IN THE SUPREME COURT OF THE
STATE OF OREGON

EASTERN OREGON MINING ASSOCIATION;
Guy Michael; and Charles Chase,
Petitioners on Review,

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY;
Dick Pederson, in his capacity as
Director of the Department of Environmental Quality;
and Neil Mullane, in his capacity as
Administrator of the Water Quality Division of the
Department of Environmental Quality,
Respondents on Review.

(CC 10C24263)

WALDO MINING DISTRICT,
an unincorporated association;
Thomas A. Kitchar;
and Donald R. Young,
Petitioners on Review,

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY;
Dick Pederson, in his capacity as
Director of the Department of Environmental Quality;
and Neil Mullane, in his capacity as
Administrator of the Water Quality Division of the
Department of Environmental Quality,
Respondents on Review.

(CC 11C19071) (CA A156161) (SC S065097)

On review from the Court of Appeals.*

Argued and submitted May 10, 2018.

James L. Buchal, Murphy & Buchal, LLP, Portland, argued the cause and filed the briefs for petitioners on review.

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* On appeal from the Marion County Circuit Court, Courtland Geyer, Judge. 285 Or App 821, 398 P3d 449 (2017).

Michael A. Casper, Assistant Attorney General, Salem, argued the cause and filed the brief for respondents on review. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General, Salem.

Before Walters, Chief Justice, and Balmer, Nakamoto, Flynn, Duncan, and Nelson, Justices, and Kistler, Senior Judge pro tempore.**

KISTLER, S. J.

The decision of the Court of Appeals is affirmed.

Balmer, J., dissented and filed an opinion.

** Garrett, J., did not participate in the consideration or decision of this case.

KISTLER, S. J.

The Clean Water Act, 33 USC §§ 1251-1388, prohibits the discharge of any pollutant into the waters of the United States unless the Environmental Protection Agency (the EPA) or the Army Corps of Engineers (the Corps) has issued a permit authorizing the discharge. 33 USC §§ 1311(a), 1342, 1344. Acting under authority delegated by the EPA, the Oregon Department of Environmental Quality (DEQ) issued a general permit in 2010 for the discharge of certain pollutants resulting from suction dredge mining. Petitioners filed this proceeding arguing, among other things, that only the Corps has authority under the Clean Water Act to permit the discharge of materials resulting from suction dredge mining. The Court of Appeals disagreed and affirmed the trial court's order upholding DEQ's permit. Having allowed review, we now affirm the Court of Appeals decision.

As applicable here, suction dredge mining involves using a small motorized pump mounted on a boat to "vacuum up" water and sediment from stream and river beds.[1] The water and sediment are passed over a sluice tray, which separates out heavier metals, such as gold, and the remaining material is then discharged into the water. In addition to discharging the leftover sediment and water, suction dredge mining creates a turbid wastewater plume and can remobilize pollutants, such as mercury, that otherwise would have remained undisturbed and relatively inactive in the sediment.

This litigation began when DEQ's predecessor, the Oregon Environmental Quality Commission (EQC), issued a general permit in 2005 authorizing suction dredge mining in Oregon as long as that activity met certain water quality standards. *See Northwest Environmental Defense Center v. EQC*, 232 Or App 619, 223 P3d 1081 (2009). The 2005 permit was challenged by both miners and environmentalists. In considering those challenges, the Court of Appeals reviewed regulations promulgated by the Corps and the EPA, as well

[1] Small suction dredge mining is a type of in-stream placer mining. *See* Nadia H. Dahab, *Muddying the Waters of Clean Water Act Permitting:* NEDC *Reconsidered*, 90 Or L Rev 335, 338-39 (2011) (discussing placer mining generally and small suction dredge mining).

as those agencies' application of the regulations to suction dredge mining. *See id.* at 631-42. Based on that review, the Court of Appeals concluded that the process of suction dredge mining created both turbid wastewater plumes and dredged spoil. *Id.* at 643-44. It reasoned that turbid wastewater plumes are pollutants that may not be discharged into navigable water without a permit from the EPA (or a state agency to which the EPA has delegated its permitting authority) while dredged spoil constitutes dredged material that requires a permit from the Corps before it may be discharged. *Id.* at 644-45.

Both sides sought review of that decision. After this court allowed review, the 2005 permit expired, and the case was dismissed as moot. *See Northwest Environmental Defense Center v. EQC*, 349 Or 246, 245 P3d 130 (2010). In 2010, DEQ issued a new five-year permit for suction dredge mining that complied with the distinction that the Court of Appeals had drawn in *NEDC*. *See Eastern Oregon Mining Assoc. v. DEQ*, 285 Or App 821, 826, 398 P3d 449 (2017). Petitioners challenged the 2010 permit, which expired while the case was pending in the Court of Appeals, and the Court of Appeals dismissed the case as moot. *Eastern Oregon Mining Assoc. v. DEQ*, 273 Or App 259, 361 P3d 38 (2015). This court reversed that decision, reasoning that the issue was capable of repetition yet evading review. *Eastern Oregon Mining Association v. DEQ*, 360 Or 10, 376 P3d 288 (2016). We remanded this case to the Court of Appeals so that it could consider whether to exercise its discretion to hear one or more of the issues that petitioners sought to raise.

On remand, the Court of Appeals exercised its discretion to consider petitioners' first assignment of error—whether DEQ, acting under authority delegated by the EPA, legally could issue a permit for suction dredge mining. *EOMA*, 285 Or App at 833. The Court of Appeals did not exercise its discretion to consider petitioners' other assignments of error. *Id.* at 834. Specifically, it did not exercise its discretion to consider petitioners' third assignment of error claiming that DEQ's factual findings were not supported by substantial evidence. *Id.* Focusing only on the legal issues raised by the first assignment of error, the Court of Appeals adhered to its decision in *NEDC*; more specifically, it

considered and rejected the grounds that petitioners raised for reconsidering that decision. *Id.* at 838-39. We allowed review to consider the single assignment of error that the Court of Appeals decided.

Before turning to that assignment of error, we note that neither petitioners nor the state disputes that the material discharged as a result of suction dredge mining constitutes a "pollutant" for the purposes of the Clean Water Act. That act provides that "pollutant" means, among other things, "dredged spoil," "rock," and "sand." 33 USC § 1362(6). The parties' dispute arises over which agency (the EPA or the Corps) has authority under the Clean Water Act to permit the discharge of those pollutants into the waters of the United States. Petitioners raise essentially two arguments on that issue. They argue initially that suction dredge mining does not come within the EPA's authority because that activity does not entail the "discharge" or "addition" of a pollutant to the water. They argue alternatively that, even if discharging material resulting from suction dredge mining adds a pollutant to the waters of the United States, the discharge is "dredged material," which the Corps has exclusive authority to permit. We begin with petitioners' first argument.

I. ADDITION OF A POLLUTANT

Petitioners' first argument starts from the proposition that the EPA's permitting authority applies only to the "discharge of a pollutant," and they note that the statutory phrase "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 USC § 1362(12). Petitioners contend that, because suction dredge mining does not add anything to the water that was not already there, there is no addition of any pollutant and thus no discharge of a pollutant for the EPA to permit.

Petitioners' first argument is problematic. Almost 30 years ago, the United States Court of Appeals for the Ninth Circuit held that, "even if the material discharged [as a result of placer mining] originally comes from the streambed itself, [the] resuspension [of the material in the water] may be interpreted to be an addition of a pollutant under the [Clean Water] Act." *Rybachek v. EPA*, 904 F2d 1276, 1285

(9th Cir 1990); *accord National Mining Assoc. v. Army Corps of Engineers*, 145 F3d 1399, 1406 (DC Cir 1998) (reaffirming *Rybachek* while holding that the "addition" of a pollutant does not include incidental fallback of dredged material). As we read *Rybachek*, the court recognized that the statutory term "addition" is ambiguous, and 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 Clean Water Act.

Since *Rybachek*, the EPA has confirmed that conclusion. In 2018, in responding to comments regarding the reissuance of a general permit for suction dredge mining in Idaho, the regional office of the EPA reaffirmed that the suspension of solid materials caused by suction dredge mining constitutes the "addition" of a pollutant to the water. EPA, Response to Comments on Idaho Small Suction Dredge General Permit 5 (May 2018).[2] Similarly, the EPA explained in response to another comment:

> "If, during suction dredging, only water was picked up and placed back within the same waterbody, the commenter would be correct that no permit would be necessary. *See South Florida Water Management Dist. v. Miccosukee Tribe of Indians*, 541 US 95 (2004). 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."

Id. at 6 (bracketed material in original).

We also note that, when the EPA reissued a general permit for suction dredge mining in Idaho in 2018, it prohibited suction dredge mining that resulted in visible turbidity "above background [levels] beyond any point more than 500 feet downstream of the suction dredge operation," directed operators to avoid "concentrated silt and clay," which could

[2] Both petitioners and the state ask us to take judicial notice of various documents, permits, and explanations that the Corps and the EPA have issued. We do so.

cause "a significant increase in suspended solids resulting in increased turbidity and downstream sedimentation," and provided that, if mercury is found during suction dredge mining, the operator must stop suction dredge mining "immediately if that is the only way to prevent remobilization of the collected mercury." EPA, General Permit for Small Suction Dredge Miners in Idaho 19-20 (April 25, 2018). Those restrictions reflect the EPA's considered conclusion that suction dredge mining can result in the addition of pollutants to navigable waters in the form of suspended solids and "remobilized" heavy metals.

Beyond that, the Corps and the EPA have issued numerous regulations in which they have recognized that redepositing materials dredged from stream and river beds constitutes a regulable discharge or addition of a pollutant. *See, e.g.*, 33 CFR § 323.2(d)(1) (2001); 40 Fed Reg 31321 (July 25, 1975) (explaining the types of redeposits of dredged material that would constitute a "discharge of dredged material" under the regulations).[3] Those regulations implementing the Clean Water Act, as well as the agencies' consistent interpretation of them, warrant deference as a matter of federal law. *See Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 US 261, 277-78, 129 S Ct 2458, 174 L Ed 2d 193 (2009) (setting out standards for deferring to agency regulations that interpret ambiguous statutes and the agencies' interpretation of their own regulations).

Petitioners contend, however, that *Los Angeles County Flood Control District v. Natural Resources Defense Council*, 568 US 78, 133 S Ct 710, 184 L Ed 2d 547 (2013), requires a different conclusion. In that case, the Court reaffirmed that "the transfer of polluted water between 'two parts of the same water body' does not constitute a discharge of pollutants under the [Clean Water Act]." *Id.* at 82 (summarizing *South Florida Water Management District v.*

[3] Both the Corps' and the EPA's permitting authority extends only to the discharge of pollutants into navigable water. *See* 33 USC §§ 1342, 1344. If the EPA lacks authority to issue a permit for the pollutants resulting from suction dredge mining because there is no addition of pollutants to the water, then the Corps lacks that authority too—a conclusion that is contrary to numerous regulations issued by the Corps treating the redeposit of dredged material into navigable waters as the addition of a pollutant.

Miccosukee Tribe of Indians, 541 US 95, 109-112, 124 S Ct 1537, 158 L Ed 2d 264 (2004)). As the Court explained, "no pollutants are 'added' to a water body when [polluted] water is merely transferred between different portions of the same water body." *Id.* In this case, by contrast, the EPA reasonably could find that suction dredge mining does more than "merely transfe[r]" polluted water from one part of the same water body to another. Rather, the 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. We agree with the Oregon Court of Appeals that the reasoning in *Los Angeles County Flood Control District* and *Miccosukee* does not call *Rybachek*'s holding into question. To be sure, a federal Court of Appeals decision does not bind a state court interpreting federal law.[4] However, we agree with *Rybachek* that the EPA reasonably has concluded that the suspension of solids and the remobilization of heavy metals resulting from suction dredge mining constitutes the "addition" of a pollutant that requires a permit under the Clean Water Act.

II. POLLUTANTS RESULTING FROM SUCTION DREDGE MINING

Petitioners mount a second, more substantial argument. They contend that, even if suction dredge mining adds pollutants to the water, the material discharged as a result of suction dredge mining constitutes "dredged material" over which the Corps has exclusive permitting authority.[5] Petitioners recognize that the Clean Water Act does not define the phrases "dredged *** material" or the "discharge of dredged *** material," but they argue that the regulations implementing the Act necessarily lead to the conclusion

[4] Only the United States Supreme Court's interpretations of federal law bind state courts.

