Nos. 07-984, 07-990

IN THE

Supreme Court of the United States

COEUR ALASKA, INC. and STATE OF ALASKA,

Petitioners,

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

BRIEF OF RESPONDENTS SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL., IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Army Corps of Engineers have authority under section 404 of the Clean Water Act to grant a "fill material" permit for an industrial process wastewater discharge that is prohibited by the Environmental Protection Agency's effluent limitations?

PARTIES TO THE PROCEEDINGS

Respondents Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation concur in the statements of the Parties to the Proceedings in the petitions, except to note that Coeur Alaska, Inc., Goldbelt, Inc., and the State of Alaska were all intervenor-defendant-appellees in the court below.

RULE 29.6 STATEMENT

Respondents Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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INTRODUCTION

For the first time in its history, the U.S. Army Corps of Engineers (Corps) issued a "fill material" permit under section 404 of the Clean Water Act, 33 U.S.C. § 1344, for a wastewater discharge from a source subject to effluent limitations adopted by the Environmental Protection Agency (EPA). In effect, the Corps allowed a new mineral processing facility to escape a strict EPA no-discharge rule by labeling the wastewater discharge "fill material." This was a one-time departure from long established practice for the Corps, presenting an issue of first impression in the courts. The Ninth Circuit's decision requires no change to the agency's longstanding practice and thus has little practical consequence. Indeed, the Corps—the principal defendant below—chose not to file a petition for a writ of certiorari.

Since 1982, it has been illegal for new gold mills using the "froth-flotation" process to discharge process wastewater into lakes, rivers, and other navigable waters. Finding that other disposal methods were feasible and actually in use at most mines, EPA adopted a no-discharge standard for all new mills: "[T]here shall be no discharge of process wastewater to navigable waters from mills that use the froth-flotation process . . . ."[1] 40 C.F.R. § 440.104(b)(1).

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[1] This regulation is a "standard of performance" adopted under section 306 of the Clean Water Act. 33 U.S.C. § 1316. A performance standard is a specific type of "effluent limitation" applicable to new sources. 33 U.S.C. § 1362(11); State App. 13a n.8. This brief uses the term "effluent limitation" to encompass new source performance standards.

From that time until 2005, the Corps never issued a single permit to discharge process wastewater from a froth-flotation mill—or from any other source subject to EPA effluent limitations—into navigable waters.

The 2005 permit at issue here would have authorized Coeur Alaska, Inc. (Coeur) to discharge 210,000 gallons per day of process wastewater from a new froth-flotation mill for the Kensington Gold Mine into 23-acre Lower Slate Lake, in the Tongass National Forest near Juneau, Alaska. The discharge would have killed all the fish and most other aquatic life in the lake. *See* State App. 5a-6a. The basis for the permit was that the discharge met the agencies' joint definition of "fill material." *See* 33 C.F.R. § 323.2(e)(1)(ii).

In their repeated assertions that the Ninth Circuit's decision departs from past practice, Petitioners and *Amici Curiae* overlook and sometimes misstate a critical distinction between the Kensington permit and every section 404 permit before it: While mines have frequently been permitted to construct tailings ponds for use as waste treatment facilities, the Kensington permit was the first to authorize the discharge of mining process wastewater into a navigable water. Petitioners and *Amici* are correct that the Corps has often issued section 404 fill material permits to build dams, diversions, roads, and other facilities needed to create tailings ponds. In the past, though, the agencies have viewed these manmade tailings ponds as non-navigable waste treatment facilities outside the jurisdiction of the Clean Water Act. *See generally Rapanos v. United States*, 547 U.S. 715, 723 (2006) (explaining that Clean Water Act prohibits discharges without a permit only to

"navigable waters"). Thus, they have never required mines to obtain any permits—neither wastewater permits under section 402 nor fill material permits under section 404—for discharges into tailings ponds. Here, by contrast, the agencies recognized that Lower Slate Lake is a navigable water, a fact not in dispute, precluding any discharges without a permit. *See id.* Nothing in the Ninth Circuit's decision changes anything about the agencies' past practice of permitting the construction of tailings ponds.

Because the Corps had never issued a permit like the one in this case, no previous court had addressed whether the Corps could issue a "fill material" permit for a source subject to EPA effluent limitations. Thus, there is no disagreement among the circuits on the issue. Nor does the Ninth Circuit's decision have significant adverse consequences for the mining industry or the economy. It simply requires the industry and the agencies to comply with the law as it has existed for at least 25 years.

Moreover, the Ninth Circuit decided the issue correctly. Section 306(e) of the Act is unambiguous and precludes the discharge. It states in its entirety: "After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source." 33 U.S.C. § 1316(e). This command applies to "any" new source, with no exceptions expressed or implied. This Court has held that the section 306 standards are "absolute prohibitions" precluding variances. *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 (1977). The Ninth Circuit confirmed its

plain language conclusion by noting that EPA and the Corps, when they adopted their joint definition of "fill material," clearly stated that they did not intend to authorize the Corps to issue permits for discharges subject to EPA effluent limitations. State App. 25a-29a.

Subsequent to the Ninth Circuit's decision, Coeur entered into discussions with the plaintiff conservation groups about alternative sites for tailings disposal that do not require discharging process wastewater into navigable waters. As a product of those discussions, Coeur has now submitted a proposal to the relevant agencies for approval. *See* http://www.juneau.org/clerk/misc/news_items/2007-11-15_Kensington_Corrected_Version.pdf. The availability of an alternative disposal site significantly reduces the importance of resolving the question presented in this case. Further, if the agencies replace the authorizations at issue here with new permits before decision by this Court, as requested by Coeur, this case will be moot.

