

The Clean Water Act Suffers a Crushing Blow: The U.S. Supreme Court Clears the Way for the Mining Industry to Pollute U.S. Waters [*Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458 (2009)]

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I. INTRODUCTION

Coeur Alaska, Inc. (Coeur Alaska) has been mining in Kensington, Alaska for the past 100 years.¹ In 1995, it acquired 100% ownership of the lucrative Kensington gold mine, and by 2005, it had secured the necessary permits.² The ambitious mining company was on pace to create 300 jobs in the Kensington area, and as a result of its operations, it would generate millions of dollars in state and local taxes, a prospect that was undoubtedly pleasing to the State of Alaska.³ But there was one problem: Coeur Alaska planned to dump its mine waste into nearby Lower Slate Lake. The Southeast Alaska Conservation Council (Conservation Council) disapproved of Coeur Alaska's project because the company's profitable operation would inevitably destroy a pristine lake. The group challenged the issuance of Coeur Alaska's permit to dump its waste in the lake. The question was simple: Who should have the authority to grant the permit?

One could reasonably assume that the massive agency normally in charge of policing our environment, the Environmental Protection Agency (EPA), would have the authority to decide whether hundreds of thousands of gallons of wastewater could be dumped into a lake. The EPA's authority to make such a decision was called into question, however, because of a 2002 change in the regulatory definition of "fill material." Ultimately, the United States Supreme Court, in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*,⁴ held that the U.S. Army Corps of Engineers (Corps), and not the EPA, had authority to

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1. Coeur Alaska, Kensington Gold Mine: Overview, <http://www.kensingtongold.com/overview.html> (last visited Apr. 3, 2010).

2. *Id.*

3. *Id.*

4. 129 S. Ct. 2458 (2009).

permit Coeur Alaska's discharge of mine waste into Lower Slate Lake and that Coeur Alaska could discharge mine waste despite EPA regulations that arguably prohibited such conduct.⁵ Notwithstanding detailed reasoning, the Court failed to analyze the Corps's and the EPA's new definition of "fill material" in its proper context, and as a result, misinterpreted the agencies' intent in promulgating the definition and Congress's intent in enacting the Clean Water Act.⁶ The Court should have considered the context in which the regulations were written and upheld the limited purpose for which they were intended. If the Court had properly analyzed the regulations, its holding would have respected the central tenets of the Clean Water Act,⁷ and fewer of our nation's waters would be at risk of environmental damage.

After setting forth the arguments in the case, this Comment outlines the Court's history of issuing opinions that erode the Clean Water Act's effectiveness, culminating in *Coeur Alaska, Inc.*, in which the Court further weakened the Clean Water Act. This Comment argues that the Court should have limited the 2002 re-definition of fill material to its intended reach—strictly mountaintop removal coal mining. The Corps and the EPA re-defined the definition of fill material in the coal-mining context, and had the Court recognized that fact, it would have reached a more appropriate decision, respectful of the Clean Water Act's fundamental purpose.

II. CASE DESCRIPTION

Coeur Alaska acquired the Kensington underground gold mine, northwest of Juneau, Alaska, in 1995.⁸ The company planned to mine gold there using a froth-flotation technique, in which large tanks of water and chemicals are used to separate the gold from the other minerals.⁹ A major issue in large-scale froth-flotation gold mining is how to dispose of the excess rocks (called tailings), which are often tainted with chemicals that the process inevitably creates.¹⁰ At first, Coeur Alaska ob-

5. *Id.* at 2477.

6. Federal Water Pollution Control Act, 33 U.S.C. § 1251 (2006).

7. *Id.* Among the stated goals was eliminating pollutant and toxic discharges into U.S. waters. *Id.* § 1251(a)(1), (3).

8. Kensington Gold mine, *supra* note 1.

9. *Coeur Alaska, Inc.*, 129 S. Ct. at 2464. The following provides an illustration of the froth-flotation technique:

Froth flotation is a process in which raw ore material is ground into fine gravel and mixed in slurry with chemicals whereby pebbles of desired metal float to the surface for capture and processing. The polluted "waste mill tailings," laden with mercury, lead, and other hazardous heavy metals, however, sink . . . destined for disposal [at the bottom of the lake].

James R. May, *Not at All: Environmental Sustainability in the Supreme Court*, 10 SUSTAINABILITY DEV. L. & POL'Y 20, 24 (2009).

10. Brief of Petitioner State of Alaska at 12, *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458 (2009) (Nos. 07-984, 07-990) (describing mine tailings and options for disposing of them). Mine tailings are "ground up rock and earth left over after minerals are extracted . . . similar to wet sand." *Id.*

tained permission from the Corps to dispose of the tailings on the land next to the mine.¹¹ The company later determined, however, that this disposal method was not its most viable option.¹²

When the price of gold dropped below \$400 an ounce, Coeur Alaska needed a cheaper way to dispose of the mine tailings in order to make its operation more profitable.¹³ To achieve this goal, the company proposed to use nearby Lower Slate Lake as a “tailings pond” into which it would dump the excess rock.¹⁴ Before using the lake for such a purpose, however, Coeur Alaska had to seek authorization from both the Corps and the EPA, as required by the Federal Water Pollution Control Act Amendments of 1972¹⁵ (later codified as the Clean Water Act).¹⁶ The Clean Water Act requires permits for discharges into navigable water bodies, and Lower Slate Lake was considered navigable.¹⁷

After extensively studying the disposal options, the Corps determined that there were two ways to dispose of the mine tailings: by piling them on wetlands or by depositing them in nearby Lower Slate Lake.¹⁸ Piling the tailings on wetlands would result in a tailings mountain “twice as high as the Pentagon and cover three times as many acres.”¹⁹ The alternative disposal method, depositing the tailings into Lower Slate Lake, which is fifty-one feet deep,²⁰ would preserve the wetlands.²¹ However, the lake would become shallower and would increase in area from twenty-three to sixty acres if the tailings were deposited in it.²² The Corps determined that depositing the tailings in the lake would cause the least environmental damage, and under section 404 of the Clean Water Act, issued Coeur Alaska a permit to dump the tailings in the lake.²³ Despite its authority to veto the Corps’s permit,²⁴ the EPA acquiesced in the decision.²⁵ Additionally, the EPA permitted Coeur

11. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 751 (6th ed. 2009).

