No. 07-990

IN THE

Supreme Court of the United States

STATE OF ALASKA,

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

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Respondent SEACC fails to recognize what the federal agencies admit: the decision below invalidates the longstanding regulatory scheme implemented by EPA and the Corps to divide their responsibilities under CWA Sections 402 and 404. SEACC does not squarely address this fundamental point. Instead, it incorrectly asserts that EPA has previously considered its effluent guidelines to be applicable to discharges of fill material. But the relevant federal agencies disagree, and it is the agencies' views, not SEACC's, that warrant judicial deference. Those agencies have clearly stated, first in regulations and now to this Court, that "'EPA has *never* sought to regulate fill material under effluent

guidelines.'" U.S. Resp. 11 (quoting 67 Fed. Reg. 31,135 (2002)) (emphasis added). The Ninth Circuit's erroneous nullification of this decades-old division of regulatory responsibilities is an important issue that warrants this Court's review.

SEACC wrongly contends that this issue is unlikely to recur. SEACC loses the forest for the trees by focusing on the specific circumstances of this single project. The question presented is which agency—the Corps or EPA—decides whether to permit discharges of "fill material," and under which regulations. On *that* issue, the Ninth Circuit is in direct conflict with decisions of other circuits, statements by this Court, and the reasoned judgment of the federal agencies. But even if one just focuses on the facts of this permit, SEACC's own brief recognizes that mines have a continual need to dispose of tailings in areas subject to CWA jurisdiction. And the Ninth Circuit's decision eliminates the disposal method that the agencies and the State consider as the most environmentally sound.

The federal Government agrees with petitioners that the Ninth Circuit erred at every turn, but is concerned about whether this concededly important issue is "sufficiently important" to warrant review "at this time." U.S. Resp. 6. It is. The Ninth Circuit's decision forces EPA and the Corps to apply a jurisdictional regime that the agencies have concluded is wrong. It also splits the country so that the states providing 31% of the nation's mining revenue, *see* Coeur Pet. 20, will labor under the Ninth Circuit's regulatory program while the rest of the country will enjoy the proper one.

Even if the Solicitor General is willing, for the time being, to tolerate this state of affairs without this Court's intervention, the State of Alaska cannot. If review is denied now, the State—which has an independent regulatory interest—will be stuck with the Ninth Circuit's regime. This will jeopardize future mining projects in a state where the federal Government has asserted CWA jurisdiction over half the land and mining is a large part of the economy. And it will force all states in the Ninth Circuit to forego the most environmentally sound method of storing mine tailings, unnecessarily risking their ecosystems. This Court should grant review now.

I. THIS CASE PRESENTS AN ISSUE OF NATIONAL IMPORTANCE.

The federal Government agrees that the question presented is "important," U.S. Resp. 6, and that the Ninth Circuit has erroneously invalidated EPA's and the Corps' longstanding and carefully crafted scheme for dealing with the interplay between sections 402 and 404. For its part, SEACC attempts to minimize that importance by mischaracterizing the agencies' historical approach to their general regulatory division of labor and to the specific issue of mine tailings disposal.

1. SEACC wrongly claims that the decision below only "reinforces" the agencies' previous scheme. SEACC Resp. 15. Ever since the CWA was enacted, both EPA and the Corps have agreed that it mandates that discharges of "fill material," without exception, are regulated exclusively by the Corps under Section 404, subject to the Corps' guidelines and EPA's statutory veto right. And for over a quarter-century, the agencies promulgated rules based on that mandate to develop a regulatory

scheme in which Sections 402 and 404 coexist without conflict. *See* Pet. 6-10.

Against the clear history embodied in the agencies' regulations and their contemporary explanations of their actions, SEACC insists that EPA and the Corps have "observed for decades" that "[t]he Corps may not issue permits for discharges subject to EPA effluent limitations." SEACC Resp. 15. As the federal agencies have explained, that is wrong.

