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.

STATE OF ALASKA, PETITIONER

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Army Corps of Engineers' authority to issue a permit for the discharge of dredge or fill material, pursuant to the statutory scheme that specifically addresses such material, is displaced by the Environmental Protection Agency's promulgation of an effluent limitation or new source performance standard pursuant to other provisions of the Clean Water Act, 33 U.S.C. 1251 *et seq.*, that address the discharge of pollutants generally.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 486 F.3d 638.[1] The opinion of the district court (Pet. App. 38a-64a) is unreported.

[1] All references to "Pet. App." are to the appendix filed in No. 07-984.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 2007. A petition for rehearing was denied on October 29, 2007 (Pet. App. 36a-37a). The petitions for a writ of certiorari were filed on January 28, 2008, and January 25, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Clean Water Act (CWA or the Act), 33 U.S.C. 1251 *et seq.*, "the discharge of any pollutant by any person shall be unlawful" except "as in compliance with" specified provisions of the Act, including Sections 301, 306, 402, and 404 (33 U.S.C. 1311, 1316, 1342, and 1344). 33 U.S.C. 1311(a). The Act establishes two principal permitting programs for discharges: the National Pollutant Discharge Elimination System (NPDES), which is administered by the Environmental Protection Agency (EPA) and some States under Section 402 of the Act, 33 U.S.C. 1342; and a separate permitting program for discharges of dredge or fill material, which is administered primarily by the United States Army Corps of Engineers (Corps) under Section 404 of the Act, 33 U.S.C. 1344.

Section 402 states that, "[e]xcept as provided" in Section 404, EPA may issue NPDES permits for the discharge of any pollutant into navigable waters "upon condition that such discharge will meet" the requirements of other specified provisions, including Sections 301 and 306 of the Act, 33 U.S.C. 1311 and 1316. 33 U.S.C. 1342(a)(1). Section 301 requires EPA to promulgate effluent limitations, while Section 306 requires EPA to promulgate new source performance standards. 33 U.S.C. 1311, 1316.

Under Section 404(a), the Corps may issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a). Such permits must meet the requirements set forth in guidelines promulgated by EPA in conjunction with the Corps. 33 U.S.C. 1344(b)(1); see 40 C.F.R. Pt. 230. Those guidelines require, among other things, that the Corps deny a Section 404 permit "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. 230.10(a). The guidelines also generally preclude the issuance of a permit where state water quality standards or other specified standards are not met, or where the discharge would "cause or contribute to significant degradation of the waters of the United States." 40 C.F.R. 230.10(b) and (c).

The Act does not define the term "fill material." In 2002, the Corps and EPA published a joint rule to "clarify the Section 404 regulatory framework" by adopting a uniform definition of "fill material." 67 Fed. Reg. 31,129-31,130. That rule defines "fill material" as "material placed in waters of the United States where the material 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." 33 C.F.R. 323.2(e)(1). The rule also defines the "discharge of fill material" to include the "placement of overburden, slurry, or tailings or similar mining-related materials." *Ibid.*

In 1982, EPA had promulgated a new source performance standard for gold mine operations that use a froth-flotation milling process. That standard requires,

in pertinent part, that "there shall be no discharge of process wastewater to navigable waters from mills that use the froth-flotation process * * * for the beneficiation of * * * gold." 40 C.F.R. 440.104(b)(1).

2. The Corps issued a Section 404 permit to petitioner Coeur Alaska, Inc. (Coeur) for the discharge of mine tailings into the Lower Slate Lake that would result from the operation of the Kensington gold mine northwest of Juneau, Alaska. The gold would be mined through a froth-flotation process under which ore-bearing rock would be finely ground and processed in a tank with water and other substances, causing the gold to bubble to the surface and form a froth that would be skimmed off the top. Mine tailings are the solid material left in the bottom of a tank after gold-bearing material has been removed. The tailings would be transported in a slurry, consisting of about 55% tailings and 45% water, through a pipeline to an impoundment at Lower Slate Lake. Over the 10- to 15-year life of the mine, some 4.5 million tons of mine tailings would be deposited into Lower Slate Lake. Coeur would construct an impoundment dam at the lake. Upon closure of the mine, the discharges of mine tailings would have raised the bottom of Lower Slate Lake by an estimated 50 feet, and increased the surface area of the lake from 23 acres to approximately 62 acres. Aquatic life would then be restored to the lake. See Pet. App. 4a-7a, 40a-44a.

