Southeast Alaska Conservation Council v. United States Army Corps of Engineers: The Ninth Circuit Restricts the Corps' Authority To Permit Discharge of Fill Material Under Section 404 of the Clean Water Act

I. OVERVIEW OF THE CASE

In 2005, the United States Army Corps of Engineers (Corps) granted Coeur Alaska a permit authorizing its plan to discharge process wastewater from the Kensington Gold Mine in Southeast Alaska.[1] Each day, the mine's froth-flotation mill[2] would release about 210,000 gallons of wastewater, including 1,440 tons of crushed rock, called "tailings," directly into Lower Slate Lake.[3] Approximately 4.5 million tons of tailings would fill Lower Slate Lake during the ten-to fifteen-year lifespan of the mine.[4] The deposit would raise the bottom elevation of the lake 50 feet and triple its surface area, thereby necessitating the construction of a dam and diversion ditch.[5] The wastewater, containing an elevated pH factor and concentrations of aluminum, lead, copper, and

1. Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs, 486 F.3d 638, 642 (9th Cir. 2007).

2. The froth-flotation process is used to separate gold from ore-bearing rock. At the mill, mined rock is mechanically crushed and ground. The ground rock is moved into a tank and combined with water, chemicals, and air. Air bubbles form and attach to the gold deposits, which float to the top. The froth is then skimmed off the top, leaving the residual ground rock, chemicals, and water as waste product. *Id.* at 641.

3. *Id.* at 642. Located in the Tongass National Forest, 23-acre Lower Slate Lake is a native fish and wildlife habitat. The sub-alpine lake drains into Berners Bay, and is a tributary of Slate Creek. *Id.*

4. *Id.*

5. *Id.* The dam, situated at the mouth of the lake, would be 90-feet high and 500-feet long. To construct the ditch, Coeur Alaska would cut down 7.6 acres of forest, create a 30-foot wide road, excavate a 3000-foot ditch, and fill in 4.3 acres of wetlands with 28,000 cubic yards of fill material. In addition, Slate Creek would be channeled around the lake via a pipeline. *Id.*

mercury, would kill all the fish and almost all the aquatic life in the lake.[6] Thus, the lake's capacity to sustain life after the discharge is unclear.[7]

Southeast Alaska Conservation Council and various environmental groups (collectively SEACC) brought suit against the Corps and the United States Forest Service (Forest Service), alleging that the Corps' issuance of a permit under section 404 of the Clean Water Act (CWA), and the Forest Service's Record of Decision (ROD) approving the disposal plan, violated certain discharge restrictions established by the Environmental Protection Agency (EPA) under section 301 and section 306 of the CWA.[8] In response, the Corps argued that sections 301 and 306 did not apply.[9] According to the Corps, since the discharge would have the effect of changing the bottom elevation of the lake, it met the definition of "fill material," and was therefore properly regulated pursuant to the section 404 permit program.[10]

In an unreported opinion issued in 2006, the district court granted summary judgment to the defendants.[11] The United States Court of Appeals for the Ninth Circuit, foreshadowing the reasoning it formally adopted in the noted case, issued an injunction pending appeal barring the Corps, the Forest Service, and Coeur Alaska from performing "further construction activities related to preparing the lake for use as a waste disposal site."[12] On appeal, the circuit court reversed and remanded the decision of the district court with instructions to vacate both the Corps' permit and the Forest Service's ROD.[13] The majority found that the EPA's discharge restrictions for ore-mining processes, set forth in sections 301 and 306 of the CWA, applied to Coeur Alaska's proposed discharge.[14] Those provisions, read together, specifically prohibit the discharge of froth-flotation wastewater into the nation's waters.[15] Accordingly, the Ninth Circuit *held* that the Corps violated the

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6. *Id.* at 642.

7. *Id.*

8. *Id.* at 643. Sierra Club and Lynn Canal Conservation joined SEACC in the litigation. *Id.* Coeur Alaska, Goldbelt, Inc., and the State of Alaska later intervened as defendants. *Id.*

9. *Id.*

10. *Id.* at 644.

11. *Id.* at 643. The district court analyzed whether the Corps incorrectly applied section 404 of the CWA. *Id.*

12. Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs, (*Se. Alaska I*) 472 F.3d 1097, 1099 (9th Cir 2006).

13. Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs, 486 F.3d 638, 640 (9th Cir. 2007). The Fourth Circuit also vacated the permit issued to Goldbelt, Inc., to build a marine facility in Berners Bay, and the Forest Service's ROD, because both were premised on the invalid permit issued by the Corps to Coeur Alaska. *Id.* at 641 n.2.

14. *Id.* at 655.

15. *Id.*

CWA by issuing Coeur Alaska a section 404 permit to discharge wastewater from its froth-flotation mill into navigable waters of the United States.[16] *Southeast Alaska Conservation Council v. United States Army Corps of Engineers*, 486 F.3d 638, 655 (9th Cir. 2007).

II. BACKGROUND

Prior to this lawsuit, Coeur Alaska had scheduled the Kensington Gold Mine to begin production in 2007 as the third largest mine in Alaska.[17] The mine would require an initial capital expenditure of over $238 million, employ 200 people during the regular mining season, distribute about $16 million in annual wages and benefits, and pay millions of dollars in state and local taxes.[18] Coeur Alaska stated that discharge into Lower Slate Lake was the only option for disposal of mining byproduct that was not recycled back into the mine.[19] The first time the Corps issued a section 404 permit under the CWA authorizing wastewater disposal from a froth-flotation process into waters of the United States was to Coeur Alaska.[20]

For years, environmental advocacy groups have challenged mining projects that threaten freshwater sources, wildlife habitats, forests, and wetlands.[21] These resources may need protection: dams have flooded over 600,000 miles of river, thousands of additional miles have been changed in ways that negatively impact important habitats, and the four categories of species at the greatest risk of extinction in the United States are all dependent on rivers, lakes, and streams.[22] Protection for freshwater sources under federal law is found mainly in the CWA,

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16. *Id.*

17. Elizabeth Bluemink, *Gold Mine's Future in Doubt*, ANCHORAGE DAILY NEWS, May 24, 2007, *available at* http://www.adn.com/money/industries/mining/story/8914370p-8814396c.html.

18. Coeur Alaska, http://kensingtongold.com/overview.html (last visited Oct. 11, 2007).

19. *Id.*

20. Appellant's Brief at *1, Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs, 486 F.3d 638 (4th Cir. 2007) (No. 06-35679).

21. *E.g.*, Ohio Valley Envtl. Coal. v. Bulen, 429 F.3d 493 (4th Cir. 2005); Kentuckians for the Commonwealth v. Rivenburgh, 317 F.3d 425 (4th Cir. 2003).

22. William L. Andreen, *Developing a More Holistic Approach to Water Management in the United States*, ENVTL. L. REP., Apr. 2006, at 2 *available at* http://www.ssrn.com/abstract=894959; Bragg v. Robertson, 54 F. Supp. 2d 635, 646 (S.D. W.Va. 1999) ("If the forest canopy of Pigeonroost Hollow is leveled [for purposes of mining], exposing the stream to extreme temperatures, and aquatic life is destroyed, these harms cannot be undone . . . [this destruction] cannot be regarded as anything but permanent and irreversible."), *aff'd in part, vacated in part on other grounds sub nom.* Bragg v. W. Va. Coal Ass'n, 248 F.3d 275 (4th Cir. 2001).

enacted for the "[r]estoration and maintenance of [the] chemical, physical and biological integrity of [the] Nation's waters."[23]

The foundation of the CWA, section 301, provides that the "discharge of any pollutant"[24] from a "point source"[25] into navigable waters of the United States is unlawful unless the discharge complies with, inter alia, sections 301 and 306, and the permit schemes established by sections 402 and 404.[26] In particular, the discharge must comply with technology-based restrictions, or effluent limitations, implemented by the EPA pursuant to section 301(b).[27] If an effluent limitation has been promulgated, then section 301(e) requires that it "shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this Act."[28] One kind of effluent limitation is the standard of performance.[29] Under section 306, the EPA must publish and regularly revise a list of categories of sources from which there may be a discharge of pollutants, and for any new sources added to the list, establish a new source performance standard (NSPS) to govern the discharge of that pollutant.[30] If practicable, "a standard permitting no discharge of pollutants" will be adopted.[31]

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23. CWA § 101(a), 33 U.S.C. § 1251(a) (2006).

24. "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." *Id.* § 1362(6).

25. "The term 'point source' means any discernable, 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." *Id.* § 1362(14).

26. "Except as in compliance with this section and sections [302, 306, 307, 318, 402, and 404] of this title, the discharge of any pollutant by any person shall be unlawful." *Id.* § 1311(a).

