IN THE SUPREME COURT OF THE UNITED STATES

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COEUR ALASKA, INC., :

Petitioner :

v. : No. 07-984

SOUTHEAST ALASKA :

CONSERVATION COUNCIL, ET :

AL.; :

- x

and

- x

ALASKA, :

Petitioner :

v. : No. 07-990

SOUTHEAST ALASKA :

CONSERVATION COUNCIL, ET AL. :

- x

Washington, D.C.

Monday, January 12, 2009

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

GEN. GREGORY G. GARRE, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of

Federal Respondents, in support of the Petitioners.
THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf of the Petitioners.
THOMAS S. WALDO, ESQ., Juneau, Alaska; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 07-984, Coeur Alaska v. The Southeast Alaska Conservation Council, and Case 07-990, Alaska v. The Southeast Alaska Conservation Council.

General Garre.

ORAL ARGUMENT OF GEN. GREGORY G. GARRE

ON BEHALF OF FEDERAL RESPONDENTS,

IN SUPPORT OF THE PETITIONERS

GENERAL GARRE: Thank you, Mr. Chief Justice, and may it please the Court:

The expert agencies charged by Congress with implementing the Clean Water Act have concluded that the discharge of fill material, like the mine tailings at issue in this case, should be permitted by the Army Corps of Engineers under section 404 of the Act, and are not -- are not subject to the effluent guidelines applicable to permits issued by the EPA under section 402 of the Act.

That interpretation is grounded on more than 3 decades of agency pronouncements and reflects the collective judgment and expertise of the Army Corps of Engineers and the EPA in administering the Act.

JUSTICE KENNEDY: If the discharge comes from a single pipe, is it always one or the other, or can it ever

be both fill and --

GENERAL GARRE: Justice Kennedy, it's always one or the other. The Clean Water Act establishes two distinct permitting regimes. And I think this is actually something where the parties agree. Either it's going to be permitted under section 402 of the Act, which covers pollutants generally but not the discharge of dredged material, or fill material, which is covered by section 404 of the Act.

CHIEF JUSTICE ROBERTS: That's a legal answer to Justice Kennedy's question. What is the physical answer? Can a pipe both emit sludge, fill, and effluent?

GENERAL GARRE: As a practical matter, for example, if you take the -- the slurry in this case, which is 55 percent solid by volume, there is going to be liquid coming out of that pipe with the slurry, but under -- under the definition that the agencies administer of "fill material," this is fill material under that definition.

JUSTICE SCALIA: Fill material trumps effluent, in other words?

GENERAL GARRE: Fill material trumps effluent. That's --

JUSTICE SOUTER: But it does -- here's the -- here's the problem that I'm -- I'm having and I think others may have. We start, number one, with a definition,

as I understand it, of “pollutant” that includes suspended solids. Number two, there is an existing regulation to the effect that wastewater from this particular method of -- of extracting gold shall -- shall simply not be released, shall not be put into -- into water bodies. And then the two agencies come along, and in effect they say, by regulation, if the suspended solid in effect comes out of a mine, or if the wastewater has got suspended solid in it, we are going to call it fill and leave it entirely to the Army engineers under 404, subject to an EPA veto.

And on the face of it, it sounds as though they are simply, number one, defining one -- one variant of pollution out of the EPA’s jurisdiction and, number two, with respect to the wastewater, in effect coming up with a contradictory determination about what should be done with it.

And it sounds as though, under the Administrative Procedure Act, that with the statutory and the regulatory regime on the one hand and this joint regulation on the other, you’ve simply got a flat contradiction, and queried whether that can be anything other than arbitrary and capricious under the APA. Will you address that for --

GENERAL GARRE: Sure, Justice Souter. I mean, first of all, I think those concerns really go to the

definition of “fill material,” and I don’t think that the Respondent SEACC has squarely challenged that definition in this case. And I would point you to two parts of the record to --

JUSTICE SOUTER: Well, let’s -- let’s assume -- and I -- I don’t mean to cut you off there, but before you’re done -- I am at least raising it because I find it very difficult to get a handle on this case without dealing with that problem. So you may say, well, they didn’t raise it well enough, but I -- I still want you to deal with it on the merits.

GENERAL GARRE: Sure. And let me just point to the two parts of the record: The JA at 541 note 12, where the Ninth Circuit acknowledged they didn’t challenge it; and then also I’d point you to their complaint, where the complaint is directed to the permits and does not seek a determination that the fill rule definition is arbitrary and capricious.

We think that that definition reflects the settled understanding and expertise of both agencies, the Army Corps of Engineers --

JUSTICE GINSBURG: How could it be settled, because isn’t it -- isn’t it a fact that, before 2002, if the primary purpose was disposing of waste, that the 402 permit applies?

GENERAL GARRE: That is correct, Justice Ginsburg. By "settled," I mean settled in 2002. They adopted this rule.

JUSTICE GINSBURG: So it's not any 30 years' experience, and when it was disposing of waste, it was under 402 until 2002.

GENERAL GARRE: I think the -- the EPA has always adopted and applied an effects test for determining whether or not a discharge is fill material --

JUSTICE GINSBURG: But in fact, was -- was there ever a permit by the Corps of Engineers when the purpose was disposal of waste? Was there ever a 404 permit, rather than a 402, for disposal of what they call process wastewater or wastewater?

GENERAL GARRE: There was a period, of course, Justice Ginsburg -- you're right -- where the Army Corps of Engineers adopted a primary purpose test. During that period -- you're right -- 404 permits were not -- were not issued for the discharge of things where the purpose was not to fill the lake; it was to dispose of material.

Now, during that period, though, those discharges were not regulated under section 402 of the Act and under section 306, the effluent guidelines, but for a different reason. The reason why they weren't regulated under 402 during that period is because of the agencies'

wastewater treatment exception, which is found at 40 C.F.R. 122.2, where the agencies excepted from the definition of "the waters of the United States" discharges into an impoundment area.

And what you have going on here is the discharge of fill material into an impoundment area, which is dammed off with a 50-foot dam. Those discharges, in this case, are governed by section 404 of the Act. But any discharges from that impoundment area into downstream waters of the United States are subject to section 402 of the Act -- there's a separate permit in this case -- and are subject to the effluent guidelines and the new source performance standards.

So you have those two. The agencies have come together. They've reconciled the statutory regimes, and they have the 404 permit of dredged material, material that's going to fill the bottom of the lake, raise it by 50 feet, governed by section 404 of the Act. That impoundment area then is sealed off, and any discharged material out of that impoundment area into waters of the United States is going to be governed by 402 and the separate effluent guidelines there. That --

JUSTICE SOUTER: Yes, but that's -- that's pretty cold comfort when -- when you treat as an impoundment area a natural lake. I -- I suppose if the --

if it's proper to do what they're doing here, then the lake in the middle of the Everglades is an impoundment area or our Great Salt Lake is an impoundment area.

GENERAL GARRE: Well, any -- we're talking about --

JUSTICE SOUTER: This is a long way from a settling pond.

