

Case at a Glance

The issue is whether the wastewater discharge from a new gold mine should be required to comply with the new source performance standard established under § 306 of the Clean Water Act for this type of mine or whether the discharge qualifies as “fill material” under § 404. The difference is substantial: The applicable new source performance standard is zero discharge; the § 404 fill permit, on the other hand, allows the discharge of untreated wastewater into a pristine subalpine lake.

Mining for Gold Gives Rise to a Permitting Dilemma

by Amy J. Wildermuth

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different methods for disposing of the waste from the extraction process.

Since 1983, the performance standard under the Clean Water Act for a new operation like Coeur Alaska’s has been zero discharge, meaning that there may be no discharge of the wastewater from the extraction process into navigable waters unless certain narrow exceptions apply. As a result, mines built after 1983 use tailings ponds, which are manmade retention ponds, to dispose of their process wastewater. In the mid-1990s, Coeur Alaska proposed to use a tailings pond for its wastewater and both the EPA and the Army Corps of Engineers issued permits for that proposal.

Then things changed.

In 2002, the EPA and the Army Corps of Engineers changed the definition of “fill material” under the Clean Water Act. Because the agencies had adopted two different defin-

ISSUE

Must the wastewater discharge from a new gold mine comply with the zero-discharge “new source” performance standard established for new gold mines of this type under § 306 of the Clean Water Act or should the wastewater be considered “fill material” that may be discharged untreated into navigable waters under a § 404 permit?

FACTS

For almost two decades, Coeur Alaska, Inc., a mining corporation, has been planning to extract gold from the Kensington Gold Mine in southeast Alaska using a froth-flotation process. During that time, Coeur Alaska has considered several

COEUR ALASKA V. SOUTHEAST ALASKA CONSERVATION COUNCIL ET AL. AND ALASKA V. SOUTHEAST ALASKA CONSERVATION COUNCIL ET AL.
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itions of the term, inconsistencies arose, including whether there was any authority whatsoever to regulate certain discharges. See *Resource Investments Inc. v. U.S. Army Corps of Engineers*, 151 F.3d 1162 (9th Cir. 1998) (concluding that landfill to be built on wetlands needed no permit because the purpose of fill was not to replace an aquatic area with dry land or to change the bottom elevation of a waterbody but rather to serve as a leak detection and collection system). The agencies therefore adopted a joint definition to remedy these problems by making clear that certain fill activities fell under § 404 and therefore could be regulated under that section. The agencies were careful to point out, however, that even though some suspended solids may be included in a discharge, where standards or effluent limits exist for a discharge, a § 404 permit is not appropriate. Instead, the discharge must comply with the established effluent standards and limits. See *Proposed Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge Fill Material,"* 65 Fed. Reg. 21,292 (Apr. 20, 2000).

In the course of the revision, the agencies also added to the definition of "fill material" the "placement of overburden, slurry, or tailings or similar mining-related materials." This seemingly small addition, proved to be quite important to this case.

When economic circumstances changed, Coeur Alaska decided that, instead of constructing a tailings pond for its discharge, it would discharge its wastewater directly into Lower Slate Lake, a much less expensive option. The corporation argued that because the discharge would consist of mine tailings, it should qualify as "fill material." The operation therefore needed only a

§ 404 permit, under which some modest water-quality requirements must be met, but those do not include any effluent limits or standards. See 33 U.S.C. § 1344(b) (2002). This would mean that Coeur Alaska would not be required to comply with the zero-discharge standard and in fact could discharge its wastewater untreated into the lake.

The difference between zero discharge and discharging the wastewater into Lower Slate Lake is stark, and not just in the economic terms that shaped Coeur Alaska's decision. Zero discharge obviously would result in no change to the lake. In contrast, Coeur Alaska's current proposal is to release at least 210,000 gallons—and perhaps as much as 510,000 gallons—of untreated process wastewater every day directly into Lower Slate Lake, a 23-acre subalpine lake. Over the 10- to 15-year lifetime of the mine, the discharge would add millions of gallons of water to the lake as well as approximately 4.5 million tons of solid waste. In addition, the discharge would contain significant concentrations of several metals, including aluminum, copper, lead, and mercury. The pH of the effluent would be over 10, which is significantly higher than the current pH of the lake.

Not surprisingly, these discharges would significantly change the character of the lake. It would likely raise the bottom of the Lower Slate Lake 50 feet and would almost triple its surface area. All fish and most other aquatic life in the lake would be lost during the 10 to 15 years of mining operations, and it is unclear if the lake would ever recover.

When asked about the disposal plan in 2004, EPA Division Directors Diane Regas, James A. Hanlon, and Geoffrey H. Grubbs sent a memo to

EPA Region X's Director of the Office of Water, Randy Smith, instructing him that the discharge qualified as "fill material" under the revised definition. As a result, the zero-discharge standard, they asserted, should not be applied to Coeur Alaska's wastewater. Instead, the Corps could—and did—issue Coeur Alaska a permit to discharge the untreated wastewater into Lower Slate Lake.

