No. 07-984

In The
Supreme Court of the United States

COEUR ALASKA, INC.,

Petitioner,

v.

SOUTHEAST ALASKA
CONSERVATION COUNCIL, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Court of Appeals for the Ninth Circuit erred in not giving deference to the joint interpretation of the Clean Water Act by the United States Army Corps of Engineers and the Environmental Protection Agency, and to the definition of "fill material" adopted by those agencies, effectively reallocating the Corps' and EPA's authority under the Act.

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief on behalf of itself and its members in support of Petitioner. Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all parties.[1]

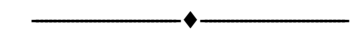
IDENTITY AND INTEREST OF *AMICUS CURIAE*

Mountain States Legal Foundation is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. Since its establishment in 1977, MSLF has actively participated in litigation to ensure the proper interpretation

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Mountain States Legal Foundation's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Mountain States Legal Foundation, its members, or its counsel made a monetary contribution to its preparation or submission.

and application of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. §§ 1251-1387, *e.g.*, *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) (*amicus curiae*); *Riverside Irrigation District v. Andrews*, 758 F.2d 508 (10th Cir. 1985) (represented intervenor), *Rapanos v. United States*, 547 U.S. 715, 126 S.Ct. 2208 (2006) (*amicus curiae*); *National Ass'n of Home Builders v. Defenders of Wildlife*, ___ U.S. ___, 127 S.Ct. 2518 (2007) (*amicus curiae*), including the instant case through its filing of an *amicus curiae* brief with the Court of Appeals in support of Appellee urging affirmance of the District Court's decision and the filing of an *amicus brief* urging the Court of Appeals to grant the petitions for rehearing *en banc*.

In addition, MSLF has over 5,000 members throughout the United States. Many of these members are engaged in mining activities that require them to secure permits under the CWA. These members will be directly affected if the decision of the Court of Appeals is allowed to stand as the decision severely restricts these members' ability to utilize a permitting scheme that Congress designed exclusively for the "discharge of dredged or fill material." Accordingly, MSLF respectfully submits this *Amicus Curiae* Brief in support of the petition for writ of *certiorari*.



SUMMARY OF THE ARGUMENT

The CWA provides two mutually exclusive permitting schemes for the discharge of pollutants into the waters of the United States. Permits are issued under either section 402 or section 404 of the CWA. 33 U.S.C. § 1342 and 1344. Section 404 of the CWA allows the U.S. Army Corps of Engineers ("Corps") to issue permits, with concurrence of the Environmental Protection Agency ("EPA"), for discharges of "dredged or fill material." 33 U.S.C. § 1344. This gives the Corps the authority to protect the navigability of the waters of the United States, and protect waters of the United States from being replaced with dry land.

Because Congress left the term "fill material" undefined, the Corps and the EPA have defined this term, in rulemaking promulgated in 2002, to mean

> 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 C.F.R. § 323.2(e) (Corps' definition); 40 C.F.R. § 232.2 (EPA's definition).

Coeur Alaska was granted a permit by the Corps under section 404 for the discharge of slurry into Lower Slate Lake. The Southeast Alaska Conservation

Council, Sierra Club, and Lynn Canal Conservation (collectively "SEACC") challenged the issuance of this permit, claiming that section 402 governed the discharges. The District Court, following the standards of deference set forth by this Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), deferred to the agencies' interpretation of the definition of "fill material" under section 404, which included the slurry discharged by Coeur Alaska as it would undoubtedly "change the bottom elevation . . . of a water of the United States." Memorandum Decision, pet. app. at 53a; 33 C.F.R. § 323.2(e); 40 C.F.R. § 232.2. The Panel reversed with a mandate that the permit be revoked, stating that the discharges should have been regulated under the effluent limitations and performance standards of section 402. *Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers*, 486 F.3d 638 (9th Cir. 2007) ("*SEACC*").

The Panel should have followed the holding in *Chevron* and deferred to the agencies' interpretation of the CWA and the regulations that have been promulgated defining its terms. *Chevron* requires courts to perform a two-step analysis to determine whether Congress has spoken directly to the question in issue, and, if Congress has not spoken directly to the issue, to determine whether the agency's interpretation is a permissible construction of the statute. 467 U.S. 837 (1984). The Panel found correctly that Congress had left a gap in the statute for the agency to fill when it did not define "fill material." The Panel, therefore,

should have proceeded to defer to the agencies' interpretation as there is no evidence that their definition was an impermissible construction of the statute.

