

# Note

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## Muddying the Waters of Clean Water Act Permitting: *NEDC* Reconsidered

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## INTRODUCTION

Two related sections of the Clean Water Act have recently received attention in the Oregon courts—and not without considerable confusion. These Clean Water Act sections allow certain pollutant discharges into Oregon’s waterways, and the recent litigation has raised questions about their application to local mining operations.

Gold mining has a long history in the western United States, and Oregon is no exception. Since the Gold Rush in the mid-1800s, prospectors have scoured the West for precious metals, laying claim to their “right to mine” under the General Mining Act of 1872.<sup>1</sup> In recent years, recreational prospectors have begun using modern small suction dredges, a more accessible and lower-impact alternative to large dredging equipment, to search for the precious minerals on federal lands.<sup>2</sup> Yet even small suction dredge mining is known to taint streams with toxins, disrupt wildlife habitats, and, ultimately, impact human health.<sup>3</sup>

Environmentalists have opposed the practice for years. In Oregon, the Northwest Environmental Defense Center has been fighting state regulations that permit small suction dredge mining practices since the state issued the regulations in 1997.<sup>4</sup> Within the past two years, after California passed a statewide moratorium prohibiting the activity,<sup>5</sup> small suction dredge mining on Oregon streams has become particularly popular,<sup>6</sup> and its impacts particularly noteworthy.

In 2005, under its delegated Clean Water Act authority, the Oregon Environmental Quality Commission (EQC) issued General Permit 700-PM to regulate the practice of small suction dredge mining. The Northwest Environmental Defense Center and other environmental

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<sup>1</sup> General Mining Act of 1872, 30 U.S.C. §§ 22–24, 26–28, 29, 30, 33–35, 37, 39–43, 47 (2006).

<sup>2</sup> Under the General Mining Act of 1872, federal lands are generally open to mining exploration. *See id.* § 22.

<sup>3</sup> Bret C. Harvey & Thomas E. Lisle, *Effects of Suction Dredging on Streams: A Review and an Evaluation Strategy*, 23 FISHERIES HABITAT 8, 8 (1998).

<sup>4</sup> *See* *Nw. Env'tl. Found. v. Or. Dep't of Env'tl Quality*, CV 9706-04970 (Or. Circ. Ct. 4th Dist. Sept. 18, 1998).

<sup>5</sup> *See* S.B. 670, 2009 Gen. Assem. Reg. Sess. (Cal. 2009), available at [http://info.sen.ca.gov/pub/09-10/bill/sen/sb\\_06510700/sb\\_670\\_bill\\_20090227\\_introduced.pdf](http://info.sen.ca.gov/pub/09-10/bill/sen/sb_06510700/sb_670_bill_20090227_introduced.pdf) (last visited Sept. 30, 2011).

<sup>6</sup> *See* The New 49'ers, *New 49'ers Discover High-grade Gold Dredging on the Rogue River in Southern Oregon!*, [http://www.goldgold.com/rogue\\_dredging.htm](http://www.goldgold.com/rogue_dredging.htm) (last visited Sept. 30, 2011) (advertising recreational gold mining opportunities on the Rogue River).

and mining organizations challenged the permit, filing a petition for judicial review in the Oregon Court of Appeals, arguing procedural, substantive, and statutory deficiencies in the suction-dredge permitting scheme. In December 2009, the court issued an opinion on the validity—or invalidity, as it were—of the general permit.<sup>7</sup> The court declared the 2005 permit invalid because its “lack of specificity” rendered it outside the statutory authority of the EQC.<sup>8</sup> In so doing, the court also addressed the distinction between two mutually exclusive and often-debated sections of the Clean Water Act: sections 402 and 404. This portion of the court’s opinion is, in many ways, problematic, because it allows for simultaneous regulation of small suction dredge mining by two distinct agencies, the U.S. Army Corps of Engineers and the Environmental Protection Agency, which the Clean Water Act empowered for two very different purposes.

This Note discusses the Oregon court’s decision in *Northwest Environmental Defense Center v. Environmental Quality Commission (NEDC)*; specifically, it addresses the court’s interpretation of the Clean Water Act as it relates to the text and structure of the Act itself, the applicable precedent, and the history and purposes of the agencies involved. To provide context, the Note begins by describing the practice of small suction dredge mining. Part I takes both a practical and technical approach, attempting to distinguish the practice regulated under Oregon law from activities regulated elsewhere. Part II addresses some of the intricacies of the Clean Water Act, providing the federal statutory background for the *NEDC* decision. Part III reviews the *NEDC* decision in detail, including its procedural history, relevant precedent, and the court’s analysis. Finally, Part IV discusses certain legal and practical considerations that the court should have addressed in the *NEDC* decision, such as the limited functions of the Act’s administering agencies and the inconsistencies that result from other provisions of the Act when sections 402 and 404 are read as the Oregon Court of Appeals chose to read them. Part V concludes by suggesting a different interpretation of at least the term “discharge” under sections 402 and 404 and by urging reconsideration of the court’s interpretation.

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<sup>7</sup> *Nw. Envntl. Def. Ctr. v. Envntl. Quality Comm’n*, 232 Or. App. 619, 223 P.3d 1071 (2009), *review allowed*, 349 Or. 56, 240 P.3d 1097 (2010), *dismissed as improvidently granted*, 349 Or. 246, 245 P.3d 130 (2010).

<sup>8</sup> *Id.* at 645, 223 P.3d at 1086.

## I

## SMALL SUCTION DREDGE MINING

As the Oregon Court of Appeals correctly noted in *NEDC*, small suction dredge mining is a subset of “placer mining,” a type of mining that extracts valuable minerals from sediment deposits known as placers.<sup>9</sup> But to what extent do small suction dredges vary from other placer mines, and do such distinctions matter? This Part considers that question.

*A. Placer Mining*

Placer mining is a broad practice. Placers, or deposits of detrital or indurated sediment<sup>10</sup> containing concentrations of precious minerals, collect in streams, on hillsides, on beaches, or in other generally offshore areas.<sup>11</sup> Placers can be formed by chemical weathering, wind, streamflows, or other natural processes.<sup>12</sup> In-stream placers are often the most valuable, yielding high concentrations of precious metals, and are generally more common than placers in other environments.<sup>13</sup> Gold has historically been among the most valuable placer minerals—simply based on its utility—but other minerals, including diamond, tin, and platinum, are also heavily mined.

