No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Clean Water Act provides two separate programs for the permitting of discharges into navigable waters of the United States. Under Section 404 of the Act, the Army Corps of Engineers may issue permits for discharges of "fill material," subject to the water-quality restrictions imposed by Section 404(b)(1). Under Section 402 of the Act, the Environmental Protection Agency may issue permits for the discharge of all other pollutants, subject to the effluent limitations prescribed under Sections 301 and 306 of the Act.

In 2002, after notice and comment, the EPA and the Corps jointly promulgated a regulation defining the statutory term "discharge of fill material" to include "tailings or similar mining-related materials." Pursuant to its authority under Section 404 to grant permits for the discharge of "fill material," the Corps granted petitioner a permit to deposit certain mine tailings in a lake.

In the decision below, the Ninth Circuit invalidated that permit even though it acknowledged that the proposed discharge "facially meets the current regulatory definition of 'fill material.'" Upsetting 35 years of established agency practice, the court of appeals held that the Corps may not issue a Section 404 permit for the discharge of fill material if the fill material in question otherwise would be subject to a Section 301 or 306 effluent limitation.

The question presented is whether the Ninth Circuit erred in reallocating the Corps' and EPA's permitting authority under the Act.

PARTIES TO THE PROCEEDING

In addition to Southeast Alaska Conservation Council, the Sierra Club and Lynn Canal Conservation were appellants in the court of appeals. In addition to Coeur Alaska, Inc., the following parties (or their predecessors in office, *see* this Court's Rule 35.3) were appellees in the court of appeals and are respondents in this Court pursuant to this Court's Rule 12.6: the United States Army Corps of Engineers; Kevin J. Wilson, in his official capacity as District Engineer; Michael Rabbe, in his official capacity as Chief of the Regulatory Branch; George S. Dunlop, in his official capacity as Principal Deputy Assistant Secretary of the Army (Civil Works); the United States Forest Service; the State of Alaska; and Goldbelt, Inc.[1]

Pursuant to this Court's Rule 29.6, undersigned counsel state that Coeur d'Alene Mines Corporation is the parent company of Coeur Alaska, Inc. and that no other publicly held company owns 10% or more of its stock. Coeur d'Alene Mines Corporation has no parent company and no publicly held company owns 10% or more of its stock.

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[1] Kevin J. Wilson replaced Timothy J. Gallagher as District Engineer, Michael Rabbe replaced Larry L. Reeder as Chief of the Regulatory Branch, and George S. Dunlop replaced Dominic Izzo as Principal Deputy Assistant Secretary of the Army (Civil Works).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Coeur Alaska, Inc. respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The court of appeals' opinion is reported at 486 F.3d 638. App., *infra*, 1a. The order denying the petition for rehearing en banc is unreported. *Id.* 36a. The opinion of the United States District Court for the District of Alaska is also unreported. *Id.* 38a.

JURISDICTION

The district court had jurisdiction over respondent's claims pursuant to 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the district court's final judgment pursuant to 28 U.S.C. § 1291. The court of appeals filed its opinion on May 22, 2007, and it denied, on October 29, 2007, petitioner's timely filed petition for rehearing en banc. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Clean Water Act, 33 U.S.C. §§ 1257–1387, are set forth in the Appendix, *infra*, at 68a.

STATEMENT

This case presents a question of exceptional importance to the administration of the Clean Water Act. Since the Clean Water Act's enactment in 1972, both the Environmental Protection Agency and the Army Corps of Engineers have consistently recognized that the Clean Water Act treats discharges of "fill material" differently from discharges of other

pollutants: Discharges of "fill material" are subject to regulation under Section 404 of the Clean Water Act (33 U.S.C. § 1344) and to effluent guidelines promulgated under Section 404(b)(1), while discharges of other pollutants are subject to regulation under Section 402 (33 U.S.C. § 1342) and the different effluent limitations (including standards of performance) that Section 402 specifies. Rejecting this well-settled statutory dichotomy and enforcement protocol developed by the specialized agencies responsible for administering the Act, by numerous courts, by state governments, and by the mining industry, the Ninth Circuit imposed a novel and conflicting requirement. In the Ninth Circuit, discharges of "fill material" must now comply with effluent limitations not only under Section 404, but also those specified for "other pollutants" by Section 402. This decision overturns the settled understanding of the Act and the enforcement regime developed over the course of 35 years by EPA and the Corps through their joint administration of the Clean Water Act, disregards the two-part statutory scheme Congress enacted, significantly impacts the mining industry by prohibiting a common practice often necessary for hard rock and other mining (including mining for gold, silver, copper, lead, zinc, phosphate, and molybdenum ores), and jeopardizes the economies (and therefore the people) of States dependent on mining.

1. Prior to the decision below, the Clean Water Act's bifurcated permitting scheme was well established. *See, e.g.*, *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 447 (4th Cir. 2003) (explaining how the Act's structure "reinforc[es] the fill-effluent distinction that has been followed by the agencies"). Section 301 of the Act broadly prohibits

the discharge of pollutants into navigable waters of the United States "[e]xcept as in compliance" with permit programs established by the Act. 33 U.S.C. § 1311(a). The Clean Water Act makes clear that the Section 404 and Section 402 permitting schemes are mutually exclusive: It entrusts to the Corps of Engineers the authority to issue permits "for the discharge of . . . fill material into the navigable waters," 33 U.S.C. § 1344, while the authority to issue permits for all pollutants other than "fill material" rests with EPA, *id.* § 1342 ("*Except as provided in section* [] . . . *1344* . . ., the [EPA] Administrator may . . . issue a permit for the discharge of any pollutant . . . .") (emphasis added). Indeed, below, even the appellants agreed that "[t]he Act provides that a single discharge will be governed by either section 402 or section 404, but not both." Appellants' C.A. Br. 24.

