Digging for Gold: The Ninth Circuit Catches the U.S. Army Corps of Engineers with Its Finger up the EPA's Nose in Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers

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DIGGING FOR GOLD: THE NINTH CIRCUIT CATCHES THE U.S. ARMY CORPS OF ENGINEERS WITH ITS FINGER UP THE EPA’S NOSE IN SOUTHEAST ALASKA CONSERVATION COUNCIL V. U.S. ARMY CORPS OF ENGINEERS

I. INTRODUCTION

In the summer of 2008, the United States Supreme Court (Supreme Court) granted certiorari to determine the fate of a proposed Alaskan gold mine. The mining company appealed a Ninth Circuit Court decision forcing the mine to alter its planned method for disposing of mining waste product. Several environmental groups responded, citing the harmful effects of a reversal, both on a natural Alaskan lake and on the inviolability of the federal Clean Water Act (CWA or the Act).

Southeast Alaska is known for its glacier-cut fjords and beautiful rainforests. The region’s main industries are fishing, tourism and logging, but the area is also home to the Juneau Gold Belt. This 120-mile stretch has hosted major gold mining initiatives since the nineteenth century.


3. See id. (discussing points of contention in noted case).


While most of the Juneau Gold Belt has been inactive since the early twentieth century, plans to reopen several mine sites emerged in the 1990s. To open the mines, mining companies must apply for, and be granted, permits by government agencies. In order to dispose of mining waste product into Southeast Alaska's numerous lakes and bodies of water, companies must obtain permits in accordance with the federal CWA. Yet, novel mining technologies and the physical geography of Southeast Alaska pose unique problems for mining companies applying for permits.

Since its inception in 1973, the CWA has presented both courts and agency administrators with problems of interpretation. The CWA grants the Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps or the Corps) administrative powers to issue permits to applicants proposing certain activities that will likely affect the nation's waters.

The Ninth Circuit is the most recent court to rule on an alleged ambiguity in the CWA. In Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers (Southeast Alaska), the court held the Corps could not classify mining waste product as "fill material" and issue a permit to dispose of the waste into an Alaskan valley.

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8. See Leibowitz, supra note 6, at 919 (discussing plans to reopen two Southeast Alaska gold mines). Mining companies proposed to restore the Alaska-Juneau mine site and the Kensington mine site in the early 1990s. Id. at 921. These proposals were subject to similar interagency disputes between the EPA and U.S. Army Corps of Engineers and the dispute at issue in the noted case. See id. at 921-22 (discussing how agencies resolved dispute in early 1990s by determining proposals did not fall under CWA).


11. See Leibowitz, supra note 6, at 919-22 (discussing difficulties Alaskan valleys and wetlands pose for mine tailings disposal).


15. 486 F.3d 638 (9th Cir. 2007).
The court found the permit unlawful because the EPA expressly prohibited the particular discharge.\textsuperscript{17} This Note examines the Ninth Circuit's decision in \textit{Southeast Alaska} as the case reaches the Supreme Court.\textsuperscript{18} Section II summarizes the relevant facts surrounding the mining proposal and the procedural history of the case.\textsuperscript{19} Section III provides necessary background to the component parts of the CWA at issue.\textsuperscript{20} Section IV summarizes the Ninth Circuit's decision.\textsuperscript{21} Section V of this Note critiques the \textit{Southeast Alaska} opinion and asserts that the Ninth Circuit correctly interpreted the CWA.\textsuperscript{22} Finally, Section VI discusses the importance of the case on CWA litigation and examines the possible consequences if the Supreme Court chooses to reverse.\textsuperscript{23}

\section*{II. Facts}

Coeur Alaska (Coeur), a mining company specializing in precious metals, constructed the Kensington Gold Mine in Southeast Alaska.\textsuperscript{24} The Kensington mine will be entirely subterranean, located on the site of a previous gold mine that operated from 1897 to 1928.\textsuperscript{25} Coeur is building the mill at the site of the prior mine for both convenience and to improve overall efficiency.\textsuperscript{26} Current...
plans call for the mine to operate for approximately ten to fifteen years.²⁷

To mine the gold, Coeur will employ an on-site froth-flotation plant.²⁸ The froth-flotation mill is an alternative mining technology to the more typical cyanide-based method.²⁹ Rock containing gold ore is transported from the mine to the mill, where the rock is crushed and ground before entering a tank and going through the froth-flotation process.³⁰

Ninety-five percent of the ore that is originally placed in the froth-flotation mill will not contain any gold.³¹ Once the ore is processed and the gold is removed, the leftover rock becomes residual waste, otherwise known as "tailings," and requires disposal.³² Kensington plans to replace forty percent of the tailings as backfill for the mine.³³ The other sixty percent will be deposited into a local body of water, Lower Slate Lake.³⁴

²⁷. See id. (discussing Coeur’s plans to keep Kensington mine in operation for ten to fifteen years).
²⁸. See Southeast Alaska, 486 F.3d at 641 (explaining Coeur’s plans to implement froth-flotation mill at Kensington mine).
²⁹. See Mining & Milling, supra note 7 (explaining froth-flotation mill does not use cyanide or other harsh chemicals typical of mining). Coeur Alaska believes that froth-flotation is an environmentally safer option to cyanide mining. Id. The controversy surrounding the case, however, stems from an EPA regulation declaring wastewater from froth-flotation facilities unsafe, and thereby prohibiting the discharge of such wastewater into the nation’s navigable waters. Ore Mining and Dressing Point Source Category, 40 C.F.R. pt. 440.104(b)(1) (2008). For further discussion of the EPA regulation and its effect on the case, see infra notes 66-91 and accompanying text.
³⁰. See Southeast Alaska, 486 F.3d at 641 (explaining froth-flotation process planned to be used at Kensington). When the rock is ground fine enough, it is placed inside the froth-flotation tank. Id. Next, water and enabling chemicals are added. Id. Finally, air is pumped into the tank. Id. Pockets of air form inside the solution and these bubbles attach to gold deposits. Id. The bubbles then rise to the top of the tank, carrying the gold with it. Id. The bubbles pop at the surface of the tank and gold forms a froth layer at the top, which is skimmed out and preserved. Id.
³¹. See id. (describing statistics representing how much gold can actually be retrieved in gold mining process).
³³. See Southeast Alaska, 486 F.3d at 641 (explaining Coeur’s plans for excess tailings).
³⁴. See Coeur Alaska Env’t, supra note 32 (explaining how excess tailings will be deposited into Lower Slate Lake).
Kensington plans to process 2,000 tons of ore each day;\(^35\) of this, only 100 tons will contain economically viable gold.\(^36\) This means that 1,440 tons of tailings will be deposited into Lower Slate Lake each day.\(^37\) Kensington intends to use a slurry, comprising forty-five percent water and fifty-five percent tailings, to transport the tailings into the bottom of Lower Slate Lake.\(^38\) Over the course of the ten to fifteen year life of the mine, 4.5 million tons of tailings will funnel through the slurry into the bottom of the lake.\(^39\)

Originally, Coeur planned to construct a dry-mining facility that did not require the use of Lower Slate Lake.\(^40\) Coeur Alaska obtained permits for the Kensington Gold Mine from both the EPA and the Corps under the initial dry tailings plan.\(^41\) The price of gold dropped, however, forcing Coeur to look for a less expensive mining method.\(^42\) After studying the local geography, Coeur decided that conveying the slurry into Lower Slate Lake would be the most economically viable method for depositing the wet tailings.\(^43\)

After revising the mining plans, Coeur resubmitted its proposal to the appropriate agencies in order to gain permits.\(^44\) The Forest

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\(^35\). See Southeast Alaska, 486 F.3d at 641 (providing specific facts regarding amount of ore processed per day).

\(^36\). See id. (explaining most ore processed in froth-flotation mill will not contain useful gold).

\(^37\). See id. at 642 (explaining environmental effects on Lower Slate Lake).

\(^38\). See id. (describing slurry that will carry tailings from froth-flotation mill to Lower Slate Lake).