In large mining operations, placer mining for these minerals can be performed using bucket scrapers, which cut pits at depths of thirty feet and involve substantial surface water diversion mechanisms.<sup>14</sup> One could also mine placers using cutterhead hydraulic dredges, which dig to depths of fifty feet and use large motors operating at up to 10,000 horsepower.<sup>15</sup> At the other end of the spectrum, placer mining could also be performed by simple hand panning, a low-impact method of mining practiced for hundreds of years.<sup>16</sup> Somewhere in between these two extremes are large and small suction dredges, which operate by suctioning the minerals from the streambed and redepositing the mineral waste after processing.<sup>17</sup>

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<sup>9</sup> See ARTHUR B. CUMMINS & IVAN A. GIVEN, SOCIETY OF MINING ENGINEERS OF AIME, MINING ENGINEERING HANDBOOK 17-151 (1973) (so describing the practice).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 17-151–52.

<sup>12</sup> *Id.* at 17-152.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 17-161.

<sup>15</sup> *Id.* at 17-164.

<sup>16</sup> *Id.* at 17-161.

<sup>17</sup> *Id.* at 17-163–64.

### B. Suction Dredging in Oregon

The State of Oregon—in particular, the Oregon Department of Environmental Quality and the Department of State Lands—has regulated small-scale dredge mining activities throughout the state since the early 1990s.<sup>18</sup> The state also regulates large-scale mining activities, although it generally prohibits such activities in state scenic waterways and Essential Salmon Habitat (ESH), subjecting large mining activities in these areas to more extensive permitting requirements than small-scale mining. In 1997, small suction dredge mining activities became the subject of a General Permit—the 700-J permit—the requirements of which are significantly less stringent than a permit for the large-scale alternative.

The activity regulated under the 700-J permit—now the 700-PM permit<sup>19</sup>—is much different than the large placer mining activities that were and still are common on many major waterways in other parts of the United States. In fact, small suction dredging is more similar, at least with respect to the magnitude of its impact, to hand panning than it is to large placer mining: with small suction dredging, the streambed volume disturbed is relatively limited, as is the ancillary effect on sediment upstream and downstream of the mining location. Under Oregon law, small suction dredge mining is permitted in areas of Essential Salmon Habitat, subject to limitations on the volume of streambed disturbed by the activity, the diameter of the intake nozzle, and the size of the motor.<sup>20</sup>

### C. Environmental Considerations

Suction dredging is harmful to fish habitat, especially spawning beds in and along the streams and waterways in which it occurs. And one can see why: a suction dredge essentially sucks up sediment from the streambed, runs it through a small sluice box, and redeposits the material—or what remains of the material—back into the stream as a suspended solid.

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<sup>18</sup> OR. DEP'T OF ENVTL. QUALITY, 700-PM GENERAL PERMIT FACT SHEET 3-4 (July 30, 2010) (describing the history Oregon's regulation of the practice under the section entitled "Permit History").

<sup>19</sup> *Id.* at 1.

<sup>20</sup> OR. DEP'T OF ENVTL. QUALITY, 700-PM GENERAL DISCHARGE PERMIT 7 (reissued July 30, 2010) (codified by reference in OR. ADMIN. R. 340-045-0033(11)).

This practice materially alters the streambed itself and increases the water's turbidity level,<sup>21</sup> extending the sediment mobility by casting it downstream and ultimately disrupting spawning gravels.<sup>22</sup> The excavation from suction dredging compounds the instability of the streambed, creating material alterations and increased local scour in areas where fish often spawn.<sup>23</sup> Dredge tailings are attractive to salmonids for spawning sites, and they ultimately increase the mortality rate for aquatic organisms and dramatically decrease the salmon population.<sup>24</sup> It seems generally undisputed that dredging activities, particularly in areas of Essential Salmon Habitat and during spawning season, are harmful to the environment.

## II

### STATUTORY BACKGROUND OF *NEDC*

In 1972, Congress enacted the Federal Water Pollution Control Act,<sup>25</sup> more commonly referred to as the Clean Water Act (the "Act"), with the express purpose of "[r]estor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters."<sup>26</sup> The Act codified at least two national goals: (1) to eliminate "the discharge of pollutants into the navigable waters [of the United States] . . . by 1985," and (2) to "provide[] for the protection and propagation of fish, shellfish, and wildlife and provide[] for recreation in and on the water [to] be achieved by . . . 1983."<sup>27</sup> To achieve those goals, Congress forcefully mandated that, "[e]xcept as in compliance with this section and sections . . . 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful."<sup>28</sup> Sections 1342 and 1344, which are more commonly referred to by their Public Law section numbers—402 and 404,

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<sup>21</sup> Turbidity is a measurement of water clarity or "light scatter"—the ability of water to scatter light—measured in Nephelometric Turbidity Units (NTUs). ENVTL PROT. AGENCY, *Importance of Turbidity*, in EPA GUIDANCE MANUAL 7.1, 7.4 (1999). Turbidity, in effect, measures the presence of suspended solids in water. *See id.* Although the question was not at issue in *NEDC*, turbidity, itself, is not a "pollutant," but an indicator thereof.

<sup>22</sup> Harvey & Lisle, *supra* note 3, at 11.

<sup>23</sup> Adrienne DelCotto, Comment, *Suction Dredge Mining: The United States Forest Service Hands Miners the Golden Ticket*, 40 ENVTL. L. 1021, 1026 (2010).

<sup>24</sup> *Id.*

<sup>25</sup> Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §§ 1251–1387 (2006).

<sup>26</sup> *Id.* § 1251(a).

<sup>27</sup> *Id.* §§ 1251(a)(1)–(2).

<sup>28</sup> *Id.* § 1311(a).

respectively—set forth two exceptions to this broad prohibition on the discharge of pollutants into waters governed by the Act.<sup>29</sup>

The first of the two exceptions, section 402, establishes the National Pollutant Discharge Elimination System, or the NPDES. The NPDES statutory scheme allows the Administrator of the Environmental Protection Agency (EPA) to issue permits for the discharge of pollutants so long as the discharge complies with certain effluent limitations established under the Act.<sup>30</sup> Section 402 also authorizes the states to establish statewide permitting programs pursuant to the NPDES, as long as those programs also meet the Act's established standards.<sup>31</sup> The EPA has authorized most states, including Oregon, to administer its own NPDES permitting.<sup>32</sup> In Oregon, the authority to issue NPDES permits belongs to the Oregon Environmental Quality Commission.<sup>33</sup>

Section 404 functions as another distinct exception to the Act's general prohibition on discharges. By the language of the Act, it is also an exception to the NPDES permitting requirement: "Except as provided in section[] . . . 404 of this Act, the Administer may . . . issue a permit for the discharge of any pollutant, [subject to authorized NPDES state guidelines]." <sup>34</sup> Section 404 authorizes the U.S. Army Corps of Engineers<sup>35</sup> to issue permits for "the discharge of dredged or fill material into the navigable waters at specified disposal sites."<sup>36</sup> This division of permitting authority is critical: the mission

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<sup>29</sup> The Clean Water Act generally governs discharges into "navigable waters." The Act defines "navigable waters" as "waters of the United States, including the territorial seas," § 1362(7), which the EPA has further interpreted to include "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams) . . . [w]hich are or could be used by interstate or foreign travelers for recreational or other purposes," 40 C.F.R. § 122.2 (2003). Federal courts have upheld this definition, although it has been controversial. See THOMAS P. SULLIVAN, ENVIRONMENTAL LAW HANDBOOK 323–25 (2008) (citing *Rapanos v. United States*, 547 U.S. 715 (2006)).