EPA and the Corps have always maintained strict division between fill material and discharges subject to Section 402. The agencies published this division in 1986 and confirmed its continuing validity in 2002, when they reaffirmed that "EPA has never sought to regulate fill material under effluent guidelines." 67 Fed. Reg. 31,135 (2002). As the federal Government has now reiterated to this Court, given the specificity of Section 404's language and "the general differences in the types of pollution addressed by the two permitting regimes, it would make little sense to treat Section 402 as displacing Section 404 when EPA has issued a performance standard." U.S. Resp. 8. The Ninth Circuit's decision has now erased this clear dividing line that the agencies so carefully drew for themselves.

The importance of this case, both nationally and to the State, lies primarily in this upsetting of the agencies' regulatory division of labor, rather than the application of that jurisdictional division in any specific case. It is undisputed that the mine tailings at issue here "facially meet[] the Corps' current regulatory definition of 'fill material.'" Pet. App. 9a. Thus, under the agencies' longstanding division of responsibilities, any CWA permit for disposal of that fill material is governed by the Corps under its

Section 404 Guidelines rather than EPA under its separate regulations. Yet the Ninth Circuit has now held that Section 402 carves out some fill material from Section 404, requiring a permit from EPA rather than the Corps.

This decision creates a sea change in the states comprising the Ninth Circuit that will split them off from the rest of the country. For more than two decades, the agencies clearly told prospective permittees which agency they needed to approach for a permit to discharge materials into U.S. waters. 51 Fed. Reg. 8,871 (1986). If a discharge met the criteria for "fill material," they were to apply to the Corps for a Section 404 permit. *Id*. at 8,872. This regulatory scheme rested on the agencies' longstanding agreement that any discharge meeting the definition of fill material must be regulated under Section 404, not Section 402. *See* 40 C.F.R. § 122.3(b) (discharges of dredged and fill material do not require permits under Section 402).

Now, as a result of the decision below, mining companies, other businesses, and state governments in the Ninth Circuit will face a different permitting regime than applies in the rest of the country, and they will be unable to obtain or issue permits that may be issued elsewhere. Neither SEACC nor the federal respondents dispute that the decision has disrupted the legal certainty necessary for the long-term planning on which the mining industry relies. And they also recognize that its effect could extend beyond the mining industry. As the federal Government concedes, the decision could affect any enterprise "in which EPA had arguably promulgated a relevant effluent limitation or new source performance standard." U.S. Resp. 12. And as SEACC

notes, enforcing the agencies' understanding that fill material is not subject to EPA effluent limitations would affect not only froth-flotation mining but permitting for "many other industrial and municipal discharges that contain solids." SEACC Resp. 26.

2. But even accepting SEACC's unduly narrow focus on the specific issue of mine tailings used as fill material, the central premise of its opposition is incorrect. SEACC rests most of its argument on its assertion that this case is a one-time-only event. According to SEACC, before 2005 "the Corps never issued a single permit to discharge process wastewater from a froth-flotation mill * * * into navigable waters." SEACC Resp. 2. Assuming, *arguendo*, that mine tailings qualify as process wastewater, the record belies that assertion. As far back as *1985*, the Corps issued a Section 404 fill permit for the Red Dog Mine in Alaska allowing it to "place * * * mine tailings in the south fork of Red Dog Creek and adjacent wetlands." SER 979.[1]

SEACC also argues, perversely, that review should be denied because the ruling it assiduously sought and obtained from the Ninth Circuit can be avoided. According to SEACC, that ruling will not prevent beneficial mining because Coeur allegedly can store its tailings on uplands created by filling wetlands, and because some prior permits have viewed tailings ponds as artificial facilities not subject to the CWA. *See* SEACC Resp. 7-8. But this only shows the recurring nature of the issue: mines are in continual need of environmentally sound ways to dispose of

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[1] Red Dog is a froth flotation mine. *See* EPA Fact Sheet 6 (http://yosemite.epa.gov/r10/water.nsf/NPDES+Permits/CurrentAK822/$FILE/AK-003865-2%20FS.pdf).

tailings in areas subject to the CWA. In the view of both the State and the federal agencies, using the tailings as fill in a secure lake impoundment is the environmentally preferable option. Storing the tailings on converted wetlands would eliminate far *more* aquatic habitat. *See* Pet. 12. Whereas the impoundment would eliminate five acres (while enlarging the lake), "[a]ll variants of the Dry Tailings Facility would result in the permanent loss of 34 to 113 acres of aquatic habitat." SER 868. And viewing tailings ponds as entirely outside the CWA would eliminate critical regulatory oversight over tailings discharges, which SEACC cannot truly want.

