Nos. 07-984, 07-990

IN THE

Supreme Court of the United States

COEUR ALASKA, INC.,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,

Respondents.

STATE OF ALASKA

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS SOUTHEAST ALASKA CONSERVATION COUNCIL, SIERRA CLUB, AND LYNN CANAL CONSERVATION

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QUESTION PRESENTED

Does the Army Corps of Engineers have authority under section 404 of the Clean Water Act to grant a "fill material" permit for an industrial process wastewater discharge from a newly constructed ore beneficiation mill, when the discharge is prohibited by a new source performance standard adopted by the Environmental Protection Agency under section 306 of the Act?

PARTIES TO THE PROCEEDINGS

Respondents Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation concur in the State of Alaska's statement of the Parties to the Proceedings.

RULE 29.6 STATEMENT

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

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MISCELLANEOUS

STATUTES AND REGULATIONS INVOLVED

Relevant portions of the statutes and regulations involved in this case, including Clean Water Act sections 301, 304, 306, 307, 309, 402, 404, and 502 (33 U.S.C. §§ 1311, 1314, 1316, 1317, 1319, 1342, 1344, 1362), 33 C.F.R. § 323.2, and 40 C.F.R. §§ 122.2, 122.3, 230.10, 401.11, 440.100, 440.104, and 440.132, are reproduced in the appendix to this brief.

INTRODUCTION

The Clean Water Act identifies by name just four "conventional pollutants" that the Environmental Protection Agency (EPA) must regulate, two of which are suspended solids and pH. 33 U.S.C. § 1314(a)(4). One of the most common technologies for removing suspended solids is the settling pond, an artificial structure that allows solids to settle out before any wastewater is discharged into navigable waters. In adopting effluent limitations, the Act's principal regulatory mechanism for controlling pollution, EPA has identified settling ponds as the best technology for many industries to reduce or eliminate suspended solids.

At issue here is whether a new source of pollution may escape strict EPA performance standards by using a navigable lake as its settling pond. The type of source here—a newly constructed mill for processing gold ores—has been subject to EPA effluent limitations since 1975 and to a new source performance standard prohibiting any wastewater discharges since 1982. In an unprecedented decision, the Army Corps of Engineers granted a permit to discharge the

mill's process wastewater directly into a lake as "fill material," bypassing EPA's no-discharge standard. The Corps acknowledged that the mill would use the lake as a "settling pond" to remove suspended solids and dilute elevated pH. J.A. 360a.

While this approach is undeniably cheaper for the mill owner, it defeats the purpose of the Clean Water Act and EPA's effluent limitations, which is to reduce or eliminate pollutants *before* they are discharged to navigable waters. More to the point, it violates both the plain language of the Act and the stated intent of the agencies when they adopted the relevant regulations. Upholding this approach would vitiate the effluent limitations not only for ore mills, but for the many other industrial sources whose process wastewater contains significant quantities of suspended solids.

STATEMENT

1. Beneficiation mills process ores to make them suitable for refining or smelting. *See* 40 C.F.R. § 440.132(f). In the "froth-flotation" process, a mill grinds large quantities of ore into fine particles and introduces water, air, and chemicals in large tanks. The mill at the Kensington Mine, for example, will use potassium amyl xanthate (a conditioner), MIBC (a frother), flocculants, polymers, surfactants, scale inhibitors, and lime. This process creates a gold-bearing froth that floats to the top and is removed for further processing off-site. *See* J.A. 189a-91a; 47 Fed. Reg. 25,682, 25,684 (June 14, 1982).

Left in the tanks is process wastewater, a slurry consisting of water, chemicals, metals, and sus-

pended solids (or "tailings").[1] According to EPA, process wastewater from froth-flotation mills "is characterized by very high suspended solids levels (often in the percent range rather than milligrams per liter), high metals levels, and process reagents such as cyanide." 47 Fed. Reg. at 25,685. Metals dissolved in the wastewater are reduced by raising the pH, typically with lime, causing the metals to precipitate. *Id.* at 25,691, 25,692. The resulting elevated pH levels can be toxic to aquatic life. *See* J.A. 206a.

The process wastewater from the froth-flotation mill at the Kensington Mine will be 70% water and 30% solids by volume. *See* J.A. 304a (total slurry

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[1] "Tailings" is an imprecise term, undefined in the statutes and regulations at issue. Petitioners and the Corps most often use it to refer to the solid component of the process wastewater. *See*, *e.g.*, Fed. Br. at 6; Coeur Br. at 6; State Br. at 12. However, record documents sometimes use it to refer to the entire wastewater slurry. *See*, *e.g.*, J.A. 192a (describing tailings as material remaining in flotation tanks after processing and transported as slurry), 206a (measuring tailings in gallons per minute), 263a (requiring monitoring of dissolved solids in tailings).

EPA's regulations define "process wastewater" to include any water that comes into contact with, or results from the production of, any waste product. 40 C.F.R. § 401.11(q). It includes "pollutants," such as "solid waste," *id.* § 401.11(f), "present in process waste water." *Id.* § 401.11(r). EPA uses the term to describe discharges with high levels of suspended solids, *see* 47 Fed. Reg. at 25,685, "including mine tailings." J.A. 291a.

There is no dispute that the discharge in this case is process wastewater. The section 404 permit at issue authorizes discharge of the entire wastewater slurry, not just the solids. *See* J.A. 275a (¶ 10), 304a, 360a-61a.

throughput will be 354 gallons per minute, of which 247 will be water). By weight, it will be about 45% water and 55% solids. *Id.* It will be sufficiently liquid to flow at a rate of 354 gallons per minute, by gravity, for 3.5 miles through a 6-inch pipe without clogging. *See id.*; J.A. 194a. At this rate, the discharge would be about 510,000 gallons per day.[2]

If discharged into a lake, river, stream, or wetland, the process wastewater of the Kensington mill would, like that of other such mills, cause substantial pollution. The wastewater will have a pH of about 10, which would be toxic to aquatic life and expected to dilute in the lake. J.A. 206a, 360a. It will contain "trace concentrations of metals bearing sulfides, metal oxides, metal sulfates, and carbonate salts." J.A. 343a. Tests of decant water (wastewater samples after the solids have settled) revealed varying traces of 18 metals, including aluminum, chromium, copper, lead, and mercury. ER 334.[3]

The discharge would kill all fish in Lower Slate Lake and most other aquatic life. J.A. 197a, 374a. Whether aquatic life would be able to repopulate the lake after discharges ceased is uncertain. Two tests of the toxic effects of settled solids from the process wastewater on freshwater organisms showed clear

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[2] An appendix to the Environmental Impact Statement assumed that the volume would be about 148 gallons per minute, or 210,000 gallons per day. J.A. 206a. The record does not explain this discrepancy, but in any event there will be a substantial volume of process wastewater containing a high level of suspended solids.

[3] ER stands for the Excerpts of Record in the Ninth Circuit. SER stands for the Supplemental Excerpts of Record.

harm to biological productivity. In one test, only 5% of tested organisms survived in the "tailings sediments," far below the EPA's minimum allowable rate of 80%. J.A. 201a. In the other, organisms survived but showed "a statistically significant reduced emergence rate," below EPA's recommended endpoint. *Id.* The agencies saw "some uncertainty" in these results, but found that a reasonable worst-case assumption was that "the tailings would not support macroinvertebrates after closure...." J.A. 202a. To mitigate these toxic effects, the owner would be required to cap the lake bottom with four inches of native material when discharges cease. J.A. 309a. The administrative record contains no studies demonstrating the efficacy of this requirement. EPA, noting the uncertainty, concluded that "the weight of the evidence suggests that restoring and 'improving' the lake would take decades, not years." ER 429.

2. In the Clean Water Act, Congress established a "national goal that the discharge of pollutants into the navigable waters be eliminated by 1985...." 33 U.S.C. § 1251(a)(1).[4] Though the goal was not achieved, the measures enacted to pursue it remain in place.

To achieve this goal, Congress mandated the use of different technologies and standards for different sources of pollution. Section 301(b) requires EPA to adopt technology-based effluent limitations for existing pollution sources, to become increasingly strin-

[4] "Navigable waters" is defined as "waters of the United States," 33 U.S.C. § 1362(7), and this brief uses the terms interchangeably.

gent over time. *See id.* § 1311(b); *Chem. Mfrs. Ass'n v. Natural Res. Def. Council*, 470 U.S. 116, 118 (1985); *E.I. du Pont de Nemours & Co. v. Train,* 430 U.S. 112, 121 (1977). Section 306 requires the agency to adopt even more stringent effluent limitations—called standards of performance[5]—for new sources. 33 U.S.C. § 1316. Section 307 requires special effluent limitations for toxic pollutants. *Id.* § 1317(a). Section 304 requires EPA to publish "effluent limitation guidelines" providing information about technologies available to reduce and eliminate pollution from different sources and to comply with effluent limitations and performance standards. *Id.* § 1314(b)-(c).

The strictest standards are for new sources under section 306, because those sources present the best opportunity to achieve the Congressional goal of eliminating discharges. These national performance standards must reflect "the greatest degree of effluent reduction which [EPA] determines to be achievable through application of the best available demonstrated control technology…." *Id.* § 1316(a)(1). The Act directs EPA to adopt, "where practicable, a standard permitting no discharge of pollutants." *Id.* With these standards, Congress "intended to insure national uniformity and 'maximum feasible control of new sources.'" *Du Pont,* 430 U.S. at 138 (quoting S. Rep. No. 92-414, at 58 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3724). The Senate Report cited in *Du Pont* states that "this section … is among the

[5] The Act's definition of "effluent limitation" includes a standard of performance. *See* 33 U.S.C. §§ 1316(a)(1), 1362(11).

most significant in the legislation." S. Rep. No. 92-414, at 57, 1972 U.S.C.C.A.N. at 3723-24. The focus on new construction "is considered by the Committee to be the most effective and, in the long run, the least expensive approach to pollution control." *Id.* at 58, 1972 U.S.C.C.A.N. at 3724.

The Act's reliance on technology means that there are no limitations generally applicable to all pollution sources. Rather, limitations are different for each source category, depending on what control technologies are available and feasible. *See generally Du Pont*, 430 U.S. at 126-30.

The Act requires all sources to comply with any applicable effluent limitations under sections 301, 306, and 307. 33 U.S.C. §§ 1311(a), (b), (e), 1316(e), 1317(d). Section 402 of the Act directs EPA to establish the "National Pollutant Discharge Elimination System" (NPDES), requiring individual sources to obtain permits conditioned on compliance with these limitations. *Id.* § 1342. Section 404 authorizes the Army Corps of Engineers to issue permits for the discharge of one type of pollutant, dredged or fill material, subject to guidelines developed in conjunction with EPA. *Id.* § 1344. If a discharge is authorized by a valid fill-material permit under section 404, a section 402 permit is not required. *Id.* § 1342(a)(1) ("Except as provided in sections [318] and [404]…").

3. Recognizing the severe adverse effects of process wastewater discharges from ore beneficiating mills, EPA in 1975 identified "ore mining and dressing" as a category of sources of pollution under the Clean Water Act. 40 Fed. Reg. 51,748 (Nov. 6, 1975). Simultaneously, the agency adopted rules describing waste characteristics of various ore-processing mills,

identifying best technologies to control discharges, and setting limits for total suspended solids, pH, and various metals in discharges from existing sources. *See* 40 Fed. Reg. 51,722 (Nov. 6, 1975). Included were limitations for mills using the froth-flotation process for gold ores. *Id.* at 51,732 (adopting 40 C.F.R. § 440.22(a)(2)).

In 1982, EPA adopted a strict no-discharge standard, which remains in effect today, for new froth-flotation mills: "there shall be no discharge of process wastewater to navigable waters from mills that use the froth-flotation process … for the beneficiation of … gold … ores…." 40 C.F.R. § 440.104(b)(1); *see* 47 Fed. Reg. 54,598, 54,619 (Dec. 3, 1982). EPA explained the no-discharge standard for new facilities as follows:

> New facilities have the opportunity to implement the best and most efficient ore mining and milling processes and wastewater technologies. Accordingly, Congress directed EPA to consider the best demonstrated process changes and end-of-pipe treatment technologies capable of reducing pollution to the maximum extent feasible through a standard of performance which includes, "where practicable, a standard permitting no discharge of pollutants."

47 Fed. Reg. at 25,696 (quoting 33 U.S.C. § 1316(a)(1)). The agency noted that while some existing sources would require expensive retrofitting to achieve zero discharge, "[t]his concern does not apply to new sources," which can be designed to meet the standard. *Id.* at 25,697.

In both the 1975 and 1982 rules, EPA identified essentially the same best control technology: removal of solids in large settling ponds, usually called tailings ponds or impoundments, preceded by lime-precipitation. *See* 40 Fed. Reg. at 51,724 (subpart B(2)); 47 Fed. Reg. at 25,691. For new sources, the agency found that it was possible to achieve zero discharge by recycling water from tailings ponds back to the mill: "Raw wastewater discharged from a typical ore mill is usually routed to a settling pond for suspended solids and metals removal. In complete recycle, all treated water is routed back to the mill for reuse in the beneficiating process." 47 Fed. Reg. at 25,692.