<sup>30</sup> 33 U.S.C. § 1342(a)(1).

<sup>31</sup> *Id.* § 1342(b); see also 40 C.F.R. § 131.5 (2010) (providing for review of state standards). In other words, a state may opt to establish its own standards, so long as its standards are at least as stringent, if not more, than the federal standards.

<sup>32</sup> At this time, the EPA has granted forty-six states the authority to administer the NPDES permitting program. SULLIVAN, *supra* note 29, at 327; see also U.S. Environmental Protection Agency, *EPA State Program Status*, <http://cfpub.epa.gov/npdes/statestats.cfm> (last visited Sept. 30, 2011).

<sup>33</sup> See OR. REV. STAT. § 468B.035(1) (2009).

<sup>34</sup> 33 U.S.C. § 1342(a)(1).

<sup>35</sup> Section 404 authorizes the "Secretary" to issue permits, referring to the "Secretary of the Army, acting through the Chief of Engineers." 33 U.S.C. § 1344(d).

<sup>36</sup> *Id.* § 1344(a).

of the EPA—“to protect human health and the environment”<sup>37</sup>—is far different than that of the U.S. Army Corps of Engineers (the “Corps”). The mission of the Corps contemplates construction and navigation; indeed, the Corps says that it “[p]rovide[s] vital engineering services . . . to strengthen our Nation’s security, energize the economy, and reduce risks from disasters.”<sup>38</sup>

It is, however, important to note that under section 404, the Act provides an avenue by which the EPA can “veto” a discharge at a specified disposal site under section 404(a).<sup>39</sup> Under section 404(c), if the EPA Administrator decides that a discharge permitted under section 404(a) will result in an “unacceptable adverse effect on [the environment],” the Administrator can exercise what amounts to veto power and bring the discharge back within the section 402 permitting scheme.<sup>40</sup>

### III

#### THE *NEDC* DECISION

In 2009, the Oregon Court of Appeals was presented with the opportunity to clarify exactly where small suction dredge mining falls under the Clean Water Act’s complex statutory scheme.<sup>41</sup> Petitioner Eastern Oregon Mining Association argued that a general permit by the Oregon EQC fell outside the statutory scope of that agency, while petitioner Northwest Environmental Defense Center argued the opposite, noting, however, that the permit was invalid on other grounds.<sup>42</sup> The court essentially dismissed all of the arguments, declaring the permit invalid because of its purported “lack of specificity.”<sup>43</sup>

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<sup>37</sup> See U.S. Environmental Protection Agency, *Our Mission and What We Do*, <http://www.epa.gov/aboutepa/whatwedo.html> (last visited Sept. 30, 2011).

<sup>38</sup> See U.S. Army Corps of Engineers, *Mission & Vision*, <http://www.usace.army.mil/about/Pages/Mission.aspx> (last visited Sept. 30, 2011).

<sup>39</sup> 33 U.S.C. § 1344(c).

<sup>40</sup> *Id.*

<sup>41</sup> *Nw. Env’tl. Def. Ctr. v. Env’tl. Quality Comm’n*, 232 Or. App. 619, 223 P.3d 1071 (2009), *review allowed*, 349 Or. 56, 240 P.3d 1097 (2010), *dismissed as improvidently granted*, 349 Or. 246, 245 P.3d 130 (2010).

<sup>42</sup> *Id.* at 643, 223 P.3d at 1084.

<sup>43</sup> *Id.* at 645, 223 P.3d at 1086.

### A. *The History*

In 1997, the Oregon EQC began regulating small suction dredge mining under a general permit issued pursuant to its delegated authority under section 402.<sup>44</sup> This permit, known as the 700-J permit, was the predecessor to the permit at issue in the *NEDC* decision and expired by its own terms in 2002.<sup>45</sup> In 2005, the EQC issued the general discharge permit known as the 700-PM permit, which functioned to replace the 700-J permit.<sup>46</sup> The 700-PM permit was the subject of the *NEDC* litigation.<sup>47</sup>

The scope of the 700-PM permit extended to “suction dredges not to exceed 30 horsepower with an inside diameter suction hose no greater than 6 inches that are used for recovering precious metals or minerals from stream bottom sediments.”<sup>48</sup> The permit established discharge limitations for small suction dredges falling within its scope, providing that “no wastes may be discharged . . . that will violate . . . OAR Chapter 340, Division 41.”<sup>49</sup>

In turn, division 41 includes a comprehensive set of water quality limitations, including turbidity standards.<sup>50</sup> Specifically, OAR 340-041-0036 provides that “[n]o more than a ten percent cumulative increase in natural stream turbidities may be allowed, as measured relative to a control point immediately upstream of the turbidity causing activity.”<sup>51</sup> The 700-PM permit, however, distinguishing between “background turbidity” and “visible turbidity,” exempted certain suction dredge sizes: “Suction dredges with suction hoses that have an inside diameter of 4 inches or greater must not create visible turbidity beyond 300 feet downstream from a working dredge.”<sup>52</sup> On the other hand, “single operating suction dredge[s] equipped with a suction hose with an inside diameter less than 4 inches has no

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<sup>44</sup> *Id.* at 623, 223 P.3d at 1074. Section 402 authorizes the issuance of general permits under section 1342(b)(1).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 622, 223 P.3d at 1073.

<sup>47</sup> See Memorandum from Larry Knudsen, Senior Assistant Attorney Gen., to Annette Liebe, Surface Water Manager, Dep’t of Env’t. Quality (Aug. 3, 2010) (on file with author).

<sup>48</sup> *Nw. Env’tl. Def. Ctr.*, 232 Or. App. at 624, 223 P.3d at 1074 (quoting the language of the 2005 700-PM Permit).

<sup>49</sup> *Id.* (alteration omitted).

<sup>50</sup> See generally OR. ADMIN. R. § 340-041.

<sup>51</sup> *Id.* § 340-041-0036.