12. *Id.*

13. *Id.*

14. *Coeur Alaska, Inc.*, 129 S. Ct. at 2464. The Court explained that usually a froth-flotation gold mining company would construct a tailings pond that it would use to separate solid waste. *Id.* In this case, however, Lower Slate Lake was to serve as the tailings pond. *Id.*

15. Pub. L. No. 92-500 (1972).

16. See 33 U.S.C. §§ 1342(a), 1344(a) (2006).

17. 33 U.S.C. § 1362(7) (2006). According to Coeur Alaska’s official environmental policy, it not only will cooperate with the permitting process, but it will also undertake environmental research on its own, ensure compliance with regulations, and “[m]aintain[] a strong social outreach program.” Environmental Policy of Coeur Alaska, Inc., Kensington Gold Mine, Tom Henderson, Vice President and General Manager, (Jan. 21, 2008), available at http://www.kensingtongold.com/Coeur%20Alaska%20Environmental%20Policy%20Final%201_21_08.pdf.

18. See Brief of Petitioner State of Alaska, *supra* note 10, at 12.

19. *Coeur Alaska, Inc.*, 129 S. Ct. at 2465.

20. *Id.* at 2478 (Breyer, J., concurring).

21. *Id.* at 2465 (majority opinion).

22. *Id.* at 2464.

23. *Id.* at 2463.

24. 33 U.S.C. § 1344(c) (2006).

25. *Coeur Alaska, Inc.*, 129 S. Ct. at 2465. The Environmental Protection Agency (EPA) did

Alaska to discharge treated water into downstream waters flowing from the lake.²⁶

Under the Administrative Procedure Act,²⁷ the Conservation Council, the named respondent, sued the Corps, arguing that the Corps's section 404 fill permit was unlawful.²⁸ The State of Alaska and Coeur Alaska intervened on behalf of the Corps and obtained summary judgment from the United States District Court for the District of Alaska.²⁹ The United States Court of Appeals for the Ninth Circuit reversed the district court's decision and vacated the Corps's permit.³⁰

The Conservation Council's central argument was that the EPA *and not the Corps* had authority to issue a permit to Coeur Alaska to discharge fill material into Lower Slate Lake.³¹ The Conservation Council argued that the overall goal of the Clean Water Act was to eliminate the discharge of pollution into navigable waters.³² Section 306 of the Clean Water Act required the EPA to "adopt . . . stringent effluent limitations—called standards of performance—for new sources" that are discharged into navigable waters.³³ Considering fill material from the Kensington mine to be a new source, the Conservation Council argued that section 306(e) of the Clean Water Act gave the EPA exclusive permitting authority without exception.³⁴ The conservation group did not deny that the Corps had authority to issue a permit for the disposal

not agree that depositing tailings into the lake was the best option, but it nonetheless agreed to allow the Corps's permit. *Id.*

26. *Id.* Although the Corps has authority under section 404 of the Clean Water Act (Act) to issue permits for the discharge of "fill material into the navigable waters," 33 U.S.C. § 1344(a) (2006), the EPA has authority under section 402 to issue permits for the "discharge of any pollutant." 33 U.S.C. § 1342(a)(1) (2006). Both the EPA and the Corps have defined fill material to include mine tailings. *Coeur Alaska, Inc.*, 129 S. Ct. at 2464. Despite agreement on the definition of fill material, a natural question arises as to which agency has the final word regarding what should and should not be dumped in our nation's waters.

27. 5 U.S.C. § 706 (2006). The Administrative Procedure Act gives the reviewing court authority to "determine the meaning or applicability of the terms of an agency action." *Id.* The reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be—arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A).

28. *Coeur Alaska, Inc.*, 129 S. Ct. at 2463 (citing 5 U.S.C. § 706(2)(A)). Two other environmental groups, the Sierra Club and Lynn Canal Conservation, joined the Conservation Council's suit. *Id.*

29. *Id.* at 2466.

30. *Id.*

31. Brief of Respondents at 23, *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458 (2009) (Nos. 07-984, 07-990).

32. *Id.* at 5 (citing 33 U.S.C. 1251(a)(1) (2006)). One of the Conservation Council's other concerns was that aquatic life would die from Coeur Alaska's discharge into Lower Slate Lake. *Coeur Alaska, Inc.*, 129 S. Ct. at 2465. Although both parties agreed that Coeur Alaska's discharges would kill all of the lake's fish, there was disagreement over whether the lake would ever be inhabitable again. *Id.* at 2480 (Ginsburg, J., dissenting). Coeur Alaska has planned to restock the lake with native fish upon completion of mining activities. Coeur Alaska, Kensington Goldmine: Environment, <http://www.kensingtongold.com/environment.html> (last visited Apr. 3, 2010). The Conservation Council was skeptical of the plan, however, and raised concerns about the potential permanency of the lake's toxicity level. *See Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 486 F.3d 638, 642 (9th Cir. 2007), *vacated*, 129 S. Ct. 2458 (2009).

