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

REPLY BRIEF FOR PETITIONER

ROBERT A. MAYNARD
PERKINS COIE LLP
251 East Front St. Ste. 400
Boise, ID 83702

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
AARON D. LINDSTROM
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, DC 20036
(202) 955-8500

Counsel for Petitioner

RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

Section 404(a) of the Clean Water Act authorizes the Corps of Engineers to "issue permits . . . for the discharge of . . . fill material into the navigable waters." 33 U.S.C. § 1344(a). An EPA regulation provides that "[d]ischarges of . . . fill material . . . which are regulated under section 404" "do *not* require [EPA] NPDES permits" under Section 402 of the Act. 40 C.F.R. § 122.3(b) (emphasis added). A 2002 regulation issued jointly by the Corps and EPA defines the term "fill material" to include any material that has the effect of "[c]hanging the bottom elevation of any portion of a water of the United States," including "overburden, slurry, or tailings or similar mining-related materials." 33 C.F.R. § 323.2(e)(1)(ii), (f).

Notwithstanding the agencies' definition of fill material, the Ninth Circuit held that the Corps violates the Clean Water Act when it permits a discharge of mine tailings that, but for being classified as fill material, otherwise could be regulated under EPA effluent limitations and EPA's NPDES permit program under Section 402 of the Act. *See* Pet. App. 10a. That holding presents the question whether the Corps of Engineers has authority under Section 404(a) to issue permits for all discharges of "fill material," as that term is defined in the 2002 joint regulation, or only the residual subset of "fill material" that is not potentially implicated by any of the hundreds of effluent limitations promulgated by EPA pursuant to Sections 301 and 306 of the Act, *see* 40 C.F.R. subchapter N, pts. 400–471.

SEACC's brief in opposition tries mightily to obfuscate that issue. It persistently (and misleadingly) asserts that the Corps of Engineers issued to Coeur

Alaska a Section 404 permit to discharge merely "process wastewater." *See*, *e.g.*, SEACC Br. 4 n.2. But Coeur did not seek, and the Corps did not issue, a permit for the discharge of "process wastewater." Rather, the Corps issued a Section 404 permit for the discharge of a largely solid tailings slurry that indisputably would have the effect of raising the bottom elevation of Lower Slate Lake—to wit, *fill material*.

There is no serious question that Coeur's discharge falls within the regulatory definition of fill material; the Ninth Circuit conceded as much when it acknowledged that Coeur's proposed tailings slurry "facially meets the Corps' current regulatory definition of 'fill material.'" Pet. App. 10a; *see also* Pet. 27–31. Nor is there any question that the joint EPA-Corps regulation defining the statutory term "fill material" is a valid and authoritative construction of the Clean Water Act. The validity of that regulation has not been challenged in this litigation, *see* Pet. App. 25a-26a n.12, or ever. The Corps of Engineers issued, exactly as Section 404 contemplates, a permit for the discharge of fill material. EPA concurred in the Corps' decision, declining to exercise its veto power under Section 404(c). 33 U.S.C. § 1344(c). Yet the Ninth Circuit concluded that, under the "plain language of the Clean Water Act," Pet. App. 10a, the existence of a potentially applicable EPA effluent limitation displaces the Corps' authority to regulate a discharge as one of fill material, confers that authority upon EPA, and requires EPA to regulate mostly solid mine tailings as "process wastewater."

This holding, SEACC acknowledges, raises a question concerning "the proper separation between the agencies' permitting programs under sections 402 and 404" of the Clean Water Act. SEACC Br. 19.

As the federal respondents here confirm, "EPA has never sought to regulate fill material under effluent guidelines." Fed. Resp'ts Br. 11 (quoting 67 Fed. Reg. 31,129, 31,135 (May 9, 2002)). Yet the Ninth Circuit would have EPA do just that. The government acknowledges the question presented by the Ninth Circuit's reallocation of agency authority is "important." Fed. Resp'ts Br. 6, 12. Coeur joins the State of Alaska in respectfully submitting that the question is, indeed, sufficiently important to warrant this Court's immediate review.