STATEMENT

EPA adopted its 1982 regulations to determine the best means of disposing of the large volume of process wastewater, including tailings,[2] generated by

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[2] Coeur writes that the tailings slurry "contains some process water." Coeur Pet. at 8. This states the proposition backwards. As EPA uses the terms, the tailings are suspended solids contained within the process wastewater. *See* State App. 20a; *see also* ER 536 (EPA decision noting that standards "prohibit the discharge of process water (including mine tailings)."). The

(footnote continued…)

froth-flotation mills. In the froth-flotation process, a mill grinds large quantities of earth into fine particles and introduces water and chemicals to create a gold-bearing froth, which is removed for further processing. Left behind is a slurry of water, chemicals, and suspended solids. At the Kensington, about 40 percent of this slurry can be used as backfill in the mineshafts. State App. 4a. At issue in this case is what to do with the remainder.

The Clean Water Act directs EPA to adopt "standards of performance" for new sources of pollution. 33 U.S.C. § 1316. Performance standards must reflect the best available technology, including, where practicable, "a standard permitting no discharge of pollutants." *Id.* § 1316(a)(1). The Act permits no variances once a standard is adopted. *Id.* § 1316(e); *E.I. du Pont de Nemours & Co.,* 430 U.S. at 138.

Pursuant to this statutory mandate, EPA conducted a detailed study of the mining industry and determined that a "no discharge" standard was feasible for froth-flotation mills and actually in use at most existing mills. *See* 47 Fed. Reg. 54,598, 54,602 (Dec. 3, 1982); 47 Fed. Reg. 25,682, 25,688 (June 14, 1982). The mining industry complained that this standard would be difficult to achieve in wet and mountainous areas (like southeast Alaska),

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(…footnote continued)
essential point, though, is undisputed: The Corps permit at issue authorizes the discharge of process wastewater from a froth-flotation mill into a navigable water.

"ER" refers to the Excerpts of Record, and "SER" to the supplemental excerpts, filed in the court of appeals.

but EPA rejected this argument. 47 Fed. Reg. at 54,602; *see* 40 C.F.R. § 440.104(b)(1).

Accordingly, for more than twenty years, the Corps never issued a permit to discharge mining process wastewater as fill material. In fact, until 2002, the Corps' definition of "fill material" explicitly precluded permits for such discharges. That definition applied only to discharges with the purpose, rather than merely the effect, of changing the bottom elevation of a water body. It specifically excluded discharges for the purpose of disposing of waste. 42 Fed. Reg. 37,122, 37,145 (July 19, 1977); *see* State App. 22a. EPA and the Corps adopted a Memorandum of Agreement in 1986 making explicit the understanding that wastewater discharges, including those from mining, would be subject to EPA permitting under section 402 of the Act and not to Corps jurisdiction under section 404. 51 Fed. Reg. 8,871, 8,872 ¶ B.5 (March 14, 1986); *see also* State App. 23a, 27a, 29a.

Amicus Curiae National Mining Association (NMA) asserts that two mines (Red Dog and Fort Knox) obtained section 404 permits for discharges into tailings ponds, NMA Br. at 10, but this is a misstatement of the record. Both mines obtained section 404 permits to *construct* tailings ponds, because placement of fill material was needed to create dams, diversions, roads, and the like. Neither mine obtained a permit, from either agency, to discharge tailings *into* the ponds. The agencies viewed the tailings ponds as waste treatment facilities, not navigable waters subject to permitting requirements under the Clean Water Act. The Corps stated explicitly in its decision document for the Fort

Knox mine, "No discharge of waste water to waters of the United States is expected…." SER 989. None of the Petitioners or *Amici Curiae* purport to cite even a single example of another mine that has obtained a section 404 permit to discharge mining process wastewater, and Respondents are not aware of any.

Guided by their longstanding interpretation of the law, the appropriate federal and state agencies in 1997 issued permits for a Kensington mining plan that would have authorized no discharge of process wastewater into navigable waters. Instead, Coeur proposed to dewater the slurry from the proposed new mill and dispose of the tailings in a dry facility on land. State App. 4a-5a. None of these permits or authorizations was challenged in court.

However, with the subsequent decline of gold prices, Coeur sought a cheaper way to dispose of the wastewater. This led to a revised mining plan, in which Coeur proposed to discharge the process wastewater from its froth-flotation mill directly into Lower Slate Lake. *Id.* at 5a.

Under this plan, Coeur would have constructed a dam 500 feet long and 90 feet high at the outlet of Lower Slate Lake to enlarge the lake enough to store all the waste. The mill would have discharged an average of 210,000 gallons containing 1,440 tons of tailings every day through a gravity-fed pipe from the mill to the lake. The wastewater discharge would have had a pH of 10 (about that of ammonia). Over the life of the mine, the discharge would have deposited 4.5 million tons of tailings, killing all the fish and most other aquatic life in the lake. *Id.* at 5a-6a. When Coeur ultimately closed the mine, it would have been required to place a cap of native

materials over the tailings on the bottom of the lake in an attempt to resolve toxicity concerns, *id.* at 7a, but "the extent to which aquatic life could be restored eventually is unclear." *Id.* at 6a.

EPA, the Corps, and the Forest Service disputed which disposal plan was environmentally preferable. EPA concluded that the 1997 dry tailings plan was feasible and environmentally preferable to lake disposal. ER 449-50. The Forest Service concluded that the two approaches were equally preferable. ER 395. The Corps was the only federal agency to conclude that discharge into Lower Slate Lake was the best alternative. ER 566.