\(^39\). See id. (explaining specific effects mining will have on Lower Slate Lake). The bottom of Lower Slate Lake will rise fifty feet, to its current high water mark. Id. Additionally, the lake will nearly triple in surface area. Id. Because of the impact of the slurry and the discharge of the tailings, all fish and aquatic life in Lower Slate Lake would be killed. Id. Initially, the pH level for the water in the lake will rise to an alkalinity level greater than ten. Id. The toxicity of the discharge may have lasting effects on Lower Slate Lake. Id.

\(^40\). See Coeur Alaska Env’t, supra note 32 (explaining original plans to construct dry-mining facility). The tailings under this alternate plan would be “dried and stacked on the ground” instead of in Lower Slate Lake, but this option “was not selected . . . due to increased wetland impacts, logistics, and cost.” Id.

\(^41\). See Southeast Alaska, 486 F.3d at 641 (describing permits involved in Coeur’s original plan for Kensington Gold Mine); see also Coeur Alaska Env’t, supra note 32 (explaining additional factors beyond economic reasons why Kensington discarded dry tailing plan). Coeur submits the plan for tailings disposal in Lower Slate Lake is “the best and only option,” citing factors such as the impact on Alaskan wetlands and the confused logistics of a dry tailings plan, in addition to the cost factor. Id.

\(^42\). See Southeast Alaska, 486 F.3d at 641 (explaining why Coeur did not follow through with dry mining plan).

\(^43\). See Coeur Alaska Env’t, supra note 32 (explaining how slurry is most appropriate method for disposing of tailings created at gold mine).

\(^44\). See Southeast Alaska, 486 F.3d at 642 (describing permitting process for new froth-flotation proposal).
Service issued a permit approving the wet tailings plan on December 9, 2004. The Corps took jurisdiction of the proposal over the EPA, believing the scheme fell under the CWA’s Section 404 permitting system because the bottom elevation of Lower Slate Lake would rise fifty feet.

On June 17, 2005, the Corps issued a permit to Coeur, authorizing the Kensington Gold Mine to deposit tailings into Lower Slate Lake. While the Corps approved Coeur’s plan to dump the chemically processed tailings into the lake, the permit required Coeur to mitigate the environmental impact when the mine ceased production.

After the Corps granted the Kensington permit, the Southeast Alaska Conservation Council (SEACC) quickly filed a lawsuit challenging the permit under the CWA. SEACC is a local environmental organization committed to preserving Alaska’s natural environment and resources. Following the lawsuit, the Corps suspended its permit and ordered Coeur to postpone operations of the Kensington Gold Mine. After nearly a year of research and studies, the Corps reinstated its permit without change on March 29, 2006. SEACC then filed an amended complaint.

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45. See id. (stating Forest Service quickly granted approval for new plan in Record of Decisions).

46. See id. (explaining why Corps believed it had jurisdiction to grant permit instead of EPA). For further information regarding the Corps' permitting responsibilities, see infra notes 73-91 and accompanying text.

47. See Southeast Alaska, 486 F.3d at 642 (discussing Corps' approval of proposal for Kensington Gold Mine).

48. See id. (describing special conditions Corps attached to permit when considering Kensington proposal). Under the Corps' permit, Coeur was required to install a cap of indigenous material over the tailings at the floor of the lake, as well as "reintroduce native fish species back into the lake and monitor the health of the ecosystem." Id. All of the environmental conditions would only be required when all mining activity ceased. Id.

49. See Southeast Alaska, 486 F.3d at 643 (describing environmental groups' disapproval of proposed Kensington mine).


51. See id. (describing Corps' actions after receiving complaint regarding Kensington Gold Mine).


53. See Southeast Alaska, 486 F.3d at 643 (describing SEACC's action after Corps reinstated permit for Kensington Gold Mine).
At trial, the district court granted summary judgment to the defendant Corps in an opinion rendered on August 4, 2006.\textsuperscript{54} The district court confirmed that Section 404 was the applicable CWA provision because the permit involved the disposal of fill material.\textsuperscript{55} As a result, the district court concluded that CWA Sections 301(e) and 306(e) were inapplicable to the Section 404 permit procedure.\textsuperscript{56}

SEACC appealed that decision on August 7, 2006, claiming the district court erred in its interpretation of the CWA.\textsuperscript{57} SEACC's core argument was that the Corps did not have jurisdiction to issue the permit because the tailings constituted a prohibited effluent from a froth-flotation facility.\textsuperscript{58} Consequently, Section 402 and the EPA should have governed the permitting proposal and the permit should have been denied.\textsuperscript{59}

III. BACKGROUND

A. The Clean Water Act

1. Purpose

Congress enacted the Clean Water Act to remedy a growing pollution problem in the nation's waters.\textsuperscript{60} The CWA's stated objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."\textsuperscript{61} First enacted in 1972, the Act set a lofty "national goal that the discharge of pollutants into the navigable waters be eliminated by 1985."\textsuperscript{62} Further, Congress sought to achieve "water quality which provides for the protection and propagation of fish, shellfish, and wildlife... and recreation in and on the water."\textsuperscript{63}

\textsuperscript{54} See id. (describing procedural history of noted case).
\textsuperscript{55} See id. (explaining trial court's reasons for granting summary judgment to Corps).
\textsuperscript{56} See id. (stating trial court's reason for concluding Corps properly granted permit for Kensington Gold Mine). For a further discussion of the relationship between the component parts of the CWA, see infra notes 60-91 and accompanying text.
\textsuperscript{57} See Southeast Alaska, 486 F.3d at 643 (explaining why SEACC appealed district court ruling).
\textsuperscript{58} See id. (stating issues before court on appeal from district court's decision).
\textsuperscript{59} See id. (stating SEACC's issues on appeal).
\textsuperscript{61} Id. (explaining congressional objective for enacting CWA).
\textsuperscript{62} Id. § 1251(a)(1).
\textsuperscript{63} Id. § 1251(a)(2).
In the thirty-seven years since Congress enacted the CWA, strict enforcement by the EPA, the Corps and the federal courts have made the CWA a material success. The Act places exacting limitations on all effluent discharges not in compliance with the CWA, and courts have considered these limitations the “cornerstone of the act.”

2. The EPA and NPDES

The CWA attempts to govern effluent discharges using a permit program, essentially creating a standardized regulatory program governed by both the EPA and the Corps. The EPA has jurisdiction over all permits relating to the discharge of pollutants. The EPA may issue permits through the National Pollutant Discharge Elimination System (NPDES), but only for those applicants in compliance with Sections 301 and 306 of the CWA.

Section 301 of the CWA governs effluent limitations, stating that, save for the enumerated exceptions in the CWA itself, “the discharge of any pollutant by any person shall be unlawful.” Section 301, together with Section 306, requires that the administrators of both the EPA and the Corps jointly establish national performance standards for effluent discharges. In 1982, the EPA used its power, granted by Sections 301, 306 and 402, to promulgate a new standard of performance for froth-flotation facilities. This performance standard prohibits a froth-flotation mill from discharging its process wastewater into waters of the United States.

64. See Andreen, supra note 12, at 537 (explaining effects CWA has had on environment since enactment).
65. See Ass’n to Protect Hammersley, Eld, & Toten Inlets v. Taylor Res., Inc., 299 F.3d 1007, 1009 (9th Cir. 2002) (describing importance of CWA’s effluent limitations).
66. See 33 U.S.C. § 1342 (granting certain permitting powers to EPA); § 1344 (granting certain permitting powers to Corps).
67. See id. § 1342 (describing EPA’s permitting powers for all proposed effluent discharges).
68. See id. (describing National Pollutant Discharge Elimination Standards system that helps govern EPA permit decisions).
69. Id. § 1311 (regulating discharge of pollutants).
70. See id. § 1311(e) (requiring all effluent limitations created under the CWA be applied to all point sources); § 1316 (making it unlawful for any new point source owner to operate in violation of published standards of performance).
72. See id. (forbidding discharge of process wastewater from froth-flotation mills into navigable waters).
3. The Corps and "Fill Material"

The CWA grants the Corps jurisdiction to issue permits to all applicants who propose to discharge dredged or fill material under Section 404.73 "Discharge of dredged material" has a fairly broad definition, covering the "addition of dredged material... into the waters of the United States."74 Section 404 also provides for explicit exceptions to effluent limitations for certain enumerated practices.75

Typical mining operations produce the type of fill within the Corps' permitting power,76 and the Corps frequently authorizes mining facilities to discharge tailings into navigable waters.77 The Corps' power becomes ambiguous, however, when asked to provide permits for fill that qualifies as an effluent otherwise controlled by the EPA.78

4. A History of Confusion

The actual interplay between the EPA and the Corps has produced a tangled history.79 Much of the confusion revolves around the organizations' evolving definitions of the term "fill material."80 Appearing first in the 1975 Code of Federal Regulations (CFR), the Corps initially defined "fill material" according to an effects-based

73. See 33 U.S.C. § 1344 (outlining Corps' permitting powers under CWA). The Corps is given authority solely for discharges of fill material into the nation's navigable waters. Id. For a discussion regarding what constitutes as a discharge of fill material, see infra notes 74-91 and accompanying text.