EPA found that 46 out of 90 existing facilities were already achieving zero discharge through complete recycling. 47 Fed. Reg. at 54,602. The agency rejected arguments that zero discharge would be too expensive in wet or mountainous areas (like Alaska), finding that it had been successfully achieved in both. *Id.*

Addressing permitting requirements, EPA explained that the effluent limitations and performance standards "will be applied to individual ore mines and mills through NPDES permits issued by EPA … under Section 402 of the Act." *Id.* at 54,606 (emphasis added). Notwithstanding the high solid content of process wastewater from these mills, *see* 47 Fed. Reg. at 25,685, EPA nowhere suggested that the Corps could permit these discharges as "fill material." Nor did EPA suggest that a mill could use a navigable lake as its settling pond, which would have directly contradicted the plain language of the rule prohibiting discharges to navigable waters.

4. Throughout most of the history of the Clean Water Act, the Corps' regulations explicitly precluded the use of a "fill material" permit to discharge process wastewater. From 1977 until 2002, the Corps' regulatory definition of "fill material" excluded "any pollutant discharged into the water primarily to dispose of waste, *as that activity is regulated under Section 402 of the Clean Water Act*." J.A. 27a (quoting former 33 C.F.R. § 323.2(e); emphasis added by agencies); *see* 42 Fed. Reg. 37,122, 37,145 (July 19, 1977). EPA had a much broader definition of "fill material," encompassing discharges with the "effect" of fill, *see* J.A. 27a, but EPA does not issue section 404 permits.

To resolve confusion created by their different definitions of "fill material," the two agencies entered into a Memorandum of Agreement (MOA) in 1986. *See* 51 Fed. Reg. 8,871 (March 14, 1986). The MOA confirmed that "a pollutant … will normally be considered by EPA and the Corps to be subject to section 402 if it is a discharge in liquid, semi-liquid, or suspended form," like the wastewater discharge from the Kensington mill. *Id.* at 8,872 ¶ B.5. The MOA cited "titanium mining wastes" as one example of such a discharge. *Id.* EPA had adopted performance standards for titanium mining wastes, including those from mills using flotation methods, in the same rulemaking that established the gold ore beneficiating rule in this case. *See* 47 Fed. Reg. at 54,614-15 (adopting 40 C.F.R. §§ 440.52(b) and 440.54(b)). Wastewater discharges from titanium mills, like those from gold mills, are high in suspended solids and metals, and require the use of settling ponds and pH adjustment as primary treatment technologies. *See* 47 Fed. Reg. at 25,687.

Under the MOA and the Corps' former regulations, the Corps did not grant section 404 permits for discharges subject to EPA effluent limitations. *See Kentuckians for the Commonwealth v. Rivenburgh*, 317 F.3d 425, 445, 448 (4th Cir. 2003). Rather, EPA granted section 402 permits for these discharges, even if they met EPA's effect-based definition of "fill material." J.A. 83a-84a. This longstanding practice recognized that even if a discharge could be defined as "fill material," it was not eligible for a section 404 permit if it was subject to an effluent limitation.

Acting in accordance with the performance standards and longstanding regulatory policies of the agencies, Coeur Alaska applied for and obtained permits in 1997 to open the Kensington Mine using a "dry tailings facility" on land near Comet Beach. J.A. 165a, 177a-78a; ER 232-39, 252-62. This design "is a standard industry technology in use at other mines in Alaska." ER 450; *see also* SER 837 ¶¶ 10-11 (describing other mines using dry tailings facilities). It would not have involved any discharge of process wastewater into navigable waters. ER 235 ("Wastewater from the milling process would be recycled."). These permits were never challenged in court. Nevertheless, Coeur abandoned this option and never opened the mine under these permits. J.A. 161a.

5. In 2000, the Corps and EPA jointly proposed a new definition of "fill material"—finalized in 2002—intended to harmonize the agencies' differing definitions. Following EPA's approach, the new definition includes any material that "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). In adopting the rule, the agencies

stated that it "is generally consistent with current agency practice and so it does not expand the types of discharges that will be covered under section 404." 67 Fed. Reg. 31,129, 31,133 (May 9, 2002); *see also id.* at 31,130, 31,132, 31,135; J.A. 46a, 47a-48a, 83a-84a.

The rule as proposed would have included an explicit exception for discharges subject to effluent limitations:

> The term *fill material* does not include discharges covered by proposed or final effluent limitations guidelines and standards under sections 301, 304 or section 306 of the Clean Water Act (see generally, 40 CFR part 401), or discharges covered by an NPDES permit issued under section 402 of the Clean Water Act.

65 Fed. Reg. 21,292, 21,299 (April 20, 2000). The agencies explained that this approach was consistent with the approach they had taken for many years under the 1986 MOA, and they specifically referenced paragraph B.5 of the MOA, providing that discharges "in liquid, semi-liquid, or suspended form" require section 402 permits. *Id.* at 21,297.

The agencies decided not to include the express exception in the final rule, but they stated explicitly, repeatedly, and consistently that they intended the rule to retain the same effect. They deleted the provision because of concerns that it was vague, that it inappropriately relied on "proposed" effluent limitations, and that it was unclear whether it was intended to cover future effluent limitations or only those then in effect. 67 Fed. Reg. at 31,135. The

agencies explained: "[A]lthough we have removed the language in question from the rule itself, we emphasize that today's rule generally is intended to maintain our existing approach to regulating pollutants under either section 402 or 404 of the CWA." *Id.*; *see also id.* at 31,130, 31,133. Thus, "[i]f EPA has previously determined that a discharge is covered by an [effluent limitation guideline], that determination is not altered by today's rule." J.A. 46a; *see also* J.A. 47a-48a, 83a-84a.[6] They offered the same explanation to the public in a document posted on the Corps' website: "Although the effluent guideline provision in the proposed regulatory language was removed, because commenters found it confusing, the approach that would be followed with respect to effluent guidelines would remain the same as in the proposal." *Qs and As on the "Fill" Rule* at 2, *available at* www.usace.army.mil/cw/cecwo/reg/fillqas.pdf (last visited Nov. 4, 2008).

The agencies reiterated this point with reference to the precise circumstances of this case, where mine tailings meet the new definition of fill material and are also subject to effluent limitations. Responding to a comment expressing confusion over whether "mine tailings" would be subject to section 402 or 404, the agencies first stated the general principle that "slurry" and "tailings" are considered fill material under the new definition. J.A. 47a-48a. The

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[6] The Response to Comments document, J.A. 22a-127a, was part of the agencies' explanation for the final rule, cited in the Federal Register and incorporated into the administrative record. 67 Fed. Reg. at 31,131.

agencies immediately qualified that statement as follows:

> Nevertheless, if EPA has previously determined that certain materials are subject to an [effluent limitation guideline] under specific circumstances, then that determination remains valid. Moreover, NPDES permits issued pursuant to section 402 are intended to regulate process water and provide effluent limits that are protective of receiving water quality. This distinction provides the framework for today's rule.

J.A. 48a.

The agencies reiterated this point by reference to paragraph B.5. of the 1986 MOA, which provides that mining wastewater with suspended solids is subject to section 402. "As explained in the proposed rule's preamble (65 FR 21296), many of the discharges referred to in Section B.5. of the 1986 MOA are subject to effluent guidelines and NPDES permitting, and today's rule would not alter that existing scheme." J.A. 83a-84a. The Federal Register page cited in this sentence explained that discharges subject to effluent limitations and performance standards would continue to require section 402 permits and listed titanium mining wastes—which are functionally indistinguishable from gold mining wastes—as an example. 65 Fed. Reg. at 21,296. The agencies also stated that the 1986 MOA remains in effect, even after adoption of the new rule. J.A. 87a.

Denying that they had weakened the regulation to allow impermissible waste disposal, the agencies stated that "the suggestion that this rulemaking now

provides a legal basis for previously illegal activities is not the case—no discharges that were previously prohibited are now authorized as a result of this rulemaking." J.A. 32a. Process wastewater discharges from new gold ore beneficiation mills were, of course, "previously prohibited." *Id.*; *see* 40 C.F.R. § 440.104(b)(1).

6. In 2001, while the proposed rule-change was pending, Coeur Alaska submitted its application for a revised plan of operations for the Kensington Mine, which abandoned the dry tailings facility permitted in 1997 in favor of the less expensive option of discharging wastewater directly to Lower Slate Lake. J.A. 165a, 175a, 182a-83a. As the Corps later explained in its Record of Decision, "Lower Slate Lake will be used as the settling pond and disposal site for the tailings generated from the mill." J.A. 360a.

Two years after the 2002 rule-change, EPA and the Corps decided to consider Coeur's request for a permit under section 404 rather than enforce EPA's no-discharge performance standard. Despite the clear statements published in the Federal Register by the heads of both agencies with the promulgation of the final rule that EPA effluent limitations would govern such situations, lower-ranking officials reversed course in an internal agency memo (the "Regas memo") that was never published or made available for public comment. J.A. 141a-49a. The memo purported to interpret the 2002 fill rule but disregarded the agencies' statements in adopting that rule that they intended to continue their practice of requiring section 402 permits for discharges subject to effluent limitations. J.A. 143a-45a. Ignoring those statements and section 306's prohibition of

all discharges in violation of performance standards, the memo concluded that the discharge of "tailings" from the Kensington Mine could be permitted as a discharge of "fill material" under section 404 and was exempt from otherwise applicable effluent limitations. *Id.*

In considering Coeur's permit application, the federal agencies disagreed among themselves as to which alternative was environmentally preferable. While the Corps concluded that lake disposal was the best option, J.A. 366a, EPA argued that the dry tailings alternative permitted in 1997 was preferable. J.A. 295a, 298a-300a. EPA noted that the dry tailings facility "is the only alternative that avoids the habitat loss and the loss of natural ecological functions in Lower Slate Lake during mine operations." J.A. 299a. While the Corps focused on the acreage of forested wetlands lost with the dry tailings facility, J.A. 364a-66a, EPA focused on the quality of habitat: "EPA believes that forested wetlands are far more plentiful, and of far less ecological value at this location, than lacustrine and palustrine emergent wetlands, which are rare and ecologically important at this location." ER 455; *see also* J.A. 204a ("Lower Slate Lake provides high values for fish habitat [and] high values for wildlife habitat"). The Forest Service found the alternatives equal. J.A. 224a-25a.

Importantly, both the Corps and EPA agreed that discharges to Lower Slate Lake were not exempt from Clean Water Act compliance on the ground that the lake could be deemed a "waste treatment system," which would exclude it from "waters of the United States" under the Act. *See* J.A. 145a-146a; 40 C.F.R. § 122.2 (definition of "Waters of the United

States").[7] Recognizing that the lake is a navigable water body under the Act, the Corps issued the section 404 permit on June 17, 2005. J.A. 266a-86a.

7. Respondents Southeast Alaska Conservation Council, et al., (collectively "SEACC") promptly filed this action, alleging that the permit violates sections 301(e) and 306(e) of the Clean Water Act, 33 U.S.C. §§ 1311(e), 1316(e), because it fails to comply with the no-discharge performance standard for new froth-flotation mills. *See* 40 C.F.R. § 440.104(b)(1); J.A. 473a-75a. SEACC alleged in the alternative that, if the 2002 revised definition of "fill material" were interpreted to allow the direct discharge into Lower Slate Lake, the rule itself would be arbitrary, capricious, and contrary to the Act. J.A. 475a, ¶ 72.

The district court entered summary judgment for the Corps. J.A. 478a-96a. The premise of the court's holding was that the new "fill material" definition includes mine tailings. The court dismissed sections 301 and 306 without analysis and did not address the agencies' intent regarding the relationship between effluent limitations and the new fill rule. J.A. 488a n.35, 490a-95a.

The Ninth Circuit reversed. The court began with the language of the Act, as required by *Chevron, U.S.A. v. NRDC,* 467 U.S. 837, 842-43 (1984). J.A. 527a. The court concluded that the plain language of

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[7] The Alaska Department of Environmental Conservation, by contrast, was able to certify the discharge as consistent with state water-quality standards only by deciding that the lake would become a "treatment work" under state law, exempting it from the standards. J.A. 258a.

sections 301(a), 301(e), and 306(e) prohibits any discharge that does not comply with applicable effluent limitations and performance standards. J.A. 531a. Addressing Petitioners' arguments that sections 402 and 404 of the Act implied an exception to these provisions, the court applied this Court's well-established rule that "[e]xceptions to clearly delineated statutes will be implied only where essential to prevent 'absurd results' or consequences obviously at variance with the policy of the enactment as a whole." J.A. 532a (quoting *United States v. Rutherford*, 442 U.S. 544, 552 (1979)). The court reviewed each of the Corps' and Petitioners' arguments for an implied exception and found they did not meet this standard. J.A. 532a-35a.

Although the court found the language of the Act sufficient to decide the case, it also considered the agencies' intent when they adopted both relevant regulations—the performance standard and the definition of fill material. The court reviewed the regulatory history and concluded that the new definition of fill material was not intended to create an exception to effluent limitations. J.A. 535a-46a. "The agencies could not have been more clear in articulating that this would be their preferred approach." J.A. 546a.

The court also concluded that if the agencies intended to repeal or create an exception to the long-standing regulations governing froth-flotation mills, they were "obligated to supply a reasoned analysis for the change." J.A. 547a (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)). The court found that the agencies had said just the opposite: that they in-

tended *no* change in their past practice. If the rule's effect differed from the agencies' stated intent, the rule would be arbitrary and capricious. J.A. 547a-48a.