[5] Petitioners suggest that the material discharged as a result of suction dredged mining can be viewed alternatively as "fill material," over which the Corps also has exclusive permitting authority. *See* 33 USC § 1344. Petitioners, however, did not raise that issue before the Court of Appeals and may not raise it here as a basis for reversing the Court of Appeals decision. Moreover, even if they had raised it, we note that petitioners' argument is difficult to square with the preamble to the current regulatory definition of "fill," which the Court quoted in *Coeur Alaska*. *See* 557 US at 289 (quoting 67 Fed Reg 31135 (May 9, 2002)).

that material discharged as a result of suction dredge mining qualifies as "dredged material." The state, for its part, argues that the EPA reasonably has concluded that suction dredge mining results in the discharge of processed waste that is subject to the EPA's permitting authority. In the state's view, the statutes and the implementing regulations are ambiguous on that issue; that is, the state recognizes that the material discharged as a result of suction dredge mining reasonably could be characterized either as dredged material or processed waste. The state maintains, however, that, in interpreting and administering their regulations, the Corps and the EPA reasonably have concluded that the material is processed waste subject to the EPA's permitting authority rather than unprocessed dredged material subject to the Corps' permitting authority and that we should defer to those agencies' reasonable interpretation.

In considering the parties' arguments, we note, as a preliminary matter, that the United States Supreme Court addressed a related but separate question in *Coeur Alaska*. Because that decision resolves some of the issues in this case, we begin by briefly describing the Court's reasoning in *Coeur Alaska*. The initial issue in *Coeur Alaska* was whether the EPA or the Corps had authority under the Clean Water Act to issue a permit for the discharge of mining slurry into a lake. 557 US at 273. Coeur Alaska planned to use a process known as "froth flotation" to remove gold bearing minerals from rock taken from a defunct gold mine; specifically, it planned to churn crushed rock from the mine in chemically treated water, which would cause gold-bearing minerals in the rock to rise to the surface of the water. *Id.* at 267. After skimming off those minerals, the company planned to discharge the resulting slurry (the leftover rock and chemically treated water) into a lake, where the mine tailings would sink to the bottom of the lake and the chemically treated water would be purified before it left the lake and drained into an adjacent creek.[6] *Id.*

[6] There were two discharges that required a permit in *Coeur Alaska*. The first involved the discharge of slurry into the lake. The second involved the discharge of the purified water from the lake into the adjacent creek, which was a separate water body. *Cf. Los Angeles County Flood Control District*, 548 US at 82 (explaining that the transfer of polluted water from one part of a water body to another part of the same water body would not implicate the Clean Water

Given regulations issued by both the EPA and the Corps, no party in *Coeur Alaska* disputed that the slurry constituted "fill," which was subject to the Corps' permitting authority. *Id.* at 275; *see* 33 USC § 1344(a) (authorizing the Corps to issue permits for the discharge of "dredged or fill material"). However, there was also no dispute that the chemically treated slurry constituted a "pollutant" that was subject to the EPA's permitting authority. *See* 33 USC § 1342(a)(1) (authorizing the EPA to issue permits for the discharge of pollutants other than dredged or fill material). The Court concluded that, in those circumstances, the Clean Water Act gave the Corps sole authority to issue a permit for the discharge of the slurry into the lake. 557 US at 273-74.[7] The Court then turned to a second issue, which this case does not present; specifically, the Court considered the extent to which the Corps had to follow or, at a minimum, accommodate the water quality standards that the EPA had established for froth flotation mining in deciding whether to permit discharging the slurry into the lake. *Id.* at 277-91.

As relevant here, *Coeur Alaska* holds that, if a single discharge constitutes "dredged or fill material" and another "pollutant," only the Corps has authority under the Clean Water Act to issue a permit authorizing the discharge of that material into navigable water. *Id.* at 273-74. As noted, this case differs from *Coeur Alaska* primarily in one respect. Although no party disputed that the slurry in *Coeur Alaska* constituted "fill," which was subject to the Corps' permitting authority, the parties in this case disagree whether the material discharged as a result of suction dredge mining constitutes "dredged material" over which the Corps has permitting authority or processed waste over which the EPA has permitting authority.

Act). The parties disagreed in *Coeur Alaska* whether the EPA or the Corps had authority to issue a permit for the first discharge. They agreed that the EPA had exclusive permitting authority over the second discharge.

[7] In reaching that conclusion, the Court relied on the text of section 402(a)(1), which gave the EPA permitting authority over pollutants "[e]xcept as provided in" section 404 of the Act—the section that gave the Corps permitting authority over dredged and fill material. (Sections 402 and 404 are the Public Law sections, which have been codified respectively as 33 USC § 1342 and 33 USC § 1344.) The Court reasoned that, even if the statutory text was ambiguous, EPA's regulations reasonably established that the Corps had exclusive permitting authority over dredged or fill material. *Coeur Alaska*, 557 US at 273-74.

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." *See id.* at 277-78 (describing when the agencies' regulations and interpretation of their regulations will bear on the meaning of the Clean Water Act). As Justice Breyer explained, the majority opinion in *Coeur Alaska*:

> "recognizes a legal zone within which regulating agencies might reasonably classify material either as 'dredged or fill material' subject to [regulation under section 404 of the Clean Water Act by the Corps] or as a 'pollutant' subject to [regulation under section 402 of the Clean Water Act by the EPA]. Within this zone, the law authorizes the environmental agencies to classify material as one or the other, so long as they act within the bounds of the relevant regulations, and provided that the classification, considered in terms of the purposes of the statutes and relevant regulations, is reasonable."

Id. at 291-92 (Breyer, J., concurring) (citations omitted); *see also id.* at 295-96 (Scalia, J., concurring in part and concurring in the judgment) (describing the majority's opinion as reflecting a form of deference to the agencies' interpretation and administration of the Clean Water Act). Following *Coeur Alaska*, we consider the text of the Clean Water Act, the implementing regulations, and the agencies' interpretation of those regulations. Finally, we consider what deference, if any, we owe to the agencies' interpretation of the Act and their regulations.

A. *Text*

Section 404 of the Clean Water Act authorizes the Corps "to issue permits, after notice and an opportunity for a public hearing, for the discharge of dredged or fill material." 33 USC § 1344(a). Unlike the term "pollutant," the Clean Water Act does not define what the phrase "discharge of dredged *** material" means. More specifically, it does not define whether material that was dredged from navigable water remains "dredged material" after it has been processed. And, if processing dredged material can change its

character, the text does not identify the point at which the processed material becomes a pollutant other than dredged material that is subject to the EPA's rather than the Corps' permitting authority.

It follows that the text of the Clean Water Act does not speak directly to the issue that this case presents; it does not answer whether the material discharged as a result of suction dredge mining is "dredged material" over which the Corps has permitting authority or some other pollutant over which the EPA has permitting authority. We accordingly turn first to the regulations promulgated to implement the Act and then to the agencies' interpretation and application of those regulations. *See Coeur Alaska*, 557 US at 277-78 (explaining that, if the text of the Clean Water Act is ambiguous, courts look to the agencies' implementing regulations and, if those regulations are ambiguous, to the agencies' interpretation and application of their regulations to determine what the Act means).

B. *Regulation and administration of the Clean Water Act*

The regulations issued by the Corps and the EPA to implement the Clean Water Act do not specifically address which agency has authority to permit the discharge of material resulting from suction dredge mining. However, in later interpreting the regulations, the Corps and the EPA explained first in 1986 and later in 1990 that the EPA, not the Corps, is authorized under the Clean Water Act to issue permits for the discharge of material resulting from suction dredge mining. More importantly, since that time, the EPA has issued general permits after notice and comment for the discharge of material resulting from suction dredge mining, and the Corps has acted consistently with the EPA's permitting authority. As we discuss below, last year, the EPA reaffirmed that allocation of authority in issuing a general permit for suction dredge mining in Idaho.

That regulatory history goes a long way toward answering the second issue that petitioners raise. Petitioners, however, argue that regulations adopted in 1975 and 2001 support their view that the Corps has exclusive permitting authority. We accordingly set out the regulatory history in greater (some might say mind-numbing) detail below.

Cf. Save Our Rural Oregon v. Energy Facility Siting, 339 Or 353, 363, 121 P3d 1141 (2005) (providing similar trigger warning). We begin with the Corps' promulgation of regulations defining "dredged material" and the "discharge of dredged material" in 1975. We then turn to a separate but related dispute over the difference between "fill" and "waste," which led to the Corps' express statement in 1990 that the EPA had exclusive authority to permit the discharge of waste resulting from suction dredge mining. After that, we consider the EPA's efforts from 1999 to 2001 to comply with a federal decision that "incidental fallback" of dredged material does not constitute the "discharge of dredged material," efforts that petitioners contend led to a 2001 regulation that supports their position. We also consider the Corps' 2008 rules, which the dissent views as dispositive. Finally, we look to the EPA's and the Corps' history of issuing permits for suction dredge mining.

1. *"Dredged material" and the "discharge of dredged material"*

On May 6, 1975, the Corps published four alternative sets of proposed regulations in response to a federal district court decision issued less than two months earlier. *See* 40 Fed Reg 31320 (July 25, 1975) (recounting that history). The district court had ruled that the statutory phrase "navigable waters" to which the Clean Water Act applies was broader than the Corps had understood, and it directed the Corps to adopt final regulations within 30 days (later extended to 80 days) that applied to "the entire aquatic system, including all of the wetlands that are part of it, rather than only those aquatic areas that are arbitrarily distinguished by the presence of an ordinary or mean high water mark." *See* 42 Fed Reg 37124 (July 19, 1977) (recounting the regulatory history).

In carrying out that task, the Corps adopted definitions of "dredged material" and the "discharge of dredged material" in 1975 that, in relevant part, have remained largely unchanged. The regulations defined "dredged material" as "material that is excavated or dredged from navigable waters." 33 CFR § 209.120(d)(4) (1976). That definition, however, did not add much to the statutory phrase "dredged

*** material." The regulatory definition essentially restated the statutory term and left unanswered when, if ever, dredged material that has been processed will become some other form of a pollutant that is subject to the EPA's permitting authority rather than the Corps'.

The 1975 definition of "discharge of dredged material" shed more light on the issue. It provided:

> "The term 'discharge of dredged material' means any addition of dredged material, in excess of one cubic yard when used in a single or incidental operation, into navigable waters. The term includes, without limitation, the addition of dredged material to a specified disposal site located in navigable waters and the runoff or overflow from a contained land or water disposal area. Discharges of pollutants into navigable waters resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill) are not included within this term and are subject to 402 of the [Clean Water Act] ***."

33 CFR § 209.120(d)(5) (1976).

Not surprisingly, that definition makes clear that, if unprocessed dredged material is reintroduced into navigable water, it remains "dredged material," which is subject to the Corps' permitting authority. In explaining its proposed regulations, the Corps observed:

> "The types of activities encompassed by this term [discharge of dredged material] would include the depositing into navigable waters of dredged material if it is placed alongside of a newly dredged canal which has been excavated in a wetland area. It would also include maintenance of these canals if excavated material is placed in navigable waters. Also included is the runoff or overflow from a contained land or water disposal area."

40 Fed Reg 31321 (July 25, 1975). All those activities focused on the placement of unprocessed dredged material adjacent to or in navigable waters, and the commentary to the regulations makes clear that the Corps' focus was on the discharge of dredged material in wetlands. That focus is hardly surprising since the district court's order had directed the Corps to include, for the first time, wetlands as part of the navigable waters to which the Clean Water Act applies.

The definition of "discharge of dredged material" also identified an exception to that definition. It provided that "[d]ischarges of pollutants into navigable waters resulting from the onshore subsequent processing of dredged material extracted for any commercial use (other than fill) are not included within the term and are subject to section 402 of the [Clean Water] Act." 33 CFR § 209.120(d)(5) (1976). In explaining the exception, the Corps stated that "[d]ischarges of materials from land based commercial washing operations are regulated under section 402 of the [Clean Water Act]" by the EPA. 40 Fed Reg 31321 (July 25, 1975).

That exception resolves a question that the statutory text and the regulatory definition of "dredged material" had left unanswered. The exception makes clear that the act of processing dredged material can result in the discharge of a "pollutant" that requires a permit from the EPA under section 402 rather than the discharge of "dredged material" that requires a permit from the Corps under section 404.[8]

Petitioners, however, rely on that exception to argue that the definition of "discharge of dredged material" draws a broad distinction between discharges resulting from processing dredged material on land, which will be subject to the EPA's permitting authority, and discharges resulting from processing dredged material over water, which will be subject to the Corps' permitting authority.[9] Because dredged material is typically processed over water during suction dredge mining, it necessarily follows, petitioners reason, that the material discharged as a result of suction dredge mining is "dredged material," which requires a permit from the Corps rather than the EPA.