Because the secure lake impoundment is environmentally preferable to upland storage, and because final approval of the upland alternative is uncertain at best, SEACC is incorrect to assert that Coeur's ongoing exploration of that second-best option moots this case. But in addition, the State has an independent regulatory interest that transcends Coeur's business interest, both because of the State's current statewide CWA oversight and because it expects to inherit EPA's Section 402 authority. *See* Pet. 33-34. Again belying SEACC's assertions that this is a non-recurring issue, the State is aware of at least two other large-scale mining projects in Alaska which are now in the pre-permitting phase, and which may ultimately face CWA tailings disposal issues similar to those facing the Kensington project.[2] If review is denied, the State will be unable to allow disposal methods it views as environmentally preferable, and will be unable to permit any tailings disposal on the more

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[2] These are the Pebble and Donlin Creek projects, both in Southwestern Alaska.

than half of Alaska over which the federal Government asserts CWA jurisdiction.

The federal Government agrees that the case is important and that the Ninth Circuit's decision will have a "significant impact on a number of mines." U.S. Resp. 12. But the Solicitor General nevertheless believes it is still "unclear how important the court's decision will prove to be." *Id*. Alaska, however, is firmly stuck in the Ninth Circuit, and the importance of this case is all too clear to the State. The Ninth's Circuit's erasure of the clear jurisdictional line between the Corps and EPA is critically important to businesses that must comply with the CWA and states that must assist in administering it. In a state that is more than half water or wetlands, with an economy where mining is the largest growth sector, an erroneous decision that will control—and hinder—almost every mining project is of overriding importance.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

SEACC spends much of its opposition defending the Ninth Circuit's decision on the merits. The petitions, as well as the federal Government's response, refute those arguments, which should be decided only after plenary briefing. In short, SEACC's merits arguments depend on the false assumption that EPA effluent guidelines are "applicable" to discharges of fill material. *See*, *e.g.*, SEACC Resp. 18, 20. The plain language of the CWA, which excepts Section 404 from the Section 402 permitting scheme, as well as the implementing agencies' reasonable interpretation of any ambiguity, show that they are not. Section 404 and Section 402

are separate permitting regimes subject to separate regulations administered by different agencies, and all "fill material"—which concededly includes the material at issue here—is subject to the Corps' Section 404 authority and guidelines rather than EPA's Section 402 authority and guidelines.

Like its attempt to downplay the importance of the case, SEACC's assertion that the Ninth Circuit's decision poses no conflict with decisions of other circuits or this Court has an unduly narrow focus. The fundamental question is whether discharges of fill material are within the exclusive permitting jurisdiction of the Corps under Section 404 (subject to EPA's statutory veto) or whether, as the Ninth Circuit has held, that jurisdiction is not really exclusive. On *that* question, the Ninth Circuit's decision starkly conflicts with the pronouncements of a majority of this Court, *see Rapanos* v. *United States*, 547 U.S. 715, 744-45 (2006); *id*. at 760 (Kennedy, J., concurring), and decisions of other circuits, *see*, *e.g.*, *Greenfield Mills, Inc.* v. *Macklin*, 361 F.3d 934, 946 n.14 (7th Cir. 2004) (noting that discharges of fill material are regulated under CWA Section 404); *Kentuckians for the Commonwealth, Inc.* v. *Rivenburgh*, 317 F.3d 425, 445 (4th Cir. 2003) (deferring to the "longstanding and consistent division of authority between the Corps and the EPA with regard to the issuance of permits under CWA Section 402 and CWA Section 404").