Finally, in addressing whether to apply the "fill material" definition or the performance standard for froth-flotation mills to the discharge, the court applied the familiar principle that the more specific rule—here, the performance standard—governs. J.A. 548a.

The Ninth Circuit denied a petition for rehearing en banc, with no active judge requesting a vote on the petition. J.A. 552a-53a.

Shortly after the appellate court's decision, Coeur and SEACC entered into discussions mediated by the mayor of Juneau for the purpose of finding a tailings disposal site that would comply with the Clean Water Act. As a result, Coeur agreed to pursue permits for a facility on the upland site authorized in 1997. The new proposal would deposit the tailings in "paste" form and would not discharge process wastewater into navigable waters. *See* http://www.juneau.org/clerk/misc/news_items/2007-11-15_Kensington_Corrected_Version.pdf. Shortly after submitting its opening brief in this Court, as the agencies neared the end of their review process, Coeur abruptly withdrew its application. *See* Kate Golden, *EPA puzzled by Coeur Alaska pullout*, Juneau Empire, Sept. 25, 2008, at 1, *available at* http://www.juneauempire.com/stories/092508/sta_336770591.shtml.

SUMMARY OF ARGUMENT

The dispute in this case—whether a process wastewater discharge meeting the agencies' definition of "fill material" is exempt from EPA performance standards—turns on the interplay between sections 306 and 404 of the Clean Water Act. Section 306(e) declares categorically that "it shall be unlawful" to operate any new source in violation of any applicable performance standard, and lists no exceptions. 33 U.S.C. § 1316(e). Section 404(a) provides that the Corps "may" issue permits for the discharge of "fill material," but does not exempt the Corps from compliance with other provisions of law in exercising this discretionary authority. *Id.* § 1344(a). In this case, the process wastewater discharge from the Kensington Mine's beneficiation mill is prohibited by a new source performance standard adopted by EPA, but it also meets the agencies' new definition of "fill material," because its suspended solids will settle and raise the bottom elevation of Lower Slate Lake.

To resolve this question, the Court follows the two-step approach articulated in *Chevron*, 467 U.S. at 842-43, focusing first on the language of the statute and second, if necessary, on the agency's interpretation of any statutory ambiguities or gaps that Congress intended the agency to fill.

Congress has spoken directly to the question presented. Section 306(e) of the Clean Water Act declares in plain terms a categorical prohibition, unambiguously applicable to the Kensington mill. *See* 33 U.S.C. § 1316(e). Section 404 does not set forth any exceptions to the prohibition, but merely

authorizes the Corps to issue permits for fill-material discharges. *See id.* § 1344. Section 404 explicitly allows EPA to take enforcement actions for violations of section 306, *id.* §§ 1344(n), 1319(a)(3), (b), (c)(1)-(3), (d), (g)(1), and does not shield permittees from enforcement of section 306. *Id.* § 1344(p).

Petitioners and the Corps urge the Court to find an implied exception to section 306(e) for any discharge that meets the agencies' new definition of "fill material," but the Court will do so only if applying the plain terms of the statute would cause "'absurd results' or consequences obviously at variance with the policy of the enactment as a whole." *Rutherford*, 442 U.S. at 552 (quoting *Helvering v. Hammel*, 311 U.S. 504, 510-11 (1941)). Applying the plain language of section 306(e) produces results that are neither absurd nor at variance with the Act's purposes. To the contrary, it much better serves the explicit Congressional goal of eliminating all discharges of pollutants to navigable waters. *See* 33 U.S.C. § 1251(a)(1).

This result does not conflict with section 404. That section is merely a grant of discretionary authority to the Corps. *See id.* § 1344(a). In exercising this authority, the Corps must respect other applicable laws, including section 306(e). Because section 404 makes no provision for the Corps to incorporate applicable section 306 performance standards in its permits, discharges from sources subject to performance standards must be permitted, if at all, under section 402.

The legislative history of the Act supports this plain-language interpretation. The Act designates the NPDES permit program administered by EPA

under section 402 as the successor to the Corps' former permit program under the Refuse Act, 33 U.S.C. § 407. *See id.* § 1342(a)(5). EPA and the Corps had required over 20,000 industrial sources to apply for permits under that program, among them Reserve Mining Company's iron-ore beneficiation mill, which was then discharging its process wastewater as a tailings slurry into Lake Superior. Congress specifically discussed this case in its deliberations, revealing an intent that industrial sources like Reserve Mining would be subject to permits under section 402, not 404.

Because the statute is clear, there is no need to consider the agency's interpretation under *Chevron* step two. However, even if the Act were ambiguous, the agencies directly addressed this question when they adopted the 2002 fill rule and stated in no uncertain terms that, in changing the definition of "fill material," they did not intend to authorize the Corps to issue permits for discharges subject to effluent limitations. Such an authorization would have been a reversal of longstanding practice, which they made clear they did not intend. This interpretation, adopted by the heads of the agencies and published in the Federal Register, is reasonable and entitled to deference.

The subsequent reinterpretation of the 2002 fill rule for the Kensington Mine is not entitled to deference. The Regas memo was written by subordinate agency officials and neither published nor made available for public comment. It purports to construe the 2002 rule but ignores the repeated statements in the Federal Register and the rulemaking record that the agencies did not intend to change their long-

standing practice of applying effluent limitations—specifically including those applicable to mine tailings—through section 402 permits. The agencies' new position would effectively nullify EPA's performance standard, again without explanation. Thus, even if the Corps' position in this case could be squared with the text of the regulations at issue—which it cannot—it would not be a construction worthy of deference.

ARGUMENT

I. UNDER THE PLAIN LANGUAGE OF THE CLEAN WATER ACT, THE CORPS LACKS AUTHORITY TO PERMIT WASTEWATER DISCHARGES FROM SOURCES SUBJECT TO EPA PERFORMANCE STANDARDS.

To determine whether the Clean Water Act exempts discharges defined as "fill material" from section 306(e), one must begin with the language of the statute. "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter…." *Chevron*, 467 U.S. at 842. The Court uses "traditional tools of statutory construction" in making this determination. *Id.* at 843 n.9.

A. Section 306(e) Prohibits Any Wastewater Discharge from the Kensington Mill.

Section 306(e) of the Act provides in its entirety:

> After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

33 U.S.C. § 1316(e). Because 306(e) contains no exceptions—a conspicuous absence in a statute otherwise replete with highly detailed exceptions—this Court has observed that performance standards are "absolute prohibitions" and that "a variance provision would be inappropriate in a standard that was intended to insure national uniformity and 'maximum feasible control of new sources.'" *Du Pont,* 430 U.S. at 138 (quoting S. Rep. No. 92-414, at 58, 1972 U.S.C.C.A.N. at 3724).

The no-discharge standard at 40 C.F.R. § 440.104(b)(1), adopted under section 306, unambiguously applies to the new mill at the Kensington Mine. The regulation's applicability provision leaves no room for interpretation: "The provisions of this subpart J are applicable to discharges from … Mills that use the froth-flotation process … for the beneficiation of … gold … ores.…" 40 C.F.R. § 440.100(a)(2). The standard itself further verifies that it applies to the Kensington mill by prohibiting discharges "from mills that use the froth-flotation process … for the beneficiation of … gold … ores.…" *Id.* § 440.104(b)(1). EPA confirmed that "the New Source Performance Standards (NSPS) for gold mines and mills are applicable to the [Kensington] project (40 CFR 440.104)." J.A. 291a.

Invoking language limiting section 306(e) to "any standard of performance applicable to such source,"

33 U.S.C. § 1316(e), the Corps implausibly denies that the performance standard for new froth-flotation mills is "applicable" to the Kensington mill. *See* Fed. Br. at 25. The agency reaches this conclusion by misreading the quoted language, arguing that "[t]o determine whether a performance standard is applicable to a source, one must again refer back to the Act as a whole and, in particular, to Section 404 when the discharge of fill material is at issue." *Id.* However, neither "the Act as a whole" nor section 404 addresses the sources to which section 306 standards are applicable. To determine whether a "standard of performance" is "applicable" to a "source," 33 U.S.C. § 1316(e), one must examine the standard and the source. Here, the standard (40 C.F.R. § 440.104(b)(1)) is plainly applicable to the source (the Kensington mill). *See also* 33 U.S.C. § 1316(a)(1), (a)(3) (defining "standard of performance" and "source").

The Corps jumps the tracks by focusing on whether the mill's wastewater discharge meets the definition of "fill material." But that is irrelevant under the plain language of section 306(e), which says nothing about the composition of the discharge. It refers only to standards and sources.

The Corps also argues that section 301(e) does not require discharges meeting the definition of "fill material" to comply with section 301 effluent limitations, but the agency misinterprets the phrase "in accordance with the provisions of this chapter." Fed.

Br. at 25 (quoting 33 U.S.C. § 1311(e)).[8] Section 301(e) provides:

> Effluent limitations established pursuant to this section or section [302] shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

33 U.S.C. § 1311(e). Because the Corps infers an exception for fill material under section 404, the agency concludes that the "provisions of this chapter" do not require compliance with otherwise applicable effluent limitations. Section 301(e) precludes such an implied exception by requiring that effluent limitations be applied to "*all* point sources … in accordance with the provisions of this chapter." *Id.* (emphasis added). The Corps reads the section as if it said "*except* in accordance with the provisions of this chapter," but Congress did not say "except." The section is, literally, a requirement that any applicable effluent limitations be applied to *all* point sources in accordance with the Act.

B. There Is No Conflict Between Section 306(e) and Section 404.

Petitioners mistakenly argue that sections 306(e) and 404 are in conflict, requiring resort to canons of statutory construction to determine which controls

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[8] In addition to the section 306 performance standard, EPA has adopted effluent limitations under section 301 for froth-flotation mills. 40 C.F.R. § 440.102(b). The latter are less strict, but the discharge authorized by the Corps here would comply with neither.

the discharge in this case. *See* Coeur Br. at 13, 27-28. There is no conflict between the two sections. While section 306(e) is a categorical prohibition, *see* 33 U.S.C. § 1316(e) ("it shall be unlawful"), section 404 is a permissive grant of discretionary authority that does not exempt fill material discharges from compliance with other applicable legal requirements. *See id.* § 1344(a) ("The Secretary may issue permits…").

Section 306(e) is only one of many legal requirements the Corps must respect in exercising its discretionary authority under section 404. The Corps and EPA have long recognized that section 404 does not exempt fill-material discharges from other requirements of law. The first sentence of the 404(b) guidelines states, "Because other laws may apply to particular discharges…, a discharge complying with the requirement of these Guidelines will not automatically receive a permit." 40 C.F.R. § 230.10. The agency's regulations identify over a dozen other statutes that may limit the agency's discretion. *See id.* § 230.10(a)(4)-(5), (b)(3)-(4); 33 C.F.R. § 320.3. In some cases, these laws may prohibit the Corps from issuing a permit. *See*, *e.g.*, 40 C.F.R. § 230.10(b)(3) (prohibiting discharges that would jeopardize listed species under Endangered Species Act).

Just as the Corps must comply with other applicable laws in issuing or denying section 404 permits, the agency must also refrain from authorizing discharges that would violate section 306(e). Section 404's enforcement provision—subsection (n)—makes this particularly clear: "Nothing in this section shall be construed to limit the authority of the [EPA] Administrator to take action pursuant to section [309]."

33 U.S.C. § 1344(n). Section 309, in turn, authorizes EPA to take enforcement actions for violations of various provisions of the Act, including, explicitly, section 306. *Id.* § 1319(a)(3), (b), (c)(1)-(3), (d), (g)(1). This enforcement authority is in addition to, and separate from, authority to enforce conditions in permits issued under sections 402 and 404. *See id.*; *see also id.* § 1344(s). Moreover, while compliance with a section 404 permit shields the permittee from actions enforcing sections 301 and 307, it does *not* provide a shield for violators of section 306. *See id.* § 1344(p). In contrast, section 402 provides that NPDES permittees are deemed to comply with section 306. *See id.* § 1342(k).

In short, nothing in section 404 exempts fill material discharges from compliance with section 306, limits EPA's authority to bring actions for violations of section 306, or protects permittees from those actions. These features reveal unambiguously that Congress did not intend section 404 to authorize the Corps to permit discharges that violate performance standards under section 306(e).

There is thus no conflict between the two sections. Absent a conflict, there is no need to resort to the canon of construction, urged by Petitioners, that specific provisions control over general ones. *See Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 335-36 (2002) (holding that the rule does not apply when there is no conflict).[9]

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[9] Even if the specific/general canon applied, section 306 is more specific than section 404 regarding the issues of greatest concern to Congress. Although section 404 is more specific as to

(footnote continued…)

The absence of conflict distinguishes this case from *National Association of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518 (2007). That case reconciled two mandatory statutes directing the agency to take inconsistent actions, *id.* at 2531-32, by deferring to the agency's reasonable interpretation of the conflicting provisions as expressed in regulations. *Id.* at 2534. The Court expressly distinguished a situation where Congress enacted discretionary and mandatory provisions, holding that the discretionary action was subject to the mandatory one, *id.* at 2536-37, and that there was "no clear repugnancy" between them. *Id.* at 2537 n.9. Similarly, the discretionary authority here (section 404) must be exercised in compliance with the mandatory (section 306(e)).

