No. 22-35978

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IDAHO CONSERVATION LEAGUE,
Plaintiff-Appellee,

v.

SHANNON POE,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Idaho
No. 1:18-cv-00353-REP
Hon. Raymond E. Patricco

PLAINTIFF-APPELLEE'S ANSWERING BRIEF

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RULE 26.1 DISCLOSURE STATEMENT

Plaintiff-Appellee Idaho Conservation League is an Idaho non-profit corporation which is recognized by the IRS as a Section 501(c)(3) public charity. It has no public shares and no corporate parents or affiliates with public shares.

Date: May 30, 2023

/s/ *Bryan Hurlbutt*
Bryan Hurlbutt

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INTRODUCTION

Plaintiff-Appellee Idaho Conservation League ("ICL") respectfully submits that the Court should affirm the district court's ruling that Defendant-Appellant Shannon Poe violated the Clean Water Act ("CWA") when he mined for gold and discharged the mining waste from a suction dredge to the South Fork of the Clearwater River in Idaho without a required CWA Section 402 permit.

Suction dredge mining is a type of "placer" mining, whereby riverbed rocks and sediments are excavated and mined for gold using a sluice box and water. For nearly fifty years, the U.S. Environmental Protection Agency ("EPA") has required CWA Section 402 permits for the mine waste discharged to water from placer mine sluice boxes, and this Court has upheld EPA's issuance of such permits and related regulations. *See Trustees for Alaska v. EPA*, 749 F.2d 549 (9th Cir. 1984); *Rybacheck v. EPA*, 904 F.2d 1276 (9th Cir. 1990). Today, EPA continues to require Section 402 permits for suction dredge mining and other placer mining, as do states with CWA permitting authority.

Well aware that EPA required a Section 402 permit to suction dredge mine in Idaho, Mr. Poe—a professional gold miner and President of the American Mining Rights Association ("AMRA")—refused to apply for a permit, taunted the EPA and other federal agencies, and urged other miners to join him in converging on the South Fork of the Clearwater to suction dredge mine without a 402 permit.

There is no dispute that Mr. Poe mined for gold using a suction dredge on the South Fork on forty-two days from 2014 to 2018 without any CWA permit. There is also no dispute that to do his mining, he used crowbars and other tools to excavate rocks, gravels, sands, sediments, and silts from under the riverbed; brought them up to the surface through a suction hose to his floating dredge; ran them through a sluice box to remove gold; and then sprayed the waste materials off the back of his dredge to the river. There is also no dispute that discarded sands, sediments, and silts entered the water column, polluting the South Fork with suspended solids and turbidity (cloudiness) that were not there before his mining.

The undisputed facts of this case thus entirely belie Poe's key argument that his suction dredge mining "merely transferred . . . water containing suspended sediments between different parts of [the] same waterbody," and did not cause any "addition" of pollutants under the CWA requiring a 402 permit. *See* Open. Br. (Dkt. No. 10) at 2 (citing *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109–12 (2004) ("*Miccosukee*"), and *Los Angeles Cnty. Flood Control Dist. v. NRDC*, 568 U.S. 78, 82–84 (2013) ("*L.A. County*")). Poe's reliance on *Miccosukee* and *L.A. County* is misplaced. Both cases involved transferring water within a water system. By contrast, Poe excavated subsurface sediments from under the river and, after mining them, added them to the river where they became suspended and flowed downstream.

The Court should also reject Poe's alternative argument that, even if his mining discharges do require a CWA permit, they require a Section 404 permit from the U.S. Army Corps of Engineers (the "Corps") for the discharge of "dredged material," instead of a Section 402 permit from EPA. Notably, the Corps agrees with EPA that suction dredge mining discharges processed waste that requires a 402 permit, not dredged material that requires a 404 permit.

"In enacting the Clean Water Act, Congress wanted to pass the broadest possible protections against water pollution." *United States v. Lucero*, 989 F.3d 1088, 1095 (9th Cir. 2021) (citation omitted). Yet Poe asks this Court to interpret the CWA as providing only the narrowest possible protections against water pollution. Like *Trustees for Alaska* and *Rybachek,* this appeal is another attempt by placer miners to avoid regulation under the CWA. More recently, the Oregon Supreme Court rejected the exact same arguments Poe makes here and upheld Oregon's 402 permitting program for suction dredge mining. *E. Oregon Mining Ass'n v. Dep't of Envtl. Quality*, 445 P.3d 251 (Or. 2019) ("*EOMA*"), *cert denied*, 2020 WL 3146697 (Jun. 15, 2020). This Court should reject Poe's attempt to evade the CWA and should affirm.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under the CWA's citizen suit provision, 33 U.S.C. § 1365. This Court has jurisdiction over this appeal because the district

court entered final judgment for ICL, which Poe timely appealed. 28 U.S.C. § 1291; Fed. R. App. P. 4(a)(1).

ISSUES PRESENTED

1. Should the Court follow its long-standing precedent in *Rybachek* and affirm the district court's ruling that by dumping suction dredge gold mining waste into a river and causing a turbid plume of suspended sediments, Poe caused an "addition" of a pollutant requiring a CWA permit?

2. Should the Court affirm the district court's ruling that EPA and the Corps reasonably interpret the CWA and their CWA regulations, as they have for the last fifty years, to conclude that suction dredge mining wastes are pollutants requiring a 402 permit, not "dredged materials" requiring a 404 permit?

STATEMENT OF THE CASE

I. LEGAL AND REGULATORY BACKGROUND

A. The CWA Prohibits Discharging Pollutants Without a Permit

Congress enacted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this objective, the CWA "categorically prohibits any discharge of a pollutant from a point source without a permit." *Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir. 1993) (citing 33 U.S.C. § 1311(a)).

The CWA defines "discharge of a pollutant" to mean the "addition of a pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Pollutant is broadly defined to include "dredged spoil, solid waste, ... rock, sand," and "industrial ... waste discharged into water." *Id.* § 1362(6). A point source is "any discernible, confined and discrete conveyance." *Id.* § 1362(14). Navigable waters are defined as "the waters of the United States." *Id.* § 1362(7).

The National Pollutant Discharge Elimination System ("NPDES") permitting program, also referred to as the Section 402 permitting program, is "[t]he centerpiece of the CWA." *Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 990 (D.C. Cir. 1997). Section 402 authorizes EPA to issue permits "for the discharge of any pollutant, or combination of pollutants," on condition that the discharge will meet other sections of the CWA. 33 U.S.C. § 1342(a)(1).

CWA Section 404 separately provides for the Corps to authorize the discharge of "dredged or fill material." *Id.* § 1344(a). When a discharge requires a 404 permit, it does not require a 402 permit. *See id.* § 1342(a)(1); 40 C.F.R. § 122.3. The CWA does not define the "discharge of dredged material" or "dredged material." *See* 33 U.S.C. §§ 1342 & 1362.

B. Since the 1970s, EPA Has Required 402 Permits to Discharge Mine Waste from Gold Placer Mines

Since the 1970s, EPA has interpreted the CWA as prohibiting discharges from placer mine sluice boxes unless done in compliance with a 402 permit. In

Trustees for Alaska, this Court reviewed EPA's issuance of Section 402 permits to 170 Alaska gold placer miners in 1976 and 1977. 749 F.2d at 553. The Court rejected the miners' argument that placer mines are not "point sources" of pollution and held that "EPA did not exceed its authority in issuing these 402 permits." *Id.* at 557–58. But the Court agreed with Trustees for Alaska's claim that EPA failed to include in the permits necessary "effluent limitations"[1] on the maximum amounts of suspended solids and turbidity allowed. *Id.* at 556–57.