The basis for the 2005 Corps permit authorizing this discharge notwithstanding the "no discharge" standard was that the wastewater discharge constituted "fill material" under a new definition of the term adopted jointly by EPA and the Corps in 2002. The new regulation defines "fill material" to include any discharge that has the effect of changing the bottom elevation of any portion of a water body. 33 C.F.R. § 323.2(e)(1)(ii). However, for decades EPA has regulated many industrial and municipal discharges containing solids that eventually settle to the bottom, thereby meeting the new definition of fill material. The new definition did not have the legal effect of shifting authority from EPA to the Corps for this broad category of discharges, nor did the agencies intend such a shift. They addressed confusion over this issue expressly in the Federal Register, explaining in some detail that EPA would continue to regulate such discharges and enforce its effluent limitations through permits under section 402 of the

Act. *See* State App. 25a-26a (quoting 67 Fed. Reg. 31,129, 31,135 (May 9, 2002)).

Contending that the 2005 permit violated the plain language of the Act and the EPA performance standard as well as the agencies' stated intent under the new fill material regulation, Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation (collectively "SEACC") promptly filed this lawsuit. In the district court, Coeur and the State of Alaska attached to their summary judgment briefs numerous documents that were not part of the administrative record, including permitting documents for the Red Dog, Fort Knox, and other mines. Dist. Ct. Docket 71, Exhs. 23-25; Docket 67, Exh. F. Petitioners submitted these documents in an attempt to establish some kind of precedent for the Kensington permit, but none of them included or referenced a section 404 permit authorizing a discharge of process wastewater into navigable waters. Because this gap effectively proved SEACC's point that the Corps had never previously granted such a permit, SEACC expressly waived objections to the extra-record submissions. *See*, *e.g.*, *Florida Power & Light Co. v. Lorion,* 470 U.S. 729, 743-44 (1985) (holding that judicial review is generally limited to administrative record).

The district court ruled in favor of the Corps, but the Ninth Circuit reversed. As required by step one of the *Chevron* test, *Chevron, U.S.A. v. Natural Res. Def. Council,* 467 U.S. 837, 842-43 (1984), the court of appeals first addressed whether Congress had spoken directly to the question presented. State App. 10a-11a. The court held that the plain language of the Clean Water Act prohibits the Corps

from issuing "fill material" permits for discharges subject to EPA effluent limitations. *Id.* at 14a-18a.

In an abundance of caution, the court also confirmed its conclusion under step two of the *Chevron* test, addressing the agencies' intended interpretation of the Act and of the regulations. *Id.* at 18a-19a. The court found that the agencies clearly and repeatedly stated that, in adopting a new definition of "fill material," they did not intend to exempt any discharges from EPA effluent limitations. *Id.* at 21a-30a.

Shortly after the court of appeals' decision, Coeur and SEACC entered into discussions mediated by the mayor of Juneau for the purpose of finding a tailings disposal site that would comply with the Clean Water Act. As a result of these discussions, Coeur agreed to pursue permits for a facility on the same upland site authorized in 1997. The new proposal would deposit the tailings as "paste" rather than in the dry form authorized in 1997, but still would not require any discharge of process wastewater into navigable waters. *See* http://www.juneau.org/clerk/misc/news_items/2007-11-15_Kensington_Corrected_Version.pdf. Coeur has submitted its proposal to the relevant agencies, who are actively reviewing it.

REASONS FOR DENYING THE PETITIONS

The decision below resolves a question of first impression for the courts: whether the Corps may use a section 404 permit to authorize a discharge of process wastewater that is prohibited by an EPA effluent limitation. The issue has not arisen before precisely because the Corps has not in the past pur-

ported to permit such discharges. Thus, the Ninth Circuit's decision does not conflict either in its holding or in principle with any prior federal decision. Nor does the decision impose significant adverse consequences on the mining industry or on communities or states with mines, because it changes nothing about the longstanding regulatory practice prior to the 2005 Kensington permit. There is therefore no important reason for this Court to consider the highly technical statutory questions posed by the application of the Clean Water Act to the unique factual circumstances of this case.

In any event, the decision below is correct. The Ninth Circuit properly applied *Chevron* steps one and two, finding, first, that the plain language of the Clean Water Act requires all discharges to comply with applicable effluent limitations and, second, that this was the explicit intent of the agencies when they adopted the 2002 joint definition of "fill material."

I. THE ISSUES POSED BY THIS CASE DO NOT MERIT REVIEW BY THIS COURT.

Despite their best efforts in the lower courts and their voluminous submissions to this Court, Petitioners and *Amici* remain unable to point to any previous instance where the Corps issued a section 404 permit for a wastewater discharge that would violate an EPA effluent limitation. The issues posed by this case have, therefore, never before been presented to any court for decision, and may never be presented again. Thus, what Petitioners are requesting is that the Court consider technical statutory and regulatory issues posed by an unusual Corps decision in the context of the unique factual circumstances of a

single proposed mine. There is no important reason for the Court to depart from its ordinary practice of denying plenary review in such a case, as the Corps' own decision not to seek review underscores.[3]

A. The Ninth Circuit's Holding Does Not Conflict with Any Other Precedent.

Contrary to Petitioners' assertions, the decision of the Ninth Circuit does not contradict decisions of any other court of appeals or of this Court. Before this case, no court had ever considered whether the Corps may issue a "fill material" permit for industrial or municipal discharges subject to EPA effluent limitations.