C. Section 306(e) Has No Implied Exception for Fill Material.

Petitioners and the Corps argue, in effect, that various provisions of the Act and its structure as a

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the form of discharges covered (dredged and fill material), section 306 is much more specific as to the sources regulated and standards applied. Section 404 applies to discharges from any "point source," *see* 33 U.S.C. §§ 1344(a), 1362(6), (12), a broadly defined term, *id.* § 1362(14), while section 306(e) applies only to "new sources," a narrow subset of point sources. *Id.* § 1316(a)(2), (3). Section 306 also requires detailed standards specific to each industry source category, while section 404 requires only one set of general guidelines applicable to all discharges. *Compare id.* § 1316(b) *with id.* § 1344(b). Congress attached high importance to new sources. *See supra* pp. 6-7. Were there actually a conflict between sections 306(e) and 404, Congress has expressed its intent that the more specific provisions for new sources under section 306 control.

whole create an implied exception to the plain language of section 306(e), and to effluent limitations adopted under section 301, whenever a discharge meets the agencies' definition of "fill material." This argument cannot pass muster.

To begin with, Petitioners' construction is highly unlikely given the Act's purposes. It would hinge the entire regulatory structure on one term—"fill material"—that Congress did not define and that was not Congress' central concern. Congressional deliberations focused overwhelmingly on industrial and municipal waste discharges.[10] The Act seeks to eliminate these discharges primarily through a system of increasingly strict, technology-based effluent limitations for industrial source categories that must prohibit any discharges where practicable. *See* 33 U.S.C. §§ 1251(a)(1), 1311(b)(2)(A), 1316(a)(1). To allow a new industrial source to escape these requirements because its wastewater contains a high level of one pollutant—suspended solids—would be contrary to this explicit legislative purpose and particularly anomalous given Congress' explicit command that EPA regulate suspended solids. *See* 33 U.S.C. § 1314(a)(4). It would reward the worst industrial discharges by exempting them from the very mechanism Congress adopted to achieve the national goal. The use of a navigable lake as a wastewater

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[10] The Clean Water Act was enacted in the wake of highly publicized problems such as the Cuyahoga River fire, massive fish kills, and contaminated drinking water supplies, all caused by industrial pollution. *See* Robert W. Adler, Jessica C. Landman, & Diane M. Cameron, *The Clean Water Act 20 Years Later* 5-6 (1993).

settling pond is also contrary to the guiding principle that "[t]he use of any river, lake, stream or ocean as a waste treatment system is unacceptable." S. Rep. No. 92-414, at 7, 1972 U.S.C.C.A.N. at 3674. The Act's language and structure do not support this unlikely outcome.

1. Courts Should Rarely Infer Exceptions.

"Exceptions to clearly delineated statutes will be implied only where essential to prevent absurd results or consequences obviously at variance with the policy of the enactment as a whole." *Rutherford*, 442 U.S. at 552 (quotation marks omitted). "Only when a literal construction of a statute yields results so manifestly unreasonable that they could not fairly be attributed to congressional design will an exception to statutory language be judicially implied." *Id.* at 555. "Whether, as a policy matter, an exemption should be created is a question for legislative judgment, not judicial inference." *Id.* at 559, *quoted in United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490 (2001).

The presumption against implied exceptions has particular force in a statute that, like the Clean Water Act, contains highly detailed, explicit exceptions. *See Du Pont*, 430 U.S. at 138 (reasoning that explicit exception in section 301(c) reinforces conclusion that Congress intended no exceptions to section 306(e)); *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.") (quoting *Andrus v. Glover Constr.*

Co., 446 U.S. 608, 616-17 (1980)); *Oakland Cannabis Buyers' Coop.*, 532 U.S. at 489-90 (declining to find implied exception where statute provided express exception).

Requiring a new source to comply with applicable performance standards as provided in section 306(e), even if its wastewater meets a broad definition of "fill material," is neither an "absurd result" nor "obviously at variance with the policy of the enactment as a whole." *Rutherford*, 442 U.S. at 552. To the contrary, it is the result that best achieves the Act's purposes. Exempting new sources from performance standards, which must prohibit any discharge "where practicable," 33 U.S.C. § 1316(a)(1), would move in the opposite direction of the express Congressional goal of eliminating all discharges. *Id.* § 1251(a)(1).

2. Sections 306 and 404 Reflect a Deliberate Choice by Congress Not to Include the Exception Sought by the Corps.

Sections 306 and 404, like the rest of the Act, include specific, detailed exceptions where Congress intended them. The absence of an express exception from section 306 for discharges meeting the agencies' definition of "fill material" strongly suggests that Congress did not intend any such exception.

While nothing in section 404 exempts fill-material discharges from section 306(e), section 404 does contain other specific exceptions, and exceptions to the exceptions. *See* 33 U.S.C. §§ 1344(f), (r). Similarly, while section 306 contains no exception for fill material, it does exempt new sources from stricter stan-

dards for a ten-year period following completion of construction. *See id.* § 1316(d).

Had Congress intended section 404 permits to exempt new sources from compliance with performance standards, it could have used a variety of devices employed elsewhere in the Act to convey that intent. It could, for example, have qualified section 306(e) with the preface, "Except as provided in section 404…." That is exactly what the Act provides in sections 301(a) and 402(a)(1), but *not* in 306(e). *Compare id.* §§ 1311(a), 1342(a)(1) *with id.* § 1316(e). Congress used the same formulation repeatedly throughout the Act, including in section 404(f). *See, e.g.*, *id.* §§ 1344(f), 1311(j)(1)(A), (*l*), 1322(f), (n)(6)(A), 1365(a).

Another way to provide the exemption sought by Petitioners in this case would have been to preface section 404 with the phrase, "Notwithstanding section 306…." This type of formulation also appears throughout the Act, including in section 306(d), but *not* in section 404. *Compare id.* §§ 1316(d), 1311(f), 1345(a), 1364(a), 1371(d) *with id.* § 1344(a).

3. Sections 301 and 306 Have Independent Effect and Do Not Depend on Other Provisions to Trigger Them.

Section 306, like the effluent-limitation provisions of section 301, applies directly to discharges and is enforceable independent of any other provisions in the Clean Water Act. Petitioners repeatedly mischaracterize the Act by asserting that EPA adopts these limitations "under" or "as part of" the 402 permit program, Coeur Br. at 3, 21, and that they apply only "where other provisions of the CWA make them

applicable." State Br. at 21. Several provisions of the Act, including sections 306 and 301 themselves, reveal that this view is incorrect. This Court has drawn the same conclusion. *Du Pont*, 430 U.S. at 133 n.24 ("a number of provisions of the Act seem to assume that § 301 effluent limitations have some existence apart from § 402 permits").

The Act's central prohibition against unlawful discharges demonstrates that sections 301 and 306 have independent effect. Section 301(a) provides: "Except as in compliance with *this section* and sections [302, *306*, 307, 318, 402, and 404], the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a) (emphasis added). If Congress intended the standards and limitations of sections 301, 302, 306, and 307 to apply only to the extent they were included as conditions in permits under sections 402 or 404, section 301(a) would simply say, "Except as provided in sections 402 or 404…." The inclusion of the other five provisions would be pure surplusage. That Congress enumerated all of these provisions demonstrates that each was intended to have independent effect.

Moreover, sections 306 and 301 on their face require compliance with their limitations independent of any permit conditions. *See*, *e.g.*, 33 U.S.C. §§ 1316(e) (prohibiting discharges in violation of performance standards), 1311(b)(2)(E) (requiring, without reference to permits, "compliance with effluent limitations … which … shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator"), 1311(e) (requiring application of effluent limitations to "all point sources"),

1311(j)(3)(B), (n)(7) (requiring, without reference to permits, that discharges must comply with effluent limitations when requests to modify limitations are denied). EPA is authorized, under specified circumstances, to *modify* these requirements in permits. *Id.* § 1311(c), (h), (k), (m), (p)(1). The contrast in the wording of these subsections shows that the effluent limitations are applicable on their own but that EPA may modify them in a permit.

That sections 301 and 306 are independently enforceable underscores the point. EPA or a citizen can bring an action to enforce sections 301 or 306, or, *separately*, to enforce permit conditions. *See* 33 U.S.C. §§ 1319(a)(3), (b), (c)(1)-(3), (d), (g)(1), 1365(a)(1), (f). Section 404 expressly preserves EPA's authority to bring enforcement actions under these provisions. *Id.* § 1344(n). The Act thus explicitly gives enforceable legal effect to effluent limitations under sections 301 and 306 independent of any permit.

The Act's structure further supports the independent applicability of sections 301 and 306. Those sections are included in Subchapter III, "Standards and Enforcement." That subchapter includes section 301(a)'s general prohibition against discharges, *id.* § 1311(a), all the Act's effluent limitations and water-quality standards, *id.* §§ 1311-17, and its enforcement provisions. *Id.* § 1319. Sections 402 and 404 are included separately in Subchapter IV, "Permits and Licenses." Had Congress intended effluent limitations to be dependent entirely on permits, a more logical organization would have been to group sections 306 and the effluent limitation provisions of

section 301 with sections 402 and 404, rather than with the prohibition and enforcement provisions.

4. Neither Section 402 nor Section 307 Establishes an Implied Exception to Section 306(e).

Petitioners and the Corps argue that section 402 implicitly exempts any discharge meeting the definition of "fill material" from the prohibition of section 306(e). They rely initially on section 402's preface, "Except as provided in sections [318 and 404]…." 33 U.S.C. § 1342(a)(1).

The preface does not create an exception to *section 306*. It means that if a discharge is authorized in a section 404 permit, it does not also need a section 402 permit, but it says nothing about whether the Corps may lawfully grant a section 404 permit in any particular case. Indeed, that Congress used this preface in section 402 but *not* 306 is strong evidence that Congress did not intend it to apply to section 306.

Petitioners and the Corps rely heavily on the fact that permits under section 402, but not 404, must include conditions requiring compliance with effluent limitations under sections 306 and 301. *Compare id. with id.* § 1344. They then leap to the conclusion that section 404 authorizes discharges otherwise prohibited by sections 306 and 301. The Ninth Circuit aptly noted that they were relying on a negative inference to find an implied exception, J.A. 531a, and found a much simpler explanation for the difference between sections 402 and 404: Congress did not intend the Corps to issue "fill material" permits for discharges subject to effluent limitations. J.A. 533a.

This interpretation gives full meaning to all the sections of the Act without resort to implied exceptions from the plain language of sections 306 and 301.

All parties agree that Congress did not authorize the Corps to issue section 404 permits incorporating effluent limitations under sections 306 or 301. Section 404 permits must comply with the 404(b) guidelines and with effluent standards for toxic pollutants under section 307. *Id.* § 1344(b), (f), (h)(1)(A)(i), (r); *see also id.* § 1317(a)(5). In contrast, section 402 permits must include conditions requiring compliance with effluent limitations under sections 301, 306, 307, and others. *See id.* § 1342(a)(1). Similarly, Congress provided a shield from enforcement under section 306 for discharges complying with a section 402 permit, but not with a section 404 permit. *Compare id.* § 1342(k) *with id.* § 1344(p). As Petitioners note, the Court must presume Congress acted purposely in writing the two provisions differently. *See S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 384 (2006).

Petitioners and the Corps carry the argument too far, however, when they infer that Congress intended an exception from section 306 and 301 effluent limitations for any discharge meeting a broad definition of "fill material." Sections 306 and 301 unambiguously prohibit discharges in violation of the effluent limitations they require, and only section 402 authorizes the issuance of permits that can carry out that command. Thus, the statutory text and structure compel the conclusion that the reason for the different language in sections 402 and 404 is to ensure that all point sources subject to effluent limitations under sections 306 or 301 be permitted, if at

all, under section 402, not section 404. This interpretation is far preferable, because it honors the plain language of sections 306 and 301 and the presumption against implied exceptions.[11]

5. The Ninth Circuit Correctly Interpreted Section 301(a).

In a sideshow, the Corps and Petitioners take issue with the Ninth Circuit's conclusion that the use of the connector "and" in section 301(a) signifies Congress' intent that discharges must comply with each applicable provision. *See* 33 U.S.C. § 1311(a); J.A. 531a. Mischaracterizing the opinion, they assert that this interpretation would require compliance with inapplicable provisions.

The Ninth Circuit recognized that discharges are subject only to "applicable" provisions. J.A. 531a. For example, an old source is not subject to section 306, which by its plain terms applies only to new sources. *See* 33 U.S.C. § 1316. Similarly, a person with a valid section 404 permit need not obtain a section 402 permit for the same discharge, because section 402 applies only "[e]xcept as provided in sections [318 and 404]…." *Id.* § 1342(a)(1). The Ninth Circuit did not suggest otherwise.

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[11] The difference between the language of section 404 and that of section 318, 33 U.S.C. § 1328, on which the State of Alaska relies, *see* State Br. at 28, reinforces the conclusion that section 404 permits cannot be issued for sources subject to effluent limitations under sections 301 and 306. Section 318 specifically provides for the incorporation of such limits into permits, *see id.* § 1328(b), while section 404 does not.

