Nos. 07-984 and 07-990

IN THE
Supreme Court of the United States

COEUR ALASKA, INC.,
Petitioner,
v.
SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,
Respondents.

STATE OF ALASKA
Petitioner,
v.
SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

SUPPLEMENTAL REPLY BRIEF FOR PETITIONER COEUR ALASKA, INC.

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RULE 29.6 STATEMENT

The corporate disclosure statement included in Coeur Alaska's petition for a writ of certiorari remains accurate.

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SUPPLEMENTAL REPLY BRIEF FOR PETITIONER COEUR ALASKA, INC.

SEACC acknowledges that it is not "desirable" for the law to induce businesses "such as Coeur Alaska" to "spend millions of dollars to construct a new source ostensibly permitted by the Corps, only to have it shut down in an enforcement action or citizen suit for violating section 306." SEACC Supp. Br. 11. Yet SEACC, without a trace of irony, urges this Court to validate under color of the Administrative Procedure Act *exactly* the same result.

When the Ninth Circuit issued its injunction pending appeal, Coeur Alaska already had invested in excess of $200 million in reliance on the Corps' Section 404 permit to construct its ore processing mill and prepare the Kensington Mine for operations. If it is undesirable and unfair to allow a citizen suit or enforcement action to condemn as illegal an activity "permitted by the Corps,"—and it is, *see* 33 U.S.C. § 404(p)—it is no less undesirable or unfair to condemn the agency's permit as "contrary to law" when the agency, in performing its congressionally assigned duties, complied scrupulously with every statute and regulation prescribing its conduct.

As the government has emphasized, for more than 30 years, EPA and the Corps have interpreted the Act's bifurcated permitting regime to accord to the Corps exclusive permitting jurisdiction over *any* discharge satisfying the agencies' definition of "fill material." *See* Gov't Supp. Br. 13-14. In the 2002 Fill Rule, EPA and the Corps jointly promulgated an effects-based definition that specifically embraced certain categories of mining waste, including tailings slurries. The expert agencies expressly envisioned

that, under the revised effects-based definition of "fill material," jurisdictional waters occasionally would be used by mining operations as disposal sites for tailings—when that placement is environmentally preferable and otherwise meets the rigorous Section 404(b)(1) water-quality guidelines. J.A. 91a-94a. SEACC does not dispute that the Fill Rule provides a reasonable interpretation of the statutory term "fill material"—it has challenged no aspect of that rulemaking—and, accordingly, the agencies' definition of "fill material" must be presumed valid.

In reliance on the unchallenged Fill Rule, Coeur applied to the Corps for a Section 404 permit to impound Lower Slate Lake and to place its tailings slurry into those impounded waters. When a question arose whether EPA's technology-based effluent limitations could apply to tailings now defined as "fill material," EPA responded in the Mine Tailings Memorandum that "the text of the [Fill 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." J.A. 144a. Accordingly, "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." J.A. 144a-45a.

After a four-year permitting process in which the Corps examined several alternatives, including various "dry stack" options that required the permanent filling of up to 113 acres of wetlands so that a mountain of tailings could be piled atop the newly-created "uplands," it concluded that the lake impoundment

was "the least environmentally damaging practicable alternative." J.A. 366a; *see also id.* at 381a-83a. EPA likewise concluded that the placement of tailings in the impoundment threatened no unacceptable adverse environmental impact and declined to exercise its veto power under Section 404(c). 33 U.S.C. § 1344(c).

SEACC does not challenge the Corps' well-reasoned conclusion that placement of the tailings at the bottom of Lower Slate Lake was environmentally preferable to filling a swath of wetlands large enough to be the base of a heap of tailings substantially larger than the Pentagon. *See* Coeur Reply Br. 26-27. Nor does SEACC quarrel with EPA's conclusion that the Kensington plan threatened no unacceptable adverse impact on the environment. SEACC's *only* contention in this Court is that the Corps' issuance of the Section 404 permit is "not in accordance with law," because it "adopted the [Mine Tailings Memorandum's] conclusion that 'fill material' discharges are exempt from section 301 and 306 effluent limitations"—an interpretation of EPA's own regulations that SEACC mischaracterizes as "legal error." SEACC Supp. Br. 10.