The Panel also should have followed this Court's ruling in *Bowles v. Seminole Rock & Sand Co.*, which held that courts should give controlling weight to an agency's interpretation of its own regulation when that interpretation is not inconsistent with the plain language of the statute or, in the case of an ambiguous statute, is not "plainly erroneous or inconsistent with the regulation." 325 U.S. at 414. Rather than defer to the agencies' interpretation, which was consistent with the plain language of the regulations, the Panel looked to various pieces of legislative history to create ambiguity and find that the agencies' interpretation is invalid. Looking to legislative history when the language is unambiguous is contrary to this Court's holding regarding statutory interpretation in *Ratzlaf v. United States,* 510 U.S. 135, 147-149 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."), and also contrary to the Ninth Circuit's own precedent regarding interpretation of regulations. *United States v. Hagberg*, 207 F.3d 569, 574 (9th Cir. 2000) (holding that statements in the regulatory history cannot alter the meaning of an unambiguous regulation).

The petitioner's request for a writ of *certiorari* should be granted because the Panel should have deferred to the agencies' interpretation of the CWA and the defining regulations.

ARGUMENT

I. STATUTORY AND PROCEDURAL BACKGROUND.

A. The Clean Water Act Provides For Two Permitting Schemes For Discharges Into Waters Of The United States.

The CWA expressly allows for the discharge of pollutants into the waters of the United States as long as the discharger holds a permit issued under one of the two permitting schemes established by the Act. 33 U.S.C. § 1311(a). The permitting schemes at issue here are found under sections 402 and 404 of the CWA. 33 U.S.C. §§ 1342 and 1344. The section 402 program is administered by the EPA and allows the EPA to issue permits for the discharge of pollutants as long as the discharge complies with other expressly enumerated provisions of the CWA. 33 U.S.C. § 1342(a)(1). Two of the expressly enumerated provisions are sections 301 and 306. *Id*. Section 301 requires that discharges from existing point sources comply with effluent limitations promulgated by the EPA. 33 U.S.C. § 1311. Section 306 requires that discharges from new sources comply with the EPA's technology-based "standards of performance" for that category of source. 33 U.S.C. § 1316.

The other major permitting scheme, the section 404 program, allows the Corps to issue permits, with the concurrence of the EPA, for "discharge[s] of dredged or fill material." 33 U.S.C. § 1344(a). Under this scheme, Congress provided for the protection of

water quality and the environment by requiring that all section 404 permits comply with guidelines developed by the EPA in conjunction with the Corps ("Section 404(b)(1) Guidelines"). 33 U.S.C. § 1344(b)(1).

Importantly, these two permitting schemes are mutually exclusive. Indeed, the CWA expressly provides that discharges regulated by the section 404 program are not subject to the section 402 program. 33 U.S.C. § 1342(a)(1) (providing that the EPA may issue permits under section 402 "[e]xcept as provided in" section 404); *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 946 n.14 (7th Cir. 2004) (a party whose activity is governed by the section 404 program "is not . . . subject to the [section 402] permitting requirements"); *see also Rapanos v. United States*, 547 U.S. 715, 126 S.Ct. 2208, 2228 (2006) (plurality opinion) (recognizing that the CWA provides for a separate permitting program, under section 404, for discharges of "dredged or fill material"). The determinative factor as to which of the two permitting schemes applies is whether the discharge will be "dredged or fill material" or some other pollutant. If the discharge is "dredged or fill material," then section 404 is the exclusive permitting scheme.

On May 9, 2002, the Corps and the EPA published joint regulations to "clarify the Section 404 regulatory framework" and to adopt uniform definitions of "fill material" and "discharge of fill material." 67 Fed. Reg. 31,129, 31,130 (May 9, 2002). Under these regulations, "fill material" is defined as "material placed in the waters of the United States where

the material has the effect of . . . [c]hanging the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e) (Corps definition); 40 C.F.R. § 232.2 (EPA definition). The two agencies also defined "discharge of fill material" to include the discharge of "overburden, slurry, or tailings or similar mining-related materials[.]" 33 C.F.R. § 323.2(f) (Corps definition); 40 C.F.R. § 232.2 (EPA definition).

