Nos. 07-984 & 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 STATE OF ALASKA

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
I. THE CORPS ACTED IN ACCORDANCE WITH LAW	3
A. The Corps Is Not Required To Apply Effluent Limitations To Fill Discharges.	3
B. The Court Could Uphold The Corps' Permit Without Deciding The Legal Status Of The Future Discharge Under Section 306.	5
II. COEUR'S FILL DISCHARGE IS PERMITTED BY THE CORPS UNDER SECTION 404 NOT EPA UNDER SECTION 402.	9
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES:

Ackels v. *EPA*, 7 F.3d 862 (9th Cir. 1993)..... 8

Auer v. *Robbins*, 519 U.S. 452 (1997)..... 11

Cmty. Television of S. Cal. v. *Gottfried*, 459 U.S. 498 (1983)..... 6, 8

FCC v. *NextWave Pers. Communic'ns, Inc.*, 537 U.S. 293 (2003)..... 7

McLean Trucking Co. v. *United States*, 321 U.S. 67 (1944)..... 6, 7

STATUTES:

Federal Water Pollution Control Act Amendments of 1972 ("Clean Water Act"), Pub. L. No. 92-500, 86 Stat. 816, as amended:

§ 401(a)(5), 33 U.S.C. § 1341(a)(5)..... 9

§ 402(a), 33 U.S.C. § 1342(a) 3, 10

§ 404(a), 33 U.S.C. § 1344(a) 3, 10

§ 404(p), 33 U.S.C. § 1344(p) 4

ADMINISTRATIVE MATERIALS:

47 Fed. Reg. 25,682 (1982) 11

67 Fed. Reg. 31,129 (2002) 11

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INTRODUCTION

Although the parties have answered the Court's hypothetical questions in different ways, they agree on two fundamental points that should control the

outcome here. First, all parties agree that the tailings discharge at issue must be permitted by a single agency—either the Corps under Section 404 or EPA under Section 402—but not by both. Second, as SEACC has correctly noted, "Section 404 * * * provides no mechanism to apply or enforce [Section 306] effluent limitations, and the Corps has no expertise or jurisdiction to do so." SEACC Supp. Br. 13. Because the discharge is concededly "fill material," Sections 404 and 402 unambiguously provide that the permit must be issued by the Corps, not EPA. Although SEACC disagrees on this final point, its assertion that EPA has permitting authority over fill material is belied by the plain language of the CWA and the agencies' authoritative interpretations.

Thus, the discharge must be permitted by the Corps under Section 404. And because the Corps has no expertise or jurisdiction to apply or enforce Section 306 effluent limitations, the Corps acted in accordance with law when it issued its permit in compliance with the Section 404(b)(1) Guidelines, regardless of the future discharge's legal status under provisions of the CWA (Sections 301 and 306) that the Corps concededly cannot apply or enforce.

This procedural point, however, should ultimately be immaterial, because the same reasoning leads to the conclusion that EPA effluent limitations do not apply to fill discharges in the first place. The parties generally agree that a properly-permitted discharge should not be subject to later collateral attack alleging that it violates the CWA. This fill discharge was properly permitted by the Corps, which has no jurisdiction to apply or enforce Section 306 effluent limitations promulgated by EPA, and the Court

should hold that both the permit *and* the discharge are lawful.

I. THE CORPS ACTED IN ACCORDANCE WITH LAW.

A. The Corps Is Not Required To Apply Effluent Limitations To Fill Discharges.

Despite the parties' divergence on many points, they agree on key issues. First, the parties agree that only one permit may be obtained for the discharge at issue. *See* Alaska Supp. Br. 13-17; Coeur Supp. Br. 1-7; SEACC Supp. Br. 12; U.S. Supp. Br. 11-12. Second, SEACC correctly recognizes that the Corps has "no expertise or jurisdiction" to "apply or enforce [Section 306] effluent limitations." SEACC Supp. Br. 13.[1] Third, there is general agreement that the CWA ought not be interpreted to subject properly-permitted discharges to collateral attack. *See* Alaska Supp. Br. 10-11; SEACC Supp. Br. 11; U.S. Supp. Br. 7-8, 15. Dischargers that receive permits under Section 404 should have assurance that the discharges allowed by those permits comply with the CWA.

