No. 19-839

IN THE SUPREME COURT OF THE UNITED STATES

EASTERN OREGON MINING ASSOCIATION, et al.,

Petitioners,

v.

OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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

ELLEN F. ROSENBLUM
Attorney General
BENJAMIN GUTMAN*
Solicitor General
DENISE G. FJORDBECK
Attorney-in-Charge
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
denise.fjordbeck@doj.state.or.us
Attorneys for Respondents

*Counsel of Record

QUESTION PRESENTED

Did the Oregon Supreme Court correctly hold, in agreement with the views of the U.S. Environmental Protection Agency, that the discharged wastewater from suction dredge mining requires a permit under section 402 of the Clean Water Act?

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RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

The question presented in this case is narrow, easily answered, and of little forward-looking consequence to the parties to this case. Suction dredge mining discharges a turbid mixture of stream water and sediment from the streambed back into the stream. The question is whether that activity involves the "addition of any pollutant" to the stream; if it does, it requires a permit under section 402 of the Clean Water Act.

In 2010, respondent Oregon Department of Environmental Quality (DEQ) issued a general permit under section 402 that allowed individuals to engage in small-scale suction dredge mining as long as they met certain water-quality criteria. Petitioners challenged the permit, arguing that it was beyond DEQ's authority under section 402. The permit expired in 2014, and Oregon has since adopted a different and more restrictive set of regulations of suction dredge mining as a matter of state law. Whether the now-expired 2010 permit should or should not have issued under the Clean Water Act has little forward-looking significance for petitioners, who must comply with state law regardless how the Clean Water Act is interpreted.

As explained below, there are strong prudential reasons to deny review here even if the question presented otherwise deserved this Court's attention. In

particular, there is a serious mootness issue that this Court would have to address if it granted review. But in any event, the question presented does not warrant review. The Oregon Supreme Court's interpretation of the Clean Water Act here is consistent with the longstanding views of the U.S. Environmental Protection Agency (EPA) and the conclusion of every other appellate court to consider the issue. Its ruling does not conflict with any decisions of this Court and does not implicate any circuit split. For those reasons, the Court should deny the petition.

STATEMENT

A. The state regulates suction dredge mining under both the Clean Water Act and state law.

Suction dredge mining involves the use of a small motorized pump to vacuum up water and sediment. Pet. App. A-3. The material is then passed over a sluice tray, separating out heavy metals including gold, and the remainder is discharged into the stream. *Id.* Ejection of the water and sediment creates a plume of turbid wastewater, and re-mobilizes pollutants such as mercury that would otherwise have remained undisturbed and inactive in the stream bed. Pet. App. A-3 to A-4.

Because of the adverse effects that suction dredge mining can have on water quality, it is regulated under both federal and state law. At issue here are now-expired general permits that the state issued under section 402 of the Clean

Water Act to allow suction dredge mining as long as that activity met certain water-quality standards.

The Clean Water Act, 33 U.S.C. § 1251 *et seq.*, is a comprehensive statute designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* § 1251(a). To accomplish that goal, the Act assigns "distinct roles for the Federal and State Governments." *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 704 (1994). That structure gives states, not the federal government, primary responsibility for regulating water quality. "It is the policy of the Congress to recognize, preserve, and protect the *primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution" in the Nation's waters. 33 U.S.C. § 1251(b) (emphasis added); *see also PUD No. 1 of Jefferson County*, 511 U.S. at 707.

In general terms, the Clean Water Act makes it unlawful to discharge any pollutant without a permit. 33 U.S.C. § 1311(a) ("Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful."). The term "discharge of a pollutant," in turn, is defined as "any *addition* of any pollutant to navigable waters from any point source[.]" 33 U.S.C. § 1362(12) (emphasis

added). The Act's definition of "pollutant" explicitly includes the materials ejected from suction dredges:

> 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) (emphasis added). Furthermore, suspended solids are specifically included in the definition of conventional pollutants. 33 U.S.C. § 1314(a)(4).