<sup>52</sup> *Nw. Env’tl. Def. Ctr.*, 232 Or. App. at 624, 223 P.3d at 1074.

turbidity discharge limitation.”<sup>53</sup> Oregon’s water quality standards provide an exception to the turbidity standard that is applicable to “[d]redging, [c]onstruction, or other [l]egitimate [a]ctivities” authorized pursuant to section 404 of the Clean Water Act, but *not* section 402.<sup>54</sup>

The Northwest Environmental Defense Council (NEDC) and the Eastern Oregon Mining Association (EOMA) both filed petitions for judicial review of the general permit, but on different grounds.<sup>55</sup> NEDC argued its case on both procedural and substantive grounds: it contended that the EQC did not follow the applicable rulemaking procedures and that the EQC did not provide sufficient notice to the public that it intended to exempt small suction dredges from the turbidity requirements.<sup>56</sup> NEDC also argued that, in providing such an exemption, the EQC violated the notice requirements of the Oregon Administrative Procedure Act.<sup>57</sup> Finally, NEDC argued that the substance of the permit—in other words, the exemption itself—was inconsistent with Oregon’s water quality standards.<sup>58</sup>

The EOMA, for its part, argued that the EQC exceeded its statutory authority by promulgating the general permit because small suction dredge mining is properly regulated under section 404, not section 402.<sup>59</sup> According to the EOMA, such regulation belongs under the authority of the Corps, not the authority of the states pursuant to the NPDES.<sup>60</sup>

Because the EOMA’s argument was dispositive, the Oregon Court of Appeals considered that argument first.<sup>61</sup> The court first identified

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<sup>53</sup> *Id.*, 223 P.3d at 1074–75 (internal quotation marks omitted).

<sup>54</sup> OR. ADMIN. R. § 340-041-0036(2).

<sup>55</sup> See *Nw. Env'tl. Def. Ctr.*, 232 Or. App. at 625, 223 P.3d at 1075. Both petitions were filed pursuant to Oregon Administrative Procedures Act, which allows “a petition by any person to the Court of Appeals” to determine the validity of any rule. OR. REV. STAT. § 183.400(1) (2007). Under the Act, the Court of Appeals’ review is henceforth limited to examination of: “(a) [t]he rule under review; (b) [t]he statutory provisions authorizing the rule; and (c)[c]opies of all documents necessary to demonstrate compliance with applicable rulemaking procedures.” *Id.* § 183.400(3).

<sup>56</sup> Opening Brief for Petitioner at 24, 41, *Nw. Env'tl. Def. Ctr. v. Env'tl. Quality Comm'n*, 232 Or. App. 619 (2009) (No. A 712) (2007 WL 7131913).

<sup>57</sup> *Nw. Env'tl. Def. Ctr.*, 232 Or. App. at 625, 223 P.3d at 1075.

<sup>58</sup> Opening Brief for Petitioner, *supra* note 56, at 41.

<sup>59</sup> *Nw. Env'tl. Def. Ctr.*, 232 Or. App. at 625, 223 P.3d at 1075.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* Under the Oregon Administrative Procedures Act, the court must declare a rule invalid if the court finds that the rule “[e]xceeds the statutory authority of the agency.” OR. REV. STAT. § 183.400(4)(b).

the methodology it would use to address the question presented. That question seems straightforward on its face: Which portion of the Clean Water Act—section 402 or section 404—governs small suction dredge mining? Underlying that question, however, is a much more fundamental, yet historically unclear, issue: How are sections 402 and 404 intended to operate, and what is the difference between the “discharge of pollutants” under section 402 and the “discharge of dredged or fill material” under section 404?

And so the Court of Appeals began a long and complex review of the statutory and regulatory fields encompassing section 402 and section 404 permits.<sup>62</sup> The court’s analysis ultimately turned on the meaning of the phrase “dredged material” under section 404<sup>63</sup> and at various points identified regulatory history indicating, in the court’s view, that the material discharged by small suction dredges could fall under either of the two Clean Water Act permitting schemes. The court concluded not only that “small suction dredge mining . . . involves the placement of dredged spoil and mining tailings . . . regulated exclusively by the Corps under section 404, and not the EPA,”<sup>64</sup> but also found that “small suction dredge mining involves . . . discharges of turbid wastewater that are permitted by the EPA.”<sup>65</sup> These conclusions, taken together, are inconsonant with the meaning of the Clean Water Act. In declaring the 700-PM permit invalid,<sup>66</sup> the court muddied the waters of Clean Water Act permitting and, in doing so, rendered an interpretation of the Act that is, in many ways, altogether inconsistent with the latest opinion of the U.S. Supreme Court.<sup>67</sup>

### B. *The Precedent: Coeur Alaska*

After oral arguments in *NEDC*, but before the Oregon Court of Appeals rendered its decision in December 2009, the U.S. Supreme Court announced its latest interpretation of the Clean Water Act’s dual permitting scheme.<sup>68</sup> In *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, the Court was called upon to determine, among other questions, whether the discharge of mining waste, or

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<sup>62</sup> *Nw. Env'tl. Def. Ctr.*, 232 Or. App. at 627–45, 223 P.3d at 1077–85.

<sup>63</sup> *Id.* at 630, 223 P.3d at 1077–78.

<sup>64</sup> *Id.* at 643–44, 223 P.3d at 1085.

<sup>65</sup> *Id.* at 645, 223 P.3d at 1086.

<sup>66</sup> *Id.* at 645, 223 P.3d at 1085.

<sup>67</sup> *See Coeur Alaska v. Se. Alaska Conservation Council*, 129 S.Ct. 2458 (2009).

<sup>68</sup> *See id.*

slurry, into an existing lake constituted “discharge of . . . fill material” subject to section 404, or whether that discharge constituted “discharge of pollutants” subject to section 402.<sup>69</sup> In essence, the Court was faced with a similar question of federal statutory interpretation: Does the Clean Water Act “give[] authority to the [Corps], or instead to the [EPA], to issue a permit for the discharge of mining waste[?]”<sup>70</sup>

The facts in *Coeur Alaska* are important in understanding the Court’s analysis of the statutory scheme. The large-scale mining operation at issue in that case had two distinct discharge locations, one from the mine into the lake and a second from the lake into the downstream waterway.<sup>71</sup> The Court was careful to draw the distinction between the two discharges. It noted, “The EPA also issued a permit of its own—not for the discharge from the mine into the lake but for the discharge from the lake into the downstream creek.”<sup>72</sup> Each location, according to the Court’s opinion, appears to be a separate “discharge” in determining the applicable permit.

In the end, the Court concluded that where one agency had authority to permit a discharge, the other did not. The Court noted, “The Act is best understood to provide that if the Corps has authority to issue a permit for a discharge under section 404, then the EPA lacks authority to do so under section 402.”<sup>73</sup> Although the opinion of the Court was joined in full by only five Justices,<sup>74</sup> all nine agreed on the proposition that sections 402 and 404 are, effectively, mutually exclusive.<sup>75</sup>

With respect to the proposed mining operation, the Court concluded that the EPA’s decision to treat discharge directly into the

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<sup>69</sup> *Id.* at 2463. Although the discharge at issue in *Coeur Alaska* was, if subject to section 404, undisputedly “fill material” rather than “dredged material,” that distinction does not change the Court’s analysis of the permitting scheme or its application to the *NEDC* decision.

