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EPA'S NEW SOURCE PERFORMANCE STANDARD DOES NOT APPLY TO DISCHARGES OF MINING SLURRY REGULATED UNDER SECTION 404 OF THE CLEAN WATER ACT

Coeur Alaska, Inc. v. Southeast Alaska Conservation Counsel, et al., 557 U.S. ____ (2009).

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On June 22, 2009, the United States Supreme Court held that the new source pollution standards in Section 306(b) of the Clean Water Act (the "CWA") did not apply to discharges of slurry from a rehabilitated "froth-flotation" gold mine into a nearby navigable lake. It did so because these discharges are properly regulated under Section 404 of the CWA governing the discharge of dredge and fill materials, rather than by an NPDES permit under Section 402 of the CWA, and because the new source pollution standard in Section 306(b) does not apply to Section 404 permits. The Supreme Court's decision reversed the Ninth Circuit Court of Appeal's determination that the issuance of a permit for the slurry discharges by the United States Army Corps of Engineers (the "Corps") under Section 404 of the CWA violated the new source performance standard set forth in Section 306 of the CWA. In the dissenting opinion, Justices Ginsburg, Stevens and Souter disagreed with the majority's holding, emphasizing the potentially weighty implication of the outcome, which they argued effectively allowed the operator of the mine to utilize Section 404 of the CWA to evade the more stringent requirements of the new source performance standard.

Coeur Alaska, Inc. ("Coeur Alaska") sought to reopen the Kensington Gold Mine in southeast Alaska, which had been closed since 1928, using a "froth flotation" mining technique. Coeur Alaska proposed disposing of the resulting waste material, a rock and water mixture called "slurry," by pumping it into nearby Lower Slate Lake, purifying the excess lake water created by the discharge, and then releasing purified water into a downstream creek. Lower Slate Lake is approximately 23 acres in area and 51 feet in depth at its maximum, thus making it a navigable body of water subject to the CWA. Over the life of the mine, Coeur Alaska estimated that 4.5 million tons of tailings would be discharged into the lake. This aggregate discharge would raise the lakebed by fifty feet and increase its area to approximately sixty acres. Coeur Alaska's plan also included a habitat rehabilitation scheme for Lower Slate Lake upon completion of mining operations. In connection with the foregoing plan, Coeur Alaska obtained a Section 404 permit from the Corps for the initial discharge of the slurry into Lower Slate Lake and a Section 402 permit from the Environmental Protection Agency (the "EPA") in connection with the subsequent discharge of the purified water into the downstream creek.

The Southeast Alaska Conservation Council, together with several other environmental groups (collectively, the “SEACC”) sued the Corps under the Administrative Procedure Act in the United States District Court for the District of Alaska, arguing that the Section 404 permit obtained by Coeur Alaska was not issued in accordance with applicable law because Coeur Alaska should have sought a Section 402 permit for the initial slurry discharge into Lower Slate Lake. The SEACC also contended that a Section 402 permit for the discharge would have been denied because the discharge would violate the EPA’s new performance standard. Coeur Alaska and the State of Alaska intervened as defendants and filed a motion for summary judgment which was granted by the District Court. On appeal, the Ninth Circuit Court of Appeals reversed the District Court, finding that Section 402 applied and that the new source performance standard precluded the issuance of a permit in this instance. It further ordered the District Court to vacate the Section 404 permit issued by the Corps. The Supreme Court granted certiorari to consider (i) whether the CWA delegates the authority to issue a permit for the discharge of slurry to the EPA or to the Corps, and (ii) assuming the Corps has the authority to issue permits for slurry discharges, whether the Corps acted in accordance with applicable law when it issued the permit to Coeur Alaska.

