that requires a permit from the Corps under section 404 or the discharge of a pollutant that requires a permit from the EPA under section 402.[11] Because the 1975 regulatory definition

---

[11] Although petitioners do not cite it, the EPA promulgated proposed water quality guidelines for the discharge of dredged or fill material that, among other things, incorporated the Corps' definitions of "dredged material" and "discharge of dredged material." *See* 40 Fed Reg 41293, 41297 (Sept 5, 1975). In responding to comments on the proposed guidelines, the EPA noted that "many commenters [had] object[ed] to the execution [*sic*] of raw material extraction from the section 404 permit process." *Id.* at 41292. It then responded to that concern by observing that the Corps' regulatory authority "included" discharges from material extracted and processed on shipboard while discharges from "land-based processing are included *** under section 402 of the Act." *Id.* That response provides a general rule of thumb regarding what each agency's sphere of authority "includes," but it does not define the precise boundary between them. That much follows from the 1975 definition of "discharge of dredged material," which did not assign discharges from all onshore processing to the EPA. Moreover, as explained below, both the EPA and the Corps later concluded that the discharges from suction dredge mining fall within the EPA's

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.

2. *Fill and waste*

In 1977, the Corps renumbered and amended the regulations to address issues that had arisen since it promulgated them two years earlier. *See* 42 Fed Reg 37122-30 (July 19, 1977). Of relevance here, 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. *Id.* at 37130. Initially, the Corps took the position that the answer to that question turned on the purpose for which those materials were discharged into the water. *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 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. *Id.*

In 1986, the EPA and the Corps entered into a Memorandum of Agreement to resolve a lingering dispute about the scope of "fill" materials that were

---

permitting authority, even though the processing occurs over water.

subject to the Corps' permitting authority. *See* 51 Fed Reg 8871 (Mar 14, 1986) (publishing the 1986 agreement). The 1986 agreement was intended to be an interim measure pending the completion of studies that were being undertaken to determine the effect of solid waste disposal on ground water and human health. *Id.* Among other things, the 1986 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. *Id.* at 8872 (setting out the agreement).

Paragraph B.4 of the agreement identified four criteria for determining when waste discharged into water ordinarily would be regarded as fill subject to the Corps' authority.[12] Paragraph B.5 then described when waste discharged into the water would be considered a pollutant subject to the EPA's authority. It provided:

> "'a pollutant (other than dredged material) will normally be considered by the EPA and the Corps to be subject to section 402 [and the EPA's permitting authority] if it is a discharge in liquid, semi-liquid, or suspended form or if it is a discharge of solid material of a homogenous

---

[12] Factors that bore on whether the material constituted "fill" were: (1) whether the primary or one principal purpose was to replace the waters of the United States with dry land or to raise the bottom elevation; (2) whether the discharge resulted from activities such as road construction; (3) whether the principal effect of the discharge was the physical loss or modification of the waters of the United States; and (4) whether the discharge was "heterogeneous in nature and of the type normally associated with sanitary land fill discharges." 51 Fed Reg 8872.

> 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. (quoting that paragraph of the agreement).

The first sentence in paragraph B.5 identifies the properties of discharged material that ordinarily will render the discharge subject to the EPA's permitting authority: That is, the sentence asks whether the discharged materials are liquid, semiliquid, or suspended, or, if solid, whether they are of a homogenous nature from a single source.[13] Those properties were broad enough to include unprocessed "dredged material," and, presumably for that reason, the first sentence of paragraph B.5 expressly excepted "dredged material" from materials that possess those characteristics. The second sentence in paragraph B.5 took a different approach to defining which materials are subject to the EPA's permitting authority. Instead of listing the properties of discharged material, the second sentence listed specific examples of processed waste that will be subject to the EPA's authority. 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

---

[13] As noted above, one criteria for "fill" subject to the Corps' permitting authority is that the discharge is "heterogeneous in nature," as opposed to homogeneous.

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.[14]

Four years after the Corps and the EPA issued the 1986 memorandum of agreement, the Corps issued a regulatory guidance letter that interpreted the 1986 agreement and stated that the material discharged as a result of placer mining is subject to the EPA's exclusive permitting authority. The 1990 guidance letter stated in full:

> "Paragraph B.5 in the Army's 23 Jan 86 Memorandum of Agreement (M[O]A) 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 [by the EPA] and not under Section 404 [by the Corps].

---

[14] As petitioners note, the 1986 memorandum of agreement was not intended to be the last word on "fill" material. Since then, the Corps and the EPA have redefined fill material as any material that has the effect of changing the bottom elevation of water. *See Coeur Alaska*, 557 US at 268. Despite that fact, in *Coeur Alaska*, decided almost 25 years after the 1986 memorandum of agreement, the Court relied on the fact that the Corps' permitting decision was consistent with the principles set out in the 1986 memorandum of agreement in upholding the Corps' decision to permit Coeur Alaska to discharge slurry into the lake. *See id.* at 288 (explaining that "[t]he MOA [the 1986 memorandum of agreement] is quite consistent with the agencies' determination that the Corps regulates all discharges of fill material and that § 306 does not apply to these discharges").

> "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 (July 28, 1990).[15]

3. *Incidental fallback*

Before 1993, the Corps excluded "*de minimus*, incidental soil movement occurring during normal dredging operations" from the definition of "discharge of dredged material." *See National Mining Assoc.*, 145 F3d at 1401. In response to litigation, the Corps

---

[15] The Corps' guidance letter expired on December 31, 1990. In 2005, the Corps issued another guidance letter, in which it explained that some expired guidance letters continue to provide useful information while others "have been superseded, replaced or otherwise made obsolete." Corps Regulatory Guidance Letter 05-06 (Dec 7, 2005). The Corps noted that, although the second class of regulatory guidance letters provide historical context, "they are no longer valid." The Corps did not include the 1990 regulatory guidance letter on a list of expired guidance letters that continue to provide useful information. *See id.*

removed the *de minimus* exception in 1993 and expanded the regulatory definition of "discharge of dredged material" to include "'[a]ny addition, including any redeposit of dredged material, including excavated material, into waters of the United States.'" *Id.* at 1402 (quoting 33 CFR § 323.2(d)(1)(iii) (1993)) (emphasis omitted). Various trade associations challenged that expanded definition on the ground that it erroneously included "incidental fallback" that occurred during dredging. They reasoned that "incidental fallback" that occurs during the removal of dredged material does not constitute the discharge—namely, the addition—of dredged material. Both the district court and the Court of Appeals for the District of Columbia Circuit agreed.

The Court of Appeals explained that "incidental fallback occurs, for example, during dredging, 'when a bucket used to excavate material from the bottom of a river, stream, or wetland is raised and soils or sediments fall from the bucket back into the water.' " *Id.* at 1403. The court noted that "[f]allback and other redeposits also occur during mechanized land clearing, when bulldozers and loaders scrape or displace wetland soil." *Id.* In holding that such "incidental fallback" did not require a permit under the Clean Water Act, the Court of Appeals explained "that the 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." *Id.* at 1404. The Court of Appeals accordingly directed the Corps to exclude "incidental fallback" from the definition of "discharge of dredged materials."

In directing the Corps to exclude "incidental fallback," the Court of Appeals specifically distinguished the discharges at issue in *Rybachek* from incidental fallback. *Id.* at 1406. It explained that *Rybachek* had:

> "held that the material separated from gold and released into the stream constituted a pollutant, and, to the extent that 'the material discharged originally comes from the streambed itself, [its] resuspension [in the stream] may be interpreted to be an addition of a pollutant under the Act.'"

Id. (quoting *Rybachek*, 904 F2d at 1285) (bracketed material added by *National Mining Assoc.*). As the court explained in *National Mining Assoc.*, *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." 145 F3d at 1406.

Although the concept of incidental fallback seems relatively straightforward, defining the concept proved difficult. The Corps initially declined to define "incidental fallback" and explained that it would identify it on a case-by-case basis. *See* 64 Fed Reg 25120 (May 10, 1999). The next year, 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 (Aug 16, 2000). Procedurally, 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. *Id.* After receiving comments on the proposed rule, the Corps

issued a final rule in 2001 that retained the substance of the presumption but stated that the burden of proof would not shift. 33 CFR § 323.2(d)(2)(i) (2001). Finally, 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 and simply excepted "incidental fallback," without further explanation, from the definition of discharge of dredged material. 33 CFR § 323.2(d)(2)(iii) (2008).

Petitioners argue that the 2001 rule demonstrates that material discharged as a result of suction dredge mining constitutes "dredged material" over which the Corps has exclusive permitting authority.[16] We first set out the relevant terms of that rule and then explain why we reach a different conclusion.

The 2001 rule sought to define the phrase "incidental fallback" in two ways: first, by identifying the types of activities that ordinarily will result in something more than incidental fallback, 33 CFR § 323.2(d)(2)(i) (2001); and second, by providing a specific definition of the phrase, 33 CFR § 323.2(d)(2)(ii) (2001). Section 323.2(d)(2) (2001) provided:

> "(i) The Corps and the EPA regard the use of mechanized earth-moving equipment to conduct land clearing, ditching, channelization, in-stream mining or other earth moving activity in

[16] As noted, the part of the 2001 rule on which petitioners rely has been repealed. We hesitate to rely too heavily on that fact, however. Neither the 1986 memorandum of agreement or the Corps' 1990 guidelines letter on which the state relies are currently in force. And, as noted above, the Court relied on the principles stated in the 1986 memorandum in deciding *Coeur Alaska* in 2009.

> 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. 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."

Petitioners argue that the reference to "in-stream mining" in paragraph (i) includes suction dredge mining and, as a result, establishes that suction dredge mining ordinarily results in the discharge of dredged material that is subject to the Corps' permitting authority. Petitioners focus on only half the sentence. Although "in-stream mining" most likely includes suction dredge mining, the general rule stated in paragraph (i) applies only to "the use of mechanized earth-moving equipment to conduct *** in-stream mining." 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." 66 Fed Reg 4552 (Jan 17, 2001).

More importantly, the point of the rule was to distinguish large-scale earth moving activities where any redeposit of unprocessed dredged material into the water was likely to be a regulable discharge of dredged material from smaller scale activities where the redeposit of unprocessed dredged material was likely to be only "incidental fallback." The 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. When 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. Similarly, we do not agree with petitioners that the 2001 rule reflects the Corps' conclusion that discharges resulting from processing dredged material over water, as opposed to processing it over land, will be automatically subject to the Corps' permitting authority under section 404.

That same conclusion follows from the explanation for the 2001 final rule, which incorporated the preamble to the 2000 proposed rule.[17] *See* 66 Fed Reg

[17] Both rules stated that using mechanized earth-moving equipment to conduct certain dredging activities ordinarily will result in a regulable redeposit of dredged material. The two rules differed only in how they allocated the burden of proving or disproving whether activities that came within that general rule resulted in incidental fallback. Presumably for that reason, the

4552 (Jan 17, 2001). Specifically, the preamble to the 2000 proposed rule expressly recognized that the discharge of material resulting from placer mining is "the 'addition of a pollutant' under the [Clean Water Act] subject to EPA's section 402 regulatory authority." 65 Fed Reg 50110 (Aug 16, 2000).

In the preamble to the 2000 proposed rule, the Corps recognized that one problem in defining "incidental fallback" is that it shares many characteristics with regulable discharges of dredged material. *See* 65 Fed Reg 50109 (Aug 16, 2000). The Corps accordingly sought to identify the "nature of th[e] activities and the types of equipment used" that ordinarily will result in the regulable discharge of dredged materials. *See id.* The Corps also reviewed federal decisions holding that the redeposit of dredged material constituted a regulable discharge. *See id.* at 50110. In doing so, the Corps listed cases concluding that the discharge of unprocessed dredged material resulted in a discharge of dredged materials subject to the Corps' authority under section 404 of the Clean Water Act. *See id.* (discussing cases involving sidecasting of dredged material, the redeposit of dredged material on adjacent sea grass beds, and backfilling trenches with dredged material).

After citing cases involving the redeposit of unprocessed dredged material, the Corps cited one decision that involved the discharge of processed dredged material, which it distinguished from the other cited cases with a "see also" cite. The explanation stated:

---

preamble to the proposed 2000 rule remained relevant to explaining the final 2001 rule.

> "see also, *Rybachek v. EPA*, 904 F.2d 976 [1276] (9th Cir. 1990) (removal of dirt and gravel from a stream bed and its subsequent redeposit in the waterway after segregation of minerals is 'an addition of a pollutant' under the CWA subject to EPA's section 402 regulatory authority)."

Id. That explanation is consistent with the District of Columbia Circuit's decision in *National Mining Assoc.*, which explained 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 National Mining Assoc.*, 145 F.3d at 1406. The Corps' description of *Rybachek*, however, went further than that and stated, consistently with the 1986 memorandum of agreement, that the material discharged as a result of placer mining "is 'an addition of a pollutant' under the CWA subject to EPA's section 402 regulatory authority." Far from suggesting an intent to depart from the conclusion in the 1986 memorandum of agreement, the 2001 final rule and the explanation for the 2000 proposed rule are 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 section 402 of the Clean Water Act for the processed waste discharged as a result of suction dredge mining.

4. *The Corps' 2008 rules*

As explained above, the 1975 exception to the definition of "discharge of dredged material" identified one instance in which the act of processing dredged material will result in the discharge of a pollutant that

requires a permit from the EPA under section 402. It did not, however, unambiguously resolve whether other instances of processing dredged material would result in such a discharge. The dissent reasons that, even if that is a correct interpretation of the 1975 definition of "discharge of dredged material," the 2008 version of that definition resolved the ambiguity. We reach a different conclusion. The 2008 version of the definition of "discharge of dredged material" left the relevant part of the 1975 regulations unchanged, and the differences between the 1975 version and the 2008 version of the definition provide no reason to think that the 2008 regulation somehow changed what the 1975 regulation meant when it was initially promulgated.

The relevant part of the 1975 definition of "discharge of dredged material" does not differ in any material respect from the 2008 definition. The 1975 regulation provided that "[t]he term 'discharge of dredged material' means any addition of dredged material * * * into navigable waters." 33 CFR § 209.120(5) (1976). It then provided that "[d]ischarges of pollutants into navigable waters resulting from the onshore subsequent processing of dredged material that is extracted for any commercial purpose (other than fill) are not included within th[e] term [discharge of dredged material]." *Id.* The 2008 regulation says the same thing. It provides that "[e]xcept as provided in paragraph (d)(2) below, the term discharge of dredged material means any addition of dredged material into *** the waters of the United States." 33 CFR § 323.2(d)(1) (2009). Paragraph (d)(2) then provides that the term "discharge of dredged material does not include the following: *** discharges of pollutants into the waters

of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill)." 33 CFR § 323.2(d)(2)(i) (2009).

There are two potentially relevant changes to the definition of the phrase "discharge of dredged material" between 1975 and 2008. First, the exceptions are organized slightly differently, an organizational change that occurred in 1993 and that prompted no discussion when it occurred. 58 Fed Reg 45008 (Aug 25, 1993), codified as 33 CFR § 323.2(d) (1994).[18] That is, the 1993 regulation (and the 2008 regulation) group initially two and later three exceptions together and put them in one place rather than stating each exception in a separate sentence, as the regulations did from 1977 to 1993.

Second, between 1975 and 2008, the Corps added two exceptions to the term "discharge of dredged material." In 1977, the Corps restated what had been an exception to the definition of "dredged material" for "material resulting from normal farming, silviculture, and ranching activities, such as plowing, cultivating, seeding, and harvesting, for the production of food, fiber, and forest products" and moved it to become an exception to the definition of "discharge of dredged material." *See* 33 CFR § 209.120(d)(4) (1976); 33 CFR § 323.2(l) (1978). The Corps explained that it had

---

[18] The explanation for the changes in the Federal Register focused almost completely on the Corps' decision to expand the definition of "discharge" to include incidental fallback. *See* 58 Fed Reg 45008-26 (Aug 25, 1993). More specifically, the discussion focused on when the incidental discharge of unprocessed dredged material would constitute a regulable discharge. *See id.*

intended in 1975 to make clear that "activities such as plowing, seeding, harvesting, and any other activity by any other industry *that do not involve discharges of dredged or fill material*" do not require section 404 permits. 42 Fed Reg 37130 (July 19, 1977) (emphasis added). It reasoned that restating and moving that exception to the definition of "discharge of dredged material" clarified its intent to except only those ordinary sorts of activities that do not result in a discharge of dredged material.[19] *Id.* The third exception was added in 1999 (and restated several times) to exclude "incidental fallback" from the definition of discharge of dredged material. That exception is discussed at some length above.

The second and third exceptions (added in 1977 and 1999) are excluded from the definition of "discharge of dredged material" because the Corps concluded that they do not involve any "discharge" of dredged material. The first exception stands on a different footing. That exception assumes that there is a "discharge" but establishes that, as a result of the

---

[19] In 1993, the Corps restated that agricultural exception one more time. 33 CFR § 323.2(d)(2)(ii) (1994). As restated, the exception provided that the discharge of dredged material does not include:

> "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."

Id. As before, the Corps explained that the reason for the exception was that the listed activities "would not cause either the addition or redeposition of dredged material." 58 Fed Reg 45017 (Aug 25, 1993).

act of processing dredged material, the material discharged is a "pollutant" subject to section 402 rather than "dredged material" subject to section 404. That is, the second and third exceptions turn on the absence of a discharge; the first turns on the nature of the material being discharged.

Contrary to the dissent's reading of the 2008 definition of "discharge of dredged material," the changes to that definition between 1975 and 2008 provide no reason to say that the exception promulgated in 1975 means anything other than what it meant in 1975. Specifically, both the 1975 and the 2008 regulations leave open the question whether other instances of processing dredged material—namely, instances other than the one instance identified in the 1975 exception—will result in the discharge of a pollutant subject to section 402 or the discharge of dredged material subject to section 404. It is precisely because the regulations leave that question open that the EPA and the Corps' application of the statute and regulations matters.

5. *Regulatory approval*

Either the EPA or a state agency acting under authority delegated by the EPA may issue a permit under section 402 of the Clean Water Act for the discharge of pollutants after providing an opportunity for a hearing. *See* 33 USC § 1342(a)(1) (permits issued by the EPA); 33 USC § 1342(b) (states acting under delegated authority). However, in considering regulatory approval of permits for suction dredge mining, we focus on permits issued by the EPA or the Corps and do not rely on permits issued by states, such as Oregon, that are acting pursuant to authority delegated by the EPA. Without some showing that the

EPA has formally adopted a state agency's issuance of a permit, the states' regulatory actions do not provide a strong basis for determining the meaning of a federal statute. *Cf. DeCambre v. Brookline Housing Auth.*, 826 F3d 1, 19 (1st Cir 2016) (explaining that deference to state agency interpretations of federal statutes could undercut the uniform interpretation of federal law).

Focusing on the EPA's issuance of permits, the state argues and petitioners do not dispute that the Regional Administrator of the EPA has issued general permits for suction dredge mining in Alaska that were in effect from 1994 to 2015.[20] Not only has the EPA issued general permits for suction dredge mining in Alaska, but the Corps in Alaska administers a general permit for "mechanical placer mining," which notes that small scale suction dredge mining is not an activity covered by the Corps' general permit but is instead regulated under a permit issued by the state agency acting under delegated authority from the EPA.[21] Specifically, the Corps' permit provides that the "use of a suction device to remove bottom substrate from a water bod[y] and discharges of material from a sluice box for the purpose of extracting gold or other precious metals *** [are] regulated by the ADEC [Alaska Department of

---

[20] Since that time, the responsibility for issuing permits for suction dredge mining has been delegated to Alaska's counterpart to Oregon's DEQ. While the Alaska counterpart has acted consistently with the EPA, we look primarily to the EPA's permitting decisions.

[21] The Corps may issue a permit under section 404 only after notice and an opportunity for a public hearing. *See* 33 USC § 1344(a)(1); 33 CFR § 325.3.

Environmental Conservation] under a Section 402 Alaska Pollution Discharge Elimination System (APDES) permit."