In 1988, EPA adopted industry-wide regulations setting effluent limitations for 402 permits for gold placer mines, including gold mining from floating dredges. *See* 40 C.F.R. § 440.140. Miners challenged these regulations in *Rybachek*, arguing placer mining does not cause the "addition" of a pollutant. This Court rejected that argument, explaining: "Placer miners excavate the dirt and gravel in and around waterways, extract any gold, and discharge the dirt and other non-gold material into the water." 904 F.2d at 1285. "The lighter sand, dirt, and clay particles are left suspended in the wastewater released from the sluice box" and "can have aesthetic and water-quality impacts on waters in the immediate vicinity and downstream." *Id.* at 1282. Based on these facts, the Court deferred to

[1] The CWA defines "effluent limitation" as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources ... including schedules of compliance." 33 U.S.C. § 1362(11).

EPA, holding it was reasonable to interpret "addition" under the CWA as including the "resuspension" of materials such as sand and dirt discharged in wastewater from a placer mining sluice box, "even if the material discharged originally comes from the streambed itself." *Id.* at 1285–86.

Over the years, as EPA and the Corps have implemented and enforced the CWA, they have agreed that gold placer mines—including suction dredges—discharge processed wastes requiring 402 permits, not dredged or fill materials requiring 404 permits. In 1986, EPA and the Corps entered a Memorandum of Agreement ("MOA") confirming the agencies' mutual agreement that placer mining wastes are subject to 402:

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

51 Fed. Reg. 8,871, 8,872 (March 14, 1986) (emphasis added).

Reiterating the agencies' shared understanding, the Corps issued Regulatory Guidance Letter 88-10 on July 28, 1990, explaining that once dredged material is "subsequently processed," it is no longer a dredged material and has become a waste regulated under 402:

> 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 locations 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.

1-SER-296 (emphasis added).[2]

C. Section 402 Permitting for Suction Dredge Mining in Idaho

The CWA allows EPA to authorize individual states to administer their own Section 402 permitting programs. 33 U.S.C. § 1342(b). After the CWA was enacted, EPA administered 402 permits in Idaho until June 2018 when it authorized the the Idaho Pollutant Discharge Elimination System ("IPDES") program, which is administered by the Idaho Department of Environmental Quality ("Idaho DEQ"). See 83 Fed. Reg. 27,769 (June 14, 2018). Under the authorization, EPA continued administering suction dredge mining permits in Idaho until July 2020. *See* 1-SER-033. Poe's CWA violations at issue here all occurred from 2014 through 2018, when EPA still administered the Section 402 program for suction dredge mining in Idaho.

[2] "SER" refers to ICL's accompanying Supplemental Excerpts of Record, while "ER" refers to Poe's Excerpts of Record.

There are two types of 402 permits: (1) an "individual permit," which "authorizes a specific entity to discharge a pollutant in a specific place and is issued after an informal agency adjudication;" and (2) a "general permit," which "is issued for an entire class of hypothetical dischargers in a given geographical region and is issued pursuant to administrative rulemaking." *Alaska Cmty. Action on Toxics v. Aurora Energy Servs.*, 765 F.3d 1169, 1171 (9th Cir. 2014) (citations omitted). Compared to individual permits, general permits create a streamlined process for qualified applicants to obtain 402 permit coverage.

In 2010, EPA proposed a 402 general permit for suction dredge mining in Idaho ("the General Permit"). *See* 78 Fed. Reg. 20,316 (Apr. 4, 2013). EPA formally adopted the General Permit in 2013 and reauthorized it in 2018. *See* 1-SER-255–94 (2018 General Permit). When EPA reissued the General Permit, it explained in the Fact Sheet:

> Because suction dredges work the stream bed, the discharges from suction dredges consist of stream water and bed material. The primary pollutant of concern in the discharges from a suction dredge is suspended solids, defined as total suspended non-filterable solids. The suspended solids discharged from suction dredges result from the agitation of stream water and stream bed material in the dredge while processing the material. The discharged suspended solids result in a turbidity plume, or cloudiness, in the receiving water. This discharge, when released into waters of the United States, constitutes the addition of a pollutant from a point source that is subject to NPDES permitting.

1-SER-035 (emphasis added). EPA further explained: "High levels of turbidity can

adversely impact water quality and can have direct and indirect effects on fish and other aquatic life." 1-SER-043. The General Permit thus includes effluent limits which: (1) prohibit any visible increase in turbidity (any cloudiness or muddiness) above background levels beyond 500 feet downstream; and (2) require modification, curtailment, or cessation of dredging to stop any such violation. 1-SER-274.

General Permit holders must visually monitor turbidity at least once per day, note the distance of their turbidity plume, and record monitoring results in a daily log. 1-SER-275. Permittees must also file an annual report with EPA, reporting their name, permit number, activity status, waterbody, location where dredging took place, length of longest observed turbidity plume, and dates of operation. *Id.* The General Permit includes twelve best management practices ("BMPs") permittees must follow, including operating at least 800 feet apart and other practices to reduce impacts to water quality and river conditions. 1-SER-275–78. For dredging on the South Fork of the Clearwater, the General Permit includes additional measures to reduce sediment pollution, including capping the number of permits at fifteen and limiting turbidity plumes more precisely. 1-SER-044–45.

The Corps shares EPA's determination that suction dredge mining in Idaho requires a 402 permit, not a 404 permit. For example, in 2018, when a miner sought the Corps' authorization to suction dredge mine on Idaho's Salmon River,

the Corps informed the miner that he needed a 402 permit from EPA and not a 404 permit from the Corps. 2-SER-298–302.

After it was delegated 402 permitting authority in 2018, Idaho DEQ followed EPA and the Corps in requiring 402 permits for suction dredge mining. *See* 1-SER-213, 1-SER-215 (Idaho DEQ webpages).

II. FACTUAL BACKGROUND

A. The South Fork of the Clearwater River

The South Fork of the Clearwater River flows from its headwaters in central Idaho through the Nez Perce-Clearwater National Forests and the Nez Perce Tribe Reservation to its confluence with the Clearwater River at Kooskia, Idaho. 1-SER-192–93. The South Fork flows year-round with a mean annual flow of 1,060 cubic feet per second. 1-SER-194. It is undisputed that the South Fork is thus a navigable waterway which qualifies as a "water of the United States" under the CWA. *See* 1-SER-129 (Poe Answer, ¶ 97).

Reflecting its outstanding fish and wildlife, recreational, and aesthetic values, the South Fork is designated by the Idaho Water Resources Board as an Idaho "state protected river." 1-SER-072. It is also eligible for designation as a federal Wild and Scenic River. 1-SER-084. The Idaho Department of Fish and Game recognizes the South Fork as "an important fishery which provides unique opportunities for anglers," and as an "important area for fish species within the

broader context of the Columbia River basin." 1-SER-182. The South Fork is inhabited by steelhead trout, fall Chinook salmon, and bull trout, each listed as "threatened" under the federal Endangered Species Act. *Id.* It also provides habitat for native Pacific lamprey, redband trout, spring Chinook salmon, and westlope cutthroat trout. *Id.*

However, the South Fork is also listed as "water quality impaired" because it fails to meet Idaho water quality standards for sediment and temperature pollution under the CWA. 1-SER-185–86, 195. In 2004, Idaho DEQ, the Nez Perce Tribe, and EPA adopted the South Fork Clearwater Subbasin Assessment and Total Maximum Daily Loads (the "South Fork TMDL") to address these sediment and temperature pollution problems. *See* 1-SER-184–91 (South Fork TMDL executive summary).[3]

The South Fork TMDL identifies suction dredge mining as a point source of sediment pollution. 1-SER-201, 203–06. The TMDL states: "While the literature is mixed in terms of the nature and severity of effects from dredge mining operations, serious impacts to water quality and habitat have been documented, depending on the size, location and manner in which dredges are operated." 1-SER-204. The South Fork TMDL caps the number of dredges allowed to operate and sets limits

[3] TMDLs are essentially pollution "budgets" that inventory pollution sources and set limits for each source at levels targeted to bring the waterbody into compliance with water quality standards. *See* 33 U.S.C. § 1313(d).

on the amount of turbidity (a surrogate for sediment) pollution that dredges can discharge. 1-SER-207–08. The South Fork TMDL determined that its effectiveness is contingent upon each dredger complying with all applicable permitting programs, "including those of the USEPA (NPDES permit)." 1-SER-208.