In particular, this question was not before the court in *Kentuckians for the Commonwealth v. Rivenburgh*, 317 F.3d 425 (4th Cir. 2003), the principal appellate decision on which Petitioners rely. At issue there was "overburden," the unprocessed soil and rock that overlies a coal seam. *Id.* at 430. The Fourth Circuit's holding that the use of such solid material to fill valleys was permissible under section 404 by no means suggests that the Corps has authority to use section 404 to permit the discharge of wastewater to a navigable lake.

Indeed, the Fourth Circuit's analysis of the relationship between EPA and Corps authority not only

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[3] By obtaining an extension of time to file its response to the petitions, the Corps has also made clear that it does not support them. *See* S. Ct. R. 12.6 ("a response supporting the petition shall be filed within 20 days after the case is placed on the docket, and that time will not be extended").

does not conflict with the decision below, but actually supports it. The *Kentuckians* opinion noted that although EPA had adopted effluent limitations for some sources involved in coal mining, none of them was applicable to overburden. *Id.* at 445 (quoting EPA affidavit). The court highlighted, twice, the Corps' longstanding interpretation that discharges of waste subject to effluent limitations could not be permitted as "fill material" under section 404. *Id.* at 445, 448. The court upheld this position as a reasonable construction of both the Act and the Corps' 1977 regulations at issue in that case. *Id.* at 448.[4] Because the agencies stated a specific intent to continue this interpretation under the new fill rule adopted in 2002, and departed from it only when the Corps issued the Kensington permit, State App. 21a-30a, the Ninth Circuit's holding not only is consistent with *Kentuckians*, but follows from it.

Nor is there any conflict with this Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006). *Rapanos* did not even remotely involve, let alone purport to decide, whether the Corps' section 404 permitting authority extends to discharges that are subject to EPA effluent limitations. The Court's general descriptive statements about section 404, plucked out of context, do not shed any light on the question presented here, still less establish a "conflict."

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[4] That *Kentuckians* involved the Corps' 1977 definition of "fill material," and not the 2002 definition at issue here, is another reason that its holding does not address the questions posed here.

At issue in *Rapanos* was whether certain wetlands were navigable waters, defined as "waters of the United States" in the Clean Water Act. *Id.* at 723, 729. Here, there is no dispute that Lower Slate Lake is a navigable water. A disputed question in *Rapanos*, irrelevant here, was whether the discharge of fill material into wetlands would eventually wash downstream to a navigable water body. Petitioners place great weight on the plurality's observation that fill material "typically" stays put and "normally" does not wash downstream. *Id.* at 744. This observation was not intended to define "fill material" or the dividing line between the section 402 and 404 permitting programs, but merely to describe a typical characteristic of fill. In fact, the plurality clarified this point in a footnote, *id.* n.11, in response to opinions questioning the observation from a majority of Justices. *See id.* at 774-75 (Kennedy, J., concurring) & 806-07 (Stevens, J., dissenting).

Beyond *Kentuckians* and *Rapanos*, Petitioners cite numerous cases for the undisputed proposition that the section 402 and 404 permitting programs are mutually exclusive. *See* Coeur Pet. at 22-23 & n.4; State Pet. at 19-20. As discussed below, nothing in the Ninth Circuit's decision suggests otherwise. *See infra* pp. 19-20. There is no conflict with these cases.

B. The Decision Below Requires No Change in the Regulatory Practices Observed by EPA and the Corps for Decades.

The Ninth Circuit's decision will not have any of the adverse economic impacts claimed by Petitioners

and *Amici*. It merely reinforces a legal requirement that both EPA and the Corps had understood and observed for decades before the 2005 Kensington permit: The Corps may not issue permits for discharges subject to EPA effluent limitations. The Kensington permit was a one-time aberration, and the Ninth Circuit's decision affects only that permit. As discussed above, Petitioners and *Amici* scoured the country in search of a prior instance in which the Corps granted such a permit and were not able to find even one.

In fact, the decision is not even likely to have an adverse effect on the jobs or economic benefits associated with the Kensington Mine. Coeur, with the cooperation of SEACC, has already begun the process of applying for permits consistent with the Ninth Circuit's decision. *See* http://www.juneau.org/clerk/misc/news_items/2007-11-15_Kensington_Corrected_Version.pdf. Although Coeur's new disposal plan does not yet moot this case—the agencies have not yet issued the replacement permits—it highlights the lack of importance of the question presented. The outcome of this case will likely determine not whether mining will take place at Kensington at all, but rather which of two economically viable forms it will take. More broadly, Coeur's ability to devise an acceptable alternative illustrates that the extravagant claims that the decision below will shut down mining throughout the mountain West are unfounded.

Finally, even if it were true that the application of the no-discharge standard rendered infeasible a large number of mines, an assertion unsupported by the facts, the problem would not result from any flaw

in the Ninth Circuit's reasoning. As will be shown below, the court's decision merely enforces the plain language of the Act ensuring that all new sources comply with EPA performance standards. If EPA's standard is really too strict, the agency has the power—even the responsibility—to modify it to ensure that it is "achievable" and "practicable." 33 U.S.C. § 1316(a)(1). Ensuring EPA's faithful implementation of the statute is a far better solution than contorting the statute to avoid compliance with an allegedly flawed standard.