To be sure, in 2012, the Corps extended another regional general permit, 2007-372-MI, that regulates "floating recovery devices" used for the purposes of recovering metals. That permit, however, was not issued under the Clean Water Act but under the Corps' authority under Section 10 of the Rivers and Harbors Act. Moreover, the Corps' permit excepts small suction dredge mining. It provides:

> "[N]o Corps authorization is required for these operations. Recovery of metals in a Section 404 water results in discharge from a sluice, trommel, or screen, however this discharge is regulated by Alaska Department of Environmental Conservation (ADEC) under a Section 402, Alaska Pollutant Discharge Elimination System Permit (APEDS)."[22]

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

---

[22] In a 2017 notice stating that it was extending the permit until 2018, the Corps added:

> "The Corps DOES NOT regulate the discharge or release of rocks and or sediment from a sluice box mounted on a recovery device. The sluice box discharge is regulated by the ADEC under a section 402 APDES permit."

(Capitalization in original.)

mining, and the Corps has recognized the EPA's authority to do so.

Additionally, as noted above, in April 2018, the Regional Administrator of the EPA reissued a general permit for suction dredge mining in Idaho after notice and comment. Before doing so, the EPA addressed several comments questioning the EPA's authority to issue a permit for suction dredge mining. *See* EPA, Response to Comments on Idaho Small Suction Dredge General Permit at 3-7. Some commenters took the position that suction dredge mining should not be regulated at all. *Id.* at 3-4. Similarly, others argued that the material discharged as a result of suction dredge mining was incidental fallback and thus not subject to regulation. *Id.* at 5-6. In responding to those comments, the EPA explained that "commenters often confuse the 'discharge of dredged material' with the 'discharge of a pollutant.' " *Id.* at 7. The EPA reaffirmed its position that the material discharged as a result of suction dredge mining was the "discharge of a pollutant" subject to regulation under section 402 and not incidental fallback, which does not constitute a regulable discharge of dredged material. *Id.* The EPA then noted that, consistently with that conclusion, "the Corps routinely informs applicants who request a 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." *Id.*

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. Petitioners

argue, however, that the Corps has issued three permits that lead to a different conclusion. Specifically, they rely on two nationwide permits (NWP) issued by the Corps and a regional permit also issued by a division of the Corps. We consider each permit separately.

The first permit, NWP 19, authorizes dredging of "no more than 25 cubic yards below" the plane of the ordinary high water mark. 82 Fed Reg 1988 (Jan 6, 2017). Notably, NWP 19 only authorizes dredging—the removal of dredged material from navigable waters. It does not authorize the discharge or addition of dredged material to the navigable waters of the United States, which is the statutory predicate for a section 404 permit under the Clean Water Act. *See National Mining Assoc.*, 145 F3d at 1404 (distinguishing between the Corps' authority to permit dredging under the Rivers and Harbors Act of 1899 and its authority to permit the discharge of dredged or fill material into navigable waters under section 404 of the Clean Water Act). Because a permit authorizing the removal of dredged material from navigable water differs from a permit authorizing the discharge of dredged material into navigable water, NWP 19 does not advance petitioners' argument.

The second permit, NWP 44, is arguably closer to the mark. It authorizes the discharge of "dredged or fill material" into the nontidal waters of the United States for mining activities, provided that either the discharge does not cause the loss of "greater than 1/2-acre of nontidal wetlands" or as long as the total mined area does not exceed 1/2 acre for open waters, such as rivers, streams, lakes, and ponds. 82 Fed Reg 1994 (Jan 6, 2017). By its terms, NWP 44 applies to

the issuance of a permit for a single mining project that can entail water impoundments and construction on fill or dredged material discharged into the water. *See* NWP 44, General Conditions Nos. 8, 9, 14, 15, 23, and 24. Moreover, it requires preconstruction notification for certain activities and remedial mitigation by the project proponent. *Id.*

At first blush, the fact that NWP 44 authorizes the discharge of dredged material for mining purposes appears to support petitioners' argument. On closer inspection, however, we reach a different conclusion. First, NWP 44 is directed at individual mining projects that can involve the impoundment of water and construction of temporary or permanent structures for mining, rather than recreational suction dredge mining. Second, in authorizing the discharge of up to one-half acre of fill or dredged material, NWP 44 appears to refer to unprocessed dredge material or fill. It does not expressly address whether processed dredged material remains subject to the Corps' permitting authority under section 404 or whether processing can result in the addition of a pollutant subject to the EPA's permitting authority under section 402. Third, and consistently with the second observation, the commentary to NWP 44 states that "[d]ischarges of processed mine materials into waters of the United States may require authorization [by the EPA] under section 402 of the Clean Water Act." 82 Fed Reg 1921 (Jan 6, 2017).

Finally, petitioners rely on a regional general permit that the Corps issued in 1995 for northern California for "certain work activities and incidental discharges of dredged or fill material associated with suction dredge mining." Department of the Army,

Regional General Permit No. 21181-98 (June 7, 1995). Again, at first blush, the permit appears to support petitioners' view that the Corps has exercised permitting authority over suction dredge mining. However, from 1961 to 2009, the State of California issued permits authorizing suction dredge mining under section 5653 of the California Fish and Wildlife Code, *see People v. Rinehart*, 1 Cal 5th 652, 658, 206 Cal.Rptr.3d 571, 377 P.3d 818 (2016)*, cert den sub nom Rinehart v. California*, 138 S Ct 635 (2018),[23] and the Corps' permit on which petitioners rely specifically provides that "[w]ork under this regional general permit is authorized *only* for holders of current and valid California Department of Fish and Game [section] 5653 Permits * * * commonly referred to as 'standard permits', for the purpose of engaging in suction dredge mining for mineral extraction." (Emphasis added.)

Moreover, the Corps issued the 1995 regional permit two years after it promulgated the 1993 regulations that defined the "discharge" of dredged materials as including "any addition, including any redeposit, of dredged material, including excavated material, into the waters of the United States, which is incidental to any activity * * *." 32 CFR § 323.2(d)(1)(iii) (1994). That rule was later modified in 1999 to except "incidental fallback," and it is unclear whether the Corps' 1995 regional permit was issued merely to comply with the rules in effect from 1993 to 1999 that the discharge of unprocessed dredged material that was incidental to any activity

---

[23] In 2009, the California imposed a temporary moratorium on all suction dredge mining, which was scheduled to sunset in 2016. *See Rinehart*, 1 Cal 5th at 658, 377 P3d 818.

required a permit under section 404 of the Clean Water Act. *See* Regional General Permit No. 21181-98 (authorizing "incidental discharges of dredged or fill material associated with suction dredge mining"). Beyond that, the 1995 regional permit does not purport to be the exclusive permitting authority for suction dredge mining but serves instead only as auxiliary authorization. The Corps' permit applies only if a person possesses a standard permit for suction dredge mining issued by the State of California. Finally, the 1995 regional permit expired on July 1, 2000, and petitioners do not identify any other permit issued by the Corps after it amended its regulations in 1999 to exclude incidental fallback that provides auxiliary authorization for incidental discharges resulting from suction dredge mining.

Ultimately, we do not view NWP 19, NWP 44, or Regional General Permit No. 21181-98 as persuasive authority for petitioners' position. Rather, NWP 19 does not authorize the discharge of dredged materials; the commentary to NWP 44 recognizes that the discharge of processed mining waste may require a permit from the EPA under section 402; and the 1995 regional general permit provided auxiliary authorization for incidental discharges associated with suction dredge mining at a time when the Corps' regulations recognized that any discharge of unprocessed dredged material that was "incidental to any activity" was a regulable discharge under section 404.

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. With that regulatory history in mind, we turn to the deference owed those agency decisions.

C. *Deference*

In *Coeur Alaska*, the Court explained that Congress had not "directly spoken" to the precise question in that case, and it looked "to the agencies' regulations construing [the statutory text], and [the Corps and] the EPA's subsequent interpretation of those regulations" to determine the answer to that question. 557 US at 277.

As *Coeur Alaska* recognized, agencies charged with administering a federal statute may interpret that statute in ways that call for deference. *See id.* The agencies may promulgate rules after notice and comment. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 US 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984); *accord United States v. Mead Corp.*, 533 US 218, 226-27, 121 S Ct 2164, 150 L Ed 2d 292 (2001). Or they may engage in formal adjudication following notice and comment, which will also warrant *Chevron* deference. *See Mead Corp.*, 533 US at 227 (explaining that "[d]elegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking"); Charles H. Koch, Jr. and Richard Murphy, 4 *Administrative Law & Practice*

§ 11.34.10 (3d ed 2010) (recognizing "a safe harbor for *Chevron* deference where an agency uses notice and comment, formal adjudication, or similarly extensive procedures to develop the interpretation"). Additionally, the Court recently reaffirmed that an agency's reasonable interpretation of its own regulations will warrant deference. *See Kisor v. Wilkie*, 588 U.S. ——, 139 S. Ct. 2400, 2414-18, —— L. Ed. 2d —— (2019) (listing the criteria for deferring to an agency's interpretation of its own regulations).[24] Finally, agency interpretations contained in opinion letters and the like are entitled to respect but only to the extent that they have the power to persuade. *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944)).

As explained above, the text of the Clean Water Act does not speak directly to the question whether discharges resulting from suction dredge mining constitute the "discharge of dredged *** material" subject to the Corps' permitting authority or the discharge of processed waste subject to the EPA's permitting authority. One would hardly expect Congress to have focused on such a small detail. Rather, that is precisely the sort of issue that ordinarily would be (and was) left to the EPA's and the Corps' application of the broader principles stated in the Clean Water Act. We also conclude that the regulations that those agencies have promulgated do

---

[24] In *Kisor*, a majority of the Court joined in only part of Justice Kagan's opinion. *See Kisor*, 139 S Ct at 2424 (Roberts, C.J., concurring in part) (joining in Parts I, II-B, III-B, and IV of Justice Kagan's opinion). In discussing *Kisor*, we refer only to those parts of the decision that state the opinion for the Court.

not resolve that issue. The regulations expressly recognize 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. However, as explained above, the 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.

In our view, the most persuasive answer to that question lies in the general permits for suction dredge mining that the EPA has issued after notice and comment. Because the level of formality that attends the issuance of those permits bears on the deference due the EPA's interpretation, *see Mead Corp.*, 533 US at 230, we discuss that issue briefly. Congress has provided that the EPA may issue a permit for the discharge of a pollutant into the navigable waters of the United States only "after opportunity for a public hearing." 33 USC § 1342(a)(1). Consistently, the EPA's rules provide that the Regional Administrator of the EPA may issue an individual or a general permit only after providing notice and an opportunity for comment. *See* 40 CFR § 124.10 (requiring notice and an opportunity for comment); 40 CFR § 124.8 (requiring preparation of a fact sheet); 40 CFR § 124.17 (requiring a response to all significant comments as a prerequisite to the issuance of a final permit); 40 CFR § 122.28(b)(4) (providing that general permits are subject to the procedures in 40 CFR Part 124). Any person who filed comments on the draft permit or participated in a public hearing on the draft

permit may petition for review to the Environmental Appeals Board. 40 CFR § 124.19 (a)(2). Only when the petition for review is finally resolved may the Regional Administrator issue a permit. 40 CFR § 124.19(l).

As we read both the Clean Water Act and the EPA's rules, they require the opportunity for a hearing before the Regional Administrator following notice and comment and provide for an appeal to the Environmental Appeals Board, which serves as the arm of the Administrator of the EPA to ensure that the agency speaks with one voice. 40 CFR § 1.25(e) (defining the role of the Environmental Appeals Board).[25] Not only does the formality that attends the issuance of individual permits call for *Chevron* deference under *Mead Corp.*, but that is particularly true for the general permits that the EPA issues. General permits are not limited to discharges from a single point source, as an individual permit is; instead, they apply to multiple discharges resulting from an activity, such as suction dredge mining, that can occur across a wide geographic area. *See* 40 CFR § 122.2 (defining "general permit"). As such, general permits possess many if not more similarities with rules than they do individual adjudications.

As discussed above, the EPA has issued general permits for suction dredge mining in Alaska that were in force from 1994 to 2015, and it reissued a general permit for suction dredge mining in Idaho in 2018. Similarly, in extending a general permit for floating recovery devices in 2012 and again in 2017, the Corps

---

[25] As noted above, the Corps follows similar procedures in issuing permits under section 404. *See* 33 USC § 1344(a)(1); 33 CFR § 325.3.

agreed that "no Corps authorization is required" for the processed waste discharged as a result of small suction dredge mining. The Corps explained instead that those discharges are regulated by the Alaska Department of Environmental Conservation under section 402. All those permits, issued after notice and comment and an opportunity for a hearing, reaffirm the EPA's and the Corps' conclusion that the EPA is authorized under section 402 of the Clean Water Act to issue permits for the processed waste discharged as a result of suction dredge mining.

Not only do those permits possess a sufficient measure of formality to warrant *Chevron* deference, but the EPA's conclusion that it is authorized to permit discharges resulting from suction dredge mining and the Corps' acquiescence in that conclusion are reasonable. *Cf. Coeur Alaska*, 557 US at 283 (deferring to a similar issue that had been "addressed and resolved in a reasonable and coherent way by the practice and policy of the two agencies"); *id.* at 291 (Breyer, J., concurring) (recognizing a "legal zone within which the regulating agencies might reasonably classify material as 'dredged *** material' subject to § 404 *** or as a 'pollutant' subject to §§ 402 and 306"). As explained above, it is possible to classify the material discharged as a result of suction dredge mining as "dredged material" subject to the Corps' permitting authority. However, is it equally possible to classify the material discharged as a result of suction dredge mining as a "pollutant" that is subject to the EPA's permitting authority under section 402.

Petitioners argue, however, that the material discharged as a result of suction dredge mining is indistinguishable from the discharge of unprocessed

dredged material over which the Corps has permitting authority. Both can remobilize heavy metals, such as mercury, and both can result in turbid wastewater plumes. As we understand petitioners' argument, they contend that it is arbitrary to classify the discharge resulting from suction dredge mining as anything other than "dredged material."[26] One difference, however, between the two types of discharges is the cumulative impact of suction dredge mining. Unlike the discharge of dredged material, which often is project-specific, suction dredge mining is a recreational activity that numerous people can pursue simultaneously in the same or multiple locations. EPA, Response to Comments on Idaho Small Suction Dredge General Permit at 13 (explaining that the EPA

---

[26] The dissent starts from a similar but analytically separate premise in interpreting the regulations. It reasons that, if the act of processing dredged material consists only of only removing part of the dredged material and adds nothing to it, then the resulting discharge will necessarily be "dredged material." The dissent, however, never identifies the basis for that premise, other than its own intuitive sense of the matter. Certainly, nothing in the text of the regulations stands for that proposition. Indeed, the one regulation that addresses discharges resulting from processing dredged material points in precisely the opposite direction. That regulation excepts discharges of pollutants resulting from the onshore processing of dredged material extracted for a commercial use from the "discharge of dredged material," without regard to whether the processing consisted of removing part of the dredged material or adding something to it. Finally, the dissent's premise is contrary to over 30 years of the EPA's and the Corps' consistent interpretation of their rules that the discharge of placer mining waste (waste left over after minerals have been removed from dredged material) is the discharge of a pollutant that requires a permit from the EPA under section 402.

deemed suction dredge mining as a "recreational activity," which numerous people can undertake).

In responding to similar objections to treating the discharge from suction dredge mining as a pollutant subject to section 402, the EPA has observed that suction dredging is " 'of special concern where it is frequent, persistent, and adds to similar effects caused by other human activities." *Id.* at 11 (quoting Bret C. Harvey and Thomas E. Lisle, *Effects of Suction Dredging on Streams: a Review and an Evaluation Strategy* 15 (Aug 1998)). In determining the extent to which suction dredge mining should be permitted, the EPA considers the total maximum density load of sediment that a stream is capable of handling. That varies depending on, among other things, the type of sediment where the suction dredge mining will be conducted, the extent to which a stream is already impaired by sediment, the rate of stream-flow, and the number of point sources—*i.e.*, suction dredge miners—discharging additional sediment into the stream. *Id.* at 26. 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. *See* Nadia H. Dahab, *Muddying the Waters of Clean Water Act Permitting:* NEDC *Reconsidered*, 90 Or L Rev 335, 352-54 (2011)

(discussing the EPA and the Corps' respective spheres of expertise). Specifically, the effect of increased sedimentation on water quality posed by multiple suction dredge mining operations requires the permitting agency to consider the number of permits that should be issued, the streams in which suction dredge mining should be permitted or limited, and the appropriate restrictions that should be included for each stream on the intensity, duration, and frequency of the activity.

Perhaps the Corps could have made those same kinds of water quality decisions. However, in light of the cumulative impact of sedimentation on water quality that can result from suction dredge mining and in light of the need to include appropriate limits on the permits to maintain the health of affected water bodies, the Corps and the EPA reasonably could conclude, as they have, that permits for the discharge of material resulting from suction dredge mining should be issued by the EPA under section 402 rather than by the Corps under section 404. It follows, we think, that the general permits issued by the both the EPA and the Corps are reasonable agency interpretations of a statute following notice and comment procedures that warrant deference under *Mead*.[27]

---

[27] Both the EPA and the Corps are charged with implementing the Clean Water Act. Because both agencies have issued general permits after a formal adjudication recognizing that discharges from small suction devices are subject to a permit issued by the EPA (or its state delegate) under section 402, this case does not require us to decide whether only one agency's formal order would be sufficient under *Mead*. *Cf. Proffitt v. FDIC*, 200 F3d 855, 860 (DC Cir 2000) (explaining that when two agencies

We note alternatively that the EPA's and the Corps' resolution of this issue can be viewed as the agencies' interpretation of their own "genuinely ambiguous" regulations. As explained above, the regulations recognize that the act of processing dredged material can result in the discharge of "pollutants" that require a permit under section 402 rather than the discharge of "dredged material" that requires a permit under section 404. However, as explained above, the regulations do not unambiguously answer the specific question in this case—whether the processed waste discharged as a result of suction dredge mining falls into the former or the latter category. *See Kisor*, 139 S Ct at 2415 (directing courts to consider "the text, structure, history, and purpose of a regulation" in determining whether it is genuinely ambiguous). We accordingly look to the agencies' interpretation of their regulations and conclude, for the reasons set out above, that their consistent conclusions come "within the bounds of reasonable interpretation." *See id.* at 2416 (internal quotation marks omitted). Moreover, their interpretation reflects the agencies' authoritative or official position. *See id.* As noted above, the Administrator of the EPA has delegated authority to issue general permits to the Regional Administrators, a decision that is subject to centralized review by the Environmental Appeals Board. The agencies' interpretation also implicates their substantive expertise, as the Court recognized in *Coeur Alaska*. *See Kisor*, 139 S Ct at 2417 (listing that criterion); *Coeur Alaska*, 557 US at 291-92 (Breyer, J.,

---

administer a statute, one agency's interpretation is not sufficient).

concurring) (describing the Court's decision as deferring to the agencies' expertise). Finally, the agencies' interpretation reflects their fair and considered judgment. *See Kisor*, 139 S Ct. at 2417-18. Their interpretation is not a convenient litigating position, a post-hoc rationalization, or a new interpretation that creates unfair surprise. *See id.*

Indeed, since entering into a memorandum of agreement in 1986, both the EPA and the Corps consistently have recognized that the processed waste discharged as a result of small suction dredge mining is a pollutant that requires a permit from the EPA under section 402 rather than dredged material that requires a permit under section 404. Even if deference to the agencies' formal interpretation of their regulations were not sufficient under *Mead*, the EPA and the Corps' consistent and reasonable interpretation of the regulations warrants deference under *Kisor*.[28]

Two other issues require mention. First, much of petitioners' opening brief focuses on evidentiary challenges to the factual premises underlying DEQ's issuance of the permit. The Court of Appeals, however, declined to exercise its discretion to consider petitioners' third assignment of error contending that DEQ's findings were not supported by substantial evidence. Petitioners have not argued that the Court of Appeals abused its discretion in making that decision, and it is unclear how much, if any, of petitioners' fact-specific challenges are properly before

---

[28] We would reach the same conclusion even if we viewed the agencies' actions less deferentially as a persuasive agency interpretation under *Skidmore*.

us. Beyond that, as we understand the legal question before us, it is whether the EPA and the Corps reasonably have concluded that the EPA (and by extension DEQ) has permitting authority under section 402 over discharges resulting from suction dredge mining. It is difficult to understand how the factual record developed in a state hearing somehow limits the Corps' and the EPA's interpretation of their own regulatory authority, as opposed to establishing the appropriate numeric, geographic, and temporal limitations on suction dredge mining permitted in local rivers and streams.