27. "The term 'effluent limitation' means any restriction established by a State or the Administrator [EPA] 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. *Id.* § 1362(11).

28. *Id.* § 1311(e).

29. "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 [EPA] 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." *Id.* § 1316(a)(1).

30. *Id.* § 1316(b). "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." *Id.* § 1316(a)(2).

31. *Id.* § 1316(a)(1).

Following the mandates of sections 301 and 306, in 1982, the EPA created an ore-mining category.[32] Within this category, the EPA established a NSPS for several subcategories, including for gold mines using the froth-flotation mill process.[33] For such operations, the EPA adopted a zero-discharge standard: "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 . . . for the beneficiation of . . . gold . . . ."[34] After such a performance standard has been promulgated, it is "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."[35]

To enforce effluent limitations and performance standards, Congress created two principal permitting regimes for the EPA to administer under section 402 and section 404 of the CWA.[36] A discharge of pollutants into the waters of the United States is unlawful unless it is authorized by one of these programs.[37] The EPA oversees the National Pollutant Discharge Elimination System (NPDES) permit program under section 402.[38] Pursuant to this program, the EPA may issue a permit "for the discharge of any pollutant" as long as the discharge will comply with, inter alia, effluent limitations and standards of performance under sections 301 and 306.[39] The Corps administers the section 404 program using guidelines developed by the EPA.[40] Under section 404(a), the Corps has the authority to permit the "discharge of dredged or fill material into the navigable waters at specified disposal sites."[41]

There is no statutory definition of "fill material," and the Corps' and the EPA's ("the agencies") differing descriptions of the term have confused courts attempting to interpret the scope of permissible discharges under section 404.[42] In 1977, the Corps used a primary-

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32. *See* Ore Mining and Pressing Point Source Category Effluent Limitations, Guidelines and New Source Performance Standards, 47 Fed. Reg. 54,598 (Dec. 3, 1982) (to be codified at 40 C.F.R. pt. 400).

33. 40 C.F.R. § 440.44(b)(1).

34. *Id.*

35. CWA § 306(e), 33 U.S.C. § 1316(e)b (2006).

36. CWA § 101(d), 33 U.S.C. § 1251(d) (stating that the EPA is sole administrator of CWA except where expressly delegated to the Corps); Kentuckians for the Commonwealth v. Rivenburgh, 317 F.3d 425, 447 (4th Cir. 2003).

37. CWA § 301(a), 33 U.S.C. § 1311(a); *Kentuckians*, 317 F.3d at 447.

38. CWA § 402, 33 U.S.C. § 1342(a)(1).

39. CWA § 402, 33 U.S.C. § 1342(a)(1).

40. CWA § 404, 33 U.S.C. § 1344.

41. CWA § 404, 33 U.S.C. § 1344(a).

42. *See Kentuckians*, 317 F.3d at 431 (finding that courts have "evinced confusion" regarding the division of authority between the Corps and the EPA over the administration of the

purpose test to define fill material, permitting under section 404 "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody."[43] The 1977 definition explicitly excluded "any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated by section 402."[44] The EPA never adopted a purpose-based test, opting instead for an effects-based test that defined fill material as "any pollutant used to create fill in the traditional sense of replacing an aquatic area with dry land or of changing the bottom elevation of a water body for any purpose."[45]

The definitions created a regulatory overlap: the EPA's definition of the term "pollutant" included the Corps' definition of fill material.[46] That is, a discharge deposited for the primary purpose of changing the bottom elevation of a water body could still be waste in certain circumstances, and would therefore qualify for permitting as waste under section 402 *and* as fill material under section 404.[47] A 1986 Memorandum of Agreement (MOA) between the agencies purported to reconcile section 402 and 404 practice, but since the agencies essentially embellished on their previous definitions, the MOA did little to clarify the ambiguity.[48]

In an unpublished opinion, *West Virginia Coal Association v. Reilly*, the United States Court of Appeals for the Fourth Circuit affirmed the district court's holding that the Corps lacked authority under section 404 to permit a coal mining company to fill valleys with material generated as a byproduct of mining operations.[49] The district court disagreed with the plaintiff's assertion that the Corps should regulate the mining discharge as fill material because it changed the bottom elevation of a body of water.[50] Rather, the discharge was subject to the EPA's authority under section 402, since "the primary purpose of the fills and treatment

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Act); *See, e.g.*, Res. Invs., Inc., v. U.S. Army Corps of Eng'rs, 151 F.3d 1162 (9th Cir. 1998); Avoyelles Sportsmen's League v. Marsh, 715 F.2d 897 (5th Cir. 1983).