II. THE NINTH CIRCUIT'S DECISION IS CORRECT.

A. The Plain Language of the Clean Water Act Requires that All Discharges Comply with Applicable Effluent Limitations.

Although Petitioners refer to claimed conflicts between the decision below and other appellate decisions, their fundamental contention is that the Ninth Circuit wrongly decided the case. Mere error correction, of course, is not this Court's function, but even if it were, this case would be a poor candidate for review because the decision below is demonstrably correct.

Section 306(e) of the Clean Water Act is a clear, unqualified prohibition: "[I]t shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source." 33 U.S.C. § 1316(e). It stands separately from both section 402 and section 404, and requires "any" operator of "any" new source to comply with "any" applicable performance standard. *Id.* Another section of the Act

separately specifies that "the discharge of any pollutant by any person shall be unlawful" except as in compliance with section 306 and other provisions. *Id.* § 1311(a). Violations of section 306 are enforceable separately from violations of sections 402 and 404. *Id.* §§ 1319(a)(3), (b) & (c), 1365(a)(1) & (f)(3). No provision of the Act contains any exception from section 306, for "fill material" or anything else. "It is clear that Congress intended these regulations to be absolute prohibitions." *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 (1977) (reversing appellate court holding requiring EPA to adopt variances).

There is no dispute that the new froth-flotation mill at the Kensington Mine is a "source" to which the no-discharge standard is "applicable" under section 306(e). *See* 33 U.S.C. § 1316(e). The EPA standards specify that they "are applicable to discharges from . . . Mills that use the froth-flotation process . . . ." 40 C.F.R. § 440.100(a)(2). Section 306(e) thus prohibits the discharge of process wastewater from the new mill to Lower Slate Lake.

1. A critical but flawed premise of Petitioners' argument is that the prohibition of section 306(e) conflicts with section 404's authorization to grant fill material permits, requiring resort to interpretive rules to resolve the purported inconsistency. *See* Coeur Pet. at 25-26; State Pet. at 21-22. There is no such conflict. Section 306(e) is a categorical prohibition, while section 404 is merely a permissive grant of discretionary authority. *Compare* 33 U.S.C. § 1316(e) ("it shall be unlawful . . .") *with id.* § 1344(a) ("The Secretary may issue permits . . ."). A discretionary grant like that of section 404 is always

subject to other limits the law may impose, including, in this case, section 306(e).

The D.C. Circuit rejected an argument similar to that of Petitioners in *Halverson v. Slater*, 129 F.3d 180 (D.C. Cir. 1997). There, as here, the defendants argued that interpreting "may" to include a prohibition would "transform 'may' into 'may not'." *Id.* at 187; *cf.* State Pet. at 21-22. The court easily disposed of this argument, noting that "[t]o say that 'may' is permissive does not lead to the conclusion that it permits *everything* . . . ." 129 F.3d at 187 (emphasis in original). "Rather, the word 'may' in [46 U.S.C.] section 2104(a) merely grants discretion to the Secretary, the limits of which are ascertained by reference to the section's other language, its structure and its purpose." *Id.* at 188. Here, section 306(e) is such a limit on the Corps' section 404 discretion.

Petitioners urge that the section 404(b) guidelines contain the only limits to the Corps' discretion, but this position is unsupported by the statute and contrary to the agencies' interpretation as stated explicitly in the guidelines themselves. The guidelines highlight this point with an unusual cautionary preface: "NOTE: Because *other laws may apply to particular discharges* and because the Corps of Engineers or State 404 agency may have additional procedural and substantive requirements, a discharge complying with the requirement [sic] of these Guidelines will not automatically receive a permit." 40 C.F.R. § 230.10 (emphasis added). Section 306(e) and EPA's performance standards are certainly "other laws" that "apply to particular discharges."

The contrast between a prohibition and a grant of discretion distinguishes this case from *National Association of Home Builders v. Defenders of Wildlife*, 127 S.Ct. 2518 (2007). That case required the Court to reconcile two apparently conflicting imperatives. Section 402(b) of the Clean Water Act provides that EPA "shall approve" a transfer application that meets specified criteria, while the Endangered Species Act provides that agencies "shall" consult with the Fish and Wildlife Service before taking agency action. *Id.* at 2531-32 (quoting 33 U.S.C. § 1342(b) and 16 U.S.C. § 1536(a)(2)). However, compliance with the latter requirement would effectively repeal or amend the former. *See id.* at 2532. This conflict left a "fundamental ambiguity that is not resolved by the statutory text," requiring the Court to consider the agency's interpretation. *Id.* at 2534. In the present case, there is no such conflict. Instead of competing "shalls," there is a "shall" and a "may."

2. The Ninth Circuit's decision maintains the proper separation between the agencies' permitting programs under sections 402 and 404. It does not require applicants to obtain permits under both sections for the same discharge. The court stated explicitly that the "program administered by EPA under § 402 is the only appropriate permitting mechanism for discharges subject to an effluent limitation . . . ." State App. 17a; *see also id.* at 26a ("If a specific discharge is regulated under Section 402, it would not also be regulated under Section 404, and vice versa.") (quoting EPA/Corps responses to comments).

The court's observation that section 301(a) requires compliance with both section 402 "and" sec-

tion 404 does not mean that a single discharge requires permits under both. *See id.* at 14a-15a; 33 U.S.C. § 1311(a). As Petitioners correctly recognize, not every one of the enumerated provisions in Section 301(a) applies to every discharge. For example, section 306, by its terms, applies only to "new" sources. 33 U.S.C. § 1316. Similarly, the statutory scheme ensures that only one permitting program is applicable to any given discharge. For the reasons discussed above, discharges subject to EPA effluent limitations may be permitted by EPA under section 402 but not by the Corps under section 404. Conversely, discharges properly permitted under section 404 do not require section 402 permits. *See id.* § 1342(a)(1) ("Except as provided in section[] . . . [404] . . .").