GENERAL GARRE: Well, let me address that in two different ways.

First of all, at the end of this project, when this lake is going to be reclaimed, the agencies determined that it's going to be environmentally as sound, if not superior, for the habitats in Alaska, fish and wildlife. So at the end of the project, it is going to be --

JUSTICE SOUTER: Yes, but what's that -- what's that got to do with the definition of "impoundment area"?

GENERAL GARRE: Well --

JUSTICE SOUTER: My problem is that you are treating -- the Corps is treating as an impoundment area a whole natural lake as distinct from a -- a settling basin.

GENERAL GARRE: The statute refers to specified disposal sites, and what you -- what you have here -- you're right -- is a lake. But it's impounded by a 50-foot dam.

The other part I wanted to point to is the

section 404 guidelines are rigorous environmental guidelines that address a number of different concerns, including the quality of the water, the fish and wildlife habitat. And at the end of that process, you've got the EPA, which has the right to exercise a veto over any --

JUSTICE SOUTER: You -- you say they're -- they're rigorous. My understanding is -- and I didn't think it was seriously disputed here -- is that, during the period in which the deposits are going to be made, the natural life of this water body is going to be destroyed.

GENERAL GARRE: That's true.

JUSTICE SOUTER: And -- and the -- the Corps comes along and says, oh, when it's all over, you know, it will come back. But when -- when you're destroying the -- the entire living sort of corpus of -- of this lake, it -- it seems to me that it's getting Orwellian to say that there -- there are rigorous environmental standards.

GENERAL GARRE: Well, that's true, Justice Souter, but -- but it's important to keep in mind that the reason why the lake -- the fish in the lake are not going to survive is because of the fill effect of the material, not because of the -- any toxics put into the water. And that's --

JUSTICE SOUTER: No, but the --

GENERAL GARRE: -- going to be the case --

JUSTICE SOUTER: But the -- as I understand it -- and you correct me if I am wrong here -- I -- I thought "suspended solids," I guess is the buzz word for it, is -- is a form of pollution. So you're saying, well, we're destroying the fish with one form of pollution rather than another form of pollution. And I don't know that that advances the ball for your side.

GENERAL GARRE: At any time you have fill material going into the waters of the United States. Of course, section 404 doesn't apply until you've got fill material going into the waters of the United States.

JUSTICE SOUTER: Yes, but this comes back to my initial question. You are simply, or the Corps is simply, defining what would otherwise be a pollutant, suspended solids discharged into the water, by calling it fill material. And it -- in effect it's defining one subject of -- of discharge regulation right out of the law of the United States by -- by redefining it and saying, oh, well, it doesn't exist if it's coming out of a mine.

GENERAL GARRE: I think what the agencies have done to reconcile their definitions is to apply this effects test. Now, if Coeur Alaska sought to fill the entire lake --

JUSTICE SOUTER: Yes, but if you applied the effects test, the legal effect, is it not, is to define one

form of pollution as no longer existent so long as that form of pollution falls within the Corps of Engineers' definition of "fill"?

GENERAL GARRE: I don't think that's correct.

JUSTICE SOUTER: Isn't that correct?

GENERAL GARRE: The legal effect is to regulate that pollution under section 404.

JUSTICE ALITO: Well, General Garre, I don't want to take up your rebuttal time, but what was -- what's the environmental alternative to what was done here?

GENERAL GARRE: The primary environmental alternative considered was a dry tailings alternative. And that would be been problematic in two different ways. One, it would have required the destruction of some 100 acres of wetlands. And two, it would have resulted in enormous stacks of tailings, 100- to 200-feet high, thousands of feet wide, that would actually dwarf the Pentagon and be visible from nearby Berners Bay.

Now, the Army Corps of Engineers, the State of Alaska, and the Forest Service determined that the wet tailings option, putting the tailings into a lake, reclaiming that lake so that it would be environmentally superior, was the preferable option.

I do want to emphasize that if this Court has any doubt about the statutory text, the regulatory

decisions here go back more than 30 years. In 1973, the EPA adopted a rule that said that the discharge of fill material is not regulated under the section 402 permitting system. In 2002, in the preamble to the fill rule, the agency made clear again EPA has never regulated the discharge of fill material under the effluent guidelines. And --

JUSTICE GINSBURG: But weren't they then thinking of fill material as material that was used either to fill in, to reclaim land, or in a construction project? I mean, to call filling the lake, to call that a fill, when what it's doing is providing a disposal place for a mining operation, is not what one ordinarily thinks of as a filling operation.

GENERAL GARRE: Not the Environmental Protection Agency. The Environmental Protection Agency, since the passage of the Clean Water Act, has taken the position that discharge that has the effect of changing the bottom elevation of a water is going to be fill. And that makes sense as a practical matter. The agencies with 30 years of experience determined that the -- the purpose definition that the Corps had adopted for a period was unworkable, unpredictable, and didn't make sense. And I think that if there's any judgment that courts ought to defer to here, it's the judgment of the agencies based on

their collective experience as to the proper definition of "fill material." That --

JUSTICE GINSBURG: There's one question that -- that Justice Souter raised and, before you sit down, I would like to get your answer, and that is, can anything, any water of the United States that the Corps of Engineers decides is appropriate to be used as a disposal place -- can any waterway be a settling pond? That is, here we have a lake. And is it -- is it just up to the Corps of Engineers? If they say this is a settling pond, it's a settling pond?

GENERAL GARRE: I think, as a practical matter, if you put discharge into a river, it may not change the bottom elevation. That wouldn't be fill material.

But, Justice Ginsburg, there have been a number of hypotheticals raised by Respondents here. Let me address those.

The section 404 process is a rigorous environmental process. The EPA does have veto authority. We haven't seen these problems at all in the 6 years that the fill definition has been in place, and I think it's simply untenable to suggest that these standards -- which, in section 4, require water quality determinations, wildlife, aquatic determinations -- would result in the sort of environmental harm that Respondents have

hypothesized. And the prospect of that harm is no basis for this Court to override the statutory scheme that Congress created with two distinct permitting regimes, one for fill material, one for other pollutants, and to override the agencies' pronouncements, interpretations for more than 30 years.

And the other agency document I wanted to point to is very important. It's the 2004 mine tailings memorandum, which is contained at JA 141 to 146. In that memorandum, which is a 2004 memo by the heads of the EPA water divisions, they explain the application of the statutory and the regulatory scheme to these types of discharges. Discharges of fill material into the impoundment is going to be subject to 404 and the rigorous process there. Any discharges out of that impoundment area is going to be subject to the rigorous requirements of 402. And that agency interpretation is entitled to deference.

CHIEF JUSTICE ROBERTS: Thank you, General.

GENERAL GARRE: Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Mr. Olson.

ORAL ARGUMENT OF THEODORE B. OLSON

ON BEHALF OF THE PETITIONERS

MR. OLSON: Mr. Chief Justice, and may it please the Court:

Let me reemphasize one point. The Clean Water

Act itself -- Congress created two distinct, mutually exclusive but complementary permitting regimes. One is fill material, which is governed by -- administered by the Corps of Engineers. The other is other, except as permitted under section 404, administered by the EPA.