B. The Agencies Correctly Interpreted The CWA.

Interpreting its own regulations, the Corps determined that Coeur Alaska, Inc.'s placement of mine tailings at the bottom of a Lower Slate Lake would be the discharge of "fill material." This determination was based on the fact that the placement of mine tailings at the bottom of the lake would "chang[e] the bottom elevation" of the lake. Accordingly, the Corps, with the concurrence of the EPA, issued a section 404 permit to Coeur Alaska.

SEACC sought judicial review of the Corps' issuance of the permit under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*. The District Court rejected SEACC's challenge to the Corps' permitting decision, upholding the Corps' and the EPA's regulations that define the terms "fill material" and "discharge of fill material" under the principles announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 842-843 (1984). Memorandum Decision, pet. app.

at 53a. The District Court upheld the Corps' interpretation that these valid regulations authorized the issuance of the permit holding that substantial deference must be accorded to an agency's interpretation of its own regulations. *Id*. at 8-11.

In reversing the District Court, the Panel acknowledged that SEACC was not challenging the validity of the Corps' and the EPA's joint regulations that defined the terms "fill material" and "discharge of fill material." *SEACC*, 486 F.3d at 651, n.12 ("[W]e do not reach the validity of the regulations."). Moreover, the Panel repeatedly acknowledged that the proposed discharge "facially" satisfies the plain language of the Corps' regulatory definition of the term "fill material." *Id*. at 644 (The discharge "facially meets the Corps' current regulatory definition of 'fill material' because it would have the effect of raising the bottom elevation of the lake."); *id.* at 655 ("[T]he discharge in this case facially qualifies for the permitting scheme under § 404 of the [CWA]. . . ."). Nonetheless, the Panel rejected the Corps' interpretation of its own regulations, reversed the District Court, and remanded with instructions to vacate the section 404 permit. *Id*. at 655. In so doing, the Panel reallocated the respective permitting authority of the Corps and the EPA under the CWA and violated two well-established tenets of administrative law.

II. THIS COURT SHOULD GRANT THE WRIT OF *CERTIORARI* BECAUSE THE PANEL'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *CHEVRON*.

A. *Chevron* Emphasizes Deference To Democratically Accountable Agencies.

This Court has long required that great deference be accorded to an agency's interpretation of a statutory scheme it is entrusted to administer. *E.g.*, *Brown v. United States*, 113 U.S. 568, 570-571 (1885); *United States v. Shimmer*, 367 U.S. 374, 381-383 (1961). In *Chevron,* this Court established the now well-recognized two-step analysis that a reviewing court must perform in order to implement this principle of deference:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. 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. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, 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.

467 U.S. at 842-844 (footnotes omitted). Thus, if Congress's "silence" or "ambiguity" has "left a gap for the agency to fill," a court must defer to the agency's interpretation so long as it is "a permissible construction of the statute." *Id*. at 842-843.

The deference required by the *Chevron* decision is based on the principle that courts are not in a position to second guess an agency's interpretation of a congressional mandate, where there is an ambiguity as to the legislative intent or where Congress intentionally left an issue to the discretion of the agency. Justice Stevens stated:

> Judges are not experts in the field, and are not part of either political branch of the Government. . . . While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make . . . policy choices – resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.
>
> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within the gap left open by Congress, the challenge must fail. In such a case, federal judges – who have no constituency –

> have a duty to respect the legitimate policy choices made by those who do.

Id. at 865-866. This approach minimizes judicial interference with the democratic accountability of the executive branch. Furthermore, the EPA and Corps are much more knowledgeable than the courts in the areas of environmental protection and regulations as well as mining practices and Congress has specifically charged them with considering a variety of factors in issuing permits, including the effect of disposal of pollutants on human health or welfare, marine life, esthetic, recreation, and *economic values*, other possible locations and methods of disposal, and the effect on alternate uses of the water, such as *mineral exploitation*. 33 U.S.C. § 1343(c) (cross-referenced by 33 U.S.C. § 1344(b) as the type of criteria that section 404 guidelines should be based on). These factors put the agency in the best position to achieve balance between the competing interests in the discharge of pollutants and fill material. Congress left a "gap" in the statute for the expertise of the agency to fill and the court should defer to agency rulemaking that fills that gap and is not contrary to any clearly expressed Congressional intent.