To recognize that compliance is required only with the applicable provisions does not lead to the conclusion that "and" within section 301(a) means "or." This substitution would allow dischargers to pick and choose which of seven enumerated sections of the Act to observe, when Congress clearly intended compliance with each applicable provision. *See id.* § 1311(a). The Ninth Circuit's interpretation is correct.

3. The Clean Water Act contains neither an express nor an implied exception for "fill material" from the blanket prohibition of section 306(e).

Petitioners wrongly attempt to characterize section 404(p) as an express exception. *See* Coeur Pet. at 24. That section does not provide any exceptions to the law, nor does it determine when or under what conditions the Corps has authority to issue a permit. By its plain language, it is merely a limited enforce-

ment shield for dischargers who have received and comply with permits. 33 U.S.C. § 1344(p). It applies exclusively "for purposes of sections 1319 and 1365 of this title," *id.*, which are the enforcement provisions of the Act. *Id.* §§ 1319 & 1365. That the law protects parties who comply with their permits from prosecution for violations of section 301 does not suggest that the Corps is free to ignore section 301 (or section 306) in deciding whether to issue a permit. Under Petitioners' interpretation, the "for purposes of" clause in section 404(p) would be superfluous.

That section 404(p) does not create an exception to sections 301 or 306 is apparent from the parallel provision in section 402(k), which is an enforcement shield for section 402 permits using language almost identical to that of section 404(p). *Compare* 33 U.S.C. § 1342(k) *with id.* § 1344(p). Compliance with a section 402 permit protects a discharger from enforcement actions for violations of sections 301 and 306, among others. *Id.* § 1342(k). Yet, section 402(a) requires that all section 402 permits contain conditions requiring compliance with the same sections. *Id.* § 1342(a)(1)(A). It would make no sense to require that discharges comply with sections 301 and 306 in one subsection only to exempt them in another. The enforcement shield provisions were not intended as exemptions from the law, but as limited protection from enforcement of laws that are otherwise applicable. *See E.I. du Pont de Nemours & Co.*, 430 U.S. at 138 n.28.

Where Congress intended exceptions from the Clean Water Act, it stated them directly, refuting any such interpretation of section 404(p). The Act provides an explicit exception to sections 301, 402,

and 404 for six enumerated categories of "fill material." *Id.* § 1344(f). It specifies several other explicit exceptions to the requirement to comply with effluent limitations. *Id.* §§ 1311(c), (h), (i), (m) & (p), & 1312(b)(2). It contains explicit exceptions for two specified types of discharges from the requirement to obtain a section 402 permit. *Id.* § 1342(*l*). None of these explicit exceptions is applicable to this case.

These explicit exceptions also refute any assertion of implied exceptions. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980). This Court has applied a similar principle specifically to section 306: "In striking contrast to § 301(c), there is no statutory provision for variances [in § 306], and a variance provision would be inappropriate in a standard that was intended to insure national uniformity and 'maximum feasible control of new sources.'" *E.I. du Pont de Nemours & Co.*, 430 U.S. at 138 (quoting S. Rep. No. 92-414, at 58 (1971)).

Nevertheless, Coeur suggests an implied exception for all fill material, drawn by negative inference from the fact that section 402 requires that permits be conditioned upon compliance with sections 301 and 306, while section 404 does not. *See* Coeur Pet. at 23-24; *compare* 33 U.S.C. § 1342(a)(1)(A) *with id.* § 1344(a). Implied exceptions are disfavored. *United States v. Rutherford*, 442 U.S. 544, 552 (1979). Coeur is correct that one must presume Congress acted purposely in choosing different language for sections 402 and 404. *S.D. Warren Co. v. Maine Bd.*

of Envtl. Prot., 547 U.S. 370, 383-84 (2006). However, as the Ninth Circuit pointed out, there is a simpler explanation for why Congress chose different language: Congress did not intend the Corps to issue "fill material" permits for discharges of industrial or municipal wastewater subject to EPA effluent limitations. State App. 17a. The prohibitions of sections 301(e)[5] and 306(e), combined with section 402's requirement that permits be conditioned upon compliance with these provisions, evince a clear Congressional intent that discharges subject to effluent limitations be permitted under section 402. *See* 33 U.S.C. §§ 1311(e), 1316(e), 1342(a)(1)(A). This interpretation explains the difference in language between sections 402 and 404, hews closer to the purposes of the Act, follows decades of agency practice, and harmonizes the provisions without resorting to implied exceptions by negative inference.

4. The application of effluent limitations to industrial wastewater discharges furthers the purposes of the Clean Water Act. Subjecting these discharges to a statutory scheme intended for "dredged or fill material," merely because they contain solids, would defeat those purposes.