From those principles, it follows that Coeur's proposed tailings discharge—which is concededly fill material—requires only one permit, and that permit must come from the Corps under Section 404 rather than from EPA under Section 402. *See* 33 U.S.C. § 1344(a) (Corps may issue permits for "fill material"); 33 U.S.C. § 1342(a) (EPA may issue permits for other pollutants only "[e]xcept as provided in section[] * * *

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[1] As SEACC notes, interpreting and applying effluent limitations is "EPA's job" because "section 402 is the exclusive permitting program for enforcing effluent limitations." SEACC Supp. Br. 9 n.4, 15.

1344"). The Corps' decisions are governed by the Guidelines that Section 404(b)(1) requires it to follow, not effluent limitations it has no expertise or authority to apply. And because the Corps has issued a permit that meets all of Section 404's requirements, including the Section 404(b)(1) Guidelines, Coeur's permitted discharge cannot be challenged for purportedly violating the CWA.

This analysis leads to one further, and dispositive, conclusion: Section 306 effluent limitations do not apply to discharges of fill material. As explained in Alaska's supplemental brief and below, it would be possible for the Court to uphold the Corps' permit while leaving that question open. But such a resolution is neither desirable nor necessary. It is not desirable because it would offer incomplete guidance to the parties, and would leave Coeur potentially subject to a future citizens' suit challenging the discharge as violating Section 306.[2] It is not necessary because the same reasoning that establishes the Corps' lawful authority over Coeur's discharge of tailings also establishes—as the agencies have consistently and authoritatively

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[2] Coeur would have a potential "permit shield" defense even as against violations of Section 306. That is because compliance with a Section 404 permit is "deemed compliance" with Section 301(a), *see* 33 U.S.C. § 1344(p), and compliance with Section 301(a) in turn constitutes compliance with all other applicable CWA provisions, including Section 306. *See* Alaska Br. 34. But there is no need to leave the parties subject to such uncertain litigation. Moreover, as the United States notes, if the permit shield did not immunize Coeur from a subsequent enforcement action alleging a Section 306 violation, that would be yet another reason why Section 306 limitations do not apply to fill discharges. *See* U.S. Supp. Br. 15.

maintained—that Section 306 limitations do not apply to discharges of fill material.

SEACC's contrary assertions miss the point and are refuted by its own reasoning. Section 404 did not need to specifically "exempt" fill discharges from Section 306 limitations. *Cf.* SEACC Supp. Br. 7. Section 306 does not mandate *application* of those limitations to such discharges by its own terms, and EPA regulations do not make them applicable—much less violated—under EPA's dispositive interpretation of its own regulations. *See* Alaska Br. 32-35; Alaska Supp. Br. 12. There is no applicable requirement to "exempt" from Section 404.

Moreover, SEACC's contention that effluent limitations apply to fill material unless specifically exempted by Section 404 cannot be reconciled with its own correct understanding that the Corps has "no expertise or jurisdiction" to "apply or enforce" those limitations under Section 404. SEACC Supp. Br. 13. Given that the Corps has no jurisdiction to apply effluent limitations in the first place, the absence of a specific exemption in Section 404 is immaterial.

B. The Court Could Uphold The Corps' Permit Without Deciding The Legal Status Of The Future Discharge Under Section 306.

In any event, the Corps' permit can also be upheld on the ground that the Corps faithfully followed every law that circumscribed its permitting action, regardless of the future discharge's legal status under other provisions that the Corps does not administer or enforce. SEACC is simply wrong when it argues that a Corps permit must be invalidated whenever the permitted action would violate any provision of the CWA or "any other law." SEACC

Supp. Br. 2. The Court's holdings in *Community Television of S. Cal.* v. *Gottfried*, 459 U.S. 498 (1983) and *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944), refute that contention. Those cases did not involve allegations that agencies merely failed to consider "general policies" of other laws, but rather allegations that the agencies licensed or permitted actions that "actually conflict[ed] with another law." SEACC Supp. Br. 4.[3] Yet the Court upheld the agencies' actions *without* deciding whether those other laws would, or would not, be violated.

Contrary to the positions successfully advanced by the Federal government in *Gottfried*, *McLean Trucking*, and other cases raising similar issues, the Solicitor General would not now defend the Corps against a charge that it acted unlawfully even though the Corps violated no statutory provision circumscribing its permitting authority. But unlike SEACC, the Solicitor General does not claim that "*every* possible legal objection to the permit applicant's proposed course of conduct" could invalidate a Corps permit, but rather only that violations of the CWA and "other federal laws bearing on the potential environmental consequences of a proposed discharge" could do so. U.S. Supp. Br. 7, 2.

