

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 COEUR ALASKA, INC., :

4 Petitioner :

5 v. : No. 07-984

6 SOUTHEAST ALASKA :

7 CONSERVATION COUNCIL, ET :

8 AL. ; :

9 - - - - - x

10 and

11 - - - - - x

12 ALASKA, :

13 Petitioner :

14 v. : No. 07-990

15 SOUTHEAST ALASKA :

16 CONSERVATION COUNCIL, ET AL. :

17 - - - - - x

18 Washington, D.C.

19 Monday, January 12, 2009

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

23 APPEARANCES:

24 GEN. GREGORY G. GARRE, ESQ., Solicitor General,

25 Department of Justice, Washington, D.C.; on behalf of

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

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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

1 be both fill and --

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

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

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

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

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

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

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

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

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

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

1 definition of "fill material," and I don't think that the
2 Respondent SEACC has squarely challenged that definition in
3 this case. And I would point you to two parts of the
4 record to --

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

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

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

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

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

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

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

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

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

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

1 wastewater treatment exception, which is found at 40 C.F.R.
2 122.2, where the agencies excepted from the definition of
3 "the waters of the United States" discharges into an
4 impoundment area.

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

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

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

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

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

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

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

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

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

17 GENERAL GARRE: Well --

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

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

25 The other part I wanted to point to is the

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

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

11 GENERAL GARRE: That's true.

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

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

24 JUSTICE SOUTER: No, but the --

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

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

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

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

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

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

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

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

5 JUSTICE SOUTER: Isn't that correct?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 CHIEF JUSTICE ROBERTS: Thank you, General.

19 GENERAL GARRE: Thank you, Your Honor.

20 CHIEF JUSTICE ROBERTS: Mr. Olson.

21 ORAL ARGUMENT OF THEODORE B. OLSON

22 ON BEHALF OF THE PETITIONERS

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

25 Let me reemphasize one point. The Clean Water

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

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

10 The fill rule --

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

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

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

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

25 Furthermore, the State is involved. The

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

10 Now, Congress determined --

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

14 MR. OLSON: No, they could not do that, Justice
15 -- Chief Justice Roberts, because the -- Congress made a
16 choice under section 404 and 402. Section 402, the EPA
17 program, is governed by those effluent limitations under
18 301 and 306 and the standards of performance.

19 Congress made a choice of applying section 307,
20 which are toxic effluent limitations that apply to the 404
21 permits. That 307 regime, which Congress selected, which
22 is also endorsed by the EPA in the rules that the -- that
23 the Corps must follow in administering the permit -- that
24 307 provision, to which I just referred to, is in the
25 404(b)(1) regime rules. So all of this -- the permitting

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

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

6 MR. OLSON: The --

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

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

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

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

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

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

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

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

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

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

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

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

10 JUSTICE BREYER: Here's -- I -- I'm perhaps
11 missing this. I -- this is in general what I don't
12 understand, how this works. My understanding is that under
13 404 something is fill -- they have a definition. And it's
14 fill, among other things, if it changes the bottom level of
15 any portion of water in the United States. That's right?

16 MR. OLSON: That's correct.

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

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

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

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

25 JUSTICE BREYER: That's the result of this

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

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

7 (Laughter.)

8 JUSTICE BREYER: Something absolutely terrible.

9 MR. OLSON: Cholesterol.

10 JUSTICE BREYER: What?

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

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

1 statute, and you will explain it to me.

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

3 (Laughter.)

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

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

16 MR. OLSON: No --

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

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

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

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

7 MR. OLSON: Pardon me?

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

15 MR. OLSON: Every -- every --

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

18 MR. OLSON: Yes, there is because --

19 JUSTICE BREYER: What?

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

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

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

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

4 The definition --

5 JUSTICE BREYER: I think what might be
6 missing --

7 JUSTICE SCALIA: Is nontoxic covered by 402?

8 MR. OLSON: Pardon me?

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

13 MR. OLSON: Yes, yes.

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

15 MR. OLSON: That's correct.

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

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

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

25 JUSTICE SOUTER: But it's going to kill every

1 living creature in the lake. Right?

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

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

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

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

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

23 CHIEF JUSTICE ROBERTS: Thank you, Mr. Olson.
24 Mr. Waldo.

25 ORAL ARGUMENT OF THOMAS S. WALDO

1 ON BEHALF OF THE RESPONDENTS

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

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

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

17 MR. WALDO: Because that's only a statement
18 about whether section 402 applies. It means that if you
19 have a section 404 permit, you don't also need a section
20 402 permit. It doesn't say anything about whether a 404
21 permit is appropriate under any particular circumstances,
22 and it doesn't say anything about whether section 306 is
23 applicable. In fact --

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

1 regulation, isn't it?

2 MR. WALDO: Yes.

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

5 MR. WALDO: But that determination was based on
6 a misinterpretation of the Clean Water Act. That prefatory
7 clause that -- that the Chief Justice was asking about
8 doesn't say anything about whether section 306 applies.
9 306 does not have a prefatory clause like that, which
10 strongly suggests that it's not intended to apply there.
11 In other --

12 JUSTICE ALITO: So your -- your position
13 requires us to determine that EPA's interpretation of those
14 -- the statutory regime that you are talking about, 306 and
15 402, is -- is contrary to the statute.