75. See 33 U.S.C. § 1344 (providing for exceptions to effluent limitations). The named exceptions do not include mining. Id. The Corps does frequently issue mining permits, however. See, e.g., Kentuckians for the Commonwealth v. Rivenburgh, 317 F.3d 425 (4th Cir. 2003) (discussing Corps-granted permit for coal mining proposal). The typical mining permit authorized by the Corps relates strictly to the discharge of fill material and does not include fill that doubles as an effluent. See id. at 431 (discussing typical permitting schemes).

76. See Kentuckians, 317 F.3d at 425 (discussing Corps' permitting power). The fill at issue in Kentuckians included tailings produced at a coal mining facility. Id. The Corps approved a plan where the tailings filled a valley that constituted a wetland under the CWA. Id. (discussing Corps' approved plan). For a further discussion of the ruling in Kentuckians, see infra notes 99-103 and accompanying text.

77. See, e.g., id. (authorizing mining tailings to be deposited as fill into wetland valley).

78. See Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs, 486 F.3d 638, 644 (9th Cir. 2007) (examining interpretation problems caused by ambiguity in CWA).

79. See id. (describing jurisdictional overlap created for fill material that doubles as effluent).

80. See id. at 650 (explaining history of agencies' 'fill material' definitions).

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test, referring to "any pollutant used to create fill in the traditional sense of replacing an aquatic area with dry land or of changing the bottom elevation of a water body for any purpose."\textsuperscript{81} The EPA eventually adopted this same effects-based test.\textsuperscript{82} In 1977, however, the Corps altered its definition to a purpose-based test.\textsuperscript{83} The Corps reasoned that too many waste materials technically fit within the fill material definition but were intended to fall under NPDES regulations, and ultimately the EPA should be granting those permits.\textsuperscript{84}

In 1986, the EPA and the Corps released a formal Memorandum of Agreement (MOA) outlining the official procedures for regulating industrial pollutants.\textsuperscript{85} Under the MOA, the EPA now regulates all industrial pollutants under Section 402, while the Corps grants permits for fill materials that either replace portions of water with dry land or change the bottom elevation of any body of water in the United States by any amount.\textsuperscript{86} Accordingly, both the Corps and EPA adopted a joint regulatory definition of "fill material," using the MOA guidelines to supplement the Corps' original effects-based test.\textsuperscript{87}

Under the new agreement, mine tailings are generally considered a discharge of fill material, thereby requiring a permit from the Corps.\textsuperscript{88} When tailings from mining-related activities are deposited into the navigable waters of the United States, however, they may also constitute effluent for which the EPA has sole juris-

\textsuperscript{81} Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31,320, 31,325 (July 25, 1975) (defining fill material).
\textsuperscript{82} See Discharge of Dredged or Fill Material, 40 Fed. Reg. 41,292, 41,298 (Sept. 5, 1975) (adopting effects-based test for EPA).
\textsuperscript{83} See Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37,122, 37,145 (July 19, 1977) (changing Corps' definition of fill material to purpose-based test).
\textsuperscript{84} See id. at 37,130 (explaining why Corps changed definition of "fill material").
\textsuperscript{85} See Water Pollution Control; Memorandum of Agreement on Solid Waste, 51 Fed. Reg. 8,871, 8,171 (Mar. 14, 1986) (outlining Memorandum of Agreement between EPA and Corps regarding regulation of "fill material").
\textsuperscript{87} See Permits for Discharges of Dredged or Fill Material Into Waters of the United States, 33 C.F.R. pt. 323.2(e) (reciting EPA definition); 404 Program Definitions; Exempt Activities Not Requiring 404 Permits, 40 C.F.R. pt. 232.2 (reciting Corps definition). Similarly, the agencies defined 'discharge of fill material' in 33 C.F.R. pt. 323.2(f) (EPA definition) and 40 C.F.R. pt. 232.2 (Corps definition).
diction. For instance, the EPA’s regulation prohibiting the process wastewater of froth-flotation mills from entering the nation’s waters remains ambiguous regarding whether such process wastewater could be permitted under the Corps’ Section 404 power when the discharge doubles as fill material. This situation is the source of the controversy in Southeast Alaska, where environmental groups challenged the Corps’ authority to issue a permit for the discharge of fill material when the material also constituted an effluent expressly prohibited by the EPA.

B. Cases Interpreting the Clean Water Act

While there is confusion at the administrative level, the issue in Southeast Alaska remains a question of first instance for the courts. Additionally, major case law discussing the CWA provides modest relevance in assessing this ambiguity. There is no precedential case precisely on point, however, meaning the Ninth Circuit had little help in reaching its determination in Southeast Alaska.

1. Rapanos v. United States

Most recently, the Supreme Court decided in Rapanos v. United States (Rapanos) that permits need not be issued for the discharge of fill material into non-navigable waters. This is instructive for cases where mining operations create dams and man-made ponds, which do not constitute navigable waters. This ruling holds little

89. Compare id. § 1342 (granting EPA ability to create new source performance standards for effluents under NPDES) with id. § 1344 (granting Corps permitting jurisdiction for proposals involving discharge of fill material).
90. See Se. Alaska Conservation Council v. U.S. Army Corps of Eng’rs, 486 F.3d 638, 644-53 (9th Cir. 2007) (discussing which agency has permitting jurisdiction when effluent also constitutes fill material).
91. See id. at 644 (stating controversy at issue).
92. See Schwartz, supra note 2 (discussing lack of split among circuit courts on issue).
93. For a discussion of CWA case law and the relevance of the cases, see infra notes 94-103 and accompanying text.
94. See Joshua A. Bloom, What’s Next After Rapanos?, NAT. RESOURCES & ENV’T, Summer 2007, at 13, 13 (discussing major Supreme Court decisions regarding interpretation of CWA).
96. Id. at 757 (holding CWA inapplicable for waters not classified as ‘navigable waters of the United States’).
97. See id. at 719-23 (discussing facts at issue in Rapanos). The facts at issue differ greatly from those in Southeast Alaska, most notably because Southeast Alaska deals with a proposal for dumping tailings into a lake that clearly constitutes navigable water. See Southeast Alaska, 486 F.3d at 642 (giving physical characteristics of Lower Slate Lake).
value for discerning proper law, however, when mining corporations plan to discharge tailings into waters that are indisputably navigable.  

2. Kentuckians for the Commonwealth, Inc. v. Riverburgh

Additionally, mining overburden that is used to fill streams is considered within the Corps' jurisdiction. In *Kentuckians for the Commonwealth, Inc. v. Riverburgh (Kentuckians)*, the Fourth Circuit Court of Appeals held that coal mining overburden had the effect of replacing United States waters with dry land, and should thereby be governed under Section 404 of the CWA. Overburden, like tailings, is listed specifically in the CFR as an example of a material included under the term "discharge of fill material." The Fourth Circuit allowed the Corps to grant permits for the discharge of fill material, but specifically excluded fill that amounted to effluent.

IV. NARRATIVE ANALYSIS

The issue before the Ninth Circuit Court of Appeals in *Southeast Alaska* was whether the EPA or the Corps had authority under the CWA to issue permits to Coeur Alaska for it's proposed Kensington Gold Mine. The Corps believed that the CFR definition of "fill material" granted it permitting power because the Kensington proposal would raise the bottom elevation of Lower Slate Lake. Conversely, SEACC and other appellants urged the court to focus on a different section of the CFR, which would prohibit discharging the process wastewater of froth-flotation mills into waters of the United States.