That contention fails for two independent reasons. *First*, the Mine Tailings Memorandum is correct. As EPA explained in that memo, "effluent limitations guidelines and standards" are part of the "regulatory regime applicable to discharges under section 402." J.A. 144a. With this much, SEACC *agrees*: "Section 402 is thus the only option." SEACC Supp. Br. 13. SEACC's case therefore stands or falls on the strength of its argument (made in response to the Court's second question) that *any* discharge that comes within the scope of a Section 301

or Section 306 effluent limitation—even one that satisfies the existing regulatory definition of "fill material"—must be permitted only under Section 402. *See id.* at 13-15. But, as EPA recognized, "the text of the [Fill Rule] makes clear" that the Kensington tailings slurry is "regulated under section 404 of the CWA as a discharge of fill material." J.A. 144a.

Second, the Corps' reliance on EPA's expert interpretation of its own regulations was "in accordance with law." Whether or not the Mine Tailings Memorandum reflects a reasonable view of the applicability of EPA's Section 306 performance standards to discharges of fill material, in issuing the permit, the Corps complied with every provision of law that prescribed its range of permissible conduct—which is all that the APA requires—and otherwise adhered to established principles of agency deference. Even assuming administrative law allows the Corps to second-guess EPA's interpretation of *EPA's* regulations, the Corps hardly could be faulted for not doing so here. In their comments on the proposed Section 404 permit, respondents did not argue that, contrary to EPA's view, EPA performance standards may apply to discharges of fill material regulated under Section 404. The APA does not require an agency to be clairvoyant.

I. THE CLEAN WATER ACT ESTABLISHES TWO MUTUALLY EXCLUSIVE PERMITTING REGIMES

1. The parties agree that the answer to the Court's second question is "no," and that a single discharge must be permitted under *either* Section 402 *or* Section 404—never both. Both the Corps and EPA agree that under the plain text of the Act, the definition of "fill material" serves as the boundary between the two permitting programs and that, accordingly,

any discharge satisfying the agencies' definition of "fill material" must be permitted under Section 404. On SEACC's novel view, it is the potential applicability of an EPA Section 301 or Section 306 effluent restriction that determines whether a discharge is permitted under Section 402 or Section 404, and any discharge to which such an effluent restriction conceivably could apply must be permitted under Section 402, even if it is fill material. But it is the agencies' view of the statutory regime—not SEACC's—to which this Court must defer.

The Corps and EPA have interpreted the statute in two rulemakings unchallenged in this litigation—the Fill Rule, 40 C.F.R. pt. 232, and EPA regulations defining the scope of the Section 402 NPDES program, 40 C.F.R. pt. 122. In this Court, the agencies have authoritatively interpreted those regulations as requiring *all* discharges satisfying their definition of "fill material" to be permitted under Section 404, and precluding regulation under Section 402. Gov't Supp. Br. 13-14. That shared understanding of the regulatory framework is "controlling" unless it is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks and citation omitted). And though SEACC continues to cite snippets of regulatory history in support of its characterization of the regulations' intent, it has no answer whatsoever to the regulations' *text*, nor to this Court's holding in *United States v. Locke*, 471 U.S. 84 (1985), that an interpretation that accords with plain language "simply cannot be found sufficiently unreasonable as to be unacceptable." *Id.* at 96 (internal quotation marks and citation omitted).