<sup>70</sup> *Id.*

<sup>71</sup> *See id.* at 2464.

<sup>72</sup> *Id.* at 2465.

<sup>73</sup> *Id.* at 2467.

<sup>74</sup> *Id.* at 2462. The opinion of the Court, announced by Justice Kennedy, was joined by Chief Justice Roberts and Justices Thomas, Breyer, and Alito. Justice Breyer wrote separately, concurring. Justice Scalia wrote separately, concurring in part and dissenting in part. Justice Ginsburg, joined by Justice Stevens, dissented.

<sup>75</sup> *Id.* at 2477. (Breyer, J., concurring) (“[T]he law authorizes the environmental agencies to classify material as one or the other.”); *id.* at 2482 (Ginsburg, J., dissenting) (“All agree on preliminary matters. Only one agency, the Corps or EPA, can issue a permit for the discharge.”).

lake as “fill material” subject to section 404, and spillover from the lake to the downstream waterway as “pollutants” subject to section 402, was reasonable.<sup>76</sup> In fact, the Court found the Clean Water Act to be clear: “The regulatory scheme discloses a defined, and workable, line for determining whether the Corps or the EPA has the permit authority.”<sup>77</sup> In the decision below, the Ninth Circuit, according to the Court, “in effect reallocated the division of responsibility that the Corps and the EPA had been following,”<sup>78</sup> by finding that “both . . . appear to apply in this case.”<sup>79</sup>

### C. The Court’s Analysis

What is interesting about the Oregon Court of Appeals’ decision in *NEDC* is that it very explicitly recognized that the Supreme Court, in *Coeur Alaska*, interpreted sections 402 and 404 to be mutually exclusive,<sup>80</sup> yet the opinion goes on to, for all practical purposes, undermine the reasoning behind that interpretation. The Oregon court began where it rightfully should have, by identifying the phrase “discharge of dredged material” in section 404 to be at issue. After reporting the “ordinary meaning” of the phrase “dredged material” (but not that of the term “discharge”), the court found the statute to be ambiguous. Because the statute is ambiguous—in other words, because Congress had not “directly spoken” to the issue—the court turned to the regulatory history of the EPA and the Corps to determine its meaning.<sup>81</sup>

The regulatory history behind the phrase “discharge of dredged materials” is, admittedly, complex. The court started with the agencies’ definition of the phrase “discharge of dredged material” as it existed at the time the 700-PM permit was issued:

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<sup>76</sup> *Id.* at 2463, 2478 (Breyer, J., concurring).

<sup>77</sup> *Id.* at 2469.

<sup>78</sup> *Id.* at 2467.

<sup>79</sup> *Id.* at 2466 (quoting *Se. Alaska Conservation Council v. United States Army Corps of Engs.*, 486 F.3d 638, 644 (2007) (alteration omitted)).

<sup>80</sup> *Nw. Env’tl. Def. Ctr. v. Env’tl. Quality Comm’n*, 232 Or. App. 619, 223 P.3d 1071 (2009), *review allowed*, 349 Or. 56, 240 P.3d 1097 (2010), *dismissed as improvidently granted*, 349 Or. 246, 245 P.3d 130 (2010).

<sup>81</sup> *Id.* at 630–31, 223 P.3d at 1078. The court cites *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), where the U.S. Supreme Court held that, where a court reviews an agency’s interpretation of a statute it administers, the court must first assess “whether Congress has directly spoken to the precise question at issue.” *Chevron, U.S.A., Inc.*, 467 U.S. at 842. “[I]f the statute is silent or ambiguous,” directed the Court, the reviewing court should defer to the agency’s interpretation if it “is based on a permissible construction of the statute.” *Id.* at 843.

(d)(1) Except as provided below in paragraph (d)(3), the term discharge of dredged material means any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States. The term includes, but is not limited to the following:

(i) The addition of dredged material to a specified discharge site located in waters of the United States;

....

(iii) Any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

(2)(i) The Corps and EPA regard the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, *in-stream mining* or other earth-moving activity in waters of the United States as resulting in a discharge of dredged material unless project-specific evidence shows that the activity results in only incidental fallback. . . .

(ii) Incidental fallback is the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal. . . .

(3) The term discharge of dredged material does not include the following:

(i) Discharges of pollutants into waters of the United States resulting from onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill). These discharges are subject to section 402 of the Clean Water Act even though the extraction and deposit of such material may require a permit from the Corps or applicable State section 404 program.

....

(iii) Incidental fallback.<sup>82</sup>

At that point, the court jumped back in time, explaining the regulatory history leading up to the 2005 definition of “dredged material.”<sup>83</sup> Starting with a decision from 1993, the court considered the *Tulloch Rule*, which defined the phrase “discharge of dredged material” to include “any addition, including any redeposit, of dredged material, including excavated material, into waters of the

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<sup>82</sup> 33 C.F.R. § 323.2 (2001) (emphasis added); *see also* 40 C.F.R. § 323.2 (similarly defining the term “discharge of dredged material”).

<sup>83</sup> *Nw Envtl. Def. Ctr.*, 232 Or. App. at 632–33, 223 P.3d at 1080.

United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.”<sup>84</sup> The *Tulloch Rule* did not exempt “incidental fallback” from section 404 regulation.<sup>85</sup> When the rule was promulgated, the court noted, the EPA and the Corps made the following statement about the *Tulloch Rule*’s impact on current agency practice:

[I]t is important to realize that the Corps has been regulating many projects involving mechanized landclearing, ditching, channelization, mining, or other excavation in waters of the U.S. for years because those projects frequently involved substantial discharges of dredged or fill material into waters of the U.S.

....

Nevertheless, this final rule does represent both a clarification of agency guidance and a change of agency practice regarding a subclass of excavation-type activities in waters of the U.S.: i.e., those that would take place with relative small-volume, “incidental” discharges of dredged material that unavoidably accompany such excavation operations.<sup>86</sup>

The court then considered a 1998 D.C. Circuit case, which invalidated the *Tulloch Rule* on the grounds that, to the extent that it purported to subject “incidental fallback” to section 404 regulation, it was outside the scope of the Corps’ statutory authority.<sup>87</sup> In response, and as the court discussed, the Corps and the EPA issued a new rule, commonly referred to as *Tulloch II*, which provided an exception to the previous definition of “discharge of dredged material” where “project-specific evidence shows that the activity results in only incidental fallback.”<sup>88</sup>

The court noted, specifically, that *Tulloch II* did not remove, but in fact added to, the language in 33 C.F.R. section 232.2 that declares,

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<sup>84</sup> Clean Water Act Regulatory Programs, 58 Fed. Reg. 45008-01, 45035, 45037 (Aug. 25, 1993). The *Tulloch Rule* gets its name from the fact that the rule resulted from a settlement agreement in *North Carolina Wildlife Federation v. Tulloch*, Civil No. C90-713-CIV-5-BO (E.D.N.C. 1992). See 58 Fed. Reg. at 45008.