A 2014 report prepared by the National Marine Fisheries Service found "[s]uction dredge mining directly contributes to [the] degraded baseline and slows restoration" on the South Fork. 1-SER-179–81. Among other effects, fine sediments discharged from a dredge reduce oxygen levels, which lowers survival of fish eggs and alevins, and reduces hiding cover and preferred forage, which reduces fish growth. 1-SER-179. When fine sediments eventually settle, they fill pools or create films of silt that reduce invertebrate production, which in turns reduces feeding opportunities for fish. *Id.* Habitat in the South Fork is also degraded by the holes and tailings piles created by dredge mining. 1-SER-180–81.

B. Poe's Suction Dredge Mining on the South Fork

Defendant Shannon Poe is professional miner from California who came to Idaho to suction dredge mine for gold in the bed of the South Fork Clearwater River in 2014, 2015, and 2018. *See* 1-SER-002-03 (Poe Decl.). Each year, Poe refused to apply for a 402 permit, despite being repeatedly notified by state and federal agencies—and ICL—that a 402 permit was required. *See* 1-SER-136–142 (ICL's Statement of Facts).

Poe is the founder and President of the American Mining Rights Association ("AMRA"). 1-SER-002–03. Through written and video posts to AMRA's website, Poe boasted about defying the EPA by mining on the South Fork without a CWA permit, encouraged other dredge miners to do the same, and solicited funds for AMRA. *See* 1-SER-137–41.

Poe's suction dredge mining is a method of placer mining using a floating dredge equipped with a gasoline-powered motorized pump, suction hose, and sluice box to mine gold from riverbeds. 1-SER-083 (diagram and photo of typical dredge from Forest Service). The riverbed materials include rock, gravel, sand, sediment, and silt. *See* 1-SER-203–04. Larger rock, gravel, and cobble tend to settle on the river bottom not far from where they are discarded from the dredge. 1-SER-204. Smaller gravel and sand discarded from the dredge may move downstream as bedload. 1-SER-203–04. Finer materials discarded from the dredge, including silts and sediments, may become suspended in the water column and carried further downstream as turbidity. *Id.*

When he dredged on the South Fork, Poe used an underwater nozzle and hose to suck riverbed material up to a dredge floating on the river surface. 1-SER-146–48 (Poe Resp. to Interrogs. Nos. 3 & 4 describing his equipment and operations). On the dredge, Poe processed the riverbed material by mixing it with water and running it through a sluice box, where gold and other heavy metals are

separated out. *Id.* After processing, the riverbed material and water were then discarded off the back of the dredge into the river. *Id.* Finer materials discarded from Poe's dredge became suspended in the water column and carried downstream. 1-SER-152–53. The turbid plume of sediments from Poe's dredge operating on the South Fork on August 8, 2018 is seen in Figure 1 below:

Fig. 1: Turbidity from Poe's Suction Dredge on Aug. 8, 2018 (see 1-SER-135).

Dredging overburden and bedrock involves dismantling the riverbed by dislodging and moving rocks and boulders, and breaking up tightly bound sediments, using the miner's hands, the dredge nozzle, crowbars, and other tools. *See* 1-SER-146–47 (Poe Resp. to Interrog. No. 3). Riverbed rocks, sands, and sediments can be so firmly bound in place that dredgers use tools to crack, blast,

and break up riverbed and bedrock. *See*, *e.g.,*1-SER-350 (image from 2015 AMRA video on South Fork showing use of pry bar on bedrock); 1-SER-136 (July 2018 video of Poe describing South Fork riverbed features as "so compacted" he and partner could not break it up with a "6-foot bar," so they are using a "high pressure blaster nozzle and trying to bust that material up"). These holes can be five or more feet deep under the riverbed. *See* 2-SER-317, 320, 327. An example of the holes Poe "punched" into the South Fork riverbed is shown in Figure 2 below:

Fig. 2: Poe's dredge in the South Fork in July 2015 (1-SER-329).

In 2014, Poe suction dredged on the South Fork on thirteen days, starting on July 15. *See* 1-SER-137. He "punched" four or five holes in the South Fork riverbed and dredged a total of about forty-five to fifty linear feet. 1-SER-147–48.

On August 5, 2014, Poe posted a story on AMRA's website titled, "Out of control EPA, Sasquatch, Ratchilla and dredging for two weeks in Idaho." 1-SER-085–88. In that post, Poe bragged about visiting the South Fork "to dredge openly in opposition to the EPA." 1-SER-085.

In October 2014, EPA issued Poe a notice of CWA violation for discharging pollutants to the South Fork without a 402 permit. 1-SER-007–14. Poe's attorney responded to EPA, stating that Poe would not provide information EPA requested and disputing that any permit is required. 1-SER-015–16.

In 2015, Poe returned to the South Fork to "stand against the EPA again." 1-SER-173–76 (Jun. 10, 2015 post). He dredged on twelve days in 2015 without a 402 permit, and estimates that he dredged about sixty linear feet. 1-SER-146–48 (Poe Resp. to Interrogs. 2 & 4). Poe documented his dredging on the South Fork in 2015 in a three-part AMRA video series, titled "Dredging in Idaho and facing a tyrannical government." *See* 1-SER-139.

Because Poe dredged without a 402 permit in 2014 and 2015, ICL sent Poe a CWA notice of intent to sue in May 2016, before that year's suction dredge season. 1-SER-019–23. Poe responded in June 2016, stating: "I have no plans, or intent to dredge the SF Clearwater this year, and do not intend to dredge in future years without the appropriate permits." 1-SER-090. Prior to the South Fork dredge

season in both 2017 and 2018, ICL sent Poe courtesy reminders of its 2016 notice of intent to sue. 1-SER-024–27.

Although EPA did not take formal action on its 2014 notice of violation against Poe, it pursued CWA enforcement actions against two other miners for operating their suction dredges on the South Fork in 2015 without a 402 permit. In one action, the miner and EPA entered into a Consent Agreement. 1-SER-245–54. In the other, EPA prevailed at hearing before an Administrative Law Judge ("ALJ"), proving CWA liability for discharging pollutants (riverbed sediments) from a point source (suction dredge) to a navigable water (the South Fork) without a 402 permit. 1-SER-219–44. The ALJ rejected the miner's arguments that he did not cause an "addition" of pollutants. 1-SER-229–38.

In 2018, Poe reneged on his 2016 written assurance to ICL that he would not suction dredge without a permit, and returned to the South Fork, where he suction dredge mined without a 402 permit on seventeen days, dredging about seventy linear feet. 1-SER-144–45, 147–48 (Poe Resp. to Interrog. Nos. 1 & 4). Poe boasted in an AMRA post about his plan to dredge without a 402 permit and without an approved Plan of Operations ("PoO") required by the Forest Service: "We are not obtaining a PoO, nor a permit the EPA states is also needed as they have no jurisdiction over this water." 1-SER-089.

On August 10, 2018, ICL filed this lawsuit while Poe was still dredging. ER 58–80 (Complaint); 1-SER-144–45 (Poe Resp. to Interrogs. No. 1 admitting he "resumed suction dredge mining on August 8" and "continued to dredge up and until August 14"). In 2019, EPA issued Poe another notice of violation for discharging pollutants to the South Fork in 2018 without a 402 permit. 1-SER-177–78.

III. PROCEEDINGS BELOW.

After accepting service of ICL's complaint, Poe filed a motion to dismiss under F.R.Civ.P. 12(b)(1) in December 2018, supported by Poe's initial declaration in which Poe admitted he suctioned dredged on the South Fork in 2014, 2015, and 2018 without any CWA Section 402 permit. *See* 1-SER-091–111 (Order Denying MTD). But rather than raise his legal arguments that Section 402 does not apply to suction dredge mining, Poe merely contended that ICL had not given adequate notice before suing and lacks Article III standing. *See id.*

After briefing and oral argument, the district court denied Poe's motion to dismiss on September 30, 2019, holding that ICL provided Poe with adequate notice under the CWA and that ICL has established Article III standing to pursue this citizen suit enforcement action. *See id.* Poe has not appealed those rulings here.

