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One Little Word Can Make All the Difference: Literal Interpretation Leads to Lake Destruction

*Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*¹

I. INTRODUCTION

Since childhood, everyone has heard the adage “sticks and stones may break my bones, but words will never hurt me.” That may be true of childhood insults, but that was certainly not the case in the Supreme Court’s recent decision in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*. The Court strictly interpreted the literal meaning of § 404 of the Clean Water Act (hereinafter “CWA”), which was amended by the Bush Administration in 2002, by interchanging the word “fill” for the word “waste” regarding mining debris. This simple change has led to a decision that will have catastrophic consequences for Lower Slate Lake, as it results in the dumping of twenty-three million pounds of debris into the lake. The deposits of this debris will kill all wildlife in the lake, will raise the water level over fifty feet, and will more than double the surface area. The implications of this decision will likely be both positive and negative, as the decision results in the development of 370 direct and indirect jobs, but also in the destruction of Lower Slate Lake.

II. FACTS AND HOLDING

Coeur Alaska, Inc. (hereinafter “Coeur Alaska”) planned to reopen the Kensington Gold Mine and make it profitable by using a technique known as “froth flotation.”² This process churns the mine’s crushed rock

¹ 129 S. Ct. 2458 (2009).

² *Id.* at 2463-64. The “froth flotation” process involves chemical treatment of an ore pulp to facilitate the attachment of pre-determined mineral particles to air bubbles, which will in turn carry the selected minerals to the surface of the pulp, there forming a stabilized froth which is skimmed off to recover the pre-determined minerals. Mining Basics, The Flotation Process, http://www.miningbasics.com/html/fundamentals_of_froth_flotatio.php (last visited Feb. 15, 2010). All other minerals will remain submerged in the pulp. *Id.*

in tanks of frothing water, creating a mixture known as slurry.³ Approximately thirty percent of the slurry's volume is crushed rock, resembling wet sand, which is known as tailings.⁴ The remaining seventy percent of the volume is water.⁵ Coeur Alaska plans to dispose of this slurry mixture by pumping it into Lower Slate Lake, which is approximately three miles from the mine.⁶

Coeur Alaska planned to use Lower Slate Lake in lieu of building a tailings pond.⁷ Lower Slate Lake is small, only 800 feet wide at its widest crossing and 2000 feet at its longest, and totaling only twenty-three acres in area.⁸ Over the life of the mine, Coeur Alaska plans to put 4.5 million tons of tailings into the lake, which will raise the lakebed by fifty feet.⁹ In an effort to contain the expansion of the lake, Coeur Alaska will dam the lake's downstream shore so that the transformed lake will be isolated from other surface water.¹⁰ Coeur Alaska has devised a system in which the lakewater will be cleaned by purification systems and will flow from the lake to a stream and then onward.¹¹

Before Coeur Alaska could operate the "froth flotation" method, it had to obtain a permit to release the slurry into Lower Slate Lake, which it obtained from the Army Corps of Engineers (hereinafter "Corps").¹² The Corps determined that the most environmentally-friendly way to dispose of the fill material was to pump it into Lower Slate Lake.¹³ The Corps rationalized that decision because the volume of "fill" material generated by the mine would be so large that it would destroy large amounts of

³ *Coeur Alaska Inc.*, 129 S. Ct. at 2464.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* The standard way to dispose of slurry is to pump it into a tailings pond where the slurry separates, allowing the solid tailings to sink to the bottom while the water is returned to the mine to be used again. *Id.*

⁷ *Id.* Lower Slate Lake is located in the Tongass National Forest in Alaska. *Id.*

⁸ *Id.*

⁹ *Id.* The area of the lake will also expand from twenty-three acres to sixty acres. *Id.*

¹⁰ *Id.* Creeks and stormwater runoff will detour around the dam. *Id.*

¹¹ *Id.*

¹² *Id.* The permit issued by the Corps is for the purpose of governing "fill" materials, which includes slurry. *Id.*

¹³ *Id.* at 2465.

surrounding wetlands if Coeur Alaska were to use the traditional tailings pond method.¹⁴ Therefore, the Corps decided that it would be preferable for Coeur Alaska to use the lake, which would be able to recover in the future through a plan developed by Coeur Alaska.¹⁵ Coeur Alaska also obtained a permit from the Environmental Protection Agency (hereinafter “EPA”) that allowed it to discharge water from Lower Slate Lake into a nearby stream.¹⁶ This permit was not designed to allow the mine to discharge slurry directly into the lake, and the water that enters the stream from the lake will be subject to water quality standards imposed by the CWA.¹⁷

