No. _____

In The
Supreme Court of the United States

THOMAS A. KITCHAR, et al.,

Petitioners,

v.

OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY, et al.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Oregon

PETITION FOR WRIT OF CERTIORARI

JAMES L. BUCHAL
Murphy & Buchal LLP
3425 S.E. Yamhill Street,
Suite 100
Portland, OR 97214
Telephone: (503) 227-1011
jbuchal@mbllp.com

DAMIEN M. SCHIFF*
JEREMY TALCOTT
**Counsel of Record*
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
dschiff@pacificlegal.org
jtalcott@pacificlegal.org

Counsel for Petitioners Thomas A. Kitchar, Guy Michael, Donald R. Young, Charles Chase, Eastern Oregon Mining Association, and Waldo Mining District

QUESTION PRESENTED

The Clean Water Act forbids the unpermitted "*addition* of any pollutant to navigable waters," 33 U.S.C. § 1362(12) (emphasis added). *See id.* § 1311(a). Below, the Oregon Department of Environmental Quality determined, pursuant to federally delegated power, that the Act's prohibition applies to small-scale suction dredge mining. Although such mining results in the movement of native streambed matter, it adds no material to the waters in which it is conducted. The Supreme Court of Oregon upheld the Department's assertion of Clean Water Act authority, ruling—in conflict with decisions of this Court as well as the D.C. and Sixth Circuit Courts of Appeals—that the mere repositioning of things within a water results in the "addition" of pollutants to that water.

The question presented is:

Does the Clean Water Act regulate activities that simply move pre-existing material, such as rock, sand, and gravel, within a "navigable water"?

LIST OF ALL PARTIES

The Petitioners are: Thomas A. Kitchar; Guy Michael; Donald R. Young; Charles Chase; Eastern Oregon Mining Association; and Waldo Mining District.

The Respondents are: the Oregon Department of Environmental Quality; Richard Whitman, in his official capacity as Director of the Oregon Department of Environmental Quality; and Justin Green, in his official capacity as Administrator of the Water Quality Division of the Oregon Department of Environmental Quality. Pursuant to Rule 35(3), Director Whitman and Administrator Green are substituted for former Director Dick Pederson and former Administrator Neil Mullane, respectively, who were Respondents below.

CORPORATE DISCLOSURE STATEMENT

The Eastern Oregon Mining Association, an Oregon nonprofit corporation, has no parent corporation and no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED CASES

The proceedings in the state trial and appellate courts identified below are directly related to the above-captioned case in this Court.

Eastern Oregon Mining Association, et al. v. Oregon Department of Environmental Quality, et al., Nos. 10C-24263 & 11C-19071, Marion County Circuit Court (Jan. 28, 2014).

Eastern Oregon Mining Association, et al. v. Department of Environmental Quality, et al., No. A156161, 273 Or. App. 259, 361 P.3d 38 (Aug. 19, 2015).

Eastern Oregon Mining Association, et al. v. Department of Environmental Quality, et al., No. SC S063549, 360 Or. 10, 376 P.3d 288 (July 14, 2016).

Eastern Oregon Mining Association, et al. v. Department of Environmental Quality, et al., No. A156161, 285 Or. App. 821, 398 P.3d 449 (June 1, 2017).

Eastern Oregon Mining Association, et al. v. Department of Environmental Quality, et al., No. SC S065097, 365 Or. 313, 445 P.3d 251 (July 25, 2019).

TABLE OF CONTENTS

Page

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

Page(s)

Statutes

Page(s)

Regulations

Other Authorities

Page(s)

Page(s)

PETITION FOR WRIT OF CERTIORARI

Petitioners Thomas A. Kitchar, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Oregon.

OPINIONS BELOW

The final opinion of the Supreme Court of Oregon is reported at 365 Or. 313, 445 P.3d 251 (2019), and is reproduced in the Appendix beginning at A-1. The final opinion of the Oregon Court of Appeals is reported at 285 Or. App. 821, 398 P.3d 449 (2017), and is reproduced in the Appendix beginning at B-1. The initial opinion of the Supreme Court of Oregon is reported at 360 Or. 10, 376 P.3d 288 (2016), and is reproduced in the Appendix beginning at C-1. The initial opinion of the Oregon Court of Appeals is reported at 273 Or. App. 259, 361 P.3d 38 (2015), and is reproduced in the Appendix beginning at D-1. The letter opinion of the Marion County Circuit Court is unreported but is reproduced in the Appendix beginning at E-1.