On October 15, 2019, Poe filed an Answer which again admitted that he suctioned dredged on the South Fork without a 402 permit in 2014, 2015, and 2018, but denied any permit was required. *See* 1-SER-112.

Thereafter, the parties agreed to a Stipulated Litigation and Discovery Plan, which the court approved, under which the case would be bifurcated to first address Poe's liability under the CWA on cross motions for summary judgment, and second (if liable) to decide appropriate remedies. *See* ER-87–88 (ECF Nos. 29 and 30).

Following briefing and argument, the district court issued its Liability Decision on June 7, 2021, granting summary judgment in favor of ICL on liability, and holding that Poe violated the CWA on each of the forty-two days he suction dredge mined without a 402 permit on the South Fork in 2014, 2015 and 2018. ER-35–57.

The court rejected Poe's reliance on the *L.A. County* and *Miccosukee Tribe* cases in arguing his suction dredging does not cause any "addition" of pollutants requiring a 402 permit, concluding: "Suction dredge mining does not simply transfer water (what the above cases address); to the contrary, it excavates rock, gravel, sand, and sediment from the riverbed and then *adds* those materials to the river – this time, in suspended form." ER-44 (emphasis in original). The court also rejected Poe's argument that even if he did need a CWA permit, he needed a 404

permit, noting that EPA and the Corps "have taken an official position and made a fair and considered judgment, based on [their] substantive expertise, that the operation of a suction dredge results in the discharge of processed wastes, thus requiring Section 402 permits." ER-56.

The parties thereafter stipulated to a litigation plan to conduct further limited discovery and briefings on remedies that the court approved. *See* ER-90 (ECF Nos. 52 & 53). ICL filed a motion for remedies on February 4, 2022, seeking an award of penalties and injunctive relief under the CWA, supported by an expert declaration and other exhibits. *See* ER-91 (ECF No. 59). Poe opposed the remedies motion on March 18, 2022, with an expert declaration and other exhibits. *See id.* (ECF No. 63).

On September 28, 2022, the district court issued its Remedies Decision, enjoining Poe from suction dredge mining on the South Fork without first obtaining and complying in good faith with a 402 permit, and ordering him to pay a $150,000 civil penalty to the U.S. Treasury. ER-06–34. In reaching this decision, the district court considered the expert declarations submitted by both sides and determined: "From this, it is clear that suction dredge mining (even small-scale, recreational suction dredge mining) disturbs a riverbed's substrate and discharges sediment into the water column, causing aesthetic and environmental harm. This is especially the case in a sensitive environment like the [South Fork]—a critical

habitat for ESA-listed species and an already-impaired river due to the failure to meet state water quality standards for sediment and temperature." ER-16.

On October 21, 2022, the district court entered Judgment. ER-03–05. Poe filed his Notice of Appeal on November 18, 2022. ER-81–84.

STANDARD OF REVIEW

The Ninth Circuit "review[s] the district court's grant or denial of motions for summary judgment *de novo*." *Animal Legal Def. Fund v. U.S. FDA*, 836 F.3d 987, 988 (9th Cir. 2016) (quotation omitted). Thus, on appellate review, the Court employs the same summary judgment standard used by the trial court under Federal Rule of Civil Procedure 56(c). *Id.* As required by that standard, the Court "views the evidence in the light most favorable to the nonmoving party, determines whether there are any genuine issues of material fact, and decides whether the district court correctly applied the relevant substantive law." *Id.* at 989.

SUMMARY OF THE ARGUMENT

On appeal, Poe does not challenge the district court's denial of his motion to dismiss, nor the district court's Remedies Decision. Poe challenges only the district court's decision granting ICL summary judgment on liability. This Court should affirm and reject Poe's attempts to exempt suction dredge mining from CWA regulation or, alternatively, to upend the current 402 permitting program for suction dredge mining in Idaho and beyond.

First, the district court properly followed this Court's precedent in *Rybachek* to hold that Poe's suction dredge mining added pollutants and thus requires a CWA 402 permit. In *Rybachek*, this Court upheld EPA's interpretation of "addition" under the CWA to reasonably include the release and suspension of rocks and sands from placer mining (including dredge mining) to a stream, even when those materials originated in the streambed. 904 F.2d 1276 (9th Cir. 1990). Poe fails to show that this long-standing decision should be overturned.

The subsequent Supreme Court cases Poe relies on, *Miccosukee*, 541 U.S. 95 (2004), and *L.A. County*, 568 U.S. 78 (2013), are not applicable here, and do not conflict with *Rybachek*. *Miccosukee* and *L.A. County* involved a pump station in one and a canal in the other which transferred water that already had pollutants in it from one part of a water body to another part of that same water body. By contrast here, Poe excavated sediments and other riverbed materials from under the South Fork to remove gold from them using the sluice box on his floating dredge, and then dumped the sediment and other materials from the back of his dredge into the river, where some flowed downstream as a turbid plume of wastewater. Poe did not simply move polluted water from one part of a waterbody to another, as in *Miccosukee* and *L.A. County*. Instead, he caused the "addition" of pollutants to a "water of the United States," as the district court correctly held.

Poe's reliance on *National Wildlife Federation v. Gorsuch*, 693 F.2d 156

(D.C. Cir 1982) and *National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580 (6th Cir. 1988) ("*CPC*"), fares no better. Poe argues these cases show that EPA took an inconsistent position at the time of *Rybachek*, and thus did not deserve the deference this Court afforded the agency. Poe is wrong. EPA's position in those cases—that for an "addition" to occur, pollutants must be introduced from the outside world—does not conflict at all with its position in *Rybachek*: that sediments originating in the bed of the river come from the outside world and are added to the water by placer mining discharges. Moreover, even if there were any discrepancy in EPA's interpretations of "addition," both *Gorsuch* and *CPC* endorsed EPA's interpretations of addition depending on the factual context, and both cases—like this Court in *Rybachek*—deferred to EPA.

Moreover, Poe's position that the underlying riverbed is part of the water and that the gold mining wastewater he sprays off the back of his dredge does not cause an "addition" of pollution is factually incorrect, conflicts with the plain language of the CWA, and creates a loophole that would remove suction dredge mining and a large number of other polluting activities from the reach of the CWA.

Second, the district court properly rejected Poe's alternative argument that even if he discharged pollutants and required a CWA permit, he discharged "dredged material" that required a 404 permit from the Corps, instead a 402 permit from EPA. The district court correctly followed the EPA and Corps interpretations

of the CWA and their regulations that by processing riverbed materials using a gold mining sluice box, suction dredges discharge processed wastes, which are pollutants regulated under 402—not dredged materials regulated under 404.

As far back as the 1970s, EPA has regulated placer mine discharges under Section 402. This Court upheld EPA's issuance of such 402 permits to placer miners in *Trustees for Alaska*, and upheld EPA's issuance of industry-wide gold placer mining 402 permit pollution limits in *Rybachek*—including for discharges from "floating" dredges. 40 C.F.R. § 440.140. The Court must defer to EPA's and the Corps' long-standing and reasonable interpretation. That is what the Oregon Supreme Court did when it rejected the same argument Poe makes here: "the Corps' and the EPA's reasonable interpretation of the [CWA] 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.'" *EOMA*, 445 P.3d at 257.

ARGUMENT

I. DUMPING MINING WASTES IN THE SOUTH FORK OF THE CLEARWATER RIVER IS AN "ADDITION" OF POLLUTANTS

A. *Rybachek* Settles This Issue

Again, the CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). But the CWA does not define "addition." Where a statute is ambiguous, courts defer to

the reasonable interpretation of the agency charged with administering that statute. *Chevron v. NRDC*, 467 U.S. 837, 844 (1984). EPA and the Corps both interpret "addition" to include the release of suspended sediment and similar materials, even when those materials originated in the beds or banks of the water body at issue, and courts have consistently deferred to this reasonable interpretation of the CWA.