Corps’ Authority to Issue a Section 404 Permit for Slurry Discharges

In response to the arguments set forth by Coeur Alaska and the SEACC, the Supreme Court conducted a detailed examination of both Section 404 and Section 402 to determine which agency possesses the authority to issue permits for slurry discharges under the CWA. Coeur Alaska argued that Section 404 of the CWA expressly delegates authority to issue permits for the discharge of fill material to the Corps, and that fill material, by regulatory definition, includes slurry. The SEACC, however, contended that Section 402 of the CWA, which gives the EPA authority to issue permits with respect to discharges of pollutants, should instead apply to the discharge contemplated by Coeur Alaska because the definition of a pollutant includes crushed rock materials such as the tailings found in slurry.

After careful consideration, the Supreme Court disagreed with the SEACC. It held that Section 402 of the CWA forbids the EPA from issuing permits for fill material falling under the Corps’ Section 404 permitting authority. In support of its holding, the Supreme Court noted that even if there were ambiguity on this point, the EPA’s own regulation provides that “[d]ischarges of ... fill material ... which are regulated under section 404” “do not require [EPA Section 402] permits.” 40 CFR §122.3. Because this interpretation by the EPA is not plainly erroneous or inconsistent with the regulation, the Court accepted it as correct, relying on *Auer v. Robbins*, 519 U.S. 452 . The Court furthermore reasoned that the EPA still played a role in regulating discharges under Section 404, even though the Corps was given the authority to issue permits for these types of discharges. In particular, the CWA allocates the responsibility of establishing the guidelines the Corps must use in evaluating a permit request for a discharge covered under Section 404 to the EPA. Additionally, the EPA still has the ability to veto any Section 404 permit issues by the Corps. With respect to the latter

point, the Court noted that the EPA did not veto the particular Section 404 permit issued to Coeur Alaska.

The Court then went on to hold that, because Section 404(a) empowers the Corps to issue permits for the discharge of fill material, and the EPA's joint regulation defines "fill material" to include "slurry ... or similar mining-related materials" having the "effect of ... [c]hanging the bottom elevation" of water, 40 CFR §232.2, the slurry Coeur Alaska proposed to discharge into Lower Slate Lake fell well within the Corps' Section 404 permitting authority, rather than the EPA's Section 402 authority. Thus, the Corps was the proper permitting authority, not the EPA.

Inapplicability of the New Source Performance Standard to Discharges Regulated under Section 404

After the Court determined that the Corps was the proper agency to issue the permit for the discharge of slurry from the Kensington Gold Mine, it next considered whether the Section 404 permit issued to Coeur Alaska violated the new source performance standard contained in Section 306(b) of the CWA. The SEACC argued that even if the Corps had authority to issue a Section 404 permit for the slurry discharge, the new source performance standard should be applied to the proposed discharge and a permit should be denied if the standard were not satisfied. In determining whether the permit violated applicable law, the Court examined the statutory context of the CWA, the agencies' regulations construing it, and the EPA's subsequent interpretation of those regulations. Reasoning that Congress had not directly spoken on the issue of whether Section 306 and the new source performance standard were intended to apply to fill discharges governed under Section 404 and that the regulations themselves did not resolve this issue, the Court turned to the EPA's own interpretation of the interplay between Section 404 and Section 306 of the CWA.

In particular, the Court relied on a memorandum written by the director of the EPA's Office of Wetlands, Oceans and Watersheds on the issue. The memorandum clearly stated that the regulatory regime under Section 402 of the CWA and the new source performance standard did not apply to the discharge of tailings, which were otherwise regulated under Section 404. The memorandum reasoned that this determination did not undercut the intent behind the new source performance standard because the finding was limited to closed bodies of water. The memorandum also concluded that utilizing Section 404 to regulate the discharges of fill materials in this context did not constitute an attempt to evade the requirements of the new source performance standard. Lastly, the memorandum distinguished the discharge of toxic pollutants from less dangerous pollutants such as slurry. Finding that this memorandum presented a reasonable interpretation of the regulatory scheme that was neither plainly erroneous nor inconsistent with the regulations, the Court deferred to the EPA's own resolution of the issue.

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