33. Brief of Respondents, *supra* note 31, at 6 (footnote omitted).

34. *Id.* at 29-40.

of mine tailings, but argued that when those tailings contain pollutants, the EPA has exclusive permitting authority.³⁵ Coeur Alaska counter-argued that two sections of the Clean Water Act give the Corps the exclusive authority to issue permits for fill material: (1) section 404, which authorizes the Corps to permit the discharge of fill material; and (2) section 402, the section granting the EPA authority to issue permits for “any pollutant,” which expressly provides an exception for permits issued under section 404.³⁶

A. *The United States District Court’s Decision*

In granting summary judgment for the defendants, the district court held that the Corps correctly interpreted the extent of its authority under section 404 of the Clean Water Act.³⁷ The district court noted that although the Conservation Council’s argument was mostly sound, it ignored certain statements that the EPA and the Corps made when they promulgated the new definitions of “fill material” and “discharge of fill material” in 2002.³⁸ The agencies specifically stated that anything having the “effect of fill when discharged will be regulated as ‘fill material.’”³⁹ In other words, even though regulating pollution in U.S. waters is fundamentally a function of the Clean Water Act, the agencies indicated that the Corps had authority to issue fill material permits, even if the fill material contained pollutants.⁴⁰ Relying on *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁴¹ the district court held that the Corps’s interpretation of its permitting authority was not contrary to the agencies’ intent when they promulgated the definition of fill material.⁴² Accordingly, the court upheld the Corps’s interpretation and granted summary judgment for the defendants.⁴³

B. *The Ninth Circuit Court of Appeals’ Decision*

The Conservation Council quickly appealed the grant of summary judgment and asked the United States Court of Appeals for the Ninth Circuit to issue immediately an injunction prohibiting Coeur Alaska from mining; the Ninth Circuit granted the injunction and accepted the

35. *Id.* at 27.

36. *Coeur Alaska, Inc.*, 129 S. Ct. at 2463.

37. *Se. Alaska Conservation Council v. U.S. Army Corps of Eng’rs*, No. 1:05-cv-00012-JKS, 2006 WL 5483382 at *5 (D. Alaska Aug. 3, 2006).

38. *Id.*

39. *Id.* (citing Final Revisions to the Clean Water Act Regulatory Definitions of “Fill Material” and “Discharge of Fill Material,” 67 Fed. Reg. 31,129, 31,135 (May 9, 2002) (codified at 40 C.F.R. pt. 232)).

40. *See id.*

41. 467 U.S. 837 (1984); *see infra* Part III.E.

42. *Se. Alaska Conservation Council*, 2006 WL 5483382 at *5.

43. *Id.* at *6.

appeal.⁴⁴ The Ninth Circuit held that the effluent limitation language of section 306 gave the EPA exclusive authority to permit Coeur Alaska's discharge of mine waste as a new source and clearly prohibited the Corps from regulating the discharge as fill material under section 404.⁴⁵ The court viewed the section 404 permitting scheme as a "limited permit program that applies only to . . . fill material, not to the discharge of pollutants from [gold mines]."⁴⁶ Additionally, the court reasoned that because section 301(a) prohibits all discharges that do not comply with sections 301, 306, 402, and 404, the Clean Water Act was unambiguous.⁴⁷ Specifically, the connector "and" instead of "or" showed that Congress intended the EPA effluent limitations guidelines under section 306 to restrict the Corps's authority under section 404, even if section 404 would otherwise allow a permit.⁴⁸ In other words, in the Ninth Circuit's view, if a discharge does not comply with all of the enumerated sections, it cannot be permitted.⁴⁹

Coeur Alaska argued that the effluent limitations in section 306 did not apply to the Corps's fill permit authority in section 404 because unlike section 402 section 404 contained no explicit requirement to comply with effluent limitations.⁵⁰ The Ninth Circuit rejected that argument.⁵¹ The court considered this a weak argument because it required a negative inference and because it would render the effluent limitations of section 306 useless.⁵² The court explained that Congress failed to provide for section 306 effluent limitations in section 404 because Congress intended for section 306 to govern all discharges subject to effluent limitations guidelines, meaning that section 404 is inapplicable when section 306 regulates the discharge.⁵³

Looking next to the Corps's and the EPA's regulations, the court reasoned that "[t]he agencies could not have been more clear" in defining how they planned to regulate effluent limitations in conjunction with fill material.⁵⁴ In the Ninth Circuit's view, when the agencies promulgated their joint definition of fill material in 2002, they left no doubt that new-source pollutants could not be regulated as fill material.⁵⁵ Furthermore, the court analyzed records of the agencies' interaction with Coeur Alaska over the past twenty years and determined that neither

44. *Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs.*, 486 F.3d 638, 643 (9th Cir. 2007), *vacated*, 129 S. Ct. 2458 (2009).

45. *See id.* at 646.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 647.

53. *Id.*

54. *Id.* at 653.

55. *Id.* at 651.

the Corps nor the EPA thought that the Corps had authority to issue the permit until the Corps granted the section 404 permit to Coeur Alaska.⁵⁶

Coeur Alaska appealed the Ninth Circuit's decision to the U.S. Supreme Court, which granted certiorari on two questions: (1) whether the Clean Water Act gave the Corps rather than the EPA authority to issue a permit for the discharge of mining waste into navigable waters; and (2) whether the Corps's permit violated the Clean Water Act's prohibition against discharging certain wastes into navigable waters.⁵⁷

III. BACKGROUND

The central issue in *Coeur Alaska, Inc.* was whether the effluent reduction provisions of sections 301 and 306 of the Clean Water Act⁵⁸ prohibit the discharge of fill material that contains pollutants, or whether section 404, which has less stringent standards, governs any material constituting fill. The effect of allowing section 404 to govern is that the Corps will be able to issue permits allowing the discharge of pollutants into navigable waters. This Part discusses the background of the two permitting systems at issue in *Coeur Alaska, Inc.*—the section 402 pollutant system administered by the EPA and the section 404 fill material system administered by the Corps. In addition, this Part discusses the source of the EPA's and the Corps's authority, the terminology that the *Coeur Alaska, Inc.* Court considered important to its decision, and finally, the cases on which the Court relied in order to establish a framework for interpreting ambiguous regulations.