98. See Bloom, *supra* note 94, at 13-16 (discussing how *Rapanos* applies to future cases).


100. 317 F.3d 425 (4th Cir. 2003).

101. See *id.* (holding Corps' 404 permitting procedure governed facts in *Kentuckians*).

102. See *permits for Discharges of Dredged or Fill Material Into Waters of the United States, 33 C.F.R. pt. 323.2(e) (2008)* (listing examples of what constitutes 'fill material').

103. See *Kentuckians*, 317 F.3d at 448 (recognizing right of EPA to control effluent that might otherwise fall within Corps' fill material permitting capabilities).


105. See *id.* (describing possible interpretation that would grant Corps jurisdiction over permit). See also 33 C.F.R. pt. 323.2(e) (defining term "fill material").

106. See *Southeast Alaska*, 486 F.3d at 644 (describing possible interpretation that would deny Corps jurisdiction and effectively reject proposal altogether).
The Ninth Circuit interpreted the conflicting regulations in favor of SEACC for three reasons. First, the court stated that the conflict could be resolved by a plain language reading of the CWA. 107 Second, the court reviewed the regulatory history of the term "fill material" and determined that neither the EPA nor the Corps intended for any waste products governed by effluent limitations to be considered fill material for regulatory purposes. 108 Finally, the court believed the regulation prohibiting waste product discharges from froth-flotation mills governed because it is a more specific regulation than the general definition of "fill material." 109

A. Plain Language Reading of the CWA

In reading the CWA, the Ninth Circuit interpreted the Act's plain language to require Section 402 to govern the Kensington Mine proposal. 110 The CWA begins by making the discharge of any pollutant presumptively unlawful, except when in compliance with Sections 301, 306, 402 and 404. 111 Further, the CWA requires the EPA to implement "increasingly stringent, technology-based effluent limitations for point sources." 112 Each time the EPA enforces a new effluent limitation, the limitation applies "to all point sources

107. See Southeast Alaska, 486 F.3d at 644-48 (discussing plain language interpretation of CWA). For a further discussion of the Court's plain reading of the CWA, see infra notes 110-28 and accompanying text.

108. See Southeast Alaska, 486 F.3d at 644, 648-53 (discussing regulatory history of term fill material). For a further discussion of the court's interpretation of the regulatory history, see infra notes 129-42 and accompanying text. Congress defines 'effluent limitation' as "any restriction established by a stated or government agency on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters." 33 U.S.C. § 1362(11) (2006).

109. See Southeast Alaska, 486 F.3d at 654 (discussing weight of precise and specific regulations). For a further discussion of the court's distinction based on the specificity of the regulations, see infra notes 143-45 and accompanying text.

110. See Southeast Alaska, 486 F.3d at 644-48 (explaining plain language of CWA).

111. See id. (discussing CWA § 301). For the relevant text of the CWA, see 33 U.S.C. §§ 1311, 1312, 1316, 1317, 1328, 1342 and 1344.

112. Southeast Alaska, 486 F.3d at 645. "The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).
of discharge of pollutants in accordance with the provisions of the statute."\textsuperscript{113}

The Kensington Gold Mine project is considered a new point source, meaning the EPA is required "to implement even more stringent 'standards of performance'" under Section 306.\textsuperscript{114} Congress intended Sections 301 and 306 to be "absolute prohibitions."\textsuperscript{115} As a result, Section 306 does not permit a variance for the Kensington Gold Mine project.\textsuperscript{116}

The CWA established two permit programs to enforce compliance with the Act.\textsuperscript{117} The EPA may permit a discharge through the NPDES program, "but only if it complies with [Sections] 301 and 306."\textsuperscript{118} Additionally, the Corps has jurisdiction under a secondary permit program to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites."\textsuperscript{119}

The Ninth Circuit concluded that the Section 404 permitting scheme is ancillary to the NPDES program outlined in Section 402; the 404 program should therefore not include the discharge of pollutants, even if those pollutants conform to the fill material definition.\textsuperscript{120} To determine congressional intent, the court focused on the use of the word "and" in Section 301.\textsuperscript{121} In this context, "and" implied that "Congress intended for effluent limitations and standards of performance to apply to all applicable discharges, even those that facially qualify for permitting under [Section] 404."\textsuperscript{122}

\begin{itemize}
\item \textsuperscript{113} Southeast Alaska, 486 F.3d at 645 (quoting 33 U.S.C. § 1311(e) with court providing emphasis).
\item \textsuperscript{114} 33 U.S.C. § 1316(b). The Kensington Gold Mine project qualifies as a new point source because it requires construction to be "commenced after the publication of proposed regulations prescribing a standard of performance under [the CWA]." See id. § 1316(a)(2) (defining "new source").
\item \textsuperscript{116} See Southeast Alaska, 486 F.3d at 645-46 (permitting no exception to standard of performance).
\item \textsuperscript{117} Id. at 646 (describing NPDES permit system under § 402 and Corps permitting system under § 404).
\item \textsuperscript{118} Id. (describing NPDES permit system under § 402).
\item \textsuperscript{119} 33 U.S.C. § 1344(a) (defining Corps' jurisdiction).
\item \textsuperscript{120} See Southeast Alaska, 486 F.3d at 646 (concluding permit program applies only to dredged or fill material).
\item \textsuperscript{121} See id. (explaining effect of word "and" in 33 U.S.C. § 1311(a)). The text of § 301(a) reads, "Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a) (emphasis added).
\item \textsuperscript{122} Southeast Alaska, 486 F.3d at 646 (explaining congressional intent). The court suggested that if the Act contained the word "or" instead of "and," the named parts of the CWA could be viewed separately. Id.
\end{itemize}
Further, Section 301(e) applies the EPA’s effluent limitations to all discharges and Section 306(e) prohibits all discharges that do not comply with the EPA’s performance standards. Responding to the Corps’ arguments, the Ninth Circuit expressly refused to make any negative inference that Section 404 “contains an implied exception to the requirements of [Sections] 301 and 306 whenever a proposed discharge would meet the agencies’ regulatory definition of ‘fill material.’” Additionally, the court found that the defendants’ interpretation of Section 404 as an implied exception “would render [Sections] 301(e) and 306(e) effectively meaningless.”

Finally, the court looked to the explicit exceptions enumerated within Section 404. While Section 404 exempts certain activities from regulation under the relevant CWA provisions, “mining is not listed as an exempt activity.” The court determined that “the lack of any explicit exception to [Sections] 301 and 306 within [Section] 404, and the lack of an exception for process wastewater from mines, is strong evidence that Congress did not intend one.”

B. Regulatory Definitions of “Fill Material”

The court eventually turned its analysis to the regulatory history of the term “fill material” as it considered whether Section 404’s grant of power to the Corps to regulate the discharge of fill material was meant to “replace the [EPA-created] performance

123. See id. (citing 33 U.S.C. §§ 1311(e), 1316(e)).
124. Id. (disagreeing with defendants’ argument that § 404 contains implied exception). The court relied on Supreme Court precedent to support this contention, writing, “Exceptions to clearly delineated statutes will be implied only where essential to prevent ‘absurd results’ or consequences obviously at variance with the policy of the enactment as a whole.” Id. (citing United States v. Rutheford, 442 U.S. 544 (1979)).
125. Id. at 646-47 (determining defendants’ interpretation renders §§ 301(e) and 306(e) meaningless).
126. See id. at 648 (finding no explicit exception to effluent limitations or performance standards).
127. Southeast Alaska, 486 F.3d at 648 (citing 33 U.S.C. § 1344(f) (2006)). Exempted discharges include those which relate to “agricultural activities and road construction, among others.” Id. For the complete list of exempted discharges, see 33 U.S.C. § 1344(f) (2006).
128. Southeast Alaska, 486 F.3d at 648 (finding lack of explicit exception for process wastewater from mines in § 404 to be evidence Congress did not intend such exception). “Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.” Id. (quoting Andrus v. Glover Constr. Co., 446 U.S. 608, 616-17 (1980)).
standard for froth-flotation mills."\textsuperscript{129} The Corps and the EPA used conflicting definitions of “fill material” throughout much of the CWA’s history before coming together on the issue in 1986 under a Memorandum of Agreement (MOA).\textsuperscript{130} The MOA had problems of its own, however, causing the two agencies to promulgate a joint definition of “fill material” in 2002.\textsuperscript{131}