<sup>85</sup> See *id.*

<sup>86</sup> *Nw. Envtl. Def. Ctr.*, 232 Or. App. at 633, 223 P.3d at 1080; 58 Fed. Reg. at 45013.

<sup>87</sup> *Nw. Envtl. Def. Ctr.*, 232 Or. App. at 634, 223 P.3d at 1079; see also *Nat’l Mining Ass’n v. United States Army Corps of Eng’rs*, 145 F.3d 1399, 1405 (D.C. Cir. 1998) (holding the same). The court in *National Mining Ass’n* reasoned that the term “addition” in section 404 “cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back.” *Id.* at 1404.

<sup>88</sup> *Nw. Envtl. Def. Ctr.*, 232 Or. App. at 634, 223 P.3d at 1080; see Further Revisions to the Clean Water Act Regulatory Definition of “Discharge of Dredged Material, 66 Fed. Reg. 4550-01 (Jan. 17, 2001).

“The Corps and EPA regard the use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, *instream-mining* or other earth-moving activity in waters of the United States as resulting in a discharge of dredged material.”<sup>89</sup> The court emphasized the agencies’ response to public comment in *Tulloch II* that stated,

We acknowledge that some suction dredging operations can be conducted in such a manner that if the excavated material is pumped to an upland location or other container outside waters of the U.S. and the mechanized removal activity takes place without re-suspending and relocating sediment downstream, then such operations generally would not be regulated.<sup>90</sup>

The court takes this statement to draw an inference that, at most, is a *non sequitur*: “[S]uction dredging operations are regulated under section 404 if the ‘excavated material’ is *not* pumped to land . . . and where the removal activity *does* resuspend or relocate sediment downstream.”<sup>91</sup> The court, after all of this, drew the preliminary conclusion that the agencies understood “in-stream mining” and, in particular, suction dredging, to be regulable under section 404.<sup>92</sup> But its analysis did not stop there.

The court then proceeded to review other instances where the EPA, the Corps, and other courts indicated that the EPA, not the Corps, regulates discharges from placer mines. It first discussed a 1986 Memorandum of Agreement (MOA) between the EPA and the Corps, addressing discharges of solid wastes into waters of the United States.<sup>93</sup> That MOA specifically addressed “placer mining wastes,” noting that such wastes constitute pollutants subject to EPA regulation under section 402, not Corps regulation under section 404.<sup>94</sup> Next, the court turned to a Regulatory Guidance Letter issued

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<sup>89</sup> *Nw. Env'tl. Def. Ctr.*, 232 Or. App. at 634–35, 223 P.3d at 1080 (quoting 40 C.F.R. § 323.2(d)(2)).

<sup>90</sup> *Id.* at 635, 223 P.3d at 1080 (quoting 66 Fed. Reg. at 4554). *Tulloch II* was later invalidated, and the agencies restored the rule to the 1999 version. *Id.* at 636, 223 P.3d at 1081 n.10; *see also* Revisions to the Clean Water Act Regulatory Definition of “Discharge of Dredged Material”; Final Rule, 73 Fed. Reg. 79641-01 (Dec. 30, 2008). That said, the reasoning behind the action taken in 73 Fed. Reg. 79641-01 is unrelated to the issue presented here, and it does not appear as if that action changed the agencies’ interpretation of section 404 as it relates to in-stream mining.

<sup>91</sup> *Nw. Env'tl. Def. Ctr.*, 232 Or. App. at 635, 223 P.3d at 1080.

<sup>92</sup> *Id.* at 636, 223 P.3d at 1080.

<sup>93</sup> *Id.* at 637, 223 P.3d at 1081.

<sup>94</sup> Memorandum of Agreement on Solid Waste, 51 Fed. Reg. 8871 (Mar. 14, 1986).

by the Corps that further classified placer-mining waste as a material regulable under section 402.<sup>95</sup>

Finally, the court landed on a series of regulatory and judicial determinations made by the EPA and the Ninth Circuit with respect to placer-mining operations in Alaska.<sup>96</sup> The most noteworthy of these determinations came with the Ninth Circuit's decision in *Rybachek v. United States*, in which the Ninth Circuit upheld EPA-established effluent limitations of placer-mining operations in Alaska, pursuant to the EPA's authority under section 402.<sup>97</sup> Following *Rybachek*, the court noted, the EPA in Alaska relied on the Ninth Circuit's analysis a number of times, explicitly rejecting arguments that small suction dredge mining was outside the scope of EPA authority.<sup>98</sup>

Then, the court reached yet another intermediate conclusion: "If that were the sum of the regulatory history . . . we might conclude that discharges from small suction dredge mining are regulated exclusively under section 402."<sup>99</sup> But, yet again, it continued its analysis. The court finally addressed a series of public notices issued by the Corps, where the Corps first explained its reasoning for not regulating small suction dredge mining and then switched course by issuing a general permit regulating Alaskan suction dredge operations.<sup>100</sup>

After all of that, the Oregon Court of Appeals arrived at a conclusion that is, at best, convenient. According to the court, not only does small suction dredge mining involve "placement of dredged spoil . . . that . . . constitutes the 'discharge of dredged material.' . . .

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<sup>95</sup> *Nw. Env'tl. Def. Ctr.*, 232 Or. App. at 637–38, 223 P.3d at 1082 (citing U.S. Army Corp of Engineers, Regulatory Guidance Letter 88-10 (July 28, 1990)). The court notes that the Regulatory Guidance Letter expired by its own terms on December 31, 1990; it asserted, however, that despite this, the letter still served as evidence that there is a meaningful distinction, according to the agencies, between mining waste and dredged material. *Id.* at 638, 223 P.3d at 1082.

<sup>96</sup> *Id.* at 638–42, 223 P.3d at 1082–84.

<sup>97</sup> *Rybachek v. United States*, 904 F.2d 1276 (9th Cir. 1990).

<sup>98</sup> *Nw. Env'tl. Def. Ctr.*, 232 Or. App. at 640–41, 223 P.3d at 1083–84 (citing, for example, Response to Comments Regarding Reissuance of General NPDES Permit (G.P.) for Alaskan Small Suction Dredging (Permit Number AKG-37-5000) (2007), incorporated by reference at 72 Fed. Reg. 20847, and U.S. Army Corps of Engineers, Alaska District Regulatory Branch, Special Public Notice 001-08 (Aug. 16, 2001)).

<sup>99</sup> *Id.* at 641, 223 P.3d at 1083.