B. The Instant Case Is On All Fours With *Chevron*, Requiring Deference From The Panel.

This case fits neatly within the scope of the *Chevron* decision. In *Chevron,* the statute in issue was the Clean Air Act, which regulated, but did not define, "stationary sources" of pollution. The EPA

defined a "stationary source" as including all pollution emitting activities belonging to the same industrial grouping and this Court held that the lower court should have deferred to that definition. *Id*. at 840-841. In the instant case, Congress similarly passed a statute for the regulation of "fill material" entering waters of the United States, the EPA promulgated a definition of "fill material," and the courts should defer to that definition.

Although SEACC was not challenging the validity of the regulations, *SEACC*, 486 F.3d at 651, n.12, the Panel essentially rewrote the regulations because they did not conform to the Panel's novel interpretation of the highly technical and complex provisions of the CWA. Specifically, the Panel held that discharges that fell within the Corps' and the EPA's definition of "fill material" could not be considered "fill material" if those discharges were also subject to an EPA effluent limitation or standard of performance. *Id*. at 646-648. Thus, after the Panel's decision, the agencies' joint definition of "fill material" now essentially reads:

> The term "fill material" means material placed in waters of the United States where the material has the effect of . . . changing the bottom elevation of any portion of a water of the United States, *unless the material may also be subject to an EPA effluent limitation or standard of performance.*

For all practical purposes, the Panel invalidated the Corps' and the EPA's carefully crafted joint regulations and replaced them with its own rule. This

replacement reorganizes the spheres of authority of the Corps and EPA, effectively minimizing the congressionally authorized role of the Corps in regulating the waters of the United States. Under this rule, the EPA will have permitting authority over any discharge that may fall within a performance standard or effluent limitation under section 402 of the CWA.

In *Chevron*, however, this Court held that a reviewing court may invalidate regulations duly promulgated by the agency charged with administering a statute only "if Congress has spoken to the precise question at issue" and the agency's regulation directly conflicts with "the unambiguously expressed intent of Congress." 467 U.S. at 842-843. Here, Congress was silent as to the meaning of the operative terms in section 404, *i.e.*, "fill material" and "discharge of fill material." Congress's silence on the meaning of these terms indicates that Congress implicitly granted authority to the Corps and the EPA to fill this "gap." *See Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 441-444 (4th Cir. 2003) (concluding that Congress's silence on the definition of "fill material" created an ambiguity for the Corps and the EPA to resolve).

Although the Panel recognized that Congress had not "spoken to the precise question at issue" and, thus, left a "gap" for the Corps and the EPA to fill, *see SEACC*, 486 F.3d at 649, the Panel invalidated the joint regulations under step one of *Chevron*. *Id*. at 644-648. The Panel's actions were in direct conflict with *Chevron*. Indeed, if Congress has left a "gap" for

the agency to fill, a reviewing court must proceed to step two to determine whether the agency's attempt to fill that "gap" was based upon a "permissible" construction of the statute. *Chevron*, 467 U.S. at 843-844. The Panel, instead, invalidated the joint regulations before it made it to step two. *SEACC*, 486 F.3d at 644-648. Although the Panel stated that its own interpretation of the regulation was permissible, it did not find that the Corps' interpretation was impermissible under step two of the *Chevron* test. *Id.* at 651 n.13.

C. Given The Interchangeable Nature Of "And" And "Or" In Statutory Construction, The Panel's Focus On The Use Of "And" In CWA Section 301 Is Not An Adequate Basis To Find That The Agency's Interpretation Is Contrary To Congressional Intent.

In reaching its decision, the Panel focused on the use of the word "and" rather than "or" in CWA section 301(a). 33 U.S.C. § 1311(a). The Panel's rigid interpretation of the word "and" runs counter to the precedent of this Court holding that Congress often uses "and" and "or" interchangeably and the meaning of the word in a particular case should be derived from the context. *See De Sylva v. Ballentine*, 351 U.S. 570 (1956) (holding that in the context of an inheritance statute "or" should be read as "and"); *United States v. Fisk*, 70 U.S. 445 (1865) ("In the construction of statutes, it is the duty of the court to ascertain the

clear intention of the legislature. In order to do this, courts are often compelled to construe '*or*' as meaning '*and*,' and again '*and*' as meaning '*or*.'"). The Panel's reading of section 301, requiring discharges of fill material under section 404 to comply with effluent limitations and performance standards under section 402, implies that discharges must comply with every section of the statute listed in section 301, but section 402 clearly provides:

> *Except as provided in sections 1328 and 1344* of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title.