JURISDICTION

The date of the decision sought to be reviewed is July 25, 2019. On September 5, 2019, Justice Kagan granted Petitioners' application to extend the time to file a petition for writ of certiorari from October 23, 2019, to December 22, 2019. *E. Or. Mining Ass'n v. Or. Dep't of Envtl. Quality*, No. 19A262.

Jurisdiction is conferred under 28 U.S.C. § 1257.

STATUTORY PROVISIONS AT ISSUE

The Clean Water Act provides in pertinent part:

> Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

33 U.S.C. 1342(a).

> At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall

> approve each submitted program unless he determines that adequate authority does not exist[.]

33 U.S.C. 1342(b).

> The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

33 U.S.C. 1362(6).

> The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

33 U.S.C. § 1362(12).

INTRODUCTION

The pickaxe-wielding and pan-toting miner seeking a bonanza is an icon of the history of the western United States. More than 150 years later, the image's essence endures among a generation of miners who are just as keen as their prospecting forebears to profit by a mother lode, but who are aided now by improved mining technology.

Rather than by panning, most in-stream, small-scale mining in the western United States today is

done by suction dredge. *See* Colin Arsenault, Note, *Suction Dredging in the United States: Current Regulations and Potential Paths Forward*, 25 Hastings Envtl. L.J. 161, 161–62 (2019) (observing that the rise in the price of gold has encouraged growth in "Artisanal and Small Scale Mining[,]" particularly suction dredge mining). This mining technique employs a small engine-powered hose to suck up rock, sand, and gravel from the streambed. The suctioned material is passed through a floating sluice box which separates out and retains gold and other heavy metals. App. A-3. The remainder of the suctioned material is then placed back into the water, ultimately to settle again on its native streambed.

Largely owing to regulation, suction dredge mining is a part-time pursuit. *See, e.g.*, Oregon Guidelines for Timing of In-Water Work to Protect Fish and Wildlife Resources 2–11 (June 2008)[1] (limiting in-water work for many streams and rivers to just two or three months per year). Although miners always hold out hope for "paydirt," suction dredge yields typically are modest. David Bernell, *et al.*, Inst. for Natural Resources, Or. State Univ., *Recreational Placer Mining in the Oregon Scenic Waterways System* 17 (2003).[2] That, however, does not faze modern-day forty-niners, who gain as much satisfaction from the knowledge that they participate in the living heritage of the intrepid prospector—and in sharing that heritage with others—as they do from the possible acquisition of lucre. *Id.* (observing that mining is for many "a very social activity—they bring their

[1] *Available at* https://bit.ly/2P5pVaw.

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

families, camp out for a weekend, and teach their children how they operate a suction dredge and pan for gold," and that "the historical place of mining in parts of Oregon is [] part of the attraction").

But unlike the prospectors of yore whose chief concerns were claim jumpers and mountain freshets, for today's suction dredge miners the principal threat comes from heavy-handed government. Below, the Supreme Court of Oregon held that suction dredge mining results in the "addition" of a pollutant to the waters in which it is conducted, and therefore requires a permit under the Clean Water Act. App. A-10. The court reached that conclusion even though suction dredge mining adds nothing but instead removes material from the waters in which it is practiced. *See* App. A-6 to A-7. Thus, according to the rule adopted below and followed by several other jurisdictions, the Clean Water Act's "addition of any pollutant" criterion can be satisfied by the mere movement of native material within a regulated water. Such a rule expands the scope of an already bloated statute to capture not just the small-scale mining at issue here, but also other normal and environmentally benign activities such as plowing. *See Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 814–15 (9th Cir. 2001) (deep plowing of vernal pool wetlands to plant orchards and vineyards results in the addition of a pollutant (soil) even though "no new material has been 'added'"), *aff'd* 537 U.S. 99 (2002) (affirmance by an equally divided Court).

The Court should grant the petition to address two issues of national importance.

First, the Court should resolve the conflict between (i) those courts, including the Supreme Court

of Oregon as well as the Ninth and Eleventh Circuit Courts of Appeals, that have adopted the "mere movement" rule, and (ii) decisions of this Court, as well as the D.C. Circuit and Sixth Circuit Courts of Appeals, holding that the mere movement of pre-existing pollutants within a regulated water does not trigger the Clean Water Act's permitting requirement. *See, e.g.*, *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109–10 (2004).

