

Supreme Court Holds that Mine Tailings May Be Regulated as “Fill Material” under the Clean Water Act

OVERVIEW

On Monday the Supreme Court, in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council et al.*, reversed a decision of the Ninth Circuit that had invalidated a permit issued by the Army Corps of Engineers (Corps) for the discharge of mine slurry from an Alaska gold mine into a lake located three miles from the mine site.

Justice Kennedy penned the opinion on behalf of a majority of six justices holding that the Corps, not the Environmental Protection Agency (EPA), had the authority to permit Coeur Alaska’s discharge of mine slurry as “fill material”, and that the Corps acted in accordance with the Clean Water Act (CWA) in issuing the permit.

The decision carries significant implications for mines seeking permits under the CWA for the discharge of mine tailings, and could have implications as well for other categories of point sources regulated under the CWA. The decision could induce the Administration, or Congress, to revise current rules for the discharge of mine tailings.

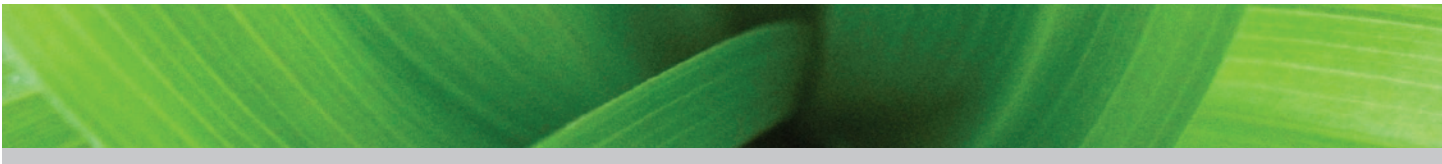
CASE BACKGROUND

In *Coeur Alaska*, environmental groups, led by the Southeast Alaska Conservation Council (SEACC), challenged a discharge permit issued to Coeur Alaska by the Corps under section 404 of the CWA. The permit would allow Coeur Alaska to discharge a mixture of crushed rock and water, or slurry, produced from a gold extraction technique known as “froth flotation” into a naturally occurring lake. Coeur Alaska proposes to discharge the slurry into the lake, raising the level of the lake bed and the size of the lake, and then to discharge purified lake water into a downstream creek.

SEACC sued the Corps over issuance of the section 404 permit, arguing that (1) Coeur Alaska should have sought a CWA section 402 permit for the discharge of slurry into the lake, just as it was required to do for the discharge of lake water into the stream below; and (2) the slurry discharge would violate “new source performance standards” promulgated by the EPA under CWA section 306, which forbid froth-flotation gold mines from discharging “process wastewater,” which includes solid wastes.

A 402 Permit Was Not Required for the Discharge of “Fill Material”

Justice Kennedy first addressed the apparent conflict between the Corps’s permitting authority under section 404 of the CWA and the EPA’s permitting authority under section 402 of the CWA, holding that the Corps, not the EPA, had the authority to permit the discharge of mine slurry into the lake.



The CWA classifies crushed rock as a “pollutant,” and forbids its discharge except as in compliance with the CWA. Section 402 of the CWA gives the EPA authority to issue permits for the discharge of any pollutant, with one important exception; section 404 empowers the Corps to issue permits “for the discharge of . . . fill material.” The CWA authorizes the EPA to “issue a permit for the discharge of any pollutant,” “[e]xcept as provided in [section 404].” A principal issue before the Court, therefore, was the decision by the agencies that Coeur Alaska’s slurry constitutes “fill material.”

Regulations issued jointly by the Corps and the EPA define “fill material” as any “material [that] has the effect of . . . [c]hanging the bottom elevation” of water, including “slurry . . . or similar mining-related materials.” The Ninth Circuit’s opinion, issued in 2007, confirmed that Coeur Alaska’s slurry meets the Corps’ regulatory definition of “fill material.” Justice Kennedy opined that the agencies’ regulations establish “a defined, and workable, line for determining whether the Corps or the EPA has the permit authority.” The Corps of Engineers, the opinion concludes, “has authority to permit Coeur Alaska’s discharge of the slurry.”