1. Problems with Differing Definitions Between Agencies

The Corps first defined the term “fill material” in 1975 using an effects-based test, considering any pollutant that replaced “an aquatic area with dry land or [changed] the bottom elevation of a water body for any purpose” to be “fill material.”\textsuperscript{132} While the EPA almost immediately adopted the same test, the Corps changed their definition two years later to a purpose-based test, where “any pollutant discharged into the water primarily to dispose of waste” would be considered “fill material.”\textsuperscript{133} For almost nine years, the agencies issued permits under the CWA despite the differing definitions.\textsuperscript{134}

The Ninth Circuit found the agencies’ regulatory history under the contrasting interpretations of “fill material” to be instructive for the current issue.\textsuperscript{135} Where certain pollutants had the effect of raising the bottom elevation of navigable waters, the Corps did not regulate those pollutants because they did not fit the purpose-based definition of “fill material.”\textsuperscript{136} Instead, the EPA controlled under

\textsuperscript{129} Id. (discussing regulatory history of term “fill material”). The CWA does not define “fill material” itself; the Act “left that term to the Corps and EPA to define.” Id. at 649.

\textsuperscript{130} For a discussion of the history of the agencies’ conflicting definitions of “fill material,” see supra notes 79-91 and accompanying text. See also Southeast Alaska, 486 F.3d at 650 (discussing Memorandum of Agreement between EPA and Corps).

\textsuperscript{131} See Southeast Alaska, 486 F.3d at 650 (discussing EPA and Corps’ current joint definition of “fill material”).

\textsuperscript{132} Id. at 649 (quoting Corps’ original definition of “fill material” published in 40 Fed. Reg. 31,320, 31,325 (July 25, 1975)).

\textsuperscript{133} Id. at 650 (quoting Corps’ revised definition of “fill material” originally published in 42 Fed. Reg 37,122, 37,145 (July 19, 1977)). For a detailed history of the reasoning behind the agencies’ choices for their respective regulatory definitions, see supra notes 79-91 and accompanying text.

\textsuperscript{134} See Southeast Alaska, 486 F.3d at 650 (explaining agencies used differing definitions for “fill material” until Memorandum of Agreement in 1986).

\textsuperscript{135} See id. at 649-50 (analyzing approach of EPA and Corps during period where agencies used differing definitions for “fill material”).

\textsuperscript{136} See id. at 650 (explaining EPA regulated industrial wastes under § 402, even when discharging such materials could raise bottom elevation of water body).
Section 402, prioritizing effluent limitations and performance standards.\textsuperscript{137}

2. Joint Definition Provides Resolution

The court continued its analysis by examining the interplay between the EPA and the Corps after the agencies adopted the MOA.\textsuperscript{138} According to the court, the MOA simply formalized both agencies' practice, which deferred jurisdiction of all industrial pollutants to the EPA under Section 402.\textsuperscript{139} After the adoption of the MOA, "the Corps continually declined to exercise jurisdiction over mine tailings."\textsuperscript{140}

In 2002, the agencies adopted joint regulatory definitions of the terms "fill material" and "discharge of fill material."\textsuperscript{141} Examining the Federal Register and a Joint Response to Comments to the proposed rule, the court concluded that "the agencies clearly intended to exclude discharges subject to effluent limitations or performance standards from the new definition of 'fill material.'"\textsuperscript{142}

C. The Specificity of the EPA's Froth-Flotation Standard of Performance

The Ninth Circuit also determined that "the performance standard governs because it is more specific," meaning the EPA's juris-

\textsuperscript{137} See id. (noting EPA continued to regulate industrial wastes under § 402, even when those wastes had effect of raising bottom elevation of body of water).

\textsuperscript{138} See id. at 650-51 (analyzing interplay between EPA and Corps after agencies adopted MOA). For a further discussion of the agencies' practice under the MOA, see supra notes 79-91 and accompanying text.

\textsuperscript{139} See Southeast Alaska, 486 F.3d at 650 (noting MOA as formal adoption of practice deferring jurisdiction to EPA under § 402).

\textsuperscript{140} Id. (noting Corps' practice of declining jurisdiction over mine tailings).

\textsuperscript{141} See id. at 650-51 (quoting C.F.R. definitions of "fill material" and "discharge of fill material"). For the actual definitions of these terms, see supra notes 79-91 and accompanying text.

\textsuperscript{142} Southeast Alaska, 486 F.3d at 651-52 (concluding agencies' intent to exclude discharges subject to effluent limitations and performance standards from new definition of "fill material"). The court emphasized that the new definition does not "change any determination [the EPA and Corps] have made regarding discharges that are subject to an effluent limitation guideline and standards, which will continue to be regulated under section 402 of the CWA." Id. (quoting Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129-01, 31,135 (May 9, 2002)). Further, the court highlighted that despite the new rule regarding "fill material," "[T]he EPA has previously determined that certain materials are subject to an [effluent limitation guideline] under specific circumstances, then that determination remains valid." Id. (quoting EPA/Corps, Joint Response to Comments 12). The new definition of 'fill material' therefore does not include mining-related materials subject to effluent limitations and standards of performance.
diction supersedes the Corps' due to the specificity of the regulation involved. In comparing the two regulations, the court found that the fill rule "pertains to fill material generally, [while] the performance standard covers froth-flotation mills precisely." As a result, the new, "more general fill rule cannot supersede the narrow, precise, and specific performance standard for froth-flotation mills."

V. CRITICAL ANALYSIS

The Ninth Circuit's decision in \textit{Southeast Alaska} has gained attention from both environmental and industrial advocates. Although the United States Supreme Court granted \textit{certiorari}, the issue presented is not one of contention among the circuit courts. Instead, the issue for the Court to review hinges on the sufficiency of the Ninth Circuit's analysis.

Specifically, the Supreme Court will review the plain language interpretation of the CWA in the Ninth Circuit's decision. Further, questions linger about \textit{Southeast Alaska}'s relation to binding

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143. See id. at 654 (concluding performance standard should govern because it is more specific than § 404). The Court relied on a "basic principle of regulatory interpretation" that a specific regulation will not be swallowed by a later regulation that covers a broader spectrum. See id. (citing \textit{Radzanower v. Touch Ross & Co.}, 426 U.S. 148 (1976)).

144. Id. (contrasting fill rule from performance standard).

145. Id. (concluding froth flotation mill governs because it was enacted first and is more specific than fill rule).


148. \textit{See} Brief for the Federal Respondents in Opposition at 6, 11-12, Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, Nos. 08-984, 07-990 (U.S. May 14, 2008) [hereinafter Brief of Respondents]. While the Solicitor General agreed with the petitioners that the Ninth Circuit erred in its analysis, the Solicitor General stated, "There is, however, no division among the courts of appeals on [the] 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." Id. at 6. The Solicitor General went on to state that if the Supreme Court did grant \textit{certiorari}, "the government would support the position of the petitioners." Id. For a discussion of the Solicitor General's faulty logic in coming to this conclusion, see infra notes 146-47 and \textit{supra} notes 149-204 and accompanying text.

149. \textit{See} Schwartz, \textit{supra} note 2 (stating issue for Supreme Court review).

150. \textit{See} id. (determining issue before Court rests on interpretation of CWA).
precedent interpreting the CWA. Finally, the decision may have altered the path of more than thirty-five years of CWA regulation.

A. The Ninth Circuit's Plain Language Interpretation of the CWA

The Ninth Circuit relied heavily on what it referred to as "the plain language of the Clean Water Act." Much of the petitioners' briefs requesting the Supreme Court to grant certiorari assert that the Ninth Circuit improperly interpreted the CWA. As the Ninth Circuit insisted, however, the plain language of the CWA supports the court's holding.