I. THE NINTH CIRCUIT'S RESTRUCTURING OF THE CLEAN WATER ACT'S DUAL PERMITTING REGIMES WARRANTS IMMEDIATE REVIEW

The Ninth Circuit decision disrupts the uniform administration of the Clean Water Act, compelling the Corps to administer a different Section 404 permit program in the Ninth Circuit than exists elsewhere in the Nation. And because it effectively prohibits within the Nation's largest and most metals-rich Circuit any discharge of mine tailings into jurisdictional waters or wetlands, the Ninth Circuit's aberrational permitting scheme threatens grave harm to the Nation's mining industry, not to mention Coeur. This Court's review is warranted.

A. The Decision Of The Court Of Appeals Disrupts The Responsible Agencies' Uniform Administration Of The Clean Water Act

Since the Clean Water Act's enactment more than thirty years ago, the agencies responsible for its administration—the Corps and EPA—have observed the "fill-effluent distinction" and employed it as the line of demarcation between the Corps' Section 404

permit program and EPA's NPDES permit program under Section 402. *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 447 (4th Cir. 2003). This Court recently acknowledged as much, observing that "[t]he Act recognizes this distinction" between fill material and other effluents "by providing a separate permit program" for discharges of fill material. *Rapanos v. United States*, 547 U.S. 715, 745 (2006) (plurality opinion). Prior to the decision below, every court of appeals to have touched upon the question recognized that discharges of fill material are governed exclusively by the Corps' Section 404 permit program. *See Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 946 (7th Cir. 2004); *see also* Pet. 23 n.4 (citing cases).

The Ninth Circuit rejected this longstanding allocation of authority between the agencies, holding that EPA had authority—indeed, exclusive authority—to regulate a discharge of fill material if it emanates from an "industrial or municipal source[]" that is subject to EPA's effluent guidelines. Pet. App. 15a; *see also id.* at 17a-18a ("If EPA has adopted an effluent limitation . . . applicable to a relevant source of pollution, § 301 and § 306 preclude the use of a § 404 permit for that discharge. Accordingly, the NPDES administered by EPA under § 402 is the only appropriate permitting mechanism for [such] discharges.") (citations omitted). The Ninth Circuit left the Corps with residual authority to regulate only the subset of fill material that is discharged by other sources.

The Brief of the Federal Respondents, however, makes clear that the responsible agencies generally will continue to administer the Clean Water Act's dual permit programs as they have for the last three

decades—with the Corps regulating discharges of fill material and EPA regulating discharges of other effluents. "The court of appeals erred," the government explains, "in conflating the Act's two separate permitting mechanisms." Fed. Resp'ts Br. 6. Left undisturbed, that error will compel EPA and the Corps to set up a separate and different Clean Water Act permitting regime that is specific to the Ninth Circuit. The prospect of that aberrational regime implicates just as surely as a conflict among decisions of the courts of appeals this Court's "responsibility and authority to ensure the uniformity of federal law." *Danforth v. Minnesota*, 128 S. Ct. 1029, 1048 (2008) (Roberts, C.J., dissenting); *see also Michigan v. Long*, 463 U.S. 1032, 1040 (1983) (observing the "important need for uniformity in federal law").

B. The Ninth Circuit's Decision Imperils The Nation's Mining Industry

The government acknowledges that the decision of the court of appeals raises an important question, but suggests that its impact on the regulated community is not so far-reaching as to warrant this Court's review. The issue will arise, the government predicts, "only in the context of mining operations that use certain technologies, especially the froth flotation process," and then only in areas where "fill material would need to be discharged into a water of the United States." Fed. Resp'ts Br. 12. The government significantly understates the magnitude of the threat the decision below poses to the Nation's mining industry.

Just as EPA has established performance standards for discharges of process wastewater from

froth flotation mills, it also has established performance standards for "mine drainage"—which is to say, any liquid runoff from the mine or onto land disturbed in the mining activity—from mining operations for coal, 40 C.F.R. §§ 434.34, 434.44, iron ore, *id.* § 440.14, aluminum ore, *id.* § 440.24, and virtually every other metal ore mined in the United States, *see*, *e.g.*, *id.* § 440.64(a) (tungsten). Additionally, EPA has established performance standards for several ore benefication processes other than froth-flotation milling that yield mine tailings, including gravity separation, *see id.* § 440.44(b)(1), and other "magnetic and physical methods," *id.* § 440.54(b).

