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.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Introduction

Whether the Clean Water Act regulates the mere movement of pre-existing "pollutants" within a water subject to the Act's jurisdiction is an issue of national importance over which lower courts are in conflict, both with this Court and with one another. Oregon offers a few arguments for why the Court's review of the "mere movement" rule in this case is unwarranted. None has merit.

First, the case is not moot because the question presented is capable of repetition yet would evade review were the normal rules of mootness to be applied. Clean Water Act permits do not last long enough to guarantee full review before their expiration, and Petitioners and their members have been and will continue to be subject to such permits. To decline review because of supposed mootness would therefore produce a striking injustice: Oregon would gain the benefits of a ruling resolving an important federal issue in its favor while Petitioners and others similarly situated would be denied the opportunity to seek review of that pressing federal issue in this Court.

Second, the question presented matters a great deal to Petitioners. To be sure, the states can regulate suction dredge mining (and for that matter any activity in waters subject to the Clean Water Act) at least as strictly as the federal government. But a determination that suction dredge mining is not an activity that requires a Clean Water Act permit would, at the very least, substantially reduce the potential civil and criminal liability that a miner would face for alleged permit violations. It also would

facilitate miners' efforts at legislative change by de-nationalizing the regulation of suction dredge mining.

Finally, whether the mere movement rule is a correct interpretation of the Clean Water Act is an issue of national importance. Oregon offers no argument for why that rule, adopted below, is not the same as that followed in *Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001), *aff'd*, 537 U.S. 99 (2002) (affirmance by an equally divided Court), which this Court has held to be worthy of its attention. And regardless of *Borden Ranch*, review is warranted to resolve the conflicts that the mere movement rule creates with decisions of this Court and certain courts of appeals.

Argument

I. This Case Is Not Moot

Citing the expiration of its 2010 suction dredge mining permit, Oregon contends that review should be denied because this action may be moot. Resp. Br. 11-12. A lawsuit is not moot, however, "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." *Turner v. Rogers*, 564 U.S. 431, 439-40 (2011) (brackets and quotation marks omitted) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)). Regardless of whether Oregon's doctrine of mootness is looser than this Court's, Petitioners' action remains a live controversy under the federal standard for "capable of repetition yet evading review."

First, as its permitting practice in this case illustrates, Oregon regularly issues National Pollutant Discharge Elimination System (NPDES) permits for suction dredge mining, and the conditions attached to these permits continue to be stringent. Pet. 9-12 & n.9.[1]

Second, as the Oregon Supreme Court correctly concluded, because NPDES permits last no more than five years,[2] 33 U.S.C. § 1342(b)(1)(B), litigants lack adequate time to obtain full review of a permit prior to its expiration and replacement. *See* Pet. App. C-11 (citing, inter alia, *Trustees for Alaska v. EPA*, 749 F.2d 549, 555 (9th Cir. 1984); *Montgomery Environmental Coalition v. Costle*, 646 F.2d 568, 582-83 (D.C. Cir 1980)). This review-escaping dynamic is pronounced in Oregon, given the state's particularly time-consuming process for contesting administrative actions like NPDES permits, Pet. App. C-12 ("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."), a point borne out by this action, Pet. App. C-13 ("[T]he difficulty of obtaining timely judicial review . . . is nowhere better illustrated than this very

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[1] The most recent permit, issued this month, maintains the prior limitation of a 30-horsepower suction motor and a 4-inch diameter hose, as well as the no-visible-turbidity standards. Dep't of Envtl. Quality, Gen. Permit, Nat'l Pollutant Discharge Elimination Sys., Waste Discharge Permit, Permit 700PM, at 1, 8 (issued May 6, 2020), https://bit.ly/2WyVqgz.

[2] The time can be substantially less than that. The current permit, issued this month, *supra* n.1, replaces a permit issued just two years ago. Dep't of Envtl. Quality, Metal Mining Activities, 700-PM Water Quality General Permit, https://bit.ly/2Xh9hqX.

case, which now has become moot not once, but twice, and even then after the parties requested—and were denied—expedited consideration.").