The EPA, through Section 402, governs the permitting of effluent discharges "[e]xcept as provided in sections [318 and 404]." Upon a singular reading of Section 402, the word "except" suggests that the EPA does not govern permit proposals that fall under Section 404 guidelines. Critics of the Southeast Alaska opinion mistakenly read Section 402 alone, separating it from the CWA backdrop. The Ninth Circuit, citing United States v. Rutheford, wrote: "Exceptions [like Section 404] to clearly delineated statutes will be implied only where essential to prevent 'absurd results' or consequences obviously at variance with the policy of the enactment as a whole." Under this principle, § 404 cannot be read without the backdrop of the CWA as a whole, which specifically grants the EPA authority over effluents.


152. Compare Brief of Respondents, supra note 148, at 14-16 (contending Ninth Circuit decision did not alter course of regulatory practices between EPA and Corps), with Brief of Petitioners, supra note 151, at 17-27 (contending Ninth Circuit's decision conflicts with established practice of EPA and Corps).


154. See, e.g., Brief of Petitioners, supra note 151, at 15 (believing Ninth Circuit improperly interpreted CWA).


157. See, e.g., Brief of Petitioners, supra note 151, at 4 (determining § 402 and § 404 permit programs to be "mutually exclusive").

158. See Southeast Alaska, 486 F.3d at 646 (explaining proper way to read CWA). The Ninth Circuit, citing United States v. Rutherford, 442 U.S. 544, 552 (1979), wrote: "Exceptions [like Section 404] to clearly delineated statutes will be implied only where essential to prevent 'absurd results' or consequences obviously at variance with the policy of the enactment as a whole." Under this principle, § 404 cannot be read without the backdrop of the CWA as a whole, which specifically grants the EPA authority over effluents.
Read in its entirety, the CWA highlights the importance of point sources and performance regulations standards.\(^1\) Section 306(e) prohibits "any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source."\(^2\) The Kensington Gold Mine proposal signals a "new source" of pollution.\(^3\) While tailings from the Kensington mine may fall within the broad definition of "fill material," they are equally considered effluent.\(^4\) The EPA has a specific regulation prohibiting the discharge of materials processed at a froth-flotation facility into waters of the United States.\(^5\) There can be no reading of the CWA which suggests Section 404 exempts froth-flotation mines from this prohibition simply because the tailings may constitute "fill material."\(^6\) As a result, the Ninth Circuit correctly interpreted the CWA's plain language.\(^7\)

B. Relation to Precedent

The Ninth Circuit did not probe too deeply into case law when it concluded the Corps overstepped its jurisdiction in *Southeast Alaska*.\(^8\) This is because no major case interpreting the CWA gives strong guidance on the issue.\(^9\) Both Coeur and the State of Alaska rely heavily on *Rapanos* and *Kentuckians* in their respective

\(^{160}\) See generally 33 U.S.C. §§ 1311, 1316, 1342, 1344 (providing relevant guidelines for CWA enforcement).

\(^{161}\) Id. § 1316(e) (stating prohibitions).

\(^{162}\) See id. § 1316(a)(2) (defining "new source"). For a discussion of the Kensington mine’s qualification as a new source, see supra note 114.

\(^{163}\) See *Southeast Alaska*, 486 F.3d at 647 (noting characterization of mine tailings). Because the EPA created specific regulation for effluent from froth-flotation facilities, the EPA controls over the more generalized § 404 granting the Corps the power to issue permits for “fill material.” See id. at 655 (holding Corps had no authority to grant permit at issue).


\(^{165}\) See 33 U.S.C. § 1344(e)(1) (granting Corps general authority to issue permits for discharge of fill material).

\(^{166}\) See *Southeast Alaska*, 486 F.3d at 644-47 (interpreting plain language of Clean Water Act).

\(^{167}\) See *Sutak*, supra note 155, at 161 (discussing Ninth Circuit’s reconciliation of issues in *Southeast Alaska* and other CWA cases).

\(^{168}\) For a discussion of why *Southeast Alaska* is distinguishable from other cases, see infra notes 171-96 and accompanying text.
petitions for *certiorari*. Each case is distinguishable, however, and therefore is not particularly relevant for the current issue.

1. *Rapanos v. United States*

The issue in *Rapanos* confronted the need to find a workable definition of “waters of the United States” in Section 301 of the CWA. Specifically, the United States charged the petitioner under the CWA for filling plots of land which the EPA considered to be within the standing definition of “waters of the United States.” In a plurality decision, the Court significantly narrowed the definition and remanded the case for determination as to whether the land in question could be considered “waters of the United States.”

While the *Rapanos* opinion deals with interpreting the CWA and the permitting powers of the EPA and the Corps, the case is inapplicable to the issue in *Southeast Alaska*. In *Rapanos*, the Court’s decision “did not even remotely involve, let alone purported to decide, whether the Corps’ section 404 permitting authority extends to discharges that are subject to EPA effluent limitations.” Instead, the Court focused on defining an essential term in the CWA’s text that had been the source of numerous conflicting opin-

169. See, e.g., Brief of Petitioners, supra note 151, at 17-21 (purporting there to be relevance in *Rapanos* and *Kentuckians* for case at bar).

170. See id. at 12-14 (distinguishing both *Rapanos* and *Kentuckians* from case at bar).


172. See *Rapanos*, 547 U.S. at 719-23 (stating facts of case).

173. See id. at 757 (remanding case for reconsideration of facts consistent with Court’s new definition of “waters of the United States”). Unfortunately, it appears the Court’s *Rapanos* decision did “little more than muddy the waters in defining the extent of the federal government’s authority under the CWA.” Bloom, *supra* note 94, at 13.

174. Compare *Rapanos*, 547 U.S. at 737 (discussing necessary definition of “waters of the United States”), with *Se. Alaska Conservation Council v. U.S. Army Corps of Eng’rs*, 486 F.3d 658, 644 (9th Cir. 2007) (contemplating whether EPA or Corps should have jurisdiction to issue mining permit for discharge of tailings processed at froth-flotation facility).

175. Brief of Respondents, *supra* note 148, at 13. There exists no conflict between *Rapanos* and *Southeast Alaska*. Id. The petitioners’ use of *Rapanos* is therefore a futile argument because the *Southeast Alaska* decision does not contradict any previous ruling. Id. at 14.
ions within both the circuits and administrative agencies interpreting the CWA. 176

Critics of the Ninth Circuit’s Southeast Alaska opinion focus on language in the Rapanos decision that suggests the Supreme Court recognized the Section 404 (Corps) permitting program as entirely distinct from the Section 402 (EPA) scheme. 177 Yet, this piecemeal approach to Rapanos ignores the substantive issue in the case. 178 No jurisdictional question stood before the Court in Rapanos. 179 Consequently, the Southeast Alaska petitioners’ use of various quotes from Rapanos is futile because they are taken out of context. 180

Southeast Alaska does not question whether Lower Slate Lake should be considered a “water of the United States” because it clearly is. 181 Rather, the issue before the Ninth Circuit involved the administrative line between the EPA and the Corps for granting permits that proposed to discharge fill material where the fill also qualifies as an effluent. 182 As a result, Rapanos is an irrelevant authority for this context. 183

2. Kentuckians v. Riverburgh

An analysis of Kentuckians also proves ineffectual. 184 While critics suggest the Ninth Circuit ruling creates conflict among the cir-

176. See id. (stating issue before Rapanos court as solely whether particular wetlands constituted ‘waters of the United States’).

177. See Brief of Petitioners, supra note 151, at 18 (discussing structural dichotomy of CWA). Justice Kennedy’s opinion in Rapanos noted that “[a]part from dredged or fill material, pollutant discharges require a permit from the Environmental Protection Agency.” Rapanos, 547 U.S. at 760 (Kennedy, J., concurring). The Petitioners construe this language to uphold what they consider the “dichotomy [that] is part of the basic structure of the CWA.” Brief of Petitioners, supra note 151, at 18.

178. See Rapanos, 547 U.S. at 723 (presenting purpose for case as needing to define “waters of the United States”). The Court’s discussion of the permitting scheme in Rapanos is therefore irrelevant because there is no material issue in Southeast Alaska as to whether Lower Slate Lake constitutes a wetland. Brief of Respondents, supra note 148, at 14.