That arbitrary distinction, however, has no legal basis and is inconsistent with the holding in *McLean Trucking*. There, the Court held that the Interstate

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[3] *See Gottfried*, 459 U.S. at 500-01 (allegation that licensee seeking renewal "had violated, and remained in violation of, § 504 of the Rehabilitation Act"); *McLean Trucking*, 321 U.S. at 77 ("The argument seems to be that the merger, notwithstanding the Commission's approval, violates the Sherman Anti-Trust Act; hence, the Commission is without power to approve the merger.") (citation omitted).

Commerce Commission ("ICC"), when acting under an Interstate Commerce Act ("ICA") provision directing it to disapprove mergers that would "'unduly restrain competition,'" was not required to consider an allegation that a merger would violate the Sherman Act. 321 U.S. at 77, 79 (citation omitted). Even though the ICA provision and the Sherman Act addressed the same general subject area—anticompetitive conduct—the Court upheld the ICC's action without determining whether it would violate the Sherman Act. Here as well, the fact that Section 306 and Section 404 address the same general subject area—environmental protection—does not impose a legal obligation on the Corps to consider a statutory provision implemented and enforced by another agency.

That the two provisions are part of the same Act is likewise irrelevant. *Cf.* SEACC Supp. Br. 8; U.S. Supp. Br. 5. The APA only ensures that a federal agency follows laws that "circumscribe[] [its] permissible action," *FCC* v. *NextWave Pers. Communic'ns, Inc.*, 537 U.S. 293, 304 (2003), not every law in existence. Although it is unusual for Congress to entrust enforcement of different parts of the same statute to different agencies, that is what the CWA does. The Corps was given distinct permitting authority that carried forward its responsibilities under prior law, whereas EPA was given its own separate authority. *See* Alaska Br. 36-38.

Each agency is thus legally responsible for administering only those areas of the CWA within its own domain, and acts lawfully when it accepts the pronouncements of other agencies acting in their own respective domains. For example, states have their own duties under the CWA, and the federal

agencies do not violate the APA when their permits incorporate a state certification, regardless of whether the certification is right or wrong. *See Ackels* v. *EPA*, 7 F.3d 862, 867 (9th Cir. 1993) (where state certification imposed conditions, "EPA was required to incorporate those conditions into the final permit and lacked authority to reject them. Petitioners' only recourse is to challenge the state certification in state judicial proceedings.") (citations omitted). Likewise, given that Section 306 effluent limitations are written and enforced by a different agency, the Corps did nothing wrong when it followed its own statute and EPA's authoritative understanding of the statutory provisions and regulations that EPA alone administers.

The United States' position confuses the legality of the Corps' initial permitting action with the agencies' anticipated corrective actions if the discharge were later held to be unlawful. The Corps acted lawfully when it issued the permit in compliance with the laws circumscribing its authority and EPA's authoritative construction of EPA's own regulations, *regardless* of what may happen if, hypothetically, the discharge is held unlawful in a subsequent judicial proceeding. Thus, in *Community Television*, the Court held that the FCC was not required to consider a licensee's alleged violation of the Rehabilitation Act in considering a license renewal, because the FCC does not enforce that law. 459 U.S. at 509. But the Court noted that if the licensee were later found to violate the Act, the FCC would have to consider the possible relevance of that violation in a later license renewal. *Id*. at 510.

Here, the Corps did nothing wrong by issuing its permit. But it could still take corrective action if a

court later holds—contrary to EPA's own interpretation—that the permitted discharge violates Section 306. Most importantly, the Corps could suspend or revoke the permit. *See* 33 U.S.C. § 1341(a)(5) (permit may be "suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311 [or] 1316 * * * of this title"). And as the United States notes, the agencies would likely change their regulations after such a holding. U.S. Supp. Br. 16.

Admittedly, the United States' position is supported by practical considerations. Given that a discharge permitted by the Corps might be barred were it later determined that the discharge violates EPA effluent limitations, it would be better if the discharger were not subject to such legal uncertainty. But the solution to this practical concern is not to hold the Corps legally responsible for compliance with CWA provisions that it has no power to interpret or administer. The solution is to recognize that EPA effluent limitations do not apply to discharges of fill material permitted by the Corps.