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[8] Dredged material, of course, is a subset of the broader statutory term pollutant. However, in this context, the exception's reference to "pollutants" that are subject to section 402 establishes that the act of processing dredged material can result in pollutants other than dredged material.

[9] In making that argument, petitioners contrast the exception to the definition of "discharge of dredged material," which was enacted in 1975, with a rule defining "incidental fallback," which was enacted in 2001 and repealed in 2008. Not only does the repeal of the 2001 rule call into question the contrast on which petitioners' argument depends, but, as explained below, petitioners misperceive the effect of the 2001 rule. In considering petitioners' argument, we analyze the 1975 rule and the repealed 2001 rule separately.

Petitioners' argument is problematic for at least two reasons. First, the exception to the definition of "discharge of dredged material" does not draw the distinction that petitioners perceive. The exception does not distinguish between discharges that result from processing dredged material over water and discharges that result from processing dredged material over land. Rather, the exception applies to discharges from the onshore processing of dredged material that is extracted for a commercial use. If, however, dredged material is extracted for some other use (a recreational one, for example), then the exception does not apply regardless of whether the dredged material is processed over land or water.[10]

Second, petitioners' argument depends on drawing a negative inference from the existence of a single exception to the definition of "discharge of dredged material." That is, petitioners' argument depends on the proposition that, by recognizing that discharges resulting from the onshore processing of dredged material extracted for a commercial use are pollutants subject to the EPA's permitting authority, the rule implies that all other discharges resulting from processing dredged material will be dredged material that is subject to the Corps' permitting authority. Apparently, in petitioners' view, that is true however the dredged material is processed and regardless of the type of chemicals that are discharged into the water as a result of processing.

Ordinarily, the sort of negative inference upon which petitioners' argument depends is appropriate when there is "a series of terms from which an omission bespeaks a negative implication." *Chevron U.S.A. Inc. v. Echazabal*, 536 US 73, 81-82, 122 S Ct 2045, 153 L Ed 2d (2002) (declining to infer that, by identifying a single statutory exception, Congress had precluded an agency from recognizing other exceptions). When, as in this case, a statute or a rule

[10] To the extent that petitioners intended to draw a distinction between discharges resulting from onshore and offshore processing of dredged material extracted for a commercial use, that distinction does not advance their argument. The EPA has deemed suction dredge mining a recreational activity, not a commercial one. *See* EPA, Response to Comments on Idaho Small Suction Dredge General Permit at 13 (explaining that the EPA deemed suction dredge mining as a "recreational activity").

identifies only a single exception, a negative inference is unlikely. *See id.* (explaining that the canon of construction for negative inferences "depends on identifying a series of two or more terms or things that should be understood to go hand in hand"). Beyond that, nothing in the Corps' explanation for recognizing the exception suggests that the Corps intended that all other discharges resulting from land-based and water-based processing of dredged material would be subject to the Corps' rather than the EPA's permitting authority.

In our view, the better reading of the 1975 definition of "discharge of dredged material" is as follows: First, as a general rule, the redeposit of unprocessed dredged material into navigable water will constitute the "discharge of dredged material" and require a permit from the Corps. Second, some onshore processing of dredged materials will result in discharges of pollutants that require a permit from the EPA under section 402 rather than the Corps under section 404. Third, that exception to the definition of discharge of "dredged material" does not go further than identifying a single exception. That is, in recognizing an exception for one category of onshore processing (discharges from dredged material extracted for commercial uses), the rule leaves unanswered whether other categories of water-based or land-based processing operations will result in the "discharge of dredged material" that requires a permit from the Corps under section 404 or the discharge of a pollutant that requires a permit from the EPA under section 402.[11] Because the 1975 regulatory definition of "discharge

[11] Although petitioners do not cite it, the EPA promulgated proposed water quality guidelines for the discharge of dredged or fill material that, among other things, incorporated the Corps' definitions of "dredged material" and "discharge of dredged material." *See* 40 Fed Reg 41293, 41297 (Sept 5, 1975). In responding to comments on the proposed guidelines, the EPA noted that "many commenters [had] object[ed] to the execution [*sic*] of raw material extraction from the section 404 permit process." *Id.* at 41292. It then responded to that concern by observing that the Corps' regulatory authority "included" discharges from material extracted and processed on shipboard while discharges from "land-based processing are included *** under section 402 of the Act." *Id.* That response provides a general rule of thumb regarding what each agency's sphere of authority "includes," but it does not define the precise boundary between them. That much follows from the 1975 definition of "discharge of dredged material," which did not assign discharges from all onshore processing to the EPA. Moreover, as explained below, both the EPA and the Corps later concluded that the discharges

of dredged material" either does not address or does not unambiguously resolve whether discharges resulting from suction dredge mining are subject to the Corps' or the EPA's permitting authority, we look to the ways in which the Corps and the EPA subsequently resolved that issue.

2. *Fill and waste*

In 1977, the Corps renumbered and amended the regulations to address issues that had arisen since it promulgated them two years earlier. *See* 42 Fed Reg 37122-30 (July 19, 1977). Of relevance here, the Corps considered when the discharge of "waste materials such as sludge, garbage, trash, and debris in water" would constitute "fill" that was subject to the Corps' permitting authority and when they would constitute another pollutant that was subject to the EPA's permitting authority. *Id.* at 37130. Initially, the Corps took the position that the answer to that question turned on the purpose for which those materials were discharged into the water. *Id.* It modified the definition of "fill" in the 1977 regulations to "exclude those pollutants that are discharged into water primarily to dispose of waste," with the result that the EPA would have permitting authority over waste discharged primarily for that purpose while the Corps would have permitting authority over waste that was discharged primarily to convert wetlands into dry land. *Id.*

In 1986, the EPA and the Corps entered into a Memorandum of Agreement to resolve a lingering dispute about the scope of "fill" materials that were subject to the Corps' permitting authority. *See* 51 Fed Reg 8871 (Mar 14, 1986) (publishing the 1986 agreement). The 1986 agreement was intended to be an interim measure pending the completion of studies that were being undertaken to determine the effect of solid waste disposal on ground water and human health. *Id.* Among other things, the 1986 agreement established criteria to determine when waste would be considered "fill" subject to the Corps' authority and when it would be considered another pollutant subject to the EPA's authority. *Id.* at 8872 (setting out the agreement).

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from suction dredge mining fall within the EPA's permitting authority, even though the processing occurs over water.

Paragraph B.4 of the agreement identified four criteria for determining when waste discharged into water ordinarily would be regarded as fill subject to the Corps' authority.[12] Paragraph B.5 then described when waste discharged into the water would be considered a pollutant subject to the EPA's authority. It provided:

> "'a pollutant (other than dredged material) will normally be considered by the EPA and the Corps to be subject to section 402 [and the EPA's permitting authority] if it is a discharge in liquid, semi-liquid, or suspended form or if it is a discharge of solid material of a homogenous 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. As appropriate, EPA and the Corps will identify additional such materials.'"

Id. (quoting that paragraph of the agreement).

The first sentence in paragraph B.5 identifies the properties of discharged material that ordinarily will render the discharge subject to the EPA's permitting authority: That is, the sentence asks whether the discharged materials are liquid, semiliquid, or suspended, or, if solid, whether they are of a homogenous nature from a single source.[13] Those properties were broad enough to include unprocessed "dredged material," and, presumably for that reason, the first sentence of paragraph B.5 expressly excepted "dredged material" from materials that possess those characteristics. The second sentence in paragraph B.5 took a different approach to defining which materials are subject to the

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[12] Factors that bore on whether the material constituted "fill" were: (1) whether the primary or one principal purpose was to replace the waters of the United States with dry land or to raise the bottom elevation; (2) whether the discharge resulted from activities such as road construction; (3) whether the principal effect of the discharge was the physical loss or modification of the waters of the United States; and (4) whether the discharge was "heterogeneous in nature and of the type normally associated with sanitary land fill discharges." 51 Fed Reg 8872.

[13] As noted above, one criteria for "fill" subject to the Corps' permitting authority is that the discharge is "heterogeneous in nature," as opposed to homogeneous.

EPA's permitting authority. Instead of listing the properties of discharged material, the second sentence listed specific examples of processed waste that will be subject to the EPA's authority. Not only does the second sentence expressly name the specific types of processed waste over which the EPA will have permitting authority, but it lists "placer mining wastes," which includes waste from suction dredge mining, as one of the wastes that will fall within the EPA's authority. Put differently, the second sentence makes clear that placer mining wastes are pollutants other than dredged material and thus subject to the EPA's permitting authority.[14]

Four years after the Corps and the EPA issued the 1986 memorandum of agreement, the Corps issued a regulatory guidance letter that interpreted the 1986 agreement and stated that the material discharged as a result of placer mining is subject to the EPA's exclusive permitting authority. The 1990 guidance letter stated in full:

> "Paragraph B.5 in the Army's 23 Jan 86 Memorandum of Agreement (M[O]A) with EPA, concerning the regulation of solid waste discharges under the Clean Water Act, states that discharges that result from in-stream mining activities are subject to regulation under Section 402 [by the EPA] and not under Section 404 [by the Corps].
>
> "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 location 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

[14] As petitioners note, the 1986 memorandum of agreement was not intended to be the last word on "fill" material. Since then, the Corps and the EPA have redefined fill material as any material that has the effect of changing the bottom elevation of water. *See Coeur Alaska*, 557 US at 268. Despite that fact, in *Coeur Alaska*, decided almost 25 years after the 1986 memorandum of agreement, the Court relied on the fact that the Corps' permitting decision was consistent with the principles set out in the 1986 memorandum of agreement in upholding the Corps' decision to permit Coeur Alaska to discharge slurry into the lake. *See id.* at 288 (explaining that "[t]he MOA [the 1986 memorandum of agreement] is quite consistent with the agencies' determination that the Corps regulates all discharges of fill material and that § 306 does not apply to these discharges").

> 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."

Corps Regulatory Guidance Letter 88-10 (July 28, 1990).[15]

3. *Incidental fallback*

Before 1993, the Corps excluded "*de minimus*, incidental soil movement occurring during normal dredging operations" from the definition of "discharge of dredged material." *See National Mining Assoc.*, 145 F3d at 1401. In response to litigation, the Corps removed the *de minimus* exception in 1993 and expanded the regulatory definition of "discharge of dredged material" to include "'[a]ny addition, including any redeposit of dredged material, including excavated material, into waters of the United States.'" *Id.* at 1402 (quoting 33 CFR § 323.2(d)(1)(iii) (1993)) (emphasis omitted). Various trade associations challenged that expanded definition on the ground that it erroneously included "incidental fallback" that occurred during dredging. They reasoned that "incidental fallback" that occurs during the removal of dredged material does not constitute the discharge—namely, the addition—of dredged material. Both the district court and the Court of Appeals for the District of Columbia Circuit agreed.

The Court of Appeals explained that "incidental fallback occurs, for example, during dredging, 'when a bucket used to excavate material from the bottom of a river, stream, or wetland is raised and soils or sediments fall from the bucket back into the water.'" *Id.* at 1403. The court noted that "[f]allback and other redeposits also occur during mechanized land clearing, when bulldozers and loaders scrape or displace wetland soil." *Id.* In holding that such "incidental fallback" did not require a permit under the Clean Water Act, the Court of Appeals explained "that

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[15] The Corps' guidance letter expired on December 31, 1990. In 2005, the Corps issued another guidance letter, in which it explained that some expired guidance letters continue to provide useful information while others "have been superseded, replaced or otherwise made obsolete." Corps Regulatory Guidance Letter 05-06 (Dec 7, 2005). The Corps noted that, although the second class of regulatory guidance letters provide historical context, "they are no longer valid." The Corps did not include the 1990 regulatory guidance letter on a list of expired guidance letters that continue to provide useful information. *See id.*

the straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back." *Id.* at 1404. The Court of Appeals accordingly directed the Corps to exclude "incidental fallback" from the definition of "discharge of dredged materials."

In directing the Corps to exclude "incidental fallback," the Court of Appeals specifically distinguished the discharges at issue in *Rybachek* from incidental fallback. *Id.* at 1406. It explained that *Rybachek* had:

> "held that the material separated from gold and released into the stream constituted a pollutant, and, to the extent that 'the material discharged originally comes from the streambed itself, [its] resuspension [in the stream] may be interpreted to be an addition of a pollutant under the Act.'"