For example, in 1983, the Fifth Circuit held that the term "addition" in the CWA "may reasonably be understood to include 'redeposit'" such as by clearing and redepositing wetland vegetation and other materials. *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 922–925 (5th Cir. 1983). In 1985, the Eleventh Circuit held that boat propellers stirring up sediment and redepositing it on a sea bottom constitutes an "addition" of pollutants under the CWA. *U.S. v. M.C.C. of Florida*, 772 F.2d 1501, 1506 (11th Cir. 1985), *vacated and remanded on other grounds*, 481 U.S. 1034 (1987).

In the 1990 *Rybachek* decision, this Court chose to "follow the lead of the Fifth and Eleventh Circuits and defer to the EPA's interpretation of the word 'addition' in the Clean Water Act," upholding EPA's determination that placer mines that suspend streambed sediments in the water cause an addition of pollutants. *Rybachek*, 904 F.2d at 1286. As this Court explained in *Rybachek*: "Because the EPA has been charged with administering the Clean Water Act, we must show great deference to the Agency's interpretation of the Act." 904 F.2d at

1284 (citation omitted). "We especially defer where the Agency's decision on the meaning or reach of the Clean Water Act involves reconciling conflicting policies committed to the Agency's care and expertise under the Act." *Id.* at 1284–85 (citing *Chevron*, 467 U.S. at 844).

In 2001, this Court reaffirmed *Rybachek*, holding that using a tractor to disturb sediments in the bottom of a wetland can reasonably be interpreted to cause an addition. *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 814–15 (9th Cir. 2001).

Applying these precedents, the district court here explained: "Because the court in *Rybachek* recognized that the statutory term 'addition' is ambiguous, 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 CWA." ER-41 (citations omitted). The district court added that it "agrees—not only that the CWA (was and) remains ambiguous on this point, but also that the EPA (did and) continues to reasonably interpret 'addition' of a pollutant to include the byproduct of suction dredge mining that likewise warrants agency deference." ER-41–42.

B. Subsequent Supreme Court Decisions in *Miccosukee* and *L.A. County* Do Not Conflict With *Rybachek*

Recognizing that this case fits squarely within *Rybachek*'s holding, Poe argues *Rybachek* is no longer good law in light of subsequent U.S. Supreme Court

decisions in *Miccosukee* and *L.A. County*. *See* Open. Br. at 37–38. Those cases are easily distinguishable and do not excuse Poe's unpermitted discharges.

In those cases, the Supreme Court held there is no "addition" of a CWA pollutant when water is transferred from one location to another within the same waterbody, along with any pollutants already in the water. In *Miccosukee Tribe,* polluted water was removed from a canal, transported through a pump station, and then deposited into a nearby reservoir. *See* 541 U.S. at 99–104. The Court held that if the canal and reservoir were simply two parts of the same waterbody, then there is no "addition" of pollutants, analogizing to ladling soup from a pot and simply pouring the ladled soup back in the pot. *Id.* at 109–112. Similarly, in *L.A. County*, the Court held that there is no "addition" when water is moved from an improved portion of a navigable waterbody (concrete channels) to an unimproved portion of the same waterbody. 568 U.S. at 82–83.

Poe argues that he too is simply transferring water, or "ladling soup." That is flatly false. If Poe were to just run his water pump, suck up river water from the South Fork (along with any pollutants already in the water), and discharge that river water back to the South Fork, then he might be simply transferring water and not adding pollutants, as in those cases. But that is not what Poe does.

Again, the undisputed evidence and district court findings document that Poe excavates rocks, gravels, sands, sediments, and silts from the riverbed, which is

obviously located under the water. While many riverbed materials might have been in the water at some point in the geologic past, they have since settled out of the water and been deposited in the riverbed and are not in the water. Moreover, Poe "punches holes" (in his words) by excavating through layers of riverbed all the way down to bedrock, seeking gold that is contained there. 1-SER-147–48. *See also* Fig. 2 above. Some of the riverbed materials are so firmly locked in place that Poe uses crow bars and high-pressure blaster nozzles to break them up so they can be removed from within the riverbed. *See* 1-SER-146–47 (Poe Resp. to Interrog. No. 3); 1-SER-136; 2-SER-350.

After sucking them up, Poe processes the materials by running them through the sluice on his dredge to isolate gold, and then discards the waste materials into the water, adding a plume of turbid wastewater to the South Fork. 1-SER-146–48, 152–53. *See also* Fig. 1 (above). The turbid wastewater is made up of suspended sediments that were not present in the water until Poe discarded them. Video of the turbid waste plume behind Poe's dredge show to the naked eye that he is adding sediments and other similar materials to the South Fork during the summer dredge season, as shown in Figure 1 above.

Given these undisputed facts, the district court correctly concluded that: "Mr. Poe's reliance on [*L.A. County* and *Miccosukee*] misses the point. Suction dredge mining does not simply transfer water (what the above cases address); to

the contrary, it excavates rock, gravel, sand, and sediment from the riverbed and then *adds* those materials back to the river—this time, in suspended form." ER-44.

Other suction dredge miners have tried Poe's same argument and have lost every time. The Oregon Supreme Court rejected this same argument, concluding that "the reasoning in [*L.A.*] *County* [] and *Miccosukee* does not call *Rybachek*'s holding into question." *EOMA*, 445 P.3d at 255. The court explained that "EPA reasonably could find that suction dredge mining does more than merely transfer polluted water from one part of the same water body to another," and that "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." *Id.* (quotation marks omitted).

EPA similarly rejected this argument in its response to comments on its proposal to reissue the General Permit for suction dredge mining in Idaho in 2018:

> If, during suction dredging, only water was picked up and placed back within the same waterbody, 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.

1-SER-218 (EPA, 2018 Response to Comments) (parenthetical in original) (emphasis added).

Likewise, in EPA's enforcement action against another unpermitted South Fork suction dredge miner, the ALJ Order characterized the miner's reliance on *Miccosukee* and *L.A. County* as "misplaced" because:

> [T]he operation of Respondent's suction dredge involves the removal of otherwise latent materials from the bed of the South Fork[], the separation of the materials by weight as they travel through the dredge, and the reintroduction of the leftover lighter materials to the waterway in a physically altered form, namely, suspended solids, thereby transforming those materials into "pollutants" and altering the base of the river where the materials are both removed and redeposited. This process can hardly be likened to the simple transfer of water.

1-SER-236–37 (emphasis added).

Poe's dredging is thus not a simple water transfer, as in the cases he cites. And those cases do not call into question the holding in *Rybachek*, which involved wastewater discarded from gold placer mining sluice boxes and not simple water transfers. The Court, thus, must continue to follow *Rybachek* and uphold EPA's reasonable interpretation that discarding riverbed materials in wastewater from a suction dredge sluice box constitutes the "addition" of a pollutant under the CWA.

C. Poe's Reliance on *Gorsuch* and *Consumer Power* Is Misplaced

Alternatively, Poe asks this Court to overrule *Rybachek*. Poe argues that EPA's position in *Gorsuch* and *CPC* conflicted with EPA's position around the same time in *Rybachek*, and therefore this Court should not have deferred to EPA. Open. Br. at 41–42. Poe is wrong.

First, EPA's position in *Gorsuch* and *CPC* (that for an "addition" to occur, pollutants must be introduced from the outside world) does not conflict with EPA's position in *Rybachek*. Riverbed materials are from the "outside world," because they are obviously under (not in) the water, as discussed above. By removing materials from the riverbed, separating out the gold, and discarding the rest into the river (where finer sediments become suspended in the water column and float downstream), those materials are no longer in the riverbed; they have been added to the water. For this reason alone, Poe's argument should be rejected.

Second, even if EPA's interpretation of "addition" in *Rybachek* differed from its interpretation in *Gorsuch* and *CPC*, that is no basis for overruling *Rybachek*. In fact, the *Gorsuch* and *CPC* decisions fully support upholding EPA's varied interpretations of the same CWA terms in different factual scenarios.