This bifurcation makes sense, as the appellants below also acknowledged: "The dual permitting structure of sections 402 and 404 reflects Congress's view that discharges of . . . fill material did not pose the same threats to water quality as discharges of industrial and municipal wastes." Appellants' Emergency Mot. under Cir. R. 27-3, at 6. As EPA and the Corps have explained, "[i]n keeping with the fundamental difference in the nature and effect of the discharge that each program was intended by Congress to address, sections 404 and 402 employ different approaches to regulating the discharges to which they apply." Proposed Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 65 Fed. Reg. 21,292, 21,293 (Apr. 20, 2000). "The section 402 program is focused on . . . discharges such as wastewater discharges from industrial operations and sewage treatment plants, stormwater and the like." *Id.* "Fill

material," on the other hand, "differs fundamentally from the types of pollutants covered by section 402 because the principal concern is the loss of a portion of the water body itself." *Id.*; *see also id.* (noting that Section 404(b)(1) guidelines "provide for consideration of the effects of chemical contaminants on water quality in a number of ways" but also "go beyond such a water quality based approach to require numerous additional considerations" including "effects of the discharge on the aquatic ecosystem as a whole," such as loss of wetlands); 33 U.S.C. § 1343(c) (setting out criteria, cross-referenced by Section 404(b)(1), that consider, among other things, effects on "economic values" and "mineral exploitation").

Discharges of "fill material" governed by Section 404 must satisfy guidelines (known as Section 404(b)(1) guidelines) jointly developed by EPA and the Corps. Section 404 does not require compliance with effluent limitations promulgated by EPA; in fact, Section 404(p) provides that "[c]ompliance with a permit issued pursuant to [Section 404] . . . shall be deemed compliance . . . with [Section 301]." 33 U.S.C. § 1344(p). Section 404(c), moreover, provides an additional protection for water quality by stating that EPA may veto any permit the Corps proposes to grant.

In contrast, discharges that fall under Section 402—also known as the National Pollution Discharge Elimination System ("NPDES") program—must meet "all applicable requirements" under Sections 301 and 306 of the Clean Water Act. 33 U.S.C. § 1342(a). Section 301 requires compliance with "[e]ffluent limitations" applicable to existing point sources, *id.* § 1311(e), while Section 306 applies more stringent effluent limitations, known as "standards of per-

formance," to new point sources, *id.* § 1316(e). *See* App., *infra*, 13a n.8 ("A standard of performance is one type of effluent limitation."). These effluent limitations are promulgated in the form of regulations issued by EPA.

Because the term "fill material" is not defined by the Clean Water Act, these agencies, acting on the discretion delegated to them by Congress, issued a joint regulation to delineate which discharges would be regulated under Section 404 of the Clean Water Act and which would fall under Section 402. In their joint regulation, the agencies clearly defined "fill material" as "material placed in 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)(1)(ii); 40 C.F.R. § 232.2. Additionally, the agencies provided that the term "discharge of fill material" "generally includes . . . placement of overburden, slurry, or tailings or similar mining-related materials." 33 C.F.R. § 323.2(f); 40 C.F.R. § 232.2.

The discharge at issue in this case is the placement of mine tailings, transported in a slurry form, into Lower Slate Lake in southeastern Alaska, where, all agree, the tailings would "raise the bottom elevation of the lake by 50 feet." App., *infra*, 3a.

2. Nearly twenty years have passed since petitioner Coeur Alaska first proposed revitalizing the historic Kensington gold mine, located about 45 miles north of Juneau, Alaska, and initiated the process of obtaining the requisite permits from the U.S. Forest Service, EPA, the Corps, and other agen-

cies. C.A. E.R. 6.[1] Over the next 15 years, the Kensington project underwent extensive environmental analysis, encompassing several different proposed methods of operations. More than 900 studies, costing over $26 million, examined the project's environmental impact; numerous federal and state agencies, including the Forest Service, the Corps, EPA, the Alaska Department of Environmental Conservation ("DEC"), the Alaska Department of Natural Resources, the National Marine Fisheries Service, and the U.S. Fish and Wildlife Service, reviewed its proposals and their expected effects. *See, e.g.*, C.A. E.R. 397.

Coeur Alaska's plan of operations provides for milling ore on-site through a conventional "froth-flotation" process that separates valuable ore from the remaining minerals. Over the 10- to 15-year life of the project, the mill processing operations will yield a great deal of valuable ore, but also several million tons of mine tailings. Only forty percent of the tailings can be stored in the mine. App., *infra*, 4a. Because depositing the excess tailings on land in this rainy, steep area of Alaska would require destructive conversion of more than 100 acres of wetlands to uplands (C.A. J.S.E.R. 401–02) and would raise other environmental, energy, safety, economic, and technical issues, Coeur Alaska sought a permit to dispose of the remainder—up to 4.5 million tons—by placing them into a carefully designed impoundment in Lower Slate Lake. The Corps carefully con-

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[1] "C.A. E.R." refers to the Excerpts of Record filed in the court of appeals. "C.A. J.S.E.R." refers to the Joint Supplemental Excerpts of Record also filed in the court of appeals.

sidered these alternatives in its Record of Decision, *id.* 555–71, and ultimately concluded that upland disposal would be "more damaging" than deposition in Lower Slate Lake because upland disposal would cause a "permanent loss of wetland[s]" that would "outweigh[] the temporary losses to the lake." C.A. J.S.E.R. 872.[2]

Because Coeur's largely solid mine tailings constitute "fill material" (the tailings indisputably would "[c]hang[e] the bottom elevation" of the lake, 33 C.F.R. § 323.2(e)(1)(ii)), Coeur sought a discharge permit from the Corps under Section 404. After reviewing the final proposal and the input of several other agencies (including a Record of Decision by the Forest Service), the Corps approved the proposal in June 2005 and granted Coeur Alaska a Section 404 permit, which incorporated numerous protective requirements under Section 404(b)(1) guidelines, to discharge tailings into Lower Slate Lake. C.A. E.R.. 522–33.