Id. (quoting *Rybachek*, 904 F2d at 1285) (bracketed material added by *National Mining Assoc.*). As the court explained in *National Mining Assoc.*, *Rybachek* addressed "the discrete act of dumping leftover material into the stream after it had been processed," not "imperfect extraction, i.e., extraction accompanied by incidental fallback of dirt and gravel." 145 F3d at 1406.

Although the concept of incidental fallback seems relatively straightforward, defining the concept proved difficult. The Corps initially declined to define "incidental fallback" and explained that it would identify it on a case-by-case basis. *See* 64 Fed Reg 25120 (May 10, 1999). The next year, the Corps issued a proposed rule in the form of a rebuttable presumption that identified the types of mechanized earth-moving activities that ordinarily would result in the discharge of dredged material. *See* 65 Fed Reg 50108, 50111-12 (Aug 16, 2000). Procedurally, the effect of the proposed rule was to shift the burden of persuasion to the regulated party to prove that any discharge was only incidental fallback. *Id.* After receiving comments on the proposed rule, the Corps issued a final rule in 2001 that retained the substance of the presumption but stated that the burden of proof would not shift. 33 CFR § 323.2(d)(2)(i) (2001). Finally, in 2008, the Corps repealed the 2001 rule listing the type

of earth moving activities that ordinarily would result in the discharge of dredged material and simply excepted "incidental fallback," without further explanation, from the definition of discharge of dredged material. 33 CFR § 323.2 (d)(2)(iii) (2008).

Petitioners argue that the 2001 rule demonstrates that material discharged as a result of suction dredge mining constitutes "dredged material" over which the Corps has exclusive permitting authority.[16] We first set out the relevant terms of that rule and then explain why we reach a different conclusion.

The 2001 rule sought to define the phrase "incidental fallback" in two ways: first, by identifying the types of activities that ordinarily will result in something more than incidental fallback, 33 CFR § 323.2(d)(2)(i) (2001); and second, by providing a specific definition of the phrase, 33 CFR § 323.2(d)(2)(ii) (2001). Section 323.2(d)(2) (2001) provided:

> "(i) The Corps and the EPA regard the use of mechanized earth-moving equipment to conduct land clearing, 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. This paragraph (i) does not and is not intended to shift any burden in any administrative or judicial proceeding.
>
> "(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. Examples of incidental fallback include soil that is disturbed when dirt is shoveled and the back-spill that comes off the bucket when such small volume of soil or dirt falls into substantially the same place from which it was initially removed."

Petitioners argue that the refence to "in-stream mining" in paragraph (i) includes suction dredge mining

[16] As noted, the part of the 2001 rule on which petitioners rely has been repealed. We hesitate to rely too heavily on that fact, however. Neither the 1986 memorandum of agreement or the Corps' 1990 guidelines letter on which the state relies are currently in force. And, as noted above, the Court relied on the principles stated in the 1986 memorandum in deciding *Coeur Alaska* in 2009.

and, as a result, establishes that suction dredge mining ordinarily results in the discharge of dredged material that is subject to the Corps' permitting authority. Petitioners focus on only half the sentence. Although "in-stream mining" most likely includes suction dredge mining, the general rule stated in paragraph (i) applies only to "the use of mechanized earth-moving equipment to conduct *** in-stream mining." The small shop-vac-like equipment used to conduct suction dredge mining hardly qualifies as "mechanized earth-moving equipment," unless one views vacuum cleaners and other small suction devices as "mechanized earth-moving equipment." Were there any doubt about the matter, the explanation for the 2001 rule removes it. It explains that the phrase "mechanized earth-moving equipment" refers to "bulldozers, graders, backhoes, bucket dredges, and the like." 66 Fed Reg 4552 (Jan 17, 2001).

More importantly, the point of the rule was to distinguish large-scale earth moving activities where any redeposit of unprocessed dredged material into the water was likely to be a regulable discharge of dredged material from smaller scale activities where the redeposit of unprocessed dredged material was likely to be only "incidental fallback." The 2001 rule was not intended to determine, nor did it determine, whether discharges resulting from processing dredged material were subject to the Corps or the EPA's permitting authority. When both the entire rule and the reason for promulgating it are considered, we cannot agree with petitioners that the 2001 rule signaled a departure from the Corps and the EPA's stated position in the 1986 memorandum of agreement. Similarly, we do not agree with petitioners that the 2001 rule reflects the Corps' conclusion that discharges resulting from processing dredged material over water, as opposed to processing it over land, will be automatically subject to the Corps' permitting authority under section 404.

That same conclusion follows from the explanation for the 2001 final rule, which incorporated the preamble to the 2000 proposed rule.[17] *See* 66 Fed Reg 4552

[17] Both rules stated that using mechanized earth-moving equipment to conduct certain dredging activities ordinarily will result in a regulable redeposit of dredged material. The two rules differed only in how they allocated the burden

(Jan 17, 2001). Specifically, the preamble to the 2000 proposed rule expressly recognized that the discharge of material resulting from placer mining is "the 'addition of a pollutant' under the [Clean Water Act] subject to EPA's section 402 regulatory authority." 65 Fed Reg 50110 (Aug 16, 2000).

In the preamble to the 2000 proposed rule, the Corps recognized that one problem in defining "incidental fallback" is that it shares many characteristics with regulable discharges of dredged material. *See* 65 Fed Reg 50109 (Aug 16, 2000). The Corps accordingly sought to identify the "nature of th[e] activities and the types of equipment used" that ordinarily will result in the regulable discharge of dredged materials. *See id.* The Corps also reviewed federal decisions holding that the redeposit of dredged material constituted a regulable discharge. *See id.* at 50110. In doing so, the Corps listed cases concluding that the discharge of unprocessed dredged material resulted in a discharge of dredged materials subject to the Corps' authority under section 404 of the Clean Water Act. *See id*. (discussing cases involving sidecasting of dredged material, the redeposit of dredged material on adjacent sea grass beds, and backfilling trenches with dredged material).

After citing cases involving the redeposit of unprocessed dredged material, the Corps cited one decision that involved the discharge of processed dredged material, which it distinguished from the other cited cases with a "see also" cite. The explanation stated:

> "see also, *Rybachek v. EPA*, 904 F.2d 976 (9th Cir. 1990) (removal of dirt and gravel from a stream bed and its subsequent redeposit in the waterway after segregation of minerals is 'an addition of a pollutant' under the CWA subject to EPA's section 402 regulatory authority)."

Id. That explanation is consistent with the District of Columbia Circuit's decision in *National Mining Assoc.*, which explained that *Rybachek* had addressed "the discrete act of dumping leftover material into the stream after it had been processed," not "imperfect extraction, i.e.,

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of proving or disproving whether activities that came within that general rule resulted in incidental fallback. Presumably for that reason, the preamble to the proposed 2000 rule remained relevant to explaining the final 2001 rule.

extraction accompanied by incidental fallback of dirt and gravel." *See National Mining Assoc.*, 145 F3d at 1406. The Corps' description of *Rybachek*, however, went further than that and stated, consistently with the 1986 memorandum of agreement, that the material discharged as a result of placer mining "is 'an addition of a pollutant' under the CWA subject to EPA's section 402 regulatory authority." Far from suggesting an intent to depart from the conclusion in the 1986 memorandum of agreement, the 2001 final rule and the explanation for the 2000 proposed rule are consistent with the Corps' and the EPA's earlier conclusion that the discharge of placer mining waste is not the discharge of dredged material and that, as a result, the EPA is authorized to issue permits under Section 402 of the Clean Water Act for the processed waste discharged as a result of suction dredge mining.

4. *The Corps' 2008 rules*

As explained above, the 1975 exception to the definition of "discharge of dredged material" identified one instance in which the act of processing dredged material will result in the discharge of a pollutant that requires a permit from the EPA under section 402. It did not, however, unambiguously resolve whether other instances of processing dredged material would result in such a discharge. The dissent reasons that, even if that is a correct interpretation of the 1975 definition of "discharge of dredged material," the 2008 version of that definition resolved the ambiguity. We reach a different conclusion. The 2008 version of the definition of "discharge of dredged material" left the relevant part of the 1975 regulations unchanged, and the differences between the 1975 version and the 2008 version of the definition provide no reason to think that the 2008 regulation somehow changed what the 1975 regulation meant when it was initially promulgated.

The relevant part of the 1975 definition of "discharge of dredged material" does not differ in any material respect from the 2008 definition. The 1975 regulation provided that "[t]he term 'discharge of dredged material' means any addition of dredged material * * * into navigable waters." 33 CFR § 209.120(5) (1976). It then provided that "[d]ischarges of

pollutants into navigable waters resulting from the onshore subsequent processing of dredged material that is extracted for any commercial purpose (other than fill) are not included within th[e] term [discharge of dredged material]." *Id.* The 2008 regulation says the same thing. It provides that "[e]xcept as provided in paragraph (d)(2) below, the term discharge of dredged material means any addition of dredged material into *** the waters of the United States." 33 CFR § 323.2(d)(1) (2009). Paragraph (d)(2) then provides that the term "discharge of dredged material does not include the following: *** discharges of pollutants into the 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 CFR § 323.2(d)(2)(i) (2009).

There are two potentially relevant changes to the definition of the phrase "discharge of dredged material" between 1975 and 2008. First, the exceptions are organized slightly differently, an organizational change that occurred in 1993 and that prompted no discussion when it occurred. 58 Fed Reg 45008 (Aug 25, 1993), codified at 33 CFR § 323.2(d) (1994).[18] That is, the 1993 regulation (and the 2008 regulation) group initially two and later three exceptions together and put them in one place rather than stating each exception in a separate sentence, as the regulations did from 1977 to 1993.

Second, between 1975 and 2008, the Corps added two exceptions to the term "discharge of dredged material." In 1977, the Corps restated what had been an exception to the definition of "dredged material" for "material resulting from normal farming, silviculture, and ranching activities, such as plowing, cultivating, seeding, and harvesting, for the production of food, fiber, and forest products" and moved it to become an exception to the definition of "discharge of dredged material." *See* 33 CFR § 209.120(d)(4) (1976); 33 CFR § 323.2(l) (1978). The Corps explained that it had intended in 1975 to make clear that "activities such

[18] The explanation for the changes in the Federal Register focused almost completely on the Corps' decision to expand the definition of "discharge" to include incidental fallback. *See* 58 Fed Reg 45008-26 (Aug 25, 1993). More specifically, the discussion focused on when the incidental discharge of unprocessed dredged material would constitute a regulable discharge. *See id.*

as plowing, seeding, harvesting, and any other activity by any other industry *that do not involve discharges of dredged or fill material*" do not require section 404 permits. 42 Fed Reg 37130 (July 19, 1977) (emphasis added). It reasoned that restating and moving that exception to the definition of "discharge of dredged material" clarified its intent to except only those ordinary sorts of activities that do not result in a discharge of dredged material.[19] *Id.* The third exception was added in 1999 (and restated several times) to exclude "incidental fallback" from the definition of discharge of dredged material. That exception is discussed at some length above.

The second and third exceptions (added in 1977 and 1999) are excluded from the definition of "discharge of dredged material" because the Corps concluded that they do not involve any "discharge" of dredged material. The first exception stands on a different footing. That exception assumes that there is a "discharge" but establishes that, as a result of the act of processing dredged material, the material discharged is a "pollutant" subject to section 402 rather than "dredged material" subject to section 404. That is, the second and third exceptions turn on the absence of a discharge; the first turns on the nature of the material being discharged.

Contrary to the dissent's reading of the 2008 definition of "discharge of dredged material," the changes to that definition between 1975 and 2008 provide no reason to say that the exception promulgated in 1975 means anything other than what it meant in 1975. Specifically, both the 1975 and the 2008 regulations leave open the question whether other instances of processing dredged material—namely, instances other than the one instance identified in the 1975

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[19] In 1993, the Corps restated that agricultural exception one more time. 33 CFR § 323.2(d)(2)(ii) (1994). As restated, the exception provided that the discharge of dredged material does not include:

> "activities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chainsawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material."

Id. As before, the Corps explained that the reason for the exception was that the listed activities "would not cause either the addition or redeposition of dredged material." 58 Fed Reg 45017 (Aug 25, 1993).

exception—will result in the discharge of a pollutant subject to section 402 or the discharge of dredged material subject to section 404. It is precisely because the regulations leave that question open that the EPA and the Corps' application of the statute and regulations matters.