At issue in *Gorsuch* was whether water quality changes caused by dams—including low dissolved oxygen, dissolved minerals and nutrients, temperature changes, sediment, and supersaturation—caused an addition of pollutants under the CWA. 693 F.2d at 161–64. EPA's position was that this did not cause an addition, because "the point source must *introduce* the pollutant into navigable water from the outside world; dam-caused pollution, in contrast, merely passes through the dam from one body of navigable water (the reservoir) into another (the downstream river)." *Id.* at 165 (emphasis in original). The D.C. Circuit concluded

"EPA's interpretation is reasonable, not inconsistent with congressional intent, and entitled to great deference; therefore, it must be upheld." *Id.* at 183.

Like Poe here, the plaintiffs in *Gorsuch* argued for reduced deference to EPA by asserting that "EPA's narrow definitions of 'addition' and 'pollutant' in the context of dam-caused pollution are inconsistent with its pursuit in other contexts of broad definitions of 'point source' and 'pollutant.'" *Id.* at 168. The D.C. Circuit disagreed: "We . . . find no inconsistency in EPA's taking a broad view of its statutory mandate in some situations and a narrower view here, even though the same statutory terms are involved. The factual contexts in which EPA has broadly construed the scope of the § 402 permit program are too disparate from this one to permit facile comparison." *Id.* It also found:

> There is special reason to defer to the [EPA]'s policy choices. Contemporaneous construction by the agency should also receive substantial weight because the agency was in a better position in 1973 to decide how broadly to characterize Congress' intent than we are almost a decade later. In this case, EPA's views on dam-induced pollution merit deference as both contemporaneous and infused with its expert evaluation of the seriousness of the problem, the cost of cure, and the effectiveness of state regulation.

Id. at 182.

Here, the factual context of gold placer mining and the stream of wastewater it generates is "too disparate" from the factual context of dams to permit comparison. And given the large factual differences, there is "no inconsistency" in EPA taking a narrower view of addition in the context of dams and a broader view

of addition in the context of placer gold mining.

Similarly, in *CPC*, the Sixth Circuit deferred to EPA's interpretation that a hydroelectric pump-storage facility's movement of pollutants (fish, dead fish, and fish remains) between a reservoir and Lake Michigan did not add pollutants from the outside world. The Sixth Circuit explained:

> Just as in *Gorsuch* the release of storage dam water low in dissolved oxygen, and containing, heat, dissolved minerals and nutrients, and sediment did not constitute an addition of a pollutant to navigable waters, so in the instant case the release of turbine generating water containing entrained fish does not constitute the addition of any pollutant to navigable waters.

862 F.2d at 585. The court explained that the dams in *Gorsuch* and the hydro facility in *CPC* "actually transform the essential character of the water for its biological inhabitants" as an "inherent result of dam operation." *Id.* at 585–86. It deferred to EPA's definition of addition as requiring "the physical introduction of a pollutant from the outside world," *id.* at 586, and added: "EPA's construction of the statutory term 'addition' is, in our view, rooted in the general congressional policy that NPDES permits are not required for dam-caused pollution. The EPA has consistently maintained that dam-induced water *quality changes* are not generally the result of the *discharge* of any pollutant." *Id.* at 587 (emphases in original).

Unlike dams and other similar facilities that "transform the essential character of the water," there is no Congressional policy that placer gold mining

does not require 402 permits. Quite the opposite. Wastewater pollution from industrial activities like gold mining are precisely the types of pollution Congress sought to regulate when it enacted the CWA.[4] And unlike dams, which EPA has consistently maintained do not require 402 permits, EPA has consistently required such permits for suction dredges and other placer mines for the last fifty years.

In summary, there is no basis or reason to overrule *Rybachek*. EPA's position in *Rybachek* does not conflict with its position in *CPC* and *Gorsuch*: that pollutants must be added from the outside world.

D. Poe's Interpretation of "Addition" Is Absurd, Conflicts with the Plain Langue of the CWA, and Would Create a Massive Loophole

According to Poe, he causes no addition because: "Instream recreational suction dredge mining involves the loosening, moving, and dredging of rocks, silt, and sand within a streambed. These materials already exist within the waterbody." Open. Br. at 35. This argument that the riverbed materials Poe discards (and which create a turbid plume of suspended sediments flowing downstream) were already in the "waterbody" and did not come from the "outside world" is factually incorrect, makes no sense under the CWA, and would let a massive number of

[4] *See*, *e.g.*, 40 C.F.R. §§ 405–471 (CWA regulations setting effluent guidelines and standards for 59 categories of point sources of pollution regulated under CWA Section 402, including the "mineral mining and processing", "coal mining", and "ore mining and processing" categories, as well as other industrial and commercial point source categories).

polluters off the hook, undermining Congress's goals in adopting the act to provide "the broadest possible protections against water pollution." *Lucero*, 989 F.3d at 1095 (citation omitted).

First, to accept Poe's definition of addition requires taking an unnatural, contorted definition of the CWA terms "water" and "waters" as including the land underneath the water, i.e., the riverbed. Again, the CWA prohibits the unauthorized "discharge of a pollutant", which is defined as the "addition of a pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (emphasis added). "Navigable waters" is defined as "the waters of the United States." *Id.* § 1362(7). The CWA does not further define "water" or "waters."

The dictionary defines "water" to include "the liquid that descends from the clouds as rain, forms streams, lakes, and seas," and as "a particular quantity or body of water" such as "the water occupying or flowing in a particular bed." Merriam-Webster's Collegiate Dictionary, (11th ed. 2019). The beds underneath and the shores surrounding a water body are not themselves water, under any natural reading of the term; beds are land. One can stand on the bed of the South Fork, but one cannot stand on the South Fork's flowing water. One can swim in the river water flowing down the South Fork, but one cannot swim in the riverbed. The riverbed is land. The liquid flowing part of the South Fork over the bed is water.

Second, Poe's interpretation of water and waters as including the bed of a

river is at odds with the U.S. Supreme Court's decision last week in *Sackett v. EPA*, 598 U.S. __, 2023 WL 3632751 (May 25, 2023). *Sackett* held that for wetlands, "waters of the United States" includes "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that they are indistinguishable from those waters." *Id.* at * 17 (quotation omitted). The Court explained that "the CWA's use of 'waters' encompasses only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" *Id.* at *10 (citation omitted). "This meaning is hard to reconcile with classifying 'lands,' wet or otherwise, as 'waters.'" *Id.* (citation omitted). Thus, the Court concluded that only those wetlands that are indistinguishable from streams, oceans, rivers, and lakes are "waters of the United States." Again, the bed of the South Fork is distinguishable from the flowing, liquid river water, and this Court should reject Poe's attempt to classify land as water.

Third, accepting Poe's erroneous characterization of the riverbed as part of the water would exempt suction dredge mining from CWA permitting, for if there is no "addition" of a pollutant, then there is no requirement to obtain any CWA permit (402 or 404). Moreover, this would remove a whole slew of other activities from CWA permitting that have been regulated under the CWA for decades. For

example, since "[p]lacer mining typically is conducted directly in streambeds or on adjacent property," *see Rybachek*, 904 F.2d at 1282, typical placer mining would no longer require a CWA permit if Poe's claim was correct, which it is not.

Finally, Poe's argument also conflicts with numerous federal circuit court decisions holding that the redeposit of unprocessed bed and shoreline materials causes the requisite "addition" of dredged or fill material triggering the requirement for a CWA Section 404 permit. *See*, *e.g.*, *Borden Ranch*, 261 F.3d at 814–15 (this Court holding redepositing soil in wetland gouged up behind tractor is "addition"); *Avoyelles Sportsmen's League*, 715 F. 2d at 923 (Fifth Circuit holding redepositing of materials taken from wetlands is a discharge); *U.S. v. Mango*, 997 F. Supp. 264, 285 (N.D.N.Y. 1998), *aff'd in part, rev'd in part on other grounds*, 199 F. 3d 85 (2d Cir. 1999) (backfilling of trenches with excavated material was a discharge); *M.C.C. of Florida*, 772 F.2d at 1506 (Eleventh Circuit holding redeposition of seabed materials resulting from propeller rotation onto adjacent sea grass beds was an ''addition'' of dredged spoil); *U.S. v. Deaton*, 209 F. 3d 331 (4th Cir. 2000) (redeposition of wetland materials by sidecasting is a regulated discharge); *U.S. v. Huebner*, 752 F. 2d 1235 (7th Cir. 1985), *cert denied*, 474 U.S. 817 (1985) (sidecasting materials along a ditch and then using a bulldozer to spread material over several acres constituted a discharge). Poe, apparently, thinks all of these courts got it wrong.