Second, this Court should reinforce the textual boundaries of the Clean Water Act to arrest the Act's continued deformation into an overbearing federal land-use statute. Over the last several years, this Court has shown great concern about the consequences of the Act's non-legislative expansion and aggressive enforcement. *See, e.g.*, *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016); *Sackett v. EPA*, 566 U.S. 120 (2012); *Rapanos v. United States*, 547 U.S. 715 (2006). The "mere movement" rule exacerbates this concern by excising one important limitation on the scope of the Act's permitting requirement—that an activity must *add* something to regulated waters in order to be regulated. *Cf. S.D. Warren Co. v. Maine Bd. of Envtl. Protection*, 547 U.S. 370, 380–81 (2006) ("The triggering statutory term here is not the word 'discharge' alone, but 'discharge of a pollutant,' a phrase made narrower by its specific definition requiring an 'addition' of a pollutant to the water."). It was this concern that led the Court to take up the "addition" issue in *Borden Ranch*, an issue which, because of Justice Kennedy's recusal, the Court could not then decide. This case, however, presents the Court with an opportunity to resolve the issue definitively.

STATEMENT OF THE CASE

The Clean Water Act's Regulation of Pollutant Discharges

The Clean Water Act generally prohibits the unpermitted "discharge of a pollutant" into "navigable waters." *See* 33 U.S.C. §§ 1311(a), 1362(12); *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 624 (2018). The Act defines "discharge of a pollutant" in relevant part as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). Thus, application of the Act's principal prohibition depends in part on whether the activity in question results in the "addition" of regulated material to a regulated water. *See Los Angeles County Flood Control Dist. v. Natural Resources Defense Council, Inc.*, 568 U.S. 78, 82–83 (2013).

The discharge of dredged or fill material is regulated by the Army Corps of Engineers; the discharge of all other "pollutants" is overseen by the Environmental Protection Agency. *Coeur Alaska, Inc. v. Se. Alaska Conserv. Council*, 557 U.S. 261, 273–74 (2009). The Act authorizes the delegation of both types of permitting authority to the states. *See* 33 U.S.C. §§ 1342(b), 1344(g).

Violation of the Act can subject individuals to criminal liability, *id.* § 1319(c), as well as ruinous civil liability, 40 C.F.R. § 19.4, Table 1 (civil penalties of up to $37,500 per day). *See generally Rapanos*, 547 U.S. at 721 (plurality op.) (["The Act] 'impose[s] criminal liability,' as well as steep civil fines, 'on a broad range of ordinary industrial and commercial activities.'") (quoting *Hanousek v. United States*, 528 U.S. 1102, 1103 (2000) (Thomas, J., dissenting from denial of certiorari)).

Suction Dredge Mining's Environmental Impacts

As noted above, suction dredges operate by vacuuming native streambed material into a floating sluice box, which captures gold and other heavy metals and allows the remaining material to resettle on the stream's floor. *See* App. A-3. Unlike the small-scale mining of yesteryear,[3] suction dredge prospecting uses no chemicals. Bernell, *supra*, at 44 ("There is no discharge of pollutants into the waterways, [and] there are no chemical components being used in the mining process . . . ."). In fact, suction dredge mining can benefit the aquatic environment by removing dangerous heavy metals, such as mercury, found within streambeds. *See* Cal. State Water Resources Control Bd., *Mercury Losses and Recovery During a Suction Dredge Test in South Fork of the American River* 7 (2005)[4] ("The test showed that a typical suction dredge set up to recover gold recovered about 98 percent of the mercury in the high-mercury, test sediment sample."); Bernell, *supra*, at 19, 44 ("In one year, miners statewide [in Oregon] turned in 10 pounds of mercury, a significant amount according to the [Department of Environmental Quality]," "equal to the mercury in 900,000 fluorescent bulbs—about half the number recycled in Oregon").

---

[3] *See, e.g.*, Mark Twain, *Roughing It* 252 (1872) ("A quantity of quicksilver was kept always in the battery, and this seized some of the liberated gold and silver particles and held on to them; quicksilver was shaken in a fine shower into the pans, also, about every half hour, through a buckskin sack.").

[4] *Available at* https://bit.ly/33yIise.