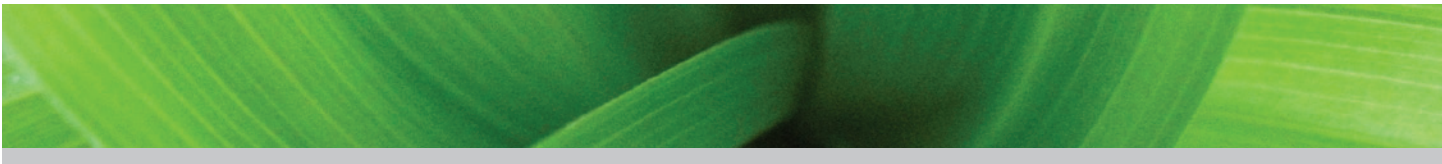
The Corps’s Section 404 Discharge Permit Did Not Violate EPA’s “New Source Performance” Discharge Standards for Gold Mines

Environmental groups also argued that the section 404 permit, issued on the basis of the Corps’s decision that Coeur Alaska’s slurry is fill material, was not issued “in accordance with law.” Specifically, SEACC and others contended that permitting Coeur Alaska to discharge the mine slurry would violate “new source performance standards” promulgated by the EPA under the CWA, which forbid froth-flotation gold mines to discharge “process wastewater,” which includes solid wastes.

Justice Kennedy acknowledged that the CWA is ambiguous on the question of whether section 306, which governs new source performance standards, applies to discharges of fill material regulated under section 404. On the one hand, section 306 provides that a discharge that violates an EPA new source performance standard is “unlawful”—without an exception for fill material. On the other hand, section 404 grants the Corps blanket authority to permit the discharge of fill material—without mentioning section 306. Moreover, Monday’s opinion found that Congress, in drafting the CWA, did not speak to the “precise question” at issue, and that the agencies’ regulations construing the CWA, which normally would be entitled to deference under *Chevron USA v. NRDC*, also fail to fully resolve the statutory ambiguity.

The Court’s resolution of the jurisdictional issue ultimately turned not on the language of the CWA or regulations issued by the Corps and the EPA, but rather on the agencies’ *subsequent* interpretation of regulations promulgated under the CWA. Focusing on agency statements “of practice and policy”, Justice Kennedy’s opinion relies heavily on an internal EPA document dubbed the “Regas Memorandum,” which explains that the EPA’s new source performance standards apply only to the discharge of water from the lake into the downstream creek, and not to the initial discharge of slurry into the lake. EPA’s 2004 Regas Memorandum is attached to this Issue Alert.

Noting that agency memoranda are “not subject to sufficiently formal procedures to merit full *Chevron* deference”, the Court nevertheless determined that the EPA’s Regas Memorandum provided guidance on the scope of the agencies’ regulations, and that the memo’s findings were not “plainly erroneous or inconsistent with the



regulation[s].” The Court ultimately found that that the Corps did not violate EPA’s new source performance standard for gold mines.

Justice Ginsburg, dissenting, insisted that the opinion could result in “[w]hole categories of regulated industries” gaining immunity from pollution control standards simply by adding “solid matter” to a pollutant “to raise the bottom of a water body,” thereby turning a “pollutant” governed by CWA section 306 into “fill” governed by section 404. Justice Breyer found this danger overstated, pointing out that that EPA has never suggested that it would interpret the regulations so as to turn section 404 into a loophole, that EPA retains the ability under section 404(c) of the CWA to veto any section 404 plan that it finds has an “unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas . . . , wildlife, or recreational areas,” and that any decision by EPA not to apply section 306 of the CWA must be a reasonable one, subject to judicial review.

IMPLICATIONS FOR THE MINING INDUSTRY AND OTHER INDUSTRIES

The *Coeur Alaska* decision carries significant implications for mines seeking permits under the CWA for the discharge of tailings, and could have implications as well for other categories of point sources regulated under the CWA, ranging from the manufacturing of cement to the mining of coal and other mineral resources.

Following the decision, environmental groups called on the Obama Administration to reverse the decision by regulation. Congress might also address the regulation of mine tailings by amending the CWA. Representatives Frank Pallone (D-NJ) and Dave Reichert (R-WA) have introduced legislation, the Clean Water Protection Act, H.R. 1310, that would, if passed, have the effect of reversing the *Coeur Alaska* decision.

FOR ADDITIONAL INFORMATION

Van Ness Feldman’s Environmental Practice provides comprehensive legal, policy, and business advisory services for the full range of issues facing the mining industry and other industries subject to federal regulation under the Clean Water Act. If you would like additional information on the Supreme Court’s opinion, please contact John Iani in our Seattle, WA office, at 206-623-9372, Andrew VanderJack in our Washington, DC office, at 202-224-1800, or any other attorney in Van Ness Feldman’s Environmental Practice.