Moreover, SEACC's interpretation of the statute is completely untethered to the text of Section 402, which, "[e]xcept as provided in section[] . . . [404]," applies to "the discharge of *any* pollutant"—not merely those to which an EPA effluent restriction might apply. 33 U.S.C. § 1342(a) (emphasis added). And if SEACC were correct and the potential applicability of an EPA effluent limitation determined whether a discharge must be permitted under Section 402 or Section 404, then, notwithstanding Congress's plain intention that discharges of dredged and fill material be permitted by the Corps under Section 404 and regulated under the Section 404(b)(1) guidelines, EPA could strip *all* dredged or fill material from the Corps' permitting jurisdiction simply by promulgating Section 301 or 306 effluent restrictions for sources engaged in those activities. EPA, in other words, could effectively repeal the Section 404 permit program by regulation. But for 120 years it has been clear that a "regulation of a department," (even EPA), "cannot repeal a statute." *Merritt v. Cameron*, 137 U.S. 542, 551-52 (1890).

2. The fact that discharges satisfying the regulatory definition of "fill material" may be permitted only under Section 404 demonstrates that EPA's conclusion that its Section 301 and Section 306 effluent restrictions "do not apply to the placement of tailings into the proposed impoundment," J.A. 145a, is correct, and that the hypothetical premise of the Court's first question—that discharge of the Kensington tailings slurry would violate Section 306(e)—is incorrect. SEACC itself acknowledges that the Section 402 permit program is the "only option" for applying EPA's technology-based effluent restrictions and that applying those EPA regulations under the rubric of Section 404 is "untenable" because: (1) it would "de-

priv[e]" EPA of the ability to enforce the discharge's compliance with its regulations through "the exercise of [its] permitting authority," (2) "Section 404 . . . provides no mechanism to apply or enforce those effluent limitations," and (3) "the Corps has no expertise or jurisdiction to do so." SEACC Supp. Br. 11, 13.

What is more, applying EPA effluent restrictions to discharges of fill material would contravene Congress's decision to regulate dredged and fill material under a different set of standards developed by EPA—the Section 404(b)(1) guidelines. *See* 33 C.F.R. pt. 230. Through those regulations, EPA requires that discharges of fill material comply with "any applicable State water quality standard" and "any applicable toxic effluent standard or prohibition under Section 307 of the Act," 40 C.F.R. § 230.10(b)(1)-(2), but makes no mention of its technology-based Section 301 and Section 306 effluent restrictions. This Court must accord meaning to Congress's choice to regulate discharges of fill material under the Section 404(b)(1) guidelines rather than "all applicable requirements under sections [301], [302], [306], [307], [308], and [403] of [the Act]." 33 U.S.C. § 1342(a)(1). *See S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 384 (2006).[1]

On the other hand, nothing in Section 301 or Section 306 commands that the effluent restrictions EPA promulgates pursuant to those sections must

[1] The agencies honored Congress's judgment here by regulating the discharge of fill material *into* the impoundment under Section 404, and the discharge of effluent *out of* the impoundment under the Section 402 program, including EPA's effluent restrictions. *See* Coeur Reply Br. 25; J.A. 294a, 373a.

apply to discharges of fill material regulated under Section 404. Both Section 301 and Section 306 authorize EPA to promulgate effluent restrictions that are applicable to particular types of *point sources*. *See* 33 U.S.C. §§ 1311(b)(2), 1316(b)(1)(A). Nothing in those statutes suggests—much less mandates—that those effluent restrictions must apply to every discharge from those sources—or even every discharge from those sources into waters of the United States. In the absence of such a clear statement from Congress, EPA has reasonably interpreted the statutory scheme in light of the clear statement Congress did make—that discharges of dredged or fill material should be regulated by the Corps under the Section 404(b)(1) guidelines—and determined its technology-based effluent restrictions to be inapplicable to discharges of dredged or fill material. Accordingly, when it promulgated the performance standard on which SEACC relies, EPA made clear the standard would "be applied to individual ore mines and mills through NPDES permits . . . under Section 402 of the Act." 47 Fed. Reg. 54,598, 54,606 (Dec. 3, 1982). "EPA's understanding of this very complex statute" is entitled to "considerable deference" and should not lightly be overturned. *Chemical Mfrs. Ass'n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116, 125 (1985) (internal quotation marks omitted).