SEACC's assertion that the Fourth Circuit's decision in *Kentuckians* "actually supports" the decision below, SEACC Resp. 13, defies reality. When the Fourth Circuit noted that discharges of "waste" were subject to EPA's Section 402 authority rather than the Corps' Section 404 authority, it was

referring to the then-extant regulatory definition of "fill material," which expressly excluded "waste." 317 F.3d at 447. It is undisputed that mine tailings *are* fill material under the current definition. *See* 33 C.F.R. § 323.2(e). The Fourth Circuit noted that the regulatory authority of EPA and the Corps "might overlap," but upheld the Corps' regulation because it "reasonably addresse[d] this potential ambiguity." 317 F.3d at 448. By contrast, the Ninth Circuit substituted its own judgment for that of the expert agencies charged with implementing the CWA.

This flawed reasoning also places the Ninth Circuit in opposition to this Court's decision in *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S.Ct. 2518 (2007) ("NAHB"), which held that courts must defer to agencies' resolution of their potentially overlapping regulatory jurisdiction. SEACC incorrectly contends that this conflict can be dismissed merely because Section 404 provides that the Corps "may" issue permits for fill material. The *only* statutory limitations on the Corps' authority are compliance with the Corps' own Section 404(b) guidelines and EPA's veto power under Section 404(c). Thus, the Ninth's Circuit's holding that the Corps may *not* issue a permit for a discharge of fill material that meets its guidelines and that was not vetoed by EPA nullifies the Corps' Section 404 authority. EPA and the Corps have been granted authority over permit programs that the Ninth Circuit ruled have overlapping areas of concern. Even if the court were correct about this, under *NAHB* it should have deferred to the agencies' reasonable resolution of the perceived statutory conflict.

The case SEACC relies on for its argument that Section 404 must have unwritten limitations, *Halverson* v. *Slater*, 129 F.3d 180 (D.C. Cir. 1997), does not support its claim. When quoting *Halverson*, SEACC leaves off the operative portion of the quote. SEACC Resp. 18. "To say that 'may' is permissive does not lead to the conclusion that it permits everything, *irrespective of other unambiguous words of limitation included in the sentence in which the term is used*." *Halverson* 129 F.3d at 187-88 (emphasis added and omitted). Here, there are no words of limitation within Section 404's grant of authority to the Corps that would exclude discharges subject to EPA jurisdiction. By contrast, Section 402 *does* expressly exclude fill material from EPA's jurisdiction. *See* 33 U.S.C. § 1342 ("Except as provided in section[] * * * 1344, the Administrator may * * * issue a permit for the discharge of any pollutant"). Thus, *Halverson* supports rather than undermines the agencies' reading of the statute and further demonstrates the Ninth Circuit's error.

The discussion in this Court's *Rapanos* decision recognizes why the agencies' longstanding statutory interpretation makes regulatory sense. SEACC notes that the parties there disputed "whether the discharge of fill material into wetlands would eventually wash downstream to a navigable water body." SEACC Resp. 14. In resolving that issue, the *Rapanos* plurality reached the "unremarkable conclusion that the deposit of *mobile* pollutants into upstream ephemeral channels is naturally described as an 'addition . . . to navigable waters,' while the deposit of *stationary* fill material generally is not." 547 U.S. at 744 n.11. This statement recognizes what EPA and the Corps knew and implemented years before—that the reasonable dividing line be-

tween fill material subject to Section 404 and pollutants subject to Section 402 is based on their different effects on U.S. waters.

Finally, SEACC offers no credible defense of the Ninth Circuit's invalidation of the agencies' interpretation of their *own* regulations. The petitions and the federal Government's response refute any argument that the agencies have ever viewed fill material as regulable under EPA effluent guidelines. *See supra* at 4. Indeed, the agencies stated clearly in 2002 that EPA had "never" sought to do so. 67 Fed. Reg. at 31,135. Thus, when the agencies stated that the 2002 rule was not intended to change prior determinations, that did not mean, as SEACC suggests, SEACC Resp. 29, that they intended for effluent guidelines to suddenly begin applying to fill material. To the contrary, the statement meant that fill material would remain regulable under Section 404, and that nothing would change earlier determinations as to which discharges qualified as such. *See* Gov't Resp. 11. At the very least, the regulatory statements are ambiguous and the Ninth Circuit erred by not deferring to the agencies' reasonable explanation of them. *See* Pet. 26-28.

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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