A discharge, in answer to your question, Justice Kennedy, may be governed by one program or the other, not both. Everybody admits that, including the Respondents.

The fill rule --

JUSTICE STEVENS: But doesn't the EPA have a veto power over a fill material permit?

MR. OLSON: Yes, it does, Justice Stevens.

JUSTICE STEVENS: So they're not totally mutually exclusive then.

MR. OLSON: Well, it's mutually exclusive in terms of the issuer -- issuing agency, and I think that's a very important point. We -- we want to emphasize that, that the rules pursuant to which the Corps of Engineers administers the fill permit are the 404(b)(1) rules, which Congress specified to be enacted by the EPA. So the rigorous rules governing the quality of the water that's going to be affected by these fill permits are established by the EPA.

Furthermore, the State is involved. The

fisheries departments are involved, the conservation area of the State of Alaska. Many different agencies are involved in this permitting process. The permits in this case followed 900 studies, the expenditure of $26 million, an evaluation by the EPA, the Corps of Engineers, the Department of Conservation of Alaska. And, Justice Stevens' point, finally, before the permit could be issued, it had to go to the EPA and the EPA had the power to veto the permit.

Now, Congress determined --

CHIEF JUSTICE ROBERTS: Could they -- could they veto it due to its failure to comply with effluent limitations?

MR. OLSON: No, they could not do that, Justice -- Chief Justice Roberts, because the -- Congress made a choice under section 404 and 402. Section 402, the EPA program, is governed by those effluent limitations under 301 and 306 and the standards of performance.

Congress made a choice of applying section 307, which are toxic effluent limitations that apply to the 404 permits. That 307 regime, which Congress selected, which is also endorsed by the EPA in the rules that the -- that the Corps must follow in administering the permit -- that 307 provision, to which I just referred to, is in the 404(b)(1) regime rules. So all of this -- the permitting

process, which Congress made the decision to put into two baskets -- either it's fill material or it's except permits under --

JUSTICE KENNEDY: What happens if the agencies disagree as to whether it's fill?

MR. OLSON: The --

JUSTICE KENNEDY: The Corps says it's fill; EPA says it isn't. Can the EPA then veto it on that ground?

MR. OLSON: The -- the -- yes. I -- I think the answer to that is yes, but the better answer to that, Justice Kennedy, is for a while, as -- as General Garre pointed out, the EPA had a different concept of what was fill than the Corps of Engineers. The EPA, right from the beginning, said it will be the effect on the -- on the water.

The Corps for a while had that definition. Then it used a purpose test. Both agencies -- the EPA and the Army Corps of Engineers -- agreed in 2002 that that "purpose" definition of the word "fill" was not workable. It was too subjective.

JUSTICE KENNEDY: But there are still going to be cases, I would assume very close cases, even under the present standard, where there could be disagreement.

MR. OLSON: Well, there could be disagreement, but I was just about to say that this rule was jointly

adopted by the Corps of Engineers and the EPA in 2002. To the extent there's any ambiguity as to what fill material is, both the Army Corps of Engineers and the EPA agree that it includes slurry from mines. So that --

JUSTICE GINSBURG: The -- the definition that was adopted, if I have it right, was the EPA definition. That was the effects. And it was the Corps that had the purpose test. And yet, until 2002, if I understand correctly, if the only reason of raising the elevation of the lake was to dispose of waste, you didn't get a 404 permit. That was not a 404 situation until 2002.

MR. OLSON: That's -- that's -- except in the early stage, as I understand it, the Corps and -- the Corps also used the effects test. Then there was a period of time when it used a purpose test. The EPA consistently used the -- the effects test. In --

JUSTICE GINSBURG: But in application, that never included filling a lake, raising the elevation of a lake simply for the purpose of disposing of waste.

MR. OLSON: That's -- that's -- until that point, that's correct, Justice Ginsburg. But the two agencies that were involved in this process determined that that was not a workable test. It didn't function well. It allowed too much evasion and -- and manipulation, and they both came together after long studies and decided a

reasonable interpretation that was effective, consistent, and workable. Under the Clean Water Act, both agencies came together and decided that the definition included the placement of overburden, slurry, tailings, or similar mining-related materials.

Now, to the extent there is any ambiguity in the statute, this is the reasoned judgment, notice-and-comment rulemaking by the two agencies given responsibility.

JUSTICE BREYER: Here's -- I -- I'm perhaps missing this. I -- this is in general what I don't understand, how this works. My understanding is that under 404 something is fill -- they have a definition. And it's fill, among other things, if it changes the bottom level of any portion of water in the United States. That's right?

MR. OLSON: That's correct.

JUSTICE BREYER: Okay. And somewhere I have the idea -- but I can't find it in the briefs now -- that it has to raise the bottom level by 55 feet.

MR. OLSON: No, I don't -- that is not --

JUSTICE BREYER: There's some -- there's some number of feet.

MR. OLSON: I don't know where you got that. That is the result in this case. There will be --

JUSTICE BREYER: That's the result of this

case. But, anyway, it raises the level. I guess it has to raise it some significant amount. All right.

So what happens in this situation? Let us think of the worst pollutant you can think of. All right. Think of that. I don't know what it is. Maybe it's saturated fat in potato chips.

(Laughter.)

JUSTICE BREYER: Something absolutely terrible.

MR. OLSON: Cholesterol.

JUSTICE BREYER: What?

We're going to think of that pollutant. And now let's suppose that with the agreement of the Army Corps of Engineers a company takes this pollutant, which is the worst one you could think of, that the EPA would never let you go within 50 feet of it, and they take it, and they fill a lake with it up to the level of 55 feet, or 20 feet, or whatever number of feet.

I mean, it just can't be that simply because they poured a lot of it in and it fills up the bottom of the lake, that suddenly the EPA can't regulate it anymore. That -- that -- since that's so counterintuitive, that all you have to do is take a terrible pollutant and fill the bottom of the lake with it and now it's up to the Army Corps of Engineers and not up to the EPA -- that's so counterintuitive that I assume I don't understand the

statute, and you will explain it to me.

MR. OLSON: Yes, I will, Justice Breyer.

(Laughter.)

MR. OLSON: If it's fill, the administrating, permitting agency is the Army Corps of Engineers. But in granting that permit, in evaluating that permit, they must follow the 404(b)(1) guidelines that were drafted and written by the EPA. So that -- and EPA has all sorts of provisions. It can't have an adverse effect on the water. There cannot be a preferable environmental alternative. It must go through the Marine Fisheries. It cannot contain that toxic material that you are talking about, that worst material in the world.

JUSTICE SCALIA: But it could contain it so long as it's -- as it -- as it is not transitory.