Second, petitioners argue that the Court of Appeals erred in concluding that the single discharge resulting from suction dredge mining was subject to permits issued by both the Corps and the EPA (or its state delegate). In petitioners' view, only one agency had the authority to permit the discharge. Although petitioners do not cite *Coeur Alaska* in support of their argument, we note that that decision is consistent with their position. *See Coeur Alaska*, 557 US at 286 (agreeing that a "two-permit regime [for a single discharge] is contrary to the [Clean Water Act] and the regulations"); *see also* Dahab, *Muddying the Waters of Clean Water Act Permitting*, 90 Or L Rev at 354-56 (critiquing the two-permit reasoning in *NEDC*, 232 Or App at 644-45).

We need not resolve that issue to decide this case. As explained above, we defer 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. Given the Corps' and the EPA's conclusion that the EPA has authority

over that permitting decision, we need not decide whether those agencies could have divided permitting responsibility for a single discharge between them. To be sure, DEQ's 2010 permit may have been too narrow in that it applied to only part of the discharge resulting from suction dredge mining. However, petitioners do not challenge the 2010 permit on the ground that it is too narrow. Rather, they challenge it on the ground that it is too broad. In their view, the EPA did not have any permitting authority over discharges resulting from suction dredge mining. That argument is not well taken and provides no basis for reversing the Court of Appeals decision.

The decision of the Court of Appeals is affirmed.

BALMER, J., dissenting.

The majority opinion reaches a result that may be sensible, but takes a path that is closed off by the federal caselaw that we are bound to follow. When an agency reasonably interprets an ambiguous statute by promulgating a rule, we must give deference to its interpretation. Here, the two agencies charged with administering the Clean Water Act (CWA) created rules interpreting some of its ambiguous terms; those definitions, to which we must defer, clearly resolve this case in petitioners' favor. The majority colors outside the lines of agency deference, and in the process ends up interpreting the statute by deferring to certain actions of the two federal agencies involved here, and perhaps to their desires, but not, as we must, to their duly promulgated interpretation of the Clean Water Act. I respectfully dissent.

The CWA imposes responsibilities on both the Army Corps of Engineers and the Environmental

Protection Agency (EPA). Section 402, administered by the EPA, gives that agency permitting authority over "the discharge of any pollutant." 33 USC § 1342(a)(1). The Corps, under section 404, "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." 33 USC § 1344(a). But that authority does not overlap. "If the Corps has authority to issue a permit, then the EPA may not do so." *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 US 261, 275, 129 S Ct 2458, 174 L Ed 2d 193 (2009).

In 2010, Oregon's Department of Environmental Quality (DEQ) issued a general permit for suction dredge mining under the authority of section 402. DEQ issued the general permit on the understandable theory that suction dredge mining involves the release of dirt and gravel into the water, creating a plume of turbidity that is the "addition of a pollutant." Petitioners argue that DEQ exceeded its authority under section 402 because, even if the release of dirt and gravel from suction dredge mining would otherwise constitute the "discharge" or "addition" of a pollutant, it is a "discharge of dredged *** material" under section 404 and therefore properly subject to permitting only by the Corps.

This case therefore turns on the meaning of the phrase "discharge of dredged * * * material" in section 404. "When a court reviews an agency's construction of the statute which it administers," *Chevron U.S.A. v. Natural Resources Defense Council*, 467 US 837, 842, 104 S Ct 2778, 81 L Ed 2d 694 (1984), it is bound to apply an interpretive canon known as *Chevron* deference. *Chevron* involves a two-step inquiry. At the

first step, the court interprets the statute "employing traditional tools of statutory construction ***." *Id.* at 843 n 9. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. At the second step, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S Ct 2778. "Even under that deferential standard, however, 'agencies must operate within the bounds of reasonable interpretation.' " *Michigan v. EPA*, ___ US ___, ___ 135 S Ct 2699, 2707, 192 L Ed 2d 674 (2015) (quoting *Utility Air Regulatory Group v. EPA*, 573 US 302, 321, 134 S Ct 2427, 189 L Ed 2d 372 (2014)).

Chevron does not require deference to all agency interpretations, because *Chevron* depends on the scope of Congress's delegation to the agency and how the agency has set forth its interpretation. However,

> "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."

United States v. Mead Corp., 533 US 218, 226-27, 121 S Ct 2164, 150 L Ed 2d 292 (2001).

I begin with the first step, interpreting CWA section 404 itself, and determining whether suction dredge mining involves "the discharge of dredged or fill material into the navigable waters ***." 33 USC § 1344(a). It could be argued that this text 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. But suction dredge mining also involves passing that dredged material over a sluice tray in order to separate out gold. It may be that dredged material remains dredged material indefinitely. But it might reasonably be thought that in some circumstances material that has been dredged will cease to qualify as dredged material. For example, the gold removed from the stream may be "dredged material" initially, but it might be anomalous to refer to it as "dredged material" once it has been turned into a wedding ring. Additionally, the context of section 404 is relevant. The words "discharge of dredged or fill material" demarcate the jurisdictional line between the EPA and the Corps, and thus might be read in a way that takes into account the relative competencies of the agencies—such as by focusing on the purpose or the environmental effects of the discharge. Thus, at *Chevron* step one, I find the statute ambiguous.

Chevron's first step being satisfied, it is appropriate to turn to agency interpretations. The Corps and the EPA have promulgated rules, through notice and comment rulemaking, to clarify the definitions of "dredged material" and "discharge of dredged material." Those rules, which were most recently revised in 2008, define dredged material as follows:

> "The term dredged material means material that is excavated or dredged from waters of the United States."

33 CFR § 323.2(c).[1] Thus, "dredged material" 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. There is no temporal caveat, and no qualification based on subsequent processing or environmental effects.[2] To read the definition to be conditioned on such requirements would require a judicial addition to the rule's text, which would be entirely inconsistent with the Supreme Court's directive that we "must employ traditional tools of interpretation" to interpret regulations. *Christopher v. SmithKline Beecham Corp.*, 567 US 142, 161, 132 S Ct 2156, 183 L Ed 2d 153 (2012).

---

[1] There are parallel and identical definitions contained in rules issued by the EPA and located in 40 CFR § 232.2. For convenience, I cite only to the Corps' rules in 33 CFR § 323.2.

[2] The omission of any consideration of effects is particularly telling because in the context of fill material, the Corps and the EPA *did* opt for an effect-based definition:

> "(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."

33 CFR § 323.2.

To be sure, an interesting question would be raised if we were faced with a mixture of dredged material and some other substance which had not been "excavated or dredged from waters of the United States." The definition does not, perhaps, speak clearly to the question of whether such a mixture, or a portion thereof, would constitute "dredged material." Suction dredge mining, however, processes material only by removing part of it. All of the remaining material, absolutely everything ultimately added to the water, was "excavated or dredged from waters of the United States."

Because everything released by suction dredge mining is "dredged material," the next question is whether the release of that material into the water qualifies as "discharge of dredged material":

> "(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."

33 CFR § 323.20(d)(1). Leaving aside, for the moment, the exceptions, this definition also favors the Corps' authority. The material released from suction dredge mining, all of which is "dredged material," is released into—added to—the water. Thus, it is captured by "any addition of dredged material into *** the waters of the United States."

I turn to the exceptions set out in paragraph (d)(2):

> "(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."

33 CFR § 323.20(d)(2). The first exception confirms that "dredged material" *does* include material that has subsequently been processed, including that which has been processed onshore. If it did not, then subparagraph (d)(2)(i) would be superfluous—it would serve no purpose to exclude from the definition of "discharge of dredged material" the release of something that was not "dredged material" in the first place. *See Corley v. United States*, 556 US 303, 314, 129 S Ct 1558, 173 L Ed 2d 443 (2009) (referring to the rule against superfluities as "one of the most basic interpretive canons").

The exclusion from the Corps' jurisdiction of certain subsequently processed material also shows that the Corps and the EPA considered how to handle

processed dredged material. And the only exception to the Corps' jurisdiction related to processing is not one that applies here. To fall under subparagraph (d)(2)(i), and thus be subject to permitting under section 402 rather than section 404, the processing must be "onshore," and the dredged material must be "extracted for any commercial use (other than fill)." It could reasonably be disputed whether the second condition is satisfied here—many suction dredge miners are hobbyists—but the first is not. Suction dredge mining typically involves processing that is not "onshore," and DEQ's permitting scheme—and certainly its assertion of authority over petitioners' in-stream suction dredging—reaches beyond onshore processing.

The agencies' regulations interpret the ambiguous terms "dredged material" and "release of dredged material," and they do so reasonably. The definitions that they have selected are natural and permissible constructions of the statutory text. Under *Chevron*, the deferring court "need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 US at 843 n. 11. The definitions contained in the rules therefore pass *Chevron*'s second step. Because those rules were adopted through notice and comment rulemaking, and agreed on both agencies charged with administering the relevant sections of the CWA,[3]

---

[3] Some courts have held that "[w]hen a statute is administered by more than one agency, a particular agency's interpretation is not entitled to *Chevron* deference." *Proffitt v. F.D.I.C.*, 200 F3d 855, 860 (DC Cir 2000). However, where, as here, both agencies

they satisfy *Mead*. This is heartland *Chevron* territory, and we are bound to defer to the agencies' interpretation.

The majority does not dispute that the 2008 rules are owed deference, but concludes that those rules are best read not to speak, one way or the other, to the question at hand. However, the majority's analysis of the definition of "discharge of dredged material" places heavy reliance on a textual ambiguity that no longer exists. The majority reasons that the 1975 version of the same regulation sets forth a "general rule" that "redeposit of unprocessed dredged material into navigable water will constitute the 'discharge of dredged material,' " *Eastern Oregon Mining Assoc. v. DEQ*, 365 Or 313, 329, 445 P.3d 251 (2019); that there is an exception for some dredged material that is processed onshore; and that "the rule leaves unanswered whether other categories of water-based or land-based processing operations will result in the 'discharge of dredged material' that requires a permit from the Corps under section 404," Id. at 329, 445 P.3d at 260.

It does not matter whether that was a permissible reading of the 1975 regulation; it is clearly foreclosed by the current text of 33 CFR § 323.2(d)(1), promulgated in 2008:

> "*Except as provided below in paragraph (d)(2)*, the term discharge of dredged material means *any* addition of dredged material into, including

---

charged with administering a statute have jointly promulgated a single interpretation, deference is appropriate. *See Loan Syndications & Trading Association v. S.E.C.*, 882 F3d 220, 222 (DC Cir 2018) (holding that *Chevron* does apply when the multiple involved agencies have issued a joint interpretation).

> redeposit of dredged material *other than incidental fallback* within, the waters of the United States."

(Emphasis added.) The present structure of the definition makes clear that aside from redeposit of "incidental fallback" and the express exceptions contained in paragraph (d)(2), every other "addition of dredged material" is a "discharge of dredged material." There is no longer—if there ever was—a phantom category of dredged material additions that the definition simply does not address. The only exception for processed dredged material is the express exception contained in subparagraph (d)(2)(i).

Having brushed past the easy answer, the majority wends through a thicket of past regulatory decisions by the EPA and the Corps. Those materials, which postdate the statute, are not relevant to our *Chevron* step one interpretation of section 404, using the ordinary tools of statutory construction. Instead, the majority interprets section 404 by deferring, under *Chevron*, to a few of those agency materials: a general permit issued by the EPA in Idaho in 2018, and general permits issued by the Corps and the EPA in Alaska over the past decade.

Any attempt to defer to those materials faces an insurmountable hurdle. *Chevron* requires deference to an agency's interpretation of a statute, but nothing in the permits, or even in the associated materials, contains an interpretation of section 404 or any of its terms. Of course, implicit interpretations can still merit deference. In *National Railroad Passenger Corporation v. Boston & Maine Corp.*, 503 US 407, 420, 112 S Ct 1394, 118 L Ed 2d 52 (1992), the Supreme Court reasoned that

> "the fact that the ICC did not in so many words articulate its interpretation of the word 'required' does not mean that we may not defer to that interpretation, since the only reasonable reading of the Commission's opinion, and the only plausible explanation of the issues that the Commission addressed after considering the factual submissions by all of the parties, is that the ICC's decision was based on the proffered interpretation."

That case, however, involved a situation where it was clear, at least contextually, that the agency had interpreted the statute and what the interpretation was. When those features are lacking, courts typically do not defer to implicit interpretations. As the D.C. Circuit explained in declining to defer to an agency manual,

> "even if we were prepared to accord *Chevron* deference to the PRO Manual, that document contains no interpretation of [the statute] to which we might defer. * * * Most important, there is no place in the manual where the agency explains *why* it believes that a PRO satisfies the statutory injunction to inform a complainant of the 'final disposition' of the complaint simply by telling him that it has investigated the matter and will take action if appropriate. Because the manual thus contains no reasoning that we can evaluate for its reasonableness, the high level of deference contemplated in *Chevron*'s second step is simply inapplicable."

Public Citizen, Inc. v. U.S. Department of H.H.S., 332 F3d 654, 661 (DC Cir 2003) (emphasis in original); *see*

also Former Employees, Marathon Ashland Pipe Line v. Chao, 370 F3d 1375, 1382 n 2 (Fed Cir 2004) (expressing confusion about deference to an implicit interpretation because "it is not entirely clear what it is that the government wishes us to defer to").

The non-overlapping authority of the EPA and the Corps means that when EPA issues a general permit under section 402, it must have concluded that the permitted activity is not the subject of the Corps' permitting authority under section 404. Similarly, the Corps permits state that the EPA has authority over suction dredge mining. But none of that allows us to discern what either agency understood "discharge," "dredged material," or any other statutory term in section 404, to mean (much less that they agreed on an interpretation). The majority does not hazard a guess as to what their interpretation is. Therefore, rather than assessing the agency interpretation of the statute for reasonableness, as *Chevron*'s second step requires, the majority evaluates only the reasonableness of its practical consequence—that the EPA rather than the Corps gets to regulate suction dredge mining. *See* 365 Or at 351-52.

Moreover, it is doubtful that the agencies' analysis of section 404 extended any further than concluding (as they must) that the answer really turns on the meaning of the more specific definitions contained in 33 CFR § 323.2, not the bare text of the CWA. Consequently, the permitting decisions that the majority relies on are very likely interpretations of the agencies' *regulations*, not a statute. That interpretation would be entitled to deference, if at all, not under *Chevron*, but under *Auer v. Robbins*, 519 US 452, 117 S Ct 905, 137 L Ed 2d 79 (1997), which

requires courts, when interpreting regulations, to defer to the agency's interpretation of its own regulations. Not long ago, the distinction might not matter in a case like this one, because *Auer* was generally understood to give even more deference to agency interpretations of rules than is accorded to agency interpretations of statutes under *Chevron*. However, the Supreme Court recently emphasized that it "has cabined *Auer*'s scope in varied and critical ways." *Kisor v. Wilkie*, —— US ——, —— 139 S Ct 2400, 2418, —— L Ed 2d —— (2019). The upshot of that shift is that while courts previously could have been insensitive to whether the implicit agency interpretation of a statute that they were deferring to under *Chevron* was actually an implicit interpretation of a rule—because even if it were, deference would be required anyway—accepting that uncertainty is no longer an option. Given that *Auer* and *Chevron* have different, non-coextensive limits, it cannot be appropriate to defer to an agency's implicit interpretation under *Chevron* unless it is either clear that the agency really is interpreting a statute, or, at minimum, that the agency's interpretation would be owed deference under *Auer* and *Kisor* even if the agency were interpreting a rule.[4] For that reason, the majority decides, in the alternative, that it can defer to the same materials under *Auer* in interpreting the

---

[4] In *Coeur Alaska*, Justice Scalia accused the Court of invoking *Auer* to defer to what was effectively an agency's interpretation of a statute, in order to avoid the limitations that *Mead* had imposed on *Chevron* deference. 557 US at 295, 129 S.Ct. 2458 (Scalia, J, concurring in part and concurring in the judgment). Now, *Auer*'s own application having been restricted, we should not use *Chevron* to avoid *Kisor*'s limitations.

applicable regulations. 365 Or at 352, 445 P.3d at 272-73.

In light of *Kisor*, *Auer* now requires a five-step analysis before deference can be accorded to an agency's interpretation of its rules. "First and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous." *Kisor*, —— US at ——, 139 S Ct at 2415. Before deferring to the agency, "a court must 'carefully consider[ ]' the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on." *Id.* at ——, 139 S Ct at 2415 (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 US 680, 707, 111 S Ct 2524, 115 L Ed 2d (1991) (Scalia, J., dissenting)). Second, the agency's reading "must come within the zone of ambiguity the court has identified after employing all its interpretive tools." *Id.* at ——, 139 S Ct at 2416. Third, the interpretation "must be the agency's 'authoritative' or 'official position,' rather than any more ad hoc statement not reflecting the agency's views." *Id.* at ——, 139 S Ct at 2416. Fourth, "the agency's interpretation must in some way implicate its substantive expertise." *Id.* at ——, 139 S Ct at 2417. Fifth, "an agency's reading of a rule must reflect 'fair and considered judgment' to receive *Auer* deference," *Id.* (quoting *Christopher*, 567 US at 155, meaning that, among other things, a court generally should not give "*Auer* deference to an agency construction 'conflict[ing] with a prior' one." *Id.* at ——, 139 S Ct at 2417-18 (quoting *Thomas Jefferson University v. Shalala*, 512 US 504, 515, 114 S Ct 2381, 129 L Ed 2d 405 (1994)).

The first and simplest reason that no agency is owed deference in its interpretation of

is that that rule is not genuinely ambiguous as to the question at hand, once ordinary interpretive methods have been applied. Neither the majority nor the state offers a permissible reading of the 2008 rule under which suction dredge mining involves the discharge of anything other than "dredged material." But even if the regulation were ambiguous, deference would not be appropriate here.

Although the majority points to recent general permits by the EPA regulating suction dredge mining under section 402, the Corps has *also* issued a general permit for suction dredge pursuant to section 404. That occurred in California, in 1995, with the permit expiring in 2000. *See* Department of the Army, Regional General Permit No. 21181-98 (Jan 7, 1995). The majority downplays that fact, suggesting that "the 1995 regional permit does not purport to be the exclusive permitting authority for suction dredge mining, but serves instead only as an auxiliary authorization" to state permits. 365 Or at 345. The same is true of the 2018 EPA Idaho permit that the majority does rely upon—suction dredge miners also need approval from the Idaho Department of Water Resources—and is of no consequence for either. More substantial is the majority's suggestion that the 1995 permit may have been issued as part of the Corps' short-lived efforts to regulate in-stream excavation under the theory that the "incidental fallback" from excavation constituted a regulable "discharge of dredged material." 365 Or at ____. If the 1995 permit were directed only to the excavation involved in suction dredging, and not to the release of processed dredged material back into the water, then any inconsistency with the EPA's subsequent permitting of suction dredge mining would be lessened. But the

majority's suggestion does not hold up to scrutiny, because the 1995 general permit plainly was not limited to "incidental fallback" from excavation. As the permit was "for certain work activities *and* incidental discharges of dredged or fill material associated with suction dredge mining" (emphasis added), its coverage was not limited to incidental discharges, much less to incidental fallback. And the requirements of the permit made clear that it applied to the post-processing discharge of dredged material, not (or, at least, not just) incidental fallback as a result of excavation. For example, it specified that "[m]ercury recovered from the waterway as part of the suction dredging-process may not be returned to the waterway." That requirement makes sense only if it is understood as a limitation on the release of dredged material that has been fully removed from the water and processed in some form.

