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Supreme Court Upholds Corps of Engineers Section 404 Permitting of Mining Waste Discharge Into Alaska Lake

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by Tina Lucero[1]

On June 22, 2009, the United States Supreme Court held in a 6-3 decision that the Army Corps of Engineers ("Corps"), not the Environmental Protection Agency ("EPA"), has the authority to permit the discharge of slurry[2] into a lake.[3] In *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council* the Court concluded that because the Corps has the authority under Section 404(a) of the Clean Water Act ("CWA") to issue permits for the discharge of fill material[4] and because the agencies' joint regulation defines "fill material" to include slurry or similar mining-related materials, the slurry Coeur Alaska sought to discharge into the lake fell well within the Corps' Section 404 permitting authority, rather than the EPA's Section 402 authority.[5]

Coeur Alaska sought to reopen the Kensington Gold Mine, located 45 miles north of Juneau, Alaska. The mine had been closed since 1928; however, the use of the froth flotation technology would make the mine profitable once again. At issue was Coeur Alaska's plan to dispose of the byproduct of the froth flotation method, slurry, by pumping it into Lower Slate Lake, located three miles from the mine in the Tongass National Forest. Once the slurry is deposited into the lake, the slurry separates in the water. The solid rocks sink to the bottom and the water on the surface returns to the mine to be used again. Over the life of the mine, Coeur Alaska planned to discharge over 4.5 million tons of slurry into the lake. The slurry would raise the lakebed 50 feet—to what is now the surface of the 51-foot-deep lake.[6]

While numerous state and federal agencies reviewed and approved Coeur Alaska's plan, the Court granted certiorari to review the actions taken by the Corps and the EPA.[7] The CWA authorizes both the EPA and the Corps to issue permits for discharges into the navigable waters of the United States. Section 402 grants the EPA the authority to issue permits for the discharge of "any pollutant," and Section 306 authorizes the EPA to subject pollutant discharge permits to discharge performance standards. Section 404 grants the Corps authority to issue permits for the discharge of "dredge and fill" materials. In this case, the Corps issued Coeur Alaska a

Section 404 permit to pump the slurry into Lower Slate Lake and the EPA issued Coeur Alaska a Section 402 permit to discharge water from Lower Slate Lake into the downstream creek, subject to strict Section 306 new source performance standards.[8]

Environmental groups, including the Southeast Alaska Conservation Council, the Sierra Club, and Lynn Canal Conservation (collectively "conservation groups"), brought this action against the Corps arguing that the slurry discharge permit was issued by the wrong agency—that Coeur Alaska should have sought a Section 402 permit from the EPA.[9] In addition, the conservation groups argued that the Section 404 permit issued by the Corps was unlawful because it would violate EPA Section 306 new source performance standards.[10]

Initially, the Court noted, it might seem as though the EPA had authority under Section 402 to permit the discharge of the slurry because under the CWA, the EPA has the authority to issue permits for the discharge of any pollutants, and the CWA defines crushed rock as a "pollutant."[11] However, the Court emphasized the exception to the CWA's general rule which provides that the EPA can issue a permit for the discharge of any pollutant, except as provided in Section 404.[12] Additionally, the EPA's own regulation provides that discharging of fill materials which are regulated under Section 404 do not require Section 402 permits.[13]

The Court explained that the regulatory scheme provides a defined and workable method for determining whether the Corps or the EPA has permit authority.[14] The discharger need only ask: Is the substance to be discharged fill material or not? "Fill material" is defined as any "material [that] has the effect of . . . [c]hanging the bottom elevation" of water.[15] If the discharge is fill material, then the discharger must seek a Section 404 permit from the Corps; if the discharge is not "fill material" but a "pollutant," then the discharger must determine if an EPA Section 306 performance standard applies, so that the discharger can obtain a Section 402 permit from the EPA.[16]

Additionally, the Court held that the EPA Section 306 performance standards do not apply to the Corps' issuance of Section 404 permits to discharge fill material.[17] Because the CWA was ambiguous as to whether Section 306 applied to discharges of fill material, the Court accorded a "measure of deference" to an EPA internal memorandum, the "Regas Memorandum," that explained that EPA performance standards do not apply to discharges of fill material.[18] Thus, through this opinion, the Court clarified the division of authority between EPA and the Corps under the CWA for discharges of fill material.