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[2] The tailings discharge is likely to result in the loss of some small fish and other aquatic life in the lake. App., *infra*, 44a–45a; *see also* C.A. J.S.E.R. 745, 755, 943–52, 959–62. This loss, however, is expected to result from the physical impact of the tailings, not from toxicity or poor water quality. App., *infra*, 43a (anticipating that aquatic life would be lost "primarily due to being covered with the discharged material"). By the time operations conclude, however, the settled tailings fill will have reduced the lake's depth from 51 feet to approximately 33 feet, and increased its surface area from 23 acres to more than 60 acres, thereby substantially improving the available fish habitat by providing more shallow, productive areas. C.A. E.R. 349. Coeur's plan of operation calls for it to reintroduce fish into the lake at the close of operations.

Originating from the mine ore processing mill, the tailings slurry unavoidably contains some process water potentially subject to Section 301 effluent limitations and Section 306 performance standards under the Section 402 program. Recognizing, however, the clear fill effect of the tailings discharge into the Lower Slate Lake impoundment, EPA concurred that Section 404 was the applicable permitting regime and that Section 301 and Section 306 limits did not apply. After reviewing multiple analyses and working with the Corps to resolve environmental concerns, EPA affirmed the permit by declining to exercise its ultimate veto authority under Section 402(c). EPA also issued a Section 402 permit, incorporating effluent limitations, to govern the subsequent discharge of water from the lake impoundment into the small adjacent creek leading to more substantial downstream waters. C.A. E.R. 412–14, 534–36, 542–43; C.A. J.S.E.R. 656, 662–664. Similarly, the Alaska DEC certified that the proposal would comply with Section 401 of the Clean Water Act and with Alaska's water-quality standards. C.A. J.S.E.R. 827–832.

3. Southeast Alaska Conservation Council, the Sierra Club, and Lynn Canal Conservation (collectively "SEACC") sued the Corps of Engineers and the Forest Service, arguing that the issuance of the permit violated the Administrative Procedure Act, 5 U.S.C. § 706(2)(a), and Sections 301(a), 301(e), and 306(e) of the Clean Water Act. SEACC relied on an EPA regulation that stated "there shall be no discharge of process wastewater to navigable waters from mills that use the froth-flotation process . . . for the beneficiation of copper, lead, zinc, gold, silver, or molybdenum ores," 40 C.F.R. § 440.104(b)(1), arguing that this "no discharge" performance standard

(promulgated under Section 306) precluded the grant of a Section 404 permit.

SEACC also challenged, in the alternative, the agencies' interpretation of their own joint regulation, arguing that it was arbitrary and capricious to interpret the term "discharge of fill material"—a term which the joint regulation provides "includes . . . placement of . . . tailings or similar mining-related materials," 33 C.F.R. § 323.2(f); 40 C.F.R. § 232.2—to include mine tailings. C.A. E.R. 15 ¶ 72. SEACC did not challenge the regulation itself or contest the Section 404 permit's compliance with the Section 404(b)(1) guidelines.

After Coeur Alaska, the State of Alaska, and Goldbelt, Inc. intervened, the district court decided, on summary judgment, that "[t]he Corps properly issued the permit to Coeur Alaska, Inc. under § 404." App., *infra*, 55a. The district court recognized that the Clean Water Act "divides the permitting process into two segments" and that different standards applied under Sections 402 and 404, *id.* 51a; accordingly, the district court concluded that "[i]f the permit was properly issued under § 404, [Sections 301(e) and 306(e)] are inapplicable," *id.* 48a n.35. The district court also rejected SEACC's argument that statements in the regulatory history compelled the conclusion that the agencies' interpretation of their own rule—an interpretation that "facially falls within the definition of 'fill material' contained in the regulations," *id.* 53a—was unreasonable.

4. SEACC filed an emergency motion for an injunction pending appeal. A two-judge panel of the Ninth Circuit (Reinhardt, J., and Goodwin, J.) granted the injunction without providing any reasoning for its order. App., *infra*, 57a–58a. After Coeur

Alaska asked the Ninth Circuit to vacate the injunction pending appeal in light of this Court's decision in *Purcell v. Gonzalez*, 127 S. Ct. 5, 6–7 (2006) (vacating an injunction where "[t]he Court of Appeals offered no explanation or justification for its order" and "fail[ed] to provide any factual findings or indeed any reasoning of its own"), the merits panel denied the motion to vacate, while providing little additional explanation of the grounds for its decision. App., *infra*, 59a.

The Ninth Circuit eventually reversed the judgment of the district court and invalidated Coeur's Section 404 discharge permit. The court of appeals concluded that the Corps, by issuing a permit for a discharge that "facially meets the Corps' current regulatory definition of 'fill material,'" App., *infra*, 10a, and "facially qualif[ies] for permitting under § 404," *id.* 15a, had nevertheless "violated the Clean Water Act," *id.* 34a.[3]

The panel purported to base its conclusion on "the plain language of the Clean Water Act." App., *infra*, 10a. The panel reasoned that Section 301(a) "prohibits all discharges of any pollutant . . . except when the discharge complies with the requirements of, *inter alia*, § 301, § 306, § 402, *and* § 404." *Id.* 11a–12a. Relying on Section's 301's "use of 'and' as a connector," the panel concluded that "§ 301(a) prohibits *any* discharge that does not comply with . . .

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[3] The Ninth Circuit also invalidated a separate Section 404 permit issued to Goldbelt Alaska Native Corporation for rock fill for a dock for the southern marine terminal for the Kensington mine project, solely because the dock was permitted for mine operations. App., *infra*, 35a.

both § 301 and § 306, as well as § 402 and § 404." *Id.* 15a. Thus, the panel concluded that "[i]f EPA has adopted an effluent limitation or performance standard applicable to a relevant source of pollution, § 301 and § 306 preclude the use of a § 404 permit scheme for that discharge." *Id.* 17a. "[T]he NPDES program administered by EPA under § 402 is the only appropriate permitting mechanism for [such] discharges." *Id.* 18a.

The panel also reached the alternative holding that, even though Coeur's proposed discharge "facially meet[s] the definition of the term 'fill material,'" App., *infra*, 22a, the "regulatory history" nonetheless demonstrated that the Corps had unreasonably interpreted its own regulation as encompassing Coeur's discharge. *Id.* 19a. The regulation's plain language notwithstanding, the panel concluded that the regulation must be interpreted to include only "those tailings and other mining-related materials that are not subject to effluent limitations or standards of performance." *Id.* 30a–31a.