After Coeur Alaska obtained the necessary permits for operation, conservation groups filed suit challenging the issuance of the Corps’ permit, arguing that the Corps did not have authority to issue the permit because the EPA is the proper authority to issue permits in compliance with the CWA.¹⁸ The environmental groups challenging the decision are the Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation (collectively, hereinafter “SEACC”).¹⁹ The mining company and the State of Alaska intervened, arguing that the statutory language allows the Corps to issue permits regarding the disposal of all “fill” material.²⁰ The district court upheld the permit and the Corps’ ability to issue it.²¹ The Court of Appeals for the Ninth Circuit reversed, stating that the rules are incompatible with each other.²² The Supreme Court held that the Corps, and not the EPA, has the authority to issue

¹⁴ *Id.*

¹⁵ *Id.* The slurry will initially kill all the populations of common fish, but the Corps determined that the fish could later be replaced and that the reclamation of the lake will result in more emergent wetlands and shallows for moderate values for fish habitat, nutrient recycling, carbon/detrital export and sediment/toxicant retention, and high values for wildlife habitat. *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 2459.

¹⁹ *Id.* at 2463.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 2466 (citing *Alaska Conservation Council v. U.S. Army Corps of Eng’rs.*, 486 F.3d 638, 654-55 (9th Cir. 2007)).

permits for the discharge of mining waste, and that the Corps acted in accordance with the CWA in issuing the permit.²³

III. LEGAL BACKGROUND

The CWA, passed in 1972, was designed to protect the country's waterways.²⁴ Bodies of water throughout the country were becoming polluted, and the CWA's purpose is to prohibit pollutants from being discharged into waterways and to maintain water quality, so as to provide a safe environment for fishing and swimming.²⁵ Because many states do not have the necessary resources to conduct the mandatory testing required for maintaining the water quality standards, the EPA has the responsibility of enforcing the CWA.²⁶ The EPA has been delegated the responsibility of testing to determine whether the level of various substances and chemicals in waterways exceed the limits set forth in the CWA.²⁷

After the CWA was passed, a controversy arose as to its application to agriculture and a few other select activities.²⁸ The Act placed restrictions on practically all placements of dredged material in any waterways or wetlands, raising the concern that the federal government was about to place all agricultural activities under the jurisdiction of the Corps.²⁹ However, this was not the case, as the CWA was designed with jurisdictional limitations to exempt most agricultural uses from regulation.³⁰

Activities regulated under the CWA include: fill for development, water resource projects including dams and levees, infrastructure

²³ *Id.* at 2463.

²⁴ Essortment, What is the Clean Water Act?,

http://www.essortment.com/all/cleanwateract_rgrl.htm (last visited Mar. 7, 2010). The Clean Water Act is more formally known as the Federal Water Pollution Control Act. *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *See id.*

²⁸ Wikipedia, Clean Water Act, http://en.wikipedia.org/wiki/Clean_Water_Act (last visited Mar. 7, 2010).

²⁹ *Id.*

³⁰ *Id.*

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development such as highways and airports, and mining projects.³¹ While the majority of the enforcement for the CWA falls to the EPA, certain responsibilities are also allotted to the Corps.³² The Corps is responsible for administering the day-to-day program including individual and general permit decisions under § 404 of the CWA, enforcement of the § 404 provisions, and the development of policy and guidance over that policy.³³ Section 404 states that the Secretary may issue permits for disposal of “dredged” or “fill” material into the navigable waters at specified locations.³⁴ In 1986, the EPA and the Corps adopted a Memorandum of Agreement making explicit the understanding that wastewater discharges, including those from mining, would be subject to the EPA permitting under § 402 of the CWA, and would not be subject to the Corps’ authority under § 404.³⁵ Section 402 is quite vague and merely indicates that permits may be issued for the discharge of any “pollutant” or combination of pollutants, except as provided in § 404.³⁶

Sections 402 and 404 also interact with § 306 on a regular basis. Section 306 of the CWA outlines the performance standards for conformity with the CWA.³⁷ The standard of performance is a standard for the discharge of “pollutants.”³⁸ The governed entities are expected to use the best processes available, including operating methods and technology.³⁹ Where practicable, the standard should permit no discharge of “pollutants.”⁴⁰ Because this performance standard only applies to “pollutants,” it only appears to become relevant when a § 402 permit is

³¹ OFFICE OF WATER, EPA, NO. 843-F-04-001, WETLAND REGULATORY AUTHORITY 1 (2004), available at http://www.epa.gov/owow/wetlands/pdf/reg_authority_pr.pdf.