MR. OLSON: No --

JUSTICE SCALIA: I mean, isn't it arguable that the best place for -- for really toxic stuff is at the bottom of a lake so long as it stays there and is not carried --

MR. OLSON: Well, that -- that may be, but the rule 404(b)(1) guidelines addressed both that point -- and I understand your point, too. But in -- on 11a of the government's brief the -- the 404(b)(1) guidelines are set forth, and it includes a provision, number 2 on that page,

violates any applicable toxic effluent standard or prohibition under section 307 of the Act. So the water quality is going to be regulated according to EPA standards.

JUSTICE BREYER: They're identical. So it doesn't make any difference.

MR. OLSON: Pardon me?

JUSTICE BREYER: I -- I heard you say before that it was not identical. That -- I mean if, of course, EPA takes all its regs and applies those regs when the Army Corps of Engineers considers a permit under 404 so that you couldn't get an Army Corps of Engineers permit unless you complied with the 402, et cetera, regs, then this all could come to nothing.

MR. OLSON: Every -- every --

JUSTICE BREYER: So there must be something missing in that.

MR. OLSON: Yes, there is because --

JUSTICE BREYER: What?

MR. OLSON: -- it's a different set of regulations.

JUSTICE BREYER: What is the most important thing that's missing?

MR. OLSON: The -- there's not -- it's -- the most important thing that's present is that Congress

decided that these regulations that the -- fill was different stuff. It was for different -- it had different consequences and should be regulated in a different way. The definition --

JUSTICE BREYER: I think what might be missing --

JUSTICE SCALIA: Is nontoxic covered by 402?

MR. OLSON: Pardon me?

JUSTICE SCALIA: Nontoxic is covered by 402. You -- you can violate the effluent guidelines by -- by pouring into the waters of the United States even nontoxic materials. Isn't that right?

MR. OLSON: Yes, yes.

JUSTICE SCALIA: And under 404 it's only toxic.

MR. OLSON: That's correct.

JUSTICE SCALIA: Well, that's a big difference.

MR. OLSON: That's correct. And -- and I'm going to reserve the balance, if I might, for rebuttal.

But let me just say "pollutant" includes sand and rock. And what's being put in this settling area, this lake, is the sand, which is the same consistency of the bottom of the lake. It's inert material. It is not changing the chemical composition. It is not hurting the water quality of the lake.

JUSTICE SOUTER: But it's going to kill every

living creature in the lake. Right?

MR. OLSON: Putting -- putting sand or rocks --

JUSTICE SOUTER: Wait a minute. It's going to kill everything in the lake.

MR. OLSON: Yes, it is, Justice Souter. Putting -- putting sand in the bottom of the lake is going to do that. They are going to reintroduce the fish. It will be a bigger lake with a better aquatic system when it's finished. But, yes, you're correct. In the interim the sand at the bottom of the lake will kill those fish.

JUSTICE GINSBURG: And how do we know that the life will ever be restored? I mean, that's a guess. Nobody knows.

MR. OLSON: It's a -- it's a condition for the permit, and every agency which examined this, including the Fisheries Department, the -- the conservation agencies of the State of Alaska -- and specifically said in the administrative record that under the worst-case scenario they believe that all of that is going to take place, and there will be more fish in a bigger lake and more livable living conditions for the fish and aquatic life after this process is finished.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Olson.

Mr. Waldo.

ORAL ARGUMENT OF THOMAS S. WALDO

ON BEHALF OF THE RESPONDENTS

MR. WALDO: Mr. Chief Justice, and may it please the Court:

In section 306(e), Congress enacted an unqualified prohibition against operating any new source in violation of any standard of performance applicable to the source. The standard of performance at issue in this case is applicable on its face to the ore mill at the Kensington mine. It says there shall be no discharge of process wastewater into navigable waters from mills that use the froth-flotation process.

CHIEF JUSTICE ROBERTS: Of course, the provision that authorizes permits begins by saying, "Except as provided in sections 1328 and 1344," and 1344 is 404. So why doesn't that just take the 404 regime completely out of what you were just talking about?

MR. WALDO: Because that's only a statement about whether section 402 applies. It means that if you have a section 404 permit, you don't also need a section 402 permit. It doesn't say anything about whether a 404 permit is appropriate under any particular circumstances, and it doesn't say anything about whether section 306 is applicable. In fact --

JUSTICE ALITO: The standard has to be -- the standard has to be applicable, and this is an EPA

regulation, isn't it?

MR. WALDO: Yes.

JUSTICE ALITO: And the EPA has said this isn't applicable to this situation.

MR. WALDO: But that determination was based on a misinterpretation of the Clean Water Act. That prefatory clause that -- that the Chief Justice was asking about doesn't say anything about whether section 306 applies. 306 does not have a prefatory clause like that, which strongly suggests that it's not intended to apply there. In other --

JUSTICE ALITO: So your -- your position requires us to determine that EPA's interpretation of those -- the statutory regime that you are talking about, 306 and 402, is -- is contrary to the statute.

MR. WALDO: That the interpretation as it's presented in this case is contrary to the statute.

JUSTICE ALITO: If EPA were to amend the performance standard to say that it doesn't apply in the situation in which the fill rule applies, would that be a valid regulation?

MR. WALDO: Well, I -- I doubt that EPA could -- could lawfully under the Clean Water Act enact such a thing, because the Clean Water Act requires EPA to regulate suspended solids, and EPA has always regulated suspended

solids through effluent limitations.

JUSTICE SCALIA: Could -- could the EPA allow a point source to discharge sand slurry -- there's nothing in it but sand -- into a river? Wouldn't you have to – wouldn't -- wouldn't you need some permission from the EPA to do that? Wouldn't that violate the Act?

MR. WALDO: If it -- I'm sorry. So it --

JUSTICE SCALIA: I want to discharge. I have a pipe and -- and there is sand on my land which is being washed away. I'm discharging all that sand into a river.

MR. WALDO: Yes --

JUSTICE SCALIA: Would that violate --

MR. WALDO: That's -- that's a discharge of a pollutant. That's correct.

JUSTICE SCALIA: Discharge of a pollutant.

MR. WALDO: Yes. And so --

JUSTICE SCALIA: Now, if I do the same thing in a -- in a lake, because I want to fill the lake, what -- of what possible application is the fill standard unless it permits what would otherwise be prohibited under -- under the earlier sections?

MR. WALDO: Well, the Corps of Engineers has the authority under section 404 to grant fill material permits --

JUSTICE SCALIA: Even though it violates

effluent standards.

MR. WALDO: No, not when it violates effluent standards.

JUSTICE SCALIA: But you say -- you say that if you discharge sand into -- into a river, it -- it violates effluent standards.

MR. WALDO: Oh, oh, no. That doesn't -- well, I'm sorry. I didn't understand that part of your question. Yes, if -- if there is an effluent limitation for a particular source -- remember, effluent limitations are adopted for industrial sources, and so you would have to look at what the source of that discharge was.

And if EPA had identified that source, a particular kind of factory of some kind, a mill, you know, a leather tanning facility or something like that -- if EPA had adopted effluent limitations that were applicable to that source, then discharges have to comply with those effluent limitations.