3. Respondents filed this action, contending that the Corps' issuance of the permit violated the discharge requirements of Sections 301 and 306 of the CWA, 33 U.S.C. 1311 and 1316, including the new source performance standard for froth flotation. Pet. App. 7a-8a.

The district court dismissed the complaint. Pet. App. 38a-56a. The court held that the Section 404 permitting

process is an "exception" to the NPDES permit process, and that the issuance of Section 404 permits for dredged or fill materials is governed by the implementing guidelines developed by EPA in conjunction with the Corps, not Sections 301 and 306. *Id.* at 51a. The court further determined that the slurry that would be discharged into the Lower Slate Lake is fill material under the Corps' and EPA's implementing regulation because it would "'change the bottom elevation' of the lake." *Id.* at 53a. While respondents argued that the agencies had not intended to include mine tailings in the definition of "fill material," the court rejected that contention, in part because the explanatory preamble specifically stated that "any mining-related material that has the effect of fill when discharged will be regulated as 'fill material.'" *Id.* at 54a (emphasis omitted) (quoting 67 Fed. Reg. at 31,135). Because respondents did not contend that the permit failed to satisfy the Section 404 guidelines, *id.* at 51a n.44, the court upheld the permit, *id.* at 56a.

4. The court of appeals reversed. Pet. App. 1a-35a. It held that, "[i]f EPA has adopted an effluent limitation or performance standard applicable to a relevant source of pollution, § 301 and § 306 preclude the use of a § 404 permit scheme for that discharge." *Id.* at 17a. In the court's view, Sections 301 and 306 unambiguously prohibit all discharges contrary to the effluent limitations and performance standards promulgated thereunder, including discharges of dredge or fill material. *Id.* at 15a-17a. The court pointed principally to those provisions' use of the terms "any" and "all." *Id.* at 15a. The upshot, according to the court, is that EPA's promulgation of an effluent limitation or performance standard displaces the Corps' Section 404 permitting regime and

replaces it with EPA's NPDES permitting regime under Section 402. *Id.* at 17a-18a.

While the court of appeals relied on its view of the plain language of the statute, it also stated that the regulatory history "further demonstrates that neither the Corps nor EPA intended for the current regulatory definition of 'fill material' to replace the performance standard for froth-flotation mills." Pet. App. 19a. The court recognized that, in promulgating the rule, the agencies had stated that "mining-related material that has the effect of fill when discharged will be regulated as 'fill material.'" *Id.* at 29a (quoting 67 Fed. Reg. at 31,135). But the court relied on other statements indicating that no regulatory change was intended. *Id.* at 26a-27a.

ARGUMENT

Petitioners argue (*e.g.*, 07-990 Pet. 16-21) that the court of appeals erred in holding that, when "EPA has adopted an effluent limitation or performance standard applicable to a relevant source of pollution," a permit for fill material may not be issued under Section 404. Pet. App. 17a. The government agrees that the court of appeals erred. There is, however, no division among the courts of appeals on that question. And while the question presented is important, it does not appear to be sufficiently important to warrant this Court's review at this time. Accordingly, the petition for a writ of certiorari should be denied. If this Court were to grant the petition, however, the government would support the position of petitioners.

1. The court of appeals erred in conflating the Act's two separate permitting mechanisms for the discharge of pollutants into waters of the United States. Sections 402 and 404 establish discrete permitting programs, go-

verning different discharges, subject to different protective requirements.

a. Under Section 404, the Corps "may issue permits * * * for the discharge of dredged or fill material into the navigable waters" when certain conditions are satisfied. 33 U.S.C. 1344(a). Thus, Section 404 specifically governs permits for the discharge of fill material. And the Act's conditions for issuance of a Section 404 permit do *not* include obtaining a Section 402 permit as well.