Thus, in 1995, under the same statute and a functionally-identical operative regulation, the Corps concluded that suction dredge mining involved a discharge of dredged material under section 404, from which it would necessarily follow that the EPA would not have permitting authority. If there is an agency interpretation in play here, it does not appear to have been a consistent one, as *Kisor* requires. Those inconsistent actions, the product of regional offices, also raise serious concerns that the regional permitting process may not " 'reflect[ ] the considered judgment of the agency as a whole' " as to the meaning of the regulations. *Kisor*, —— US at ——, 139 S Ct at 2424 (quoting *Mead*, 533 US at 233.

But even putting those qualms to one side, any deference would require the interpreting court first to

perform its task of ensuring that "the agency's reading [falls] 'within the bounds of reasonable interpretation.' *Kisor*, ___ US at ___, 139 S Ct at 2416 (quoting *Arlington v. FCC*, 569 US 290, 296, 133 S Ct 1863, 185 L Ed 2d 941 (2013)). The Supreme Court has reaffirmed that *Auer* "gives agencies their due, while also allowing—*indeed, obligating*—courts to perform their reviewing and restraining functions." *Id.* at ___, 139 S Ct at 2415 (emphasis added); *see also id.* at ___, 139 S Ct at 2449 (Kavanaugh, J., concurring in the judgment) ("after today's decision, a judge should engage in appropriately rigorous scrutiny of an agency's interpretation of a regulation, and can simultaneously be appropriately deferential to an agency's reasonable policy choices within the discretion allowed by a regulation"). We cannot satisfy that obligation here because, as discussed above in the context of *Chevron* deference, it is impossible to tell what the supposed joint interpretation *is*. Certainly, the cited materials give no hint.[5] The majority points to the purpose and effects of suction dredge mining—suction dredge mining is recreational and may cloud the water—and to the EPA's expertise on the health of water bodies. 365 Or at 350-51. But the regulation is, on any reading, completely unambiguous that those considerations do not factor into the division of jurisdiction between the two agencies. In any event, "a court should decline to defer to a merely 'convenient

---

[5] The majority highlights a 1990 guidance letter that that did offer an interpretation of the relevant regulation, 365 Or at 332-33, but acknowledges that that letter expired almost thirty years ago and that the Corps has since indicated that that letter is no longer valid and no longer provides useful information, *id.* at 333 n. 15. It is not, therefore, an interpretation that might merit deference.

litigating position' or '*post hoc* rationalizatio[n] advanced' to 'defend past agency action against attack,' " *Kisor*, —— US at ——, 139 S Ct at 2417 (quoting *Christopher*, 567 US at 155). That being the case, this court certainly should not square the circle by deferring to its own *post hoc* rationalization.

It is true that, as the majority documents, there are some indications that both agencies might presently prefer discharges from suction dredge mining to be regulated by the EPA. But those signals do not qualify for deference under either *Chevron* or *Auer*.[6] And the only agency product that does demand deference, the regulations promulgated by both agencies after notice and comment, points decisively in the other direction.

That leaves one final issue: whether there are, as the Court of Appeals held, two discharges from suction dredge mining—" 'dredged spoil and mining tailings' " and " 'turbid wastewater' "—or one. *Eastern Oregon Mining Assoc. v. DEQ*, 285 Or App 821, 825, 398 P3d 449 (2017) (quoting *Northwest Environmental Defense Center v. EQC*, 232 Or App 619, 644, 223 P3d 1071 (2009)). To find, as the Court of Appeals did, two simultaneous discharges, one regulated by each agency, would seem to contravene the Supreme Court's interpretation of the CWA in *Coeur Alaska* and its holding that "a two-permit regime is contrary to the statute and regulations." 557 US at 286. In any event, even if there are two discharges, both would fall

---

[6] Other agency actions may still qualify for deference under *Skidmore v. Swift & Co.*, 323 US 134, 65 S Ct 161, 89 L Ed 124 (1944), to the extent that they have the power to persuade. But, because the general permits that the majority relies on do not advance an interpretation or a justification, *Skidmore* deference also is unavailable.

under the Corps' permitting authority. However the discharge is characterized or subdivided, it involves only the "redeposit of dredged material."

Nothing that I have said should suggest that suction dredge mining might not be better regulated by DEQ in concert with the EPA, rather than by the Corps. I take no position on that policy question and heed instead the Supreme Court's caution "that 'judges ought to refrain from substituting their own interstitial lawmaking' for that of an agency." *Arlington*, 569 US at 304-05 (quoting *Ford Motor Credit Co. v. Milhollin*, 444 US 555, 568, 100 S Ct 790, 63 L Ed2d 22 (1980)). I also do not mean to suggest that the CWA cannot permissibly be read to divide authority between the agencies as the majority does. If the Corps and the EPA were to promulgate a new rule, clarifying that suction dredge mining was not within the Corps' jurisdiction, I doubt that I would have any difficulty concluding that that also was a reasonable interpretation of section 404. The point is simply that those agencies have not done so. The last time that they spoke in a way that merited deference—when they jointly promulgated the 2008 regulations—they put suction dredge mining within the Corps' purview. The Corps may now wish to disclaim permitting authority over suction dredge mining. But the current rules say what they say, and no principle of agency deference accords the emanation of an intention the same stature as a rule promulgated after notice and comment.

Accordingly, I respectfully dissent.

FILED: June 01, 2017

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

EASTERN OREGON MINING ASSOCIATION; GUY MICHAEL; and CHARLES CHASE,

Petitioners-Appellants,

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY; DICK PEDERSON, in his capacity as Director of the Department of Environmental Quality; and NEIL MULLANE, in his capacity as Administrator of the Water Quality Division of the Department of Environmental Quality,

Respondents-Respondents.

Marion County Circuit Court
10C24263

WALDO MINING DISTRICT, an unincorporated association; THOMAS A. KITCHAR; and DONALD R. YOUNG,

Petitioners-Appellants,

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY; DICK PEDERSON, in his capacity as Director of the Department of Environmental Quality; and NEIL MULLANE, in his capacity as Administrator of the Water Quality Division of the Department of Environmental Quality,

Respondents-Respondents.

Marion County Circuit Court
11C19071

A156161

On remand from the Oregon Supreme Court, *Eastern Oregon Mining Association v. DEQ*, 360 Or 10, 376 P3d 288 (2016).

Courtland Geyer, Judge.

Submitted on remand August 23, 2016.

Argued on remand May 04, 2017.

James L. Buchal argued the case for appellants. With him on the briefs was Murphy & Buchal LLP.

Michael A. Casper, Assistant Attorney General, argued the cause for respondents. On the answering brief were Ellen F. Rosenblum, Attorney General, Anna M. Joyce, Solicitor General, and Inge D. Wells, Assistant Attorney General. On the supplemental brief were Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Michael A. Casper, Assistant Attorney General.

Before Armstrong, Presiding Judge, and Egan, Judge, and Shorr, Judge.

SHORR, J.

Portion of judgment concluding DEQ had authority to issue 2010 700-PM permit under section 402 of the Clean Water Act affirmed; otherwise declining to address remaining moot issues under ORS 14.175.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondents

[ ] No costs allowed.
[X] Costs allowed, payable by Appellants.
[ ] Costs allowed, to abide the outcome on remand, payable by

---

SHORR, J.

This case returns to us on remand from the Supreme Court. The first issue on remand is whether we will exercise our discretion under ORS 14.175 to decide the otherwise moot issues presented by this case. As discussed below, we decide to exercise our discretion to reach only petitioners' first assignment of error. With respect to the merits of that assignment, we determine, based on our decision in a prior related case, that the trial court did not err in concluding that respondent Department of Environmental Quality (DEQ) had the delegated authority under section 402 of the Clean Water Act[1] to issue the general permit to regulate "visible turbidity" from small suction dredge mining. We decline to exercise our discretion to reach the second through fourth assignments of error.

This litigation and the type of small suction dredge mining permit at issue has a long history. Some background is helpful to understand our opinion. We

---

[1] As we have done in the past, we refer to the Federal Water Pollution Control Act Amendments of 1972, 33 USC §§ 1251-1387, by the more commonly used "Clean Water Act."

start with a brief history of the prior related case, which, as we later discuss, resolves our decision on the first assignment of error. The two primary parties involved in this case, petitioner Eastern Oregon Mining Association (EOMA) and respondent DEQ, were also parties to that prior case, *Northwest Environmental Defense Center v. EQC*, 232 Or App 619, 223 P.3d 1071 (2009), *rev. dismissed*, 349 Or 246 (2010) (*Northwest Environmental Defense Center I*). In that case, petitioners EOMA and other petitioners (collectively petitioners)[2] sought a judicial determination from us under ORS 183.400 that would have invalidated a general discharge permit, which was known as the "700-PM permit," that was issued by DEQ in 2005.[3] 232 Or App at 622. The 2005 700-PM permit placed conditions on the operation of small suction mining dredges in Oregon waters. *Id.* Petitioners are individual small suction dredge miners and associations of such miners. Small suction dredge mining generally involves using a gas-powered pump to pull streambed sediments and water through a small intake hose, which passes the material through a sluice tray that separates out gold and other dense particles for collection, and then returns the discharged water and lighter material back into the stream. *Id.* at 623.

---

[2] There is some, but not complete, overlap among petitioners in *Northwest Environmental Defense Center I* and petitioners in this appeal.

[3] The 700-PM permit was adopted by DEQ's policy and rule-making board, the Oregon Environmental Quality Commission, and issued by DEQ. *Northwest Environmental Defense Center I*, 232 Or App at 623 n. 2.

In the prior case, petitioners argued to us that the permitting of discharges from small suction dredge mining was within the exclusive regulatory authority of the Army Corps of Engineers (Corps) under the Clean Water Act. *Id*. at 622. In other words, petitioners claimed that DEQ had no authority under federal law to issue the 700-PM permit. Conversely, DEQ argued that it had the delegated authority to issue the permit under the Clean Water Act's National Pollution Discharge Elimination System (NPDES) and ORS 468B.035, by which the state accepted that delegated authority.[4] *Northwest Environmental Defense Center I*, 232 Or App at 622. Broadly stated for these introductory purposes, the Corps has exclusive authority under section 404 of the Clean Water Act to regulate the permitting of the "discharge of dredged or fill material" into navigable waters. 33 USC § 1344(a). Separately, the Environmental Protection Agency (EPA) has the authority under

---

[4] Northwest Environmental Defense Center (NEDC), an environmental interest group, was also a party to the prior case and argued that the 700-PM permit was invalid because DEQ "failed to follow certain procedural requirements and because the permit violates aspects of the Clean Water Act." *Northwest Environmental Defense Center I*, 232 Or App at 622.

NEDC is not a party to this case, although issues related to NEDC are raised here. In later litigation, NEDC again challenged DEQ's practices with respect to the issuance of small suction dredge mining permits by filing a petition for review in the circuit court. NEDC ultimately reached a settlement agreement with DEQ that resolved that litigation. As part of this case, petitioners contest DEQ's authority to resolve certain issues relating to the permitting of small suction dredge mining through that settlement agreement rather than through administrative rule-making or contested-case procedures. As discussed below, we do not exercise our discretion to reach that issue.

section 402 of the Clean Water Act to regulate the permitting of the "discharge of any pollutant" into navigable waters. 33 USC § 1342(a)(1), (4). As part of the NPDES program, states also have the delegated authority to administer their own permit programs for the discharge of pollutants into navigable waters. *Id*. § 1342(a)(3), (b).

In December 2009, we issued our opinion in *Northwest Environmental Defense Center I*, which addressed the 700-PM permit that DEQ issued in 2005. We examined whether the small suction dredge mining that was regulated by that 700-PM permit involved the discharge of dredged material, exclusively regulated by the Corps, or the discharge of pollutants, which can be regulated by the state. 232 Or App at 630. We concluded that small suction dredge mining usually "involves the placement of dredged spoil and mining tailings in piles and that such a discharge constitutes the 'discharge of dredged material' " that is regulated exclusively by the Corps. *Id*. at 643-44. However, we further concluded that small suction dredge mining also involves the discharge of "turbid wastewater—*i.e.*, the discharge of water that contains suspended solids." *Id*. at 644. We determined that turbid wastewater sent further downstream is a "pollutant" regulated by the EPA and, by federal statutory delegation, the state. *Id*. at 644-45. We noted that the problem was that the 2005 700-PM permit regulated "*all* waste discharges from small suction dredges," which would include the regulation of both the discharge of "dredged material" that piles up in navigable waterways and turbid wastewater that disperses water and suspended solids further downstream. *Id*. at 645 (emphasis in original).

The United States Supreme Court has held that the regulatory authority granted to the Corps by section 404 (governing, in part, the discharge of "dredged or fill material") forecloses the EPA's authority to act under section 402 (governing the discharge of "any pollutant[s]"). *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 274, 129 S Ct 2458, 174 L Ed 2d 193 (2009) (stating that the Clean Water Act "is best understood to provide that if the Corps has authority to issue a permit for a discharge under § 404, then the EPA lacks authority to do so under § 402"). As a result of the encroachment of the 2005 700-PM permit on the Corps' exclusive regulation of the discharge of dredged material (even if the permit also regulated pollutants in the form of turbid wastewater), we held that the permit exceeded the state's "statutory authority to implement the Clean Water Act." *Northwest Environmental Defense Center I*, 232 Or App at 645.

Following our decision in *Northwest Environmental Defense Center I*, the parties sought and initially were allowed review by the Oregon Supreme Court. In the meantime, after our decision, the 2005 700-PM permit expired and was replaced by DEQ in July 2010 by a newly issued 700-PM permit regulating small suction dredge mining. Rather than exercising its rule-making authority, DEQ issued the new permit as an "order in other than a contested case." *See* ORS 468B.050(2) (giving DEQ authority to issue certain permits by rule or order). The new 2010 permit, compared to the 2005 permit, focused on regulating just the discharge of "visible turbidity" in streams and narrowed the permit to respond directly to our decision in *Northwest Environmental Defense Center I*. DEQ stated in an accompanying fact sheet

that the 2010 permit was changed expressly to "address[ ] a pending Oregon Court of Appeals ruling that DEQ had not adequately articulated the basis for prior permit conditions and requirements."

As a result of the expiration of the 2005 permit, the issues in *Northwest Environmental Defense Center I* were rendered moot. *Northwest Environmental Defense Center v. Environmental Quality Commission*, 349 Or 246, 245 P3d 130 (2010) (*Northwest Environmental Defense Center II*). Accordingly, the Supreme Court dismissed the petition for review. *Id.* At that time in our history, our courts did not have the "judicial power under the Oregon Constitution" to decide a moot case even if the issues presented by the case were "capable of repetition, yet evading review." *Yancy v. Shatzer*, 337 Or 345, 363, 97 P3d 1161 (2004), *overruled by Couey v. Atkins*, 357 Or 460, 520, 355 P3d 866 (2015). Thus, the case in *Northwest Environmental Defense Center II* concluded. 349 Or at 246.

That brings us to the current litigation, which in many ways is "déjà vu all over again"[5] of the prior litigation. Following DEQ's issuance of the 2010 700-PM permit, the mining petitioners again challenged the small suction dredge mining permit. This time, however, they filed a petition for judicial review in the circuit court under ORS 183.484 challenging the permit (instead of filing directly with us as a rule challenge under ORS 183.400).[6] In the operative

---

[5] Attributed to Yogi Berra.

[6] Several mining petitioners filed two separate petitions for judicial review. The environmental group NEDC filed its own petition for judicial review, which was later resolved by

petition, petitioners ultimately asserted two claims for relief alleging several violations of law. In their first claim for relief, petitioners alleged that DEQ violated federal law in issuing the 2010 700-PM permit because—petitioners claimed again—the permit regulated the discharge of dredged material that was exclusively regulated by the Corps under section 404 of the Clean Water Act, and, accordingly, was not within the EPA and the state DEQ's delegated regulatory authority over the discharge of pollutants under section 402. As part of their first claim, petitioners also contended that DEQ violated state water quality laws in issuing the 2010 700-PM permit. In their second claim for relief, petitioners alleged that a settlement agreement reached between DEQ and NEDC that related to the 2010 700-PM permit violated Oregon law, because it was a privately negotiated agreement that resolved issues that were required to be addressed publicly through either administrative rule making or procedures applicable to the issuance of agency orders. Petitioners sought, among other things, to set aside the 700-PM permit and a declaration that the settlement agreement could not be used to issue any new suction dredge mining permit. DEQ moved for summary judgment on all of petitioners' claims for relief, and petitioners cross-moved for summary judgment on most, but not all, of their claims.

The trial court granted summary judgment to DEQ, agreeing with DEQ on nearly every issue. There

---

settlement agreement. For ease of reference, we follow the parties' practice of relying on the operative petition filed by lead petitioner EOMA in Marion County Circuit Court Case No. 10C-24263.

are four issues that are relevant to this appeal. First, the trial court concurred with DEQ that it had the delegated authority under section 402 of the Clean Water Act to issue the 2010 700-PM permit to regulate turbid wastewater. Second, the trial court agreed with DEQ that it had the authority under state law to issue the 700-PM permit. Third, the trial court also agreed with DEQ that substantial evidence supported DEQ's decision to issue the 700-PM permit. Fourth, and finally, the trial court concluded that DEQ had authority to reach a settlement agreement with NEDC that resolved pending litigation, and that DEQ did not have to reach that agreement through either rule-making or contested-case procedures. After the parties stipulated to the resolution of one outstanding issue, the trial court granted DEQ summary judgment on all claims and denied petitioners summary judgment on all claims.

Petitioners then appealed the trial court's judgment. As happened previously with respect to the 2005 permit, the 2010 700-PM permit expired during the pendency of the appeal and a new 2015 permit was issued. *Eastern Oregon Mining Assoc. v. DEQ*, 273 Or App 259, 261, 361 P3d 38 (2015) (*Eastern Oregon Mining Assoc. I*), *rev.'d and rem'd*, 360 Or 10, 376 P3d 288 (2016) (*Eastern Oregon Mining Assoc. II*). However, unlike during the prior *Northwest Environmental Defense Center* litigation, when, under *Yancy*, the appellate courts lacked the judicial power to decide moot cases, by the time we issued our decision in *Eastern Oregon Mining Assoc. I*, the Supreme Court had overruled *Yancy*, holding in *Couey* that Oregon courts do have discretion to decide certain otherwise moot cases that are "public actions" or

involve "matters of public interest." *Couey*, 357 Or at 520.

Couey held that the legislature had the authority under the Oregon Constitution to enact ORS 14.175,[7] which confirms the authority of Oregon courts to consider otherwise moot cases if they meet three statutory factors. 357 Or at 463. We applied those factors in *Eastern Oregon Mining Assoc. I* and held that the issues presented did not satisfy the third factor, which requires that "[s]imilar acts[ ] are likely to evade judicial review in the future." 273 Or App at 262. We concluded that a future "challenge to the 2015 permit is not likely to evade judicial review" and that petitioners could use the accumulated work from their challenge to the 2010 permit to challenge the 2015 permit. *Id.*

On review, the Supreme Court disagreed and concluded that petitioners had met each of the three factors under ORS 14.175. *Eastern Oregon Mining Assoc. II*, 360 Or at 19. The Supreme Court remanded

---

[7] ORS 14.175 provides, in part, that, in any action in which a party alleges that a certain government act, policy or practice is unconstitutional or otherwise contrary to law,

> "the party may continue to prosecute the action and the court may issue a judgment on the validity of the challenged act, policy or practice even though the specific act, policy or practice giving rise to the action no longer has a practical effect on the party if the court determines that:
>
> "(1) The party had standing to commence the action;
>
> "(2) The act challenged by the party is capable of repetition, or the policy or practice challenged by the party continues in effect; and
>
> "(3) The challenged policy or practice, or similar acts, are likely to evade judicial review in the future."

the case to us to decide whether we would exercise our discretion to review the issues in this otherwise moot case. *Id.* With that long procedural history stated and our stage set, we turn to the two issues presently before us. First, we consider whether we should exercise our discretion to reach some or all of the otherwise moot issues presented by petitioners' four assignments of error. Second, after deciding to consider just petitioners' first assignment of error, we consider whether the trial court erred in determining that DEQ had the authority to issue the 2010 700-PM permit under section 402 of the Clean Water Act.