5. The court of appeals denied rehearing, App., *infra,* 37a, but, on Coeur's motion, stayed its mandate pending review by this Court. *Id.* 65a. After granting the stay, however, the court of appeals issued an order, on SEACC's motion, to require Coeur Alaska, the Corps, and the Forest Service to prepare and approve a reclamation plan by April 1, 2008. *Id.* 66a.

REASONS FOR GRANTING THE PETITION

The decision of the Ninth Circuit effectively rewrites the structure of the Clean Water Act: It changes the Section 404 permit program from a distinct permitting scheme that carves out an important exception to Section 402, *see* 33 U.S.C. § 1342(a)(1)

("Except as provided in section[] . . . 1344"), into a secondary permitting scheme that has only residual application.

Left undisturbed, the consequences of this decision will be extensive. It has the immediate impact of upsetting national uniformity in the administration of the Clean Water Act by reallocating (in the Ninth Circuit) the division of labor and expertise followed by EPA and the Corps for the past three decades. It imposes new requirements on mining in this country—much of which occurs under the jurisdiction of the Ninth Circuit—by threatening to restrict the industry's ability to conduct common types of ore processing. And it correspondingly weakens the economies of western States that rely significantly on mining.

The decision below also warrants review because it contravenes basic, firmly established principles of statutory interpretation consistently recognized in the decisions of this Court and of the courts of appeals. Moreover, by refusing to defer to the Corps' interpretation (in which EPA concurred) of the joint EPA-Corps regulation defining "fill material"—even as it acknowledged that the agencies' interpretation was consistent with the joint regulation's plain text—the Ninth Circuit set itself against a long line of this Court's decisions concerning the extraordinary deference due to an agency's interpretation of its own regulation. This Court should grant the petition to resolve the questions arising out of the Ninth Circuit's transformative construction of the Clean Water Act and to restore to EPA and the Corps their rightful roles in administering this important federal statute.

I. THE BROAD RAMIFICATIONS OF THE NINTH CIRCUIT'S DECISION MARK THIS CASE AS ONE OF EXCEPTIONAL IMPORTANCE

The Ninth Circuit's decision immediately impacts the administration of the Clean Water Act. It also has serious, direct economic implications for both the mining industry and western States, such as Alaska, Arizona, California, and Nevada, that produce, as a group, nearly a third of the nation's nonfuel minerals and that rely significantly on mining for their economic well-being. Moreover, should this decision stand, environmental groups that disagree with how Congress, EPA, and the Corps have exercised their discretion by balancing environmental interests with wise use of natural resources are likely to use this decision as a springboard to challenge hard rock and other mining throughout the country.

A. The Ninth Circuit's Decision Radically Alters The Longstanding Structure Of The Clean Water Act's Discharge Permit Programs

For over three decades, EPA and the Corps have specialized in different, important aspects of managing our Nation's waters. In the Clean Water Act, Congress tasked EPA with protecting water quality by restricting the addition of toxic chemicals into jurisdictional waters. 33 U.S.C. § 1251(a), (d). Effluent limitations promulgated by EPA typically address issues such as toxicity by restricting concentrations of contaminants and total suspended solids ("TSS") to small amounts that are measured in milligrams per liter. *See, e.g.*, 40 C.F.R. § 440.12(a) (limiting "[t]he concentration of pollutants discharged in mine drainage from mines operated to obtain iron

ore" to a daily average of 1.0 mg/L of iron and of 20.0 mg/L of TSS); *id.* § 440.24 (for aluminum ore mining, limiting daily averages to 0.5 mg/L of iron, 1.0 mg/L of aluminum, and 20 mg/L of TSS). As EPA and the Corps have explained, however, "[t]here are no statutory or regulatory provisions under the section 402 program designed to address discharges that convert waters of the U.S. to dry land." Proposed Revisions to Regulatory Definitions, 65 Fed. Reg. at 21,292.

Discharges of fill material, in contrast, are not measured in milligrams per liter; instead, such discharges may exceed a thousand tons of relatively solid material per day. C.A. E.R. 295. The Corps has long experience with special considerations arising from filling jurisdictional waters. Under the Section 404(b)(1) program, the Corps evaluates whether to permit a discharge of fill material into a body of water through a "careful consideration of the effects of the discharge on the aquatic ecosystem as a whole, as well as evaluation of alternatives to the discharge and measures to minimize and compensate for unavoidable adverse effects," and it also considers "effects on human health, recreation, aesthetic, and economic values." Proposed Revisions to Regulatory Definitions, 65 Fed. Reg. at 21,293.

In spite of Congress's clear intent to create Section 404 as a separate program to permit discharges of fill material and to address the special considerations such discharges present, future requests for permission to discharge fill material will, at least in the Ninth Circuit, have to comply with the requirements of Section 402 when EPA has promulgated effluent limitations. *See* App., *infra*, 15a (rejecting argument that "§ 301 and § 306 do not apply to § 404 permits"). The Ninth Circuit's decision significantly

narrows the application of the Section 404 program—previously an important permitting mechanism that covered all discharges of fill material—to only that subset of fill material discharges for which EPA has not yet imposed an effluent limitation. No longer, in the Ninth Circuit, does the Section 404 permit program operate as an exception to the Section 402 program. There, the Section 404 program is allowed only residual application.

Left undisturbed, this interpretation will require EPA and the Corps to restructure how they administer the Act and will narrow the role that Congress set out for the Corps in the Act. For example, the Corps' ability to efficiently address common fill activities by issuing a Nationwide Permit ("NWP") for such activities will be hampered whenever an effluent limitation might apply, as each instance of the activity would then need to be evaluated under the Section 402 program. At the same time, the Corps' personnel will need to become familiar with all potentially relevant effluent limitations in order to ensure that they do not issue Section 404 permits conflicting with those numerous now-applicable requirements; correspondingly, EPA personnel will have to increase their oversight under Section 404(c) to ensure compliance. The joint development of Section 404(b)(1) guidelines to meet specific criteria set out by Congress, *see* 33 U.S.C. §§ 1344(b)(1), 1343(c), will be largely supplanted by the technology-based criteria of Sections 301 and 306. Topping things off, the agencies will need to decide whether to implement these changes nationwide or to develop a special process within the Ninth Circuit.