43. 33 C.F.R. § 323.2(m) (1978); *Res. Invs.*, 151 F.3d at 1166.

44. 33 C.F.R. § 323.2(m) (1977); *Res. Invs.*, 151 F.3d at 1166.

45. 40 C.F.R. § 230 Appendix A(6)(1977).

46. *See Res. Invs.*, 151 F.3d at 1165-66, 1168-69 (acknowledging the regulatory overlap).

47. *See Kentuckians*, 317 F.3d at 432 ("[T]he Corps acknowledged that the differing approaches in defining 'fill material' employed by EPA and the Corps in their regulations had created some uncertainty about their interpretation of the Clean Water Act. . . .").

48. Memorandum of Agreement on Solid Waste, 51 Fed. Reg. 8,871, 8,871 (Mar. 14, 1986); Nathaniel Browand, *Shifting the Boundary Between the Sections 402 and 404 Permitting Programs by Expanding the Definition of Fill Material*, 31 B.C. ENVTL. AFF. L. REV. 617, 628-29 (2004).

49. No. 90-2034, 1991 WL 75217, at *4 (4th Cir. May 13, 1991).

50. W. Va. Coal Ass'n v. Reilly, 728 F. Supp. 1276, 1286 (S.D.W. Va. 1989).

ponds is to dispose of waste or spoil and treat sediment-laden water, not to create dry land."[51]

In *Resource Investments, Inc. v. United States Army Corps of Engineers*, the Ninth Circuit held that the EPA, not the Corps under section 404, governed permitting for the construction of a municipal solid waste landfill on a wetlands site.[52] The court found the proposed solid waste deposit failed to meet the primary purpose test under the 1977 definition because solid waste was not "material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a water body."[53] Rather, the discharge fell squarely within the waste exclusion, which eliminated pollutants discharged primarily to dispose of waste from consideration as fill material under section 404.[54] The court cited the Corps and the EPA's intent to regulate under the EPA's NPDES program certain waste discharges that would technically meet the definition of fill material, because after the material is dumped in water, the "final result may be a landfill even though the primary purpose of the discharge is waste disposal."[55]

In 2002, the agencies introduced a joint regulatory definition of "fill material," which instituted two primary changes from the Corps' previous definition.[56] First, the agencies replaced the primary purpose test with an effects test by defining fill material as "material placed in waters of the United States" that "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."[57] Second, the new fill rule eliminated the broad waste exclusion found in the Corps' former rule in favor of a more limited exception that "the term fill material does not include trash or garbage."[58]

As the joint definition took shape, the Fourth Circuit in *Kentuckians for the Commonwealth v. Rivenburgh* reversed a district court judgment that the Corps exceeded the scope of its authority by qualifying coal mining overburden as fill material under its then-superseded 1977 definition and issuing a section 404 permit for the discharge to Martin

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51. *Id.* at 1287.
52. 151 F.3d 1162, 1169 (9th Cir. 1998).
53. *Id.* at 1168.
54. *Id.*
55. *Id.* (quoting 42 Fed. Reg. 37,122 (1977)).
56. 33 C.F.R. § 323.2(e)(1) (2007) (Corp's regulation); 40 C.F.R. § 232.2 (2007) (EPA's regulation). As these regulations are the same, only the Corps regulation will be cited.
57. 33 C.F.R. § 323.2(e)(1).
58. *Id.*

County Coal Corporation (Martin Coal).[59] Martin Coal proposed to fill twenty-seven valleys with mining overburden, burying about 6.3 miles of streams.[60]

When, as in *Kentuckians*, a particular agency action is challenged pursuant to the Administrative Procedure Act, the two-part inquiry set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, is used to examine the scope of the agency's authority as provided by the subject statute.[61] First, the reviewing court should examine the statutory text, giving effect to the clear intent of Congress as to "the precise question at issue."[62] If Congress has spoken on the matter, the inquiry ends.[63] However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[64]