In contrast, Section 402 generally governs the permitting of *other* discharges by providing that, "*[e]xcept as provided in [S]ections [318 and 404]*, the Administrator may * * * issue a permit for the discharge of any pollutant, or combination of pollutants," under certain circumstances. 33 U.S.C. 1342(a). As that "except" clause reflects, the specific Section 404 permitting regime displaces the more general Section 402 NPDES permitting regime in the context of discharges of dredged or fill material. Indeed, it is a settled canon of construction that specific provisions generally govern over general ones. *E.g.*, *National Cable & Telecomms. Ass'n* v. *Gulf Power Co.*, 534 U.S. 327, 335 (2002).

That conclusion is confirmed by the specificity of, and differences between, the two permitting regimes. Section 404 requires that discharges of dredged or fill material comply with guidelines promulgated by EPA after consultation with the Corps. 33 U.S.C. 1344(b)(1). Those guidelines provide, among other things, that no discharge is permitted "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. 230.10(a). The guidelines also generally preclude the issuance of a per-

mit where state water quality standards or other specified standards are not met, or where the discharge would "cause or contribute to significant degradation of the waters of the United States." 40 C.F.R. 230.10(b) and (c). The Act also authorizes EPA to prohibit the specification of any defined area as a disposal site, and to deny or restrict the use of any defined area as a disposal site for dredged or fill material. 33 U.S.C. 1344(c). In contrast, Section 402 requires that discharges comply with other specified provisions of the Act, including effluent limitations established under Section 301 and new source performance standards established under Section 306. 33 U.S.C. 1342(a)(1). Significantly, neither Section 404 nor the implementing guidelines require that discharges of dredged or fill material comply with the Section 301 effluent limitations or the Section 306 new source performance standards.

Those differences between the requirements for the discharge of dredged or fill material and the discharge of other pollutants reflect that, in general, there are practical differences between such discharges. As EPA and the Corps have explained, "[f]ill material differs fundamentally from the types of pollutants covered by [S]ection 402 because the principal concern is the loss of a portion of the water body itself." 65 Fed. Reg. 21,293 (2000). Considering the greater specificity of Section 404 with respect to dredged or fill material, the significant differences between the Section 402 and 404 permitting regimes, and the general differences in the types of pollution addressed by the two permitting regimes, it would make little sense to treat Section 402 as displacing Section 404 when EPA has issued a performance standard.

The court of appeals drew the opposite conclusion because the Act specifies elsewhere that, "[e]xcept as in compliance with [Section 301] and [S]ections [302, 306, 307, 318, 402, and 404] * * * the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. 1311(a). In the court's view, the use of the word "and" in that list means that all discharges of pollutants into waters of the United States must comply with all of the listed sections, including the effluent limitations of Section 301 and the new source performance standards of Section 306. See Pet. App. 15a.

That general list cannot bear the weight the court of appeals assigned it, in part because requiring compliance with all of the listed sections would logically require companies to secure *both* a Section 402 permit and a Section 404 permit, and thereby collapse the distinction between the two permitting regimes. Even the court of appeals did not go so far, and instead held that *only* a Section 402 permit could issue. Pet. App. 17a-18a. Nothing in the cumulative listing of statutory provisions suggests any modification of the respective terms of each of those provisions considered individually. Section 402 provides for EPA to issue permits "[e]xcept as provided in" Sections 318 and 404. 33 U.S.C. 1342(a)(1). Thus, the listing of Section 402 *includes* its exception for discharges approved by Section 404 and preserves the disparate treatment of the two types of discharges.

Moreover, use of the word "and" simply signifies that all of the sections identified in the list create exceptions to the general prohibition against discharges. In any event, even if the sentence's use of the term "and" were inartful, the term "or" would have been equally inartful. Under the court of appeals' approach to construing the

series of statutory provisions, the term "or" would have suggested, for example, that a discharge governed by Section 402 need only comply with Section 301 effluent limitations *or* Section 306 new source performance standards, which is contrary to Section 402's express requirement that both of those provisions must be satisfied by discharges that require a Section 402 permit. See 33 U.S.C. 1342(a)(1).