B. The Ninth Circuit's Decision Will Severely Harm the Nation's Mining Industry

The Ninth Circuit's decision severely restricts the mining industry's ability to use the Section 404 permit program within the Ninth Circuit. Indeed, requiring discharges of mine tailings to comply with effluent limitations significantly "impair[s] . . . environmentally sound mine operations of all kinds throughout the country." Nat'l Mining Ass'n C.A. Amicus Br. 2 (hereinafter "NMA C.A. Br.").

Section 404 permits are often necessary because "[m]ining activities must occur where the mineral resources are found, and the terrain in those areas is often such that the only feasible site for disposal is in a water body." NMA C.A. Br. 7. Mining inherently produces excess materials, including rock, dirt, and other tailings. These materials, particularly crushed rock, swell in volume and so cannot all be disposed of by backfilling. *See Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 286 (4th Cir. 2001); C.A. J.S.E.R. 835–36. At the same time, minerals are often located in mountainous regions, such as in Alaska and "in the Appalachian Mountains, in a broad area stretching from Pennsylvania to Alabama[] and including Kentucky, Virginia[,] and West Virginia," where the available "stable locations for the placement of excess rock are mostly the bottom of hollows which, as a simple matter of topology, form streams." NMA C.A. Br. 8.

Applying effluent limitations to mine tailings will affect numerous types of mines because "EPA has promulgated effluent limitations for a vast number of substances commonly present in the excess rock and dirt from mines." Nat'l Mining Ass'n C.A.

Amicus Br. In Support of Pet. for Reh'g En Banc 17; *see generally* 40 C.F.R. Pts. 434, 440 (listing effluent limitations for numerous types of mining operations). By eliminating the ability of mines to use a body of water to settle out excess dirt and rock, mining operations will have to seek out alternative means of disposal that may, as the Corps found in rejecting such alternatives for the Kensington mine, lead to a greater loss of wetlands, to aesthetic harms (such as the creation of unsightly tailings stacks), and other environmental costs. *See, e.g.*, C.A. J.S.E.R. 872. These additional costs inevitably will stifle both resource exploration and mine development.

As Coeur's situation illustrates, if Section 402 effluent limitations replace Section 404 as the regime governing discharges of mine tailings, mines previously eligible for Section 404 permits will be unable to operate as planned, years of planning and significant financial investments (here, approximately $200 million, C.A. J.S.E.R. 1064) made in reliance on decades of agency practice notwithstanding. For example, NWP 44, issued to authorize "aggregate mining and hard rock/mineral mining activities" where the discharge would "not cause the loss of greater than ½-acre of non-tidal waters of the United States," Reissuance of Nationwide Permits, 72 Fed. Reg. 11,092, 11,139, 11,189 (Mar. 12, 2007), is now vulnerable to challenge; despite the fact that it "authorizes mining activities that [in the judgment of the agencies] have no more than minimal individual and cumulative adverse effects on the aquatic environment," *id.* at 11,140, any "no discharge" effluent limitation would prohibit even these "minimal" discharges.

The effects of Ninth Circuit's decision will be felt throughout the Nation. The mining industry is a

significant contributor to the national economy. "The total value of U.S. raw nonfuel mineral production alone was about $64.4 billion." Mineral Commodity Summaries 2007, at 7. Six metals, five of which are governed by the same froth-flotation performance standard relevant to this case (and the sixth of which is governed by other effluent limits), contribute a combined total of $22.7 billion dollars towards that total. *Id.* at 52 (copper: $8.6 billion), 70 (gold: $5.1 billion), 110 (molybdenum: $3.2 billion), 82 (iron ore: $2.8 billion), 186 (zinc: $2.3 billion), and 92 (lead: $702 million).

Most of those metals are mined in the Ninth Circuit. *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. Gold is produced primarily in Alaska and other western States; Alaska and Nevada are the leading producers of silver; Arizona, Nevada, and Montana are three of the top five copper-producing States; Idaho, Arizona, Montana, and Nevada are leading producers of molybdenum; Alaska, Idaho, Montana, and Washington are four of the top five lead-producing States; and three of the four states that produce 99% of the Nation's domestic zinc are Alaska, Montana, and Washington. *Id.* at 70, 148, 52, 110, 92, & 186.

Effluent limitations currently in place apply to each of these types of ores and to numerous types of mining operations, including open-pit operations, underground operations, placer deposits, froth-flotation processes, dump processes, heap processes, in-situ leach processes, vat-leach processes, and gravity separation methods. *See generally* 40 C.F.R. Part 440, Subparts J & M. Should the Ninth Cir-

cuit's decision stand, discharges of mining-related materials that previously qualified as fill material in the Ninth Circuit must now comply with these regulations, including zero-discharge standards of performance, formerly applicable only under Section 402.

C. The Ninth Circuit's Decision Threatens To Disrupt The Economies Of Alaska And Other Western States

"Mining is a critical part of [Alaska's] economy," Alaska's C.A. Br. Re Reh'g En Banc 15; for example, it contributed $1.8 billion dollars to Alaska's economy in 2005. C.A. J.S.E.R. 644. As explained above, mining inherently produces excess rock, dirt, and other tailings that swell in volume and so cannot all be disposed of by backfilling. Approximately half of Alaska's land mass consists of wetlands. Taken together, these facts demonstrate the importance of fill-material permits to the State of Alaska and to the citizens of Alaska who rely on mining for their livelihood.

If discharges of these excess mining materials into wetlands in Alaska must comply with a zero-discharge Section 306 standard of performance, then other important mining projects in Alaska, including pending and future projects for which "[t]he agencies' [Section 404] permitting plan is expected to be a critical component," Alaska's C.A. Pet. Reh'g En Banc 16, will have to cease or delay operations (or pay penalties, 33 U.S.C. §§ 1319, 1365) until such time as their operations can be brought into compliance with the zero-discharge standard of performance—which is to say, never. In many locations placement of tailings on dry land is not practicable,

and compliance with the Ninth Circuit's construction of the Act otherwise is not possible. The decision below thus threatens serious harm to the Alaskan economy.