A. Permitting Under the Clean Water Act

The United States first began regulating navigable waters under the Rivers and Harbors Act of 1899, also known as the Refuse Act.⁵⁹ Al-

56. *Id.* at 653. The court also considered 40 C.F.R. § 440.104(b)(1) (2009), a regulation that the EPA promulgated specifying that froth-flotation gold mines could not discharge process wastewater into navigable waters. *Id.* In the court's view, the specificity of this regulation was helpful in resolving the dispute over whether section 306 prohibited the discharge of fill material containing pollutants. *Id.* at 654. A rudimentary principle of regulatory interpretation is that a newer regulation covering a broader scope (for example, fill material) does not overrule a specific regulation (for example, on froth-flotation gold mining). *Id.*

57. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2463 (2009).

58. Section 301 provides effluent limitations, and section 306 provides new source performance standards. Because a performance standard is essentially an effluent limitation, the two statutes have the same effect. *See* 33 U.S.C. § 1362(11) (2006); *see also Se. Alaska Conservation Council*, 486 F.3d at 645 n.8.

59. JOEL M. GROSS & LYNN DODGE, CLEAN WATER ACT § 2.1, at 5 (2005). Although the Refuse Act was eventually used to combat pollution, Congress initially enacted it to enhance trade by keeping rivers clear for navigation. Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 729 (2006). Somewhat ironically, the industries that are now highly regulated by environmental laws, such as the coal mining industry, were the instigators of federal environmental legislation because those industries could not afford to be subject to multiple states' environmental laws. *Id.* at 730. As a result, the EPA now has virtually unreserved authority to regulate pollution. *See id.* at 731.

though the initial goal of this act was to enhance navigation through our nation's waterways, the Government eventually used the Refuse Act to remedy the problems associated with water pollution.⁶⁰ In a more direct effort to control water pollution, Congress enacted the Federal Water Pollution Control Act (FWPCA) in 1948.⁶¹ Increased environmental consciousness prompted Congress to amend the FWPCA in 1972, creating what is now called the Clean Water Act.⁶²

The Clean Water Act gave the Federal Government more power to control water pollution.⁶³ Congress enumerated seven national goals for the restoration and the control of U.S. water bodies in the 1972 Amendments, including the elimination of "the discharge of pollutants into the navigable waters" by 1985.⁶⁴ To achieve these goals, Congress created a permitting system to control water pollution.⁶⁵ The act makes "the discharge of any pollutant [into United States waters] by any person . . . unlawful," unless authorized by a permit.⁶⁶ Although there are four types of permits, two types are particularly important: permits granted under the National Pollutant Discharge Elimination System (NPDES), administered by the EPA under section 402, and permits for fill material, administered by the Corps under section 404.⁶⁷

The NPDES, created by section 402 of the Clean Water Act, provides the EPA with broad regulatory authority. The EPA has the authority to "issue a permit for the discharge of any pollutant," with few exceptions.⁶⁸ The Act allows the states to create and implement programs in accordance with the law, subject to EPA approval, and although most states choose this option, some states opt for direct EPA regulation.⁶⁹ The NPDES prohibits the disposal of pollutants into navi-

60. GROSS & DODGE, *supra* note 59, § 2.1, at 5.

61. *Id.*

62. *Id.* § 2.1, at 6-7 (citing The Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified at 33 U.S.C. § 1251 (2006)), reprinted in SENATE COMM. ON PUB. WORKS, 92D CONG., LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 3674 (1972)). An example of an incident that helped spur the increased regulation is the 1969 Cuyahoga River fire. See Michael Scott, *Cuyahoga River Fire 40 Years Ago Ignited an Ongoing Cleanup Campaign*, THE PLAIN DEALER, June 22, 2009, available at http://www.cleveland.com/science/index.ssf/2009/06/cuyahoga_river_fire_40_years_a.html. The Cuyahoga River, which runs through Cleveland, Ohio, caught fire because companies in the heavily industrialized city were dumping oil and debris into the river. *Id.*

63. 33 U.S.C. § 1251(d) (2006). The 1972 Amendments gave the EPA administrative authority. *Id.*

64. *Id.* § 1251(a)(1).

65. See *id.* § 1251(b).

66. 33 U.S.C. § 1311(a) (2006).

The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

33 U.S.C. § 1362(12) (2006).

67. GROSS & DODGE, *supra* note 59, at 2. The remaining two permitting systems deal with polluted storm water and other non-point source pollution. *Id.* at 3.

68. 33 U.S.C. § 1342(a)(1) (2006).