It's important to realize here that the Clean Water Act, contrary to the way the Petitioners try to present it, is not just one big permitting statute. It's not simply 402 and 404, and that determines everything. The effluent limitations under sections 301 and 306 have independent applicability directly to discharges. They are separately enforceable by EPA and through citizens --

CHIEF JUSTICE ROBERTS: The -- the discharges we're talking about have to be discharges of -- of effluent. Right?

MR. WALDO: Something that is governed by an effluent limitation, yes.

CHIEF JUSTICE ROBERTS: My question is, does it apply to solids?

MR. WALDO: Oh, absolutely. EPA is required in the Clean Water Act to regulate suspended solids through effluent limitations.

CHIEF JUSTICE ROBERTS: Well, I guess, I mean, does suspended solids mean there's some liquid involved?

MR. WALDO: That implies some liquid, right; that -- that the solids are present in a liquid, like the discharge here.

CHIEF JUSTICE ROBERTS: Like the discharge here. Now, I think Mr. Olson said these are 55 percent solid by volume.

MR. WALDO: By weight. By volume, it's 30 percent solids.

CHIEF JUSTICE ROBERTS: Is there a point at which it's proper to speak of it as a solid rather than a suspended solid? I mean, 90 percent by weight or by volume, whichever it is, solid?

MR. WALDO: Well, the -- the standard in this

case prohibits a discharge of process wastewater.

CHIEF JUSTICE ROBERTS: Right.

MR. WALDO: And so, if --

CHIEF JUSTICE ROBERTS: You wouldn't think something that's 90 percent solid is wastewater?

MR. WALDO: There might be some point at which the liquid content of a solid waste is so small that EPA wouldn't regard it as process wastewater anymore. But that's not the case here. In this case, there is no dispute that the discharge is process wastewater. The government has conceded that point.

And -- and it's extremely important, because EPA is required to, as I said, regulate suspended solids through effluent limitations and to adopt a zero discharge --

CHIEF JUSTICE ROBERTS: So if they were just putting whatever it is that doesn't have any water, concrete, into this lake, then you agree that it would be just the Corps of Engineers through the fill -- fill provisions that would govern that?

MR. WALDO: As long as there's no effluent limitation governing it, yes.

CHIEF JUSTICE ROBERTS: And so if they chop up the concrete and put a little water in so that it's easier to move, then all of a sudden it comes under 402 and the

EPA's jurisdiction.

MR. WALDO: It depends on if EPA has adopted an effluent limitation for it. So if -- if that waste stream that you're describing comes from some kind of factory, a -- for example, cement manufacturing is a source category that EPA --

CHIEF JUSTICE ROBERTS: I guess I'm just curious how that makes any sense, since we're talking about putting something into water. I mean, does it really matter whether you add the water before it goes into the lake or just the lake adds the water when you put in the solid?

MR. WALDO: Well, EPA --

CHIEF JUSTICE ROBERTS: Either way, I guess your friends on the other side would argue, I assume, that it's properly regarded as fill material, because that is the effect of it, rather than as effluent subject to 402.

MR. WALDO: EPA has always regulated industrial sources that -- whose raw process wastewater contains high levels of suspended solids, high enough that it would have the effect of fill material and could be considered fill. In fact -- and -- and, in fact, EPA has always had a definition of "fill material" that was based on the effects.

So for more than 30 years, EPA has been

regulating sources like ore processing mills, cement manufacturing plants, aluminum smelters, coal-fired power plants, all of which and many more require the use of settling ponds to remove the solids because they're --

JUSTICE KENNEDY: So do we decide -- we decide this case on the assumption that this is fill? Do you agree that this is fill?

MR. WALDO: Yes, it's both. It's fill material and it's process wastewater that's subject to an effluent limitation.

JUSTICE KENNEDY: Well, then the question that we put earlier as to whether or not a single pipe contained both, you -- you say that it can contain both.

MR. WALDO: Well, it's -- it's one slurry.

JUSTICE KENNEDY: I know.

MR. WALDO: It meets both definitions. The -- the solids are part of the process wastewater.

JUSTICE KENNEDY: It's one -- visibly, it's one stream, but you say it consists of two things?

MR. WALDO: Well, it is -- it is a slurry that contains water, chemicals --

JUSTICE KENNEDY: Is it both slurry --

MR. WALDO: -- metals --

JUSTICE KENNEDY: Is it both fill and non-fill?

MR. WALDO: It's -- it's fill and it's process

wastewater. It's both.

JUSTICE ALITO: Well, if it's both, who gets to -- do you agree that there can be only one permit; there can't be a 402 and a 404 permit?

MR. WALDO: No. In this case, there can't be any permit because there is a new source performance standard that prohibits --

JUSTICE ALITO: All right. Let's -- let's change that. What if the -- what if the new source performance standard was not a total prohibition? What if there was an effluent limitation in there, so that a permit could be issued, provided that there was compliance with the effluent limitation? Now, who issues the permit? And -- and I repeat, you -- I understand it's your position that there can't be both a 402 and a 404 permit.

MR. WALDO: If there's an effluent limitation applicable, it will end up having to be EPA that issues the permit, and that's -- that's simply because the Corps of Engineers just doesn't have the tools available to apply effluent limitations in its 404 permits, except for toxic substances.

JUSTICE ALITO: Where do you find that in the statute --

MR. WALDO: Well --

JUSTICE ALITO: -- that where -- where there's

a situation where possibly there could be a 402 and a 404 permit, the 402 permit trumps the 404 permit?

MR. WALDO: Well, it's -- where I would find that is in section 306(e), which says -- which is a prohibition against operating sources in violation of performance standards. And -- and here where you have --

JUSTICE ALITO: This wouldn't be an operation in violation of a performance standard. There would be a performance standard.

MR. WALDO: The performance -- right. The performance standard that says --

JUSTICE ALITO: It could be put in a 402 -- it could be put in a 402 permit.

MR. WALDO: Oh. Oh, I see what you're saying. Yes. Well, even -- the -- what the problem is, is that section 404 doesn't make any provision for application of effluent limitations and performance standards under sections 301 and 306.

JUSTICE ALITO: And 402 doesn't make any application for -- for the 404 regulations.

MR. WALDO: Yes, that's correct, but -- but it does provide the tool for EPA to apply those effluent limitations that you were asking about. The effluent limitations have to be complied with, and EPA is the agency under section --

JUSTICE ALITO: Where does it make the -- where does it make provision for application of the standards that should apply to fill under 404?

MR. WALDO: Well, those standards apply if you have fill material that's not subject to some effluent limitation. Effluent limitations are only adopted for industrial sources --

JUSTICE ALITO: Where does the statute say that?

MR. WALDO: Where does it say -- I'm sorry. Could you clarify the question?

JUSTICE ALITO: Where does it say that? You say that there can't be two permits, and you say 402 trumps 404. And I'm asking where in the statute does it say that?

MR. WALDO: It's -- it is an absence of a provision in 404. But -- but the thing is, even if 404 has -- even if the Corps of Engineers -- and I should say, we agree with the government and with the agencies about this. The agencies have never interpreted section 404 to provide for the application of effluent limitations in 404 permits. The 404(b) guidelines don't provide for it. It's not provided in the statute. And so, they just don't have the ability to do it.

