

## Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, 129 S. Ct. 2458 (U.S. 2009).

William Larson\*

### *I. Background*

Coeur Alaska ("Coeur"), a silver and gold mining company, sought to reopen the Kensington Gold Mine north of Juneau, Alaska. The mine had been inactive since 1928 and Coeur hoped to make the mine profitable again by using a mining technique known as "froth flotation". The procedure involved churning crushed rock in tanks of frothing water. The water contained chemicals that caused the gold-bearing minerals to rise to the surface. The gold was then skimmed off the top of the mixture and "slurry", a water based mixture containing about 30 percent crushed rock by volume, remained in the tanks after froth flotation. *Coeur AK, Inc. v. Se. AK Conservation Council*, 129 S.Ct. 2458, 2464 (2009). The dispute in this case revolved around the this issue of which environmental agency had the authority to grant Coeur a permit for the disposal of the mixture of slurry that remained in the tanks after the process of froth flotation was complete and whether that agency followed the correct procedures in granting the permit.

### *II. The Army Corps and the EPA*

Instead of building a tailings pond, a manmade pond where slurry can separate, Coeur's plan was to dispose of the slurry in Lower Slate Lake. Because the Lake is part of the Tongass National Forest and is a navigable waterway it subject to the Clean Water Act ("CWA"), a fact the parties did not dispute. *See id.* Coeur expected to pump 4.5 million tons of tailings into the lake, raising the lakebed 50 feet, while the mine was in operation. *See id.* This process would have increased the lake's area from 23 to approximately 60

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\* Class of 2011, Washington and Lee University School of Law

acres. *See id.* Coeur would then dam the lake water to separate it from the groundwater and later purify the water before allowing it to go into a stream. Coeur sought permits from the Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Corps"). The Corps granted a permit for disposal of slurry in Lower Slate Lake under §404 of the CWA. *See* 86 Stat. 884; 33 U.S.C. §1344(a). The Corps understood the environmental damage, which included destroying the lake's fish, would be temporary and the water would be treated under strict EPA criteria before flowing into downstream waters. *See Coeur*, 129 S. Ct. at 2465. The alternative to disposing the slurry in the Lower Slate Lake would be to place the tailings on wetlands, which would in turn, destroy dozens of acres of wetlands permanently. *See id.* The Corps determined that the plan to use Lower Slate Lake as a tailings pond was the least environmentally damaging option when compared to the other proposed alternatives. *See Coeur*, 128 S.Ct. at 2465. If the plan was determined to have "an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas...wildlife, or recreational areas", the EPA had the statutory authority to veto the permit under CWA §404(c). *Id.* (quoting 33 U.S.C. §1344(c)). While the EPA did not think placing the tailings in the lake was the "environmentally preferable" method, it not exercise its veto power and deferred to the decision of the Corps. *See Coeur*, 128 S.Ct. at 2465.

### *III. The Dispute with SEACC*

Southeast Alaska Conservation Council ("SEACC"), an environmental protection organization, filed suit against the Corps in the United States District Court for the District of Alaska. SEACC argued the permit violated the law because Coeur should have sought a permit from the EPA under §402 of the CWA and the discharge itself is unlawful in violation of the EPA new source performance standard for froth-flotation gold mining. *See id.* at 2466. Coeur and the State of Alaska intervened as defendants and both sides moved for summary judgment. The District Court granted summary judgment for the defendants. The Court of Appeals for the Ninth Circuit reversed the District Court and ordered the court vacate the permit. "The Court of Appeals concluded that Coeur Alaska required a §402 permit for its slurry discharge, that the Corps lacked authority to issue such a permit under §404 and that the proposed discharge was unlawful because it would violate the EPA new source performance standard and §306(e)." *Id.* at 2467.

The Supreme Court of the United States granted certiorari and considered two questions: 1. "whether the Act gives authority to the United States Army

Corps of Engineers, or instead to the [EPA], to issue a permit for the discharge of mining waste, called slurry," and 2. "whether, when the Corps issued that permit, the agency acted in accordance with the law". *Coeur*, 129 S.Ct. at 2463. The Opinion of the Court by Justice Kennedy reversed the Court of Appeals for the Ninth Circuit and held that the Corps had the proper authority and lawfully issued the permit. *See id.*

#### *IV. Corps Authority to Issue Permits for Slurry*

SEACC argued that the CWA gave authority to the EPA and not the Corps to issue a permit for slurry. The EPA's permitting power stems from §402, while the Corps permitting power stems from §404 of the CWA. The Court reasoned that "[t]he EPA may not issue permits for fill material that fall under the Corps' §404 permitting authority. *Id.* at 2467. The corps, not the EPA, has permit power under §404 for "fill material". *See* 33 U.S.C. §1344(a).