Alaska, moreover, is not alone. Other States within the jurisdiction of the Ninth Circuit also rely on mining (and its creation of jobs and income for their residents) as a significant part of their economies. Indeed, the top three States in the Nation in terms of nonfuel mineral production are Arizona ($4.35 billion in 2005), California ($4.25 billion in 2005), and Nevada ($3.88 billion in 2005), and the nine states combine to contribute 31% of total U.S. nonfuel mineral production. U.S. Dep't of the Interior, U.S. Geological Survey., 2005 Minerals Yearbook, Statistical Summary at 2.5–2.6 (Aug. 2007), *available at* http://minerals.usgs.gov/minerals/pubs/commodity/statistical_summary/myb1-2005-stati.pdf. Mining in these States often takes place in mountainous areas where it is often impracticable to dispose of mine tailings except by placing them as fill material in drainage channels, wetlands, or other waters. The Section 404 permit program thus is important in these States just as it is in Alaska. In the absence of a permit program that permits deposition of tailings in jurisdictional waters, these mines, too, will have to develop new plans of operations—plans that promise to be more expensive and that may well be more environmentally damaging (as the Corps found to be the case for the alternatives to issuing a Section 404 permit for the tailings placement at issue here).

II. THE NINTH CIRCUIT'S CONSTRUCTION OF THE CLEAN WATER ACT CONTRAVENES THE ACT'S TEXT AND STRUCTURE, DECISIONS OF THIS COURT, AND DECISIONS OF OTHER COURTS OF APPEALS

In restructuring EPA's and the Corps' permitting authority under the Act to invalidate Coeur's Section 404 permit, the Ninth Circuit ignored well-established rules of interpretation, basic principles of logic, the structure of the Clean Water Act, and even a provision expressly exempting Section 404 permits from effluent limitations. Unsurprisingly, the result achieved cannot be reconciled with this Court's decisions, including *Rapanos v. United States*, 126 S. Ct. 2208 (2006), and *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 126 S. Ct. 1843 (2006), or with the decisions of other courts of appeals.

1. The Ninth Circuit grounded its novel reconstruction of the Act's permitting programs—"[i]f EPA has adopted an effluent limitation or performance standard applicable to a relevant source of pollution, § 301 and § 306 preclude the use of a § 404 permit scheme for that discharge"—on the use, in Section 301(a), of the conjunction "and." App., *infra*, 12a, 15a; *see* 33 U.S.C. § 1311(a) ("Except as in compliance with this section and sections [302], [306], [307], [318], [402] *and* [404] of this title, the discharge of any pollutant by any person shall be unlawful." (emphasis added)). "The use of 'and' as a connector, instead of 'or,'" the panel reasoned, meant that "*any* discharge" had to comply with "both § 301 and § 306, as well as § 402 and § 404," and "indicates that Congress intended for [Section 301] effluent limitations and [Section 306] standards of performance to apply to all applicable discharges, even those that facially qualify for permitting under § 404." App., *infra*, 15a.

But context clearly demonstrates that the conjunction "and" cannot be read to impose the statutory obligations that the Ninth Circuit ascribed to it.

As this Court explained long ago, "courts are often compelled to construe '*or*' as meaning '*and*,' and again '*and*' as meaning '*or*.' *United States v. Fisk*, 70 U.S. 445, 447 (1866); *see also Slodov v. United States*, 436 U.S. 238, 246–48 (1978) (interpreting "and" as "or" to avoid result "obviously at odds with the statute's purpose"). When the word "and" "conjoins a list of mutually exclusive alternatives," "context *requires* the term to be construed disjunctively." *Officemax, Inc. v. United States*, 428 F.3d 583, 591 (6th Cir. 2005) (Sutton, J.) (emphasis added).

This, clearly, is such a case. Section 301 does not, as the panel states, require one to obtain permits under both Section 402 *and* 404 for the same discharge. This Court recently recognized that Section 402 and Section 404 are mutually exclusive permitting schemes. *See Rapanos*, 126 S. Ct. at 2228 (plurality opinion) (contrasting "pollutants normally covered by the permitting requirement of [Section 402(a)]" with "dredged or fill material" and explaining that "[t]he Act recognizes this distinction by providing a separate permitting program for such discharges in [Section 404(a)]"); *id.* at 2237 (Kennedy, J., concurring) ("*Apart from* dredged or fill material, pollutant discharges require a permit from [EPA], which also oversees the Corps' . . . permitting decisions.") (emphasis added). Numerous courts of appeals have similarly acknowledged this mutual exclusivity. *See, e.g.*, *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 946 (7th Cir. 2004) ("[A] defendant who wishes to discharge a pollutant must first obtain a permit *either* under [Section 404] for the discharge of

dredged or fill material *or* under [Section 402] for other pollutants.") (emphases added).[4] Both agencies charged with administering the two permitting schemes agree that Section 301 only requires compliance with "one of the two permitting programs." Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129, 31,130 (May 9, 2002). Even SEACC acknowledged that "[t]he Act provides that a single discharge will be governed by either section 402 or section 404, but not both." Appellants' C.A. Br. 24.