Particularly in comparison to larger types of placer mining, suction dredge mining's environmental impact is limited. *See* Nadia H. Dahab, Note, *Muddying the Waters of Clean Water Act Permitting:* NEDC *Reconsidered*, 90 Or. L. Rev. 335, 339 (2011) ("[S]mall suction dredging is more similar, at least with respect to the magnitude of its impact, to hand panning than it is to large placer mining: with small suction dredging, the streambed volume disturbed is relatively limited, as is the ancillary effect on sediment upstream and downstream of the mining location."); Bernell, *supra*, at 44 ("To provide a comparative perspective, [the Department of Environmental Quality] noted that recreational suction dredge mining is considered to be a very small activity when it comes to impacting water quality. . . . [R]ecreational placer mining is one of the most benign activities the department regulates . . . ."); Bret C. Harvey & Thomas E. Lisle, *Effects of Suction Dredging on Streams: A Review and an Evaluation Strategy*, 23 Fisheries Habitat 8, 8 (1998)[5] (although variation exists, "[e]ffects of [suction] dredging commonly appear to be minor and local").

The Miners' Challenge to Clean Water Act Regulation of Suction Dredge Mining

Some years ago Oregon issued, pursuant to authority delegated by EPA, its first general Clean Water Act permit[6] regulating small suction dredge

---

[5] *Available at* http://bit.ly/36N1Meu.

[6] *See generally* Jeffrey M. Gaba, *Generally Illegal: NPDES General Permits under the Clean Water Act*, 31 Harv. Envtl. L. Rev. 409, 410–11 (2007) ("Since 1979, EPA and states have had a process of issuing 'general permits' to satisfy the requirements of the Clean Water Act. These general permits may contain

mining conducted in Oregon's waters. *See Nw. Envtl. Defense Ctr. v. Envtl. Quality Comm'n*, 223 P.3d 1071, 1074 (Or. Ct. App. 2009). Following that permit's expiration, the state issued in 2005 a new general permit, which two of the Petitioners here, as well as environmental groups, challenged directly in the Oregon Court of Appeals. *Id.* at 1074–75. That court held the permit invalid, reasoning that it did not distinguish between "discharges of dredged material that are permitted by the Corps and discharges of turbid wastewater that are permitted by the EPA." *Id.* at 1086. The Supreme Court of Oregon granted review but ultimately dismissed the appeal as moot when, in 2010, the state issued another superseding permit. *Nw. Envtl. Def. Ctr. v. Envtl. Quality Comm'n*, 245 P.3d 130 (Or. 2010).

All Petitioners here then initiated an action in Oregon trial court to challenge the 2010 permit on a variety of grounds, among them that the state lacked authority to issue the permit under the Clean Water Act. App. E-2. On cross-motions for summary judgment, the trial court upheld the permit, App. E-5; App. F-2; App. G-2 to G-3, and Petitioners appealed. This time, however, the Oregon Court of Appeals itself dismissed the action as moot following the 2010 permit's expiration during the pendency of the appeal. App. D-4. On review of that decision, the Supreme Court of Oregon reversed, concluding that Petitioners' challenge fell within the mootness exception for

---

enforceable effluent limitations and other requirements, but, unlike individual permits, they may apply to large numbers of sources discharging into many different bodies of water.").

actions capable of repetition yet likely to evade review. App. C-3, C-14.

On remand, Petitioners renewed their arguments against the 2010 permit. In addition to contesting the state's position that the Clean Water Act authorized the 2010 permit, Petitioners sought to highlight the permit's many practical deficiencies. To begin with, the 2010 permit dramatically limits the size of motorized suction dredge equipment. Regardless of the size of a stream or the ability of larger equipment to meet the permit's conditions, the permit allows for suction dredges no greater than 30 horsepower with a suction hose no wider than six inches. App. H-1. The permit prohibits "any visible increase in turbidity of wastewater discharges . . . above background turbidity beyond any point more than 300 feet downstream or downcurrent from the activity at any time[.]"[7] App. H-8. It also forbids any change in turbidity that extends from bank to bank, *see id.*, thus effectively precluding mining in smaller streams as well as in larger streams during low-water periods. The permit also imposes burdensome recordkeeping requirements, mandating the detailed daily monitoring and recordation of turbidity and the amounts of mercury encountered and recovered within the sluice box, as well as the preservation of

[7] Turbidity, *i.e.*, the measure of the effect of suspended materials on a liquid's opacity, is not itself a defined "pollutant," *cf.* 33 U.S.C. § 1362(6), but is instead merely a characteristic of pollutants. *See* Dahab, *supra*, at 339 n.21 ("[T]urbidity, itself, is not a 'pollutant,' but an indicator thereof."). The only such "characteristic" of pollutants that the Clean Water Act defines as itself a pollutant is "heat," 33 U.S.C. § 1362(6). In contrast, Oregon law defines turbidity itself as a pollutant. Or. Rev. Stats. § 468B.005.

this voluminous information for three years and its rendering to government inspectors at any time. App. H-9 to H-10, H-22. Because all of this information is presumptively considered to be public, *see* App. H-22 to H-23, the permit frequently results in the disclosure to other enterprising prospectors of miners' promising potential claims. Perhaps most ominously, the 2010 permit subjects miners to financially devastating federal fines for any permit violations, *see* App. H-16 to H-17,[8] which can be enforced by third parties under the Clean Water Act's citizen suit provision, 33 U.S.C. § 1365, *see* App. H-15.