The EPA is empowered, under Section 402 of the Act, to issue permits for the discharge of pollutants. 33 U.S.C. § 1342(a)(1). In the alternative, a state may opt to administer its own program. 33 U.S.C. § 1342(b). If the state program is approved by the EPA, it supplants EPA's role in issuing permits for discharges to water. 33 U.S.C. § 1342(c)(1). Any such state program must be at least as stringent as that administered by the EPA, but states are free to adopt standards that are more stringent than required by the Clean Water Act. 33 U.S.C. § 1370.

In 2005, the Oregon Environmental Quality Commission issued a five-year general permit allowing anyone to engage in small-scale suction dredge mining as long as they complied with state water quality standards. *Nw. Envtl. Def. Council v. Envtl. Quality Comm'n*, 223 P.3d 1071, 1074 (Or. App. 2009)

("*NEDC*"). Both miners and environmentalists challenged the permit in state court. The Oregon Court of Appeals concluded that the process of suction dredge mining created turbid wastewater plumes that required a section 402 permit. *Id.* at 1085. It also held, however, that the permit was overbroad to the extent it regulated dredged material within the exclusive jurisdiction of the Army Corps of Engineers. *Id.* at 1086. The Oregon Supreme Court allowed review, 240 P.3d 1097 (Or. 2010), but later dismissed the petition for review as moot after the permit expired by its own terms in 2010, 245 P.3d 130 (Or. 2010).

In 2010, DEQ issued another five-year general permit, tailored to match the requirements set by the Court of Appeals in the *NEDC* case. Pet. App. C-4. That permit, which expired at the end of 2014 (Pet. App. D-3), is the subject of this case. Pet. App. H.

In the meantime, the state has also taken action under state law to regulate suction dredge mining and mitigate its impacts on water quality. In 2013, the legislature adopted a moratorium on motorized mining in streams containing salmon habitat and adjoining uplands. 2013 Or. Laws, ch, 783, *available at* https://www.oregonlegislature.gov/bills_laws/lawsstatutes/2013orLaw0783.pdf. In passing that law, the legislature found that the practice had increased significantly in recent years, raising concerns about cumulative

impacts, and that the practice posed "significant risks to Oregon's natural resources, including fish and other wildlife, riparian areas, water quality, the investments of this state in habitat enhancement and areas of cultural significance to Indian tribes." *Id.* § 1(4)–(5).

The moratorium was to remain in effect until January 2, 2021. *Id.* § 2. The legislature directed the governor to consult with relevant state and federal agencies, tribes, and affected stakeholders and propose a revised regulatory framework. *Id.* § 8. In 2017, the legislature acted again, enacting a prohibition on motorized mining operations in streams designated as "essential indigenous anadromous salmonid habitat." Or. Rev. Stat. § 468B.114(2). Motorized mining is allowed in streams not so designated, provided that the operator has an individual permit or is covered under a general permit. Or. Rev. Stat. §468B.114(1). The legislation also imposes additional restrictions, such as limiting the size of dredge hoses. Or. Rev. Stat. § 468.116. Miners challenged the state law, but the Ninth Circuit held that it was a reasonable state environmental regulation that was not preempted by federal mining laws, and this Court denied review of that ruling. *Bohmker v. Oregon*, 903 F.3d 1029 (9th Cir. 2018), *cert. den.*, 139 S. Ct. 1621 (2019).

B. The Oregon Supreme Court upheld DEQ's authority to issue the 2010 permit allowing suction dredge mining under certain conditions.

As noted earlier, in 2010 ODEQ exercised its authority under section 402 of the Clean Water Act to issue a new five-year general permit allowing small-scale suction dredge mining as long as it complied with water-quality standards. Petitioners challenged the permit, arguing (among other things) that section 402 did not give DEQ authority to regulate their suction dredge mining. Pet. App. C-5.

That challenge was still pending in the Oregon Court of Appeals at the end of 2014, when the permit expired. Pet. App. C-6. That court held that the case was moot and dismissed the appeal. Pet. App. D-4.

The Oregon Supreme Court reversed. Pet. App. C-14. The court agreed with the Court of Appeals that the case was moot. Pet. App. C-8. But because there is no "case or controversy" provision in the Oregon Constitution, Oregon courts have the discretion, under certain circumstances, to decide moot cases. Pet. App. C-10. Those circumstances are defined by a statute, Or. Rev. Stat. § 14.175, that sets forth a standard similar to but not exactly the same as the capable-of-repetition-yet-evading-review standard that applies in federal court:

> In any action in which a party alleges that an act, policy or practice of a public body, as defined in ORS 174.109, or of any officer, employee or agent of a public body, as defined in ORS 174.109, 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 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.