33 U.S.C. § 1342(a)(1). Nowhere does the plain language of section 402 indicate that it also applies to discharges under section 404. Reading section 301 to require compliance with sections 301, 306, 402, and 404 dramatically changes the current administrative practice of the CWA and the division of authority between the EPA and the Corps, shifting the bulk of the permitting responsibility to the EPA. The EPA's and Corps' reading of "and" as "or" in section 301 is a permissible reading and should have received deference from the Panel under the test set forth in *Chevron*.

III. THIS COURT SHOULD ALSO GRANT THE WRIT OF *CERTIORARI* BECAUSE THE PANEL'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *SEMINOLE ROCK*.

In ordering the section 404 permit to be vacated, the Panel also ruled that the Corps erroneously interpreted its own regulatory definition of "fill material" in issuing the permit. *SEACC*, 486 F.3d at 648-653. In so doing, the Panel violated a tenet of administrative law older than *Chevron*.

Over sixty years ago, in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-414 (1945), this Court articulated the now well-known rule of deference to an agency's interpretation of its own regulations:

> Since this [case] involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. . . . *[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation*.

(Emphasis added). This principle has become known as "*Seminole Rock* deference" and has been followed consistently by this Court. *E.g.*, *United States v. Larionoff*, 431 U.S. 864, 872 (1977); *Auer v. Robbins*, 519 U.S. 452, 461 (1997). In fact, adherence to this deference principle is especially important when, as

in the instant case, an agency is charged with administering:

> "[A] complex and highly technical regulatory program" in which the identification and classification of relevant "criteria necessarily require significant expertise and . . . the exercise of judgment grounded in policy concerns."

Thomas Jefferson University v. Shalala, 512 U.S. 504, 512 (1994) (quoting *Pauley v. BethEnergy Mines, Inc*., 501 U.S. 680, 697 (1991)).

Under *Seminole Rock,* when a court reviews an agency's interpretation of its own regulations, its analysis is similar to that which it performs when reviewing an agency's construction of statute under *Chevron*. Scott H. Angstreich, *Shoring up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. Davis L. Rev. 49, 70-71 (2000) (hereinafter "*Shoring up Chevron*"). The first step is to determine whether the regulation is unambiguous. *Id*. If the regulation is unambiguous, a court will simply interpret the plain language of the regulation and hold unlawful an agency interpretation that is inconsistent with the plain language. *See id.*; *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (according no deference to an agency's interpretation that conflicted with its unambiguous regulation); *Wards Cove Packing Corp. v. National Marine Fisheries Service*, 307 F.3d 1214, 1219-1220 (9th Cir. 2002) (same). If, however, the regulation is ambiguous, then a court must proceed to the second step and

defer to the agency's interpretation, unless that interpretation "is plainly erroneous or inconsistent with the regulation." *Seminole Rock*, 325 U.S. at 413-414; *Shoring up Chevron*, 34 U.C. Davis L. Rev. at 70-71.

In the instant case, neither SEACC nor the Panel suggested that the Corps' definition of the term "fill material" was ambiguous. This is not surprising because the language in the regulation could not be clearer: "fill material" means "material placed in the waters of the United States where the material has the effect of . . . [c]hanging the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e). In fact, the Panel ruled that the proposed discharge in this case "facially" satisfied the Corps' definition of "fill material" "because it would have the effect of raising the bottom elevation of the lake." *SEACC*, 486 F.3d at 644. This ruling, in and of itself, should have resulted in the Panel affirming the District Court. Indeed, if an agency's interpretation of its own regulation is consistent with the unambiguous language of its regulation, a reviewing court must uphold the agency's interpretation. *See Thomas Jefferson University,* 512 U.S. at 512-518 (upholding an agency's interpretation of an unambiguous regulation).