Despite its legal deficiencies and onerous conditions—the latter of which bode particularly ill for miners' regulatory future, given the Clean Water Act's "anti-backsliding" provision presumptively prohibiting the relaxation of such conditions in subsequent permits, 33 U.S.C. § 1342(*o*)(1)—the Oregon Court of Appeals upheld the 2010 permit.[9] The court rejected Petitioners' argument that suction dredge mining results in no "addition" of any pollutants. App. B-24 to B-26. And unlike the 2005 permit, the 2010 permit was, according to the court, appropriately limited to regulating "visible turbidity resulting from small suction dredge mining." App. B-27.

---

[8] The cap for federal civil penalties is more than three times that for correlated state penalties. *See* App. H-16.

[9] The pertinent provisions of the current permit are at least as strict as those in the 2010 permit. *Compare* App. H-1, H-8 to H-10, H-15 to H-16, H-22 to H-23 *with* Gen. Permit, Nat'l Pollutant Discharge Elimination Sys., Wastewater Discharge Permit, Permit 700PM, at 1, 7, 8, 11–12, 14 (May 2018), *available at* https://bit.ly/34LuHiN.

On review, the Oregon Supreme Court affirmed, holding, among other points,[10] that suction dredge mining results in the addition of a pollutant to the waters in which it is conducted. App. A-10. The court rejected Petitioners' argument that the mere movement of material within a regulated water cannot constitute such an addition. *See* App. A-6. Relying principally on the Ninth Circuit's decision in *Rybachek v. U.S. EPA*, 904 F.2d 1276 (9th Cir. 1990), the court elaborated that, in its view, suction dredge mining "does more than 'merely transfe[r]' polluted water from one part of the same water body to another"; it purportedly "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." App. A-10. The court did not, however, explain why the mere movement of one type of pollutant (streambed material) as opposed to another ("polluted water") should matter in determining whether there has been an "addition" of a pollutant to a regulated water.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts With Decisions of This Court and Several Lower Courts

The Clean Water Act's reach is limited to activities that result in "any addition of any pollutant." 33 U.S.C. § 1362(12). *See id.* § 1311(a).

---

[10] The court affirmed, over a dissent, the 2010 permit's regulation of discharges from suction dredges as "processed waste" subject to EPA's oversight rather than "dredged" material subject to Corps permitting. App. A-57 to A-58.

This Court, joined by several lower courts, has read that quoted phrase to encompass only those activities that in fact add pollutants to regulated waters. In contrast, the decision below adopts the view of other lower courts that the mere movement—such as the resuspension or redeposit—of materials already existing within a regulated water is sufficient to constitute the "addition" of a pollutant and thus trigger the Act's burdensome regulatory scheme. The conflict that this "mere movement" rule creates with the decisions of this Court and others merits the Court's review.

A. The decision below conflicts with this Court's decisions in *Miccosukee* and *Los Angeles County Flood Control District*

This Court has held that the Clean Water Act's permitting scheme does not reach activities that merely move existing pollutants within a regulated water body, even if such intra-water movement might adversely affect water quality in particular segments of that water body. The rule adopted below—that such mere movement can trigger the Act—is irreconcilable with that holding.

In *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, the Court addressed whether the Clean Water Act requires a permit for the discharge of pollutants if those pollutants originate from a "hydrologically indistinguishable part[] of [the same] water body." *Id.* at 109. The Court concluded that pumping pollutants between "two parts of the same water body" does not "constitute an 'addition' of pollutants." *Id.* The reason why, the Court explained, is demonstrated by a

homely example from cookery: "[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." *Id.* at 110 (quoting *Catskill Mountains v. City of New York*, 273 F.3d 481, 492 (2nd Cir. 2001)).