5. *Regulatory approval*

Either the EPA or a state agency acting under authority delegated by the EPA may issue a permit under section 402 of the Clean Water Act for the discharge of pollutants after providing an opportunity for a hearing. *See* 33 USC § 1342(a)(1) (permits issued by the EPA); 33 USC § 1342(b) (states acting under delegated authority). However, in considering regulatory approval of permits for suction dredge mining, we focus on permits issued by the EPA or the Corps and do not rely on permits issued by states, such as Oregon, that are acting pursuant to authority delegated by the EPA. Without some showing that the EPA has formally adopted a state agency's issuance of a permit, the states' regulatory actions do not provide a strong basis for determining the meaning of a federal statute. *Cf. DeCambre v. Brookline Housing Auth.*, 826 F3d 1, 19 (1st Cir 2016) (explaining that deference to state agency interpretations of federal statutes could undercut the uniform interpretation of federal law).

Focusing on the EPA's issuance of permits, the state argues and petitioners do not dispute that the Regional Administrator of the EPA has issued general permits for suction dredge mining in Alaska that were in effect from 1994 to 2015.[20] Not only has the EPA issued general permits for suction dredge mining in Alaska, but the Corps in Alaska administers a general permit for "mechanical placer mining," which notes that small scale suction dredge mining is not an activity covered by the Corps' general permit but is instead regulated under a permit issued by the state agency acting under delegated authority from the EPA.[21] Specifically, the Corps' permit provides that the

[20] Since that time, the responsibility for issuing permits for suction dredge mining has been delegated to Alaska's counterpart to Oregon's DEQ. While the Alaska counterpart has acted consistently with the EPA, we look primarily to the EPA's permitting decisions.

[21] The Corps may issue a permit under section 404 only after notice and an opportunity for a public hearing. *See* 33 USC §1344(a)(1); 33 CFR §325.3.

"use of a suction device to remove bottom substrate from a water bod[y] and discharges of material from a sluice box for the purpose of extracting gold or other precious metals *** [are] regulated by the ADEC [Alaska Department of Environmental Conservation] under a Section 402 Alaska Pollution Discharge Elimination System (APDES) permit."

To be sure, in 2012, the Corps extended another regional general permit, 2007-372-MI, that regulates "floating recovery devices" used for the purposes of recovering metals. That permit, however, was not issued under the Clean Water Act but under the Corps' authority under Section 10 of the Rivers and Harbors Act. Moreover, the Corps' permit excepts small suction dredge mining. It provides:

> "[N]o Corps authorization is required for these operations. Recovery of metals in a Section 404 water results in discharge from a sluice, trommel, or screen, however this discharge is regulated by Alaska Department of Environmental Conservation (ADEC) under a Section 402, Alaska Pollutant Discharge Elimination System Permit (APEDS)."[22]

As the Corps' and the EPA's joint exercise of authority in Alaska demonstrates, those agencies have adhered to the distinction reflected in the 1986 memorandum of agreement and stated in the Corps' 1990 regulatory guidance letter. The EPA has issued permits for discharges resulting from small scale suction dredge mining, and the Corps has recognized the EPA's authority to do so.

Additionally, as noted above, in April 2018, the Regional Administrator of the EPA reissued a general permit for suction dredge mining in Idaho after notice and comment. Before doing so, the EPA addressed several comments questioning the EPA's authority to issue a permit for suction dredge mining. *See* EPA, Response to Comments on Idaho Small Suction Dredge General Permit at 3-7. Some

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[22] In a 2017 notice stating that it was extending the permit until 2018, the Corps added:

> "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."

(Capitalization in original.)

commenters took the position that suction dredge mining should not be regulated at all. *Id.* at 3-4. Similarly, others argued that the material discharged as a result of suction dredge mining was incidental fallback and thus not subject to regulation. *Id.* at 5-6. In responding to those comments, the EPA explained that "commenters often confuse the 'discharge of dredged material' with the 'discharge of a pollutant.'" *Id.* at 7. The EPA reaffirmed its position that the material discharged as a result of suction dredge mining was the "discharge of a pollutant" subject to regulation under section 402 and not incidental fallback, which does not constitute a regulable discharge of dredged material. *Id.* The EPA then noted that, consistently with that conclusion, "the Corps routinely informs applicants who request a 404 permit for small suction dredging in Idaho that, unless a regulable discharge of dredged or fill material will occur, the EPA is the lead agency for the activity." *Id.*

The EPA thus reaffirmed that the material discharged as a result of suction dredge mining is a pollutant that requires a permit from the EPA under section 402 and not dredged material that requires a permit from the Corps under section 404. Petitioners argue, however, that the Corps has issued three permits that lead to a different conclusion. Specifically, they rely on two nationwide permits (NWP) issued by the Corps and a regional permit also issued by a division of the Corps. We consider each permit separately.

The first permit, NWP 19, authorizes dredging of "no more than 25 cubic yards below" the plane of the ordinary high water mark. 82 Fed Reg 1988 (Jan 6, 2017). Notably, NWP 19 only authorizes dredging—the removal of dredged material from navigable waters. It does not authorize the discharge or addition of dredged material to the navigable waters of the United States, which is the statutory predicate for a section 404 permit under the Clean Water Act. *See National Mining Assoc.*, 145 F3d at 1404 (distinguishing between the Corps' authority to permit dredging under the Rivers and Harbors Act of 1899 and its authority to permit the discharge of dredged or fill material into navigable waters under section 404 of the Clean Water Act). Because a permit authorizing the removal of dredged material from

navigable water differs from a permit authorizing the discharge of dredged material into navigable water, NWP 19 does not advance petitioners' argument.

The second permit, NWP 44, is arguably closer to the mark. It authorizes the discharge of "dredged or fill material" into the nontidal waters of the United States for mining activities, provided that either the discharge does not cause the loss of "greater than 1/2-acre of nontidal wetlands" or as long as the total mined area does not exceed 1/2 acre for open waters, such as rivers, streams, lakes, and ponds. 82 Fed Reg 1994 (Jan 6, 2017). By its terms, NWP 44 applies to the issuance of a permit for a single mining project that can entail water impoundments and construction on fill or dredged material discharged into the water. *See* NWP 44, General Conditions Nos. 8, 9, 14, 15, 23, and 24. Moreover, it requires preconstruction notification for certain activities and remedial mitigation by the project proponent. *Id*.

At first blush, the fact that NWP 44 authorizes the discharge of dredged material for mining purposes appears to support petitioners' argument. On closer inspection, however, we reach a different conclusion. First, NWP 44 is directed at individual mining projects that can involve the impoundment of water and construction of temporary or permanent structures for mining, rather than recreational suction dredge mining. Second, in authorizing the discharge of up to one-half acre of fill or dredged material, NWP 44 appears to refer to unprocessed dredge material or fill. It does not expressly address whether processed dredged material remains subject to the Corps' permitting authority under section 404 or whether processing can result in the addition of a pollutant subject to the EPA's permitting authority under section 402. Third, and consistently with the second observation, the commentary to NWP 44 states that "[d]ischarges of processed mine materials into waters of the United States may require authorization [by the EPA] under section 402 of the Clean Water Act." 82 Fed Reg 1921 (Jan 6, 2017).

Finally, petitioners rely on a regional general permit that the Corps issued in 1995 for northern California

for "certain work activities and incidental discharges of dredged or fill material associated with suction dredge mining." Department of the Army, Regional General Permit No. 21181-98 (June 7, 1995). Again, at first blush, the permit appears to support petitioners' view that the Corps has exercised permitting authority over suction dredge mining. However, from 1961 to 2009, the State of California issued permits authorizing suction dredge mining under section 5653 of the California Fish and Wildlife Code, *see People v. Rinehart*, 1 Cal 5th 652, 658, 377 P3d 818 (2016), *cert den sub nom Rinehart v. California*, 138 S Ct 635 (2018),[23] and the Corps' permit on which petitioners rely specifically provides that "[w]ork under this regional general permit is authorized *only* for holders of current and valid California Department of Fish and Game [section] 5653 Permits *** commonly referred to as 'standard permits', for the purpose of engaging in suction dredge mining for mineral extraction." (Emphasis added.)

Moreover, the Corps issued the 1995 regional permit two years after it promulgated the 1993 regulations that defined the "discharge" of dredged materials as including "any addition, including any redeposit, of dredged material, including excavated material, into the waters of the United States, which is incidental to any activity ***." 32 CFR § 323.2(d)(1)(iii) (1994). That rule was later modified in 1999 to except "incidental fallback," and it is unclear whether the Corps' 1995 regional permit was issued merely to comply with the rules in effect from 1993 to 1999 that the discharge of unprocessed dredged material that was incidental to any activity required a permit under section 404 of the Clean Water Act. *See* Regional General Permit No. 21181-98 (authorizing "incidental discharges of dredged or fill material associated with suction dredge mining"). Beyond that, the 1995 regional permit does not purport to be the exclusive permitting authority for suction dredge mining but serves instead only as auxiliary authorization. The Corps' permit applies only if a person possesses a standard permit for suction dredge mining issued by the State of California.

[23] In 2009, the California imposed a temporary moratorium on all suction dredge mining, which was scheduled to sunset in 2016. *See Rinehart*, 1 Cal 5th at 658.

Finally, the 1995 regional permit expired on July 1, 2000, and petitioners do not identify any other permit issued by the Corps after it amended its regulations in 1999 to exclude incidental fallback that provides auxiliary authorization for incidental discharges resulting from suction dredge mining.

Ultimately, we do not view NWP 19, NWP 44, or Regional General Permit No. 21181-98 as persuasive authority for petitioners' position. Rather, NWP 19 does not authorize the discharge of dredged materials; the commentary to NWP 44 recognizes that the discharge of processed mining waste may require a permit from the EPA under section 402; and the 1995 regional general permit provided auxiliary authorization for incidental discharges associated with suction dredge mining at a time when the Corps' regulations recognized that any discharge of unprocessed dredged material that was "incidental to any activity" was a regulable discharge under section 404.

In our view, the regulatory history reveals that, from 1986 to 2018, the EPA and the Corps have been on the same page. From the 1986 memorandum of agreement between the EPA and the Corps to the general permits issued by the EPA in 2018 and the Corps in 2017, both agencies consistently have recognized that processed waste discharged as a result of suction dredge mining is a pollutant that requires a permit from the EPA under section 402. Similarly, they consistently have concluded that the discharge resulting from suction dredge mining is not "dredged material" that requires a permit from the Corps under section 404. With that regulatory history in mind, we turn to the deference owed those agency decisions.

C. *Deference*

In *Coeur Alaska*, the Court explained that Congress had not "directly spoken" to the precise question in that case, and it looked "to the agencies' regulations construing [the statutory text], and [the Corps and] the EPA's subsequent interpretation of those regulations" to determine the answer to that question. 557 US at 277.

As *Coeur Alaska* recognized, agencies charged with administering a federal statute may interpret that statute

in ways that call for deference. *See id.* The agencies may promulgate rules after notice and comment. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 US 837, 104 S Ct 2778, 81 L Ed 2d 694 (1984); *accord United States v. Mead Corp.*, 533 US 218, 226-27, 121 S Ct 2164, 150 L Ed 2d 292 (2001). Or they may engage in formal adjudication following notice and comment, which will also warrant *Chevron* deference. *See Mead Corp.*, 533 US at 227 (explaining that "[d]elegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking"); Charles H. Koch, Jr. and Richard Murphy, 4 *Administrative Law & Practice* § 11.34.10 (3d ed 2010) (recognizing "a safe harbor for *Chevron* deference where an agency uses notice and comment, formal adjudication, or similarly extensive procedures to develop the interpretation"). Additionally, the Court recently reaffirmed that an agency's reasonable interpretation of its own regulations will warrant deference. *See Kisor v. Wilkie*, 588 US ___, 139 S Ct 2400, 2414-18, ____ L Ed 2d ____ (2019) (listing the criteria for deferring to an agency's interpretation of its own regulations).[24] Finally, agency interpretations contained in opinion letters and the like are entitled to respect but only to the extent that they have the power to persuade. *Christensen v. Harris County*, 529 US 576, 587, 120 S Ct 1655, 146 L Ed 2d 621 (2000) (citing *Skidmore v. Swift & Co.*, 323 US 134, 140, 65 S Ct 161, 89 L Ed 124 (1944)).

As explained above, the text of the Clean Water Act does not speak directly to the question whether discharges resulting from suction dredge mining constitute the "discharge of dredged *** material" subject to the Corps' permitting authority or the discharge of processed waste subject to the EPA's permitting authority. One would hardly expect Congress to have focused on such a small detail. Rather, that is precisely the sort of issue that ordinarily would be (and was) left to the EPA's and the Corps' application of the broader principles stated in the Clean Water Act.