Under step one of *Chevron*, the Fourth Circuit found that, contrary to the assertion of the district court, Congress had "not clearly spoken on the meaning of 'fill material.'"[65] In particular, there was no evidence of congressional intent to limit the Corps authority under section 404 to permit only discharge of fill material for which a beneficial primary purpose, such as construction work, exists.[66] Based on regulatory history, the Fourth Circuit further determined that the Corps' interpretation of fill material as used in section 404 of the CWA was a permissible construction of the statute under the second *Chevron* prong.[67] The Corps interpretation of fill material to mean "all material that displaces water or changes the bottom elevation of a water body except for 'waste'-meaning garbage, sewage, and effluent that could be regulated by ongoing effluent limitations as described in section 402" reflected the regulatory record.[68] Furthermore, the Corps' construction promoted the CWA's clear intent to allocate authority between the agencies according to the kind of discharge involved.[69] Finally, the Fourth Circuit vacated as overbroad the district court's finding that the 2002 definition of fill material was

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59. Kentuckians for the Commonwealth v. Rivenburgh, 317 F.3d 425, 430 (4th Cir. 2003).
60. *Id.*
61. 467 U.S. 837, 842 (1984).
62. *Id.*
63. *Id.*
64. *Id.* at 843.
65. Kentuckians for the Commonwealth v. Rivenburgh, 317 F.3d 425, 444 (4th Cir. 2003).
66. *See id.* at 437, 444 (finding that the "beneficial primary purposes test" was not supported by section 404(f)(2) of the CWA, by the CWA's connection to the Rivers and Harbors Act, or by the CWA's association to the Surface Mining Control and Reclamation Act).
67. *Id.* at 448.
68. *Id.*
69. *Id.*

"fundamentally inconsistent" with the "spirit and letter of the CWA," because it is "intended to and does allow the massive filling of Appalachian streams with mine waste under auspices of the CWA."[70]

III. COURT'S DECISION

The noted case considers whether the Corps' issuance of a permit to a gold mining company to fill a lake with process wastewater from a froth-flotation mill was lawful under section 404 of the CWA.[71] SEACC took the position that the discharge was prohibited because the EPA's effluent limitations and performance standard, promulgated in sections 301 and 306 of the Act, set forth a zero-discharge rule for froth-flotation mills.[72] The Corps contended that the fill was properly permitted under section 404 because the discharge, which would "have the effect of raising the bottom elevation of the lake," facially met the Corps' and the EPA's joint definition of fill material.[73] Separate regulations construing the CWA seemed to govern Coeur Alaska's proposed operations, but each produced a different result under the Act and therefore could not both apply.[74]

Within a *Chevron* framework, the Ninth Circuit analyzed relevant statutory text and concluded that the plain language of the CWA resolved the regulatory conflict and mandated that the performance standard govern.[75] First, the court emphasized that section 301(a) prohibits *any* discharge that fails to comply with a number of enumerated sections, including sections 301, 306, 402, *and* 404.[76] Significantly, Congress used "and" as a connector, rather than "or," demonstrating that Congress meant for an effluent limitation or performance standard to regulate *every* applicable discharge, including discharges that could facially qualify for permitting pursuant to section 404.[77] Furthermore, the court highlighted that section 301(e) makes effluent limitations established by EPA applicable to *all* discharges, and section 306(e) prohibits *any* discharge that does not comply with performance standards set forth by the EPA.[78] Thus, Congress intended sections 301(e) and 306(e) as

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70. *Id.* at 433-34, 438.
71. Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs, 486 F.3d 638, 644 (9th Cir. 2007).
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 646.
77. *Id.*
78. *Id.*

"absolute prohibitions," making unlawful without exception every discharge failing to comply with existing effluent limitations and performance standards.[79] Defendant's position that the provisions were inapplicable was insupportable because it took all meaning away from the words "all" in 301(e) and "any" in section 306(e).[80]

The Ninth Circuit rejected the Corps' argument that sections 301 and 306 were inapplicable to section 404 permits because section 402 explicitly mandates compliance with those sections whereas section 404 does not, as such a reading would impermissibly render certain CWA provisions inconsistent with others.[81] Specifically, for the Corps to issue a section 404 permit whenever a proposed discharge met the agencies' definition of "fill material," without considering whether the material was subject to an EPA performance standard, would imply an exception to any applicable mandate contained in sections 301 and 306.[82] This implied exception would render meaningless the rule under section 301 prohibiting the discharge of any pollutant unless in compliance with the requirements of sections 301, 306, 402, *and* 404.[83] Moreover, Congress explicitly listed certain exceptions to the Act in section 404, but section 404 did *not* contain exceptions for effluent limitations, performance standards, or mining activity, and the court could not imply extra exceptions.[84]