2. Nor is it true, as the panel stated, that the use of "and" in Section 301 compels the conclusion that "[Section 301] effluent limitations and [Section 306] standards of performance [ ] apply to . . . discharges" that "qualify for permitting under § 404." The text of the Clean Water Act, in addition to its two-part structure, in fact compels the opposite conclusion. Whereas Section 402(a) explicitly requires that permitted discharges comply with both Section 301 effluent limitations and Section 306 performance stan-

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[4] *See also Kentuckians*, 317 F.3d at 447 (4th Cir. 2003) (recognizing that "cross-references, exclusions, and vetoes" interlocking Sections 404 and 402 "reinforc[ed] the fill-effluent distinction that has been followed by the agencies"); *Friends of Crystal River v. U.S. E.P.A.*, 35 F.3d 1073, 1075 (6th Cir. 1994) ("The Act establishes two discrete permitting systems by which individuals might obtain permits from the appropriate federal agency."); *State of Minn. by Spannaus v. Hoffman*, 543 F.2d 1198, 1208 (8th Cir. 1976) ("Unlike all other pollutants, dredged spoil [and fill material] [are] not regulated under the NPDES, since [§] 402(a)(1) establishing the NPDES begins, as we have seen, with the words, '(e)xcept as provided in sections 318 and 404.'") (citation and footnote omitted).

dards, Section 404 does not, instead expressly requiring compliance with different water-quality standards (and additional requirements) developed under Section 404(b)(1). *Compare* 33 U.S.C. § 1342(a), *with id.* § 1344. The panel dismissed this fact—that "§ 402 explicitly requires compliance with [Sections 301 and 306] whereas § 404 does not"—as a mere "negative inference" of an "implied exception." App., *infra*, 15a.

But the exception is hardly inferential: Section 404(p), apparently overlooked by the panel, explicitly provides that "[c]ompliance with a permit issued pursuant to this section . . . shall be deemed compliance . . . with [Section 301]." 33 U.S.C. § 1344(p). *Compare id.*, with App., *infra*, 18a ("§ 404 does not contain an explicit exception to effluent limitations").[5] But even setting aside Section 404(p)'s affirmative, express exception for effluent limitations, this Court recently reiterated, in another Clean Water Act case, that "if 'Congress includes particular language in one section of a statute'"—as Congress did in Section 402, stating that Sections 301 and 306 apply under that section—"'but omits [that language] in another section of the same Act'"—as Congress did in Section 404—"'it is generally presumed that Con-

[5] SEACC has suggested that Section 404(p) does not apply here because it refers only to Section 301, and not to Section 306. Given, however, that "[a] standard of performance is one type of effluent limitation" and that all effluent limitations "have the same practical effect" of restricting the discharge of pollutants, App., *infra*, 13a n.8, it would be quite strange if compliance with Section 404 did not also similarly constitute compliance with the particular type of effluent limitation (i.e., performance standards) mandated by Section 306.

gress acts intentionally and purposefully in the disparate inclusion or exclusion.'" *S.D. Warren Co.*, 126 S. Ct. at 1852 (quoting *Bates v. United States*, 522 U.S. 23, 29–30 (1997)). Congress clearly expressed its intent to impose different requirements under the different programs—compliance under Section 402 with effluent limitations, including performance standards, and compliance under Section 404 with Section 404(b)(1) guidelines—and even expressly exempted discharges of fill material from compliance with effluent limitations. Yet the Ninth Circuit concluded that Congress intended that Section 404 permits comply with effluent limitations.

3. Attempting to bolster its conclusion that Section 306(e) applies under Section 404, the Ninth Circuit also relies on the fact that Congress phrased Sections 301(e) and 306(e) broadly to establish (in the panel's words) "blanket prohibitions" that apply to "*all*" and "*any*" discharges. App., *infra*, 15a–16a. This conclusion, however, is at odds with a number of more specific requirements set out in the Act: first, the requirement that permits issued under Section 404 comply with Section 404(b)(1) guidelines, 33 U.S.C. § 1344(b)(1); second, Section 404's exemption from compliance with Section 301, *id.* § 1344(p); and third, Congress's conspicuous failure to specify that Sections 301 and 306 apply under Section 404, *cf.* § 1342(a).

In the face of these more specific provisions, the Ninth Circuit's reliance on Section 301's and Section 306's more general language violates the well-settled canon of statutory interpretation that "specific statutory language should control more general language when there is a conflict between the two." *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S.

327, 335 (2002); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("it is a commonplace of statutory construction that the specific governs the general"). This is particularly disturbing in light of the Ninth Circuit's acknowledgement of this canon, *see* App., *infra*, 32a, and its recognition of Section 404 as "a limited permit program that applies only to dredged or fill material," *id.* 15a. Thus, to the extent that the general prohibitions on discharges in Sections 301 and 306 appear to conflict with Section 404's specific exception permitting discharges of fill material as long as they comply with Section 404(b)(1) guidelines, Section 404 ought to control. *See HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) ("[I]t is a basic principle of statutory construction that a specific statute . . . controls over a general provision . . ., particularly when the two are interrelated and closely positioned, both in fact parts of" the same statutory scheme.); *Townsend v. Little*, 109 U.S. 504, 512 (1883) (explaining the "well-settled rule" that "general and specific provisions, in apparent contradiction . . ., may subsist together, the specific qualifying and supplying exceptions to the general").

4. The Ninth Circuit's flawed construction of the Clean Water Act is a direct result of its cart-before-the-horse approach to statutory interpretation: The Ninth Circuit started with the proposition that the two regulations potentially implicated by the discharge—that is, the froth-flotation effluent limitation and the regulation defining "fill material"—conflicted intractably, and then interpreted the *Act* in light of those *regulations*. *See, e.g.*, App., *infra*, 9a–10a ("Two different regulations contain plain language interpreting the Clean Water Act that would appear to govern . . ., but they result in different interpreta-

tions of the Act."). Under this approach, the existence of an EPA *regulation* setting out effluent limitations on rock, sand, and dirt (quintessential examples of fill material) could nullify a *statutory provision* (Section 404) and could negate Congress's clear intent to create a Corps-administered program for permitting discharges of fill material. As the Clean Water Act itself makes clear, however, one must first determine which permitting scheme applies before one can know whether effluent limitations would apply to the discharge. And, according to the two agencies charged with administering the Act, the line of demarcation between the two permit programs is the definition of "fill material," which is supplied by a joint EPA-Corps regulation not challenged in this litigation.