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[24] In *Kisor*, a majority of the Court joined in only part of Justice Kagan's opinion. *See Kisor*, 139 S Ct at 2424 (Roberts, C.J., concurring in part) (joining in Parts I, II-B, III-B, and IV of Justice Kagan's opinion). In discussing *Kisor*, we refer only to those parts of the decision that state the opinion for the Court.

We also conclude that the regulations that those agencies have promulgated do not resolve that issue. The regulations expressly recognize that the act of processing dredged material can result in the discharge of a pollutant that requires a permit from the EPA under section 402 rather than the discharge of dredged material that requires a permit from the Corps under section 404. However, as explained above, the regulations do not resolve whether the discharges resulting from suction dredge mining constitute a pollutant subject to section 402 or dredged material subject to section 404. Both the statutes and the regulations are genuinely ambiguous on that question.

In our view, the most persuasive answer to that question lies in the general permits for suction dredge mining that the EPA has issued after notice and comment. Because the level of formality that attends the issuance of those permits bears on the deference due the EPA's interpretation, *see Mead Corp.*, 533 US at 230, we discuss that issue briefly. Congress has provided that the EPA may issue a permit for the discharge of a pollutant into the navigable waters of the United States only "after opportunity for a public hearing." 33 USC § 1342(a)(1). Consistently, the EPA's rules provide that the Regional Administrator of the EPA may issue an individual or a general permit only after providing notice and an opportunity for comment. *See* 40 CFR § 124.10 (requiring notice and an opportunity for comment); 40 CFR §124.8 (requiring preparation of a fact sheet); 40 CFR § 124.17 (requiring a response to all significant comments as a prerequisite to the issuance of a final permit); 40 CFR § 122.28(b)(4) (providing that general permits are subject to the procedures in 40 CFR Part 124). Any person who filed comments on the draft permit or participated in a public hearing on the draft permit may petition for review to the Environmental Appeals Board. 40 CFR § 124.19 (a)(2). Only when the petition for review is finally resolved may the Regional Administrator issue a permit. 40 CFR § 124.19(l).

As we read both the Clean Water Act and the EPA's rules, they require the opportunity for a hearing before the Regional Administrator following notice and comment and provide for an appeal to the Environmental Appeals Board,

which serves as the arm of the Administrator of the EPA to ensure that the agency speaks with one voice. 40 CFR § 1.25(e) (defining the role of the Environmental Appeals Board).[25] Not only does the formality that attends the issuance of individual permits call for *Chevron* deference under *Mead Corp.*, but that is particularly true for the general permits that the EPA issues. General permits are not limited to discharges from a single point source, as an individual permit is; instead, they apply to multiple discharges resulting from an activity, such as suction dredge mining, that can occur across a wide geographic area. *See* 40 CFR § 122.2 (defining "general permit"). As such, general permits possess many if not more similarities with rules than they do individual adjudications.

As discussed above, the EPA has issued general permits for suction dredge mining in Alaska that were in force from 1994 to 2015, and it reissued a general permit for suction dredge mining in Idaho in 2018. Similarly, in extending a general permit for floating recovery devices in 2012 and again in 2017, the Corps agreed that "no Corps authorization is required" for the processed waste discharged as a result of small suction dredge mining. The Corps explained instead that those discharges are regulated by the Alaska Department of Environmental Conservation under Section 402. All those permits, issued after notice and comment and an opportunity for a hearing, reaffirm the EPA's and the Corps' conclusion that the EPA is authorized under section 402 of the Clean Water Act to issue permits for the processed waste discharged as a result of suction dredge mining.

Not only do those permits possess a sufficient measure of formality to warrant *Chevron* deference, but the EPA's conclusion that it is authorized to permit discharges resulting from suction dredge mining and the Corps' acquiescence in that conclusion are reasonable. *Cf. Coeur Alaska*, 557 US at 283 (deferring to a similar issue that had been "addressed and resolved in a reasonable and coherent way by the practice and policy of the two agencies"); *id.* at 291 (Breyer, J., concurring) (recognizing a "legal zone within

[25] As noted above, the Corps follows similar procedures in issuing permits under section 404. *See* 33 USC §1344(a)(1); 33 CFR § 325.3.

which the regulating agencies might reasonably classify material as 'dredged *** material' subject to § 404 *** or as a 'pollutant' subject to §§ 402 and 306"). As explained above, it is possible to classify the material discharged as a result of suction dredge mining as "dredged material" subject to the Corps' permitting authority. However, is it equally possible to classify the material discharged as a result of suction dredge mining as a "pollutant" that is subject to the EPA's permitting authority under section 402.

Petitioners argue, however, that the material discharged as a result of suction dredge mining is indistinguishable from the discharge of unprocessed dredged material over which the Corps has permitting authority. Both can remobilize heavy metals, such as mercury, and both can result in turbid wastewater plumes. As we understand petitioners' argument, they contend that it is arbitrary to classify the discharge resulting from suction dredge mining as anything other than "dredged material."[26] One difference, however, between the two types of discharges is the cumulative impact of suction dredge mining. Unlike the discharge of dredged material, which often is project-specific, suction dredge mining is a recreational activity that numerous people can pursue simultaneously in the same or multiple locations. EPA, Response to Comments on Idaho Small Suction Dredge General Permit at 13 (explaining that the EPA deemed suction dredge mining as a "recreational activity," which numerous people can undertake).

[26] The dissent starts from a similar but analytically separate premise in interpreting the regulations. It reasons that, if the act of processing dredged material consists only of only removing part of the dredged material and adds nothing to it, then the resulting discharge will necessarily be "dredged material." The dissent, however, never identifies the basis for that premise, other than its own intuitive sense of the matter. Certainly, nothing in the text of the regulations stands for that proposition. Indeed, the one regulation that addresses discharges resulting from processing dredged material points in precisely the opposite direction. That regulation excepts discharges of pollutants resulting from the onshore processing of dredged material extracted for a commercial use from the "discharge of dredged material," without regard to whether the processing consisted of removing part of the dredged material or adding something to it. Finally, the dissent's premise is contrary to over 30 years of the EPA's and the Corps' consistent interpretation of their rules that the discharge of placer mining waste (waste left over after minerals have been removed from dredged material) is the discharge of a pollutant that requires a permit from the EPA under section 402.

In responding to similar objections to treating the discharge from suction dredge mining as a pollutant subject to section 402, the EPA has observed that suction dredging is "'of special concern where it is frequent, persistent, and adds to similar effects caused by other human activities." *Id.* at 11 (quoting Bret C. Harvey and Thomas E. Lisle, *Effects of Suction Dredging on Streams: a Review and an Evaluation Strategy* 15 (Aug 1998)). In determining the extent to which suction dredge mining should be permitted, the EPA considers the total maximum density load of sediment that a stream is capable of handling. That varies depending on, among other things, the type of sediment where the suction dredge mining will be conducted, the extent to which a stream is already impaired by sediment, the rate of streamflow, and the number of point sources—*i.e.*, suction dredge miners—discharging additional sediment into the stream. *Id.* at 26. The concern is not with the navigability of the water body, a concern that falls within the Corps' expertise; rather, the concern is with the health of the water body, a concern that lies at the heart of the EPA's expertise.

The Corps and the EPA reasonably could conclude that the EPA was better suited than the Corps to make those types of water quality decisions. The risks posed by the cumulative effects of multiple suction dredge mining operations on the overall health of a stream differ from the sort of engineering issues that the Corps typically addresses. *See* Nadia H. Dahab, *Muddying the Waters of Clean Water Act Permitting:* NEDC *Reconsidered*, 90 Or L Rev 335, 352-54 (2011) (discussing the EPA and the Corps' respective spheres of expertise). Specifically, the effect of increased sedimentation on water quality posed by multiple suction dredge mining operations requires the permitting agency to consider the number of permits that should be issued, the streams in which suction dredge mining should be permitted or limited, and the appropriate restrictions that should be included for each stream on the intensity, duration, and frequency of the activity.

Perhaps the Corps could have made those same kinds of water quality decisions. However, in light of the cumulative impact of sedimentation on water quality that

can result from suction dredge mining and in light of the need to include appropriate limits on the permits to maintain the health of affected water bodies, the Corps and the EPA reasonably could conclude, as they have, that permits for the discharge of material resulting from suction dredge mining should be issued by the EPA under section 402 rather than by the Corps under section 404. It follows, we think, that the general permits issued by the both the EPA and the Corps are reasonable agency interpretations of a statute following notice and comment procedures that warrant deference under *Mead*.[27]

We note alternatively that the EPA's and the Corps' resolution of this issue can be viewed as the agencies' interpretation of their own "genuinely ambiguous" regulations. As explained above, the regulations recognize that the act of processing dredged material can result in the discharge of "pollutants" that require a permit under section 402 rather than the discharge of "dredged material" that requires a permit under section 404. However, as explained above, the regulations do not unambiguously answer the specific question in this case—whether the processed waste discharged as a result of suction dredge mining falls into the former or the latter category. *See Kisor*, 139 S Ct at 2415 (directing courts to consider "the text, structure, history, and purpose of a regulation" in determining whether it is genuinely ambiguous). We accordingly look to the agencies' interpretation of their regulations and conclude, for the reasons set out above, that their consistent conclusions come "within the bounds of reasonable interpretation." *See id.* at 2416 (internal quotation marks omitted). Moreover, their interpretation reflects the agencies' authoritative or official position. *See id.* As noted above, the Administrator of the EPA has delegated authority to issue general permits to the Regional Administrators, a decision that is subject to centralized

[27] Both the EPA and the Corps are charged with implementing the Clean Water Act. Because both agencies have issued general permits after a formal adjudication recognizing that discharges from small suction devices are subject to a permit issued by the EPA (or its state delegate) under section 402, this case does not require us to decide whether only one agency's formal order would be sufficient under *Mead*. *Cf. Proffitt v. FDIC*, 200 F3d 855, 860 (DC Cir 2000) (explaining that when two agencies administer a statute, one agency's interpretation is not sufficient).

review by the Environmental Appeals Board. The agencies' interpretation also implicates their substantive expertise, as the Court recognized in *Coeur Alaska*. *See Kisor*, 139 S Ct. at 2417 (listing that criterion); *Coeur Alaska*, 557 US at 291-92 (Breyer, J., concurring) (describing the Court's decision as deferring to the agencies' expertise). Finally, the agencies' interpretation reflects their fair and considered judgment. *See Kisor*, 139 S Ct. at 2417-18. Their interpretation is not a convenient litigating position, a post-hoc rationalization, or a new interpretation that creates unfair surprise. *See id.*

Indeed, since entering into a memorandum of agreement in 1986, both the EPA and the Corps consistently have recognized that the processed waste discharged as a result of small suction dredge mining is a pollutant that requires a permit from the EPA under section 402 rather than dredged material that requires a permit under section 404. Even if deference to the agencies' formal interpretation of their regulations were not sufficient under *Mead*, the EPA and the Corps' consistent and reasonable interpretation of the regulations warrants deference under *Kisor*.[28]

Two other issues require mention. First, much of petitioners' opening brief focuses on evidentiary challenges to the factual premises underlying DEQ's issuance of the permit. The Court of Appeals, however, declined to exercise its discretion to consider petitioners' third assignment of error contending that DEQ's findings were not supported by substantial evidence. Petitioners have not argued that the Court of Appeals abused its discretion in making that decision, and it is unclear how much, if any, of petitioners' fact-specific challenges are properly before us. Beyond that, as we understand the legal question before us, it is whether the EPA and the Corps reasonably have concluded that the EPA (and by extension DEQ) has permitting authority under section 402 over discharges resulting from suction dredge mining. It is difficult to understand how the factual record developed in a state hearing somehow limits the Corps' and the EPA's interpretation of their own regulatory authority, as opposed to establishing the appropriate numeric,

[28] We would reach the same conclusion even if we viewed the agencies' actions less deferentially as a persuasive agency interpretation under *Skidmore*.

geographic, and temporal limitations on suction dredge mining permitted in local rivers and streams.

Second, petitioners argue that the Court of Appeals erred in concluding that the single discharge resulting from suction dredge mining was subject to permits issued by both the Corps and the EPA (or its state delegate). In petitioners' view, only one agency had the authority to permit the discharge. Although petitioners do not cite *Coeur Alaska* in support of their argument, we note that that decision is consistent with their position. *See Coeur Alaska*, 557 US at 286 (agreeing that a "two-permit regime [for a single discharge] is contrary to the [Clean Water Act] and the regulations"); *see also* Dahab, *Muddying the Waters of Clean Water Act Permitting*, 90 Or L Rev at 354-56 (critiquing the two-permit reasoning in *NEDC*, 232 Or App at 644-45).