In sum, Poe wants this Court to adopt his preferred interpretations of the terms "addition" and "water." But Poe's interpretations are absurd, defy common definitions, and conflict with every circuit court decision addressing similar issues. Moreover, even if there were any credence to Poe's interpretation, *Chevron* requires this Court to defer to EPA and the Corps, as it did in *Rybachek*. The Court should thus reject Poe's arguments and affirm the district court.

II. THE DISTRICT COURT DID NOT ERR WHEN IT HELD SUCTION DREDGE MINING REQUIRES A 402 PERMIT, NOT A 404 PERMIT

Poe argues in the alternative that even if he did add pollutants to the South Fork, he discharged "dredged material" that is regulated by the Corps under Section 404, not other pollutants subject to 402. Open. Br. at 43–51. The basic flaw in Poe's argument is that the Corps does not regulate suction dredge mining under 404. Again, EPA and the Corps agree that suction dredge mining discharges are comprised of processed wastes that require 402 permits, not 404 permits. This Court should—like the district court and the Oregon Supreme Court in *EOMA*—defer to EPA's and the Corps' reasonable interpretation, and reject Poe's attempt to evade the CWA and upend the established CWA permitting programs for suction dredge mining in Idaho and beyond.

A. EPA and the Corps Reasonably Interpret the CWA to Regulate Suction Dredge Mining Discharges Under Section 402

Under the CWA, pollution discharges require a 402 permit from EPA, unless

the discharge is "dredged or fill material" requiring a permit from the Corps. *See* 33 U.S.C. §§ 1342 & 1344; 40 C.F.R. § 122.3; *Coeur Alaska v. Southeast Alaska Conservation Council*, 557 U.S. 261, 274 (2009).[5] The CWA defines "pollutant" broadly to include numerous things, including "industrial waste", "rocks," and "sand." 33 U.S.C. § 1362(6). The CWA does not define "dredged material." *See* 33 U.S.C § 1362.

Poe argues his discharges from a suction dredge are "dredged material" under the CWA. Open. Br., 44–46. EPA and the Corps, however, have long agreed that when materials are dredged from a waterbody and are subsequently processed, they are no longer dredged materials and have become industrial waste, rock, sand,

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[5] The U.S. Supreme Court's decision in *Coeur Alaska v. Southeast Alaska Conservation Council*, 557 U.S. 261, 274 (2009), held that if a discharge is classified as "dredged" or "fill" material, then it requires a 404 permit from the Corps and not a 402 permit. *Coeur Alaska* has no bearing on whether Poe's mining converts what might have initially been dredged materials into "processed" wastes. In *Coeur Alaska*, the mining company planned to reopen a massive gold mine and was issued a 404 permit to dump 4.5 million tons of mine tailings into a lake: enough mine tailings to create a "pile would that would rise twice as high as the Pentagon" and raise the bed of the 51-foot deep lake by about 50 feet, permanently creating an extremely shallow lake and nearly tripling the lake's surface area. *Id.* at 267–68. Unlike here, EPA, the Corps, and the parties in *Coeur Alaska* all agreed that the mine discharged "fill material." *Id.* at 257. Southeast Alaska Conservation Council, nevertheless, argued that it should be permitted under 402, instead of under 404. The Supreme Court deferred to agencies' position that the material was fill, because it was not "plainly erroneous or inconsistent with the regulation." *Id.* at 278 (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

or other CWA pollutants regulated under 402. This is what Poe does: after excavating riverbed materials, Poe processes those materials by running them through a sluice as part of his gold mining operations, and converts them to industrial waste, rocks, and sands before discharging them to the South Fork.

Again, in their 1986 MOA, EPA and the Corps agreed that "placer mining wastes" were the type of "pollutant" discharged in "liquid, semi-liquid, or suspended form" subject to 402, not 404. 51 Fed. Reg. at 8,872. The Corps' 1990 regulatory guidance letter confirms its position that once "dredged material" is "subsequently processed to remove desired elements, its nature has been changed" and "it is no longer dredged material" regulated under 404. 1-SER-296. The Corps explained: "The raw materials associated with placer mining operations are not being excavated to simply change their locations as in a normal dredging operation, and the residue of this processing should be considered waste." *Id.*

Nothing in the CWA says that once a material has been dredged, it remains a dredged material forever. And nothing in the CWA delineates the point at which a material that has been dredged is no longer a dredged material. EPA and the Corps reasonably interpret the CWA to conclude that by processing dredge mining materials, they become "industrial wastes," "rocks," "sands," or other CWA pollutants regulated under 402, and that they are no longer dredged materials regulated under 404.

The sediment and other riverbed material processed and discarded by Poe's suction dredge can reasonably be considered to be "industrial waste," which is a pollutant specifically listed in the CWA. 33 U.S.C. § 1362(6). For instance, this Court has held that salty groundwater pumped to the surface and discharged to a river during coal bed methane extraction activities is "industrial waste." *Northern Plains Res. Council v. Fidelity Expl. & Dev. Co.*, 325 F.3d 1155 (9th Cir. 2003). Rejecting the argument that industrial waste is limited to "sludge oozing from manufacturing or processing plants, barrels filled with toxic slime, and raw sewage floating in a river," *Northern Plains* considered the ordinary meanings of "industrial" and "waste," and held that "industrial waste" is "any useless byproduct derived from the commercial production and sale of goods and services." *Id.* at 1160–61 (citations omitted). Poe is a professional miner, who suction dredge mines on the South Fork to obtain gold and make money. 1-SER-002–03. Once riverbed materials are processed on his dredge by sorting out gold, the discharged water and riverbed materials are a useless byproduct of his gold production and are, thus, industrial waste.

The processed materials discharged from Poe's suction dredge can also reasonably be considered "rock" and "sand," which are specifically listed as CWA pollutants. 33 U.S.C. § 1362(6). Numerous courts, including this one, have held that sediment and its components are pollutants under the Act. *See*, *e.g.*, *Driscoll v.*

Adams, 181 F.3d 1285, 1291 (11th Cir. 1999); *Rybachek*, 904 F.2d at 1285–86; *Pronsolino v. Marcus*, 91 F.Supp.2d 1337, 1351 (N.D. Cal. 2000); *Hudson River Fishermen's Ass'n v. Arcuri*, 862 F.Supp. 73, 76 (S.D.N.Y. 1994); *N. Carolina Shelfish Growers Ass'n v. Holly Ridge Assocs., LLC*, 278 F.Supp.2d 654, 676 (E.D.N.C. 2003). The riverbed material processed and then discarded from Poe's suction dredge includes primarily rock, gravel, cobble, sand, sediment, and silt.

Thus, after excavating riverbed materials from under the river, Poe converts them to "industrial waste" or other CWA "pollutants," such as "sand" and "rocks," which he adds to the water when he dumps them off his dredge into the river. EPA's and the Corps' interpretation of the CWA on this is reasonable and must be upheld, as the district court did when it "defer[ed] to the interpretation by these agencies that the processed material discharged from Mr. Poe's suction dredge mining on the South Fork Clearwater river is a pollutant, not a dredged or fill material, and requires an NPDES permit under Section 402 of the CWA." ER-56–57. This Court should affirm.

B. EPA and the Corps Reasonably Interpret Their CWA Regulations to Regulate Suction Dredge Mining Under 402

Poe also argues that his mining discharges are "dredged materials" as defined in the CWA regulations adopted by EPA and the Corps. Open. Br. 46–50. Poe is wrong. The CWA regulations define "dredged material" as "material that is excavated or dredged from waters of the United States." 33 C.F.R. § 323.2(c). But

the regulations provide exceptions to the definition, including: "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)." 33 C.F.R. § 323.2(d)(2)(i).