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does not represent decisions about the suitability of a permit for any particular project.

EPA and the Corps agree that the discharge of fill material to construct the dam for a tailings impoundment as well as the discharge of the mine tailings into the impoundment is subject to permitting under CWA section 404, which governs the discharge of dredged or fill material. EPA and the Corps also agree that any discharge of pollutants from the impoundment to a downstream water (such as Slate Creek in the Kensington project) is subject to CWA Section 402, the National Pollutant Discharge Elimination System (NPDES) program. This discharge from the impoundment, like any discharge needing an NPDES permit, is subject to effluent limitations based on technology-based standards (e.g., any applicable effluent guidelines such as 40 C.F.R. Part 440) and any more stringent limits needed to comply with state water quality standards.

2002 Rulemaking Defining “Fill Material” and “Discharge of Fill Material”

Under section 404 of the CWA, the Corps (or an authorized State) issues permits for discharges of dredged or fill material into waters of the United States. Discharges of all other pollutants into waters of the U.S. are subject to permits issued by EPA (or authorized States) under the NPDES program. To bring greater clarity and consistency to how EPA and the Corps regulate discharges of pollutants, the agencies recently revised their regulatory definitions of “fill material” and “discharge of fill material.” 67 Fed. Reg. 31129 (May 9, 2002). The regulations now define “fill material” as material placed in waters of the U.S. where the material has the effect of either replacing any portion of a water of the U.S. with dry land or changing the bottom elevation of any portion of the water. 67 Fed. Reg. 31130; see also 40 C.F.R. §232.2, 33 C.F.R. §323.2(e). Examples of fill material, as defined by the regulations, include overburden from mining and materials used to create any structure or infrastructure in waters of the United States. Similarly, the phrase “placement of overburden, slurry, tailings or similar mine-related materials” was added to the definition of “discharge of fill material” to provide further clarification as to the type of activities generally regulated under section 404. See 40 C.F.R. §232.2; 33 C.F.R. §323.2(f).

We believe that the text of the rule makes clear that mine tailings placed into impounded waters of the U.S., as proposed by the Kensington mine project, are regulated under section 404 of the CWA as a discharge of fill material, and that effluent discharged from the impoundment to a downstream water, such as Slate Creek is covered by section 402. Mine tailings placed into the proposed impoundment will have the immediate effect of filling the areas of water into which

and, in part, turns on the effect of the particular discharge on the receiving waterbody in question. This memorandum is specific to impoundments and thus our analysis today focuses solely on the discharge of mine tailings into impoundments designed to hold such materials. Any other type of proposed project, such as open water disposal of mine tailings or any other similar materials, would be subject to a different regulatory analysis.

they are discharged and therefore fall within the scope of section 404. As a result, the regulatory regime applicable to discharges under section 402, including effluent limitations guidelines and standards, such as those applicable to gold ore mining (see 40 C.F.R. Part 440, Subpart J), do not apply to the placement of tailings into the proposed impoundment. See 40 C.F.R. §122.3(b). This result is confirmed by the preamble to the rule which explained the dividing line between section 402 discharges and section 404 discharges by noting that EPA would continue to regulate under section 402 “discharges (such as suspended or settleable solids) [that] can have the associated effect, over time, of raising the bottom elevation of a water due to settling of waterborne pollutants.” 67 Fed. Reg. 31135. Here, the effluent discharged from the impoundment into Slate Creek will contain pollutants in the form of suspended and settleable solids, materials that will have, at most, an incidental filling effect. The addition of those pollutants to the Creek from this impoundment associated with an industrial operation would therefore be subject to regulation under section 402.

In sum, under both the plain language of the rule and the Agencies’ interpretation of the regulation in its preamble, the mine tailings that are to be placed into an impoundment are covered by section 404 and effluent discharges from the impoundment into a receiving water are subject to permitting under section 402.

The Waste Treatment Exclusion

In 1992, EPA and the Corps were approached to address CWA regulation of the Kensington project, as then proposed, and a related mining proposal, the A-J Mine. Under the approach articulated in the 1992 memorandum from then EPA Assistant Administrator LaJuana Wilcher to the Region’s Water Director Charles Findley regarding the A-J and Kensington proposals, issuance of a section 404 permit for the impoundment of waters for mine tailings would, under certain circumstances, create a waste treatment system that was excluded from the regulatory definition of “waters of the United States.” In those circumstances, neither a section 404 permit nor a section 402 permit would be required to discharge tailings into the treatment system. A section 402 permit would be needed for any discharge of pollutants from the treatment system into waters of the United States. The 1992 memorandum provided that, as part of the analysis required under the section 404(b)(1) Guidelines, the physical impacts of the discharge of mine tailings into the system also would be considered.