II. ALL FILL DISCHARGES ARE PERMITTED BY THE CORPS UNDER SECTION 404, NOT BY EPA UNDER SECTION 402.

All parties agree that the Section 404 and 402 permitting programs are mutually exclusive. And all agree that the basis for that conclusion is Section 402's first clause, which states that EPA may issue permits for discharges of pollutants "[e]xcept as provided in" Section 404, which provides that the Corps may issue permits for discharges of dredged

and fill material. Yet SEACC alone claims that fill material must be addressed by EPA under the Section 402 program—rather than by the Corps under Section 404—if the fill material would arguably come within the scope of a Section 306 effluent limitation. SEACC Supp. Br. 16. That assertion is inconsistent with the statutory language and the agencies' unwavering interpretation of it.

Section 402 gives EPA the power to issue a discharge permit "except as provided in" Section 404. 33 U.S.C. § 1342(a). Section 404, of course, covers dredged and fill material permits. 33 U.S.C. § 1344(a). It follows, then, that EPA lacks statutory authority to issue a permit for a fill material discharge. SEACC admits that Section 402's exception is a "limitation" on "EPA's authority." SEACC Supp. Br. 12. But it then claims that the limitation only applies when a proposed discharge of fill material is not subject to an EPA effluent limitation. *Id*.

There is no statutory basis for the distinction, and SEACC offers none. *See* SEACC Supp. Br. 12-17. Nor do the agencies' regulations support SEACC's theory. SEACC's contention that the agencies have always subjected fill material to EPA permitting is as wrong now as when SEACC advanced it previously. *See* Alaska Reply Br. 15-23. The statements SEACC cites, SEACC Supp. Br. 14-15, only clarify that *the definition of fill material* excludes—and has always excluded—wastewater with low levels of particulates that may, over a long period, change a waterbody's bottom elevation. JA46a. This situation does not include fill discharges like Coeur's, which will be 55% solid. As EPA has noted, if a discharge constitutes fill material under the applicable definition, EPA has "never" subjected such

a discharge to effluent limitations. 67 Fed. Reg. 31,129, 31,135 (2002).[4] Nor do SEACC's cited statements change EPA's longstanding regulation that discharges of fill material do not require Section 402 permits. *See* Alaska Supp. Br. 16.

SEACC once again confuses the agencies' definition of fill material, which has evolved over the years, with the regulatory treatment of such discharges, which has never changed. Indeed, SEACC has identified no instance where EPA has subjected a discharge identified as fill material to Section 402 permitting under Section 306 effluent guidelines. The agencies have been clear and consistent on this point, U.S. Br. 35-37, and their interpretation of their own regulations is entitled to maximum deference, *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997).

The "except as provided in" language of Section 402 provides that *all* fill discharges—not just some—are permitted by the Corps under Section 404 and may not be permitted by EPA under Section 402. That a fill discharge would, in SEACC's view, implicate an EPA effluent limitation makes no difference under the statute. SEACC's interpretation, under which EPA rather than the Corps would issue permits for discharges of fill material, would effectively erase Congress' unambiguous jurisdictional dividing line.

SEACC strains to advance an interpretation that subjects fill material to EPA permitting where it

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[4] When EPA wrote of mill process wastewater with "'very high suspended solids levels,'" SEACC Supp. Br. 15 n.7, the rest of the quoted provision clarified that EPA was not describing fill material, but rather a discharge with suspended solids levels usually measured by "milligrams per liter" but "often in the percent range," implying a low percentage, not 55%. 47 Fed. Reg. 25,682, 25,685 (1982).

allegedly implicates Section 306 effluent limitations because, as SEACC concedes, the Corps has no jurisdiction or expertise to interpret or apply such limitations. But neither the statute nor the agencies' authoritative interpretations support this erasure of the clear jurisdictional line between the agencies. Congress provided the Corps—and not EPA—with exclusive permitting authority over *all* discharges of fill material under regulations carefully crafted to address the environmental concerns pertinent to such discharges, subject to an absolute EPA veto right.

Applying those regulations, the Corps properly determined that it would be environmentally preferable to utilize a lake impoundment rather than destroy an even larger area of wetlands in order to construct a massive open-air tailings stack. EPA could have, but did not, veto that determination if it believed the plan would have unacceptable adverse effects. This decision complied with all applicable statutory provisions, and was eminently reasonable. That the Corps has no jurisdiction or expertise to apply Section 306 effluent limitations only shows that the limitations were never intended, either by Congress or by EPA, to apply to discharges of fill material.

CONCLUSION

For the foregoing reasons, and those in Alaska's prior briefs, the judgment below should be reversed.

Respectfully submitted,

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