³² See *id.*

³³ *Id.*

³⁴ 33 U.S.C. § 1344(a) (2006).

³⁵ Brief of Respondents Southeast Alaska Conservation Council, et al., in Opposition to Petitions for a Writ of Certiorari at 6, *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458 (2008) (Nos. 07-984 and 07-990).

³⁶ 33 U.S.C. § 1342(a).

³⁷ *Id.* § 1316(a)(1).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

proper, and not when a § 404 permit is proper, because § 404 permits only deal with “fill” material rather than “pollutants.”

For nearly thirty years, it has been illegal for newly-founded gold mines using the froth-flotation process to discharge any process wastewater into navigable bodies of water.⁴¹ The EPA adopted a no-discharge standard for all new mills, finding that other disposal methods were not only possible but actually in use in most mines.⁴² From 1982 until 2005, the Corps never issued a single permit to discharge process wastewater from a froth-flotation mill into navigable waters.⁴³

In 2002, the Bush Administration changed the rule in § 404 by redefining mining debris, even toxic mining debris, as “fill” rather than “waste.”⁴⁴ This small change had the giant effect of shifting mine-waste disposal decisions from the EPA to the Corps.⁴⁵ This change in the definition means that now only mining discharges with the *purpose*, rather than merely the *effect*, of raising the bottom elevation of a body of water via fill material would be proscribed—meaning that the Corps can now issue permits even though the action the permit allows may incidentally result in raising water levels with fill material.⁴⁶ In fact, this change in wording specifically excluded discharges for the purpose of disposing of waste.⁴⁷

The “fill rule,” as the May 2002 rule change is now known, is a case study of how the Bush Administration attempted to reshape environmental policy in the face of fierce opposition from

⁴¹ Brief of Respondents Southeast Alaska Conservation Council, et al., in Opposition to Petitions for a Writ of Certiorari, *supra* note 35, at 1.

⁴² *Id.*

⁴³ *Id.* at 2.

⁴⁴ Mike Lillis, *Supreme Court Decimates Clean Water Act*, WASH. INDEP., June 23, 2009, <http://washingtonindependent.com/48332/supreme-court-decimates-clean-water-act>.

⁴⁵ *Id.*

⁴⁶ Brief of Respondents Southeast Alaska Conservation Council, et al., in Opposition to Petitions for a Writ of Certiorari, *supra* note 35, at 6.

⁴⁷ *Id.*

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environmentalists, citizen groups, and political opponents.⁴⁸ This fill rule is one of several key changes to coal-mining regulations enacted by the Bush Administration, an administration which took office promising to ease bureaucratic burdens for the coal industry and to expand the nation's energy production.⁴⁹ According to many administrative officials and mining companies, these changes were simply clarifications of ambiguities in the law—even though these clarifications sometimes led to entirely different interpretations.⁵⁰ To environmental groups, these are changes to benefit the industry that raised over nine million dollars for the Republicans since 1998.⁵¹

The Fourth Circuit dealt with a very similar issue regarding fill material in coal mining only months before the *Coeur Alaska* decision was made.⁵² In February 2009, the Fourth Circuit held that the Corps had the authority to issue permits for coal mines to dispose of waste without any further review.⁵³ The coal mining company in this case, Aracoma Coal, was blasting away peaks of mountaintops, and then dumping the rock and debris into valleys where streams are located.⁵⁴ The Ohio Valley Environmental Coalition filed suit just after the Corps issued a permit to the Aracoma Coal Company under § 404 of the CWA in September 2005.⁵⁵ The court stated that § 404 is unambiguous about the type of permits the Corps can issue under the CWA.⁵⁶ Section 404 now gives the Corps absolute authority over the issuance of permits regarding “fill” material.