The Corps and the EPA define fill material as "any 'material [that] has the effect of . . . [c]hanging the bottom elevation' of the water." *Coeur*, 129 S. Ct. at 2464 (quoting 40 CFR §232.2). They "further defined the 'discharge of fill material' to include 'placement of . . . slurry, or tailings or similar mining related materials.'" *Coeur*, 129 S. Ct. at 2464 (quoting 40 CFR §232.2). The parties agreed that slurry meets the definition of fill material. However, the SEACC argued that §404 contains an implicit exception for material otherwise subject to an EPA new source performance standard, standards promulgated for new sources of pollutants. The Court noted that "§404 refers to all 'fill material' without qualification," therefore the Corps maintains permitting power. *Coeur*, 129 S.Ct. at 2469.

The EPA retains some control, because it writes the guidelines for the Corps to follow in deciding whether to issue a permit for fill material and §404(c) of the CWA gives the EPA the power to "prohibit" or veto a permit issuance by the Corps for a particular disposal site. *See* 33 U.S.C. § 1344(b). The Court concluded that the EPA's regulations are clear "that '[d]ischarges of dredged or fill material into waters of the United States which are regulated under section 404 of CWA' 'do not require [§402] permits' from the EPA." *Coeur*, 129 S.Ct. 2467-68 (quoting 40 CFR §122.3). The Court held, the Corps and not the EPA has the authority to permit *Coeur's* slurry discharge. *See Coeur*, 129 S.Ct. 2469.

*V. Corps Permit was Lawful*

The SEACC argued "the slurry discharge will violate the EPA's new source performance standard and therefore the Corps permit is 'unlawful' [under] CWA §306(e)." *Id.* Petitioners "argue[d] that the permit is lawful because the EPA performance standard, and §306(e), do not apply to fill material regulated by the Corps." *Id.* The Court considered whether the EPA performance standards and §306(e) apply to the fill material discharge.

The Court engaged in statutory interpretation to determine whether the performance standards applied to fill material discharge. The Court determined that neither the statute nor agency regulations resolved the ambiguity. Petitioners argued the Court should follow an internal EPA memorandum, the Regas Memorandum, which explains that the performance standards do not apply because an EPA permit is not necessary for fill material discharges. *See id.* at 2470. The memo asserts that because discharge is regulated under §404, "the regulatory regime applicable to discharges under section 402 . . . such as those applicable to gold ore mining" do not apply. *Id.* at 1273 (quoting App. 144a–145a). Meanwhile respondents argue the memorandum "is not entitled to deference because it contradicts the agencies' published statements and prior practice." *Id.* The Court determined the memorandum was not entitled to *Mead* deference, *see United States v. Mead Corp.*, 533 U.S. 218, 234–38 (2001), deference granted to agencies in rule-making, but was "entitled to a measure of deference because it interprets the agencies' own regulatory scheme." *Auer v. Robbins*, 519 U.S. 452, 461 (1997). The deference was further warranted because the interpretation was "reasonable" and consistent with the regulations. *See Coeur*, 129 S.Ct. at 2473. The Court also considered that "the Memorandum preserves a role for the EPA's performance standard," acknowledges the discharger did not try to evade the EPA's performance standard, "preserves the Corps' authority to determine whether a discharge is in the public interest," prohibits toxic pollutants from entering navigable waters, and is "a sensible and rational construction that reconciles §§206, 402, and 404." *Id.* at 2473–74. Furthermore, the Court looked to Congress's omission of §306 under §404 in contrast to its inclusion in §402(k) as "evidence that Congress did not intend §306(e) to apply to Corps §404 permits or to discharges of fill material." *Coeur*, 129 S.Ct. at 2471. The statutory construction along with the Regas Memorandum led the Court to find the agency's practice reasonable and not unlawful.

### *VI. Concurring Opinion*

Justice Breyer joined the opinion of the Court and concurred in the judgment, but added that the issue before the Court was "the kind of detailed decision that the statutes delegate authority to the EPA, not the courts, to make (subject to the bounds of reasonableness)." *Id.* at 2479. Justice Scalia also concurred in judgment and joined the opinion of the Court "except for its protestation" that deference should be accorded the Regas Memorandum. *Id.*

### *VII. Dissent*

Justice Ginsburg joined by Justices Stevens and Souter dissented. The dissenters assert the proper question is whether "a pollutant discharge prohibited under §306 of the Act [is] eligible for a §404 permit as discharge of fill material." *Id.* at 2480. They concluded the discharge was not eligible for a permit under §404 of the CWA. Focusing on the intent of the CWA they assert that "[t]he use of waters of the United States as 'settling ponds' for harmful mining waste . . . is antithetical to the text, structure, and purpose of the Clean Water Act." *Id.* at 2484.