69. GROSS & DODGE, *supra* note 59, § 4.2.1, at 27.

gable waters from certain “point sources.”⁷⁰ A “point source” is virtually any identifiable source that discharges a pollutant into a navigable water body.⁷¹ Point source dischargers apply for permits from either the relevant EPA-approved state authority or from the regional EPA office, either of which then reviews the application and determines if it meets the appropriate discharge standards.⁷²

Section 306 of the Clean Water Act authorizes the EPA to create new source performance standards for industries such as mining.⁷³ New source performance standards govern pollution sources that are built after initial pollution source limitations are established.⁷⁴ The EPA promulgated a new source performance standard for froth-flotation gold mining in 1982.⁷⁵ The pertinent EPA regulations state that “there shall be no discharge of process wastewater to navigable waters from [froth-flotation gold mines].”⁷⁶

The most significant exception to the NPDES permitting system is the Corps’s section 404 permitting authority. Section 404 of the Clean Water Act, the original purpose of which was to protect wetlands from further industrial encroachment, allows the Corps to regulate discharge of fill material into navigable waters.⁷⁷ Currently, fill material is defined

70. See 33 U.S.C. § 1311(b)(1)(A). Pollutants include several broad categories. For instance, heat, municipal waste, chemical waste, and biological materials are among the categories prohibited. 33 U.S.C. § 1362(6).

71. 33 U.S.C. § 1362(14). An individual person cannot be a point source. GROSS & DODGE, *supra* note 59, § 3.2.4, at 21. In *United States v. Plaza Health Laboratories, Inc.*, 3 F.3d 643 (2d Cir. 1993), the United States Court of Appeals for the Second Circuit reversed a defendant’s conviction of knowingly dumping pollutants (vials of human blood infected with hepatitis-B) into navigable waters in violation of the Clean Water Act because the Act was ambiguous and because the rule of lenity favored resolving the dispute in the defendant’s favor. *Id.* at 649. This controversial decision produced much commentary in the following years but has not been overturned. GROSS & DODGE, *supra* note 59, § 3.2.4, at 21 n.34 (citing Ann M. Gabigian, *Medical Waste, a Loaded Gun on the Verge of Firing*; *United States v. Plaza Health Labs*, 13 PACE ENVTL. L. REV. 1063 (1996)).

72. GROSS & DODGE, *supra* note 59, § 4.3, at 30. Before granting a permit, the EPA holds a public comment period of thirty days. *Id.* at 31. If the EPA grants a permit, the discharger is required to submit discharge monitoring reports signed under penalty of perjury to show its compliance. *Id.* Most permits are effective for five years, at which point a revised permit is necessary. NICHOLAS A. ASHFORD & CHARLES C. CALDART, ENVIRONMENTAL LAW, POLICY, AND ECONOMICS: RECLAIMING THE ENVIRONMENTAL AGENDA 659 (2008).

73. 33 U.S.C. § 1316(b) (2006). A “new source” simply means a polluting point source that was built after the initially promulgated regulations. See *id.* § 1316(a)(2). The ability to promulgate new source performance standards is a powerful tool for the EPA because it can require state-of-the-art effluent limitation technology. ENVIRONMENTAL LAW HANDBOOK 338 (Thomas F.P. Sullivan ed., 20th ed. 2009). Moreover, new sources are subject to the “best available demonstrated control technology,” which allows the EPA to eliminate pollutant discharge entirely under some circumstances. *Id.*

74. 33 U.S.C. § 1316(b).

75. See 40 C.F.R. § 440.104(b)(1) (2009).

76. *Id.* The parties in *Coeur Alaska, Inc.* agreed that the term “process wastewater” included solid wastes like the material that the Corps permitted Coeur Alaska to discharge into Lower Slate Lake (30% was solid waste). *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2470-71 (2009). The parties in *Coeur Alaska, Inc.* agreed that the EPA had the authority to promulgate the new source performance standard for froth-flotation mines; their dispute was in regard to whether the Corps’s section 404 authority allowed it to issue a permit for fill material notwithstanding the EPA’s new source performance standard. *Id.* at 2471.

77. GROSS & DODGE, *supra* note 59, § 8.1, at 75-7633; see also U.S.C. § 1344(a) (2006). Environmental groups have historically viewed the Corps’s section 404 permitting authority as an alterna-

as “material [that is] placed in waters of the United States where the material has the effect of . . . [c]hanging the bottom elevation of any portion of a water of the United States.”⁷⁸ In its regulations, one example of fill material that the Corps lists is “overburden from mining.”⁷⁹ The Corps issues two types of section 404 permits—individual and general. Individual permits are required for projects that will likely have a major impact on wetlands, whereas general permits are required for projects that will likely have a negligible impact on wetlands.⁸⁰

Before issuing an individual permit, the Corps conducts a public-interest review to determine the likely effect that a proposed activity will have on the public.⁸¹ The Corps balances the probable effect on the environment against the benefits that are expected to result from the proposed activity.⁸² For example, given a mining proposal, the Corps would balance the need for the mineral against the “national concern for . . . protection . . . of important resources.”⁸³ The Corps must also adhere to the EPA’s section 404(b)(1) guidelines, which allow the EPA to veto any Corps permit that the EPA determines will have an “unacceptable adverse effect.”⁸⁴ The EPA seldom uses its veto power.⁸⁵ The EPA has, however, issued mandatory guidelines to the Corps for section 404 permitting.⁸⁶

tive environmental protection program, advocating that the Corps has authority only when the EPA has no authority under section 402. See Nathaniel Browand, *Shifting the Boundary Between the Sections 402 and 404 Permitting Programs by Expanding the Definition of Fill Material*, 31 B.C. ENVTL. AFF. L. REV. 617, 617-18 (2004). When the Clean Water Act was enacted, the Corps had authority to regulate shipping channels under the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403 (2006). See *id.* Because the Clean Water Act granted extensive pollutant regulation authority to the EPA, Congress added section 404 as an exception to the EPA’s pollutant regulation authority. *Id.* at 619-20.

78. 33 C.F.R. § 323.2(e)(1), (e)(1)(ii) (2009). The definition at 33 C.F.R. § 323.2 is the Corps’s definition. The EPA has promulgated an identical definition at 40 C.F.R. § 232.2 (2009).