Applying that standard, the Oregon Supreme Court held the case met the statutory criteria and that the Court of Appeals therefore had the discretion to decide to hear the case notwithstanding that it was moot. Pet. App. C-13. It remanded the case to the Court of Appeals for that court to decide whether to exercise that discretion. *Id.*

On remand, the Court of Appeals upheld the order and general permit. Pet. App. B-27. The court determined that it would exercise its discretion to consider a single issue: whether DEQ had authority, under Section 402 of the Clean Water Act, to regulate turbid wastewater discharges from suction dredges. Pet. App. B-16 to B-20. On that issue, the court adhered to its 2009 *NEDC* opinion, noting again that the EPA has consistently agreed that the turbid wastewater discharge was a "pollutant" subject to regulation under Section 402. Pet. App. B-21 to B-27.

The Oregon Supreme Court affirmed. Pet. App. A-3. The court rejected petitioners' argument that suction dredge mining did not add a pollutant to the water. Pet. App. A-10. It agreed with the holding of *Rybachek v. EPA*, 904 F.2d 1276 (9th Cir. 1990), that even if the material discharged as a result of the mining comes from the streambed itself, the resuspension of the material in the water constitutes the addition of a pollutant that requires a permit. Pet. App. A-6 to A-7. The court noted that the EPA confirmed that conclusion as recently as 2018, stating that no permit is necessary if "only water was picked up and placed back within the same waterbody" but that when bed material is also picked up with the water that causes the addition of pollutants to the stream. Pet. App. A-7 to A-8.

The Oregon Supreme Court also rejected at much greater length a separate argument that petitioners do not raise here: that the discharge from suction dredge mining is a discharge of fill material regulated under section 404 of the Clean Water Act rather than under Section 402. Pet. App. A-10 to A-58. One justice dissented as to that issue alone. Pet App. A-58 to A-76.

ARGUMENT

This Court should deny the petition for certiorari both because of problems with using this case as a vehicle to decide the question presented and because that question does not warrant this Court's review. First, there is a

serious question whether this case is moot under Article III standards, even though it satisfied the looser requirements for adjudication in state court. The petition does not grapple with that question. Regardless whether mootness is a jurisdictional problem here, it is a strong prudential reason to deny review. Second, the question presented has limited practical significance to petitioners because their mining activities can be (and are) regulated just as much under state law. Finally, the Oregon Supreme Court's decision does not conflict with prior decisions of this court or decisions of the federal courts of appeals. Whatever other issues may arise in interpreting the Clean Water Act, the courts and the EPA agree that vacuuming up heavy metals and other materials from the streambed, resuspending them in water, and then discharging the turbid wastewater is the addition of a pollutant to the stream that requires a Clean Water Act permit.

A. There is a serious question whether this case is moot under Article III standards.

The judicial power under Article III extends to "Cases" and "Controversies." A case that becomes moot at any point during the proceedings is no longer a case or controversy for purposes of Article III. *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018). There is an exception for a controversy that is "capable of repetition, yet evading review." *Id.* at 1540. But that exception applies only if "(1) the challenged action is in its duration too

short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the *same* complaining party will be subjected to the same action again." *Id.* (emphasis added).

The same constraints do not apply in Oregon's state courts. In particular, the state capable-of-repetition exception to mootness does not require a showing that the *same* party will again be affected by a similar action. *Penn v. Bd. of Parole & Post-Prison Supervision*, 451 P.3d 589, 620 (Or. 2019).

Here, the permit that petitioners challenged expired in 2014. Pet. App. D-3. The state courts nonetheless decided the case under the broader state capable-of-repetition exception to mootness, on the ground that five years (the permit's length) is too short to allow full litigation of the permit's validity. Pet. App. C-12.