<sup>100</sup> *Id.* at 641–42, 223 P.3d at 1083–84 (citing U.S. Army Corps of Engineers, Alaska District Regulatory Division, Special Public Notice 94-10 (Sept. 13, 1994); U.S. Army Corps of Engineers, Alaska District Regulatory Division, Public Notice 007-372 (July 3, 2007)).

regulated exclusively by the Corps under section 404,”<sup>101</sup> but it also involves “discharges of turbid wastewater that are permitted by the EPA.”<sup>102</sup> This conclusion raises the question, how is that possible?

#### IV

##### PRACTICAL [RE]CONSIDERATIONS

The practical implications of *NEDC* are monumental. Premised on its conclusions, the EPA and the Corps could both simultaneously regulate small suction dredge mining. The Oregon Court of Appeals seemed to take no account of the broader purposes behind the distinction between section 402 and section 404, the meaning of the term “discharge” as it has applied in most other cases, or the basis for its conclusion within the broader, more complex statutory framework of the Clean Water Act. The conclusion is problematic, and the Oregon courts should reconsider it.

##### A. *The Agencies Involved*

There is evidently some reason that Congress provided the EPA with authority to regulate pollutants and the Corps the authority to regulate dredged and fill material. What that reason is, however, appears to have been lost in translation, as courts struggle to derive meaning from the Act’s terms and structure but do not look back to the origins of these two agencies.

The EPA, established by President Nixon in December 1970, was formed with the express purpose of dealing with the country’s imminent environmental pollution problem.<sup>103</sup> In the face of increasing pollution and degradation of the nation’s land, air, and water, the country was searching for solution.<sup>104</sup> The Nixon

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<sup>101</sup> *Id.* at 643–44, 223 P.3d at 1085.

<sup>102</sup> *Id.* at 645, 223 P.3d at 1086.

<sup>103</sup> Reorganization Plan No. 3 of 1970, Special Message from the President to the Congress About Reorganization Plans to Establish the Environmental Protection Agency and the National Oceanic and Atmospheric Administration (July 9, 1970), *available at* [www.epa.gov/aboutepa/history/org/origins/reorg.html](http://www.epa.gov/aboutepa/history/org/origins/reorg.html).

<sup>104</sup> U.S. Environmental Protection Agency, *The Birth of the EPA* (Nov. 1985), <http://www.epa.gov/history/topics/epa/15c.htm>. The piece describes the state of the nation and the world:

In May 1969, U Thant of the United Nations gave the planet only ten years to avert environmental disaster; the following month, he blamed the bulk of planetary catastrophe on the United States. Under Secretary of the Interior Russell E. Train spoke skeptically . . . : “If environmental deterioration is

Administration's answer was to combine a series of disconnected, environmentally focused federal programs into one agency that could formulate a coordinated response to the dilemma.<sup>105</sup> The EPA was thus established and empowered to conduct research and monitoring programs, establish standards and policies in area of environmental pollution and protection, and enforce those standards in concert with the states.<sup>106</sup>

The Corps, on the other hand, has its origins in engineering, construction, and navigation. The Corps was established as a branch of the Army in March 1802, and has been the lead agency in construction of military fortifications and transportation infrastructure, disaster response, and flood control. Starting in the late-nineteenth century and lasting through Roosevelt's New Deal, the Corps was the primary agency that performed design and construction services for hydropower and flood-control projects throughout the nation.

In recent years, and through various Acts of Congress—in particular, through section 10 of the Rivers and Harbors Act and section 404 of the Clean Water Act—the Corps now works on various projects in the environmental context. That said, the extent of the Corps' authority in such contexts is “a natural product of historical evolution,” and is, thus, limited.<sup>107</sup> Courts today have recognized this limitation and construe Corps authority in light of its history and purpose.<sup>108</sup>

It is with this understanding in mind that one must read the language of the Clean Water Act. The Act prohibits discharges of pollutants, as a general matter, into the nation's navigable waters. The authority of the Corps, then, as the lead agency in construction and navigation, is undoubtedly implicated in a significant way, and

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permitted to continue and increase at present rates, [man] wouldn't stand a snowball's chance in hell [of surviving].”

*Id.* (modifications in original).

<sup>105</sup> Reorganization Plan No. 3 of 1970, Special Message from the President to the Congress About Reorganization Plans to Establish the Environmental Protection Agency and the National Oceanic and Atmospheric Administration (July 9, 1970), available at [www.epa.gov/aboutepa/history/org/origins/reorg.html](http://www.epa.gov/aboutepa/history/org/origins/reorg.html).

<sup>106</sup> *Id.*

<sup>107</sup> U.S. Army Corps of Engineers, *A Brief History*, <http://www.usace.army.mil/History/Documents/Brief/index.html> (last visited Sept. 30, 2011).

<sup>108</sup> See, e.g., *Coeur Alaska v. Se. Alaska Conservation Council*, 129 S.Ct. 2458, 2482 (2009) (“Section 404 hews to the Corps' established expertise in matters of navigability and construction.” (Ginsburg, J., dissenting)).

Congress was faced with the task of addressing our nation's pollution crisis without adversely affecting the work of the executive in areas of vast importance, including the military, public safety, and economic development. Congress itself recognized this authority in the Senate floor debates surrounding the language of section 404: "[This section] simply retains the authority of the Secretary of the Army to issue permits for the disposal of dredged materials. This is essential since the Secretary of the Army is responsible for maintaining and improving the navigable waters of the United States."<sup>109</sup> Throughout the debates, Congress went on to address the Corps' responsibility in the construction of diked disposal areas in the Great Lakes, navigation projects in the remaining ports and harbors of the United States, and other projects necessarily implicating foreign and domestic commerce.<sup>110</sup> To say that recreational gold mining belongs among these activities seems far-fetched, at best.

### B. A Single Discharge

The Oregon Court of Appeals focused—as it should have, at least in part—on the phrase “dredged material,” and whether the discharge of such material is more properly regulated under section 402 or section 404.<sup>111</sup> The court seemed, however, to take for granted the meaning of the term “discharge” as it relates to dredged material or other pollutants prohibited by the Act. In the end, it held that one single discharge could be regulated under both sections 402 and 404.

Under the Act, the phrase “discharge of a pollutant” means “any addition of any pollutant to navigable waters from any point source.” The EPA's section 402 implementing regulations further define “[d]ischarge of a pollutant” as “(a) [a]ny addition of any ‘pollutant’ *or combination of pollutants* to ‘waters of the United States’ from any ‘point source.’”<sup>112</sup> In all cases, the term “discharge,” standing alone, therefore, turns on the meaning of the term “addition,” which courts

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<sup>109</sup> 92 Cong. Rec. 38,853 (1971) (statement of Mr. Ellender).

<sup>110</sup> *Id.*

<sup>111</sup> See *supra* Part III.