This interpretation is entirely consistent with the plain language of section 301(a) and the use of "and" as a connector. If one of the listed sections has no application to a particular discharge, then the discharge cannot be in violation of it. In that sense, the discharge is literally "in compliance" with that provision. *Id.* § 1311(a).

Moreover, Coeur cannot be correct in suggesting that "and" actually means "or." *See* Coeur Br. at 25. As the Corps recognizes, this would eviscerate the statute. *See* Fed. Br. at 25 n.6. However, the Corps is equally incorrect in suggesting that section 301(a) simply requires compliance with "the overall body of law." *Id.* at 24. The statute enumerates seven separate provisions, a plain statement that every discharge must comply with every applicable provision. 33 U.S.C. § 1311(a). Indeed, the State of Alaska concedes this point. State Br. at 31.

None of this, however, resolves the question in this case. While section 301(a) clearly evinces a Congressional intent that each of the enumerated provisions has independent effect, it does not, by itself, answer whether a particular section applies to a particular source or discharge. To do that, one must consult the provision in question. As demonstrated above, section 306(e) applies to and prohibits the discharge at issue here.

D. The Language and History of the Act Demonstrate That Congress Intended Wastewater Discharges from Ore Beneficiation Mills to Be Governed by Section 402 Permits.

Section 402(a)(5) of the Act further demonstrates Congress' intent that process wastewater discharges from industrial sources—including, specifically, ore beneficiation mills—were to be regulated under section 402. Section 402(a)(5) terminated the Corps' authority to issue permits under the Refuse Act, 33 U.S.C. § 407, and provided that pending Refuse Act permit applications be deemed applications for section 402 permits. 33 U.S.C. § 1342(a)(5); *see also id.* § 1342(k) (transition provisions for Refuse Act enforcement).

When the Clean Water Act was enacted, the Corps had recently established a comprehensive permit program under the Refuse Act, also known as section 13 of the Rivers and Harbors Act. *See* 36 Fed. Reg. 6564 (April 7, 1971). Although the Refuse Act dated from the 19th Century, the Corps historically had construed it as limited to discharges affecting navigation and even then only rarely invoked it. In response to severe and worsening water pollution, the president in 1970 issued an executive order requiring adoption of a Refuse Act permit program. *See United States v. Pa.. Indus. Chem. Corp.*, 411 U.S. 655, 659 n.9, 672 (1973). The resulting 1971 regulations for the first time encompassed "all direct and indirect discharges or deposits" into navigable waters. 36 Fed. Reg. at 6565 (§ 209.131(d)(1)).

In adopting these regulations, the Corps drew a distinction between "discharges or deposits," which

would require permits under the Refuse Act, *see id.*, and "work" or "structures" in navigable waters, which would require permits under section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403 (a predecessor to the section 404 permit program). *See* 33 Fed. Reg. 18,670, 18,671 (Dec. 18, 1968) (adopting § 209.120, "Permits for work in navigable waters"); 36 Fed. Reg. at 6567 (adopting § 209.131(f), explaining difference in programs); *see also Pa.. Indus. Chem. Corp.*, 411 U.S. at 672 (describing section 10 regulations as "dealing with construction and excavation in navigable waters").[12]

The Refuse Act permit program adopted in 1971 was the template for section 402 of the Clean Water Act, a fact discussed repeatedly in the legislative history and formalized in section 402(a)(5). The Senate Report noted that Congress had made a conscious "effort to weave the [Refuse Act] permit program into this legislation." S. Rep. No. 92-414, at 71, 1972 U.S.C.C.A.N. at 3737. While deliberations over the Act were underway, a district court declared the Refuse Act regulations unlawful. *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971). The Administrator of EPA wrote in a letter published in the Congressional Record that "[t]he enrolled bill formalizes" the Refuse Act permit program and "affords EPA the opportu-

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[12] This Court had previously held that an industrial waste discharge containing solids could be considered both an "obstruction" under section 10 and a "discharge" under the Refuse Act. *See United States v. Republic Steel Corp.*, 362 U.S. 482, 485 (1960). However, in its later permitting regulations, the Corps drew the line described above between permits under the two provisions.

nity to extricate the Permit Program from its current judicial morass." 118 Cong. Rec. 36,780 (1972). Representative Clark remarked:

> At the present time, [the Refuse Act permit] program has broken down completely and no permits are being issued. Over 20,000 applications have been filed, but all discharges could be considered in technical violation of the law, because they have no permits. Section 402 transfers the program from the corps [sic] to EPA....

Id. at 33,765.

Members of Congress discussed one of these 20,000 applications specifically during deliberations over the Clean Water Act's final passage: the discharge from Reserve Mining Company's iron-ore beneficiation plant into Lake Superior. The discharge was a slurry containing 67,000 tons per day of suspended tailings that settled on the lake bottom. *See Reserve Mining Co. v. EPA*, 514 F.2d 492, 500 (8th Cir. 1975). It contained asbestos, posing a threat to the drinking-water supply of Duluth, Minnesota, among other health concerns. *Id.* at 501. Although Reserve held a section 10 permit under the Rivers and Harbors Act addressing impediments to navigation, *id.* at 530, it had to apply for a Refuse Act permit under the Corps' new program in 1971. *Id.* at 531. The permit was not granted before passage of the Clean Water Act, *id.*, and in February 1972 EPA sued to abate the ongoing harm. *Id.* at 501. EPA ultimately succeeded in forcing Reserve to discontinue discharges into the lake and develop an on-land tailings disposal site. *Id.* at 537-38.

The situation was brought to Congress' attention as a result of some members' concerns that passage of the Clean Water Act not impede EPA's lawsuit—concerns that led to inclusion of an uncodified savings provision to ensure the Reserve Mining case and others would continue. *See id.* at 531 n.75; 118 Cong. Rec. 33,705-06, 33,713 (1972) (statements of Sens. Griffin, Muskie and Hart). In light of Congress' specific attention to the Reserve Mining situation, its decision to transfer permitting authority for such discharges from the Corps under the Refuse Act to EPA under section 402(a) cannot be squared with Petitioners' view that such discharges fall outside EPA's authority. Indeed, Reserve's application to discharge the tailings slurry from its ore beneficiation mill was transferred to EPA under section 402(a), not to the Corps under section 404. *See Reserve Mining*, 514 F.2d at 531; 33 U.S.C. § 1342(a)(5).

The State of Alaska thus draws exactly the wrong conclusion from the Reserve Mining case. *See* State Br. at 37-38. It is true, as the State points out, that Reserve had a permit under section 10 of the Rivers and Harbors Act and that section 404 of the Clean Water Act was a successor to the section 10 permit program. But by the time of the Clean Water Act's enactment, that permit was no longer sufficient to authorize the discharge of tailings. A Refuse Act permit was required, and the new permitting authority was transferred to EPA, not retained by the Corps.

Contrary to the assertions of Petitioners and the Corps, continued enforcement of effluent limitations by EPA is entirely consistent with the division of responsibilities intended by Congress. It will have no

impact on traditional regulation of fill material, because typical fill-material discharges do not come from sources regulated by EPA effluent limitations. Fill material is normally used to build roads, buildings, dams, causeways, levees, seawalls, and other useful structures in waters. *See* 33 C.F.R. § 323.2(f). Discharges of fill material also include placement of overburden (the unprocessed rock overlying a coal seam) and other mining-related materials that are not subject to effluent limitations. *See id.*; *Kentuckians*, 317 F.3d at 445, 448; J.A. 542a, 546a. As far as the record reflects, this case is the first time the Corps has tried to use a fill material permit to authorize a wastewater discharge from an industrial source subject to effluent limitations.

E. Exempting Wastewater Discharges Containing Solids from Effluent Limitations Would Undermine Congressional Goals.

If the Corps' position in this case is upheld, any source that generates wastewater with significant suspended solids will be able to escape EPA effluent limitations by labeling the discharge "fill material." Such sources will similarly seek to save money by using navigable waters as "settling ponds," defeating the Congressional goal of eliminating all discharges to navigable waters, 33 U.S.C. § 1251(a)(1), and reversing decades of progress in reducing pollution through the Act's scheme of technology-based effluent limitations. EPA has frequently identified settling ponds as the best technology for removing solids from process wastewater, allowing the agency to set strict limits on suspended solids through effluent limitations. Examples include:

- aluminum smelting, 38 Fed. Reg. 33,170, 33,175 (Nov. 30, 1973) (noting that the solid portion of untreated wastewater "approaches 70 percent by volume");

- copper smelting, 45 Fed. Reg. 44,926, 44,930 (July 2, 1980);

- inorganic chemicals manufacturing, 42 Fed. Reg. 37,294, 37,296 (July 20, 1977);

- ferroalloy manufacturing, 38 Fed. Reg. 29,008, 29,010 (Oct. 18, 1973);

- cement manufacturing, 38 Fed. Reg. 24,462, 24,463 (Sept. 7, 1973);

- concentrated aquatic animal production, 67 Fed. Reg. 57,872, 57,888 (Sept. 12, 2002) ("Solids, which come from feces and uneaten feed, are the largest mass of pollutants generated in CAAP facilities.");

- beef cattle feedlots, 66 Fed. Reg. 2960, 2988 (Jan. 12, 2001); *see also* 40 C.F.R. § 412.31(a) (prohibiting "discharge of manure, litter, or process wastewater pollutants into waters of the U.S.");

- coal-fired power plants, 45 Fed. Reg. 68,328, 68,337 (Oct. 14, 1980); and

- battery manufacturing, 49 Fed. Reg. 9108, 9122 (March 9, 1984).

II. IF THE CLEAN WATER ACT WERE AMBIGUOUS, THE COURT SHOULD DEFER TO THE INTERPRETATION STATED BY THE HEADS OF BOTH AGENCIES UPON PROMULGATION OF THE 2002 FILL RULE.

If the Court were to find the Clean Water Act ambiguous as to whether all discharges meeting the definition of "fill material" are exempt from section 306(e), the Court should defer to the reasonable interpretation of the Act adopted by EPA and the Corps when they adopted the relevant regulations, *see Chevron*, 467 U.S. at 843-44, and not to the subsequent mischaracterization of those regulations in the Regas memo.

A. The Agencies' Regulations Reveal that Some Discharges Meeting the Definition of "Fill Material" Are Subject to Effluent Limitations and NPDES Permits.

The plain language and history of the relevant regulations, and the practices of EPA and the Corps, reveal that the agencies have long recognized that some discharges defined as "fill material" are nevertheless subject to effluent limitations and NPDES permits and not eligible for section 404 permits.

As an initial matter, the 2002 fill rule on its face, though not ambiguous, does not answer the question presented. It is merely a definition that does not, by itself, purport to authorize anything. *See* 33 C.F.R. § 323.2(e)-(f). The question in this case is whether a wastewater discharge meeting that definition is exempt from otherwise applicable performance standards under section 306.

To be sure, the new definition did create the potential for confusion because it is broad enough to encompass many discharges that are subject to effluent limitations, like the one in this case. Were the new fill definition construed to authorize the discharge here, there would be a direct conflict between that definition and the performance standard prohibiting the discharge. *See* 40 C.F.R. § 440.104(b)(1). To resolve this potential conflict, it is necessary to examine the agencies' regulations, their history, and what the agencies said in adopting them.

Petitioners and the Corps rely heavily on 40 C.F.R. § 122.3(b), but that regulation actually proves the opposite of the point for which they cite it. It exempts from NPDES permitting requirements "[d]ischarges of dredged or fill material into waters of the United States which are regulated under section 404 of the CWA." 40 C.F.R. § 122.3(b). There is no comma preceding "which." By its plain terms, this regulation provides that only those fill material discharges that are regulated under section 404 are exempt from section 402; its language assumes that some "fill material" discharges are *not* regulated under section 404.[13] The regulation thus interprets and applies the prefatory "except as provided" clause in

[13] Were there a comma preceding "which," the words following the comma would be a "nonrestrictive clause," *i.e.*, one "that could be omitted without essential loss of meaning…." *The Chicago Manual of Style* 250, ¶ 6.38 (15th ed. 2003). The absence of a comma makes it a "restrictive" clause, *i.e.*, one that is "essential to the meaning of the sentence…." *Id.* While it is stylistically preferable to use "that" rather than "which" for a nonrestrictive clause, it is the absence or presence of the comma that determines whether the clause is restrictive. *Id.*

section 402(a)(1): If a discharge is properly permitted under section 404, it does not also require a 402 permit, but not all discharges of "fill material" are properly permitted under section 404. *See* 33 U.S.C. § 1342(a)(1).

The history of section 122.3(b) confirms this interpretation. As the Corps correctly points out, the original regulation purported to exempt all fill material, without restriction. *See* Fed. Br. at 27 (citing 40 C.F.R. § 125.4(d) (1973)). The Corps overlooks that EPA changed this regulation just a few years later to exempt only those discharges that are both "[d]ischarges of dredged or fill material into waters of the United States *and* regulated under section 404 of the Act." 44 Fed. Reg. 32,854, 32,902 (June 7, 1979) (adopting 40 C.F.R. § 122.4(a)(2)) (emphasis added). The following year, EPA changed "and" to "which are," the same language that remains today. 45 Fed. Reg. 33,290, 33,442 (May 19, 1980) (adopting 40 C.F.R. § 122.51(c)(2)(ii)). The preamble did not explain this specific change but stated generally, "Minor editorial and stylistic changes … have been made in all sections and are not discussed." *Id.* at 33,294. This history reveals that the "which are" clause was intended to be restrictive—requiring that the discharge be both "fill material" and regulated under section 404—consistent with proper grammar.[14]

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[14] This interpretation was necessary when the rule in its current form was adopted, because EPA and the Corps had differing definitions of "fill material." Many discharges that EPA considered "fill material" were not within the Corps' definition and were therefore ineligible for section 404 permits. *See supra* p. 10; *infra* pp. 49-50.