But it is unclear whether those circumstances would also satisfy Article III's stricter requirements. First, although this Court has held that duration of less than two years may satisfy the evading-review prong, *see Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016), the period of time here—five years—is longer than anything this Court approved under that prong. Second, there may be other procedural vehicles for addressing the question presented that will not go moot when the permit expires. For example, a challenge to a permit's validity likely will not evade review, regardless when

the permit expires, if the challenger is fined for violating it and contests the fine. Finally, the record does not reflect whether petitioners personally will be affected by the permitting question in the future in light of the more recent state laws restricting suction dredge mining in certain streams.

This Court's precedents suggest that it cannot review a case that is moot under Article III standards even if the state courts would choose to adjudicate them. "Whatever the practice in the courts" of Oregon, "the duty of this Court is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Local No. 8-6, Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. Missouri,* 361 U.S. 363, 367 (1960); *see also Richardson v. Ramirez*, 418 U.S. 24, 36 (1974) ("While the Supreme Court of California may choose to adjudicate a controversy simply because of its public importance, and the desirability of a statewide decision, we are limited by the case-or-controversy requirement of Art. III to adjudication of actual disputes between adverse parties."); *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974). *But cf. ASARCO Inc. v. Kadish*, 490 U.S. 605, 617–18 (1989) (holding that a state court adjudication of a federal question can give rise to Article III standing even if the plaintiff would not have met the requirements for standing in federal court).

But even if this case satisfied Article III requirements, either under the capable-of-repetition exception or because the state court addressed the merits of the federal issue, the serious mootness question would be a strong prudential reason to deny review. It is all the more compelling a reason to deny review when the petition does not grapple with the question or explain why the mootness issue that the Court would inevitably have to confront warrants review.

B. The Clean Water Act question has little practical significance for petitioners because their mining can be and is regulated under state law.

This Court also should deny review because the question presented, even if otherwise certworthy, will have limited forward-looking significance for petitioners. Even if the Clean Water Act did not require them to get a section 402 permit to engage in suction dredge mining, the state could (and would) insist that they get a materially identical permit under state law. It is of limited practical significance whether the permit is required by federal or state law or both.

At the time that this matter was filed, the regulations adopted by DEQ were based on the authority delegated to states under the Clean Water Act. 33 U.S.C. § 1342(b). Since that time, the Oregon legislature has exercised its own authority to impose stricter environmental regulations to protect sensitive fish

and other species. The Clean Water Act explicitly allows states to do so. 33 U.S.C. § 1370.

The fundamental premise advanced by the petitioners is that the Clean Water Act does not authorize DEQ to regulate the discharge of the small suction dredges that they operate. Even if that were true, the Oregon Legislature required in 2013 and again in 2017 that operators of motorized in-stream dredges obtain a permit from DEQ. The current statute, Or. Rev. Stat. § 468B.114(1) states, "An operator may not allow a discharge to waters of the state from a motorized in-stream placer mining operation or activity without having an individual permit or being covered by a general permit issued under ORS 468B.050." The latter statute refers to water quality permits issued by DEQ or, for agricultural operations within its delegated authority, the Oregon Department of Agriculture. These Oregon statutes provide independent authority to DEQ to regulate the discharge of turbid wastewater from motorized suction dredges through a permit system. As a result, petitioners are subject to the same requirements regardless whether those requirements arise under federal or state law.

C. The Oregon Supreme Court's ruling is correct, matches the EPA's longstanding interpretation of the Clean Water Act, and does not conflict with decisions of this Court or the courts of appeals.

Even if the procedural and practical reasons discussed above for denying review were not present, the question presented here does not warrant this Court's review. The Oregon Supreme Court correctly held that discharging turbid wastewater through suction dredge mining is the addition of a pollutant to a stream that requires a permit under section 402. That uncontroversial decision follows straightforwardly from the text of the Clean Water Act, is consistent with the EPA's interpretation of the statute and this Court's precedent, and neither creates nor implicates any circuit split.

1. The Clean Water Act requires a person to obtain a permit, such as a section 402 permit, to "discharge any pollutant." 33 U.S.C. § 1311(a). The term "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The definition of "pollutant" includes "dredged spoil," "rock," and "sand," and another section of the Act expressly recognizes "suspended solids" as pollutants. 33 U.S.C. § 1314(a)(4), 1362(6).