Poe claims that he dredges in the river, and therefore this exception for "onshore subsequent processing" does not apply to him. However, the phrase "onshore subsequent processing" can reasonably be interpreted to include materials processed over the water on a floating dredge tethered in place by ropes strung to the shore or riverbed, like Poe's. There is nothing unreasonable about applying the onshore subsequent processing exception to Poe.

Moreover, there is no meaningful distinction between processing over the shoreline versus processing over the water, such as on a floating craft, pier, or dock. It is the "subsequent processing" of the dredged material and discharge to water that matters under the CWA and CWA regulations, not the location of the subsequent processing. It would make no meaningful difference under the CWA if Poe did his processing on the shore (say by simply moving his dredge a few feet over onto the bank of the river) while still using a nozzle and hose to suck up riverbed material, still processing them through a sluice box, and still discharging the mining wastes off the back of his dredge into the South Fork.

Most significantly, Poe reads the definition of "dredged materials" and the

"onshore subsequent processing" exception in complete isolation. He fails to even acknowledge that another section of the CWA regulations specifically regulates gold placer mining under 402, not under 404. In 1988, when EPA adopted the CWA regulations which this Court upheld in *Rybachek*, those regulations established 402 permit pollution limits for gold placer mines, including specifically "dredges." 40 C.F.R. § 440. 140(a). The regulations define a "[d]redge" as "a self-contained combination of an elevating excavator…, the beneficiation or gold-concentrating plant, and a tailings disposal plant, all mounted on a floating barge." 40 C.F.R. § 440.141(a)(4) (emphasis added).[6]

Poe never even acknowledges this part of the CWA regulations, nor does he explain the direct contradiction between his interpretation of the "subsequent onshore processing" exception and this other part of the CWA regulations explicitly regulating all gold dredges (including "floating" dredges) under 402.

"Regulations, like statutes, are interpreted according to canons of construction." *Black & Decker Corp. v. C.I.R.*, 986 F.2d 60, 65 (4th Cir. 1993).

[6] The pollution limits set in these regulations apply to larger dredge mines, not "dredges which process less than 50,000 cu yd of ore per year." 40 C.F.R. § 440.140(b). But as EPA explained when it adopted the pollution limits, all dredges not covered by the regulation "remain subject to regulation by the NPDES permit issuing authority under section 402 of the CWA." 53 Fed. Reg. 18,764, 18,780 (May 24, 1988). Thus, while Poe's operations might be small enough that they are not subject to the specific pollution limits set forth in these regulations, they still trigger the requirement for a 402 permit.

Under the canon of *generalia specialibus non derogant*, when there is a conflict between a general provision and a specific provision, the specific provision prevails. "The canon provides that a 'narrow, precise, and specific' statutory provision is not overridden by another provision 'covering a more generalized spectrum' of issues." *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1075 (9th Cir. 2016) (quoting *Radzanower v. Tourche Ross & Co.*, 426 U.S. 148, 153–54 (1976)). "[T]he assumption being that the more specific of two conflicting provisions 'comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence.'" *Perez-Guzman*, 835 F.3d at 1075 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 183 (2012)).

The part of the CWA regulations setting 402 permit limits for dredges and other placer gold mines at 40 C.F.R. § 440.140 is very specific; it sets 402 permit pollution limits for sluice box discharges from placer gold mines, and defines and includes "floating" dredges. By contrast, the CWA regulations defining dredge material at 33 C.F.R. § 323.2 are more general, and the they make no mention of placer mining, sluice boxes, or floating dredges. Thus, the regulations at 40 C.F.R. § 440.140 setting 402 permit limits "comes closer to addressing the very problem posed by the case at hand." And because these narrow, precise, and specific provisions are not overridden by other provisions covering more general issues,

EPA's and the Corps' interpretation is not only reasonable, but it is the better interpretation of their CWA regulations.

Courts defer to an agency's interpretation of its regulations when: (1) the regulation is genuinely ambiguous; (2) the agency's interpretation is reasonable; (3) the character and context of the interpretation entitle it to deference; (4) the interpretation was actually made by the agency; (5) the interpretation implicates the agency's substantive expertise; and (6) the interpretation reflects the fair and considered judgment of the agency. *See Kisor v. Wilkie*, 139 S.Ct. 2400, 2415–18 (2019). These factors are all met here, such that the Court again must defer to EPA and the Corps' reasonable interpretation of their CWA regulations.

That is what the Oregon Supreme Court did in *EOMA* when it considered and rejected the same arguments that Poe makes here. As it explained:

> *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."

EOMA, 445 P.3d at 257.

After analyzing the relevant regulatory history from 1986 to 2018 in what it described as "mind-numbing" detail, *id.* at 258, *EOMA* concluded that "EPA and the Corps have been on the same page," *id.* at 269, and "defer[red] 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," *id.* at 273–74.

In summary, EPA's and the Corps' actions adopting CWA regulations and implementing and enforcing the CWA for the last fifty years show that the agencies used their expertise to make a fair and considered judgment that gold placer mines discharge pollutants regulated under 402, not dredged material regulated under 404. This is a reasonable interpretation of their CWA regulations, as the district court held, and this Court should affirm.

C. Accepting Poe's Argument Will Upend Existing Suction Dredge Mining Permitting Programs, While Letting Him Off the Hook

Accepting Poe's argument that he discharged dredged materials regulated under 404 would upend the 402 permitting programs for suction dredge mining in Idaho, Alaska, California, and Oregon. These are states with 402 permitting authority and where suction dredge mining occurs. In all of these states, suction dredge mining is regulated under Section 402 through state agency programs. And there is no Corps program for regulating them under 404.

Since receiving 402 permitting authorization in 2018, Idaho DEQ requires 402 permits (IPDES permits) for suction dredge mining. *See* 1-SER-213; 1-SER-215. And again, the Corps does not require 404 permits in Idaho. 2-SER-298–302.

Similarly, the Alaska Department of Environmental Conservation (ADEC) issues Section 402 permit for suction dredge mining in Alaska. 1-SER-295. As the

Corps explained in 2012 for Alaska: "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." 2-SER-305 (emphasis in original).

The Oregon Department of Environmental Quality also requires 402 permits for suction dredge mining in Oregon, and created a streamlined general permit for suction dredge mining, which was upheld in *EOMA*. 445 P.3d at 252.

In 2009, California put a moratorium on suction dredge mining due to its adverse environmental and health effects. *See People v. Rinehart*, 1 Cal.5th 652, 658, 377 P.3d 818, 821 (2016) (upholding moratorium), *cert denied* 138 S.Ct. 635 (2018). More recently, and while the moratorium was still in effect, the California State Water Resources Control Board issued a draft 402 general permit for suction dredge mining. *See* 2-SER-306–09; 2-SER-310–12.

Accepting Poe's argument would upend these 402 permitting programs, including the streamlined general permit program in Idaho. Dredge miners would instead have to seek 404 permits from the Corps, a process that "can take years and cost an exorbitant amount of money." *Sackett*, 598 U.S. __, 2023 WL 3632751 at *10. Other dredge miners (including those who have obtained 402 permits to authorize their dredging) would lose 402 permit coverage and face the burden, uncertainty, and delay of seeking approval from the Corps. Yet Poe would be let

off the hook for dredging on the South Fork without any CWA permit—402 or 404—in 2014, 2015, and 2018.

In summary, EPA, the Corps, and state agencies in Idaho, Oregon, Alaska, and California all classify sediment discharges from suction dredges as processed wastes requiring 402 permits. The Court should reject Poe's misleading and unfounded arguments asking it to deviate from those authorities.

CONCLUSION

For the foregoing reasons, ICL respectfully prays that the Court affirm the district court.

Dated: May 30, 2023

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

9th Cir. Case Number No. 22-35978

The undersigned attorney or self-represented party states the following:

[x] I am unaware of any related cases currently pending in this court.

[ ] I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

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Signature */s/ Bryan Hurlbutt* **Date** May 30, 2023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

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