179. See Rapanos, 547 U.S. at 715 (asserting no jurisdictional question before Court).

180. See Brief of Respondents, supra note 148, at 14 (noting issue that petitioners advance regarding Rapanos is irrelevant in Southeast Alaska).

181. See Se. Alaska Conservation Council v. U.S. Army Corps of Eng’rs, 486 F.3d 638, 642 (9th Cir. 2007) (discussing Lower Slate Lake’s geographic features).

182. See id. at 644 (stating issue before court in case).

183. See Brief of Respondents, supra note 148, at 14 (determining Rapanos does not help solve substantive issue in Southeast Alaska).

184. See Kentuckians for Commonwealth, Inc. v. Riverburgh, 317 F.3d 425 (4th Cir. 2003). The Ninth Circuit did not follow the Kentuckians precedent because the issue in Southeast Alaska was distinguishable. Southeast Alaska, 486 F.3d at 652-53 (distinguishing facts of case from Kentuckians).
circuits based on the *Kentuckians* precedent, the Fourth Circuit case did not address the discharge of fill material that doubles as effluent.\(^{185}\) Instead, *Kentuckians* merely extended the Corps' Section 404 permitting power to cover mining corporations that proposed to discharge overburden into valley fills.\(^{186}\)

While commentators claim the *Southeast Alaska* opinion essentially ignores horizontal *stare decisis*,\(^{187}\) the Ninth Circuit specifically addressed *Kentuckians* in the *Southeast Alaska* decision.\(^{188}\) The Ninth Circuit pointed to the holding in *Kentuckians*, which stated that the Corps had jurisdiction over fill material unless that fill material was subject to effluent limitations.\(^{189}\) Applying this analysis, the Ninth Circuit correctly determined that the Corps overstepped its bounds in issuing a permit for the discharge of tailings generated at a froth-flotation mining facility.\(^{190}\)

Additionally, *Kentuckians* is not a barrier to the *Southeast Alaska* decision due to the differences between overburden and tailings.\(^{191}\) The EPA has specific guidelines for tailings discharged from a froth-flotation mine.\(^{192}\) There is no such specific regulation for

\(^{185}\) See Brief of Respondents, *supra* note 148, at 12 (stating no court has considered issue before arising in present case). The Respondents stated, "[T]his question was not before the court in *Kentuckians* . . . At issue there was 'overburden,' the unprocessed soil and rock that overlies a coal seam." *Id.* But see Brief of Petitioner's, *supra* note 151, at 19 (relating issues in *Kentuckians* and *Southeast Alaska* on fact that both involved disposal of mining waste product). "*Kentuckians* involved the disposal of mining waste that had the effect of filling waterbodies." *Id.*

\(^{186}\) See *Kentuckians*, 317 F.3d at 448 (holding Corps could regulate disposal of mining overburden). The Fourth Circuit was explicit in stating the Corps' permitting power was limited by the EPA Section 402 guidelines: "Section 404 confers on the Corps all responsibility to issue permits for the discharges of 'fill material' but it gives the EPA a veto when those discharges might adversely affect the quality of certain waters." *Id.* (emphasis added). Further, the court submitted that 'fill material' includes "all material that displaces water or changes the bottom elevation of a water body except for 'waste'—meaning . . . effluent that could be regulated by ongoing effluent limitations as described in [Section] 402." *Id.*

\(^{187}\) See *Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 486 F.3d 638, 653 n.15 (9th Cir. 2007) (distinguishing Fourth Circuit's *Kentuckians* ruling).

\(^{188}\) See Brief of Petitioners, *supra* note 151, at 19-21 (asserting Ninth Circuit should have adhered to Fourth Circuit's *Kentuckians* ruling).

\(^{189}\) See id. (highlighting Fourth Circuit's language excepting effluent from Corps' "fill material" jurisdiction).

\(^{190}\) See id. at 653 (relying on EPA's specific froth-flotation limitation as reason for holding Corps had no authority to issue permit).

\(^{191}\) See Sutak, *supra* note 155, at 163 (distinguishing *Southeast Alaska* from *Kentuckians* based on differences between froth-flotation discharge and coal-mining overburden). The Fourth Circuit defined 'overburden' as "the soil and rock that overlies a coal seam." *Kentuckians*, 317 F.3d at 430.

\(^{192}\) See Ore Mining and Dressing Point Source Category, 40 C.F.R pt. 440.104(b)(1) (2008) (setting forth guidelines). The regulation provides in relevant part, "[T]here shall be no discharge of process wastewater to navigable waters
overburden.193 The Corps may therefore freely regulate overburden without crossing the boundary into EPA-controlled subjects.194 Given that tailings from froth-flotation mills are subject to additional EPA regulations, the Ninth Circuit correctly ruled that the Corps could not issue permits to discharge these tailings under the "fill material" definition.195 Accordingly, Southeast Alaska does not offend any precedent.196

C. A New Path for CWA Regulation?

The Southeast Alaska ruling does not significantly alter the EPA’s and Corps’ current regulatory practice in CWA policy-making.197 The Corps still has authority to issue permits for the discharge of fill material.198 Similarly, the EPA still has jurisdiction to control point source regulations and limit effluent discharges.199

from mills that use the froth-flotation process alone, or in conjunction with other processes, for the beneficiation of copper, lead, zinc, silver, or molybdenum ores or any combination of these ores." Id. The Kensington mine plan falls directly under this regulation, proposing to discharge tailings and slurry created at a froth-flotation facility into Lower Slate Lake, a navigable water. Southeast Alaska, 486 F.3d at 641-42.


195. See Sutak, supra note 155, at 164 (concluding Ninth Circuit’s ruling is in line with purpose of CWA).

196. Compare Southeast Alaska, 486 F.3d at 655 (holding Corps may not issue permits for discharge of fill material that constitutes effluent produced at froth-flotation mill) with Kentuckians, 317 F.3d at 490 (holding Corps could issue permits to fill valleys with coal-mining overburden).

197. See Brief of Respondents, supra note 148, at 14-16 (contending Ninth Circuit’s decision will not offend current regulatory interplay between EPA and Corps).

198. See 33 U.S.C. § 1344 (2006) (granting Corps authority to issue permits for discharge). Section 404 gives the Corps jurisdiction over permit proposals requesting to discharge fill material. Id. The Ninth Circuit ruling does nothing to alter this authority, but simply clarifies that fill material that doubles as an effluent is not within the Corps’ jurisdiction. Southeast Alaska, 486 F.3d at 655 (holding Corps violated CWA by issuing permit for discharges from froth-flotation mill).

199. See 33 U.S.C. § 1342 (governing EPA’s permitting authority). The Ninth Circuit’s ruling merely clarified the balance of jurisdiction between the Corps and the EPA; the EPA’s permitting power is no more expansive following Southeast Alaska. Southeast Alaska, 486 F.3d at 655 (asserting EPA’s authority in matter is based on performance standard regulations promulgated in §§ 301 and 306 of CWA).
Southeast Alaska merely clarifies an overlap in the regulatory scheme, giving jurisdiction to the EPA when effluent doubles as fill material.\(^{200}\)

The Corps is not responsible for issuing permits for discharges subject to effluent limitations.\(^{201}\) While critics point to the agencies' joint definitions as evidence of intent, in practice, the Corps has never before issued a permit authorizing the discharge of an effluent subject to EPA regulation.\(^{202}\) Moreover, the Ninth Circuit addressed the CWA — and all of the federal regulations that interpret the CWA — in its decision.\(^{203}\) The lack of relevant precedent proves there is no conflict with the established operation of the CWA.\(^{204}\)

\[VI. \text{Impact}\]

The Southeast Alaska ruling carries both local and national implications.\(^{205}\) Should the Ninth Circuit's judgment withstand Supreme Court review, the Kensington Gold Mine will not be allowed to operate under the current plan.\(^{206}\) Additionally, the holding will require future undertakings involving discharges of fill material, normally requiring a permit from the Corps under Section 404, to

\(^{200}\) See Southeast Alaska, 486 F.3d at 655 (holding EPA's performance standard governs).