The Court reaffirmed *Miccosukee* less than a decade later. In *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*, 568 U.S. 78, the Court addressed whether "the flow of water out of a concrete channel within a river bank [is] a 'discharge of a pollutant.'" *Id.* at 80. In ruling that "no discharge of pollutants occurs when water . . . simply flows from one portion of the water body to another," the Court emphasized that its holding followed "*a fortiori*, from *Miccosukee*." *Id.*

The theory of liability adopted below (and, as discussed in the following section, adopted by many other jurisdictions) would hold that the mere movement of pollutants within a regulated water is itself a regulated discharge. That position cannot be reconciled with the Clean Water Act as construed by this Court. *See* Jeffrey G. Miller, *Plain Meaning, Precedent, and Metaphysics: Interpreting the "Addition" Element of the Clean Water Act Offense*, 44 Envtl. L. Rep. News & Analysis 10770, 10800 (2014) ("The Supreme Court also impliedly rejected the ['mere movement'] theory in *Miccosukee* when it adopted the Second Circuit's *Catskill I* soup-ladle analogy for addition.").

To be sure, the decisions in *Miccosukee* and *Los Angeles Flood Control District* concern just the movement of polluted "water," whereas suction dredge mining also "[p]ick[s] up the bed material," including "rock and sand," which are defined as "pollutants,"

33 U.S.C. § 1362(6). App. A-8 (quoting EPA, Response to Comments on Idaho Small Suction Dredge General Permit 5 (May 2018)).[11] But this distinction is unavailing. The Clean Water Act's definition of "discharge of a pollutant" does not turn on the type of pollutant being discharged. *See* 33 U.S.C. § 1362(12). Neither does the rationale that underlies the Court's decisions in *Miccosukee* and *Los Angeles County Flood Control District*—something cannot be "added" if it was already there.

Moreover, as far as Petitioners are aware, neither Oregon nor EPA nor the Corps has ever contended that a regulated water's streambed is not part of the water itself. That shouldn't be surprising—were the rule otherwise, a person would be free to flout all of the Clean Water Act's provisions by the expedient of discharging when a stream is dry. *But see United States v. Moses*, 496 F.3d 984, 989 (9th Cir. 2007)

---

[11] Although "the EPA, since 1997, has expressly regulated small suction dredge mining under the [Clean Water Act] permitting scheme," *Nw. Envtl. Defense Ctr.*, 223 P.3d at 1083 (citing examples), "[t]he general definitional section of EPA's . . . regulations, 40 C.F.R. §122.2, does not define 'addition' [and] EPA's few attempts to clarify the meaning of 'addition' have only muddied the waters," Miller, *"Addition"*, *supra*, at 10773. To the extent that ad hoc regulation of suction dredge mining by EPA or the Corps might otherwise operate as an authoritative construction of "addition," *see* App. A-16 to A-58, no such deference would be warranted to such a contrary-to-plain-meaning interpretation. *See Los Angeles County Flood Control Dist.*, 568 U.S. at 82 ("Under a common understanding of the meaning of the word 'add,' no pollutants are 'added' to a water body when water is merely transferred between different portions of that water body."). *Cf. Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 57 (2014) ("Under *Chevron*, the statute's plain meaning controls, whatever the [agency] might have to say.").

("[E]ven the now often-dry portion of Teton Creek remains a water of the United States just as it was antediluvially."), *aff'g United States v. Moses*, No. CR-05-061-E-BLW, 2006 WL 1459836, at *7 (D. Idaho May 25, 2006) ("[T]here is no requirement that there be water in the streambed . . . .").

This Court's review is merited.

B. The decision below extends an entrenched conflict among the lower courts

Besides conflicting with decisions of this Court, the rule adopted below worsens an already entrenched split among lower courts as to the interpretation of the Clean Water Act's regulation of the "addition of any pollutant."

Consistent with the principle articulated in *Miccosukee* and affirmed in *Los Angeles County Flood Control District*, some lower courts have held that the mere movement of pollutants within a regulated water does not constitute the "addition" of pollutants. *See Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 174–75 (D.C. Cir. 1982) (affirming EPA's position with respect to dams as point sources—namely, that the "addition from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world"); *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 585 (6th Cir. 1988) (following *Gorsuch* to hold that "manipulation of water by [a point source that] changes the form of the pollutant from live fish to a mixture of live and dead fish in the process of generating electricity . . . . does not mean that the [point source] 'adds' a pollutant to Lake Michigan"). *See generally Catskill*

Mountains, 273 F.3d at 492 ("The *Gorsuch* and *Consumers Power* decisions comport with the plain meaning of 'addition' . . . ."). *Cf. Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1404 (D.C. Cir. 1998) ("[T]he straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back."); *United States v. Law*, 979 F.2d 977, 979 (4th Cir. 1992) ("Where 'pollutants' existed . . . in the waters of the United States before contact with [point sources], the mere diversion in the flow of the waters [does] not constitute 'additions' of pollutants to the waters.").