We need not resolve that issue to decide this case. As explained above, we defer 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. Given the Corps' and the EPA's conclusion that the EPA has authority over that permitting decision, we need not decide whether those agencies could have divided permitting responsibility for a single discharge between them. To be sure, DEQ's 2010 permit may have been too narrow in that it applied to only part of the discharge resulting from suction dredge mining. However, petitioners do not challenge the 2010 permit on the ground that it is too narrow. Rather, they challenge it on the ground that it is too broad. In their view, the EPA did not have any permitting authority over discharges resulting from suction dredge mining. That argument is not well taken and provides no basis for reversing the Court of Appeals decision.

The decision of the Court of Appeals is affirmed.

BALMER, J., dissenting.

The majority opinion reaches a result that may be sensible, but takes a path that is closed off by the federal caselaw that we are bound to follow. When an agency reasonably interprets an ambiguous statute by promulgating a

rule, we must give deference to its interpretation. Here, the two agencies charged with administering the Clean Water Act (CWA) created rules interpreting some of its ambiguous terms; those definitions, to which we must defer, clearly resolve this case in petitioners' favor. The majority colors outside the lines of agency deference, and in the process ends up interpreting the statute by deferring to certain actions of the two federal agencies involved here, and perhaps to their desires, but not, as we must, to their duly promulgated interpretation of the Clean Water Act. I respectfully dissent.

The CWA imposes responsibilities on both the Army Corps of Engineers and the Environmental Protection Agency (EPA). Section 402, administered by the EPA, gives that agency permitting authority over "the discharge of any pollutant." 33 USC § 1342(a)(1). The Corps, under section 404, "may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 USC § 1344(a). But that authority does not overlap. "If the Corps has authority to issue a permit, then the EPA may not do so." *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 US 261, 275, 129 S Ct 2458, 174 L Ed 2d 193 (2009).

In 2010, Oregon's Department of Environmental Quality (DEQ) issued a general permit for suction dredge mining under the authority of section 402. DEQ issued the general permit on the understandable theory that suction dredge mining involves the release of dirt and gravel into the water, creating a plume of turbidity that is the "addition of a pollutant." Petitioners argue that DEQ exceeded its authority under Section 402 because, even if the release of dirt and gravel from suction dredge mining would otherwise constitute the "discharge" or "addition" of a pollutant, it is a "discharge of dredged *** material" under section 404 and therefore properly subject to permitting only by the Corps.

This case therefore turns on the meaning of the phrase "discharge of dredged *** material" in section 404. "When a court reviews an agency's construction of the statute which it administers," *Chevron U.S.A. v. Natural Resources Defense Council*, 467 US 837, 842, 104 S Ct 2778, 81 L Ed 2d

694 (1984), it is bound to apply an interpretive canon known as *Chevron* deference. *Chevron* involves a two-step inquiry. At the first step, the court interprets the statute "employing traditional tools of statutory construction ***." *Id.* at 843 n 9. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. At the second step, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. "Even under that deferential standard, however, 'agencies must operate within the bounds of reasonable interpretation.'" *Michigan v. EPA*, ___ US ___, ___, 135 S Ct 2699, 2707, 192 L Ed 2d 674 (2015) (quoting *Utility Air Regulatory Group v. EPA*, 573 US 302, 321, 134 S Ct 2427, 189 L Ed 2d 372 (2014)).

Chevron does not require deference to all agency interpretations, because *Chevron* depends on the scope of Congress's delegation to the agency and how the agency has set forth its interpretation. However,

> "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."

United States v. Mead Corp., 533 US 218, 226-27, 121 S Ct 2164, 150 L Ed 2d 292 (2001).

I begin with the first step, interpreting CWA section 404 itself, and determining whether suction dredge mining involves "the discharge of dredged or fill material into the navigable waters ***." 33 USC § 1344(a). It could be argued that this text is enough to settle the case. After all, suction dredge mining does "dredge" material. And, in a literal sense, that material is then "discharged" into water. But suction dredge mining also involves passing that dredged material over a sluice tray in order to separate out gold. It may be that dredged material remains dredged material indefinitely. But it might reasonably be thought that in some circumstances material that has been dredged will cease to

qualify as dredged material. For example, the gold removed from the stream may be "dredged material" initially, but it might be anomalous to refer to it as "dredged material" once it has been turned into a wedding ring. Additionally, the context of section 404 is relevant. The words "discharge of dredged or fill material" demarcate the jurisdictional line between the EPA and the Corps, and thus might be read in a way that takes into account the relative competencies of the agencies—such as by focusing on the purpose or the environmental effects of the discharge. Thus, at *Chevron* step one, I find the statute ambiguous.

Chevron's first step being satisfied, it is appropriate to turn to agency interpretations. The Corps and the EPA have promulgated rules, through notice and comment rulemaking, to clarify the definitions of "dredged material" and "discharge of dredged material." Those rules, which were most recently revised in 2008, define dredged material as follows:

> "The term dredged material means material that is excavated or dredged from waters of the United States."

33 CFR § 323.2(c).[1] Thus, "dredged material" is defined based solely on the source of the material—the waters of the United States—and the process by which it is removed—excavation or dredging. There is no temporal caveat, and no qualification based on subsequent processing or environmental effects.[2] To read the definition to be conditioned on such requirements would require a judicial addition to the rule's text, which would be entirely inconsistent with the

[1] There are parallel and identical definitions contained in rules issued by the EPA and located in 40 CFR § 232.2. For convenience, I cite only to the Corps' rules in 33 CFR § 323.2.

[2] The omission of any consideration of effects is particularly telling because in the context of fill material, the Corps and the EPA *did* opt for an effect-based definition:

> "(e)(1) Except as specified in paragraph (e)(3) of this section, the term fill material means material placed in waters of the United States where the material has the effect of:
>
> "(i) Replacing any portion of a water of the United States with dry land; or
>
> "(ii) Changing the bottom elevation of any portion of a water of the United States."

33 CFR § 323.2.

Supreme Court's directive that we "must employ traditional tools of interpretation" to interpret regulations. *Christopher v. SmithKline Beecham Corp.*, 567 US 142, 161, 132 S Ct 2156, 183 L Ed 2d 153 (2012).

To be sure, an interesting question would be raised if we were faced with a mixture of dredged material and some other substance which had not been "excavated or dredged from waters of the United States." The definition does not, perhaps, speak clearly to the question of whether such a mixture, or a portion thereof, would constitute "dredged material." Suction dredge mining, however, processes material only by removing part of it. All of the remaining material, absolutely everything ultimately added to the water, was "excavated or dredged from waters of the United States."

Because everything released by suction dredge mining is "dredged material," the next question is whether the release of that material into the water qualifies as "discharge of dredged material":

> "(d)(1) Except as provided below in paragraph (d)(2), 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."

33 CFR § 323.20(d)(1). Leaving aside, for the moment, the exceptions, this definition also favors the Corps' authority. The material released from suction dredge mining, all of which is "dredged material," is released into—added to—the water. Thus, it is captured by "any addition of dredged material into *** the waters of the United States."

I turn to the exceptions set out in paragraph (d)(2):

> "(2) The term discharge of dredged material does not include the following:
>
> "(i) 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). 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.

> "(ii) Activities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chainsawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material.
>
> "(iii) Incidental fallback."

33 CFR § 323.20(d)(2). The first exception confirms that "dredged material" *does* include material that has subsequently been processed, including that which has been processed onshore. If it did not, then subparagraph (d)(2)(i) would be superfluous—it would serve no purpose to exclude from the definition of "discharge of dredged material" the release of something that was not "dredged material" in the first place. *See Corley v. United States*, 556 US 303, 314, 129 S Ct 1558, 173 L Ed 2d 443 (2009) (referring to the rule against superfluities as "one of the most basic interpretive canons").

The exclusion from the Corps' jurisdiction of certain subsequently processed material also shows that the Corps and the EPA considered how to handle *processed* dredged material. And the only exception to the Corps' jurisdiction related to processing is not one that applies here. To fall under subparagraph (d)(2)(i), and thus be subject to permitting under section 402 rather than section 404, the processing must be "onshore," and the dredged material must be "extracted for any commercial use (other than fill)." It could reasonably be disputed whether the second condition is satisfied here—many suction dredge miners are hobbyists—but the first is not. Suction dredge mining typically involves processing that is not "onshore," and DEQ's permitting scheme—and certainly its assertion of authority over petitioners' in-stream suction dredging—reaches beyond onshore processing.

The agencies' regulations interpret the ambiguous terms "dredged material" and "release of dredged material," and they do so reasonably. The definitions that they have selected are natural and permissible constructions of the statutory text. Under *Chevron*, the deferring court "need not conclude that the agency construction was the only one it

permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 US at 843 n 11. The definitions contained in the rules therefore pass *Chevron*'s second step. Because those rules were adopted through notice and comment rulemaking, and agreed on both agencies charged with administering the relevant sections of the CWA,[3] they satisfy *Mead*. This is heartland *Chevron* territory, and we are bound to defer to the agencies' interpretation.

The majority does not dispute that the 2008 rules are owed deference, but concludes that those rules are best read not to speak, one way or the other, to the question at hand. However, the majority's analysis of the definition of "discharge of dredged material" places heavy reliance on a textual ambiguity that no longer exists. The majority reasons that the 1975 version of the same regulation sets forth a "general rule" that "redeposit of unprocessed dredged material into navigable water will constitute the 'discharge of dredged material,'" *Eastern Oregon Mining Assoc. v. DEQ*, 365 Or 313, ___, ___ P3d ___ (2019); that there is an exception for some dredged material that is processed onshore; and that "the rule leaves unanswered whether other categories of water-based or land-based processing operations will result in the 'discharge of dredged material' that requires a permit from the Corps under section 404," 365 Or at ___.

It does not matter whether that was a permissible reading of the 1975 regulation; it is clearly foreclosed by the current text of 33 CFR § 323.2(d)(1), promulgated in 2008:

> "*Except as provided below in paragraph (d)(2)*, 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."

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[3] Some courts have held that "[w]hen a statute is administered by more than one agency, a particular agency's interpretation is not entitled to *Chevron* deference." *Proffitt v. F.D.I.C.*, 200 F3d 855, 860 (DC Cir 2000). However, where, as here, both agencies charged with administering a statute have jointly promulgated a single interpretation, deference is appropriate. *See Loan Syndications & Trading Association v. S.E.C.*, 882 F3d 220, 222 (DC Cir 2018) (holding that *Chevron* does apply when the multiple involved agencies have issued a joint interpretation).

(Emphasis added.) The present structure of the definition makes clear that aside from redeposit of "incidental fallback" and the express exceptions contained in paragraph (d)(2), every other "addition of dredged material" is a "discharge of dredged material." There is no longer—if there ever was—a phantom category of dredged material additions that the definition simply does not address. The only exception for processed dredged material is the express exception contained in subparagraph (d)(2)(i).

Having brushed past the easy answer, the majority wends through a thicket of past regulatory decisions by the EPA and the Corps. Those materials, which postdate the statute, are not relevant to our *Chevron* step one interpretation of section 404, using the ordinary tools of statutory construction. Instead, the majority interprets section 404 by deferring, under *Chevron*, to a few of those agency materials: a general permit issued by the EPA in Idaho in 2018, and general permits issued by the Corps and the EPA in Alaska over the past decade.

Any attempt to defer to those materials faces an insurmountable hurdle. *Chevron* requires deference to an agency's interpretation of a statute, but nothing in the permits, or even in the associated materials, contains an interpretation of section 404 or any of its terms. Of course, implicit interpretations can still merit deference. In *National Railroad Passenger Corporation v. Boston & Maine Corp.*, 503 US 407, 420, 112 S Ct 1394, 118 L Ed 2d 52 (1992), the Supreme Court reasoned that

> "the fact that the ICC did not in so many words articulate its interpretation of the word 'required' does not mean that we may not defer to that interpretation, since the only reasonable reading of the Commission's opinion, and the only plausible explanation of the issues that the Commission addressed after considering the factual submissions by all of the parties, is that the ICC's decision was based on the proffered interpretation."