The problem is, they try to carry that a step farther and take that absence of provision to say that it's

an exception from effluent limitations, to say that they don't have to comply with section 301 and 306. But it doesn't say that, and that's an implied exception. And the Court should only find an implied exception if it's necessary to avoid absurd results.

JUSTICE BREYER: So can you go back --

MR. WALDO: No one --

JUSTICE BREYER: Could you go back for a second to my discussion with Mr. Olson? I'm thinking of it in very simplified terms. The simplified terms is, I think of a pipe and I think of a circumstance where some terrible pollutant comes out of the pipe that would be subject to 306. And if the pipe ends up in a river or a lake, a regular lake, it could fill up the bottom. It seems possible.

MR. WALDO: Yes.

JUSTICE BREYER: All right. So if it fills up the bottom, it's called "fill" and comes under 404.

MR. WALDO: It doesn't even have to fill it up very much --

JUSTICE BREYER: No, I know. A little bit.

MR. WALDO: Just a tiny bit.

JUSTICE BREYER: Okay. I -- I see the point.

But I mean, it seems to me, if it fills up to the bottom to whatever point, it's fill. So now it's the

Army Corps of Engineers. If it has effluent in it, it's effluent and so now it's under EPA. In other words, you have both.

MR. WALDO: That's the --

JUSTICE BREYER: Now, this has only been going on for 40 years. I'm sure this isn't the first time they've had both.

MR. WALDO: That's exactly right.

JUSTICE BREYER: And -- and so I don't understand. What I would think of is if -- if you have two sets of standards and it's both, they should satisfy both. I'm not writing these statutes.

MR. WALDO: Well, let me -- I think --

JUSTICE BREYER: All right. So now -- now I heard from -- from -- I might interpret Mr. Olson -- he may not have really said this, but I -- the way I heard it was: Well, don't worry, because if it's fill and you get it over to the Corps of Engineers, they're going to apply the effluent standard anyway. And now you're sort of saying: Well, if it's -- they're going to apply some standard. And then there was a question of, well, what standard, and we got a little vague there.

Now -- now, what happens if it goes to the EPA as effluent? Justice Alito's question is, do they apply the fill standard? And between my response to these two

answers, I still don't understand how it works. It -- help me.

MR. WALDO: The Corps of Engineers only applies toxic effluent limitations. There are other pollutants that are nontoxic --

JUSTICE BREYER: Okay. So now, if you lose this case, what we're going to have is all the fish are going to be killed by some horrible pollutant, and the -- the Army Corps of Engineers can't do anything about it, and the only reason is we put enough of the pollutant in there to fill it up 10 feet from the bottom. And then if you did it the other way, if the EPA regulated it, it might do something terrible under 404, and they couldn't do anything about it.

Now, it's very hard for me to believe that that's really how these agencies have been operating for 40 years.

MR. WALDO: Well, that's not, and let me explain how they have been operating, because I think that will help clarify it. For 40 years, EPA has regulated sources like ore processing mills, aluminum smelters, others that I have named, others that are listed in our brief, and has applied effluent limitations to those discharges. Now, you -- you hear this statement a lot --

CHIEF JUSTICE ROBERTS: Even when they -- even

when they fill -- even when they fill a lake?

MR. WALDO: Absolutely, and let me explain that, because you hear this statement a lot: EPA never regulates fill material. Well, that's because when you apply the effluent limitations, it's not fill material anymore.

The effluent limitations require the use of settling ponds that are not in navigable waters. The settling ponds or other technologies remove almost all of the solids so that the discharge that is permitted by EPA in the section 402 permit might have a limitation of 20 or 30 milligrams per liter, something that wouldn't have any measurable filling effect on the receiving water body.

CHIEF JUSTICE ROBERTS: So when EPA regulates -- or it has regulated these for 40 years, which I assume is up to 2002 -- then it -- it's because they don't go into lakes; it's because they go into settling ponds.

MR. WALDO: Settling ponds. Exactly.

CHIEF JUSTICE ROBERTS: Which are not navigable waters of the United States.

MR. WALDO: Exactly.

CHIEF JUSTICE ROBERTS: So the new regulation says that EPA does not regulate it when it goes into -- I can understand why the Army Corps of Engineers doesn't care if it's an impoundment pond or a settling pond, but they do

care when it's a lake.

MR. WALDO: When they adopted the new regulation, they were very clear that they intended to continue their past practice. The agencies never stated an intent to repeal or modify or change the applicability of any effluent limitations, and in fact, this question came up repeatedly: What happens if it's fill material but it's subject to an effluent limitation? And every time they addressed it, they said the same thing: Effluent limitations will continue to apply and will be applied through section 402 permits.

CHIEF JUSTICE ROBERTS: To fill material, as defined in the 2002 regulation?

MR. WALDO: That's what it was all about, yes. That's what they were talking about. That was addressed over and over again in the -- in the fill rule, and they never said --

CHIEF JUSTICE ROBERTS: Which --

MR. WALDO: -- anything that contradicted --

CHIEF JUSTICE ROBERTS: -- which -- I'm sorry. Which fill rule?

MR. WALDO: The -- I'm talking about the Federal Register preamble and the --

CHIEF JUSTICE ROBERTS: Yes. You're talking about the preamble. I'm looking at the definition of "fill

material" in -- whatever -- it's reproduced at page 7a and 8a of the government's brief.

MR. WALDO: Right. Well --

CHIEF JUSTICE ROBERTS: The applicable definition, not the preamble.

MR. WALDO: -- the definition of "fill material" is simply a definition. By itself it doesn't have any operative effect. It doesn't -- it doesn't authorize any particular kinds of discharges.

JUSTICE SCALIA: Yes, but -- but do you have a case over these 40 years where a company was trying to use the emission from the mine as a fill material in a lake rather than in a settling pond and where the EPA, despite the fact that it was using it to fill a lake, applied its effluent standards?

MR. WALDO: No, it's been -- it's been prohibited.

JUSTICE SCALIA: Well, then --

MR. WALDO: It's been prohibited. It's illegal for -- to permit the discharge of the process wastewater --

JUSTICE SCALIA: Evidently not. I mean, the EPA says not. Do you have a -- an instance where it was prohibited where a company wanted to -- to emit fill material into a lake and the EPA said no, you can't do it, because of the effluent limitations?

MR. WALDO: Well, if any -- I don't know if anyone ever asked to do that, but if they did the answer would have been no. I can't come up with an answer because that's what the effluent limitations require.

JUSTICE SCALIA: But your -- your 40 years of experience then really don't -- don't cover this case. People have been putting it into settling ponds.