Justice Breyer concurred in the opinion because the Court's deference to the agency interpretations recognized a legal zone within which the regulating agencies might reasonably classify material as "fill material" subject to Section 404 or as a "pollutant" subject to Sections 402 and 306.[19] Within the "legal zone," the authority to interpret and classify materials was delegated by Congress to the agencies, not to the courts.[20]

Justice Scalia concurred in part and concurred in the judgment. He joined

the opinion except for the Court's refusal to accord *Chevron* deference to the Regas Memorandum. He disagreed with the Court's accordance of a "measure of deference."[21]

Justice Ginsburg, with whom Justice Stevens and Justice Souter joined, dissented from the Court's opinion because the decision created a "loophole" by which "[w]hole categories of regulated industries" might "gain immunity from a variety of pollution-control standards," by adding "sufficient solid matter" to a pollutant "to raise the bottom of a water body," thereby turning a "pollutant" governed by Section 306 into "fill" governed by Section 404.[22]

In sum, the Supreme Court's decision addresses a long-standing question about the division of regulatory authority for mine tailings disposal between Sections 402 and Section 404 of the CWA. Viewed in that context, the decision is consistent with the reach of some other lower court decisions holding, for instance, that the construction of dams, placement of rip rap, land-clearing, sidecasting from ditches, and other material that changes the bottom elevation of a water of the United States or replaces a water of the United States is regulated under the Section 404 wetlands program. By contrast, the discharge of sediment from a deactivated dam, discharge of lead shot from waterfowl hunting, and other pollutant discharges have not been so regulated.

The Court's decision may not be the final answer, however. Conservation groups have already indicated a desire to seek regulatory or legislative changes that might again alter the division of permitting responsibility under the CWA between pollutant discharges and wetland fill so as to bring activities such as the mine tailings disposal into the Section 402 regulatory program. Current legislative proposals for amendments to the CWA may become the focus of these efforts then as well.

On balance, the decision is another example of the Roberts Court's deference to agency decisionmaking and government authority in the environmental arena. Other examples from earlier this term include the *Summers v. Earth Island Institute* case denying standing to a group to challenge national forest management practices, and the *NRDC v. Winter* decision denying an injunction of naval training exercises in the Pacific Ocean, the sonar from which was alleged to potentially harm marine mammals.

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1. Tina Lucero, a third-year law student at the University of Denver, is currently a summer associate at Holland & Hart LLP.
2. Slurry is the rock and water waste material that results from the "froth floatation" gold mining technique. The "froth flotation" technique involves churning the mine's crushed rock in tanks of frothing water. Chemicals in the water cause gold-bearing minerals to float to the surface, where they are skimmed off.
3. *Coeur Alaska Inc. v. Southeast Alaska Conservation Council et al.,* 557 U.S. ____, No. 07-984, slip. op. at 13 (June 22, 2009).
4. 33 U.S.C. § 1344 (a).
5. *Coeur Alaska,* slip. op. at 13.
6. *Id.* at 3-4.

7. *Id.* at 4.
8. *Id.* at 4, 6.
9. *Id.* at 7.
10. *Id.* at 2.
11. *Id.*
12. *Id.* at 6 (citing 33 U.S.C. § 1342(a)).
13. *Id.* at 11 (citing 40 C.F.R. § 122.3).
14. *Id.* at 13.
15. *Id.* at 4 (citing 40 C.F.R. § 232.2).
16. *Id.*
17. *Id.* at 20.
18. *Id.* at 18, 20.
19. *Id.* (Breyer, J., concurring at 1)
20. *Id.*
21. *Id.* (Scalia, J., concurring at 1).
22. *Id.* (Ginsburg, J., dissenting at 7).