The Panel, however, failed to follow the *Seminole Rock* analysis. Instead, the Panel erroneously looked at snippets of regulatory history and then concluded that the Corps could not have meant what it wrote in its regulatory definition of "fill material." *SEACC*,

486 F.3d at 648-653. Yet, it is axiomatic that, when the language of a statute is unambiguous, a court may not look to the legislative history in an effort to create an ambiguity. *Ratzlaf v. United States*, 510 U.S. 135, 147-149 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."). If a court may not look to the legislative history in an effort to create an ambiguity in a statute, *a fortiori*, a court may not look to the regulatory history in an effort to turn an unambiguous regulation into an ambiguous one. *See United States v. Hagberg*, 207 F.3d 569, 574 (9th Cir. 2000) (statements in the regulatory history cannot alter the meaning of an unambiguous regulation); *Entergy Services, Inc. v. FERC*, 375 F.3d 1204, 1209 (D.C. Cir. 2004) ("[L]anguage in the preamble of a regulation is not controlling over the language of the regulation itself.") (quotation omitted).

In any event, even if the Panel properly consulted the regulatory history to find ambiguity in the definition of "fill material," that ambiguity simply means the Panel was required to apply step two of the *Seminole Rock* analysis. *Shoring up Chevron*, 34 U.C. Davis L. Rev. 49, 70-71. Under step two, a reviewing court must give "controlling weight" to an agency's interpretation of an ambiguous regulation unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Seminole Rock*, 325 U.S. at 413-414.

Here, the Corps' interpretation of its own regulations, as demonstrated by its issuance of the section

404 permit, was neither "plainly erroneous" nor "inconsistent" with its definition of "fill material." This is especially true considering that it is undisputed that placement of mine tailings at the bottom of the lake "would have the effect of raising the bottom elevation of the lake." *SEACC*, 486 F.3d at 644. However, instead of giving "controlling weight" to the Corps' interpretation of its own regulation as mandated by *Seminole Rock*, the Panel substituted its judgment for that of the Corps by creating its own interpretation of the Corps' regulation. *See SEACC*, 486 F.3d at 652-653 ("[T]he current fill rule only applies to those tailings or other mining-related materials that are not subject to effluent limitation or standards of performance."). Because the Panel's actions were in direct contravention of *Seminole Rock*, the petitions for rehearing *en banc* should be granted.

IV. CONSIDERATIONS OF THE IMPACT OF THE NINTH CIRCUIT'S DECISION ON THE MINING INDUSTRY AND THE ECONOMIES OF THE WESTERN STATES UNDERSCORE THE NEED FOR THIS COURT TO GRANT THE WRIT OF *CERTIORARI*.

If this decision from the Ninth Circuit is allowed to stand, it may have the effect of reallocating a significant amount of administrative authority between the Corps and the EPA – changing the permitting practice that has been in effect for the past several decades – and, at the least, will generate confusion as to which permit will be required for

mines and discharges of this type. A large percentage of the mining activity in the United States occurs in the Ninth Circuit and will be impacted by this change in the permitting practice. *See* U.S. Dep't of the Interior, U.S. Geological Survey, Mineral Commodity Summaries 2007, at 13, available at http://minerals.usgs.gov/minerals/pubs/mcs/2007/mcs2007.pdf. This decision will encourage similar challenges to permits granted to other mines, causing delays in mining productivity or rendering productivity impracticable as mines are unable to meet the effluent limitations and performance standards required under CWA sections 402, 301 and 306 as now incorporated in section 404 by the Ninth Circuit Panel. This will cause a loss of billions of dollars to the economies of the states that are now producing much of the non-fuel minerals in the United States. Mineral Commodity Summaries 2007, at 7 ("The total value of U.S. raw nonfuel mineral production alone was about $64.4 billion."). It is important that Coeur Alaska's petition for writ of *certiorari* be granted and that this reallocation of authority between the Corps and EPA and the vulnerability of the mining industry under this new permitting scheme be reviewed in light of the congressional intent to delegate the authority to define "fill material" and regulate its discharge primarily to the Corps in conjunction with EPA.

CONCLUSION

The permitting schemes under sections 402 and 404 of the CWA are mutually exclusive. The Corps' decision to issue a permit to Coeur Alaska for the discharge of slurry under the section 404 provision for "fill material" was consistent with the plain language of the CWA and the defining regulations, and was not "plainly erroneous." This Court should grant the petition for writ of *certiorari* to reinforce the rulings in *Chevron* and *Seminole Rock* and confirm that the permitting scheme under section 404 of the CWA is not rendered irrelevant by the effluent limitations and performance standards of section 402 of the CWA.

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