That the new "fill material" definition did not create an exception to EPA's effluent limitations is further compelled by the canon of construction that "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). The 1982 performance standard is much more "narrow, precise, and specific" than the "later enacted" fill rule. The latter is a broad definition of "fill material" without independent operative effect. The 1982 performance standard is more specific as to the discharges covered ("process wastewater," as defined at 40 C.F.R. § 401.11(q)), the source to which it applies (new mills using the froth-flotation process for the beneficiation of gold ores), and the effect of the rule ("no discharge"). 40 C.F.R. § 440.104(b)(1).

B. EPA Intended the Effluent Limitations for Ore Beneficiation Mills to Be Applied in Permits Under Section 402, Not 404.

Longstanding practice confirms that the agencies did not intend all discharges meeting the definition of "fill material" to be exempt from EPA's effluent limitations. For decades, EPA issued NPDES permits for discharges that met its effect-based definition of "fill material" but were also subject to effluent limitations. *See* J.A. 83a-84a. Throughout that time, EPA continued to adopt effluent limitations for sources—including the ore mills at issue—whose wastewater contained high concentrations of suspended solids and would therefore have a filling effect if discharged directly to navigable waters. *See supra* pp. 7-9, 44-45. Thus, EPA recognized that some discharges meeting its definition of "fill mate-

rial" were not regulated under section 404 and therefore not exempt from NPDES permitting under 40 C.F.R. § 122.3(b). Indeed, even the Regas memo recognizes that some discharges—those with an "incidental" filling effect—would meet the new definition of "fill material" but not be eligible for section 404 permits. J.A. 145a.

When adopting new source performance standards for ore mines and mills in 1982, EPA left no doubt as to the intended permitting requirements: "The … [standards] in this regulation will be applied to individual ore mines and mills through NPDES permits issued by EPA … under Section 402 of the Act." 47 Fed. Reg. at 54,606. Nowhere in the rule or preamble, or in their predecessors or subsequent minor amendments, did EPA suggest that a mill could escape these standards through a permit to discharge wastewater as "fill material" under section 404. This was true even though EPA recognized that the wastewater contained very high levels of suspended solids, generally requiring the use of settling ponds as a treatment technology. *See supra* pp. 3, 9.

Further evidence of EPA's intent is that it used limits on suspended solids as a surrogate for limits on certain toxic pollutants. As Petitioners and the Corps point out, the Corps must ensure that discharges of fill material comply with any effluent limitations for toxic pollutants adopted under section 307 of the Act. *See* 33 U.S.C. § 1344(f), (h)(1)(A)(i), (p), (r); 40 C.F.R. § 230.10(b)(2). One of the toxic substances of concern in the wastewater discharges of many beneficiation mills is asbestos, as the Reserve Mining case illustrates. *See* 47 Fed. Reg. at 25,694 ("'Asbestiform fibers' are evident in dis-

charges from ore mining and milling facilities, and chrysotile asbestos was detected in wastewaters in all subcategories and subparts."); 40 C.F.R. § 401.15(7) (listing asbestos as toxic pollutant under CWA § 307(a)(1)); *Reserve Mining*, 514 F.2d at 501, 514-20. EPA did not adopt section 307 effluent limitations for asbestos from beneficiation mills because it found that limits on total suspended solids (TSS) under sections 301 and 306 would effectively control asbestos and obviate the significant expense of monitoring for it. *See* 47 Fed. Reg. at 25,694-95; *see also id.* at 25,703-04; 47 Fed. Reg. at 54,605. If a mill were allowed to escape the TSS limitations by obtaining a "fill material" permit under section 404, it would effectively escape the intended limit on asbestos, a result at odds with section 404's intent to control discharges of toxic pollutants.

That EPA used this approach (rather than promulgating section 307 standards for asbestos that could be enforced through section 404) shows that the agency could not have intended section 404 permits to be used to authorize discharges subject to its ore-mill performance standards. It also illustrates the potentially dangerous effects of the interpretation sought by the Corps in this case. Authorizing ore beneficiation wastewater discharges with section 404 permits could reprise the Reserve Mining scenario, one of the very problems Congress intended to stop.

In the decades following adoption of the first effluent limitations for ore beneficiation mills in 1975 and the new source performance standards in 1982, the agencies repeatedly confirmed that section 404 permits were not available for process wastewater

discharges from these facilities. From 1977 to 2002, the Corps' regulations excluded discharges for the primary purpose of waste disposal from the definition of "fill material." *See supra* p. 10. The agencies' 1986 MOA provided that discharges "in liquid, semi-liquid, or suspended form," including various "mining wastes," would require section 402 permits.[15] *See id.* The agencies interpreted their regulations to preclude the use of section 404 permits for discharges subject to effluent limitations. *See Kentuckians*, 317 F.3d at 445, 448.

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[15] Petitioners and the Corps rely on a sentence from the MOA's preamble that has no applicability to wastewater discharges from ore mills for the purpose of waste disposal, which were described in paragraph B.5. *See* Fed. Br. at 27; Alaska Br. at 9. They quote the second sentence of the following paragraph:

> This agreement does not affect the regulatory requirements for materials discharged into waters of the United States for the primary purpose of replacing an aquatic area or of changing the bottom elevation of a water body. Discharges listed in the Corps definition of "discharge of fill material," 33 CFR 323.2(1) remain subject to section 404 even if they occur in association with discharges of wastes meeting the criteria in the agreement for section 402 discharges.

51 Fed. Reg. at 8,871. This explanation discussed and incorporated the Corps' "fill material" definition, which at that time required that the primary purpose of the discharge be to create dry land or change the bottom of the water body, not to dispose of waste. *See id.* Thus, the sentence merely clarified that discharges meeting this definition were subject to section 404 permits even if they occurred in association with waste otherwise subject to section 402. This clarification did not apply to discharges like the one here, whose only purpose was to dispose of process wastewater.

Accordingly, as far as the record reflects, the Corps never issued a permit to discharge process wastewater into a navigable water body before the 2005 Kensington Mine permit. Coeur cites three permits it holds out as counterexamples, *see* Coeur Br. at 40-42, but all three miss the mark.

The Red Dog and Fort Knox permits were both permits to use solid fill material to build tailings impoundments and associated structures; they did not permit the ongoing discharge of wastewater into navigable waters. *See* SER 979 (authorizing permittee to "place … mine tailings in the south fork of Red Dog Creek and adjacent wetlands *to construct a 150' high x 2,400' long dam*")[16] (emphasis added); SER 1099 (Red Dog Decision); SER 983 (authorizing discharge of fill material for "construction of impoundment structures, stockpiles, rock dumps, culverted road crossings, and other components" of Fort Knox mine). Neither mine obtained a permit for discharges into the tailings ponds themselves, because the agencies determined that the tailings ponds were "waste treatment systems" not considered "waters of the United States" under the Clean Water Act. *See* 40 C.F.R. § 122.2 (definition of "Waters of the United States"). Thus, the decision document for the Fort Knox mine explicitly stated that "[n]o discharge of waste water *to waters of the United States* is expected…." SER 989 (emphasis added).

In contrast, EPA and the Corps rejected a suggestion that Lower Slate Lake be deemed an exempt

[16] Dewatered tailings are sometimes used as a construction material in dams at mines.

"waste treatment system," notwithstanding the construction of a dam to expand its capacity. J.A. 145a-46a. The Kensington Mine's 404 permit, unlike those for the Red Dog and Fort Knox mines, expressly authorizes discharges of process wastewater into navigable waters. *See* J.A. 275a (¶ 10), 283a (Area 24), 266a (authorizing discharge to "navigable waters of the United States").[17]

Nor did the other permit cited by Coeur—Nationwide Permit 21, for minimal-impact surface coal-mining work—authorize discharges of process wastewater into navigable waters. It was originally promulgated in the same Federal Register notice as a re-promulgation of the Corps' former "fill material" definition, which precluded discharges for the primary purpose of waste disposal. *See* 47 Fed. Reg. 31,794, 31,811 (July 22, 1982) (adopting "fill material" definition); *id.* at 31,833 (adopting Nationwide Permit 21). Presumably, the Corps did not intend to contradict itself within the same document. Thus,

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[17] There is a legal question whether, or under what circumstances, the Corps may deem an impoundment in a navigable stream to be a "waste treatment system." *See*, *e.g.*, *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs*, No. 3:05-0784, 2007 WL 2200686 (S.D. W.Va. June 13, 2007), *appeals docketed*, Nos. 07-1355, 07-1479, 07-1480, 07-1964 (consolidated) (4th Cir.). Normally, the tailings pond can be constructed outside of any stream by diverting the stream around the tailings pond, segregating the waste treatment system from navigable waters. *See*, *e.g.*, SER 995; *see also* Pac. Legal Found. *Amicus* Br. at 14 (diagramming "stream bypass"). This Court need not address these questions here because the agencies expressly declined to deem the lake a "waste treatment system" and recognized it as "waters of the United States."

the "[s]tructures, work, and discharges," *id.* at 31,833, authorized in Nationwide Permit 21 could not have included wastewater discharges.

In short, if the Corps ever granted a "fill material" permit to discharge process wastewater to navigable waters before the Kensington permit, it has not been brought to the attention of the Court, even though Petitioners canvassed the country to find one. SEACC is unaware of any such examples.

Granting section 404 permits for wastewater discharges from ore beneficiation mills would, therefore, be a substantial change in agency practice. It would effectively repeal EPA's effluent limitations for those sources, because the wastewater from these mills is inherently "very high" in suspended solids, 47 Fed. Reg. at 25,685, and will therefore always raise the bottom elevation of a water body when the solids settle. In adopting the effluent limitations, EPA expected that solids would be removed in settling ponds, not in navigable waters. *See supra* pp. 8-9.

If the agencies wished to reverse this practice, they would be required to provide an explanation. "[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change...." *State Farm*, 463 U.S. at 42. The failure to do so would render the decision arbitrary. *Id.* at 42-43.

C. When the Agencies Adopted Their New Definition of Fill Material in 2002, They Did Not Intend to Change Past Practice.

In adopting the 2002 fill rule, the agencies did not supply an analysis for changing course—"reasoned" or otherwise, *id.* at 42—because, as they repeatedly

explained, they did not intend to change course. *See supra* pp. 11-15. The original proposal would have expressly excluded discharges subject to effluent limitations, consistent with longstanding agency practice. *See* 65 Fed. Reg. at 21,297, 21,299. The agencies stated that they removed that language only because it was confusing as drafted and that the deletion did not reflect any intention to change their existing practice. *See* 67 Fed. Reg. at 31,135; J.A. 46a. They repeated this statement specifically in the context of "mine tailings," noting that mine tailing discharges subject to effluent limitations would remain so and that section 402 permits would still be needed for "process water" discharges. J.A. 47a-48a. They reiterated the point by citing paragraph B.5 of the 1986 MOA, J.A. 82a-84a, and explained that the new definition would not authorize discharges that were previously prohibited or expand the types of discharges covered under section 404. 67 Fed. Reg. at 31,133; J.A. 32a. They made these statements in the Federal Register, in their response-to-comments document incorporated in the Federal Register, and in a document posted on the Corps' website to explain the new rule to the public. *See supra* p. 13.

These statements were not isolated snippets, but were critical to the agencies' analysis and to their explanation for deleting language from the proposed regulation. Moreover, the agencies said nothing to contradict this explanation. Petitioners and the Corps cite general statements from the Federal Register that mine tailings would be considered fill material under the new rule and that EPA does not regulate fill material. *See* Fed. Br. at 35-37. However, none of these general statements addresses the specific question created where a wastewater dis-

charge, including one containing mine tailings, both meets the new "fill material" definition and is subject to a performance standard or other effluent limitation. The agencies specifically foresaw this circumstance, addressed it several times, and stated each time that the effluent limitation would govern.

The Corps argues that this interpretation would render meaningless the regulation's inclusion of "tailings," the placement of which is "generally" considered a discharge of fill material in the revised definition. *See* Fed. Br. at 39-40; 33 C.F.R. § 323.2(f). This is not so, because discharges of "slurry" or "tailings" are still eligible for section 404 permits if they are not covered by section 306 performance standards or section 301 effluent limitations. There are many minerals whose tailings are not subject to such limitations, including: platinum (40 C.F.R. § 440.110-.115)[18]; antimony (*id.* § 440.90-.95); tin (no regulation); and numerous minerals covered under 40 C.F.R. Part 436 such as mica and sericite (subpart I), trona (subpart P), lithium (subpart U), attapulgite and montmorillonite (subpart AB), kyanite (subpart AC), aplite (subpart AE), kaolin (subpart AG), feldspar (subpart AI), and talc, steatite,

[18] EPA has adopted effluent limitations under section 307 for toxic pollutants from froth-flotation mills for platinum ores, 40 C.F.R. § 440.113(b), but no effluent limitations for conventional pollutants and no performance standards. *See id.* §§ 440.112, .114, .115. Because the Corps may apply section 307 effluent limitations (but not section 301 or 306 limitations) in section 404 permits, *see* 40 C.F.R. § 230.10(b)(2), the tailings from a platinum beneficiation mill could be subject to a section 404 permit.

soapstone, and pyrophyllite (subpart AJ), among others.