Regulatory history concerning the development of effluent limitations and performance standards for gold mines using froth-flotation mills further demonstrated that the EPA did not intend for its 2002 definition of fill material to replace the zero-discharge standard.[85] The court observed that when the standard was adopted in 1982, the EPA was aware of the regulatory overlap created with its own effects-based definition of fill material.[86] In particular, that froth-flotation discharge, which contained a high percentage of suspended solids, would have the

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79. *Id.* at 645-46. The court recognized that since a performance standard is one kind of effluent limitation, sections 301(e) and 306(e) "have the same practical effect in this case." *Id.* at 645 n.8.

80. *Id.* at 647.

81. *Id.* at 646-47.

82. *Id.* at 646.

83. *Id.* at 647.

84. *Id.* at 648 (quoting Andrus v. Glover Constr. Co., 446 U.S. 608, 616-17 (1980)). For example, section 404(f) exempts from regulation under sections 301(a), 402, and 404, discharges of dredged or fill material from activities such as agricultural activities or road construction. *Id.*

85. *Id.*

86. *Id.* at 649 (citing Ore Mining and Pressing Point Source Category Effluent Limitations, Guidelines and New Source Performance Standards, 47 Fed. Reg. 54,598 (Dec. 3, 1982) (to be codified at 40 C.F.R. pt. 400).

effect of raising bottom elevation and therefore qualify for permitting under section 404, although it was prohibited by the performance standard.[87] In the court's view, one way the EPA addressed the conflict was by specifying that the standard apply to *any* discharge from a froth-flotation mill, which implicitly included discharges that would facially qualify for permitting under section 404.[88]

Further examination of the Federal Register showed that when the agencies promulgated their joint definition of fill material, they did not intend to alter their long-standing practice whereby the EPA regulated the discharge of pollutants subject to effluent limitations or performance standards under the section 402 NPDES program.[89] The record evidenced that the EPA had never wanted to regulate fill material subject to effluent guidelines, and it also showed that settleable solids were considered pollutants, not fill material, and should thus be regulated under section 402.[90] Furthermore, the Corps had, after the 1986 MOA, "continually declined to exercise jurisdiction over mine tailings."[91] Based on the above findings, the Ninth Circuit declared, "the current fill rule only applies to those tailings and other mining-related materials that are not subject to effluent limitations or standards of performance."[92]

The Ninth Circuit reconciled its holding with the Fourth Circuit's judgment in *Kentuckians* by noting that the Fourth Circuit was asked to determine whether the Corps had authority to issue a section 404 permit for valley fills that served "no purpose other than to dispose of excess overburden from the mining activity."[93] *Kentuckians* was also distinguishable because at the time the case was decided, the EPA had not set forth a standard of performance regarding mountain-top coal mining, and so the case did not implicate either section 301 or section 306.[94] Moreover, in that case, the Corps had admitted that under the 2002 definition, "it was authorized to regulate discharges of fill, even for waste, *unless the fill amounted to effluent that could be subjected to effluent limitations*."[95]

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87. *Id.*
88. *Id.*
89. *Id.* at 651.
90. *Id.* at 651-52 (citing Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material", 67 Fed. Reg. at 31,135 (May 9, 2002) (to be codified at 33 C.F.R. pt. 323, 40 C.F.R. pt. 232)).
91. *Id.* at 650.
92. *Id.* at 652-53.
93. *Id.* at 653 n.15 (quoting Kentuckians for the Commonwealth v. Rivenburgh, 317 F.3d 425, 439 (4th Cir. 2003)).
94. *Id.*
95. *Id.* (quoting *Kentuckians*, 317 F.3d at 445) (emphasis in original).

The court advanced a rule, which, in its belief, accommodated the language difference between sections 402 and 404, did not render superfluous any of the subject provisions of the CWA, and gave effect to the stated intent of Congress.[96] If the EPA has established an effluent limitation or performance standard for a source of pollution, then sections 301 and 306 preclude the use of a section 404 permit for that discharge.[97] An organization could only obtain a permit to discharge wastewater subject to effluent limitations under section 301 or performance standards under section 306 if in compliance with the NPDES program administered by the EPA under section 402.[98] Therefore, although the discharge of froth-flotation wastewater from the Kensington Gold Mine is facially eligible for the section 404 permitting scheme because it will raise the bottom elevation of Lower Slate Lake, the discharge is illegal pursuant to the applicable performance standard.[99]