We consider first whether to exercise our discretion to consider any of the issues on appeal. As stated above, petitioners raise four assignments of error arising from the trial court's grant of DEQ's motion for summary judgment and the denial of petitioners' cross-motion for summary judgment. Petitioners urge us to exercise our discretion to consider the merits of all four assignments of error. In response, DEQ agrees that we should consider the first assignment of error, regarding whether DEQ had authority under the Clean Water Act to issue the 2010 700-PM permit to regulate turbid wastewater. It contends, however, that we should not consider the remaining three assignments. As we discuss below, we agree with DEQ and choose to address only petitioners' first assignment of error.

There has been little, if any, guidance since *Couey* on what should guide our exercise of discretion to consider the merits of otherwise moot issues. *See, e.g.*, *Hooper v. Division of Medical Assistance Programs*, 273 Or App 73, 84, 356 P3d 666 (2015) (concluding that we will exercise our discretion under

and noting "the ongoing relationship between the parties and the petitioner's need for the medical transportation service ultimately at issue"). *Couey*, however, offers potential guideposts in its review of the history of the mootness doctrine.

In *Couey*, the Supreme Court concluded that mootness is a prudential, rather than a constitutional, constraint on justiciability in cases involving "public actions" or "matters of public interest." 357 Or at 520. The court noted that the legislature's enactment of a statute, ORS 14.175, to permit consideration of certain otherwise moot cases merely codified the historical practice of courts to consider whether to exercise their judicial power under the Oregon Constitution over such cases. 357 Or at 521 (stating that "[s]uch legislation purports to confer no more authority than what we have just concluded the courts possess under Article VII (Amended), section 1"). Consequently, considering that *Couey* carefully discussed the history of the prudential justifications for addressing certain otherwise moot cases, we find it appropriate to look to those same justifications when deciding whether to exercise our discretion to consider the issues in this case. *See Eastern Oregon Mining Assoc. II*, 360 Or at 15 (stating that "[e]xisting case law on the subject of mootness offers guidance concerning the circumstances under which the court will continue to dismiss moot claims" even when considering just prudential considerations).

Although the following list is not exhaustive, we identify several significant considerations bearing on whether to exercise our judicial power over moot cases involving "public actions" or "matters of public interest." *Couey*, 357 Or at 520. Those factors may

include, but are not limited to, the adversarial nature of the parties' interests, the effect of the decision on both the parties and others not before the court, judicial economy, and the extent of the public importance of the issues presented.

First, *Couey* recognized that the nature of the parties' adverse interests may guide a court's exercise of discretion in considering whether to decide otherwise moot cases. In *Couey*, when reviewing the historical prudential justifications for dismissing moot cases, the court observed that early courts dismissed moot cases to avoid creating " 'rules for the government of cases in which the *real parties* would have had no opportunity to be heard.' " 357 Or at 500 (quoting *Smith v. Cudworth*, 41 Mass 196, 197 (1837) (emphasis added)). Relatedly, existing case law on the issue of mootness has also considered whether the "court's decision no longer will have a practical effect on or concerning the rights of the parties." *Brumnett v. PSRB*, 315 Or 402, 406, 848 P2d 1194 (1993).[8] Given that history, when deciding whether to exercise our discretion, we conclude that it is appropriate to

---

[8] Of course, in "public action" cases or those involving "matters of public interest," the court first considers those same two factors in determining *whether* a case is moot before turning to the test in ORS 14.175(1) to (3) and then whether to exercise discretion to consider the otherwise moot case. *See, e.g.*, *Eastern Oregon Mining Assoc. II*, 360 Or at 15-19 (undertaking analysis). The application of those factors, even if they have already been addressed as part of mootness analysis, may still be relevant to the later issue of whether to exercise discretion to consider the issues in the case. The parties' interests may or may not be adverse in the future even if the litigation at issue has been resolved. As is the case here, petitioners and DEQ appear likely to have adverse interests into the future.

consider whether the parties' interests remain adverse as to future disputes that are likely to recur. Second, and relatedly, we may also consider whether the parties are advocating only narrow arguments and rules of law that may benefit just themselves or are presenting arguments affecting a wider group of parties or interests.

Third, *Couey* recognized "judicial economy" as a factor that past courts have considered when deciding whether to exercise judicial power over moot cases. 357 Or at 501. Courts disposed of moot cases, in part, to avoid " 'decid[ing] questions which might never arise.' " *Id.* at 500 (quoting *Smith*, 41 Mass. at 197). Of course, ORS 14.175 already provides that we are to consider whether an act challenged by a legal action is "capable of repetition" and yet "likely to evade judicial review." ORS 14.175(2)-(3). However, in deciding whether to exercise our discretion, we may dig deeper to consider if the challenged act is likely to arise *often*. We may also consider whether judicial economy supports addressing the issue presented by the litigation before us based on the existing record and circumstances or whether another, future case might present a more developed record or more thoroughly developed arguments.

Considering judicial economy as a relevant factor is also consistent with our decisions in other similar areas where we exercise discretion. For example, in plain-error analysis, we will often exercise our discretion to correct plain error where not doing so would "waste further judicial resources." *State v. Simkins*, 263 Or App 459, 461, 330 P3d 1235 (2014).

Fourth, *Couey* recognizes the relative "public importance" of a case as a historical consideration in guiding courts' discretion to exercise judicial power over otherwise moot cases. 357 Or at 508, 510-11, 519, 521-22. That includes consideration of the "public interest" in the issues involved as well as the universe of people and interests potentially affected by the challenged rule or practice. *Id*. at 508. *Couey* concludes that the Oregon Constitution does not "*require* dismissal" of a case that is moot if it is a "public action[ ]" or one involving "matters of public interest." *Id*. at 520 (emphasis in original). The facts in *Couey* did not require the Supreme Court to "define the outer limits of what might constitute a 'public action' or one involving issues of 'public interest' " for the purpose of determining the authority of a court to decide an otherwise moot case. *Id*. at 522. Although we do not undertake to define those outer limits here either, we conclude that courts may consider the relative public importance of the issues and the universe of people or interests potentially affected as part of its exercise of discretion.

As stated, this list is not exhaustive. In addition, some factors could be in conflict but still lead a court to exercise discretion to hear a moot case or issue. For instance, a challenged practice may not be likely to repeat very often in the future, but it may have such widespread public effect and importance that the latter factor still leads us to exercise our discretion.

Applying those factors here, we conclude that we should exercise our discretion to consider the issues presented in petitioners' first assignment of error, but not the second through fourth assignments of error. As part of their first assignment of error, petitioners

contend that the trial court erred in concluding that DEQ had authority under federal law, *viz.*, section 402 of the Clean Water Act, to issue a permit that regulates petitioners' small suction dredge mining. We conclude that the discretionary factors that we discuss above—(a) the past and continuing adversity of the parties' interests, (b) the application of the disputed federal and state laws to wider interests than those of the parties themselves, (c) judicial economy, and (d) the relative public importance of the case and the breadth of people and interests potentially affected—support resolving that assignment of error. These same parties have been litigating a nearly identical legal issue for years, and there is no indication that the litigation of these issues will end if we dismiss this appeal as moot. Indeed, DEQ has issued a new 700-PM permit that relies on section 402 of the Clean Water Act as a continuing source of its authority to regulate small suction dredge mining. The litigated issues certainly affect the parties, but they also affect a wider class of interests—those interested in the proper regulation and practice of small suction dredge mining, including government, environmental, and mining interests. Judicial economy also favors considering the first assignment of error. The factual record has been completely and well developed. The first assignment presents a legal issue. The parties have already developed and presented their arguments to the court twice—each time being prevented from reaching a conclusion due to mootness. Refusal to consider petitioners' argument on the first assignment of error would lead to a waste of further judicial resources in developing the factual and legal issues again in new litigation. Finally, although we do not consider this a matter of

overarching public importance, it raises a significant issue that affects the public interests noted above.

In their second assignment of error, petitioners argue that the trial court erred in concluding that DEQ properly issued the 2010 700-PM permit under state law. Although petitioners' argument in this assignment is not entirely clear, they appear to argue that, although the 2010 700-PM permit "purports" to be issued under state law, ORS 468B.050, as well as the federal Clean Water Act, it actually is solely authorized, incorrectly in petitioners' view, under the Clean Water Act and contains requirements unique to federal law. DEQ, in response, appears to contend that its authority is under "both" state and federal law in furtherance of the "partnership" contemplated by the Clean Water Act—presumably the state's delegated authority under section 402 of the Clean Water Act to issue NPDES permits. In their reply brief, petitioners then argue that "whether or not [DEQ] might exercise state-law-based regulatory power * * * is not before this Court" and asks us to remand the case back to DEQ for new permitting under state law or possibly under different authority, *viz.*, section 401 of the Clean Water Act.

Without reaching the merits of this dispute, we choose not to exercise our discretion to reach petitioners' second assignment of error because the argument, as framed by the parties, is not well developed for this court and may be quite narrow. Both parties' arguments can be read to contend that

the *purely* state-law issues are not even properly before us. For that reason, we will not reach them.[9]

We also do not exercise our discretion to reach petitioners' third and fourth assignments of error. In the third assignment of error, petitioners contend that the trial court erred in concluding that DEQ's findings were supported by substantial evidence. Without discussing each of the discretionary factors that apply here, we find most persuasive that this assignment of error raises a case-bound question that, although perhaps significant to this now-mooted case, does not present a recurring legal issue that has implications beyond this particular litigation. Petitioners also no longer have any ongoing or future "adverse interest" in whether the 2010 700-PM permit is supported by "substantial evidence." Petitioners are no longer subject to that expired 2010 permit and, significantly, the 2015 permit is based on a different factual record.

---

[9] There is a chance that there may be new state laws with respect to small suction dredge mining in the coming years. In 2013, the legislature passed Senate Bill (SB) 838, which imposed a moratorium on suction dredge mining from January 2, 2016, until January 2, 2021, in "any river and tributary thereof" that contains "essential indigenous anadromous salmonid habitat * * * or naturally reproducing populations of bull trout," except where the populations do not exist due to a "naturally occurring or lawfully placed physical barrier to fish passage." Or Laws 2013, ch 783, § 2. Although mining interests opposed this law, no party contends in this case that that law currently effectively bans all small suction dredge mining in Oregon rivers and streams due to the absence of sufficient riverbed or streambed for mining. *See Bohmker v. State of Oregon*, 172 F Supp 3d 1155, 1165 (D Or 2016) (stating that SB 838 restricts dredge mining in only limited areas and provides exceptions even within prohibited areas).

In the fourth assignment of error, petitioners argue that the trial court erred in concluding that DEQ had the authority to resolve a pending lawsuit, in the manner that it did, without going through a contested-case hearing or through rule-making procedures. Again, without discussing each factor, we do not exercise our discretion to consider this issue. The procedures governed by the settlement agreement, which was between DEQ and a third party not currently involved in this litigation, are already completed. The legal issues presented by the settlement agreement are narrow issues that do not appear to us to have widespread effect and are not matters of significant public importance.

Finally, we turn to the merits of the dispute over the first assignment of error. Petitioners assign error to the trial court's grant of summary judgment to DEQ and denial of it to petitioners on petitioners' first claim for relief. That claim alleged that DEQ lacked authority to issue the 2010 700-PM permit because the permit regulates the discharge of dredged materials, which is under the exclusive regulatory authority of the Corps under section 404 of the Clean Water Act. Petitioners contend that the trial court legally erred in concluding that DEQ had the authority to issue the 2010 700-PM permit. In that circumstance, we review to "determine if the trial court correctly interpreted and applied the correct legal standards." *Powell v. Bunn*, 185 Or App 334, 340, 59 P3d 559 (2002), *rev. den*, 336 Or 60 (2003).[10]

---

[10] As noted at the outset of this opinion, petitioners initially sought review of DEQ's permitting decision in the circuit court under ORS 183.484, which provides for circuit court review of orders in "other than contested cases." Petitioners then appealed

Petitioners' essential argument is that the 2010 700-PM permit, even if it purports to be limited to regulating visible turbidity, improperly regulates the discharge of "dredged material," which is within the exclusive regulatory authority of the Corps under section 404 of the Clean Water Act. We understand that petitioners are primarily advancing two arguments. First, petitioners contend, as both a factual and legal matter, that the discharge from small suction dredges is a "single discharge" that cannot be "parsed" into two components, the discharge of "dredged material" (regulated by section 404 of the Clean Water Act) and the discharge of "pollutants" (regulated by section 402 of the Clean Water Act). Second and relatedly, petitioners argue that small suction dredges *only* discharge "dredged material" and do not discharge "pollutants."

Those arguments, however, have already been rejected by our reasoning, if not also our conclusions,

---

the circuit court's judgment, challenging the trial court's adverse summary judgment decision. The standard of review we apply to an appeal of a circuit court decision granting summary judgment in a typical civil action differs from that applied to an appeal of a circuit court decision granting summary judgment to an agency following judicial review under ORS 183.484 of an order in "other than contested cases." *Powell*, 185 Or App at 339-40. That difference in the standard of review can be significant where the appeal arises from claimed disputed factual issues in the trial court. *Id*. (explaining application of substantial evidence standard of review to trial court decision granting summary judgment to agency following review under ORS 183.484 of an agency order that is in "other than a contested case"). Where, as here, the issue is purely legal, "although the standards of review that apply to the civil action and the review proceeding differ, ultimately they converge, because the inquiry for both is legal only." *Id*. at 340.

in *Northwest Environmental Defense Center I*, 232 Or App at 645. In that case, we extensively analyzed the relevant sections of the Clean Water Act, the federal regulations that define the term "dredged material" and distinguish it from pollutants, and the history of the Corps' and EPA's treatment and regulation of in-stream mining activities. *Id.* at 626-45. After undertaking that extensive analysis, we concluded that small suction dredge mining "typically involves the placement of dredged spoil and mining tailings in piles and that such a discharge constitutes the 'discharge of dredged material' * * * regulated exclusively by the Corps under section 404, and not the EPA." *Id.* at 643-44. We went on to state, however, that federal agencies have

> "consistently taken the position that turbid wastewater—*i.e.*, the discharge of water that contains suspended solids—is a pollutant that is regulated by the EPA rather than the 'discharge of dredged material.' * * * Thus, as far as we can tell, the agencies have distinguished between those pollutants that are suspended in wastewater and those that are spoil or tailings discharged by placing them in piles on the stream or river bed. * * * Whereas the Corps is generally concerned with 'dredge' and 'fill' matters affecting navigation, the EPA addresses all other types of pollution under Section 402."

Id. at 644. In light of our analysis, and relying on that regulatory history, we concluded that, "small suction dredge mining involves discharges of dredged material that are permitted by the Corps and discharges of turbid wastewater that are permitted by the EPA." *Id.* at 645. In light of that conclusion, we

determined that the 2005 700-PM permit lacked specificity and was overly broad in that it regulated all suction dredge mining waste discharge, spanning both the Corps' and EPA's (and by delegation DEQ's) exclusive regulatory authority. *Id.* We concluded that the 2005 permit exceeded DEQ's statutory authority to implement the Clean Water Act. *Id.*

Northwest Environmental Defense Center I addresses both of petitioners' primary arguments to us. It concluded, contrary to petitioners' arguments, that small suction dredge mining did involve the discharge of *both* "dredged material" within the exclusive regulatory authority of the Corps and turbid wastewater, which we concluded was a "pollutant" within the EPA's (and DEQ's) regulatory authority. *Id.* at 644-45. Although we concluded that the 2005 permit was overly broad in regulating both discharges, we at least necessarily implied, if we did not overtly state, that a new permit that regulated solely "turbid wastewater" as a pollutant from small suction dredge mining would be within DEQ's delegated statutory authority under section 402 of the Clean Water Act. *Id.* In the 2010 permit, DEQ expressly limited the permitting to the regulation of the discharge of "turbid wastewater." Indeed, no party before us claims otherwise.[11] *Northwest Environmental Defense Center I* rejects the argument that small suction dredge mining necessarily results

---

[11] The 2010 700-PM permit also has restrictions on the times of day that persons can engage in small suction dredge mining and different limitations on the practice in particular Oregon rivers and areas designated "essential salmon habitat." No one argues that those permit restrictions are relevant to our decision or otherwise in violation of the Clean Water Act.

in a single discharge that can be regulated by only one regulatory authority.

In a related manner, *Northwest Environmental Defense Center I* expressly rejects petitioners' second argument that small suction dredge mining waste is only "dredged material" and not a "pollutant." *Id.* at 645. As discussed above, we concluded that it can be both, and that small suction dredge mining results in the downstream discharge of turbid wastewater, a pollutant regulated by the EPA. *Id.* at 643-44.

Petitioners make a number of arguments as to why *Northwest Environmental Defense Center I* was wrongly decided. However, many of petitioners' arguments were previously made and rejected in that case. The remaining arguments do not persuade us to reconsider our prior decision. *See State v. Civil*, 283 Or App 395, 406, 388 P3d 1185 (2017) (stating that we will only overturn prior precedent where it is " 'plainly wrong,' a rigorous standard grounded in presumptive fidelity to *stare decisis*"). Without addressing all of those arguments, we briefly address three of petitioners' contentions that they claim are either recent developments or were not argued or addressed in our prior opinion.

First, petitioners argue that our prior decision did not address the Clean Water Act's definition of a "discharge of a pollutant," which includes "any addition of any pollutant to navigable waters from any point source." 33 USC § 1362(12)(A).[12] Petitioners

---

[12] Petitioner EOMA concedes that it previously told us in *Northwest Environmental Defense Center I* that it did not believe that we needed to resolve whether suction dredge mining resulted in an "addition" of a pollutant to resolve that case.

argue that, even though "dredged spoil," "rock," and "sand" are defined "pollutant[s]" under the Clean Water Act, 33 USC § 1362(6), the vacuum and release of sediment on streambeds cannot involve the "addition" of a pollutant because the same sediment is sent downstream and no additions are made. Although our opinion did not cite 33 USC section 1362(12), we did address whether suction dredge mining involved the "addition" of pollutants. *Northwest Environmental Defense Center I*, 232 Or App at 639. We relied, in part, on a conclusion from the Ninth Circuit Court of Appeals that, when suction dredge mining pulls up sediment, sifts out gold and heavy materials, and returns the remaining resuspended soils downstream, "'even if the material discharged originally comes from the streambed itself, such re-suspension may be interpreted to be an addition of a pollutant under the [Clean Water] Act.' " *Id*. (quoting *Rybachek v. U.S. E.P.A.*, 904 F.2d 1276, 1285 (9th Cir.1990) (brackets omitted)); *see also Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F3d 810, 814-15 (9th Cir 2001) (practice of "deep ripping" a wetland, which involves churning up soil already there and redepositing it, is a "discharge" and addition of a pollutant).

Second, petitioners contend that a recent United States Supreme Court decision, *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council, Inc.*, 568 U.S. 78, 133 S Ct 710, 184 L Ed 2d 547 (2013), is "irreconcilable" with *Northwest Environmental Defense Center I*. (Emphasis omitted.) However, *Los Angeles County Flood Control Dist.* merely held that the flow of water from one improved concrete channel of a river to a lower unimproved portion of the same river was not a discharge of

pollutants under the Clean Water Act. 568 U.S. at 82, 133 S Ct at 713. It does not address a qualitatively different practice in which a suction pump pulls up streambed in a river, sifts out gold and heavy particles, and sends reconstituted and resuspended soils with water further down river.