Oregon suggests that more expeditious review could be obtained by a miner as a defendant in an action seeking fines or other penalties for violation of a permit's conditions. But this Court normally does "not require plaintiffs to 'bet the farm . . . by taking the violative action' before 'testing the validity of the law.'" *Free Enterp. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 490 (2010) (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007)). Indeed, review that can be had only by inviting enforcement from another party is generally inadequate. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016); *Sackett v. EPA*, 566 U.S. 120, 127 (2012). Moreover, such indirect review may not even be statutorily authorized here. *See* 33 U.S.C. § 1369(b)(2) (generally prohibiting collateral review of, inter alia, EPA permitting decisions); Or. Rev. Stats. § 183.480(2) ("Judicial review of final orders of agencies shall be solely as provided by [the direct review provisions of the Oregon Administrative Procedure Act].").

Third, because they want to continue suction dredge mining in areas covered by NPDES permits, Petitioners and their members are and will be subject to subsequent versions of the permit challenged here. *See* Decl. of Pet'rs on Review Guy Michaels, Thomas A. Kitchar, and Donald R. Young ¶ 4, Or. Sup. Ct. No. S063549 (docketed March 4, 2016) (declaring that the aforementioned Petitioners "have one or more mining claims that are outside the SB 838 moratorium areas, and would like to engage in suction

dredging on those claims without the restrictions unlawfully imposed by [the Oregon Department of Environmental Quality's] misuse of Section 402 of the federal Clean Water Act").[3]

Finally, even if this action were otherwise moot under federal law, the Oregon Supreme Court's ruling on the merits of the federal statutory issue, a ruling that binds Petitioners as a matter of res judicata as well as all Oregon citizens as a matter of precedent, creates a case or controversy sustaining this Court's jurisdiction. *See ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617-18 (1989) (a state court action that normally would not be justiciable in this Court is properly heard when "petitioners allege a specific injury stemming from the state-court decree, a decree which rests on principles of federal law").

II. This Case Will Have a Significant Impact on Petitioners

The state argues against review because this Court's resolution of the question presented would allegedly mean little to Petitioners, given Oregon's independent authority to regulate suction dredge

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[3] In 2017, the Oregon Legislature repealed the SB 838 permitting moratorium and enacted a permanent prohibition on motorized suction dredge mining applicable to "essential indigenous anadromous salmonid habitat." Or. Rev. Stats. § 468B.114(2). The scope of the permanent prohibition is in fact narrower than that of the moratorium, which applied to bull trout as well as salmon habitat, 2013 Or. Laws ch. 783, § 2(1). *See Bohmker v. Oregon*, 903 F.3d 1029, 1032-33 & n.2 (9th Cir. 2018). Hence, Oregon's assertion that "more recent state laws restricting suction dredge mining in certain streams" may preclude Petitioners' ability to pursue their mining claims, Resp. Br. 12, is not well founded.

mining. Resp. Br. 13-15. The state's argument proves too much. The Clean Water Act is not field-preemptive. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 497-98 (1987). Thus, every Clean Water Act case that this Court has taken necessarily presented the possibility of state regulation of the activity at issue. *See* 33 U.S.C. § 1370 (prohibiting only state regulation that is less stringent than federal standards). In fact, the desire to reaffirm the states' traditional authority over land and water has driven the Court's decision-making in several Clean Water Act cases. *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1471 (2020); *Rapanos v. United States*, 547 U.S. 715, 737-39 (2006) (plurality op.); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001). Thus, far from undercutting the need for review, the fact that Oregon can regulate suction dredge mining provides further reason for this Court to take the case.

In any event, Oregon's independent authority to regulate suction dredge mining does not make this case a trifle. Eliminating federal regulation would mean eliminating the threat of separate federal civil and criminal liability, 33 U.S.C. § 1319(c)-(d), as well as exposure to federal citizen suits along with their attorney fee liability, *id.* § 1365(a)(1), (d). These changes to the regulatory status quo would provide substantial relief to Petitioners and other suction dredge miners. *See* Br. Amicus Curiae of Am. Mining Rights Ass'n, *et al.*, at 10 ("The continued viability of small-scale mining, represented largely by suction dredge mining, turns on whether the 'mere movement' rule adopted by the Oregon Supreme Court and other courts will stand.").