⁴⁸ Joby Warrick, *Appalachia is Paying Price for White House Rule Change*, WASH. POST, Aug. 17, 2004, at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A6462-2004Aug16.html>.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See *Ohio Valley Env'tl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009).

⁵³ *Id.* at 179-80.

⁵⁴ *Id.* at 186.

⁵⁵ *Id.* at 187.

⁵⁶ *Id.* at 194.

IV. INSTANT DECISION

The Court addressed two questions under the CWA.⁵⁷ The first was whether the CWA gives authority to the Corps or the EPA to issue a permit for the discharge of mining waste, called slurry.⁵⁸ The second was whether the Corps acted in accordance with the law when it issued the permit.⁵⁹ The Corps had already issued a permit to Coeur Alaska for a discharge of slurry into a lake in Southeast Alaska.⁶⁰ The Court concluded that the Corps was the appropriate agency to issue the permit and that the permit was lawful.⁶¹

A. Authority to Issue Permits for the Discharge of Slurry

With regard to whether the Corps or the EPA has the authority to issue a permit for the discharge of mining waste, § 404(a) of the CWA grants the Corps the power to “issue permits . . . for the discharge of . . . fill material.”⁶² However, the EPA also has authority to issue permits for the discharge of pollutants under § 402 of the CWA, which states that the EPA may “issue a permit for the discharge of any pollutants, except as provided in §404.” The Court concluded that because the material that Coeur Alaska wished to discharge into the lake is defined by the regulation as “fill material,”⁶³ Coeur Alaska obtained the permit from the Corps correctly under § 404 rather than from the EPA under § 402.⁶⁴

In reaching its conclusion, the Court examined several factors. First, the EPA’s function is different regarding the regulation of fill material than in regulating other pollutants; however, the agency still

⁵⁷ *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2463 (2009).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* (omissions in original) (quoting 33 U.S.C. § 1344(a) (2006)).

⁶³ “Fill material” includes “slurry . . . or similar mining-related materials” having the “effect of . . . [c]hanging the bottom elevation” of water. 40 C.F.R. § 232.2 (2009).

⁶⁴ *Coeur Alaska*, 129 S. Ct. at 2463.

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exercises some authority concerning regulation of fill material.⁶⁵ Section 404 assigns the EPA two tasks in regard to fill material. First, the EPA is to write guidelines containing criteria that the Corps must follow in determining whether or not to issue permits.⁶⁶ Second, the CWA gives the EPA the authority to overrule decisions made by the Corps regarding issuances of permits at particular disposal sites.⁶⁷ However, because of the phrasing of the regulation, the Court interpreted it to mean that if the Corps has authority to issue the permit for a particular type of discharge under § 404, then the EPA lacks authority to do so under § 402.⁶⁸

After the Court determined that only the Corps has the authority to issue permits under § 404, its analysis turned to whether or not the slurry that would be produced by Coeur Alaska falls under the classifications of § 404.⁶⁹ Section 404(a) gives the Corps power to “issue permits . . . for the discharge of dredged or fill material,” and all parties agree that slurry meets the definition of fill material as interpreted by the agencies.⁷⁰ Because the Court determined that it is the Corps, and not the EPA, that has the authority to issue permits under § 404, and because the slurry that would be produced by Coeur Alaska falls directly into the definition of “fill materials” covered by § 404, the Court held that only the Corps has the authority to permit Coeur Alaska’s discharge of the slurry.⁷¹

B. *Lawfulness of the Permit Issuance*

The second question addressed was whether the Corps’ permit is lawful.⁷² SEACC argued that the permit from the Corps was unlawful because the discharge of slurry would violate the EPA regulation since the

⁶⁵ *Id.* at 2467.

⁶⁶ *Id.* (citing 33 U.S.C. § 1344(b)).

⁶⁷ *Id.* (citing 33 U.S.C. § 1344(c)).

⁶⁸ *Id.*

⁶⁹ *Id.* at 2468.

⁷⁰ *Id.* (alteration in original) (internal quotation marks omitted) (quoting 33 U.S.C. § 1344(a)).

⁷¹ *Id.* at 2469.