\(^{201}\) See Brief of Respondents, supra note 148, at 15 (noting Corps had never before issued similar permits). The Respondents assert, "The Kensington permit was a one-time aberration . . . Petitioners and Amici scoured the country in search of a prior instance in which the Corps granted such a permit and were not able to find even one." \textit{Id.}

\(^{202}\) See id. (determining Corps had never issued permit in circumstances similar to Kensington Gold site).

\(^{203}\) See Sutak, supra note 155, at 159-62 (discussing Ninth Circuit's complete application of CWA and relevant regulations).

\(^{204}\) See Brief of Respondents, supra note 148, at 15 (concluding no conflict with existing CWA practice). For a complete discussion of the relevant case law, see supra notes 92-103 and accompanying text.


\(^{206}\) See Elizabeth Bluemink, Court Ruling May Trouble Kensington and Pebble, ANCHORAGE DAILY NEWS, May 26, 2007, available at http://www.adn.com/money/industries/mining/story/230664.html (explaining if Supreme Court upholds ruling, Kensington Gold Mine will be forced to create new proposal in order to proceed with project). The implications of a Supreme Court affirmation are even heavier than the newspaper originally contemplated. Coeur has given up on all other proposals and is now requiring a Supreme Court reversal to allow the disposal of tailings into Lower Slate Lake in order to proceed with the Kensington Gold Mine initiative. For a discussion on the developments regarding the lack of a further plan, see infra notes 209-27 and accompanying text.
undergo a separate analysis to determine if the discharge constitutes a prohibited effluent (regulated by the EPA under Section 402). The resolution of this ambiguity will prove useful for mining and various other operations.

The Kensington Mine project has stalled as it awaits final review by the Supreme Court. In January 2008, Coeur Alaska submitted a contingency plan that proposed to use a "paste" tailings disposal system if the Supreme Court upholds the Ninth Circuit's ruling. This was a collaborative proposal that gained environmentalist support. In a surprise move, however, Coeur dropped this proposal in late September 2008, gambling on the future of the Kensington Mine by requiring a reversal by the Supreme Court. The dissolution of this alternate plan marks the second time Coeur has abandoned a tailings disposal option that is valid under the CWA.

At the local level, the Kensington Mine was expected to create nearly 400 new jobs. In October of 2008, just days after announc-


208. See Fandino, supra note 205 (concluding ruling relevant to any operation producing fill material that may be subject to effluent regulations created under §§ 301 and 306 of CWA).


210. See Kate Golden, Coeur Drops Tailings Plan, JUNEAU EMPIRE, Sept. 24, 2008, available at http://www.juneauempire.com/stories/092408/loc_336282304.shtml (detailing Coeur's alternative paste tailings plan that could have been used as contingency if Supreme Court upholds Ninth Circuit's ruling). The paste tailings plan had the approval of SEACC and other environmental groups, as it would protect the water and provide more jobs to help stimulate the Juneau economy. Id.


213. See Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs, 486 F.3d 638, 641 (9th Cir. 2007) (describing Coeur's initial plan for dry tailings facility that Coeur abandoned when price of gold dropped); see also, Press Release, Se. Alaska Conservation Council, supra note 212 (reporting Coeur would no longer pursue paste tailings alternative). Both proposals had the support of environmental groups. Id. Coeur is now proceeding with the only proposal for tailings disposal that has not had environmentalist support. Id.

ing its abandonment of the eco-friendly paste tailings proposal, Coeur announced it would lay off half of its active Kensington workforce, a total of forty-one employees. Local Alaskans are voicing displeasure with the Southeast Alaska decision and its local implications, especially the impact on the local work force. Despite its October 2008 decisions regarding mine operations, Coeur is successfully shifting the ire of local Alaskans away from itself and toward SEACC and other environmental groups.

A Supreme Court reversal of Southeast Alaska would set a dangerous precedent for CWA litigation. As the Ninth Circuit demonstrated in its opinion, the text of the CWA specifically grants power to the EPA to create effluent guidelines and performance standards. One such standard promulgated by the EPA prohibits the discharge of certain materials produced at a froth-flotation mill facility. Despite this regulation, the Corps granted a permit to the Kensington Gold Mine, circumventing the EPA on the basis that part of the slurry from the froth-flotation mill contained “fill material,” a substance that is under the Corps’ jurisdiction.

02208/loc_249720192.shtml (reporting Coeur would directly hire 200 people with additional 170 jobs created indirectly).


216. See Posting of Mackenzie to Reader Comments to Golden, Coeur Drops Tailings Plan, supra note 210, http://www.juneauempire.com/stories/092408/loc_336282304.shtml (Sept. 24, 2008, 4:26:14 EST) (blaming SEACC for delays in opening mine and expressing fear that local jobs would consequently be lost). There are over fifty comments in response to the cited article, the majority of which blame SEACC for the delays in mining, while placing little to no blame on Coeur for failing to follow through with an environmentally viable tailings plan. See id.

217. See, e.g., id. (directing anger regarding delays in mining at SEACC, while hoping Coeur succeeds at Supreme Court).

218. See Southeast Alaska, 486 F.3d at 644-48 (discussing plain text of CWA). For more information regarding the Ninth Circuit’s plain text interpretation of the CWA, see supra notes 110-28 and accompanying text.


220. See Southeast Alaska, 486 F.3d at 642 (explaining Corps issued permit for Kensington mine proposal based on § 404 permitting scheme). The Corps and the EPA have a history of circumventing the CWA in order to approve mining projects the agencies deem important for the local community. See Leibowitz, supra note 6, at 922. The two agencies “conveniently resolved [a previous controversy] by agreeing and announcing the CWA was inapplicable.” Id.
If the Supreme Court affirms the Ninth Circuit, it will have detrimental effects on Southeast Alaska’s local economy. Reversal by the Supreme Court, however, could cause a significant upheaval in the EPA-Corps relationship with regards to interpreting the CWA. Significantly, this appeal is a facial challenge to the CWA; while the local benefits to Alaskan residents are great, the Court must interpret the law, not the circumstances. Although Coeur has rallied local support for the mine as a boost to the economy at the price of a rarely used lake, the Court must consider the aggregate effect of allowing the Corps to issue this permit under the “fill material” definition. If the Supreme Court reverses Southeast Alaska, it will permit all froth-flotation mines to dump their process wastewater into local navigable waters, so long as they combine that process wastewater with fill material. This would effectively eliminate the EPA’s performance standard for froth-flotation facilities.

Coeur Alaska has passed on two environmentally friendly proposals for dealing with tailings, the first because the plan was too costly, and the second because it would take too long for approval. Instead, Coeur has jumbled the CWA’s words into an argument before the Supreme Court in an attempt to destroy an Alaskan lake and all of its aquatic life. The Ninth Circuit upheld the CWA and kept Coeur from implementing its environmentally

221. See Kate Golden, Coeur Report Estimates Kensington Mine Payroll, supra note 214 (detailing economic boost that Kensington mine would give to Juneau economy).

222. See Fandino, supra note 205 (describing positive effects Ninth Circuit’s ruling has on delineating powers of EPA and Corps in ambiguous part of CWA).

223. See Brief of Petitioners, supra note 151, at 3-6 (asserting text of CWA permits Corps to issue permits for fill material even when fill doubles as effluent otherwise regulated by EPA).

224. See 40 C.F.R. pt. 440.104(b)(1) (creating new source performance standard for froth-flotation mills). If new point sources did not have to obey this performance standard simply by discharging waste from the froth-flotation mill as “fill material,” the sanctity of the CWA allowing the EPA to create such standards would be questioned and perhaps rendered useless.

225. For a discussion on the reasons Coeur Alaska rejected tailings plans, see supra notes 210-17 and accompanying text.

226. See Brief of Petitioners, supra note 151, at 3 (stating core of Petitioners’ argument to revolve around text of CWA § 404). Coeur Alaska and its co-petitioners look to only § 404 in determining the Corps had jurisdiction to issue the permit at issue in Southeast Alaska. Id. The act must be read as a whole in order to gain the true intent of Congress, an intent, which does not glean support for Coeur Alaska’s argument. See generally 33 U.S.C. §§ 1311-1376 (2006).
dangerous plan. Now, the question is before the Supreme Court and it will have to decide whether to do the same.

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