Third, petitioners contend that we failed to consider that Congress gave the EPA authority under section 404(c) of the Clean Water Act to prohibit or restrict permits issued by the Corps under that section. *See* 33 USC. § 1344(c) (providing that the EPA administrator may prohibit or restrict a permit issued by the Secretary of Army if the administrator determines that the discharge of dredged or fill material will have "an unacceptable adverse effect" on municipal water supplies, shellfish beds, fisheries, wildlife, or recreational areas). Petitioners argue that our decision to allow the EPA (or DEQ) and the Corps to issue separate permits under sections 402 and 404 to regulate, respectively, the discharge of pollutants and the discharge of dredged material by a single suction dredge renders the EPA's veto authority under section 404(c) meaningless. We do not agree with that reasoning. The fact that the EPA may regulate the discharge of pollutants from a source, even when the same source discharges dredged material regulated by the Corps, does not render meaningless the EPA's veto authority when it determines, perhaps for completely independent reasons, that a permit issued by the Corps for dredged material under section 404 has unacceptable adverse effects on municipal water supplies, fish habitat, or other environmental considerations.

For the reasons stated above, we exercise our discretion under ORS 14.175 to reach the issues presented by petitioners' first assignment of error. When addressing those issues, we conclude, as did the trial court, that DEQ had the delegated authority under section 402 of the Clean Water Act to issue the 2010 700-PM permit to regulate visible turbidity resulting from small suction dredge mining. *See* ORS 14.175 (stating that the court "may issue a judgment on the validity of the challenged act, policy or practice" even though the underlying action is otherwise moot). We do not exercise our discretion under ORS 14.175 to reach the issues presented by the second through fourth assignments of error.

Portion of judgment concluding DEQ had authority to issue 2010 700-PM permit under section 402 of the Clean Water Act affirmed; otherwise declining to address remaining moot issues under ORS 14.175.

FILED: July 14, 2016

IN THE SUPREME COURT OF
THE STATE OF OREGON

EASTERN OREGON MINING ASSOCIATION; Guy Michael; and Charles Chase,
Petitioners on Review,

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY; Dick Pederson, in his capacity as Director of the Department of Environmental Quality; and Neil Mullane, in his capacity as Administrator of the Water Quality Division of the Department of Environmental Quality,
Respondents on Review.

(CC 10C24263)

WALDO MINING DISTRICT, an unincorporated Association; Thomas A. Kitchar; and Donald R. Young,
Petitioners on Review,

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY; Dick Pederson, in his capacity as Director of the Department of Environmental Quality; and Neil Mullane, in his capacity as Administrator of the Water Quality Division of the Department of Environmental Quality,
Respondents on Review.

(CC 11C19071)

(CC 10C24263, 11C19071;
CA A156161; SC S063549)

On review from the Court of Appeals.*

Submitted on the briefs June 9, 2016.

James L. Buchal, Murphy & Buchal LLP, Portland, filed the briefs for petitioners on review. With him on the briefs was William P. Ferranti, Portland.

Michael A. Casper, Assistant Attorney General, Salem, filed the briefs for respondents on review. With him on the briefs were Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Carson Whitehead, Assistant Attorney General.

Before Balmer, Chief Justice, and Kistler, Walters, Landau, Baldwin, and Brewer, Justices, and Lagesen, Justice pro tempore.**

LANDAU, J.

The decision of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals for further proceedings.

---

* Appeal from Marion County Circuit Court, Courtland Geyer, Judge. 273 Or App 259, 361 P3d 38 (2015).

** Nakamoto, J., did not participate in the consideration or decision of this case.

LANDAU, J.

Petitioners are a group of miners who operate small suction dredges in Oregon waterways. In this case, they challenge the lawfulness of an order of the Department of Environmental Quality (DEQ) adopting a general five-year permit that regulates that type of mining. By the time the challenge reached the Court of Appeals, however, the permit had expired. The agency then moved to dismiss petitioners' challenge on the ground that it had become moot. The Court of Appeals agreed and dismissed. Petitioners now seek review of the dismissal arguing that their case is not moot. In the alternative, they argue that, if it is moot, their challenge nevertheless is justiciable under ORS 14.175 because it is the sort of action that is capable of repetition and likely to evade judicial review.

We conclude that the petitioners' challenge to the now-expired permit is moot. But we agree with petitioners that it is justiciable under ORS 14.175. We therefore reverse the decision of the Court of Appeals and remand for further proceedings.

The relevant facts are not in dispute. Petitioners are an association of miners, a mining district, and a number of individual suction dredge miners. Suction dredge mining entails vacuuming up streambed material through a hose, passing the material through a sluice box that separates out any gold, and returning the remaining material back to the waterway. DEQ asserts that it has authority to regulate suction dredge mining under state and federal law. Among other things, DEQ asserts that suction dredge miners must obtain a National Pollutant Discharge Elimination System (NPDES) permit, pursuant to

section 402 of the federal Clean Water Act. 33 USC §1342 (2012).

In 2005, DEQ adopted an administrative rule setting out its authority to regulate suction dredge mining and the requirements for engaging in that activity. The order was denominated as a "general permit" and is known as the "2005 permit." Both environmentalists and miners—including petitioners—challenged the lawfulness of the 2005 permit. The miners' principal contention was that suction dredge mining is subject to the exclusive regulatory authority of the Army Corps of Engineers, pursuant to section 404 of the Clean Water Act. 33 USC § 1344 (2012).

The Court of Appeals agreed with the miners in part, concluding that a portion of the discharge from suction dredge mining is subject to the exclusive authority of the Corps, but also concluding that another part of that discharge remains subject to DEQ's authority under section 402 of the federal statute. *Northwest Environmental Defense Center v. EQC*, 232 Or App 619, 223 P3d 1071 (2009). This court granted review. *Northwest Environmental Defense Center v. EQC*, 349 Or 56, 240 P.3d 1097 (2010).

Before briefing could be completed, however, the five-year 2005 permit expired in 2010. DEQ moved to dismiss the review as moot. This court allowed the motion and dismissed. *Northwest Environmental Defense Center v. EQC*, 349 Or 246, 245 P3d 130 (2010). Meanwhile, DEQ issued a new five-year general permit in 2010, known as the "2010 permit." This time, however, DEQ issued the permit as an order in other than a contested case, not as an administrative rule. *See generally*

(authorizing department to issue general permits either as an administrative rule or as an order in other than a contested case). The 2010 permit contained the same provisions requiring compliance with section 402 of the federal Clean Water Act.

Petitioners challenged the validity of the 2010 permit. Because the permit had been issued as an order in other than a contested case, they were required to do so by first bringing an action in circuit court. ORS 183.484 (conferring "[j]urisdiction for judicial review of orders other than contested cases" on Marion County Circuit Court and the circuit court for the county in which the petitioner resides or maintains a principal business office). The petition advanced three claims: (1) DEQ lacks authority under the federal Clean Water Act to regulate suction dredge mining; (2) DEQ lacks authority under state law to regulate such mining; and (3) DEQ's 2010 permit was not supported by substantial evidence in the record.

The Northwest Environmental Defense Center (NEDC) also filed a petition for review in circuit court. In 2012, however, NEDC and DEQ settled their differences. At that point, petitioners amended their petition to add a claim for relief under the Uniform Declaratory Judgment Act seeking a declaration that DEQ lacked authority to enter into such a settlement agreement.

In 2013, the parties filed cross-motions for summary judgment. The trial court concluded that, with respect to petitioners' contention that the 2010 permit violated federal law, there remained issues of fact. With respect to all other issues, though, the court granted DEQ's motion. After that, the parties stipulated to entry of judgment in favor of DEQ on all

claims to facilitate appellate review. The trial court entered judgment in January 2014.

In February 2014, petitioners appealed. They asked for expedited consideration of their appeal, but the request was denied. The appeal proceeded through briefing and oral argument and was taken under advisement. While still under advisement, the five-year 2010 permit expired. DEQ issued a new five-year permit, effective through January 1, 2020. The department then moved to dismiss the appeal as moot. Petitioners argued that the appeal was not moot and that, in any event, it was capable of repetition and likely to evade review and so still justiciable under ORS 14.175.

The Court of Appeals concluded that, in light of the expiration of the 2010 permit, petitioners' challenge to the validity of that permit had become moot. *Eastern Oregon Mining Assoc. v. DEQ*, 273 Or App 259, 262, 361 P3d 38 (2015). The court further concluded that petitioners' challenge was not likely to evade review. The court explained that, because petitioners could "easily use their work" in challenging the prior permits, they could "challenge the 2015 permit in the circuit court in more streamlined litigation." *Id.*

In the meantime, the legislature enacted a moratorium on suction dredge mining for five years, beginning January 2, 2016. Or Laws 2013, ch 783. The moratorium, however, does not apply to all waterways in the state in which suction dredge mining may occur.[1] The precise extent to which the moratorium

---

[1] The moratorium applies to "any river and tributary thereof" that contains essential anadromous salmonid habitat or naturally reproducing populations of bull trout, except where

would prohibit suction dredge mining in Oregon is not clear. But DEQ and petitioners agree that the moratorium does not appear to apply to all suction dredge mining in the state.

Petitioners sought review in this court. This court allowed review, limiting the issues on review to three questions: (1) whether the case is now moot; (2) whether, if moot, the case is nevertheless justiciable under ORS 14.175; and (3) whether, even if justiciable under ORS 14.175, the case should be dismissed because of the legislative moratorium. We address each of those questions in turn.

1. *Is the case moot?*

In *Couey v. Atkins*, 357 Or 460, 520, 355 P3d 866 (2015), we explained that Article VII (Amended) of the Oregon Constitution does not require the court to dismiss moot cases, at least not in "public actions or cases involving matters of public interest." But we cautioned that merely because the constitution does not require dismissal in such cases does not mean that the court will not continue to dismiss moot cases as a prudential matter. *Id.* Existing case law on the subject of mootness offers guidance concerning the

---

populations do not exist because of "a naturally occurring or lawfully placed physical barrier." Or Laws, ch 783, § 2(1). DEQ estimates that up to 30 percent of all stream miles fall within the scope of the moratorium. It acknowledges that the "percentage of those stream miles that are suitable for suction dredge mining, however, is unclear." A group of miners challenged the constitutionality of the moratorium in federal court, but the court concluded that the law amounts to a reasonable environmental regulation that, precisely because it does not appear to ban mining completely, is not preempted by federal law. *Bohmker v. State*, 2016 WL 1248729, —— F Supp 3d —— (D Or 2016).

circumstances under which the court will continue to dismiss moot claims. *Id.* at 469, 355 P3d 866.

In *Brumnett v. PSRB*, 315 Or 402, 848 P2d 1194 (1993), the court explained that cases "in which a court's decision no longer will have a practical effect on or concerning the rights of the parties [ ] will be dismissed as moot." *See also* Dept. of Human Services v. G.D.W., 353 Or 25, 32, 292 P3d 548 (2012) (An appeal is moot when a court decision will no longer have a "practical effect on the rights of the parties."). The rule applies to judicial review proceedings involving challenges to administrative agency action. Homestyle Direct, LLC v. DHS, 354 Or 253, 260–61, 311 P3d 487 (2013). In this case, petitioners' principal challenge is to the validity of the 2010 permit. That permit has expired. A judicial declaration as to the validity of the 2010 permit can have no possible practical effect on the rights of the parties in relation to that permit.

Petitioners contend that, notwithstanding the expiration of the 2010 permit, a ruling on their underlying legal contentions will affect them. In their view, in issuing the 2010 permit, DEQ adopted an erroneous legal position that continues to adversely affect them, given that it is the basis for the more recently adopted 2015 permit. The problem with the argument is that it ignores the fact that theirs is a claim for judicial review of *a specific agency order*—the 2010 permit—not some abstract legal position that DEQ has taken. Under the Administrative Procedure Act, a challenge to an order in other than a contested case entitles a court to "affirm, reverse, or remand *the order*" that is the subject of the challenge. ORS 183.484(5)(a) (emphasis added). In this case,

there is no longer any order in effect for a court to affirm, reverse, or remand.

The same result and reasoning apply to petitioners' claim under the Uniform Declaratory Judgment Act. Claims under that statute also are subject to dismissal if a judicial decision will not have a practical effect on the rights of the parties. *Couey*, 357 Or at 470, 355 P.3d 866; *see also Barcik v. Kubiaczyk*, 321 Or 174, 188, 895 P2d 765 (1995) (relief under the Uniform Declaratory Judgment Act is available "only when it can affect *in the present* some rights between the parties") (emphasis in original). In this case, petitioners rely on that statute to challenge the validity of a settlement agreement concerning the implementation of the 2010 permit. Any judicial decision as to that challenge would not affect the rights of any of the parties. The permit to which the settlement agreement otherwise would have applied has expired.

2. *Is the action nevertheless justiciable under ORS 14.175?*

ORS 14.175 provides:

> "In any action in which a party alleges that an act, policy or practice of a public body * * * is unconstitutional or is otherwise contrary to law, the party may continue to prosecute the action and the court may issue a judgment on the validity of the challenged act, policy or practice even though the specific act, policy or practice giving rise to the action no longer has a practical effect on the party if the court determines that:
>
> "(1) The party has standing to commence the action;

> "(2) The act challenged by the party is capable of repetition, or the policy or practice challenged by the party continues in effect; and
>
> "(3) The challenged policy or practice, or similar acts, are likely to evade judicial review in the future."

The statute thus provides that, even when a judicial decision would no longer have a practical effect on the rights of the parties, a court may issue the decision if the parties can satisfy each of the three stated requirements. *Couey*, 357 Or at 477, 355 P3d 866.

DEQ does not contest the first two of the three statutory requirements. The only issue is whether petitioners' challenge to the five-year 2010 permit is of a sort that is likely to evade review before the permit expires. The Court of Appeals concluded that petitioners' challenge is not likely to evade review because petitioners could "easily use their work" in challenging the prior permits and, as a result, could "challenge the 2015 permit in the circuit court in more streamlined litigation." *Eastern Oregon Mining Assoc.*, 273 Or App at 262.

In so concluding, the court erred. As we explained in *Couey*, the focus of ORS 14.175(3) is whether the general type or category of challenge at issue is likely to evade being fully litigated—including by appellate courts—in the future, not whether a specific case might avoid becoming moot through expedited consideration or some other mechanism:

> "The fact that there is a possibility that a particular case could obtain expedited consideration is beside the point. ORS 14.175 applies to types or categories of cases in which it

> is 'likely' that such challenges will avoid judicial review."

357 Or at 482.

DEQ argues that, in any event, the type or category of case at issue is not the sort that is likely to evade review. DEQ begins by observing that some federal courts have adopted a "rule of thumb" that two years is an adequate time to obtain a final judicial decision on a challenge to a federal administrative agency order. *See, e.g.*, *Fund for Animals, Inc., v. Hogan*, 428 F3d 1059, 1064 (DC Cir 2005). The time it takes to fully litigate a challenge to a federal administrative agency order or rule, however, may be different from the time it would take to challenge an Oregon agency's order or rule under the Oregon Administrative Procedure Act. Moreover, the "rule of thumb" that DEQ identifies does not appear to have been uniformly followed by federal courts, particularly in cases involving challenges to NPDES permits. *See, e.g.*, *Trustees for Alaska v. EPA*, 749 F2d 549, 555 (9th Cir 1984) (holding that challenge to expired five-year NPDES permits originally issued eight years earlier was capable of repetition, yet evading review); *Montgomery Environmental Coalition v. Costle*, 646 F2d 568, 582–83 (DC Cir 1980) (holding that "we have no difficulty" concluding that challenge to expired five-year NPDES permit was capable of repetition, yet evading review).

DEQ asserts that "a review of this court's administrative law cases supports the conclusion that five years is sufficient time to fully litigate such a case" as this one. In support, the department cites *Broadway Cab LLC v. Employment Dept.*, 358 Or 431, 364 P3d 338 (2015); *OR–OSHA v. CBI Services, Inc.*,

356 Or 577, 341 P3d 701 (2014); and *Noble v. Dept. of Fish and Wildlife*, 355 Or 435, 326 P3d 589 (2014), each of which took approximately four years to fully litigate a challenge to an administrative agency decision.

None of those cases involved a challenge to an order in other than a contested case, however. In cases involving challenges to orders in other than a contested case, an additional layer of judicial review is required over and above what is ordinarily required for challenges to administrative agency rules or orders. *See generally* *Norden v. Water Resources Dept.*, 329 Or 641, 645-46, 996 P2d 958 (2000) (describing procedure for challenging orders in other than contested cases). That extra layer of judicial review makes a difference. Even a cursory review of cases involving that process reveals that it is (perhaps unfortunately) quite common for them to take five years or substantially longer to fully litigate.[2]

---

[2] *See, e.g.*, *Noble v. Oregon Water Resources Dept.*, 356 Or 516, 340 P3d 47 (2014) (five years); *Gearhart v. PUC*, 356 Or 216, 339 P3d 904 (2014) (six years); *Powell v. Bunn*, 341 Or 306, 142 P3d 1054 (2006) (six years); *Norden*, 329 Or at 644 (six years); *Mendieta v. Division of State Lands/McKay*, 328 Or 331, 987 P2d 510 (1999) (five years); *Coalition for Safe Power v. Oregon Public Utility Com'n*, 325 Or 447, 939 P2d 1167 (1997) (eight years); *Teel Irrigation Dist. v. Water Resources Dept.*, 323 Or 663, 919 P2d 1172 (1996) (five years); *Pacific Northwest Bell Telephone Co. v. Eachus*, 320 Or 557, 888 P2d 562 (1988) (seven years); *Hardy v. Land Board*, 274 Or App 262, 360 P3d 647 (2015) (seven years); *Bridgeview Vineyards, Inc. v. State Land Board*, 258 Or App 351, 309 P3d 1103 (2013) (14 years); *G.A.S.P. v. Environmental Quality Commission*, 198 Or App 182, 108 P3d 95 (2005) (eight years).

Moreover, although the particular circumstances of the case before the court do not determine whether it is the sort of claim that is likely to evade review, the difficulty of obtaining timely judicial review of orders in other than a contested case is nowhere better illustrated than this very case, which now has become moot not once, but twice, and even then after the parties requested—and were denied—expedited consideration. We conclude that petitioners' challenge is of the sort that is likely to evade review within the meaning of ORS 14.175(3).

The fact that the parties may have established the three requirements for review under ORS 14.175 does not end the matter. As we explained in *Couey*, the statute *permits* a court to issue a judgment on the validity of the challenged act or policy, but it does not require a court to do so. 357 Or at 522. The statute "leaves it to the court to determine whether it is appropriate to adjudicate an otherwise moot case under the circumstances of each case." *Id.* In this instance, the Court of Appeals did not reach that issue, having determined that this is not the sort of case to which ORS 14.175 even applies. We therefore remand the case for the appropriate exercise of the discretion that the statute affords.

DEQ argues that, if we determine that petitioners' challenge qualifies for judicial review under ORS 14.175, we should exercise our discretion to limit the scope of that review to the issue whether the issuance of the 2010 permit violates the federal Clean Water Act. But whether to limit judicial review is, as DEQ itself notes, a matter of discretion under ORS 14.175. As in *Couey*, that discretion is not for a reviewing court to exercise in the first instance. 357 Or at 522.

3. *Should the case be dismissed because of the enactment of a moratorium?*

There remains the issue whether we should even allow for the exercise of discretion under ORS 14.175 because of the enactment of the legislative moratorium on suction dredge mining until 2021. As we have noted, however, the extent of the moratorium is not clear. The parties agree that, whatever that extent may be, it does not apply to all waterways in the state where suction dredge mining may take place. Under the circumstances, we see no reason to conclude that the enactment of the moratorium precludes the exercise of discretion to issue a judgment on the claims at issue in this case.

The decision of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals for further proceedings.

FILED: August 19, 2015

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

EASTERN OREGON MINING ASSOCIATION; GUY MICHAEL; and CHARLES CHASE,
Petitioners-Appellants,

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY; DICK PEDERSON, in his capacity as Director of the Department of Environmental Quality; and NEIL MULLANE, in his capacity as Administrator of the Water Quality Division of the Department of Environmental Quality,
Respondents-Respondents.