⁷² *Id.* at 2463.

regulation has a new source performance standard.⁷³ The new standard forbids mines like Coeur Alaska's from discharging process wastewater into the navigable waters.⁷⁴ Coeur Alaska, the State of Alaska, and the federal agencies argue that the Corps' permit is still lawful because the EPA's performance standard that prohibits any wastewater does not apply to the discharge of fill material because fill material is regulated by the Corps.⁷⁵

Therefore, the first step the Court took in determining this issue was to decide whether the EPA's performance standards apply to the discharge of fill material.⁷⁶ Congress has not directly spoken to that precise question, so the statute alone does not resolve the issue.⁷⁷ Therefore, after the Court turned to the text of the CWA, it looked to the agencies' regulations construing it and the EPA's subsequent interpretation of those regulations.⁷⁸ Looking first to agency regulations, which are entitled to deference if the regulation language resolves the ambiguity in a reasonable manner, the Court determined that there remained ambiguity and turned to the agencies' subsequent interpretation of those regulations.⁷⁹ The Court used an internal memorandum known as the Regas Memorandum (hereinafter "Memorandum"), in which the EPA, in order to resolve the ambiguities, explained that its performance standards do not apply to discharges of fill material.⁸⁰ The Memorandum explains that,

⁷³ *Id.* at 2469. The source performance standard is promulgated under § 306(b) of the CWA. See 33 U.S.C. § 1316(b).

⁷⁴ *Id.* at 2470 (citing 40 C.F.R. § 440.104(b)(1) (2009)).

⁷⁵ *Id.* at 2463.

⁷⁶ *Id.* at 2469.

⁷⁷ See *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984) (standing for the proposition that when there is ambiguity in a statute that it administers, the agency is allowed to use its expertise in that area to interpret the regulation, and unless the agency interpretation of the regulation is clearly erroneous, deference will be given to the agency interpretation).

⁷⁸ *Coeur Alaska*, 129 S. Ct. at 2469.

⁷⁹ *Id.*

⁸⁰ *Id.* at 2473.

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[a]s a result [of the fact that the discharge is regulated under § 404], the regulatory regime applicable to discharges under section 402, including effluent limitations guidelines and standards, such as those applicable to gold ore mining . . . do not apply to the placement of tailings into the proposed impoundment [of lower Slate Lake].⁸¹

The Court determined that the standard was not plainly erroneous or inconsistent with the regulations, so it was accepted as reasonable.⁸²

The Court accepted the Memorandum's interpretation for five reasons.⁸³ First, the Memorandum does not purport to invalidate the EPA's performance standard.⁸⁴ Second, the Memorandum states that the EPA's performance standard will still govern when a discharge has only an incidental filling effect.⁸⁵ Third, the Memorandum preserves an important role for the Corps' expertise, so its conclusion that the EPA's performance standard does not apply is reasonable.⁸⁶ Fourth, the Memorandum's interpretation does not allow toxic pollutants⁸⁷ to enter the navigable waters.⁸⁸ The final reason the Court chose to defer to the Memorandum was its reasonable construction that reconciles §§ 306, 402, and 404 and the regulations used in enforcing the sections.⁸⁹ The Court added that a two-permit regulatory scheme where one permit was issued by the EPA and one permit was issued by the Corps would lead to delay, confusion, expenses, and uncertainty.⁹⁰ The Court deferred to the EPA's conclusion that its strict standard does not apply to the initial discharge of

⁸¹ *Id.* (alterations in original) (internal quotation marks omitted).

⁸² *Id.* at 2468.

⁸³ *Id.* at 2473.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 2474.

⁸⁷ *Id.* Toxic pollutants are distinguished from other, less dangerous pollutants, such as slurry. *Id.* The standard for different types of pollutants entering waterways is variable, depending on the type of pollutant. See 33 U.S.C. § 1317 (2006).

⁸⁸ *Coeur Alaska*, 129 S. Ct. at 2474.

⁸⁹ *Id.*

⁹⁰ *Id.*

slurry into the lake; rather, it applies only to the later discharge of water from the lake into the downstream creek, which will prohibit any slurry from entering the downstream creek.⁹¹