At the most, Congress's drafting creates an ambiguity in the Act. It does not unambiguously override the remainder of the Act's more specific provisions. Thus, the court of appeals erred by holding that the Act unambiguously precludes the agencies' reasonable interpretation, which is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984).[2]

b. The court of appeals also misperceived the regulatory history of the agencies' regulation defining "fill" material. See Pet. App. 19a-30a. That regulation defines "fill material" as material placed in waters of the United States that has the effect of "[r]eplacing any portion of a water of the United States with dry land," or "[c]hanging the bottom elevation of any portion of a water of the United States." 33 C.F.R. 323.2(e)(1). And of particular significance here, the rule specifically defines

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[2] Nor do Sections 301(e) and 306(e) shed light on the question. Section 301(e) states only that effluent limitations "shall be applied to all point sources of discharge *in accordance with the provisions of this chapter*.'" 33 U.S.C. 1311(e) (emphasis added). Because "provisions of this chapter" refers to the entire CWA, the court of appeals' reliance on that provision (Pet. App. 12a-13a) is circular. Similarly, Section 306(e) makes it unlawful to operate any new source "in violation of any standard of performance *applicable to such source*." 33 U.S.C. 1316(e) (emphasis added). To determine whether a performance standard is applicable to a source, one must again refer back to the Act as a whole.

the "discharge of fill material" as including the "placement of overburden, slurry, or tailings or similar mining-related materials." 33 C.F.R. 323.2(f). Those provisions contain no exception based on Section 301 effluent standards or Section 306 new source performance standards, nor do they state that discharges of fill material are subject to the Section 402 permitting process.

As the language of the rule is unambiguous, resort to its regulatory history is unnecessary. In any event, the preamble to the rule emphasizes that "mining-related material that has the effect of fill when discharged will be regulated as 'fill material.'" 67 Fed. Reg. at 31,135. The court of appeals discounted that statement, which is directly on point, and instead looked to a general statement that the rule does not "change any determination we have made regarding discharges that are subject to an effluent limitation guideline and standards, which will continue to be regulated under [S]ection 402 of the CWA." Pet. App. 27a (emphasis omitted) (quoting 67 Fed. Reg. at 31,135). That language must be read, however, in conjunction with the preceding statement that "EPA has never sought to regulate fill material under effluent guidelines." 67 Fed. Reg. at 31,135. Accordingly, the regulatory history provides no basis for questioning the rule's plain language. In any event, the agencies' interpretation of their own regulation is entitled to deference. *E.g.*, *Auer* v. *Robbins*, 519 U.S. 452, 460-462 (1997).

2. While the court of appeals erred, its decision does not conflict with any decisions of this Court or other courts of appeals. The court held that EPA's promulgation of an effluent limitation or new source performance standard displaces the Section 404 permitting process. See Pet. App. 17a-18a, 30a n.15. None of the cases relied

on by petitioners (*e.g.*, 07-990 Pet. 19-21) involves that circumstance. Indeed, the court of appeals distinguished *Kentuckians for the Commonwealth, Inc.* v. *Rivenburgh*, 317 F.3d 425 (4th Cir. 2003) (relied on at 07-990 Pet. 19-21), precisely because "EPA had not promulgated a performance standard for mountain-top coal mining, so neither § 301 nor § 306 was implicated in [*Kentuckians*]." Pet. App. 30a n.15.

3. While the question presented is important, it does not appear to be sufficiently important to satisfy this Court's certiorari standards at this time. Theoretically, the question presented could arise in any context in which EPA had arguably promulgated a relevant effluent limitation or new source performance standard. A review of EPA's effluent limitations and performance standards suggests, however, that the issue will arise only in the context of mining operations that use certain technologies, especially the froth flotation process. Even for mines that use those technologies, the significance of the issue depends on the topography of the surrounding area, *i.e.*, whether fill material would need to be discharged into a water of the United States.

Thus, while the court of appeals' holding will have a significant impact on a number of mines, it is unclear how important the court's decision will prove to be. At least at this time, in the absence of a circuit split, this Court's review does not appear to be warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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