Suction dredge mining involves vacuuming up water and sediment from a streambed, running it over a sluice to remove some of the heavier metals, and discharging the turbid wastewater back into a stream. Pet. App. A-3. There is

no dispute for purposes of this petition that the turbid wastewater is a pollutant, the streams at issue are navigable waters, and the suction dredge is a point source; the sole dispute is whether the mining causes the "addition" of the pollutant to the waters. Petitioners argue that it does not because the suspended solids in the wastewater came from the streambed, so they are merely moving pollutants from one part of a waterbody to another part of the same waterbody. Pet. 20. But as the Oregon Supreme Court correctly held, the turbid wastewater that comes out of a suction dredge is *not* the same as what went in.

The court explained 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." Pet. App. A-10. It thus does not "merely transfer polluted water from one part of the same water body to another." *Id.* (brackets and quotation marks omitted). Thus, even if the solids came from the streambed, "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." *Id.*

2. The EPA has consistently interpreted the Clean Water Act the same way. For decades, it has regulated the operation of suction dredges in the states that have chosen not to accept a delegation of authority under section 402

of the Act. For example, in 2018, EPA issued a general permit for small suction dredge operators in Idaho. *See* Pet. App. A-7 to A-8. The primary pollutant of concern was described as suspended solids resulting from agitation of the stream water and bed materials while processing it through the dredge. EPA, *IDG370000 Fact Sheet*, at 8, *available at* https://www.epa.gov/sites/production/files/2017-12/documents/r10-npdes-idaho-suction-dredge-gp-idg370000-fact-sheet-2017.pdf (last visited Apr. 16, 2020). In describing the permit, EPA stated:

> Operators of small suction dredges in Idaho must obtain NPDES permit coverage. The permit places conditions on the discharge of rock and sand from each mining operation to protect water quality and aquatic resources. These conditions include best management practices and prohibited areas.

EPA, *NPDES General Permit for Small Suction Dredge Placer Mining in Idaho*, *available at* https://www.epa.gov/npdes-permits/npdes-general-permit-small-suction-dredge-placer-miners-idaho (last visited Apr. 16, 2020). In response to a comment similar to the argument made here, that suction dredging simply moves material from one place to another within the same body of water, EPA explained the difference between merely moving water around and manipulating it to make it more turbid:

> 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. However, in suction dredging, bed material is also picked up with water. Picking up the bed

> material is in fact the very purpose of suction dredging – the bed material is processed to produce gold. This process is an intervening use that causes the addition of pollutants [rock and sand, see CWA § 502(6)] to be discharged to waters of the United States. As a result, the water transfer exclusion in 40 CFR 122.3(i) does not apply, and an NPDES permit is required for the discharge from this activity.

EPA, *Response to Comments*, at 6 (May 2018), *available at* https://www.epa.gov/sites/production/files/2018-05/documents/r10-npdes-idaho-suction-dredge-gp-idg370000-rtc-2018.pdf (last visited Apr. 29, 2020) (citation omitted; brackets in original).

This Court often pays particular attention to the views of the agencies charged with enforcing legislation, "in light of the agency's expertise in a given area, its knowledge gained through practical experience, and its familiarity with the interpretive demands of administrative need." *County of Maui v. Hawaii Wildlife Fund*, __ U.S. __ (slip op. at 12) (April 20, 2020). EPA has consistently treated the material emitted from small suction dredges is a pollutant to be regulated under Section 402 of the Clean Water Act. EPA's views confirm that the Oregon Supreme Court ruled correctly here.

3. The Oregon Supreme Court's ruling is consistent with this Court's precedent under the Clean Water Act. Petitioners argue that the ruling conflicts with two of this Court's opinions (Pet. 14–16), but neither addressed the issue presented here.

In *South Florida Water Management Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), the dispute was about whether a permit was needed when a water district pumped water from a canal into a reservoir a short distance away. This Court ultimately remanded to the district court for further factual development about whether the canal and the reservoir were distinct water bodies. *Id.* at 99. The parties agreed that no permit was required if they were a single waterbody: "if one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." *Id.* at 110 (quoting *Catskill Mountain Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001)) (brackets omitted).