In contrast, many decisions—some expressly relied upon by the Supreme Court of Oregon below, *see* App. A-10—hold that the mere movement of pre-existing pollutants within a regulated water can itself qualify as the "addition" of pollutants. *See, e.g.*, *United States v. Deaton*, 209 F.3d 331, 335 (4th Cir. 2000) ("The idea that there could be an addition of a pollutant without an addition of material seems to us entirely unremarkable . . . ."); *Rybachek*, 904 F.2d at 1285–86 ("[E]ven if the material discharged originally comes from the streambed itself, such resuspension may be interpreted to be an addition of a pollutant under the Act."); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983) ("The word 'addition', as used in the definition of the term 'discharge,' may reasonably be understood to include 'redeposit.'"). *Accord United States v. Cundiff*, 555 F.3d 200, 213–14 (6th Cir. 2009); *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 948–49 (7th Cir. 2004). Perhaps "the most extreme of these . . . decisions," Miller, *"Addition"*, *supra*, at 10801, is *United States v.*

M.C.C. of Florida, Inc., 772 F.2d 1501 (11th Cir. 1985), which held that a tugboat propeller's stirring up of sediment onto submerged sea grass beds was an "addition" of "dredged spoil" pollution, *id*. at 1506.

Resolution of this conflict among the lower courts is particularly important given the degree to which a "resuspension" or "redeposit" interpretation of "addition" diverges from Congressional intent and results in a reckless extension of significant liability for normal, everyday activities. Indeed, adoption of the "mere movement" rule "would . . . flaunt the given definition of 'discharge,' [and] would . . . criminaliz[e] every artificial disturbance of the bottom of any polluted harbor because the disturbance moved polluted material about[,]" a result that should only obtain if "Congress . . . redefine[s] the term 'discharge.'" *United States v. Wilson*, 133 F.3d 251, 259–60 (4th Cir. 1997) (opinion of Niemeyer, J.). *See* Jeffrey G. Miller, *Plain Meaning, Precedent, and Metaphysics: Lessons in Statutory Interpretation from Analyzing the Elements of the Clean Water Act Offense*, 46 Envtl. L. Rep. News & Analysis 10297, 10306 (2016) (observing in the "redeposit" cases the employment of "a fanciful metamorphosis [that] suggests that the argument that a violation has occurred may be equally fanciful").

This Court's review is merited.

II. The Rule Adopted Below Radically Expands the Scope of the Clean Water Act's Permitting Requirement, Thereby Raising an Issue of National Importance

The decision below is emblematic of the significant non-legislative expansion of the Clean

Water Act's permitting requirement, a trend over which members of this Court have repeatedly expressed concern. *See, e.g.*, *Hawkes Co., Inc.*, 136 S. Ct. at 1816 (Kennedy, J., concurring) ("[B]ased on the Government's representations in this case, the reach and systemic consequences of the Clean Water Act remain a cause for concern."); *Rapanos*, 547 U.S. at 722 (plurality op.) ("[An] immense expansion of federal regulation of land use . . . has occurred under the Clean Water Act—without any change in the governing statute—during the past five Presidential administrations."). *Cf. Sackett v. EPA*, 566 U.S. at 132 (Alito, J., concurring) ("The reach of the Clean Water Act is notoriously unclear.").

The proposition—which Oregon is just the latest jurisdiction to adopt—that the mere movement of material within a regulated water is itself a regulated discharge of a pollutant, imposes significant burdens on productive activity well beyond the small, vocational mining at issue in this case.

A case in point is *Borden Ranch*. There, a landowner sought to convert a ranch into vineyards and orchards but, to do so, needed to deep-plow the land to break up subsurface impermeable layers so as to allow for adequate root growth. *See Borden Ranch*, 261 F.3d at 812. Such "deep ripping" by definition adds nothing to the land where it is conducted. *See id.* at 814 (observing that deep ripping "simply churns up soil that is already there, placing it back basically where it came from"). Nevertheless, the landowner in *Borden Ranch* was convicted in a Clean Water Act civil action, and that judgment was affirmed by a divided Ninth Circuit. The panel majority explained that "activities . . . are not immune from the Clean

Water Act merely because they do not involve the introduction of material brought in from somewhere else." *Id.* at 814–15. Dissenting, Judge Gould would have held that "the return of soil in place after deep plowing is not a 'discharge of a pollutant.'" *Id.* at 819 (Gould, J., dissenting). Although through deep plowing "the hydrological regime is modified," Judge Gould concluded that any such ecological impact was irrelevant, because "Congress spoke in terms of discharge or addition of pollutants, not in terms of change of the hydrological nature of the soil."[12] *Id.* at 820.