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

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

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

1 solids through effluent limitations.

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

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

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

11 MR. WALDO: Yes --

12 JUSTICE SCALIA: Would that violate --

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

15 JUSTICE SCALIA: Discharge of a pollutant.

16 MR. WALDO: Yes. And so --

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

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

25 JUSTICE SCALIA: Even though it violates

1 effluent standards.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 case prohibits a discharge of process wastewater.

2 CHIEF JUSTICE ROBERTS: Right.

3 MR. WALDO: And so, if --

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

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

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

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

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

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

1 EPA's jurisdiction.

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

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

13 MR. WALDO: Well, EPA --

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

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

25 So for more than 30 years, EPA has been

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

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

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

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

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

15 JUSTICE KENNEDY: I know.

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

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

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

22 JUSTICE KENNEDY: Is it both slurry --

23 MR. WALDO: -- metals --

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

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

1 wastewater. It's both.

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

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

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

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

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

24 MR. WALDO: Well --

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

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

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

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

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

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

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

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

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

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

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

8 JUSTICE ALITO: Where does the statute say
9 that?

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

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

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

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

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

6 JUSTICE BREYER: So can you go back --

7 MR. WALDO: No one --

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

16 MR. WALDO: Yes.

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

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

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

22 MR. WALDO: Just a tiny bit.

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

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

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

4 MR. WALDO: That's the --

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

8 MR. WALDO: That's exactly right.

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

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

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

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

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Even when they -- even

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

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

7 The effluent limitations require the use of
8 settling ponds that are not in navigable waters. The
9 settling ponds or other technologies remove almost all of
10 the solids so that the discharge that is permitted by EPA
11 in the section 402 permit might have a limitation of 20 or
12 30 milligrams per liter, something that wouldn't have any
13 measurable filling effect on the receiving water body.

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

18 MR. WALDO: Settling ponds. Exactly.

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

21 MR. WALDO: Exactly.

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

1 care when it's a lake.

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

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

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

18 CHIEF JUSTICE ROBERTS: Which --

19 MR. WALDO: -- anything that contradicted --

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

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

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

1 material" in -- whatever -- it's reproduced at page 7a and
2 8a of the government's brief.

3 MR. WALDO: Right. Well --

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

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

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

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

18 JUSTICE SCALIA: Well, then --

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

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

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

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

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

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

18 JUSTICE GINSBURG: Do you agree with --

19 MR. WALDO: -- an even more --

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

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

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

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

5 MR. WALDO: Yes.

6 CHIEF JUSTICE ROBERTS: Right?

7 MR. WALDO: Right, and --

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

10 MR. WALDO: That's right.

11 CHIEF JUSTICE ROBERTS: Okay.

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

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

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

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

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

9 MR. WALDO: I'm sorry?

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

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

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

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

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

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

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

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

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

12 JUSTICE SCALIA: Right.

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

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

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

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

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

3 CHIEF JUSTICE ROBERTS: Microinvertebrae?

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

7 JUSTICE SCALIA: Plankton and stuff.

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

13 JUSTICE BREYER: Is it right --

14 MR. WALDO: -- all be destroyed.

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

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

25 MR. WALDO: EPA can veto for unacceptable

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

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

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

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

11 MR. WALDO: Well, but --

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

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

20 JUSTICE BREYER: So couldn't they veto it?

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

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

1 the water?

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

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

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

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

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

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

24 JUSTICE ALITO: Within how long?

25 MR. WALDO: -- correct.

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

4 Now, for the lake to recover --

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

7 MR. WALDO: Of the slurry.

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

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

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

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

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

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

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

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

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

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

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

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

14 JUSTICE KENNEDY: You say -- you say this is
15 404; it's not 402 --

16 MR. WALDO: No.

17 JUSTICE KENNEDY: It is 306?

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

20 JUSTICE KENNEDY: No, but it is fill.

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

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

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

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

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

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

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

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

19 CHIEF JUSTICE ROBERTS: Go ahead. Finish your
20 thought.

21 MR. WALDO: Okay. EPA amended its regulations
22 in 1979 specifically to recognize the fact that some
23 discharges of fill material are not eligible for section
24 404 permits and require NPDES permits. At that time, the
25 regulations said you don't need an NPDES permit if it's

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

5 CHIEF JUSTICE ROBERTS: Thank you, Mr. Waldo.

6 MR. WALDO: Thank you.

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

9 REBUTTAL ARGUMENT OF THEODORE B. OLSON

10 ON BEHALF OF THE PETITIONERS

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

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

21 There's an agreement, a memorandum of
22 agreement, between the EPA and the Corps of Engineers in
23 1986. It is cited at the United States Government brief at
24 page 27. The EPA and the Corps agree -- and this is in
25 response to your question, Justice Breyer, and I think

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

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

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

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

1 addresses this froth-flotation --

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

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

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

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

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

18 MR. OLSON: No, it doesn't. It says -- with
19 due respect, Justice Stevens, it says on the bottom of page
20 144: As a result, the regulatory regime applicable to the
21 discharges under section 402, and so forth. What -- I
22 think one thing that's been left out --

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

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

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

5 CHIEF JUSTICE ROBERTS: Thank you, Mr. Olson.
6 The case is submitted.

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

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