<sup>112</sup> 40 C.F.R. § 122.2 (2009) (emphasis added). Regulations promulgated by the U.S. Army Corps of Engineers and the EPA under section 404 do not define the term “discharge,” but appear to equate it to the term “addition.” See 33 C.F.R. § 323.2 (2010) (defining “discharge of dredged material” as “the addition of dredged material,” and “discharge of fill material” as “the addition of fill material.”); 40 C.F.R. § 232.2 (2010) (same).

have interpreted broadly.<sup>113</sup> As a general matter, however, it seems that a “discharge of a pollutant,” whatever the pollutant type, would include the discharge of *multiple* pollutants from a single point source. In such a case, the discharge of multiple pollutants would still be considered one “discharge” under the Act. Put differently, a single “discharge,” regulated under either section 402 or section 404, could release multiple pollutants into the stream.

As a practical matter, this would necessarily mean that a suction dredge, consisting of one discharge (the opening at the end of the sluice box), would *either* be a discharge regulable under section 402 *or* a discharge regulable under section 404, but not both. To say, as the Oregon Court of Appeals did, that a small suction dredge consists of both a discharge of turbid wastewater regulable under section 402 *and* a discharge of mining tailings regulable under section 404 misreads the wording of the Clean Water Act.

The ordinary meaning of the terms “discharge” and “addition” also support this interpretation. “Discharge,” as a noun, is defined as “a flowing or issuing out” or “a rate of flow.”<sup>114</sup> When used as a verb, the term “discharge” means, “to give outlet to” or “pour forth.”<sup>115</sup> The word “addition” generally means, “the result of adding” or “anything added.”<sup>116</sup> All of these definitions are broad and, when applied to an activity like small-suction dredge mining, make it unreasonable to interpret the single outlet from the mine’s sluice box as anything but one single discharge. The definitions further preclude one from parsing a single discharge into multiple discharges based on its material composition.

Again, the Oregon Court of Appeals’ conclusion that “small suction dredge mining involves discharges of dredged material . . . and discharges of turbid wastewater,” each regulable under separate permitting schemes, is simply incorrect. That the court decided the issue because the 700-PM permit did not identify the “particular discharge” at issue opens every discharge—of pollutants, dredged material, or fill material—to regulation by any and all Clean Water Act permitting regimes. This, as the U.S. Supreme Court announced in *Coeur Alaska*, simply cannot be the case.

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<sup>113</sup> SULLIVAN, *supra* note 29, at 320; *see also* Rybachek v. United States, 904 F.2d 1276, 1285 (9th Cir. 1990) (“[R]esuspension may be interpreted to be an addition of a pollutant under the Act.”).

<sup>114</sup> WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 644 (3d ed. 1961).

<sup>115</sup> *Id.* at 644.

<sup>116</sup> *Id.* at 24.

### C. *The Structure of the Clean Water Act*

As discussed above, the section 402 and section 404 permitting schemes set forth under the Act are exceptions to the Act's general prohibition on discharges of pollutants into our nation's navigable waterways. The Oregon Court of Appeals, in describing this statutory framework, correctly identified section 402 as the first exception to that prohibition. The court then went on to describe section 404 as regulating a "subset of pollutant discharges—discharges of 'dredged or fill material.'" It noted that discharges falling within section 404, by the language of section 402, are not subject to the section 402 permitting scheme.

While this description may very well be accurate, the court failed, in its expository report on the meaning of each section, to point out the critical relationship between the two sections. Not once did the court discuss the EPA's "veto power" under section 404(c) to effectively prohibit the Secretary of the Army from permitting a proposed discharge if the EPA Administrator finds that the discharge would have an "unacceptable adverse effect on [the environment]." Had the court considered this, along with the history of the legislation and the meaning of the term "discharge," perhaps its analysis would have seemed a little less clouded.

The EPA's authority under section 404(c) is necessary in the structural framework because it allows the authority of the Corps of Engineers to be preserved in section 404 without undermining the express purposes of the Act itself: to "[r]estore and maintain the chemical, physical, and biological integrity of [the] Nation's waters."<sup>117</sup> Beyond that, however, 404(c) also answers the question about whether a given discharge of dredged or fill material is regulable under both section 402 and section 404. It is simply not. Discharges of such material are presumptively regulable under section 404 *unless* the EPA Administrator exercises its veto power under section 404(c). If Congress intended a single discharge to be parsed so finely as to allow the EPA and the Corps to regulate different components thereof—as the Court of Appeals held in *NEDC*—then section 404(c) would be without meaning. That is a proposition one cannot assume.<sup>118</sup>

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<sup>117</sup> Federal Water Pollution Act (Clean Water Act), 33 U.S.C. § 1251(a) (2006).

<sup>118</sup> See *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) (declining to adopt an interpretation that would render a portion of a statute "mere surplusage" and without effect).

#### D. NEDC Reconsidered

The Oregon Court of Appeals should reconsider its reasoning and its conclusion in *NEDC*. Although the various agency interpretations of the Clean Water Act permitting schemes are concededly complex, it seems clear that there may in fact be a brighter line between sections 402 and 404 than the Oregon court established. That the U.S. Supreme Court recently announced a clear distinction certainly bolsters this position. Although the Oregon Court of Appeals posits that its decision is consistent with, and issued pursuant to, the Supreme Court's announcement in *Coeur Alaska*, the practical effect of the ruling is altogether inconsistent with *Coeur Alaska* and will only compound the confusion that already exists.

On reconsideration, the Oregon Court of Appeals should consider the history of the Clean Water Act, the purposes behind the agencies that administer the law, and the practical effect of its prior holding. All of this, taken together, may lead the court down a more straightforward road—or a more readily navigable stream—and allow it to see why recreational gold mining does not fall within the authority of the U.S. Army Corps of Engineers.

#### CONCLUSION

The Court of Appeals' decision in *NEDC* might, on its face, appear to be somewhat limited. The facts are relatively limited to the practice of small suction dredge mining, and the EQC's subsequent reissuance of the 700-PM permit might appear, to some, to correct whatever flaws might inhere in the opinion. On further consideration, however, one might see that the court's conclusion regarding the 700-PM permit's "lack of specificity" as to "the particular discharge" it sought to regulate was in fact irrelevant. What is important is that the opinion fundamentally misreads the language of the Clean Water Act by allowing simultaneous regulation of a single discharge by two, "mutually exclusive" regulatory schemes. The Oregon court's opinion is thus inconsistent with the structure of the Act and the Supreme Court's most recent interpretation thereof.

Oregon courts should reconsider the interpretation of the Clean Water Act expounded in *NEDC*, and in doing so, the courts should account for the purposes behind the Act, the precise language of the Act in regulating single "discharges," and the overall structure of the complex statutory scheme. The *NEDC* opinion ultimately confers excessive authority on the state agencies charged with implementing

the Act's permitting schemes, and where that authority is misplaced, could undermine its overall environmental protection goals.