79. 33 C.F.R. § 323.2(e)(2).

80. GROSS & DODGE, *supra* note 59, § 8.4.2, at 83. Section 404(e) of the Clean Water Act allows the Corps to issue general permits on a “[s]tate, regional, or nationwide basis” for similar activities that will have a “minimal cumulative adverse effect on the environment.” 33 U.S.C. § 1344(e)(1). General permits are subject to the same guidelines for approval as individual permits, but apply to more routine activities with less potential for environmental impact. *Id.* § 1344(e)(2).

81. 33 C.F.R. § 320.4(a)(1) (2009).

82. GROSS & DODGE, *supra* note 59, § 8.4.2, at 84 (“According to the regulations, a permit will issue if (a) no practicable alternative exists; (b) no significant adverse impacts on aquatic resources will result; (c) all reasonable mitigation measures are employed; and (d) the proposed project does not violate other statutes.”).

83. 33 C.F.R. § 320.4(a)(1).

84. 33 U.S.C. § 1344(c).

85. See generally GEORGE C. COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 27:2 (2d ed. 2009). The EPA has used its veto power on only thirteen occasions. PERCIVAL ET AL., *supra* note 11, at 759. The EPA vetoed its first permit in sixteen years in August 2008. *Id.* (citing Final Determination of the Assistant Administrator for Water Pursuant to Section 404(c) of the Clean Water Act Concerning the Proposed Yazoo Backwater Area Pumps Project in Issaquena County, MS, 73 Fed. Reg. 54,398 (Sept. 19, 2008), in which the EPA reasoned that potential degradation of “critical ecological functions” steered its decision to veto the Yazoo Backwater Area Pumps Project that was created to prevent farm land flooding).

86. 40 C.F.R. § 230.10 (2009). Those guidelines require the Corps to evaluate four areas, including: whether there are practical alternatives, whether and to what extent the project will impact wildlife, whether the project will significantly degrade U.S. waters, and whether appropriate steps

B. The 2002 Definition of “Fill Material”

The definition of “fill material” is crucial in determining whether a discharge should be permitted under the EPA’s NPDES (section 402) authority or under the Corps’s section 404 authority. Section 404 was created in 1975, and the Corps amended the definition of fill material in 1977.⁸⁷ Under the original definition, discharging “primarily to dispose of waste” had to be permitted under the EPA’s NPDES system.⁸⁸ In its 1977 rules and regulations, the Corps made clear that even though a proposed discharge technically was within its pre-1977 definition of fill material, the NPDES permitting process should not be circumvented.⁸⁹ Thus, from 1977 until a change in the definition in 2002, the NPDES permitting process clearly applied to discharges of waste into U.S. waters regardless of whether section 404 also applied.⁹⁰

In response to a proposal to clarify the section 404 permitting statute and to develop a consistent definition, the agencies changed the definition of fill material in 2002.⁹¹ The agencies significantly re-defined fill material, limiting the EPA’s authority over fill permits. The Bush Administration promulgated the 2002 definition of fill material, which is

have been taken to minimize the effect on the aquatic ecosystem. *Id.* § 230.10(a)-(d). States can enact stricter procedural requirements, which means that a permit may not be issued even if it fully complies with the guidelines. *Id.* § 230.10. Furthermore, “[a]lthough all requirements in § 230.10 must be met, the compliance evaluation procedures will vary to reflect the seriousness of the potential for adverse impacts on the aquatic ecosystems posed by specific dredged or fill material discharge activities.” *Id.* Cost is a factor in determining whether an alternative is “practical,” but it is not the deciding factor. PERCIVAL ET AL., *supra* note 11, at 758. Moreover, “water dependent” projects are approved more easily than non-water-dependent projects. *Id.* For instance, a permit for a boat ramp would face less scrutiny than a permit to build a shopping mall in wetlands. *Id.* For non-water-dependent projects, the guidelines require the Corps to presume that there is a better alternative and place the burden of proving otherwise on the developer. *Id.*

87. See Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37,122, 37,130 (July 19, 1977).

88. *Id.* Before 2002, the Corps defined fill material as follows:
any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody [sic]. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the Clean Water Act.
Brief of Plaintiff-Appellee at 5, *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425 (4th Cir. 2003) (Nos. 02-1736(L), 02-1737).

89. Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. at 37,130.

90. This “include[d] the disposal of waste materials such as sludge, garbage, trash, and debris in water.” *Id.* The Corps also stated that it would not “take any final action on the Section 404 permit application until a decision on the NPDES permit [had] been made.” *Id.*

91. Final Revisions to the Clean Water Act Regulatory Definitions of “Fill Material” and “Discharge of Fill Material,” 67 Fed. Reg. 31,129, 31,130 (May 9, 2002) (codified at 40 C.F.R. pt. 232). Before promulgating the 2002 definition of fill material, both the Corps and the EPA had gone through several different definitions, but had never had the same definition. See Browand, *supra* note 77, at 624. The Corps initially adopted a “primary purpose test” that classified fill material based on its use. *Id.* at 625. Using this definition, the Corps was highly deferential to the EPA and exercised its authority only when a proposed discharge was to be used for fill and when the EPA granted a section 402 permit. See *id.* Despite entering into a memorandum of agreement in 1986, the agencies still confused the courts about how to determine whether a discharge should be regulated as fill material rather than as a pollutant. *Id.* at 628-29. Circuits were split on whether a discharge that had the effect of fill could be permitted by section 404 even if the primary purpose was for something else. *Id.* at 629-30. To solve the circuit split, the agencies proposed a joint, effects-based definition in 2000 that eventually morphed into the 2002 fill rule. See *id.* at 631-32.

still in effect today, in response to several cases from the United States Court of Appeals for the Fourth Circuit that had the potential to prevent coal mining companies from seeking fill material permits from the Corps.⁹² Under the 2002 definition, the Corps may regulate as fill material anything that raises the elevation of a water body.⁹³ This new definition broadened the scope of the definition of fill material.⁹⁴ Unlike the previous definition, the 2002 definition does not defer to section 402 in the event that a discharge constituting fill material also contains pollutants regulated by section 402.⁹⁵ Moreover, EPA regulations specify that “[d]ischarges of . . . fill material into waters of the United States which are regulated under section 404 . . . do not require NPDES permits.”⁹⁶ Despite the seeming clarity of these regulations, a conflict of interpretation arises when a discharger seeks to dump fill material containing pollutants into U.S. waters.⁹⁷ The Fourth Circuit has rendered a full analysis of the issue.