SEACC further contended that § 306(e) of the CWA forbids slurry discharge, while petitioners and federal agencies contend the opposite.⁹² Section 306 allows the EPA to monitor the froth-flotation gold mining industry.⁹³ It was pursuant to this authority that the EPA created the new source performance standard, which would allow “no discharge of process wastewater”⁹⁴ from the mine.⁹⁵ Here, the EPA’s § 402 permit authorizes Coeur Alaska to discharge water from Lower Slate Lake into a downstream creek, provided the water has no remaining slurry in it by the time it enters the creek.⁹⁶ This means the performance standard regulates all solid waste discharges.⁹⁷ The EPA’s performance standard and application thereof to the discharge of mining waste from Lower Slate Lake is applicable to Coeur Alaska’s mine in some circumstances, so the Court had to look to which circumstances would be included.⁹⁸ The Court stated that Congress’ omission of the § 306 performance standard from § 404 is evidence that Congress did not intend the performance standard to apply to the Corps’ permits or to the discharges of fill material under § 404.⁹⁹ The Court looked again to the Memorandum and concluded that it would defer to the agencies’ reasonable decision to continue its prior practice.¹⁰⁰

⁹¹ *Id.*

⁹² *Id.* at 2470.

⁹³ *Id.* (citing 33 U.S.C. § 1316(b) (2006)).

⁹⁴ “The term ‘process wastewater’ includes solid waste[, s]o the regulation forbids not only pollutants that dissolve in water, but also solid pollutants suspended in water” *Id.* (citing 40 CFR § 440.104(a)).

⁹⁵ *Id.* (internal quotation marks omitted) (quoting 40 C.F.R. § 440.104(b)(1) (2009)).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 2471.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 2477.

C. *Dissent*

Ginsberg wrote the three justice dissent, in which support is given to the Ninth Circuit's opinion.¹⁰¹ The three justice dissent articulated its belief that once an EPA permit is denied under § 306 of the CWA, the entity seeking the permit should not be allowed to apply to the Corps under § 404.¹⁰² The dissent referred to the history, purpose, and intent of the CWA and emphasized that it was the EPA that delegated the responsibility of enforcing the various provisions of the CWA.¹⁰³ Relying heavily on § 306, and its proposition that it shall be "unlawful for any . . . new source to operate . . . in violation of" an applicable performance standard, Ginsberg stated that Coeur Alaska should have been subject to the performance standards governed by the EPA because the mine will create a discharge.¹⁰⁴ The new EPA source performance standards state that a mine operating under a froth-flotation method should not produce any discharge. Therefore, according to the dissent, any discharge by Coeur Alaska would put it in violation of § 306 which specifically proscribes using bodies of water as disposal sites.¹⁰⁵ Relying on § 306, the dissent stated that the permit for Coeur Alaska should be regulated by the EPA because any discharge governed by the EPA's performance standards are not subject to the Corps' permitting authority.¹⁰⁶

The dissent also criticized the majority's logic in its application of the definition of "fill" materials.¹⁰⁷ Ginsberg argued that there is no logic in allowing a pollutant, even a toxic pollutant, to be classified as fill material simply because a sufficient quantity of other debris will be mixed with it to raise water levels.¹⁰⁸ The dissent recognized this idea as counterproductive and stated that a giant loophole has been created for

¹⁰¹ *See id.* at 2480.

¹⁰² *Id.*

¹⁰³ *Id.* at 2480-81.

¹⁰⁴ *Id.* at 2480 (alterations in original) (internal quotation marks omitted) (quoting 33 U.S.C. § 1316(e) (2006)).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 2482-83.

¹⁰⁷ *Id.* at 2483.

¹⁰⁸ *Id.*

companies wishing to dispose of materials otherwise prohibited under the EPA standards.¹⁰⁹ Now all those companies will have to do is include enough other waste particles in the discharge to create “fill” material and then sidestep the EPA regulations to get a permit issued directly from the Corps.¹¹⁰

V. COMMENT

The Ninth Circuit’s ruling in *Coeur Alaska* is almost certainly a short-term victory for the mining industry. It effectively prevents the EPA from issuing permits governing the discharge of slurry and instead allocates that power to the Corps.¹¹¹ However, mining groups would be better advised to see what the long-term implications of this case are, as many other mines have developed more environmentally-friendly ways to deal with waste discharges. Since most mining groups have found more environmentally-friendly methods, it seems unlikely that the comparatively lax standard of the Corps will be allowed to remain applicable in the long-term.