The 1992 memorandum, however, was developed to clarify the regulatory approach to discharges of mine tailings in light of the Corps’ and EPA’s then differing definitions of “fill material” and “discharge of fill material.” Our current analysis of how the 2002 rulemaking applies to the permitting of discharges of mine tailings into impounded waters will help to ensure a more effective environmental review of any adverse impacts associated with these types of projects. The rulemaking did not, however, alter EPA’s interpretation of the waste treatment exclusion contained in 40 C.F.R. §122.2. While the permitting framework described in this memorandum does not invoke the exclusion for the discharge of mine tailings to impounded waters, neither does it preclude its use for waste treatment systems or system components that meet the definition in 40 C.F.R. §122.2.

Applicability of State Water Quality Standards

You also have asked how water quality standards would apply to the permitting of this project under section 404. The regulatory approach articulated in this memorandum does not alter the manner in which water quality standards currently apply under section 404 of the CWA or, in particular, how they would apply to the Kensington proposal.

With regard to the Kensington Mine project, we understand that the company's current proposal would result in a tailings pile behind the dam that is some 54 feet above the current water level in Slate Lake and, in the process, result in filling the entire Lake.² In addition to the analysis of the availability of upland alternatives, the Corps' environmental review of the project under the section 404(b)(1) Guidelines must specifically consider compliance with water quality standards and the chemical, physical, and biological impacts associated with the proposed conversion of waters to non-waters that are contemplated to result from the discharge of fill material. Before a section 404 permit may be issued, the Corps must conclude, among other determinations, that the proposed project would not cause or contribute to significant degradation after all practicable steps have been taken to avoid and minimize environmental impacts and to mitigate for remaining adverse aquatic impacts.

In addition, under the Guidelines, "no discharge of dredged or fill material may be permitted if it causes or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard." 40 C.F.R. §230.10(b)(1). In circumstances like the proposed Kensington mine, the Guidelines do not require that the proposed discharges comply with water quality criteria within the impoundment since the impoundment is the "disposal site" proposed to be authorized to be filled under the Corps' section 404 permit. The regulations define "disposal site" as "that portion of the 'waters of the United States' where specific disposal activities are permitted and consist [sic] of the bottom surface area and any overlying volume of water." 40 C.F.R. §230.3(i).

In this particular case, because the entire lake is proposed to be within the permitted disposal site specified under section 404(a), the section 404(b)(1) Guidelines require the Corps to consider, during the permitting process, whether the discharge of fill material would cause or contribute to a violation of water quality criteria or impairment to designated uses in the adjacent waters of Slate Creek (i.e., waters outside the impoundment). The State, in making decisions with regard to water quality certification, determines whether the project would cause or contribute to a violation of water quality standards, at a minimum, in waters upstream or downstream (outside) of the disposal site, considering, among other factors, whether future discharges from the impoundment to downstream waters will meet discharge limits that assure

²Additionally, we understand that there may be some water on top of the disposal site after the conclusion of the permitted activity. Any determination by the government to reassert CWA jurisdiction over this water would generally not occur until after site reclamation has been completed consistent with an approved mine reclamation plan.

compliance with applicable downstream water quality standards.³

State water quality standards also include antidegradation policies consistent with 40 C.F.R. §131.12. EPA interprets section 131.12(a)(1) of the federal requirements for antidegradation policies to be satisfied with regard to fills in waters if the discharge will not result in “significant degradation” as defined under section 230.10(c) of the section 404(b)(1) Guidelines. See Water Quality Standards Handbook, 2d Ed. (U.S. EPA Aug. 1994), at 4-5. Accordingly, unless a state indicates otherwise, a discharge of fill material which complies with the “no significant degradation” requirement of the Guidelines would be considered also to satisfy the “existing uses” requirement of the state’s antidegradation policy.

I appreciate the assistance you and your staff have provided on this matter. I trust that the information provided in this memorandum meets your needs. Should you have any additional questions, please contact me or have your staff contact John Meagher at 202-566-1353.

cc: Major General Strock
Director of Civil Works

³States retain the authority to adopt use designations for waters that prohibit or substantially restrict discharges into certain waters, such as outstanding natural resource waters (see 40 C.F.R. §131.12(b)(3)) and to protect those uses through the exercise of their certification authority.