C. *The Rivenburgh Case*

In *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*,⁹⁸ the Fourth Circuit Court of Appeals faced an issue similar to that faced by the U.S. Supreme Court in *Coeur Alaska, Inc.*⁹⁹ In *Rivenburgh*, a nonprofit environmental group (Kentuckians) sued the Corps for issuing a section 404 permit to a coal mining company that proposed to fill 6.3 miles of streams with mine “overburden.”¹⁰⁰ Kentuckians’s suit challenged the Corps’s authority to issue the permit.¹⁰¹ In an argument similar to the Conservation Council’s argument in *Coeur Alaska, Inc.*, Ken-

92. See Mark Baller & Leor Joseph Pantilat, Comment, *Defenders of Appalachia: The Campaign to Eliminate Mountaintop Removal Coal Mining and the Role of Public Justice*, 37 ENVTL. L. 629, 644-46 (2007). The agencies changed the definition of fill material in 2002 to the following: “material placed in waters of the United States where the material has the effect of . . . [c]hanging the bottom elevation of any portion of a water of the United States . . . [including] overburden from mining or other excavation activities.” 33 C.F.R. § 323.2(e)(1)-(2) (2009). The new definition of fill material essentially changed the “fill rule” from a primary purpose test to an effects-based test. See Sandra Satak, Note, *Southeast Alaska Conservation Council v. United States Army Corps of Engineers: The Ninth Circuit Restricts the Corps’ Authority to Permit Discharge of Fill Material Under Section 404 of the Clean Water Act*, 21 TUL. ENVTL. L.J. 151, 156-58 (2007). Importantly, the 2002 fill rule also removed the “broad waste exclusion” and narrowed the category of waste to only trash or garbage. *Id.* at 157.

93. *Id.*

94. See 33 C.F.R. § 323.2(e)(1)-(2).

95. *Id.*

96. 40 C.F.R. § 122.3 (2009).

97. See *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458 (2009). The *Coeur Alaska, Inc.* Court reasoned that these regulations were ambiguous because 40 C.F.R. § 122.3 “merely states that a permit for [a section 404] discharge cannot be issued by the EPA,” and 33 C.F.R. § 323.2(e) fails to explain whether new source performance standards apply to section 404 permits. *Coeur Alaska, Inc.*, 129 S. Ct. at 2472.

98. 317 F.3d 425 (4th Cir. 2003).

99. See *id.* at 431.

100. *Id.* at 430.

101. *Id.* at 431.

tuckians argued that the definition of fill material did not encompass mine waste that was prohibited from discharge under the effluent limitations of section 301 and that the EPA had permitting authority under section 402.¹⁰² A few days before the district court could reach a decision, the EPA and the Corps changed the definition of “fill material” to its current version.¹⁰³

The district court held that the change in definition was beyond the agencies’ power, and it prohibited the Corps from issuing a section 404 permit.¹⁰⁴ The district court’s injunction, however, was based on its interpretation of the pre-2002 definition of fill material.¹⁰⁵ It held that fill material meant something put in water for a beneficial purpose, not including mine waste.¹⁰⁶ The Fourth Circuit did not decide the applicability of the 2002 definition of fill material because the parties did not argue over its validity. But the court disagreed with the district court’s decision, finding that the statute authorizing the agencies’ definition of fill material did not indicate that it had to be limited to a beneficial use.¹⁰⁷ Moreover, the Fourth Circuit held that the Corps’s interpretation of its 1977 regulations defining fill material was a permissible construction of the Clean Water Act.¹⁰⁸

In the Fourth Circuit’s view, the district court overstepped its bounds when it analyzed the 2002 re-definition of fill material, which was outside the scope of the questions presented.¹⁰⁹ Although the district court judge apparently deplored the policy created by the 2002 definition of fill material,¹¹⁰ the parties did not argue over its validity, so the district court could not enjoin the Corps from taking action under the new definition.¹¹¹ *Rivenburgh* is important not only as a precursor to future legal battles over the 2002 definition of fill material but also as an illustration of the context in which the definition was promulgated.

D. U.S. Waters Covered by the Clean Water Act

The Clean Water Act covers navigable waters, which are defined as

102. See Brief of Plaintiff-Appellee, *supra* note 88, at 21-30.

103. *Rivenburgh*, 317 F.3d at 438.

104. *Id.* at 430.

105. See *id.* at 433.

106. *Id.*

107. *Id.* at 441-42.

108. *Id.* at 447-48.

109. *Id.* at 438.

110. *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 206 F. Supp. 2d 782, 795 (S.D. W. Va. 2002) (clarifying the extent of the injunction issued previously in *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 204 F. Supp. 2d 927 (S.D. W. Va. 2002)). In his clarifying opinion, the district court judge opined that “[i]t would be unreasonable and in stark variance with [Clean Water Act] policy to allow the nation’s waters to be filled and destroyed solely to dispose of waste.” *Rivenburgh*, 206 F. Supp. 2d at 795.