In short, when they adopted the new definition of "fill material," EPA and the Corps did not intend to make any change in EPA's effluent limitations or in the agencies' longstanding practice of applying those limitations to the process wastewater from ore beneficiation mills through section 402 permits. If the Court finds that the 2002 fill rule has the effect of reversing that practice, as the Corps now argues, *see* Fed. Br. at 40, the Court should set the regulation aside as arbitrary, since the agency did not provide a "reasoned analysis" for—and actually denied the existence of—this change. *State Farm*, 463 U.S. at 42; 5 U.S.C. § 706(2)(A); *see* J.A. 475a, ¶ 72.

D. The Regas Memo Could Not Change the Agencies' Authoritative Interpretation Published in the Federal Register.

The Regas memo, which purported to construe the 2002 fill rule, J.A. 143a-45a, could not reverse the agency's interpretation explained in the Federal Register upon adoption of the rule. An authoritative expression of an agency's interpretation of its rule is entitled to deference as to the rule's meaning. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997). A clear statement in the Federal Register upon promulgation of a rule is "dispositive" of the agency's intent. *See Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 714-16 (1985). Subsequent, inconsistent interpretations of the regulation do not receive deference. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) ("we must defer to the Secretary's interpretation unless an 'alternative

reading is compelled … by other indications of the Secretary's intent at the time of the regulation's promulgation'") (quoting *Gardebring v. Jenkins,* 485 U.S. 415, 430 (1988)); *accord*, *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) ("That the current interpretation runs counter to the 'intent at the time of the regulation's promulgation,' is an additional reason why *Auer* deference is unwarranted.") (citation omitted). Formal notice-and-comment rulemaking procedures tend "to foster the fairness and deliberation that should underlie a pronouncement of such force." *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) (denying *Chevron* deference to informal Customs classification rulings); *see also Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999) (Randolph, J.) (agency may not change definitive interpretation of rule without new notice-and-comment rulemaking).

If subordinate officials could alter an agency's interpretation of regulations as published in the Federal Register by writing an internal, unpublished memo, preambles to rules published in the Federal Register would become largely meaningless. The Regas memo reveals the lack of "fairness and deliberation," *Mead Corp.*, 533 U.S. at 230, in this approach. The memo neglects entirely the repeated statements in the Federal Register and the rulemaking record that the rule was not intended to exempt discharges from applicable effluent limitations. *See* J.A. 143a-45a. Instead, the Regas memo substitutes a distinction between discharges whose filling effects are "immediate" and those that are "incidental," a distinction with no clear boundary or basis in the language of the rule and that was never mentioned at the time of the rule's promulgation. J.A. 144a-

45a. To give effect to the Regas memo would be inappropriate and inconsistent with this Court's precedents.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

STATUTES INVOLVED

Section 101 of the Clean Water Act, 33 U.S.C. § 1251

§ 1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

. . . .

Section 301 of the Clean Water Act, 33 U.S.C. § 1311

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives

In order to carry out the objective of this chapter there shall be achieved—

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2)(A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title;

(B) Repealed. Pub.L. 97-117, § 21(b), Dec. 29, 1981, 95 Stat. 1632.

(C) with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but

in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 1317 of this title which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(E) as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989, compliance with effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 1314(a)(4) of this title shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(4) of this title; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

(3)(A) for effluent limitations under paragraph (1)(A)(i) of this subsection promulgated after January

1, 1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989; and

(B) for any effluent limitation in accordance with paragraph (1)(A)(i), (2)(A)(i), or (2)(E) of this subsection established only on the basis of section 1342(a)(1) of this title in a permit issued after February 4, 1987, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established, and in no case later than March 31, 1989.

(c) Modification of timetable

The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

(d) Review and revision of effluent limitations

Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

(e) All point discharge source application of effluent limitations

Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

. . . .

Section 304 of the Clean Water Act, 33 U.S.C. § 1314

§ 1314. Information and guidelines

(a) Criteria development and publication

. . . .

(4) The Administrator shall, within 90 days after December 27, 1977, and from time to time thereafter, publish and revise as appropriate information identifying conventional pollutants, including but not limited to, pollutants classified as biological oxygen demanding, suspended solids, fecal coliform, and pH. The thermal component of any discharge shall not be identified as a conventional pollutant under this paragraph.

. . . .

(b) Effluent limitation guidelines

For the purpose of adopting or revising effluent limitations under this chapter the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of October 18, 1972, regulations, providing guidelines for effluent limitations,

and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall—

(1)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section 1311 of this title shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

(2)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives for classes

and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b)(2) of section 1311 of this title to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

(3) identify control measures and practices available to eliminate the discharge of pollutants from categories and classes of point sources, taking into account the cost of achieving such elimination of the discharge of pollutants; and

(4)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best conventional pollutant control technology (including measures and practices) for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the best conventional pollutant control technology measures and practices to comply with section 1311(b)(2)(E) of this title to be applicable to

any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best conventional pollutant control technology (including measures and practices) shall include consideration of the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived, and the comparison of the cost and level of reduction of such pollutants from the discharge from publicly owned treatment works to the cost and level of reduction of such pollutants from a class or category of industrial sources, and shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

(c) Pollution discharge elimination procedures

The Administrator, after consultation, with appropriate Federal and State agencies and other interested persons, shall issue to the States and appropriate water pollution control agencies within 270 days after October 18, 1972 (and from time to time thereafter) information on the processes, procedures, or operating methods which result in the elimination or reduction of the discharge of pollutants to implement standards of performance under section 1316 of this title. Such information shall include technical and other data, including costs, as are available on alternative methods of elimination or reduction of the discharge of pollutants. Such information, and revisions thereof, shall be published

in the Federal Register and otherwise shall be made available to the public.

. . . .

Section 306 of the Clean Water Act, 33 U.S.C. § 1316

§ 1316. National standards of performance

(a) Definitions

For purposes of this section:

(1) The term "standard of performance" means a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

(2) The term "new source" means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section.

(3) The term "source" means any building, structure, facility, or installation from which there is or may be the discharge of pollutants.

(4) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a source.

(5) The term "construction" means any placement, assembly, or installation of facilities or equipment (including contractual obligations to purchase such facilities or equipment) at the premises where such equipment will be used, including preparation work at such premises.

(b) Categories of sources; Federal standards of performance for new sources

(1)(A) The Administrator shall, within ninety days after October 18, 1972, publish (and from time to time thereafter shall revise) a list of categories of sources, which shall, at the minimum, include:

pulp and paper mills;

paperboard, builders paper and board mills;

meat product and rendering processing;

dairy product processing;

grain mills;

canned and preserved fruits and vegetables processing;

canned and preserved seafood processing;

sugar processing;

textile mills;

cement manufacturing;

feedlots;

electroplating;

organic chemicals manufacturing;

inorganic chemicals manufacturing;

plastic and synthetic materials manufacturing;

soap and detergent manufacturing;

fertilizer manufacturing;

petroleum refining;

iron and steel manufacturing;

nonferrous metals manufacturing;

phosphate manufacturing;

steam electric powerplants;

ferroalloy manufacturing;

leather tanning and finishing;

glass and asbestos manufacturing;

rubber processing; and

timber products processing.

(B) As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Administrator shall, from time to time, as technology and alternatives change, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance, or revisions thereof, shall become effective upon promulgation. In establishing or revising Fed-

eral standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving such effluent reduction, and any non-water quality, environmental impact and energy requirements.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards and shall consider the type of process employed (including whether batch or continuous).

(3) The provisions of this section shall apply to any new source owned or operated by the United States.

(c) State enforcement of standards of performance

Each State may develop and submit to the Administrator a procedure under State law for applying and enforcing standards of performance for new sources located in such State. If the Administrator finds that the procedure and the law of any State require the application and enforcement of standards of performance to at least the same extent as required by this section, such State is authorized to apply and enforce such standards of performance (except with respect to new sources owned or operated by the United States).

(d) Protection from more stringent standards

Notwithstanding any other provision of this chapter, any point source the construction of which is commenced after October 18, 1972, and which is so constructed as to meet all applicable standards of performance shall not be subject to any more stringent standard of performance during a ten-year period beginning on the date of completion of such

construction or during the period of depreciation or amortization of such facility for the purposes of section 167 or 169 (or both) of Title 26, whichever period ends first.

(e) Illegality of operation of new sources in violation of applicable standards of performance

After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

Section 307 of the Clean Water Act, 33 U.S.C. § 1317

§ 1317. Toxic and pretreatment effluent standards

(a) Toxic pollutant list; revision; hearing; promulgation of standards; effective date; consultation

(1) On and after December 27, 1977, the list of toxic pollutants or combination of pollutants subject to this chapter shall consist of those toxic pollutants listed in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives, and the Administrator shall publish, not later than the thirtieth day after December 27, 1977, that list. From time to time thereafter, the Administrator may revise such list and the Administrator is authorized to add to or remove from such list any pollutant. The Administrator in publishing any revised list, including the addition or removal of any pollutant from such list, shall take into account toxicity of the pollutant, its persistence, degradability, the usual or potential

presence of the affected organisms in any waters, the importance of the affected organisms, and the nature and extent of the effect of the toxic pollutant on such organisms. A determination of the Administrator under this paragraph shall be final except that if, on judicial review, such determination was based on arbitrary and capricious action of the Administrator, the Administrator shall make a redetermination.

(2) Each toxic pollutant listed in accordance with paragraph (1) of this subsection shall be subject to effluent limitations resulting from the application of the best available technology economically achievable for the applicable category or class of point sources established in accordance with sections 1311(b)(2)(A) and 1314(b)(2) of this title. The Administrator, in his discretion, may publish in the Federal Register a proposed effluent standard (which may include a prohibition) establishing requirements for a toxic pollutant which, if an effluent limitation is applicable to a class or category of point sources, shall be applicable to such category or class only if such standard imposes more stringent requirements. Such published effluent standard (or prohibition) shall take into account the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms and the nature and extent of the effect of the toxic pollutant on such organisms, and the extent to which effective control is being or may be achieved under other regulatory authority. The Administrator shall allow a period of not less than sixty days following publication of any such proposed effluent standard (or prohibition) for written comment by interested persons on such proposed standard. In addition, if within thirty days of

publication of any such proposed effluent standard (or prohibition) any interested person so requests, the Administrator shall hold a public hearing in connection therewith. Such a public hearing shall provide an opportunity for oral and written presentations, such cross-examination as the Administrator determines is appropriate on disputed issues of material fact, and the transcription of a verbatim record which shall be available to the public. After consideration of such comments and any information and material presented at any public hearing held on such proposed standard or prohibition, the Administrator shall promulgate such standard (or prohibition) with such modification as the Administrator finds are justified. Such promulgation by the Administrator shall be made within two hundred and seventy days after publication of proposed standard (or prohibition). Such standard (or prohibition) shall be final except that if, on judicial review, such standard was not based on substantial evidence, the Administrator shall promulgate a revised standard. Effluent limitations shall be established in accordance with sections 1311(b)(2)(A) and 1314(b)(2) of this title for every toxic pollutant referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives as soon as practicable after December 27, 1977, but no later than July 1, 1980. Such effluent limitations or effluent standards (or prohibitions) shall be established for every other toxic pollutant listed under paragraph (1) of this subsection as soon as practicable after it is so listed.

(3) Each such effluent standard (or prohibition) shall be reviewed and, if appropriate, revised at least every three years.

(4) Any effluent standard promulgated under this section shall be at that level which the Administrator determines provides an ample margin of safety.

(5) When proposing or promulgating any effluent standard (or prohibition) under this section, the Administrator shall designate the category or categories of sources to which the effluent standard (or prohibition) shall apply. Any disposal of dredged material may be included in such a category of sources after consultation with the Secretary of the Army.

(6) Any effluent standard (or prohibition) established pursuant to this section shall take effect on such date or dates as specified in the order promulgating such standard, but in no case, more than one year from the date of such promulgation. If the Administrator determines that compliance within one year from the date of promulgation is technologically infeasible for a category of sources, the Administrator may establish the effective date of the effluent standard (or prohibition) for such category at the earliest date upon which compliance can be feasibly attained by sources within such category, but in no event more than three years after the date of such promulgation.

(7) Prior to publishing any regulations pursuant to this section the Administrator shall, to the maximum extent practicable within the time provided, consult with appropriate advisory committees, States, independent experts, and Federal departments and agencies.

. . . .

(d) Operation in violation of standards unlawful

After the effective date of any effluent standard or prohibition or pretreatment standard promulgated under this section, it shall be unlawful for any owner or operator of any source to operate any source in violation of any such effluent standard or prohibition or pretreatment standard.

. . . .

Section 309 of the Clean Water Act, 33 U.S.C. § 1319

§ 1319. Enforcement

(a) State enforcement; compliance orders

. . . .