IV. ANALYSIS

Southeast Alaska Conservation Council is a benchmark decision in the ongoing effort to define the scope of the Corps' permitting authority as related to "fill material" under section 404 of the CWA. Although the Ninth Circuit confined its opinion to the narrow issue presented, and thus did not critically analyze the 2002 definition of fill material, it did hint that the current fill rule may go against the CWA.[100] More importantly, the majority's ruling—that the Corps violated the CWA when it issued a section 404 permit authorizing the discharge of wastewater subject to an EPA zero-discharge standard—represents an important clarification of the Corps' jurisdiction to permit discharges into the navigable waters of the United States.[101] Therefore, courts, the Corps, and the EPA should follow the Ninth Circuit's rule when evaluating the propriety of a section 404 fill permit.

Precedent supports the Ninth Circuit's holding that the EPA, and not the Corps, should regulate mining waste. As in *Southeast Alaska Conservation Council*, the Fourth Circuit in *Reilly* determined that

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96. *Id.* at 647.
97. *Id.*
98. *Id.*
99. *Id.* at 655.
100. *Id.* at 651 n.12. The court noted that an amici brief submitted by 14 members of Congress "argues persuasively" that the 2002 definition of fill material "violates the purposes and plain language of the Clean Water Act by allowing waste material to be dumped into lakes, rivers, and other waters of the United States." *Id.*
101. *Id.* at 655.

mining discharge was subject to regulation by the EPA.[102] The Ninth Circuit in *Resource Investments* similarly held that the EPA intended to regulate discharge that would technically meet the definition of fill material but had the result of a waste fill.[103] And, while the judgment in the noted case appears to be directly at odds with the Fourth Circuit's decision in *Kentuckians*, prompting predictions of a circuit split,[104] the cases are distinguishable. It is true that unlike the prohibition against froth-flotation discharge issued in the noted case, the Fourth Circuit held that coal mining overburden was authorized under the Corps' section 404 permitting authority.[105] However, the legal framework for the circuit courts' analysis explains the seemingly divergent holdings. As the Ninth Circuit pointed out, a performance standard for mountaintop mining was not in effect when *Kentuckians* was decided, so sections 301 and 306 were not implicated.[106] Presumably, until a performance standard for mountaintop removal is promulgated, the Fourth Circuit's judgment will stand.

The bright line rule established in the noted case will provide important guidance, at least when a performance standard has been promulgated, to the permit-issuing agency. Evidently, neither the Corps nor the EPA understood prior to this case that the EPA's performance standard controlled. Furthermore, an unambiguous rule will eliminate, in certain cases, the confusion and inconsistent results created by courts attempting to divine the meaning of the term "fill material" as it existed when the permit was issued. Now, whether a purpose-based or effects-based definition controls, the threshold question to be asked is whether the proposed discharge is subject to an effluent limitation or standard of performance. If it is, the inquiry ends. The EPA has jurisdiction over the discharge under section 402.[107] This clear two-step inquiry will reduce litigation, and lend greater predictability and stability to the CWA permitting scheme than has existed in recent years.

The Ninth Circuit's decision reflects a policy trend toward stricter regulation of mining discharge. For example, recognizing the

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102. W. Va. Coal Ass'n v. Reilly, No. 90-2034, 1991 WL 75217, at *4 (4th Cir. May 13, 1991).

103. Res. Invs., Inc. v. U.S. Army Corps of Eng'rs, 151 F.3d 1162, 1169 (9th Cir. 1998).

104. Stefan Cornibert, *Enforcement Suits Force Stricter Waste Controls on Mining Industry*, 28 INSIDE THE EPA, May 25, 2007, at 2; INSIDE WASHINGTON PUBLISHERS, WATER POLICY REPORT, BILL LIMITING MINE WASTE FACES CLASH WITH COAL STATE LAWMAKERS 16 (May 28, 2007).

105. Kentuckians for the Commonwealth v. Rivenburgh, 317 F.3d 425, 448 (4th Cir. 2003).

106. *Se. Alaska II*, at 653 n.15.