II. REGARDLESS OF WHETHER SECTION 306 PERFORMANCE STANDARDS APPLY TO DISCHARGES OF FILL MATERIAL, THE CORPS ACTED "IN ACCORDANCE WITH LAW"

The government has indicated that it will not allow a discharge to violate Section 301 or 306. The Court's first question, however, suggests a potential basis—albeit not one favored by petitioners—for the

Court to affirm the Corps' Section 404 permits without resolving definitively the question presented in their petitions.

SEACC argues that to be "in accordance with law," the Corps was obligated to ensure that the private conduct it authorized did not violate "any other law," including Section 306. SEACC Supp. Br. 2. But in support of that proposition, SEACC points only to *FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003), a case where the agency violated a statute forbidding any "'governmental unit'" from revoking licenses, *id.* at 301 (quoting 11 U.S.C. § 525(a)), and *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), a case where the agency violated a statute binding "'any department or agency.'" *Id.* at 294 (quoting 18 U.S.C. § 1905). These cases support only the proposition that an agency is required to follow the provisions of law that "circumscribe[] [the agency's] permissible action," *NextWave*, 537 U.S. at 304, and not every "arguably relevant statutory policy." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 646 (1990).

SEACC does not suggest that Section 301 or Section 306 directly limits the Corps' conduct as an agency, and it does not dispute that the Corps' permitting decision complied with those laws and regulations that do cabin the Corps' permitting discretion—Section 404, 33 U.S.C. § 1344, the Section 404(b)(1) guidelines, 33 C.F.R. pt. 230, and the Corps' public-interest criteria, 33 C.F.R. pt. 320. The government, however, suggests that, if a court held that Section 306 performance standards applied to discharges of fill material, then the Corps would have failed to evaluate the Kensington permit for "compliance with applicable effluent limitations and

water quality standards." *Id.* § 320.4(d). But the Corps did make the required evaluation; as SEACC observes (at 4, 10), the Corps deferred to EPA's determination that EPA's technology-based effluent restrictions did not apply. *See* J.A. 342a ("This decision has been made in conformance with the [Mine Tailings Memorandum]").

SEACC's argument thus rests on the absurd proposition that the only way the Corps could have acted "in accordance with law" would have been for it—an agency that even SEACC agrees (at 13) has "no expertise" "to apply or enforce effluent limitations"—to have rejected the settled and authoritative interpretation of the only agency with such expertise—EPA. This is, to say the least, a curious view of agency deference. If agencies did routinely what SEACC suggests the Corps should have done here—substitute its view of EPA's regulation for the expertise-based conclusion of the agency that authored it—the resulting chaos would greatly undermine the stability the Administrative Procedure Act promises to promote.

If that path ever were advisable, the Corps committed no error by declining to take it here. In their public comments on the Corps' proposed permit, respondents never argued that EPA's Section 301 and Section 306 effluent limitations apply to discharges of fill material. *See* Administrative Record ("AR") 5548-5555 (comments of Lynn Canal Conservation), 5637-5653 (comments of SEACC), 5908-5910 (comments of Sierra Club). They complained bitterly about "EPA's and the Corps' convenient redefinition of fill," AR 5551, and even argued that, under the 2002 Fill Rule, "pollutants for which there are effluent guidelines . . . are not 'fill material' even if they

have the effect of raising the bottom elevation of water," AR 5646. They did not, however, suggest to the Corps that EPA's conclusion that its effluent restrictions do not apply to discharges of fill material should be disregarded. "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires . . . that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952).

In issuing the Section 404 permit challenged by SEACC, the Corps meticulously followed the mandates of Section 404, the rigorous EPA-developed Section 404(b)(1) guidelines, and its own permitting procedures. In short, it did everything the law required it to do before issuing the permit. On that basis, this Court should hold that the Corps acted "in accordance with law."

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded to the court of appeals with instructions to vacate immediately the injunction pending appeal and to affirm the judgment of the district court.

Respectfully submitted.

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