

07-990 ALASKA V. SOUTHEAST ALASKA CONSERVATION COUNCIL

DECISION BELOW:486 F3d 638

LOWER COURT CASE NUMBER: 06-35679

QUESTIONS PRESENTED:

1. Whether the Ninth Circuit erred in invalidating the longstanding regulatory interpretation of the U.S. Army Corps of Engineers (the "Corps") and the Environmental Protection Agency ("EPA") that discharges of dredged or fill material are subject to the exclusive permitting authority of the Corps under Section 404 of the Clean Water Act, rather than effluent limitations and standards of performance promulgated under Sections 301 and 306 and applied by EPA pursuant to its separate permitting authority under Section 402.

CERT. GRANTED 6/27/2008

CONSOLIDATED WITH 07-984 FOR ONE HOUR ORAL ARGUMENT ORDERED 5/4/2009: THE PARTIES ARE DIRECTED TO FILE SUPPLEMENTAL BRIEFS ADDRESSING THE FOLLOWING QUESTIONS: (1) IF THE DISCHARGE OF THE SLURRY INTO THE LAKE WOULD VIOLATE SECTION 301 OR SECTION 306 OF THE CLEAN WATER ACT, WOULD THAT FUTURE VIOLATION AUTHORIZE A COURT TO SET ASIDE THE PERMITS ISSUED BY THE UNITED STATES ARMY CORPS OF ENGINEERS, AND THE RECORD OF DECISION ISSUED BY THE UNITED STATES FOREST SERVICE, AS "NOT IN ACCORDANCE WITH LAW," 5 U.S.C. §706(2)(A)? SEE PENSION BENEFIT GUARANTY CORP. V. LTV CORP., 496 U.S. 633, 646 (1990).

(2) IF A DISCHARGE COMES WITHIN THE SCOPE OF THE ENVIRONMENTAL PROTECTION AGENCY'S EFFLUENT LIMITATIONS AND SATISFIES THE DEFINITION OF FILL MATERIAL, MAY THE DISCHARGER OBTAIN PERMITS UNDER BOTH SECTION 402 AND SECTION 404 OF THE CLEAN WATER ACT? MUST THE DISCHARGER DO SO?