III. The Rule Adopted Below Presents an Issue of National Importance and Conflicts With Decisions of This Court and Other Lower Courts

Oregon contends that its supreme court correctly decided that suction dredge mining results in the "addition of a pollutant" to the waters in which it is conducted. The state therefore impliedly argues that the question presented is not important enough to warrant this Court's review. Resp. Br. 15-16. Yet Oregon does not cite, much less discuss, *Borden Ranch*. One of the questions raised there—whether redeposit of materials within a regulated water triggers the Clean Water Act's permitting requirement—is precisely the issue raised here. *Cf.* Pet. 20-23. Accordingly, this case presents an excellent opportunity for the Court to resolve what it could not in *Borden Ranch*.

Oregon also tries to explain away the conflicts that the "mere movement" rule creates with decisions of this Court and certain lower courts. Resp. Br. 19-22. The state considers these decisions to be distinguishable because they concerned the movement of just water or other non-pollutants, whereas suction dredge mining results in the movement of defined pollutants in addition to water. But if these cases had really been only about the movement of pollutant-free water, there would have been nothing to contest. *Cf. Orleans Audubon Soc'y v. Lee*, 742 F.2d 901, 910 (5th Cir. 1984) ("Clear water is not within the definition of a pollutant under the [Clean Water Act]."). Rather, it is precisely because the cases dealt (as here) with the movement of defined pollutants that they were litigated. *See L.A. County*

Flood Control Dist. v. Natural Resources Defense Council, 568 U.S. 78, 80-81 (2013) (stormwater polluted with "aluminum, copper, cyanide, fecal coliform bacteria, and zinc"); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 101 (2004) (canal water "contain[ing] elevated levels of phosphorous"); *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 585 (6th Cir. 1988) (hydroelectric dam discharge "chang[ing] the form of the pollutant from live fish to a mixture of live and dead fish"); *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 163-64 (D.C. Cir. 1982) (dam discharges containing, among other things, "minerals and nutrients" and "sediment"); *id.* at 174 n.56 ("EPA admits that 'sediment' is a pollutant . . . .").

The state's alternative basis for distinguishing this case law—suction dredge mining somehow changes the pre-existing streambed material—is simply incorrect. To be sure, suction dredge mining does result in a temporary increase in a stream's turbidity. But turbidity is not itself a defined "pollutant" and thus its "addition" is not regulated by the Clean Water Act. Pet. 11 n.7. And although the streambed material that suction dredge mining momentarily resuspends is a defined "pollutant" (as "rock" or "sand," 33 U.S.C. § 1362(6)), the passing of such material through a sluice box in no way chemically transforms it into something that was not there before.[4] Pet. 8.

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[4] Oregon does not appear to contest that a regulated water's streambed is, for purposes of the Clean Water Act, a part of that water. *Cf.* Pet. 16-17.

Finally, the state contends that review is not merited because EPA has consistently held that suction dredge mining requires a Clean Water Act permit. Resp. Br. 16-18. But agency practice, even an "entrenched" one, cannot supersede the statute. *Rapanos*, 547 U.S. at 752 (plurality op.). *Cf.* Pet. 16 n.11. In any event, the state's framing of the issue is unjustifiably narrow. The question is not whether EPA has never flip-flopped about suction dredge mining, but rather whether the agency has consistently interpreted the Clean Water Act's "addition" requirement. It has not. *Compare* Resp. Br. 17-18 *with Gorsuch*, 693 F.2d at 175 (deferring to EPA's interpretation "that addition from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world"). *See generally* 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, 10773 (2014) ("The 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."). *Cf. County of Maui*, 140 S. Ct. at 1473 (declining to defer to EPA's interpretation of a different Clean Water Act provision because "EPA itself has changed its mind about the meaning of [that] provision").

Conclusion

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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