Marion County Circuit Court
10C24263

WALDO MINING DISTRICT, an unincorporated association; THOMAS A. KITCHAR; and DONALD R. YOUNG,
Petitioners–Appellants,

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY; DICK PEDERSON, in his capacity as Director of the Department of Environmental Quality; and NEIL MULLANE, in his capacity as Administrator of the Water Quality Division of the Department of Environmental Quality,
Respondents–Respondents.

Marion County Circuit Court
11C19071

A156161

Courtland Geyer, Judge.

Argued and submitted June 15, 2015, on respondents' motion to dismiss filed May 26, 2015, and appellants' response to motion to dismiss filed June 9, 2015.

James L. Buchal argued the cause for appellants. With him on the briefs was Murphy & Buchal LLP.

Inge D. Wells, Assistant Attorney-in-Charge, argued the cause for respondents. With her on the brief were Ellen F. Rosenblum, Attorney General, and Anna M. Joyce, Solicitor General.

Before Armstrong, Presiding Judge, and Nakamoto, Judge, and Egan, Judge.

PER CURIAM.

Motion to dismiss granted; appeal dismissed as moot.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondents

[X] No costs allowed.
[ ] Costs allowed, payable by
[ ] Costs allowed, to abide the outcome on remand, payable by

---

PER CURIAM

We consider whether this appeal—which concerns a now-expired permit—is justiciable under ORS 14.175. We conclude that it is not and dismiss the appeal as moot.

Petitioners Eastern Oregon Mining Association, Waldo Mining District, and four individual miners are involved in small-scale suction-dredge mining for gold and other minerals in Oregon waterways. In 2010, respondent Department of Environmental Quality (DEQ) adopted by order in an other than contested case a general permit for suction-dredge mining. In two consolidated cases, one brought in 2010 and the other brought in 2011, petitioners sought judicial review of the 2010 permit in the Marion County Circuit Court. A third case was brought by parties with environmental protection interests against DEQ and its director and was also consolidated with those now on appeal, but those parties settled. After considering cross-motions for summary judgment, the circuit court entered a judgment in respondent's favor at the beginning of 2014, and petitioners appealed.

We denied petitioners' motion for an expedited appeal in March 2014. The 2010 permit then expired on December 31, 2014. By the time of oral argument in June 2015, DEQ had issued another permit, effective May 15, 2015, to January 1, 2020, that covers the same activities as the 2010 permit. Accordingly, DEQ and the other respondents have moved to dismiss this appeal on the ground that, with the expiration of the challenged permit, the matter is now moot.

Petitioners acknowledge that they have yet to challenge the 2015 permit. They argue that we should decide this appeal because (1) the 2015 permit presents the same significant legal issues as the 2010 permit that they challenge on appeal and (2) those issues are likely to evade judicial review.

After oral argument in this case, the Supreme Court decided *Couey v. Atkins,* 357 Or 460, 355 P3d 866 (2015), and held that the legislature had authority to enact ORS 14.175. In relevant part, ORS 14.175 provides that a court "may" issue a judgment

> "on the validity of the challenged act * * * though the specific act * * * giving rise to the action no longer has a practical effect on the party if the court determines that:
>
> "(1) The party had standing to commence the action;
>
> "(2) The act challenged by the party is capable of repetition * * *; and
>
> "(3) * * * [S]imilar acts, are likely to evade judicial review in the future."

Here, the third factor is disputed. Respondents argue that petitioners are positioned to efficiently challenge the 2015 permit in the circuit court and to seek relief in a case that is not moot. We agree that a challenge to the 2015 permit is not likely to evade judicial review. The permit recently went into effect, and, assuming they are correct that the main issues to be raised with respect to the 2015 permit are identical to those regarding the 2010 permit, petitioners can easily use their work in challenging the 2010 permit to challenge the 2015 permit in the circuit court in more streamlined litigation.

Motion to dismiss granted; appeal dismissed as moot.

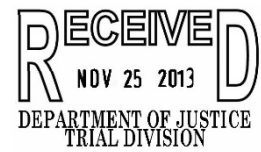
Appendix E-1

CIRCUIT COURT OF OREGON
THIRD JUDICIAL DISTRICT
MARION COUNTY COURTHOUSE
100 HIGH STREET NE
P.O. BOX 12869
SALEM, OREGON 97309-0869

Courtland Geyer
Circuit Court Judge
(503) 373-4445
Fax: (503) 588-7928

November 21, 2013

James L. Buchal
Murphy & Buchal LLP
3425 SE Yamhill Street, Suite 100
Portland, OR 97214



Stacy C. Posegate
Oregon Department of Justice
Trial Division
1162 Court St NE
Salem, OR 97301-4096

RE: *Eastern Oregon Mining Association, et al. v. Oregon DEQ, et al.*
Marion County Docket No. 10C24263

Waldo Mining District, et al. v. Oregon DEQ, et al.
Marion County Docket No. 11C19071

Dear Ms. Posegate and Mr. Buchal:

On October 29, 2013, the Court heard oral argument on Defendants' Motion for Summary Judgment and Plaintiffs' Cross-Motion for Summary Judgement. Plaintiffs appeared by and through attorney of record, James L. Buchal; Defendants appeared by and through attorneys Stacy Posegate and Stephanie Parent. Having heard the respective arguments of the parties, reviewed the legal memoranda and relevant authority cited, the Court will briefly discuss the motions as they relate to each of the claims for relief.

FIRST CLAIM – ORS 183.484 / Judicial Review of Order Other Than Contested Case

Plaintiffs' challenges are multiple and complex. At the risk of oversimplification, plaintiffs – who engage in small-scale, in-water mining using small suction dredge hoses – challenge General Permit 700 PM ("the permit") put in effect by the Department of Environmental Quality ("DEQ") to enforce water quality standards established by the Environmental Quality Commission ("EQC). The permit established limits on the visible turbidity that miners could create in the water. Plaintiffs position is that DEQ had no authority to regulate under the federal Clean Water Act ("CWA"); that suction dredging adds no pollutants and, therefore, cannot run afoul of the CWA; and that the permit interferes with federally protected mining rights in an unreasonable manner. Plaintiffs believe that the permit violates Oregon law because the dredge discharge – which does not introduce anything that was not already in the water – cannot legally be considered "waste"; that the turbidity standard is

vague; and that there is not substantial evidence in the record to support the permit.

In moving for summary judgment, the parties have asked the Court, in essence, to make a legal determination in matters where there are no factual disputes (the Court recognizes that Defendants do not make a "mirror image" motion for summary judgment and argue that certain claims are inappropriate for summary judgement by either party). Plaintiffs have patiently waited a long time for their "day in court" – to explain the burden the permit will present; to present their own evidence proving the permit is unnecessary to protect aquatic life; and to challenge the explanations posited by defendants. The standards of review for most of these questions do not present issues of fact. This is true even on the issue of "substantial evidence" supporting DEQ's decision. While plaintiff understandably wishes to present their own evidence, it is well settled that on judicial review a reviewing court is not to reweigh the evidence and make its own factual findings; rather, the decision of the agency must be upheld if the record, viewed as a whole, would permit a reasonable person to make the same determination as the agency. In this case, the Court finds that on every issue except preemption (see, for example, paragraph 34 of the Third Amended Petition in 10C24263), defendants' positions are well-taken. The Court finds that defendants have not erroneously interpreted any provision of law and that "substantial evidence" – as defined by Oregon law for this kind of determination – exists in the record to support defendants' determinations in this case.

The issue of preemption asks whether the permit interferes with federally protected mining rights in an

unreasonable manner. A determination of what is "reasonable" versus "unreasonable" is a question of law; however, the parties present conflicting factual scenarios and studies to support their positions. It appears to the Court that issues of fact remain and summary judgement is inappropriate.

For the reasons and upon the authority set forth in defendants' legal memorandum and at the hearing in the matter, defendants' motion for summary judgment on the first claim for relief (except preemption) is GRANTED and plaintiffs' motion for cross summary judgment is DENIED. Motions for summary judgment and cross summary judgment on the issue of preemption are DENIED.

SECOND CLAIM – ORS 28.010 / Declaratory Judgment (Settlement Agreement)

Plaintiffs Eastern Oregon Mining Association, Guy Michael and Charles Chase also challenge a settlement agreement executed by defendants, settling a lawsuit brought by groups led by the Northwest Environmental Defense Center. The second claim for relief argues that the settlement agreement violates Oregon rulemaking procedure and that DEQ failed to use contested case proceedings. There is no genuine issue of material fact on this question. The Court finds no authority requiring contested case order in this circumstance; that settling a lawsuit is within the range of discretion delegated to the agency; the result is not inconsistent with any agency rule, position or prior practice; and that the settlement agreement does not violate any other provision of the Oregon Constitution or law. For the reasons and upon the authority set forth in defendants' legal memorandum and at the hearing in

the matter, defendants' motion for summary judgment on the second claim for relief is GRANTED and plaintiffs' motion for cross summary judgment is DENIED.

Ms. Posegate should prepare the appropriate order.

Very truly yours,

s/ Courtland Geyer
Courtland Geyer
Circuit Judge

CG:kat

FILED: Jan. 28, 2014

IN THE CIRCUIT COURT OF
THE STATE OF OREGON
FOR THE COUNTY OF MARION

EASTERN OREGON MINING ASSOCIATION, GUY MICHAEL, and CHARLES CHASE, Petitioners, v. OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY, DICK PEDERSON, in his capacity as Director of the Department of Environmental Quality, and NEIL MULLANE; in his capacity as Administrator of the Water Quality Division of the Department of Environmental Quality, Respondents.	Case No. 10C-24263 Honorable Courtland Geyer ORDER **ORS 20.140 – State fees deferred at filing**
WALDO MINING DISTRICT, an unincorporated association, THOMAS A. KITCHAR, and DONALD R. YOUNG Petitioners,	Case No. 11C-19071 Honorable Courtland Geyer

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY, DICK PEDERSON, in his capacity as Director of the Department of Environmental Quality, and NEIL MULLANE; in his capacity as Administrator of the Water Quality Division of the Department of Environmental Quality,

Respondents.

On October 29, 2013 this matter came before the Court on Respondents' Motion for Summary Judgment (OJIN# 90) and Petitioners' Cross-Motion for Summary Judgment (OJIN# 94). James L. Buchal, Attorney at Law, appeared for Petitioners and Senior Assistant Attorneys General Stacy C. Posegate and Stephanie Parent appeared for Respondents. Having reviewed the submissions and having heard oral argument from the parties, and having taken this matter under advisement and being fully informed in the premises, the Court issued its decision in the attached letter opinion Dated November 21, 2013. For the reasons set forth in the Court's letter opinion,

IT IS HEREBY ORDERED

1) Respondents' motion for summary judgment on Petitioners' First Claim for Relief – ORS 183.484 on the count of Preemption, ¶ 34 of the Third Amended Complaint, is DENIED;

2) Respondents' motion for summary judgment on Petitioners' First Claim for Relief – ORS 183.484 Review, on all counts' other than Preemption, and their motion for summary judgment on Petitioners' Second Claim for Relief; Challenge to Respondent's Use of Settlement Agreement is GRANTED; and

3) Petitioners' cross-motion for summary judgment on all claims and counts is DENIED.

Judgment shall be entered in favor of Respondents and against Petitioners consistent with the terms of this Order.

DATED this 28th day of Jan. 2014.

s/ Courtland Geyer
HONORABLE COURTLAND GEYER
Circuit Court Judge

Submitted by: Stacy C. Posegate
Senior Assistant Attorney General
Of Attorneys for Respondents

FILED: Jan. 28, 2014

IN THE CIRCUIT COURT OF
THE STATE OF OREGON

FOR THE COUNTY OF MARION

EASTERN OREGON MINING ASSOCIATION, GUY MICHAEL, and CHARLES CHASE, Petitioners, v. OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY, DICK PEDERSON, in his capacity as Director of the Department of Environmental Quality, and NEIL MULLANE; in his capacity as Administrator of the Water Quality Division of the Department of Environmental Quality, Respondents.	Case No. 10C-24263 Honorable Courtland Geyer GENERAL STIPULATED JUDGMENT **ORS 20.140 – State fees deferred at filing**
WALDO MINING DISTRICT, an unincorporated association, THOMAS A. KITCHAR, and DONALD R. YOUNG Petitioners,	Case No. 11C-19071 Honorable Courtland Geyer

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY, DICK PEDERSON, in his capacity as Director of the Department of Environmental Quality, and NEIL MULLANE; in his capacity as Administrator of the Water Quality Division of the Department of Environmental Quality,

Respondents.

On October 29, 2013, this matter came before the Court on Respondents' Motion for Summary Judgment (OJIN# 90) and Petitioners' Cross-Motion for Summary Judgment (OJIN# 94). James L. Buchal, Attorney at Law, appeared for Petitioners and Senior Assistant Attorneys General Stacy C. Posegate and Stephanie Parent appeared for Respondents. In accordance with the order granting Respondents' Motion for Summary Judgment, in part, and denying Petitioners' Cross Motion for Summary Judgment in its entirety, which order is incorporated herein by reference and based upon the Court's order and the stipulation of the parties below, **IT IS HEREBY ADJUDGED** that:

1) Judgment is given in favor of Respondents on all claims against Petitioners on all claims; and

2) Each party shall bear its own costs and attorneys' fees.

DATED this 28th day of January, 2014.

s/ Courtland Geyer
HONORABLE COURTLAND GEYER
Circuit Court Judge

Stipulation

Whereas, the Court has granted Respondents' motion for summary judgment on all claims, other than issues relating to preemption and denied Petitioners' cross-motion for summary judgment in its entirety;

Whereas, the parties desire to resolve this matter to facilitate the appeal of the issues decided by this court on the cross-motions for summary judgment, except for the issues relating to preemption;

Whereas, the parties agree that Petitioners' shall dismiss their claim under ORS 183.484 as it relates to issues of preemption such that the court's decision on these issues cannot be appealed from the Court's order;

IT IS HEREBY STIPULATED:

All allegations in the Third Amended Complaint alleging a claim relating to the laws of preemption, particularly ¶ 34, shall be dismissed without prejudice.

IT IS SO STIPULATED:

MURPHY & BUCHAL LLP

By s/ James L. Buchal
James L. Buchal, OSB # 921618
Phone: (503) 227-1011
Fax: (503) 573-1939
Email: jbuchal@mbllp.com

Attorney for Petitioners

DEPARTMENT OF JUSTICE

By s/ Stacy C. Posegate
Stacy C. Posegate, OSB # 064743
Phone: (503) 947-4700
Fax: (503) 947-4792
Email: stacy.c.posegate@doj.state.or.us

Attorney for Respondents

Submitted by: Stacy C. Posegate
Senior Assistant Attorney General
Of Attorneys for Respondents

GENERAL DISCHARGE PERMIT

Department of Environmental Quality
811 SW Sixth Avenue
Portland, OR 97204
Telephone: (503) 229-5630

Issued pursuant to ORS 468B.050 and 402 of the Federal Clean Water Act

---

ISSUED TO: SOURCES REQUIRED TO REGISTER UNDER THIS PERMIT:

1) small suction dredges not to exceed 30 horsepower with an inside diameter suction hose no greater than six inches used for recovering precious metals or minerals from stream bottom sediments in areas NOT designated as essential salmon habitat.

2) small suction dredges not to exceed 16 horsepower with an inside diameter intake nozzle no greater than 4 inches used for recovering precious metals or minerals from stream bottom sediments in areas designated as essential salmon habitat.

SOURCES COVERED BY THE PERMIT BUT NOT REQUIRED TO REGISTER

1) in-water nonmotorized mining equipment used doe recovering

precious metals or minerals from stream bottom sediments.

SOURCES NOT REQUIRED TO OBTAIN A WATER QUALITY PERMIT

1) hand panning

s/ Neil Mullane — 7/30/10
Neil Mullane, Administrator — Date
Water Quality Division

SCOPE OF PERMITTED ACTIVITIES

This 700PM permit replaces the 700PM permit issued in 2005. This permit is valid until December 31, 2014.

Until this permit expires or is modified or revoked, the registrant of this permit is authorized to mine and discharge turbid wastewater to waters of the state only in accordance with all the requirements, limitations, and conditions set forth in the attached schedules as follows:

DEFINITIONS

1. *Background Turbidity* means turbidity that represents the ambient, undisturbed turbidity as measured or observed at least 10 feet upstream or

upcurrent from the suction dredge or in-water nonmotorized mining equipment operation at the time dredging occurs.

2. *Daylight hours* are those hours between sunrise and sunset.
3. *DEQ* or *Department* means Oregon Department of Environmental Quality.
4. *Essential salmon habitat* means the habitat that is designated pursuant to ORS 196.810 and is necessary to prevent the depletion of indigenous anadromous salmon species during their life stages of spawning and rearing.
5. *Gravel Bar* means a transitional gravel deposit that lacks any rooted vegetation, located either between the stream banks and the wet perimeter of the stream or entirely within the wet perimeter of the stream.
6. *Habitat structure* includes:
   - *Boulders* include cobbles and larger rocks that protect and prevent erosion of the banks from spring run runoff and storm event stream flow;
   - *Woody* material includes living or dead trees, shrubs, stumps, large tree limbs, and logs;
   - *Vegetation* includes grasses, wildflowers, weeds, and other vegetation that stabilizes the stream banks or provides cover for fish or provides shade
7. *In-water nonmotorized mining equipment or device* are small scale prospecting and mining methods that use gravity separation for processing placer

ore and minerals within the wet perimeter such as a hand sluice box and mini rocker.

8. *OAR* means Oregon Administrative Rule.
9. *Pollution* or *water pollution* means alteration of the physical, chemical or biological properties of any waters of the state, including change in temperature, taste, color, turbidity, silt odor of the waters, or such discharge of any liquid; gaseous, solid, radioactive or other substance into any waters of the state, which will or tends to, either by itself or in connection with any other substance, create a public nuisance or which will or tends to render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational or other legitimate beneficial uses or to livestock, wildlife, fish or other aquatic life or the habitat thereof. ORS 468B.005(5).
10. *Stream bank* means a slope of land adjoining and confining a stream channel.
11. *Visible Turbidity* means turbidity that is distinctly visible when compared to background turbidity.
12. *Wastes* mean sewage, industrial wastes, and all other liquid, gaseous, solid, radioactive or other substances which will only cause pollution or tend to cause pollution of any waters of the state. ORS 468B.005(9). ·
13. *Wet perimeter* means the area of the stream that is underwater, or is exposed as a non-vegetated dry gravel bar island surrounded on all sides by actively moving water at the time the activity occurs.

HOW TO APPLY FOR COVERAGE UNDER THIS GENERAL PERMIT

A. Persons Seeking To Register Under This 700PM General Permit

1. Suction dredge operators can obtain coverage under this permit by the following steps:

   a. Obtain a DEQ application form by:

      i. Mail or in person from a DEQ regional office, or

      ii. Downloading the application from the DEQ website.

   b. Submit a completed application to DEQ, requesting coverage under this permit at least thirty days prior to the planned activity. The Department may accept applications filed less than thirty days from the planned activity on a case by case basis.

   c. Submit the annual permit registration fee or the optional 5-Year permit registration fee with the application. Permit holders registered for coverage under this permit that pay the annual permit registration fee, need only submit the annual permit registration fee. Unless the registrant's contact information or the operation has changed, DEQ does not require an application each year from registered permit holders paying the annual permit fee.

2. DEQ will review the applications submitted under sections (1) and (2) above and will take one of the following actions:

a. Issue written notice of permit registration approval.

b. Request additional information.

c. Deny coverage under this permit. The applicant will be notified if the applicant's operation cannot be approved for coverage under the permit, and that the applicant may need to obtain an individual permit.

3. Fees

a. To obtain and maintain coverage under this permit, the applicable fees provided in OAR 340-045-0075 must be received by the Department

b. Permit holders may, but are not required to, prepay multiple years of coverage in advance.

d. Failure to pay applicable fees may result in termination of coverage under this permit. Coverage may be restored upon payment of the fee.