The Act seeks to reduce and, where practicable, eliminate discharges of water pollution through the use of increasingly strict, nationally uniform effluent limitations. For existing industrial and municipal

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[5] For effluent limitations that are not new source performance standards, section 301(e) has the same effect that section 306(e) has for performance standards. *See* 33 U.S.C. §§ 1311(e) & 1316(e); State App. 12a-13a & n.8.

sources of pollution, the Act requires EPA to adopt technology-based effluent limitations that become more stringent over time. *See* 33 U.S.C. § 1311(b); *Chem. Mfrs. Ass'n v. Natural Res. Def. Council*, 470 U.S. 116, 118 (1985). For new sources, like the froth-flotation mill at the Kensington Mine, the Act requires even stricter effluent limitations called standards of performance. 33 U.S.C. § 1316(a)(2). These standards must reflect "the best available demonstrated control technology, processes, operating methods, or other alternatives…." *Id.* § 1316(a)(1). Congress directed EPA to adopt, where practicable, "a standard permitting no discharge of pollutants." *Id.* Pursuant to this directive, EPA studied the mining industry and determined that a no-discharge standard was practicable for new froth-flotation mills. *See* 47 Fed. Reg. 54,598, 54,602 (Dec. 3, 1982); 47 Fed. Reg. 25,682, 25,688 (June 14, 1982).

To escape EPA's carefully considered no-discharge requirement by labeling the discharge "fill material," and finding an implied exception to the blanket prohibition of section 306(e), would defeat the Congressional purposes of requiring increasingly stringent control methods over time, eliminating discharges where practicable, and ensuring national uniformity. *See E.I. du Pont de Nemours & Co.*, 430 U.S. at 137.

B. The Ninth Circuit's Decision Adheres to the Authoritative Agency Interpretation Set Forth in the Federal Register.

Although the Ninth Circuit found that the plain language of the Clean Water Act resolves the ques-

tion presented in this case, the court also confirmed its conclusion with a *Chevron* step two analysis of the agencies' interpretations of the statute and the regulations. State App. 18a-19a. The court correctly determined that the Kensington permit issued by the Alaska District office of the Corps was inconsistent with the stated intent of the heads of the Corps and EPA published in the Federal Register when they promulgated their joint definition of "fill material" in 2002. To the extent of any ambiguity in the Clean Water Act or in the regulations, the courts owe deference only to the agencies' authoritative explanation in the Federal Register, not to the subsequent inconsistent permitting decision of the Alaska District.

The adoption of the 2002 fill rule created an acknowledged potential for misinterpretation. There are now two regulations that could lead to opposite conclusions if not considered in their statutory and regulatory context. EPA's 1982 performance standard for new froth-flotation mills is unambiguous and plainly prohibits the discharge from the Kensington facility and others like it: "[T]here shall be no discharge of process wastewater to navigable waters from mills that use the froth-flotation process . . . ." 40 C.F.R. § 440.104(b)(1). However, the 2002 joint agency definition of "fill material" includes anything that "has the effect of . . . Changing the bottom elevation of any portion of a water of the United States." *See* 33 C.F.R. § 323.2(e)(1)(ii); *see also id.* § 323.2(f) (defining "discharge of fill material" to include "placement of overburden, slurry, or tailings"). The potential for misinterpretation occurred when public participants in the rulemaking process concluded—mistakenly—that the expansive new definition of fill material would overrule EPA's longstand-

ing effluent limitations, not only for froth-flotation wastewater discharges, but for many other industrial and municipal discharges that contain solids.

Properly understood, these two rules are not in conflict. The EPA standard squarely prohibits the discharge, while the fill material rule is merely a definition that does not, by itself, authorize anything. As discussed above, the discretionary authority of the Corps to issue section 404 permits is not unfettered. Even a proposed discharge that otherwise falls within the new definition of "fill material" may be prohibited or limited by other applicable laws, including effluent limitations.[6]

Nevertheless, EPA and the Corps acknowledged that the new rule created some confusion, and they explained exactly what they intended at the time. The Ninth Circuit interpreted their explanation correctly.

1. The Administrator of EPA and the responsible official in the Department of the Army overseeing the Corps addressed the precise circumstance of this case in the Federal Register when they adopted the 2002 joint rule. They explained—repeatedly, consistently, and clearly—that discharges subject to EPA effluent limitations would continue to be subject to

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[6] The State, but none of the other Petitioners or *Amici*, argues that 40 C.F.R. § 122.3(b) exempts anything meeting the definition of "fill material" from section 402. State Pet. at 27. On its face, that regulation merely begs the question of whether the discharges "are regulated under section 404 of the CWA." 40 C.F.R. § 122.3(b). To the extent there is any ambiguity, EPA and the Corps made their intentions clear in the 2002 fill rule.

EPA's jurisdiction under the section 402 permitting program, even if they otherwise met the new definition of fill material. The Ninth Circuit described this history in considerable detail. State App. 20a-30a.

Petitioners err by focusing on isolated, general sentences in the 2002 Federal Register preamble about the broad scope of the new definition, while ignoring the full context of those statements. Every one of these references is from the same page of the Federal Register. *See* Coeur Pet. at 27-28; State Pet. at 27. Rather than trying to deduce the intent of the rule from these few sentences, it is most helpful to review the agencies' complete explanation of this issue, as quoted in the Ninth Circuit opinion:

> [W]e emphasize that today's rule generally is intended to maintain our existing approach to regulating pollutants under either section 402 or 404 of the CWA. Effluent limitation guidelines and new source performance standards ("effluent guidelines") promulgated under section 304 and 306 of the CWA establish limitations and standards for specified wastestreams from industrial categories, and those limitations and standards are incorporated into permits issued under section 402 of the Act. EPA has never sought to regulate fill material under effluent guidelines. Rather, effluent guidelines restrict discharges of pollutants from identified wastestreams based upon the pollutant reduction capabilities of available treatment technologies. Recognizing that some discharges (such as suspended or settleable solids) can have the associated effect, over time, of raising the

> bottom elevation of a water due to settling of waterborne pollutants, we do not consider such pollutants to be "fill material," and nothing in today's rule changes that view. *Nor does today's rule change any determination we have made regarding discharges that are subject to an effluent limitation guideline and standards, which will continue to be regulated under section 402 of the CWA.* Similarly, this rule does not alter the manner in which water quality standards currently apply under the section 402 or the section 404 programs.