107. *Id.* at 655.

environmental harm caused by mining byproducts, the EPA recently prioritized enforcement of environmental standards for the mining and mineral-processing sector.[108] In addition, there has been growing bipartisan support in Congress for the Clean Water Protection Act (CWPA), a bill Representative Pallone (D-NJ) has introduced repeatedly since the 2002 definition of fill material was adopted.[109] The CWPA would amend the CWA to clarify that fill material cannot be composed of waste.[110] Adoption of this amendment would effectively reinstate the broad waste exclusion found in the Corps' 1977 definition, which was replaced in 2002 by a more limited exclusion for trash or garbage.[111] Representative Pallone reintroduced the CWPA on May 4, 2007, and the measure is currently under review by the House Subcommittee on Water Resources and the Environment.[112] Although congressional sources predict that the CWPA is unlikely to pass in the House due to historical opposition from lawmakers from Appalachian states,[113] the decision rendered in *Southeast Alaska Conservation Council* shows that the federal judiciary is willing to impose stricter standards on mining discharge simply by interpreting statutory provisions already found in the Act.

To hold, as the Ninth Circuit has done, that discharges subject to effluent limitations and performance standards are clearly within the regulatory jurisdiction of the EPA, and not the Corps, promotes the fundamental purpose of the CWA in at least two ways. First, the Corps

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108. OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, FINAL FY2006 UPDATE, NATIONAL PROGRAM MANAGERS' GUIDANCE 7-8, *available at* http://www.epa.gov/compliance/resources/policies/data/planning/npmguidance2006.pdf ("The mishandling of mineral processing wastes has caused significant environmental damage and resulted in costly cleanups. These highly acidic wastes have caused fish kills and the arsenic and cadmium that these waters often contain have been found in mineral processing facilities . . . failing to obtain the necessary permits and adequately manage their wastes.").

109. *See* H.R. 4683, 107th Cong. (2002), *available at* http://www.frwebgate.access.spo.gov/cgi_bin/getdoc.cgi?dbname=107_cong_bills&docid=f:n4683ih.txt.pdf (identifying 36 cosponsors); H.R. 738, 108th Cong. (2003), *available at* http://www.frwebgate.access.spo.gov/cgi_bin/getdoc.cgi?dbname=108_cong_bills&docid=f:n738ih.txt.pdf (naming 64 cosponsors); H.R. 2169, 110th Cong. (2007), *available at* http://www.frwebgate.access.spo.gov/cgi_bin/getdoc.cgi?dbname=110_cong_bills&docid=f:n2169ih.txt.pdf (showing 104 sponsors).

110. H.R. 2169, 110th Cong. ("Section 502 of the Federal Water Pollution Control Act (33 U.S.C. 1362) is amended by adding at the end the following: '(25) Fill Material—The term 'fill material' means any pollutant which replaces portions of the waters of the United States with dry land or which changes the bottom elevation of a water body for any purpose. The term does not include any pollutant discharged into the water primarily to dispose of waste.'").

111. *See supra* note 44 and accompanying text.

112. H.R. 2169, 110th Cong. (2007).

113. INSIDE WASHINGTON PUBLISHERS, SUPERFUND REPORT, ENFORCEMENT SUITS FORCE STRICTER WASTE CONTROLS ON MINING INDUSTRY 21 (2007).

should not be allowed to create an exception to performance standards set forth by the EPA, because this directly contravenes EPA's role as the primary administrator of the Act.[114] Second, the ruling applies broadly to *all* operations that propose to discharge substances regulated pursuant to CWA sections 301 and 306. Imposing stricter standards for discharges whose potential harm to the environment has already been recognized by the EPA through the promulgation of performance standards furthers the purpose of the Act to protect the nation's waters.

V. CONCLUSION

The Ninth Circuit correctly ruled that the Corps lacks jurisdiction over discharges subject to the EPA's effluent limitations and standards of performance.[115] In addition to ample precedent supporting the EPA's jurisdiction over material created as a bi-product of mining operations, Congress clearly intended for the EPA's effluent restrictions to control these discharges. The Ninth Circuit's clarification on the Corps' authority to issue fill permits under section 404 gives courts and agencies a clear rule to follow, which will lead to greater institutional stability to the CWA's permitting scheme. Most importantly, mandating stricter compliance with EPA discharge restrictions will have a ripple effect, thereby expanding the protection, restoration, and maintenance of the nation's waters and wildlife habitats.

Sandra Sutak*

114. *See* CWA § 101(d), 33 U.S.C. § 1251(d) (2000).

115. Se. Alaska Conservation Council v. U.S. Army Corps of Engr's, 486 F.3d 638, 655 (9th Cir. 2002).

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