4. An existing permit holder who submitted the 2010 annual fees in accordance with the 2005 permit is covered under this permit on its effective date. These permit holders must complete and submit the 2010 application form within 30 days to retain coverage.

5. Renewing coverage prior to the December 31, 2014 expiration date.

a. Before July 1, 2014 permit holders must:

i. Submit a complete application form to DEQ. The DEQ Director may grant permission to submit the application later than July 1, 2014 but no later than the permit expiration date.

ii. Submit all applicable fees with the permit application.

B. Sources Covered By this Permit But Not Required To Register Under The Permit

1. In-water nonmotorized mining. No application or fee is required for these activities. Persons conducting in-water nonmotorized mining must have a copy of the permit in their possession or readily available for inspection at the mining location.

COVERAGE AND ELIGIBILITY

1. Activities covered by this permit may not discharge wastes to waters of the state except in compliance with this permit.
2. Any person not wishing to be covered or limited by this permit may apply for an individual permit in accordance with the procedures in OAR 340-045-0030.
3. Persons covered by this permit may own or have access to multiple suction dredges or in-water nonmotorized mining equipment at the mining site. The person covered by this permit or, a designated person under supervision of that person, may only operate one device at a time. Other persons not assigned to this permit may operate either a single small suction dredge or in-water nonmotorized mining equipment under the

supervision of the permit holder if all conditions of this permit are met. The person covered by this permit must be present when supervising small suction dredge or in-water nonmotorized mining equipment operations by the alternate person.

4. During mining activities, persons covered by this permit must have a copy of the permit in their possession or readily available for inspection at the mining location. Copies of this permit are available at DEQ's website: http://www.deq.state.or.us/wq and at DEQ's regional offices listed on page 8.

SCHEDULE A

DISCHARGE LIMITATIONS FOR ALL EQUIPMENT

1. Suction dredges and in-water nonmotorized equipment authorized by this permit must not create visible turbidity beyond 300 feet downstream or downcurrent. In no case may the visible turbidity cover the entire wet perimeter. No wastes may be discharged and no activities may be conducted that will violate Water Quality Standards as adopted in OAR Chapter 340, Division 41.

2. If any visible increase in turbidity of wastewater discharges is observed above background turbidity beyond any point more than 300 feet downstream or downcurrent from the activity at any time, the operation must be modified, curtailed or stop immediately so that a violation as defined in Schedule A does not exist. Options to prevent, mitigate or correct turbid water discharges include, but are not limited to, ceasing operations,

moving the location of the operation, reducing process flow or using a smaller machine.

3. Suction dredge and in-water nonmotorized mining operations are prohibited during non-daylight hours.

4. Mining must not cause any measurable increase in turbidity in the Diamond Peak, Kalmiopsis, Eagle Cap, Gearhart Mountain, Mount Hood, Mount Jefferson, Mount Washington, Mountain Lakes, Oregon Islands, Strawberry Mountain, Three Arch Rocks and Three Sisters wilderness areas. Measureable increase in turbidity is measured as visible turbidity.

SCHEDULE B

MONITORING REQUIREMENTS FOR SUCTION DREDGE PERMIT HOLDERS

1. Suction dredge permit holders, or a person under the permit holder's supervision, must visually monitor the turbid wastewater discharges each day of the operation. Visual monitoring must be performed once a day during daylight hours.

2. Visual monitoring of the wastewater discharge must be conducted immediately downstream or down current from the mining activity until the turbidity plume is no longer visible.

3. The following information must be recorded in a monitoring log.

    a. Record the **date, location, equipment used, whether mitigation measures were needed to comply with the 300 foot turbidity limit,** and the **printed name of the**

person making the record in the monitoring log.

4. The log must be legible and available to authorities upon request.
5. The permit holder must maintain the records for at least three years.

SCHEDULE C

SPECIAL CONDITIONS

Best Management Practices

1. Suction dredges or in-water nonmotorized mining equipment must be operated to ensure that there is no overlap of turbidity plumes from equipment used in the same waters.
2. Suction dredging is not allowed outside the periods set in the in water work schedule (*Timing of In-Water Work To Protect Fish and Wildlife Resources*) established by the Oregon Department of Fish and Wildlife. Where written approval is required by ODFW, the operator must be in possession of a copy of that written approval or have it readily available during dredging activities.
3. Nonmotorized mining equipment may not be used where fish eggs are present.
4. Fish must be able to swim past the operation. The operator, equipment, turbid discharge, and other mining activities under this permit must not prevent a migrating fish to advance up- or downstream.
5. Dredging or mining from stream banks is not allowed under this permit.

6. Undercutting or eroding stream banks and removal or disturbance of boulders, rooted vegetation, or embedded woody plants and other habitat structure from stream banks is prohibited.
   - *Boulders* include cobbles and larger rocks that protect and prevent erosion of the banh from spring run runoff and storm event stream flow.
   - *Woody* plants include living or dead trees or limbs, and shrubs.
   - *Vegetation* includes grasses, wildflowers, weeds, and other vegetation that stabilizes the stream-banks or provides cover for fish or provides shade.
   - *Other natural features*.
7. Moving boulders, logs, or other stream habitat structure within the stream channel is allowed. However, in no case may this habitat structure be removed entirely from the stream bank is also prohibited.
8. Removal of habitat structure that extends into the stream channel from the stream bank is also prohibited.
9. This permit does not authorize operations that may affect bridge footings, dams, and other structures in or near the stream.
10. The suction dredge equipment must be properly maintained and petroleum products managed as follows:
    a. Discharging oil, grease and fuel from suction dredge activity is prohibited. The permit holder

must report spills according to requirements of Schedule D, Section D.2.

b. Equipment used for suction dredging must not release petroleum products. Equipment surfaces must be free of oils and grease, and must be checked for fuel-and oil leaks prior to start of operation on a daily basis.

c. A polypropylene pad or other appropriate spill protection and a funnel or spill-proof spout must be used when refueling to prevent possible contamination of surface waters or groundwater.

d. All fuel and oil must be stored in an impermeable container and must be located at least 25 feet from the wet perimeter of the stream For dredge locations where a 25 foot buffer is not possible addition precaution must be taken to ensure that petroleum products cannot spill or otherwise enter the stream.

e. In the event a spill occurs, suction dredge operators must contain, remove and mitigate such spills immediately. All waste oil or other clean up materials contaminated with petroleum products must be properly disposed off-site.

11. No wastewater discharges are allowed where the visible turbidity plume impacts the intake of a drinking water source. Drinking water source information tools to identify downstream intake locations are provided by the DEQ Drinking Water Protection Program and the Oregon Department of Water Resources.

12. Except as restricted in essential salmon habitat, suction dredging and obtaining placer ore for in-water nonmotorized mining is allowed into non-vegetated gravel bars up to 10 feet outside the wet perimeter of the stream.

13. Motorized wheeled or tracked equipment is prohibited below the ordinary high water mark except for the suction dredge and life support system (for example, breathing air supply).

14. Operators must ensure that mining equipment does not house invasive species. Equipment must be decontaminated prior to its placement in Oregon waters and when transferring from one water body to another. The Oregon Marine Board provides information including decontamination steps on aquatic invasive species. Discharge of decontamination solutions to waters of the state is prohibited.

15. Use of chemical agents such as mercury to improve mineral processing or metal extraction from ore or high-grade fines is not allowed under this permit.

CONDITIONS TO PROTECT OREGON SCENIC WATERWAYS, ESSENTIAL SALMON HABITAT, AND WILDERNESS AREAS

16. Suction dredging is prohibited in Oregon Scenic Waterways.

17. Areas designated as essential salmon habitat are restricted to small suction dredges not to exceed 16 horsepower with an inside diameter intake nozzle no greater than 4 inches.

18. Mining in essential salmon habitat is restricted to the wet perimeter of the stream.

CONDITIONS FOR SUCTION DREDGING ON WATER QUALITY LIMITED STREAMS

19. Suction dredging is prohibited on any stream segment that is listed as water quality limited for sediment, turbidity or toxics on the list published by DEQ pursuant to OAR 340-041-0046. This prohibition does not apply, however, to stream segments that were properly subject to mining under the 700-J permit between May 3, 1999 and July 1, 2005, or to stream segments subject to a total daily maximum load (TMDL) that specifically authorizes mining under the 700 PM permit.

    a. The 303(d) list of water quality limited streams is available on the DEQ website or at the following Department offices:

        i. Northwest Region
        2020 SW 4th Avenue, Suite 400
        Portland, OR 97201
        Tel. No. (503) 229-5263

        ii. Western Region
        165 East 7th Avenue, Suite 100
        Eugene, OR 97401
        Tel. No. 541-687-7326

        iii. Eastern Region
        700 SE Emigrant, #330
        Pendleton, OR 97801
        Tel. No. (541) 276-4063

iv. DEQ Headquarters
811 SW 6th Avenue 7th floor
Portland, OR 97204-1390
Tel. No (503) 229-6114
Tel. No. (800) 452-4011 (x6114)

SCHEDULE D
NPDES GENERAL CONDITIONS

Where the above permit requirements are in conflict with these general conditions, the permit requirements supersede these general conditions.

SECTION A. STANDARD CONDITIONS

1. Duty to Comply with Permit

The permit holder must comply with all conditions of this permit. Failure to comply with any permit condition is a violation of Oregon Revised Statutes (ORS) 468B.025 and the federal Clean Water Act and is grounds for an enforcement action. Failure to comply is also grounds for the Department to terminate, modify and reissue, revoke, or deny renewal of a permit.

2. Penalties for Water Pollution and Permit Condition Violations

The permit is enforceable by DEQ or EPA, and in some circumstances also by third-parties under the citizen suit provisions 33 USC §1365. DEQ enforcement is generally based on provisions of state statutes and EQC rules, and EPA enforcement is generally based on provisions of federal statutes and EPA regulations.

ORS 468.140 allows the Department to impose civil penalties up to $10,000 per day for violation of a term, condition, or requirement of a permit. The federal Clean Water Act provides for civil penalties not to exceed $32,500 and administrative penalties not to exceed $11,000 per day for each violation of any condition or limitation of this permit.

Under ORS 468.943, unlawful water pollution, if committed by a person with criminal negligence, is punishable by a fine of up to $25,000, imprisonment for not more than one year, or both. Each day on which a violation occurs or continues is a separately punishable offense. The federal Clean Water Act provides for criminal penalties of not more than $50,000 per day of violation, or imprisonment of not more than 2 years, or both for second or subsequent negligent violations of this permit.

Under ORS 468.946, a person who knowingly discharges, place, or causes to be placed any waste into the waters of the state or in a location where the waste is likely to escape into the waters of the state is subject to a Class B felony punishable by a fine not to exceed $200,000 and up to 10 years in prison. The federal Clean Water Act provides for criminal penalties of $5,000 to $50,000 per day of violation, or imprisonment of not more than 3 years, or both for knowing violations of the permit. In the case of a second or subsequent conviction for knowing violation, a person shall be subject to criminal penalties of not more

than $100,000 per day of violation, or imprisonment of not more than 6 years, or both.

3. Duty to Mitigate

The permit holder must take all reasonable steps to minimize or prevent any discharge or sludge use or disposal in violation of this permit that has a reasonable likelihood of adversely affecting human health or the environment. In addition, upon request of the Department, the permit holder must correct any adverse impact on the environment or human health resulting from noncompliance with this permit, including such accelerated or additional monitoring as necessary to determine the nature and impact of the noncomplying discharge.

4. Duty to Reapply

If the permit holder wishes to continue an activity regulated by this permit after the expiration date of this permit, the permit holder must apply for and have the permit renewed. The application must be submitted at least 180 days before the expiration date of this permit.

The department may grant permission to submit an application less than 180 days in advance but no later than the permit expiration date.

5. Permit Actions

This permit may be modified, revoked and reissued, or terminated for cause including, but not limited to, the following:

a. Violation of any term, condition, or requirement of this permit, a rule, or a statute

b. Obtaining this permit by misrepresentation or failure to disclose fully all material facts

c. A change in any condition that requires either a temporary or permanent reduction or elimination of the authorized discharge

d. The permit holder is identified as a Designated Management Agency or allocated a waste load under a Total Maximum Daily Load (TMDL)

e. New information or regulations

f. Modification of compliance schedules

g. Requirements of permit reopener conditions

h. Correction of technical mistakes made in determining permit conditions

i. Determination that the permitted activity endangers human health or the environment

j. Other causes as specified in 40 CFR 122.62, 122.64, and 124.5

The filing of a request by the permit holder for a permit modification, revocation or reissuance, termination, or a notification of planned changes or anticipated noncompliance, does not stay any permit condition.

6. Toxic Pollutants

The permit holder must comply with any applicable effluent standards or prohibitions established under Oregon Administrative

Rules (OAR) 340-041-0033 and 370(a) of the federal Clean Water Act for toxic pollutants and with standards for sewage sludge use or disposal established under Section 405(d) of the Clean Water Act within the time provided in the regulations that establish those standards or prohibitions, even if the permit has not yet been modified to incorporate the requirement.

7. Property Rights and Other Legal Requirements

The issuance of this permit does not convey any property rights of any sort, or any exclusive privilege, or authorize any injury to persons or property or invasion of any other private rights, or any infringement of federal, tribal, state, or local laws or regulations.

8. Permit References

Except for effluent standards or prohibitions established under Section 307(a) of the federal Clean Water Act and OAR 340-041-0033 for toxic pollutants and standards for sewage sludge use or disposal established under Section 405 (d) of the Clean Water Act, all rules and statutes referred to in this permit are those in effect on the date this permit is issued.

9. Permit Fees

The permit holder must pay the fees required by Oregon Administrative Rules.

SECTION B. OPERATION AND MAINTENANCE OF POLLUTION CONTROLS

1. Proper Operation and Maintenance

   The permit holder must at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) that are installed or used by the permit holder to achieve compliance with the conditions of this permit.

SECTION C. MONITORING AND RECORDS

1. Representative Sampling

   Sampling and measurements taken as required herein shall be representative of the volume and nature of the monitored discharge. All samples shall be taken at the monitoring points specified in this permit, and shall be taken, unless otherwise specified, before the effluent joins or is diluted by any other waste stream, body of water, or substance. Monitoring points may not be changed without notification to and approval of the Department.

2. Monitoring Procedures

   Monitoring must be conducted according to test procedures approved under 40 CFR part 136, or in the case of sludge use and disposal, under 40 CFR part 503, unless other test procedures have been specified in this permit.

3. Penalties of Tampering

   The Clean Water Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method

required to be maintained under this permit may, upon conviction, be punished by a fine of not more than $10,000 per violation, imprisonment for not more than two year, or both. If a conviction of a person is for a violation committed after a first conviction of such person, punishment is a fine not more than $20,000 per day of violation, or by imprisonment of not more than four years, or both.

4. Additional Monitoring by the Permit holder

   If the permit holder monitors any pollutant more frequently than required by this permit, using test procedures approved under 40 CFR part 136, or as specified in this permit, the results of this monitoring must be included in the calculation and reporting of the data submitted in the Discharge Monitoring Report. Such increased frequency must also be indicated.

5. Retention of Records

   The permit holder must retain records of all monitoring information, including all calibration and maintenance records for this permit for a period of at least 3 years from the date of the sampling or measurement. This period may be extended by request of the Department at any time.

6. Records Contents

   Records of monitoring information must include:

   a. The date, location, time, and methods of sampling or measurements;

   b. The individual(s) who performed the sampling or measurements;

c. The date(s) analyses were performed;

d. The individual(s) who performed the analyses;

e. The analytical techniques or methods used; and

f. The results of such analyses

7. Inspection and Entry

The permit holder must allow the Department or EPA upon the presentation of credentials, to:

a. Enter upon the permit holder's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;

b. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;

c. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practice, or operations regulated or required under this permit, and

d. Sample or monitor at reasonable times, for the purpose of assuring permit compliance or as otherwise authorized by state law, any substances or parameters at any location.

8. Confidentiality of Information

Any information relating to this permit that is submitted to or obtained by DEQ is available to the public unless classified as confidential by the Director of DEQ under ORS 468.095. The permit holder may request that information be classified as confidential if it is a trade secret as defined by that statute. The name and address of the permit holder, permit applications, permits, effluent data,

and information required by NPDES application forms under 40 CFR 122.21 will not be classified as confidential. 40 CFR 122.7(b).

SECTION D. REPORTING REQUIREMENTS

1. Transfers

   This permit may be transferred to a new permit holder provided the transferee acquires a property interest in the permitted activity and agrees in writing to fully comply with all the terms and conditions of the permit and the rules of the Commission. No permit may be transferred to a third party without prior written approval from the Department. The Department may require modification or revocation and reissuance of the permit to change the name of the permit holder and incorporate such other requirements as may be necessary under 40 CFR Section 122.61. The permit holder must notify the Department when a transfer of property interest takes place.

2. Twenty-Four Hour Reporting

   The permit holder must report any noncompliance that may endanger health or the environment. Any information must be provided orally (by telephone) within 24 hours from the time the permit holder becomes aware of the circumstances unless a shorter time is specified in the permit. During normal business hours, the Department's Regional office must be called. Outside of normal business hours, the Department must be contacted at 1-800-452-0311 (Oregon Emergency Response System).

   A written submission must also be provided within 5 days of the time the permit holder becomes aware

of the circumstances. The written submission must contain:

a. A description of noncompliance and its cause;

b. The period of noncompliance, including exact dates and times;

c. The estimated time noncompliance is expected to continue if it has not been corrected;

d. Steps taken or planned to reduce, eliminate and prevent reoccurrence of the noncompliance; and

The Department may waive the written report on a case-by-case basis if the oral report has been received within 24 hours.

3. Duty to Provide Information

The permit holder must furnish to the Department within a reasonable time any information that the Department may request to determine compliance with the permit or to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit. The permit holder must also furnish to the Department, upon request, copies of records required to be kept by this permit.

Other Information: When the permit holder becomes aware that it has failed to submit any relevant facts or has submitted incorrect information in a permit application or any report to the Department, it must promptly submit such facts or information.

4. Signatory Requirements

All applications, reports or information submitted to the Department must be signed and certified in accordance with 40 CFR Section 122.22.

5. Falsification of Information

   Under ORS 468.953, any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports of compliance or noncompliance, is subject to a Class C felony punishable by a fine not to exceed $100,000 per violation and up to 5 years in prison. Additionally, according to 40 CFR 122.41(k)(2), any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit including monitoring or reports of compliance or non-compliance shall, upon conviction, be punished by a federal civil penalty not to exceed $10,000 per violation, or by imprisonment for not more than 6 months per violation, or by both.

6. Changes to Discharges of Toxic Pollutant

   The permit holder must notify the Department as soon as it knows or has reason to believe the following:

   a. That any activity has occurred or will occur that would result in the discharge, on a routine or frequent basis, of any toxic pollutant that is not limited in the permit, if that discharge will exceed the highest of the following "notification levels;

      (1) One hundred micrograms per liter (100 µg/l);

      (2) Two hundred micrograms per liter (200 µg/l) for acrolein and acrylonitrile; five hundred

micrograms per liter (500 µg/l) for 2,4-dinitrophenol and for 2-methyl-4,6-dinitrophenol; and one milligram per liter (1 µg/l) for antimony;

(3) Five (5) times the maximum concentration value reported for that pollutant in the permit application in accordance with 40 CFR Section 122.21(g)(7); or

(4) The level established by the Department in accordance with 40 CFR Section 122.44(f).

b. That any activity has occurred or will occur that would result in any discharge, on a non-routine or highest of the following "notification levels":

(1) Five hundred micrograms per liter (500 µg/l));

(2) One milligram per liter (1mg/l) for antimony;

(3) Ten (10) times the maximum concentration value reported for that pollutant in the permit application in accordance with 40 CFR Section 122.21(g)(7); or

(4) The level established by the Department in accordance with 40 CFR Section 122.44(f).