State App. 25a-26a (quoting 67 Fed. Reg. 31,129, 31,135 (May 9, 2002)) (emphasis added by court). If this were not clear enough, the agencies made the same point again in the specific context of mine tailings:

> Some commenters also noted that the proposed rule language and preamble discussion created some confusion about whether mine overburden and mine tailings are both subject to section 404 regulation as opposed to section 402. Today's final rule clarifies that any material that has the effect of fill is regulated under section 404 and further that the placement of "overburden, slurry, or tailings or similar mining-related materials" is considered a discharge of fill material. *Nevertheless*, if EPA has previously determined that certain materials are subject to an [effluent limitation guideline] under specific circumstances, then that determination remains valid. *Moreover*, NPDES permits is-

> sued pursuant to section 402 are intended to regulate process water and provide effluent limits that are protective of receiving water quality. This distinction provides the framework for today's rule.

ER 277 (emphasis added), *quoted in part in* State App. 28a.[7] The Kensington discharge comes under both the "nevertheless" and the "moreover" qualifications to the general rule that mine tailings are fill material. *See id.* It is subject to an EPA effluent limitation, and it is process water. The Ninth Circuit put it aptly: "The agencies could not have been more clear in articulating that this would be their preferred approach." State App. 29a.

This Court has consistently held that statements, like those quoted above, made by agency heads at the time of promulgating a rule are authoritative and control over subsequent, inconsistent interpretations by lower level agency officials. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (court will not defer to agency interpretation that contradicts agency's intent at the time it promulgated regulation); *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 714-16 (1985) (holding that clear agency statement in Federal Register at time of promulgation was "dispositive" of the agency's intent); *United States v. Mead Corp.*, 533 U.S. 218, 226-34 (2001) (generally applicable agency rules adopted through formal administrative procedures

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[7] The document quoted is the agencies' joint Response to Comments on the rule, which was incorporated by reference in the Federal Register notice. 67 Fed. Reg. at 31,131.

are entitled to *Chevron* deference, but less formal agency actions by lower level officials are not). Under these principles, if a court finds the Clean Water Act or the agencies' regulations ambiguous, the courts should defer to the intent stated in the Federal Register at the time of adopting the fill rule. No such deference is owed to the Alaska District's decision to issue the Kensington permit. Because the permit decision was inconsistent with the statement of intent in the Federal Register, the permit must give way.

2. Contrary to the assertions of Petitioners and *Amici*, *e.g.*, Coeur Pet. at 30-31, the Ninth Circuit's decision does not invalidate or modify the 2002 joint definition of "fill material." The court was explicit about this. State App. 24a n.12. Again, the 2002 rule is merely a definition that does not exempt any discharges from any applicable legal requirements. *See* 33 C.F.R. § 323.2(e) & (f). The Ninth Circuit's review of the regulatory history merely confirms that the agencies' intent was consistent with the limitations on the Corps' authority stated explicitly in sections 301(a), 301(e), and 306(e) of the Act.

3. Petitioners' interpretation of the 2002 fill rule would not only contradict the plain language of the Clean Water Act and the agencies' stated intent, but it would cause an impermissible implied repeal of numerous EPA regulations.

If Petitioners were right, EPA's no-discharge rule for new froth-flotation mills would be a nullity. The nature of mining mills is that they process huge quantities of earth to extract small amounts of metal, thereby generating process wastewater laden with solids, *i.e.*, tailings. EPA explicitly noted this

fact in adopting the rule: "Mill process wastewater is characterized by very high suspended solids levels (often in the percent range rather than milligrams per liter) . . . ." 47 Fed. Reg. 25,682, 25,685 (June 14, 1982), *quoted in* State App. 20a. For this reason, discharges of mill process wastewater inherently have the effect of "[c]hanging the bottom elevation" of the receiving water body, meeting the new definition of "fill material." 33 C.F.R. § 323.2(e)(1)(ii). If the adoption of this definition authorized the Corps to grant permits for froth-flotation wastewater discharges, it had the *de facto* but unstated effect of repealing the no-discharge standard.

Any such modification of effluent limitations would render the 2002 fill rule arbitrary. An agency may repeal or modify its rules, but it "is obligated to supply a reasoned analysis for the change…." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). In this case, the agency provided no analysis—reasoned or otherwise—for any such change. To the contrary, EPA and the Corps stated just the opposite: that effluent limitations adopted by EPA would continue to apply notwithstanding the new definition.

In fact, under Petitioners' interpretation, it is not only the effluent limitations for froth-flotation mills that would be impliedly repealed, but those of many sources whose wastewater discharges contain suspended solids that eventually settle to the bottom. Besides froth-flotation mills, such sources include facilities for processing or manufacturing dairy products, grains, cement, leather, and timber products, among others. *See* 40 C.F.R. parts 405, 406, 411, 425, & 429. Under Petitioners' interpretation, EPA's

effluent limitations for these sources would no longer be effective, because the solids would render the discharges "fill material" subject to section 404 permits. This was, explicitly, not the intent of the agencies. *See* State App. 26a (quoting 67 Fed. Reg. 31,129, 31,135 (May 9, 2002)).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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