The ladle analogy explains why a permit is not needed when a point source (the ladle) merely takes water (soup) from a body (pot) and moves it to unchanged to another part of the body. Here, however, suction dredge mining does not take a ladle of "soup" (clean water) from the stream and redeposit it. It takes the soup, mixes it with sediment that was not in the water, and pours the turbid mixture with suspended solids it back into the pot. It is not the simple movement of water from one place in a stream to another. *South Florida Water Management* did not address anything like the activity at issue here.

Neither did *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council, Inc.*, 568 U.S. 78 (2013). The question presented

there was, "Under the CWA, does a "discharge of pollutants" occur when polluted water 'flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river,' and then 'into a lower portion of the same river'?" *Id.* at 82. This court held that "no discharge of pollutants occurs when water, rather than being removed and then returned to a water body, simply flows from one portion of the water body to another." *Id.* at 83. But suction dredge mining does not involve water "simply flow[ing] from one portion of the water body to another." It removes material from a stream and its streambed, processes the material, and returns the result to a stream in an entirely different state than it entered.

4. Finally, petitioners are incorrect in asserting that there is an "entrenched conflict" between decisions of federal circuit courts of appeal about the question presented here. Pet. 17. To the contrary, those courts that have considered the issue presented here—whether suction dredge mining causes the addition of a pollutant that requires a Clean Water Act permit—have uniformly decided the issue in the same way that the Oregon Supreme Court did. There is no conflict that requires resolution by this court.

In *Rybachek*, the Ninth Circuit squarely addressed the issue presented here and rejected the argument that suction dredge mining does not add any

pollutant to the water. 904 F.2d at 1286. Citing cases from the Fifth and Eleventh Circuits, as well as EPA's longstanding interpretation, the court concluded that "resuspension" of solids in the wastewater from the dredge was within Section 402's purview as discharge of pollutants from a point source. *Id.* at 1285–86.

The decision in *Rybachek* is not at odds with *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982). There, the court adopted an interpretation set forth by the EPA that the discharge from hydroelectric dams did not introduce "pollutants" into the water. *Id.* at 161. The question turned on whether low dissolved oxygen, cold, or supersaturation are pollutants, and whether "addition" of those qualities was a discharge from a point source under Section 402. *Id.* at 171–75. The court deferred to EPA's longstanding position, since the Act was adopted, that dams are not subject to Section 402. *Id.* at 171. EPA's position was reasonable, because unlike the pollutants in this case (dredged spoil, rock, and sand), the conditions brought about by dams were not listed as pollutants in the Act, and they were conditions rather than substances. *Id.* at 171; *see also National Wildlife Fed. v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) (adopting EPA's distinction between facilities that remove fish from water and discharge dead fish from a facility that, in the process of moving water, causes some fish mortality).

The other cases that petitioners cite to support the argument that there is a circuit split are not to the contrary. Petitioner refer to a selective quote in *United States v. Law*, 979 F.2d 977 (4th Cir. 1992), but the holding in that case—affirming a felony conviction for discharging pollutants without a Section 402 permit—confirms rather than conflicts with the consistent position of the federal courts of appeals. Similarly, in *Catskill Mountains*, 273 F.3d 481, the Second Circuit held that a discharge of water containing sediments from a tunnel into a creek was a discharge of pollutants. And *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), dealt with incidental fallback of dredged material from a permitted dredging operation. The court held that fallback of material into the same place from where it was removed is not a discharge of pollutants. That case did not address the discharge of suspended solids creating a turbid plume.

The federal appellate courts have consistently held that the movement of suspended materials such as dredge spoil, soil, and rock—as opposed to the mere movement of water from one place to another—creates the discharge of a pollutant that is subject to the requirements of the Clean Water Act. Whatever other disagreements there may be about how to interpret the Clean Water Act, the question presented here does not implicate any circuit split that requires resolution by this court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General

/s/ Benjamin Gutman

BENJAMIN GUTMAN
Solicitor General
benjamin.gutman@doj.state.or.us
DENISE G. FJORDBECK
Attorney-in-Charge
denise.fjordbeck@doj.state.or.us
Attorneys for Respondents

DGF:aw2/10227390