Let me ask you another question. The other side says that the alternative to this would be even worse, or it sounds worse to me, anyway. What -- what is your solution? Closing down the mine? Is there any --

MR. WALDO: No, no, no. We -- we agree with EPA on this point. There was a difference of opinion between EPA and the Corps of Engineers as to which was the preferred site. EPA preferred the dry land disposal site, and -- and we agreed that has much less adverse effect on the ecosystem, but --

JUSTICE GINSBURG: Do you agree with --

MR. WALDO: -- an even more --

JUSTICE GINSBURG: -- the description of that effect? The other solution, we were told, would involve filling in a vast expanse of wetlands and then having these huge piles that could be seen by all the tourist boats.

MR. WALDO: Yes, it has -- it does have adverse impacts, but it's -- in EPA's view and in our view, is not

as bad as filling up a lake and killing all the fish and aquatic life in the lake and --

CHIEF JUSTICE ROBERTS: All the fish. There are a thousand fish in this lake.

MR. WALDO: Yes.

CHIEF JUSTICE ROBERTS: Right?

MR. WALDO: Right, and --

CHIEF JUSTICE ROBERTS: Those aren't endangered fish. There are millions of them somewhere else. Right?

MR. WALDO: That's right.

CHIEF JUSTICE ROBERTS: Okay.

MR. WALDO: But it's -- also an important point for us here is that this is a national rule, and EPA considered these kind of alternative land use requirements as an effect of its no-discharge rule. When the -- EPA specifically addressed the fact that if you prohibit discharges of process wastewater into navigable waters, it's going to require using more land to dispose of all that solid waste somewhere, and they determined that the benefits of keeping process wastewater out of the navigable waters was worth it. And so it's both site-specifically preferable, and it's a determination that was based --

JUSTICE ALITO: Wasn't there a decision in the lower courts that the alternative was unacceptable as well? And would you represent that if the case were remanded,

that would not be your position on remand and creating this --

MR. WALDO: Oh, we've already taken that position, yes. We've been working -- we -- we were working with the mining company after the Ninth Circuit decision to identify an alternative --

JUSTICE ALITO: It was never your position that that was unacceptable?

MR. WALDO: I'm sorry?

JUSTICE ALITO: It was never your client's position that creating this -- permanently destroying wetlands and creating a mound that was bigger than the Pentagon was an unacceptable solution to this --

MR. WALDO: I don't want to make any representations about what a client might have said over the last 20 years of this mine, but I can tell you that we were working with the agencies and with Coeur to identify an alternative site. The agencies -- or the Coeur applied for the permits to do that, and -- pursuant to this mediation we were having, and then abruptly pulled out a few weeks ago.

JUSTICE SCALIA: Why -- why do you say the EPA preferred the -- the solution of filling in the wetlands and creating an ash Pentagon?

MR. WALDO: When -- when the Corps of Engineers

proposed the draft 404 permit, EPA commented on it and said, we disagree with your conclusion that filling up the lake is the least environmentally damaging alternative.

JUSTICE SCALIA: Well, if it really felt that way, couldn't it -- couldn't it simply have vetoed the permit?

MR. WALDO: Yes, EPA can veto if it's --

JUSTICE SCALIA: So it couldn't have felt very strongly about it.

MR. WALDO: Well, EPA -- its -- the veto authority is a discretionary authority --

JUSTICE SCALIA: Right.

MR. WALDO: -- if it finds unacceptable adverse consequences. And for understandable reasons, EPA very rarely exercises that authority. But EPA never changed its position about whether the -- about which was the preferred alternative. The EPA --

JUSTICE SCALIA: Well, it couldn't have preferred it very much, or it would have vetoed this one.

MR. WALDO: It -- apparently not enough to come to the conclusion that it was one of those situations where they wanted to veto based on unacceptable adverse consequences.

CHIEF JUSTICE ROBERTS: Is there -- is there any aquatic life in this lake other than the thousand fish?

MR. WALDO: Well, sure. There's microinvertebrae and --

CHIEF JUSTICE ROBERTS: Microinvertebrae?

MR. WALDO: I mean, all sorts of the things that fish feed on, plant life and animal life and all that stuff.

JUSTICE SCALIA: Plankton and stuff.

MR. WALDO: Yes. Whatever. I'm not an expert on the ecology of this lake, but there's a couple of different kinds of fish and other life that make the -- that make it possible for those fish to live there, and it will essentially --

JUSTICE BREYER: Is it right --

MR. WALDO: -- all be destroyed.

JUSTICE BREYER: Is it right -- now, I am back on my hobby horse -- but if it's right that this slurry is pushing into this lake 50 feet or 75 feet covering the bottom with some stuff, a lot of it's dirt, and some of it's the worst chemical ever, except it's not toxic. Okay. I guess cyanide isn't toxic.

But the -- the -- now, I just heard that if the EPA doesn't give the permit but the Corps of Engineers does, the EPA has the power to veto the permit. Is that right?

MR. WALDO: EPA can veto for unacceptable

adverse consequences. It's not a way to enforce effluent limitations.

JUSTICE BREYER: Why not? If they have a veto --

MR. WALDO: Because that's all 404(c) says.

JUSTICE BREYER: I know it comes under a different statute, but in any instance where in fact they see that some of their rules that they promulgate are being violated and they think the Corps of Engineers is not paying attention to those rules, they can veto it.

MR. WALDO: Well, but --

JUSTICE BREYER: And if they don't veto it, then that would be a way of reconciling these two things.

MR. WALDO: The -- the position that EPA has taken in this case, unfortunately, is that, if the discharge meets that definition of "fill material," no matter how bad the consequences are for water quality, it's fill material, and it's therefore exempt from effluent limitations --

JUSTICE BREYER: So couldn't they veto it?

MR. WALDO: Only if it was for -- well, it was for -- they found adverse -- unacceptable adverse consequences --

JUSTICE BREYER: And wouldn't an unacceptable adverse consequence be that it puts all this effluent in

the water?

MR. WALDO: It's a -- it's a different standard from whether it violates an effluent limitation is all I'm saying.

And I want to be clear that the effluent in this case, although it doesn't necessarily violate any toxic pollutant effluent, it is toxic. It's toxic with conventional pollutants. It has a pH of 10, which is toxic to aquatic life. It's very high. It's about the pH of ammonia, is what this slurry effluent is that's being discharged in this case. And the --

JUSTICE ALITO: Isn't that the -- isn't that the pH at the point where it's discharged, and not the general pH in the lake?

MR. WALDO: It'll dilute in the lake. They're using the lake as their diluting settling pond. That's right. They're using a navigable water body --

JUSTICE ALITO: What was the answer -- what's the answer to the question? When -- once it's released into the lake, what's the pH of the lake as opposed to the --

MR. WALDO: Oh, it'll -- it'll dilute in the lake, so it will revert to normal levels --

JUSTICE ALITO: Within how long?

MR. WALDO: -- correct.

Oh, I mean, that happens, you know, in a -- some sort of a mixing zone just outside the pipe. That happens pretty quickly.

Now, for the lake to recover --

JUSTICE ALITO: So the pH -- so the pH you just cited was the -- was the pH --

MR. WALDO: Of the slurry.

JUSTICE ALITO: -- just at the point of the discharge?

MR. WALDO: Of the slurry. That's right.