Because nearly all mine tailings are entrained with at least some water (either naturally occurring or as a result of an ore benefication process), on the Ninth Circuit's reasoning, *any* of these standards of performance could displace the Corps' authority to permit disposal of mine tailings as fill material: One need only to label the mostly solid overburden, "mine drainage," or a tailings slurry, "process wastewater," to trigger the pertinent EPA effluent guideline and displace the Corps' regulatory authority. *See* Br. Amici Curiae of Nat'l Mining Ass'n 18 ("NMA Br."). Such a regime would kill more than just metals mining: If the fill material at issue in *Kentuckians*—an entire mountaintop, enough to fill 27 valleys and more than six miles of streams, 317 F.3d at 430—were classified as "mine drainage," that "discharge" could not possibly meet EPA's performance standard

for "total suspended solids" of 35 *milligrams* per liter. 40 C.F.R. §§ 434.35, 434.45.[1]

Even as confined to the Ninth Circuit, this ersatz regulatory regime threatens significant harm to the Nation's mining industry. Coeur's petition demonstrated that most of the Nation's metals mining occurs in the Ninth Circuit. Pet. 18. "[M]assive quantities" of mine tailings are an inescapable byproduct of this valuable industry. NMA Br. 7. And though it is true that a Section 404 permit will be needed only when "the topography of the surrounding area" requires that tailings be "discharged into a water of the United States" (Br. of Fed. Resp'ts 12), in the Ninth Circuit—particularly, in Alaska—that is very often the case. *Id.* at 16–17 ("In large swaths of the nation . . . the terrain surrounding ore deposits is covered with wetlands and streams" leaving mining operations with "no practicable alternative" to impounded tailings ponds). Indeed, the federal government asserts Clean Water Act jurisdiction over nearly *half* of the State of Alaska. *Id.* If the decision below becomes the law of the Ninth Circuit and the industry's long-accepted practice of disposing of mine tailings in secure aquatic impoundments becomes illegal there, many of the Nation's metal mining operations will be rendered "topographically impossible or exorbitantly cost-prohibitive." *Id.* at 18.

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[1] Of course, there, EPA recognized the obvious—that the largely solid discharge of a mountaintop was "fill material," not subject to EPA's performance standards for "mine drainage," *Kentuckians*, 317 F.3d at 445—just as EPA recognized here that Coeur's largely solid tailings slurry was not subject to EPA's performance standard for process wastewater.

SEACC suggests that none of these untoward consequences will come to pass in the Ninth Circuit or elsewhere if the Corps simply returns to the "longstanding regulatory practice prior to the 2005 Kensington permit." SEACC Br. 11. But the brief of the National Mining Association demonstrates the Kensington permit was consistent with—not a deviation from—the Corps' "longstanding regulatory practice." NMA Br. 6–16. SEACC asserts (at 6, tellingly, without citation) that, before Kensington, tailings were deposited only into waters that had been made nonjurisdictional by dint of their designation as "waste treatment facilities"—a result SEACC cannot conceivably be thought to endorse. Yet Alaska's reply demonstrates that the Corps has previously permitted virtually identical froth-flotation mining operations—including the largest zinc mine in the world, the Red Dog mine—to dispose of their tailings into *jurisdictional* waters. Alaska Reply 6 & n.1. If there is a "misstatement of the record" (SEACC Br. 6), it is not petitioners or their *amici* who have made it.

In truth, the *only* difference between the regulatory scheme of 1985, when the Corps permitted the impoundment for the Red Dog mine's ongoing disposal of froth-flotation tailings slurry, and that of 2005, when the Corps permitted Kensington's substantially identical discharge, is that by 2005, the Corps and EPA had jointly promulgated a rule making absolutely clear that, when it has the effect of raising the bottom elevation of a jurisdictional water, a discharge of "slurry, or tailings or similar mining-related materials," is a "discharge of fill material" subject to the Corps' permitting authority. 33 C.F.R. § 323.2(f).

II. COEUR'S EFFORTS TO OBTAIN PERMITS FOR AN ALTERNATIVE TAILINGS PLAN NEITHER DIMINISH THE IMPORTANCE OF THE QUESTION PRESENTED NOR RISK MOOTING COEUR'S APPEAL

When the Ninth Circuit issued its opinion invalidating Coeur's tailings impoundment permit—a result that threatened to delay indefinitely the Company's ability to bring the Kensington mine into productive use—Coeur naturally began to explore potential alternatives for tailings disposal. Those efforts included mediated discussions with SEACC on alternative tailings sites. Coeur engaged in those discussions on the explicit condition that they be without prejudice to Coeur's right to seek this Court's review of the Ninth Circuit's decision.