The landowner then sought review from this Court on, among other questions, "[w]hether deep plowing ranchland to plant deep-rooted crops constitutes the 'addition' of a 'pollutant' . . . so as to fall within . . . the Clean Water Act." Br. For Pet'rs at 1, *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, No. 01-1243, 2002 WL 1990144 (Aug. 26, 2002). The Court granted the petition in full, *Borden Ranch*

---

[12] Judge Gould distinguished the Ninth Circuit's decision in *Rybachek*, on which the Supreme Court of Oregon relied, on the ground that the placer mining there at issue was understood to result in the movement of "process[e]d" material "to a substantially different geographic location." *Borden Ranch*, 261 F.3d at 820 (Gould, J., dissenting). Here, however, suction dredges release material in the same location that it was collected, and the "processing"—passing gravel and sand through a floating sluice box—is de minimis. *Cf.* Kara Marciniec, Comment, *When (Moving) Dirt Hurts: How the Ninth Circuit in* Borden Ranch Partnership v. United States Army Corps of Engineers *Could Have Better Justified Its Decision to Protect Wetlands*, 27 U. Haw. L. Rev. 417, 434 (2004) (criticizing *Borden Ranch* and other redeposit decisions for not focusing on "the distance [the material] was moved in determining whether it was regulable").

P'ship v. U.S. Army Corps of Eng'rs, 536 U.S. 903 (2002), but, because of Justice Kennedy's recusal, *id*., produced a non-precedential 4-4 affirmance of the Ninth Circuit majority, *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002).

The reasons for Supreme Court review now are just as strong as they were then. Indeed, commentators have underscored the continuing need for this Court's intervention to narrow how some lower courts have interpreted "addition." *See, e.g*., Miller, *"Addition"*, *supra*, at 10773, 10803 (advocating for construing "addition" to mean "the act of a person adding a pollutant to navigable waters from a point source, when that pollutant would not otherwise be in those navigable waters" and observing that the contrary "redeposit" decisions "push 'addition' to its outer limit"); Adam Gerber, Casenote, Borden Ranch Partnership v. U.S. Army Corps of Engineers*: A Barge in a Bucket? May Isolated Wetlands Be Considered "Navigable Waters" Under the CWA?*, 15 Vill. Envtl. L.J. 415, 433 (2004) (noting that the rule in cases like *Borden Ranch* "could impose severe regulatory burdens"); Arthur F. Coon, *Is Plowing a Point Source Discharge? The Aftermath of* Borden Ranch, 18 Nat. Res. & Env't 6, 7 (Summer 2003) (arguing that "the Ninth Circuit's holding in *Borden Ranch* is wrong on the law, and should ultimately be overruled by the U.S. Supreme Court if the same issues arise again in another case"). *Cf*. Timothy S. Bishop, *et al*., *Counting the Hands on* Borden Ranch, 34 Envtl. L. Rep. (Envtl. L. Inst.) 10,040 (2004) (noting the parallel between the argument that "moving water around within a single water body cannot amount to an 'addition' of a pollutant" and the *Borden Ranch* petitioners' position that "moving soil around within a wetland cannot be

the 'addition' of a pollutant because it adds nothing new to the wetland").

Whether the activity is small-scale mining, normal farming practices, or mere tugboat operation, the legal issue raised in *Borden Ranch* and raised anew in the decision below is of national importance, and merits this Court's review.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: December 2019.

Respectfully submitted,

JAMES L. BUCHAL
Murphy & Buchal LLP
3425 S.E. Yamhill Street,
Suite 100
Portland, OR 97214
Telephone: (503) 227-1011
jbuchal@mbllp.com

DAMIEN M. SCHIFF*
JEREMY TALCOTT
**Counsel of Record*
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
dschiff@pacificlegal.org
jtalcott@pacificlegal.org

Counsel for Petitioners Thomas A. Kitchar, Guy Michael, Donald R. Young, Charles Chase, Eastern Oregon Mining Association, and Waldo Mining District