III. THE NINTH CIRCUIT'S REFUSAL TO DEFER TO CORPS' INTERPRETATION OF ITS OWN REGULATION CONFLICTS WITH THIS COURT'S PRECEDENTS

As an alternative holding, the Ninth Circuit posited that the Corps (and EPA) unreasonably interpreted the joint EPA-Corps fill rule—which provides that a "discharge of fill material" "includes . . . placement of . . . slurry, or tailings or similar mining-related materials." 33 C.F.R. § 323.2(f)—to include Coeur's proposed mine tailings. *See* App., *infra*, 19a–31a. The Ninth Circuit refused to defer to the Corps' interpretation of its regulation defining fill material, concluding that statements in the "regulatory history"—not the regulation itself—were "dispositive and compel the conclusion that the Corps overstepped its authority in issuing a permit to Coeur Alaska under § 404." *Id.* 31a. *But see* Final Revisions to Regulatory Definitions, 67 Fed. Reg. at 31,135 ("mining-related material that has the effect

of fill when discharged will be regulated as 'fill material'"); *see also id.* ("EPA has never sought to regulate fill material under effluent guidelines"). The Ninth Circuit's approach cannot be reconciled with this Court's decisions.

1. It is axiomatic that a court must defer to an agency's construction of its own regulation unless that interpretation is "'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997). The joint EPA-Corps regulation defining "discharge of fill material" explicitly states that the term "includes, without limitation, . . . placement of overburden, slurry, or tailings or similar mining-related materials." 33 C.F.R. § 323.2(f); 40 C.F.R. § 232.2.

It is, of course, difficult to envision how an agency's interpretation can "facially meet[]" a regulation, App., *infra*, 10a, yet nevertheless be "'inconsistent with the regulation.'" *Auer*, 519 U.S. at 461. The Ninth Circuit's position seems to be that, even where agency's interpretation is consistent with the *text* of its regulation, that interpretation may nevertheless be rejected as unreasonable if an examination of regulatory *history* demonstrates that the text does not accurately reflect the agency's regulatory intent. *See* App., *infra*, 19a–20a. That is clearly wrong. In *United States v. Locke*, 471 U.S. 84 (1985), this Court explained that where statutory language "is plain and the agency's construction completely consistent with that language, the agency's construction simply cannot be found 'sufficiently unreasonable' as to be unacceptable." *Id.* at 96. If courts may not find an agency's interpretation of a *statute* unreasonable when the interpretation is consistent with the statute's text, it is even more apparent that

they may not, under an even more deferential test, find an agency's interpretation of its own *regulation* unreasonable when that interpretation is completely consistent with the regulation's plain text.

The court of appeals' refusal to defer to the agencies' interpretation of their own joint regulation wrested from the agencies the authority Congress delegated to them to determine where to draw the line separating discharges of fill material from discharges of all other pollutants. This contravenes this Court's guidance that Congress expects agencies to make "substantive choices" when it "leaves the intersection of competing objectives . . . imprecisely marked." *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 85 (2002); *see also Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2534 (2007) (agency interpretations that resolve "fundamental ambiguit[ies]" resulting from "differing mandates" in statutory texts by developing a "'reasonable interpretation' of the statutory scheme" are "entitled to deference").

As the Fourth Circuit has explained, Sections 402 and 404 "might overlap on certain types of 'fill material' that adversely affect the quality of water," but any such overlap can be resolved by regulations defining "fill material." *Kentuckians*, 317 F.3d at 447–48. In other words, the Fourth Circuit recognized that a regulation defining "fill material" does not *conflict* with a regulation establishing an effluent limitation, as the Ninth Circuit would have it. Quite the opposite, it *resolves* any "overlap" between Sections 404 and 402 by determining the appropriate permitting regime for a particular discharge. Thus, the plain language in the 2002 regulation—which defined "discharge of fill material" to include "slurry,

or tailings or similar mining-related materials," 40 C.F.R. § 232.2—is entirely consistent with the agencies' settled understanding that tailings, including tailings left over after time-honored practices such as the froth-flotation process regulated under an effluent limitation since 1982, are governed by Section 404, not Section 402.

There is no reason to think the Ninth Circuit is better equipped than Congress, EPA, or the Corps—let alone all three—to decide how to balance interests in protecting the environment against interests in "reasonable development," "infrastructure development," and "growth of the economy." U.S. Army Corps of Eng'rs, Regulatory Program Mission Statement, http://www.usace.army.mil/cw/cecwo/reg/ mission.htm (last visited Jan. 7, 2008).

2. As the Ninth Circuit acknowledged, SEACC did not challenge the validity of the joint EPA-Corps regulation defining "fill material." App., *infra*, 25a–26a n.12. Accordingly, the court of appeals stated that it did "not reach the issue of the validity of these regulations." *Id.* In addition to this disclaimer, the Ninth Circuit affirmatively recognized that "[t]he Clean Water Act does not define the term 'fill material'" and that, instead, "Congress implicitly left that term to the Corps and EPA to define." *Id.* 22a; *see also Kentuckians*, 317 F.3d at 444 ("[W]e conclude that Congress has not clearly spoken on the meaning of 'fill material[.]'"). This admission demonstrates that the Ninth Circuit had no authority under *Chevron* step one to invalidate the regulation. Under step one of *Chevron*, a court may strike down an agency interpretation of a statute only when "'Congress has spoken directly to the precise question at issue'" and the agency interpretation defies "'the unambiguously

expressed intent of Congress.'" App., *infra*, 11a (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

Under these circumstances (where SEACC had not raised the issue and where the Ninth Circuit acknowledged that Congress did not unambiguously express its intent, but rather "left that term to the Corps and EPA to define," App., *infra*, 22a), the Ninth Circuit, by its own admission, had no authority to invalidate the agencies' reasonable joint interpretation of ambiguous statutory language. Thus, the decision's references to the Act's "plain" and "unambiguous" language, *see* App., *infra*, 10a, 15a, 19a, 35a, can only be understood either as relating to statutory language other than "discharge of fill material" or as a backdoor attempt to challenge the validity of the joint regulation itself—a regulation SEACC has not challenged and would have had no basis to challenge under *Chevron*.

CONCLUSION

Further percolation in the courts of appeals is unnecessary—the issue raised by this petition is already crystallized. Moreover, additional decisions by other courts of appeals are unlikely to lead the Ninth Circuit to change its view, given that it has already denied rehearing en banc. In light of the exceptional national importance of this case and for all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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