Following those discussions with SEACC, Coeur developed a plan to store the tailings in the form of a semi-solid paste on a site previously approved for storage of dry tailings. This tailing storage plan calls for Coeur to clear and fill with dirt some 70 acres of wetlands, thereby converting those wetlands into the "upland site" referenced by SEACC. SEACC Br. 10. Coeur would then pile the tailings paste on the newly created uplands. This alternative comes with a steep price tag: The Corps and the Alaska Department of Natural Resources previously estimated the construction and first-year operating costs of similar dry-stack tailings alternatives to range from $78 to $89 million, while the same costs for the Lower Slate Lake tailings alternative were estimated to be less than $23 million. C.A. J.S.E.R. 756, 873–74.

The permitting review process for the potential paste tailings facility alternative has only recently begun, and Coeur has no assurance regarding its

timing or result. By initiating the permitting process now, however, Coeur hopes to minimize further delays in the event that this Court denies certiorari or affirms the judgment of the Ninth Circuit on the merits.

Consistent with that approach, Coeur has taken care to ensure that its permit applications (like the mediation that preceded them) be without prejudice to its appeal in this Court. For example, Coeur's recently filed application for a Section 404 permit in connection with the paste tailings alternative expressly states that it is made "without prejudice to Coeur Alaska and other party legal rights in the pending U.S. Supreme Court appeal." Application of Department of the Army Permit of Coeur Alaska, Inc. ¶ 19 (Apr. 25, 2008). Indeed, the application states that it is being undertaken because, "[u]nless the 2007 Order [of the Ninth Circuit] is reversed or changed by the currently pending Supreme Court appeal, Coeur Alaska does not expect the Lower Slate Lake Tailings Storage Facility to be available." *Id.*[2]

SEACC argues that the "availability of an alternative disposal site significantly reduces the importance of resolving the question presented in this case." SEACC Br. 4. For two reasons, SEACC is incorrect. First, the alternative disposal site is not "available"; exactly *none* of the many agencies whose approval is required has issued a permit for the facility. And SEACC knows better than most that even if

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[2] Pursuant to this Court's Rule 32.3, petitioner has sent a letter to the Clerk proposing to lodge with the Court a copy of Coeur Alaska's April 25, 2008, Section 404 permit application.

the alternative tailings disposal plan is permitted by every pertinent agency, one or more of those permits may become the subject of protracted litigation, further frustrating Coeur's plans for operation.[3]

But even if the alternative site surely were "available"—and, it must be emphasized, it is not—that would not diminish the importance of the question presented. It does not diminish at all the importance of the question to the Corps of Engineers, who still must administer a different Section 404 permit program in the Ninth Circuit than in the rest of the country. Nor does it diminish the importance of the question presented to the State of Alaska and its mining industry, neither of whom can be assured that such an alternative site will be "available" for every mining project. And it does not significantly diminish the importance of the question to Coeur and its shareholders, for whom $60 million or more may ride on the answer.

SEACC also suggests that "Coeur's new disposal plan" might "moot this case." SEACC Br. 15. This *sotto voce* suggestion of mootness is spurious. SEACC apparently assumes that if the Corps grants Coeur's recently filed alternative Section 404 permit application while this case is pending, that the Corps must vacate the existing Section 404 permit and thereby leave this Court without any ability to grant any effective relief to any prevailing party. But there

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[3] SEACC states that Coeur is seeking permits for the alternative tailings disposal plan "with the cooperation of SEACC." SEACC Br. 15. That is correct in the sense that SEACC has not yet opposed Coeur's efforts, but SEACC has stopped short of announcing full support for Coeur's alternative plan.

is no basis for such an assumption. As noted above, Coeur's alternative Section 404 permit application was made expressly "without prejudice to Coeur Alaska and other party legal rights in the pending U.S. Supreme Court appeal." The Corps could not, consistent with that application, vacate the existing permit while this appeal remains pending before this Court, for that certainly would risk "prejudice" to Coeur's "legal rights in the pending U.S. Supreme Court appeal."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT A. MAYNARD
PERKINS COIE LLP
251 East Front St. Ste. 400
Boise, ID 83702

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
AARON D. LINDSTROM
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, DC 20036
(202) 955-8500

Counsel for Petitioner

May 27, 2008