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corpora-

tion, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 1318 of this title shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

(5)(A) Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this chapter or in any permit issued under this chapter, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 1342 of this title was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an exten-

sion of the date referred to in section 1311(b)(1)(A) of this title to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person is in violation of section 1311(b)(1)(A) or (C) of this title, (B) that such person cannot meet the requirements for a time extension under section 1311(i)(2) of this title, and (C) that the most expeditious and appropriate means of compliance with this chapter by such person is to discharge into a publicly owned treatment works, then, upon request of such person, the Administrator may issue an order requiring such person to comply with this chapter at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur with such order. Such order shall include a schedule of compliance.

(b) Civil actions

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

(c) Criminal penalties

(1) Negligent violations

Any person who—

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

(2) Knowing violations

Any person who—

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in a permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

(3) Knowing endangerment

(A) General rule

Any person who knowingly violates section 1311, 1312, 1313, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than $1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

. . . .

(d) Civil penalties; factors considered in determining amount

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, ,[19] or in a permit issued under section 1344 of this title by a

[19] So in original.

State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

. . . .

(g) Administrative penalties

(1) Violations

Whenever on the basis of any information available—

(A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or has violated any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by a State, or

(B) the Secretary of the Army (hereinafter in this subsection referred to as the "Secretary") finds that any person has violated any permit condition or limitation in a permit issued under section 1344 of this

title by the Secretary, the Administrator or Secretary, as the case may be, may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection.

. . . .

Section 402 of the Clean Water Act, 33 U.S.C. § 1342

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits is-

sued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator de-

termines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

. . . .

(k) Compliance with permits

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

. . . .

Section 404 of the Clean Water Act,
33 U.S.C. § 1344

§ 1344. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

(b) Specification for disposal sites

Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) of this title, and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

. . . .

(f) Non-prohibited discharge of dredged or fill material

(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material—

(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

(C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;

(D) for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;

(E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;

(F) resulting from any activity with respect to which a State has an approved program under section 1288(b)(4) of this title which meets the requirements of subparagraphs (B) and (C) of such section,

is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).

(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

. . . .

(h) Determination of State's authority to issue permits under State program; approval; notification; transfers to State program

(1) Not later than the one-hundred-twentieth day after the date of the receipt by the Administrator of a program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall determine, taking into account any comments submitted by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, pursuant to subsection (g) of this section, whether such State has the following authority with respect to the issuance of permits pursuant to such program:

(A) To issue permits which—

(i) apply, and assure compliance with, any applicable requirements of this section, including, but not

limited to, the guidelines established under subsection (b)(1) of this section, and sections 1317 and 1343 of this title;

. . . .

(n) Enforcement authority not limited

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

. . . .

(p) Compliance

Compliance with a permit issued pursuant to this section, including any activity carried out pursuant to a general permit issued under this section, shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1317, and 1343 of this title.

. . . .

(r) Federal projects specifically authorized by Congress

The discharge of dredged or fill material as part of the construction of a Federal project specifically authorized by Congress, whether prior to or on or after December 27, 1977, is not prohibited by or otherwise subject to regulation under this section, or a State program approved under this section, or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title), if information on the effects of such discharge, including consideration of the guidelines developed under subsection (b)(1) of this section, is included in an environmental impact statement for such project

pursuant to the National Environmental Policy Act of 1969 [42 U.S.C.A. § 4321 et seq.] and such environmental impact statement has been submitted to Congress before the actual discharge of dredged or fill material in connection with the construction of such project and prior to either authorization of such project or an appropriation of funds for such construction.

(s) Violation of permits

(1) Whenever on the basis of any information available to him the Secretary finds that any person is in violation of any condition or limitation set forth in a permit issued by the Secretary under this section, the Secretary shall issue an order requiring such person to comply with such condition or limitation, or the Secretary shall bring a civil action in accordance with paragraph (3) of this subsection.

(2) A copy of any order issued under this subsection shall be sent immediately by the Secretary to the State in which the violation occurs and other affected States. Any order issued under this subsection shall be by personal service and shall state with reasonable specificity the nature of the violation, specify a time for compliance, not to exceed thirty days, which the Secretary determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection is issued to a corporation, a copy of such order shall be served on any appropriate corporate officers.

(3) The Secretary is authorized to commence a civil action for appropriate relief, including a perma-

nent or temporary injunction for any violation for which he is authorized to issue a compliance order under paragraph (1) of this subsection. Any action under this paragraph may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such acton[20] shall be given immediately to the appropriate State.

(4) Any person who violates any condition or limitation in a permit issued by the Secretary under this section, and any person who violates any order issued by the Secretary under paragraph (1) of this subsection, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

. . . .

[20] So in original. Probably should be "action".

Section 502 of the Clean Water Act,
33 U.S.C. § 1362

§ 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

. . . .

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. . . .

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

. . . .

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

. . . .

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

. . . .

REGULATIONS INVOLVED

33 C.F.R. § 323.2

§ 323.2 Definitions.

For the purpose of this part, the following terms are defined:

. . . .

(e)(1) Except as specified in paragraph (e)(3) of this section, the term fill material means material placed in waters of the United States where the material has the effect of:

(i) Replacing any portion of a water of the United States with dry land; or

(ii) Changing the bottom elevation of any portion of a water of the United States.

(2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.

(3) The term fill material does not include trash or garbage.

(f) The term *discharge of fill material* means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; placement of overburden, slurry, or tailings or similar mining-related materials; and artificial reefs. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products (See § 323.4 for the definition of these terms). See § 323.3(c) concerning the regulation of the placement of pilings in waters of the United States.

. . . .

40 C.F.R. § 122.2

§ 122.2 Definitions.

The following definitions apply to Parts 122, 123, and 124. Terms not defined in this section have the meaning given by CWA. When a defined term appears in a definition, the defined term is sometimes placed in quotation marks as an aid to readers.

. . . .

Waters of the United States or *waters of the U.S.* means:

(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(b) All interstate waters, including interstate "wetlands;"

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;

(f) The territorial sea; and

(g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR § 423.11(m) which also meet the criteria of this definition) are not waters of the United States. . . .

. . . .

40 C.F.R. § 122.3

§ 122.3 Exclusions.

The following discharges do not require NPDES permits:

. . . .

(b) Discharges of dredged or fill material into waters of the United States which are regulated under section 404 of CWA.

. . . .

40 C.F.R. § 230.10

§ 230.10 Restrictions on discharge.

Note: Because other laws may apply to particular discharges and because the Corps of Engineers or State 404 agency may have additional procedural and substantive requirements, a discharge comply-

ing with the requirement of these Guidelines will not automatically receive a permit.

Although all requirements in § 230.10 must be met, the compliance evaluation procedures will vary to reflect the seriousness of the potential for adverse impacts on the aquatic ecosystems posed by specific dredged or fill material discharge activities.

(a) Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.

(1) For the purpose of this requirement, practicable alternatives include, but are not limited to:

(i) Activities which do not involve a discharge of dredged or fill material into the waters of the United States or ocean waters;

(ii) Discharges of dredged or fill material at other locations in waters of the United States or ocean waters;

(2) An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered.

(3) Where the activity associated with a discharge which is proposed for a special aquatic site (as defined in subpart E) does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not "water dependent"), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.

(4) For actions subject to NEPA, where the Corps of Engineers is the permitting agency, the analysis of alternatives required for NEPA environmental documents, including supplemental Corps NEPA documents, will in most cases provide the information for the evaluation of alternatives under these Guidelines. On occasion, these NEPA documents may address a broader range of alternatives than required to be considered under this paragraph or may not have considered the alternatives in sufficient detail to respond to the requirements of these Guidelines. In the latter case, it may be necessary to supplement these NEPA documents with this additional information.

(5) To the extent that practicable alternatives have been identified and evaluated under a Coastal Zone Management program, a section 208 program, or other planning process, such evaluation shall be considered by the permitting authority as part of the consideration of alternatives under the Guidelines.

Where such evaluation is less complete than that contemplated under this subsection, it must be supplemented accordingly.

(b) No discharge of dredged or fill material shall be permitted if it:

(1) Causes or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard;

(2) Violates any applicable toxic effluent standard or prohibition under section 307 of the Act;

(3) Jeopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act of 1973, as amended, or results in likelihood of the destruction or adverse modification of a habitat which is determined by the Secretary of Interior or Commerce, as appropriate, to be a critical habitat under the Endangered Species Act of 1973, as amended. If an exemption has been granted by the Endangered Species Committee, the terms of such exemption shall apply in lieu of this subparagraph;

(4) Violates any requirement imposed by the Secretary of Commerce to protect any marine sanctuary designated under title III of the Marine Protection, Research, and Sanctuaries Act of 1972.

(c) Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States. Findings of significant degradation related to the proposed discharge shall be based upon appropriate factual determinations, evaluations, and tests required by subparts B and G, after consideration of subparts C

through F, with special emphasis on the persistence and permanence of the effects outlined in those subparts. Under these Guidelines, effects contributing to significant degradation considered individually or collectively, include:

(1) Significantly adverse effects of the discharge of pollutants on human health or welfare, including but not limited to effects on municipal water supplies, plankton, fish, shellfish, wildlife, and special aquatic sites;

(2) Significantly adverse effects of the discharge of pollutants on life stages of aquatic life and other wildlife dependent on aquatic ecosystems, including the transfer, concentration, and spread of pollutants or their byproducts outside of the disposal site through biological, physical, and chemical processes;

(3) Significantly adverse effects of the discharge of pollutants on aquatic ecosystem diversity, productivity, and stability. Such effects may include, but are not limited to, loss of fish and wildlife habitat or loss of the capacity of a wetland to assimilate nutrients, purify water, or reduce wave energy; or

(4) Significantly adverse effects of discharge of pollutants on recreational, aesthetic, and economic values.

(d) Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem. Subpart H identifies such possible steps.

40 C.F.R. § 401.11

§ 401.11 General definitions.

For the purposes of Parts 402 through 699 of this subchapter:

. . . .

(f) The term *pollutant* means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water. . . .

. . . .

(q) The term *process waste water* means any water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, by-product, or waste product.

(r) The term *process waste water pollutants* means pollutants present in process waste water.

. . . .

40 C.F.R. § 440.100

§ 440.100 Applicability; description of the copper, lead, zinc, gold, silver, and molybdenum ores subcategory.

(a) The provisions of this Subpart J are applicable to discharges from—

(1) Mines that produce copper, lead, zinc, gold, silver, or molybdenum bearing ores, or any combination of these ores from open-pit or underground operations other than placer deposits;

(2) Mills that use the froth-flotation process alone or in conjunction with other processes, for the beneficiation of copper, lead, zinc, gold, silver, or molybdenum ores, or any combination of these ores;

(3) Mines and mills that use dump, heap, in-situ leach, or vat-leach processes to extract copper from ores or ore waste materials; and

(4) Mills that use the cyanidation process to extract gold or silver.

(b) Discharge from mines or mines and mills that use gravity separation methods (including placer or dredge mining or concentrating operations, and hydraulic mining operations) to extract gold ores are regulated under Subpart M.

(c) Discharge from mines (including placer or dredge mining, and hydraulic mining operations) or mines and mills that use gravity separation methods to extract silver from placer ores are not covered under this part.

(d) The provisions of this subpart shall not apply to discharges from the Quartz Hill Molybdenum Project in the Tongass National Forest, Alaska.

40 C.F.R. § 440.104

§ 440.104 New source performance standards (NSPS).

Except as provided in Subpart L of this part any new source subject to this subsection must achieve the following NSPS representing the degree of effluent reduction attainable by the application of the best available demonstrated technology (BADT):

. . . .

(b)(1) Except as provided in paragraph (b) of this section, there shall be no discharge of process wastewater to navigable waters from mills that use the froth-flotation process alone, or in conjunction with other processes, for the beneficiation of copper, lead, zinc, gold, silver, or molybdenum ores or any combination of these ores. The Agency recognizes that the elimination of the discharge of pollutants to navigable waters may result in an increase in discharges of some pollutants to other media. The Agency has considered these impacts and has addressed them in the preamble published on December 3, 1982.

(2)(i) In the event that the annual precipitation falling on the treatment facility and the drainage area contributing surface runoff to the treatment facility exceeds the annual evaporation, a volume of water equal to the difference between annual precipitation falling on the treatment facility and the drainage area contributing surface runoff to the treatment facility and annual evaporation may be discharged subject to the limitations set forth in paragraph (a) of this section.

(ii) In the event there is a build up of contaminants in the recycle water which significantly interferes with the ore recovery process and this interference can not be eliminated through appropriate treatment of the recycle water, the permitting authority may allow a discharge of process wastewater in an amount necessary to correct the interference problem after installation of appropriate treatment. This discharge shall be subject to the limitations of paragraph (a) of this section. The facility shall have the burden of demonstrating to the permitting authority that the discharge is necessary to eliminate interference in the ore recovery process and that the interference could not be eliminated through appropriate treatment of the recycle water.

. . . .

40 C.F.R. § 440.132

§ 440.132 General definitions.

. . . .

(f) "Mill" is a preparation facility within which the metal ore is cleaned, concentrated, or otherwise processed before it is shipped to the customer, refiner, smelter, or manufacturer. A mill includes all ancillary operations and structures necessary to clean, concentrate, or otherwise process metal ore, such as ore and gangue storage areas and loading facilities.

. . . .