That case, however, involved a situation where it was clear, at least contextually, that the agency had interpreted the statute and what the interpretation was. When those features are lacking, courts typically do not defer to implicit

interpretations. As the D.C. Circuit explained in declining to defer to an agency manual,

> "even if we were prepared to accord *Chevron* deference to the PRO Manual, that document contains no interpretation of [the statute] to which we might defer. *** Most important, there is no place in the manual where the agency explains *why* it believes that a PRO satisfies the statutory injunction to inform a complainant of the 'final disposition' of the complaint simply by telling him that it has investigated the matter and will take action if appropriate. Because the manual thus contains no reasoning that we can evaluate for its reasonableness, the high level of deference contemplated in *Chevron*'s second step is simply inapplicable."

Public Citizen, Inc. v. U.S. Department of H.H.S., 332 F3d 654, 661 (DC Cir 2003) (emphasis in original); *see also Former Employees, Marathon Ashland Pipe Line v. Chao*, 370 F3d 1375, 1382 n 2 (Fed Cir 2004) (expressing confusion about deference to an implicit interpretation because "it is not entirely clear what it is that the government wishes us to defer to").

The non-overlapping authority of the EPA and the Corps means that when EPA issues a general permit under section 402, it must have concluded that the permitted activity is not the subject of the Corps' permitting authority under section 404. Similarly, the Corps permits state that the EPA has authority over suction dredge mining. But none of that allows us to discern what either agency understood "discharge," "dredged material," or any other statutory term in section 404, to mean (much less that they agreed on an interpretation). The majority does not hazard a guess as to what their interpretation is. Therefore, rather than assessing the agency interpretation of the statute for reasonableness, as *Chevron*'s second step requires, the majority evaluates only the reasonableness of its practical consequence—that the EPA rather than the Corps gets to regulate suction dredge mining. *See* 365 Or at ___.

Moreover, it is doubtful that the agencies' analysis of section 404 extended any further than concluding (as they must) that the answer really turns on the meaning of the more specific definitions contained in 33 CFR § 323.2, not the bare text of the CWA. Consequently, the permitting

decisions that the majority relies on are very likely interpretations of the agencies' *regulations*, not a statute. That interpretation would be entitled to deference, if at all, not under *Chevron*, but under *Auer v. Robbins*, 519 US 452, 117 S Ct 905, 137 L Ed 2d 79 (1997), which requires courts, when interpreting regulations, to defer to the agency's interpretation of its own regulations. Not long ago, the distinction might not matter in a case like this one, because *Auer* was generally understood to give even more deference to agency interpretations of rules than is accorded to agency interpretations of statutes under *Chevron*. However, the Supreme Court recently emphasized that it "has cabined *Auer*'s scope in varied and critical ways." *Kisor v. Wilkie*, ___ US ___, ___, 139 S Ct 2400, 2418, ___ L Ed 2d ___ (2019). The upshot of that shift is that while courts previously could have been insensitive to whether the implicit agency interpretation of a statute that they were deferring to under *Chevron* was actually an implicit interpretation of a rule—because even if it were, deference would be required anyway—accepting that uncertainty is no longer an option. Given that *Auer* and *Chevron* have different, non-coextensive limits, it cannot be appropriate to defer to an agency's implicit interpretation under *Chevron* unless it is either clear that the agency really is interpreting a statute, or, at minimum, that the agency's interpretation would be owed deference under *Auer* and *Kisor* even if the agency were interpreting a rule.[4] For that reason, the majority decides, in the alternative, that it can defer to the same materials under *Auer* in interpreting the applicable regulations. 365 Or at ___.

In light of *Kisor*, *Auer* now requires a five-step analysis before deference can be accorded to an agency's interpretation of its rules. "First and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous." *Kisor*, ___ US at ___, 139 S Ct at 2415. Before deferring to the agency, "a court must 'carefully consider[]' the text, structure, history, and purpose of a regulation, in

[4] In *Coeur Alaska*, Justice Scalia accused the Court of invoking *Auer* to defer to what was effectively an agency's interpretation of a statute, in order to avoid the limitations that *Mead* had imposed on *Chevron* deference. 557 US at 295 (Scalia, J, concurring in part and concurring in the judgment). Now, *Auer*'s own application having been restricted, we should not use *Chevron* to avoid *Kisor*'s limitations.

all the ways it would if it had no agency to fall back on." *Id.* at ___, 139 S Ct at 2415 (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 US 680, 707, 111 S Ct 2524 115 L Ed 2d (1991) (Scalia, J., dissenting)). Second, the agency's reading "must come within the zone of ambiguity the court has identified after employing all its interpretive tools." *Id.* at ___, 139 S Ct at 2416. Third, the interpretation "must be the agency's 'authoritative' or 'official position,' rather than any more ad hoc statement not reflecting the agency's views." *Id.* at ___, 139 S Ct at 2416. Fourth, "the agency's interpretation must in some way implicate its substantive expertise." *Id.* at ___, 139 S Ct at 2417. Fifth, "an agency's reading of a rule must reflect 'fair and considered judgment' to receive *Auer* deference," *Id.* at ___, 139 S Ct at 2417 (quoting *Christopher*, 567 US at 155), meaning that, among other things, a court generally should not give "*Auer* deference to an agency construction 'conflict[ing] with a prior' one." *Id.* at ___, 139 S Ct at 2417-18 (quoting *Thomas Jefferson University v. Shalala*, 512 US 504, 515, 114 S Ct 2381, 129 L Ed 2d 405 (1994)).

The first and simplest reason that no agency is owed deference in its interpretation of 33 CFR § 323.2 is that that rule is not genuinely ambiguous as to the question at hand, once ordinary interpretive methods have been applied. Neither the majority nor the state offers a permissible reading of the 2008 rule under which suction dredge mining involves the discharge of anything other than "dredged material." But even if the regulation were ambiguous, deference would not be appropriate here.

Although the majority points to recent general permits by the EPA regulating suction dredge mining under section 402, the Corps has *also* issued a general permit for suction dredge pursuant to section 404. That occurred in California, in 1995, with the permit expiring in 2000. *See* Department of the Army, Regional General Permit No. 21181-98 (Jan 7, 1995). The majority downplays that fact, suggesting that "the 1995 regional permit does not purport to be the exclusive permitting authority for suction dredge mining, but serves instead as an auxiliary authorization" to state permits. 365 Or at ___. The same is true of the 2018 EPA Idaho permit that the majority does rely

upon—suction dredge miners also need approval from the Idaho Department of Water Resources—and is of no consequence for either. More substantial is the majority's suggestion that the 1995 permit may have been issued as part of the Corps' short-lived efforts to regulate in-stream excavation under the theory that the "incidental fallback" from excavation constituted a regulable "discharge of dredged material." 365 Or at ___. If the 1995 permit were directed only to the excavation involved in suction dredging, and not to the release of processed dredged material back into the water, then any inconsistency with the EPA's subsequent permitting of suction dredge mining would be lessened. But the majority's suggestion does not hold up to scrutiny, because the 1995 general permit plainly was not limited to "incidental fallback" from excavation. As the permit was "for certain work activities *and* incidental discharges of dredged or fill material associated with suction dredge mining" (emphasis added), its coverage was not limited to incidental discharges, much less to incidental fallback. And the requirements of the permit made clear that it applied to the post-processing discharge of dredged material, not (or, at least, not just) incidental fallback as a result of excavation. For example, it specified that "[m]ercury recovered from the waterway as part of the suction dredging-process may not be returned to the waterway." That requirement makes sense only if it is understood as a limitation on the release of dredged material that has been fully removed from the water and processed in some form.

Thus, in 1995, under the same statute and a functionally-identical operative regulation, the Corps concluded that suction dredge mining involved a discharge of dredged material under section 404, from which it would necessarily follow that the EPA would not have permitting authority. If there is an agency interpretation in play here, it does not appear to have been a consistent one, as *Kisor* requires. Those inconsistent actions, the product of regional offices, also raise serious concerns that the regional permitting process may not "'reflect[] the considered judgment of the agency as a whole'" as to the meaning of the regulations. *Kisor*, ___ US at ___, 139 S Ct at 2424 (quoting *Mead*, 533 US at 233).

But even putting those qualms to one side, any deference would require the interpreting court first to perform its task of ensuring that "the agency's reading [falls] 'within the bounds of reasonable interpretation.' *Kisor*, ___ US at ___, 139 S Ct at 2416 (quoting *Arlington v. FCC*, 569 US 290, 296, 133 S Ct 1863, 185 L Ed 2d 941 (2013)). The Supreme Court has reaffirmed that *Auer* "gives agencies their due, while also allowing—*indeed, obligating*—courts to perform their reviewing and restraining functions." *Id.* at ___, 139 S Ct at 2415 (emphasis added); *see also id.* at ___, 139 S Ct at 2449 (Kavanaugh, J., concurring in the judgment) ("after today's decision, a judge should engage in appropriately rigorous scrutiny of an agency's interpretation of a regulation, and can simultaneously be appropriately deferential to an agency's reasonable policy choices within the discretion allowed by a regulation"). We cannot satisfy that obligation here because, as discussed above in the context of *Chevron* deference, it is impossible to tell what the supposed joint interpretation *is*. Certainly, the cited materials give no hint.[5] The majority points to the purpose and effects of suction dredge mining—suction dredge mining is recreational and may cloud the water—and to the EPA's expertise on the health of water bodies. 365 Or at ___. But the regulation is, on any reading, completely unambiguous that those considerations do not factor into the division of jurisdiction between the two agencies. In any event, "a court should decline to defer to a merely 'convenient litigating position' or '*post hoc* rationalizatio[n] advanced' to 'defend past agency action against attack,'" *Kisor*, ___ US at ___, 139 S Ct at 2417 (quoting *Christopher*, 567 US at 155). That being the case, this court certainly should not square the circle by deferring to its own *post hoc* rationalization.

It is true that, as the majority documents, there are some indications that both agencies might presently prefer discharges from suction dredge mining to be regulated by the EPA. But those signals do not qualify for deference

[5] The majority highlights a 1990 guidance letter that that did offer an interpretation of the relevant regulation, 365 Or at ___, but acknowledges that that letter expired almost thirty years ago and that the Corps has since indicated that that letter is no longer valid and no longer provides useful information, 365 Or at ___. It is not, therefore, an interpretation that might merit deference.

under either *Chevron* or *Auer*.[6] And the only agency product that does demand deference, the regulations promulgated by both agencies after notice and comment, points decisively in the other direction.

That leaves one final issue: whether there are, as the Court of Appeals held, two discharges from suction dredge mining—"'dredged spoil and mining tailings'" and "'turbid wastewater'"—or one. *Eastern Oregon Mining Assoc. v. DEQ*, 285 Or App 821, 825, 398 P3d 449 (2017) (quoting *Northwest Environmental Defense Center v. EQC*, 232 Or App 619, 644, 223 P3d 619 (2009)). To find, as the Court of Appeals did, two simultaneous discharges, one regulated by each agency, would seem to contravene the Supreme Court's interpretation of the CWA in *Coeur Alaska* and its holding that "a two-permit regime is contrary to the statute and regulations." 557 US at 286. In any event, even if there are two discharges, both would fall under the Corps' permitting authority. However the discharge is characterized or subdivided, it involves only the "redeposit of dredged material."

Nothing that I have said should suggest that suction dredge mining might not be better regulated by DEQ in concert with the EPA, rather than by the Corps. I take no position on that policy question and heed instead the Supreme Court's caution "that 'judges ought to refrain from substituting their own interstitial lawmaking' for that of an agency." *Arlington*, 569 US at 304-05 (quoting *Ford Motor Credit Co. v. Milhollin*, 444 US 555, 568, 100 S Ct 790, 63 L Ed 2d 22 (1980)). I also do not mean to suggest that the CWA cannot permissibly be read to divide authority between the agencies as the majority does. If the Corps and the EPA were to promulgate a new rule, clarifying that suction dredge mining was not within the Corps' jurisdiction, I doubt that I would have any difficulty concluding that that also was a reasonable interpretation of section 404. The point is simply that those agencies have not done so. The last time that they spoke in a way that merited deference—when they jointly

[6] Other agency actions may still qualify for deference under *Skidmore v. Swift & Co.*, 323 US 134, 65 S Ct 161, 86 L Ed 124 (1944), to the extent that they have the power to persuade. But, because the general permits that the majority relies on do not advance an interpretation or a justification, *Skidmore* deference also is unavailable.

promulgated the 2008 regulations—they put suction dredge mining within the Corps' purview. The Corps may now wish to disclaim permitting authority over suction dredge mining. But the current rules say what they say, and no principle of agency deference accords the emanation of an intention the same stature as a rule promulgated after notice and comment.

Accordingly, I respectfully dissent.