Southeast Alaska Conservation Council along with other conservation groups filed suit in the district court in Alaska, claiming that the permit issued to Coeur Alaska violated § 301(e) and § 306(e) of the Clean Water Act because it did not require Coeur Alaska to comply with the zero-discharge standard for new gold mines. The district court granted summary judgment for the Corps, reasoning that because the new fill definition included mining tailings, the Corps could issue a § 404 permit without regard to the zero-discharge standard.

The Ninth Circuit unanimously reversed, holding the zero-discharge standard of § 306 applied to Coeur Alaska's discharge. The Supreme Court granted certiorari in the case in the closing days of the October 2007 Term on June 27, 2008.

CASE ANALYSIS

In this case, the Court must decide whether it will defer to the agency's application of its fill definition or, instead, conclude that the Clean Water Act clearly requires the zero-discharge standard to apply in this situation.

The Supreme Court treats an agency's interpretation of its own regulations as controlling so long as that interpretation is not inconsistent with the regulation it is interpreting and does not conflict with

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the statute that gave rise to the regulation. See *Auer v. Robbins*, 519 U.S. 452 (1997); *White v. United States*, 543 F.3d 1330 (Fed. Cir. 2008) (“The agency’s interpretation must be rejected ... because the interpretation it advocates would result in a regulation that conflicts with the clear language of the statute.”). Accordingly, the key question will be whether the clear language of the Clean Water Act requires the application of the zero-discharge performance standard to this discharge.

The petitioners claim that it does not, and the heart of their argument is that the language of the Clean Water Act requires first that a choice be made between a § 404 permit and a § 402 permit, a choice that is resolved solely on the basis of the definition of “fill material.” If something is fill material, it qualifies for § 404 permit and need not meet effluent standards or limits that are not required by § 404. If something is not fill material, it requires a § 402 permit, which in turn incorporates effluent standards and limits.

The respondent conservation groups, on the other hand, argue that the first step under the act is to identify the substantive treatment requirements that apply to a particular discharger. If an effluent standard or limit exists, the limit applies to the wastewater and if a discharge is allowed, it must be permitted under § 402 in order to be discharged into navigable waters. (Here, because the standard is zero-discharge, no discharge would be permitted under § 402.) If no such standard or limit exists, one then asks whether the discharge falls under the definition of “fill material.” If so, then the discharge must be permitted under § 404.

In simplest terms, petitioners would have the limits on discharges under

the Clean Water Act be determined based on the definition of “fill material,” which makes that definition and § 404 the fundamental starting point of the act. The respondents, instead, focus primarily on the many provisions of the act that create substantive effluent limits and performance standards that EPA must promulgate for a variety of dischargers, and argue that those constitute the meat of the act and must therefore be complied with first. Under this view, § 404 and the definition of “fill material,” although important, play a more limited role.

Although the Supreme Court has never faced this particular question before and few courts of appeals have considered it, the Fourth Circuit has suggested that a discharge to navigable waters must comply with any existing effluent standards and limits. See *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425 (4th Cir. 2003). In *Kentuckians*, the Fourth Circuit upheld the Corps’ determination that § 404 permits, not § 402 permits, are required for valley fills in connection with mountaintop coal mining but only because the Corps was not attempting to issue a permit for an “effluent that could be regulated by ongoing effluent limitations as described in § 402.”

SIGNIFICANCE

Although at bottom this case is about whether Coeur Alaska may discharge its untreated wastewater into Lower Slate Lake, it is also more fundamentally about the structure of the Clean Water Act. It had long been the view of the agencies (and most academics and practitioners) that where a performance standard or effluent limitation has been promulgated for a type of discharge, the Clean Water Act requires that that discharge comply

with those limitations. This was so even if the material in the discharge included solids that could arguably change the bottom elevation of the waterbody into which it was being discharged, thus triggering a question of § 404 permitting.

By creating an exception to their longstanding practice in this case, the agencies have opened the door to a new reading of the Clean Water Act, one that could result in a fairly large exception to effluent limitations and standards. Indeed, one can imagine that any discharge of wastewater containing solids—which would, in fact, be most discharges—could be considered fill material and therefore exempt from effluent limits or standards. As such, many effluent limits and standards could become superfluous, a result that would seem to turn the Clean Water Act on its head.

A more modest decision in the petitioners’ favor might limit the exemption from effluent standards and limits to a narrow category of discharges, such as mining discharges like those at issue in this case. Although it may be difficult to reconcile with the overall purpose and language of the Clean Water Act, a decision of this sort would permit fewer exemptions from effluent limits and standards through the fill material definition.

All of these possibilities disappear, of course, if when the new administration takes office, it decides to reopen the permits at issue in this case. If it does so, that action will likely prompt the Court to dismiss the case. This might be a wise course if the new administration does not want to risk the possibility of an opinion that would allow a future administration to exempt discharges from effluent limits and standards under the fill material definition. But a decision to reopen



these permits would take time to consider and act on, perhaps more time than it will take the Court to write its opinion.

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