And now, I want to talk about this allegation that it's like dumping wet sand in the lake. That's not true at all. They tested the -- the tailings sediment from this discharge with two organisms, and with one of them, it killed 95 percent of the organisms in the test, which is way over the top for EPA's toxicity threshold. In the other organism they had, it -- the organism survived, but their reproduction rate was significantly reduced, also meeting the toxicity test standards that EPA establishes. So this --

CHIEF JUSTICE ROBERTS: Just to follow up, that's -- that's the same point, though, that Justice Alito made. You're testing that right as it comes out, not as it's diluted in the lake.

MR. WALDO: No. No, Your Honor, that's not

right. That's what the solids -- that's the effect of the solids, and that's why, as a result of that, they -- they established this rule that --

CHIEF JUSTICE ROBERTS: I'm sorry, I didn't understand you. I thought you said that the toxicity in the slurry was tested and killed 99 or whatever percent of these invertebrates.

MR. WALDO: They took that slurry, they let the solids settle down to the bottom, and then they tested those solids for what effect it would have on some fresh water organisms, because they were trying to determine whether the lake would be able to recover from depositing all these solids into the lake. And they found that it had a very high toxicity level. And so what they did to try to remedy that is require depositing native vegetation on the top of all of that, after the mine closes. And they are hoping that that will have the effect of letting the lake recover. But EPA concluded that it will take decades, if ever, before the lake can recover from that. So this -- this is not some benign wet-sand kind of discharge. It's a toxic slurry with a high pH level and with effects that are going to last for decades.

And if EPA -- if section 404 is interpreted to allow these kinds of discharges to be emitted exempt from effluent limitations, it eviscerates key requirements of

the Clean Water Act. EPA is required to regulate sources of this type through effluent limitations. EPA is required to regulate the suspended solids through effluent limitations from industrial sources like this.

JUSTICE BREYER: But, in fact, if you have this mix and it -- it goes as an effluent part and a fill part, in your view, what? That the statute says both agencies regulate? They have to meet both? One or the other? How does it work?

MR. WALDO: If there's an effluent limitation, the effluent -- there's a performance standard under section 306. The performance standard must be complied with under section 306(e). And the only way --

JUSTICE KENNEDY: You say -- you say this is 404; it's not 402 --

MR. WALDO: No.

JUSTICE KENNEDY: It is 306?

MR. WALDO: 404 is not appropriate here because there is an effluent limitation. It's fill material --

JUSTICE KENNEDY: No, but it is fill.

MR. WALDO: It's fill material, but it's not fill material that is available for -- for a section 404 permit. And EPA has always regulated discharges from sources like this, that meet that definition of "fill material." EPA has had an effects-based definition of

"fill material" since virtually the beginning of the Clean Water Act.

JUSTICE BREYER: So fill material is only that material as to which no effluent standard applies?

MR. WALDO: No, it's fill material. In this case, it's fill material, but it's just fill material that's not eligible for a 404 permit.

JUSTICE BREYER: 404 material is material such that it is fill material and there is no effluent standard applicable?

MR. WALDO: Yes, that's correct. And --

JUSTICE ALITO: So if it's 95 percent solid but there's an effluent limitation, your position is that there can't be a 404 permit; it has to be a 402 permit.

MR. WALDO: It depends. If it's -- if that discharge is covered by an effluent limitation, yes, that's correct. And -- and I want to be clear about this point, that EPA -- well, I guess my time is up.

CHIEF JUSTICE ROBERTS: Go ahead. Finish your thought.

MR. WALDO: Okay. EPA amended its regulations in 1979 specifically to recognize the fact that some discharges of fill material are not eligible for section 404 permits and require NPDES permits. At that time, the regulations said you don't need an NPDES permit if it's

fill material. EPA amended that regulation to say you don't need an NPDES permit if it's fill material and it's subject to section 404 of the Clean Water Act. And the purpose --

CHIEF JUSTICE ROBERTS: Thank you, Mr. Waldo.

MR. WALDO: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Olson, you have three minutes remaining.

REBUTTAL ARGUMENT OF THEODORE B. OLSON
ON BEHALF OF THE PETITIONERS

MR. OLSON: What the Respondents would wish to do is to have this Court disagree with the agencies' interpretation of the statutes which they administer, their consistent interpretations of those statutes, and the factual findings that a whole slew of agencies made with respect to the subject matter of these permits.

The preamble of the 202 -- the 2002 fill regulations specifically says -- this is 31,135 of Federal Register volume 67 -- EPA has never sought to regulate fill material under effluent guidelines. Never.

There's an agreement, a memorandum of agreement, between the EPA and the Corps of Engineers in 1986. It is cited at the United States Government brief at page 27. The EPA and the Corps agree -- and this is in response to your question, Justice Breyer, and I think

something Justice Kennedy said and something Justice Souter said with respect to what if there are two things in the stream going into the water. Fill material remains subject to 404 permitting even if they occur in association with discharges meeting 402 criteria. That's the answer to that question. And the -- and the EPA --

JUSTICE KENNEDY: But I thought -- I thought your brother would say: But that does not respond to 306 effluent.

MR. OLSON: The 306 provisions in the statute are not made applicable to 404 permitting, and the consistent regulatory history from 1973 -- and it's all set out on page 27 of the -- or summarized on page 27 of the government's brief -- are that 301 and 306 are not applicable under the 404 process.

And if there was any doubt at all, there is a -- the so-called mine tailings memorandum at pages 141 through 145 of the joint appendix, in which three top officials of the EPA construe what they call the rules, the regulations, and the statute. This is both agencies. Under the plain regulation -- language of the rule -- this is page 145a -- under the plain language of the rule and the agencies' interpretation of the regulation in its preamble, the mine tailings that are to be placed into an impoundment are covered by 404. And it specifically

addresses this froth-flotation --

JUSTICE SOUTER: Why does that mean anything more than you've got to get a 404 permit, without addressing the question whether you can get a 404 permit if it has, in effect, the -- the -- if it has the effects which are supposed to be regulated by the effluent limitations?

MR. OLSON: That precise question, Justice Souter, is addressed on pages 143, 144, and 145 of this memorandum from top officials of the EPA, applicable to this particular mine and these particular discharges --

JUSTICE SOUTER: Where is -- where is that in the appendix?

MR. OLSON: That's on pages 141 through 145a of the joint appendix.

JUSTICE STEVENS: But as I read that sentence, Mr. Olson, it says they're subject to both permitting.

MR. OLSON: No, it doesn't. It says -- with due respect, Justice Stevens, it says on the bottom of page 144: As a result, the regulatory regime applicable to the discharges under section 402, and so forth. What -- I think one thing that's been left out --

JUSTICE STEVENS: I'm talking about the last sentence on --

MR. OLSON: There is a 402 permit in this case,

too. There's a 404 permit with respect to the material going into the lake and a 402 permit for the material coming out of the lake into the waters of the United States.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Olson.

The case is submitted.

(Whereupon, at 11:06 a.m., the case in the above-entitled matter was submitted.)