Although the Court decided this case using a strict interpretation of § 404 of the CWA, that interpretation has led to results that were unforeseen before the *Coeur Alaska* case emerged.¹¹² Until recently, the issuance of permits by the Corps under § 404 of the CWA had never been seen as in direct conflict with the issuance of permits by the EPA under § 402 of the CWA.¹¹³ The result in *Coeur Alaska*, therefore, carries significant implications for mines seeking permits under the CWA for the discharge of fill material in the form of tailings and other slurry.¹¹⁴

The *Coeur Alaska* decision could also have an impact on other activities regulated by the CWA, and as such many environmental groups

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See *supra* Part IV.A.

¹¹² See *supra* Part II.

¹¹³ See *supra* Part II.

¹¹⁴ *Supreme Court Holds that Mine Tailings May Be Regulated as “Fill Material” Under the Clean Water Act*, ISSUE ALERT (VanNess Feldman, Wash. D.C.), June 24, 2009, at 1, available at <http://www.vnf.com/assets/attachments/503.pdf>.

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have called on the Obama Administration to change the regulation to avoid this outcome in the future.¹¹⁵ In fact, Congress might also address the regulation by amending the CWA.¹¹⁶ Legislation has already been introduced with proponents from both parties that, if passed, would have the effect of reversing the *Coeur Alaska* decision.¹¹⁷ Furthermore, the Obama Administration, in response to a recent case in North Carolina, has already started working with the EPA and the Corps regarding the issuance of § 404 permits¹¹⁸ as the permits relate to coal mining in the eastern United States.¹¹⁹

The EPA issued a memo on July 2, 2009, indicating that the CWA would become more strictly enforced.¹²⁰ There are concerns regarding the lack of enforcement pertaining to certain provisions of the CWA, which is addressed in the July 2 memo. These concerns arise particularly from states that fail to enforce the permitting provisions that they have adopted.¹²¹ The issuance of permits by the states has been monitored less strictly than the EPA would have enforced if the EPA had been directly overseeing the project.¹²²

On a smaller scale, the states now have an option of adopting portions of the CWA.¹²³ Section 404(g) of the CWA allows a state to apply to the EPA to administer its own permit program regulating dredge and fill activities in lieu of the permit program administered by the Corps.¹²⁴ If a state adopts § 404(g), known as the “state assumption

¹¹⁵ *Id.* at 3.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ See Posting of Robert G. McLusky to Energy & Environment Monitor, <http://eem.jacksonkelly.com/2009/06/obama-administration-to-tighten-review-of-appalachian-surface-mining-.html> (June 22, 2009).

¹¹⁹ *Ohio Valley Envtl. Coal. v. Arcoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009).

¹²⁰ See Posting by Jonathan Kalmuss-Katz to SPR Environmental Law Blog, <http://blog.sprlaw.com/category/cwa> (July 7, 2009, 17:46 EST).

¹²¹ *Id.*

¹²² See *id.*

¹²³ See LEAH STETSON, EXPANDING STATE ASSUMPTION OF CWA SECTION 404: NECESSARY, WISE, AND WORKABLE I (2009), available at www.ecos.org/files/3723_file_July_2009_Green_Report.pdf.

¹²⁴ *Id.* at 2.

program,” the EPA must provide overall program oversight on state programs to ensure compliance with federal standards.¹²⁵ When a state adopts this assumption, the fill permits that would typically be administered by the Corps under § 404 of the CWA switch authority to the EPA, leaving the Corps with jurisdiction to issue permits only dealing with waters that are traditionally utilized to transport interstate or foreign commerce, such as major rivers, tidal or coastal waters, and adjacent wetlands.¹²⁶ If the state program under § 404 is approved by the EPA, then the Corps suspends the processing of § 404 permits everywhere else, except the specific bodies of water listed above.¹²⁷ The state assumption section of § 404 also gives states the leadership role in evaluating and issuing permits and the EPA merely retains broad oversight authority.¹²⁸ Thus, if Coeur Alaska had adopted § 404(g) of the CWA and subjected itself to governance of the EPA, the outcome of *Coeur Alaska* would have been completely opposite. As Lower Slate Lake is a small inland lake that is not connected to any major rivers or coastal waters utilized in interstate commerce, it would have fallen under the jurisdiction of the EPA, and would not have received the permit for fill material to be deposited directly into the lake.

Although this decision will have an adverse impact on Lower Slate Lake, the Coeur President and CEO Dennis Wheeler said that the production rates targeted for 2010 represent a 135% increase over current gold production levels.¹²⁹ This increase in production is expected to provide an estimated 370 direct and indirect jobs and is expected to generate long-term economic benefits to Juneau and Southeast Alaska.¹³⁰ The decision in *Coeur Alaska* greatly favors the mining industry, particularly gold and coal mining. These particular industries can employ

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Dorothy Kosich, *Far More Than Alaska Gold may Rely on Supreme Court's Kensington Decision*, MINEWEB, June 23, 2009,

<http://www.mineweb.com/mineweb/view/mineweb/en/page68?oid=85355&sn=Detail&pid=68>.

¹³⁰ *Id.*

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methods that are less environmentally-friendly in an effort to achieve higher profit margins if the enforcement of the CWA standards becomes more lax; particularly popular are mountain top removal techniques in coal mining and froth flotation techniques in gold mining. Both of these methods provide large amounts of “fill” material discharge but allow for much higher rates of production because the mining companies do not have to worry about disposal methods.

In Missouri, several different materials are mined, and the Mining Industry Council of Missouri is divided into multiple branches, including: barite, iron, cement and lime, lead-zinc, clay, stone, coal, lead smelting, industrial sand, and sand and gravel.¹³¹ Mining generates \$4.5 to 5 billion toward the economy in the state of Missouri every year.¹³² This money goes to generate more jobs, build schools and roads, and buy supplies to use for the most common minerals mined in Missouri, which include: lead, fire clay, lime, zinc, coal, sand and gravel, barite, iron oxide, copper, cement, crushed limestone, and silver.¹³³

Missouri uses very comprehensive plans for reclamation of land after mining projects have extracted all the mineral deposits from an area.¹³⁴ Missouri also has many laws in place that govern various mining activities.¹³⁵ The Missouri Legislature has specifically addressed issues such as the Land Reclamation Act,¹³⁶ the Strip Mine Law,¹³⁷ the Surface Coal Mining Law,¹³⁸ and the Interstate Mining Compact Commission Act.¹³⁹ With all the regulations that Missouri has in place, as well as its

¹³¹ Mining Industry Council of Missouri, Homepage, <http://www.momic.com> (last visited Feb. 21, 2010).

¹³² Mining Industry Council of Missouri, Mining and Missouri, <http://www.momic.com/bridge.asp?pagenumber=48659> (last visited Feb. 21, 2010).

¹³³ *Id.*

¹³⁴ See Missouri Department of Natural Resources, Land Reclamation Program – Laws and Regulations, <http://www.dnr.mo.gov/env/lrp/lawsregs.htm> (last visited Feb. 21, 2010).

¹³⁵ *See id.*

¹³⁶ See MO. REV. STAT. §§ 444.760-.790 (2000).

¹³⁷ *See id.* §§ 444.500-.755.

¹³⁸ *See id.* §§ 444.800-.970.

¹³⁹ *See id.* §§ 444.400-.420.

history of mining, it is unlikely that a situation similar to *Coeur Alaska* will arise here. However, just to ensure that it does not, Missouri should take the precautionary step of having the legislature adopt § 404(g) of the CWA. By adopting this provision, the state would issue its own permits regarding fill material among other such things, but the EPA rather than the Corps would oversee the issuing of permits, even those issued under § 404. This would ensure that all mines would be forced to meet the EPA discharge guidelines or risk being revoked.

VI. CONCLUSION

The Court's holding indicates a strict interpretation of the wording of the rules that could create a method of exploitation to be used by different companies within the industry, a concern clearly articulated by the dissent. By adhering to the CWA's interpretation so strictly, the Court has brought attention to the verbally subtle but outcome determinative changes that the Bush Administration made to the CWA. By substituting the word "fill" for "waste" in § 404 of the CWA, the Bush Administration successfully granted the authority to issue permits for mining waste to the Corps and away from the EPA. The EPA would not have granted a permit to Coeur Alaska to discharge slurry into Lower Slate Lake. Thus, by giving the permit authority to the Corps, instead of the EPA, the result is that all wildlife in Lower Slate Lake will certainly be exterminated and the lake levels will be expanded to over twice the current surface area. This devastating result has received attention from many environmental groups, and the Obama Administration has already begun to modify some portions of the CWA. It is likely that the permits under § 404 will be further dealt with in the future. *Coeur Alaska* is the disheartening result of a modification intended to help the mining industry that may instead have opened the door for ways to sidestep environmental regulations.

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