111. *Rivenburgh*, 317 F.3d at 433.

“the waters of the United States.”¹¹² The Corps has added significantly to this definition through its regulations, and the Supreme Court has addressed the definition on several occasions. For example, the Corps has broadened the scope of the waters covered by the Clean Water Act by including within the definition of navigable waters “waters that are navigable by watercraft in the traditional sense, waters that are susceptible to navigation, waters subject to the ebb and flow of the tides, and any waters that could affect interstate commerce.”¹¹³ The Corps has also included in the definition of navigable waters tributaries and other non-navigable waters that affect interstate commerce, which has stretched the Corps’s jurisdiction to its constitutional limits.¹¹⁴ Additionally, the Corps, in 1986, promulgated the so-called migratory bird rule, which stated that isolated water bodies that were not next to tributaries or other water bodies could be regulated if migratory birds that cross state lines used the isolated water bodies.¹¹⁵ The rule was subsequently challenged and rejected by the U.S. Supreme Court in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*.¹¹⁶

Since 1985, the Court has decided two other cases, in addition to *SWANCC*, that are instructive to an understanding of the definition of navigable waters.¹¹⁷ In the 1985 case *United States v. Riverside Bayview Homes, Inc.*,¹¹⁸ the Court had held that the Corps’s interpretation was reasonable—waters bordering, but not actually joining, navigable waters were subject to the Corps’s regulation.¹¹⁹ In *SWANCC*, the Court read *Riverside* narrowly and held that the Corps’s jurisdiction could not extend to “ponds that are *not* adjacent to open water” simply because migratory birds use the pond.¹²⁰ The Court reasoned that although it had previously stretched the term “navigable” to include non-navigable waters that are next to navigable waters, it could not ignore

112. 33 U.S.C. § 1362(7) (2006). The parties in *Coeur Alaska, Inc.* agreed that Lower Slate Lake and the stream flowing from it were navigable waters subject to the Clean Water Act. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2464 (2009). The term must be discussed in order to understand how the Court’s decision in *Coeur Alaska, Inc.* recently narrowed the Clean Water Act’s reach.

113. GROSS & DODGE, *supra* note 59, § 8.3.3, at 80 (citing 33 C.F.R. §§ 328-29 (2009)).

114. Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31,320, 31,320 (July 25, 1975).

115. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) (codified at 33 C.F.R. pts. 320-30).

116. 531 U.S. 159 (2001) (hereinafter *SWANCC*).

117. See *Rapanos v. United States*, 547 U.S. 715 (2006); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

118. 474 U.S. 121 (1985).

119. *Id.* at 135. The Court reasoned that the Corps’s interpretation was reasonable partly because of the difficult task of defining where navigable waters begin and end and partly because of the Corps’s “technical expertise.” *Id.* at 134. Furthermore, the Court deferred to the Corps’s determination that protecting wetlands adjacent to actually navigable waters was important to protecting overall water quality. *Id.* at 133.

120. *SWANCC*, 531 U.S. at 168.

the term entirely.¹²¹ The Court continued its retreat from its broad interpretation of navigable waters in *Rapanos v. United States*.¹²² That case resulted in a four-one-four decision and hinged on Justice Kennedy's separate concurrence, ultimately creating further uncertainty about which waters fall under the Corps's jurisdiction.¹²³

Even setting *Rapanos* aside, many environmentalists argue that the Court's decision in *SWANCC* allowed the Bush Administration to repeal effectively many of the protections that the Clean Water Act previously afforded.¹²⁴ One could similarly argue that the *SWANCC* decision provided a starting point for the further weakening of the Clean Water Act, as evidenced by the agencies' 2002 re-definition of fill material.¹²⁵

E. Interpreting the Clean Water Act

Despite wavering on its interpretation of the meaning of "navigable waters," the Court's interpretive method of agency regulations has been relatively consistent. The Court applies what has been dubbed "*Chevron* deference" when reviewing an agency's interpretation of its governing statute.¹²⁶ *Chevron* deference is based on *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹²⁷ in which the Court devised

121. *Id.* at 172. The lower courts' interpretation of *SWANCC* has varied. GROSS & DODGE, *supra* note 59, § 8.3.3, at 81. Some courts have held that *SWANCC* strictly limits the Corps's jurisdiction to clearly adjacent waters, but others have held that the Corps's jurisdiction extends to non-adjacent waters that have a "hydrological connection" to actually navigable waters. *Id.*

122. 547 U.S. 715 (2006).

123. *Id.* Writing for the plurality, Justice Scalia attempted to limit the definition of navigable waters to permanent, continuous waters with a surface connection to actually navigable waters, whereas Justice Kennedy, in his concurring opinion, disagreed with Justice Scalia. Kevin Frankel, *A Flood of Uncertainty: Rapanos and Carabell*, 32 COLUM. J. ENVTL. L. 141, 151-52 (2007). Because Justice Kennedy disagreed with every pertinent point in Justice Scalia's plurality opinion, lower courts are left without a clear indication of what the law is. *See id.* at 152. Justice Kennedy is the clear swing vote on environmental issues, so his concurrence is in some ways the most important opinion in *Rapanos*. *Id.* at 159. As a result of the Court's confusing language and division in *SWANCC* and *Rapanos*, some companies are exploiting the disorder in the state of the law, claiming that the Clean Water Act no longer applies to them. *See* Charles Duhigg & Janet Roberts, *Rulings Restrict Clean Water Act, Foiling E.P.A.*, N.Y. TIMES, Feb. 28, 2010, available at <http://www.nytimes.com/2010/03/01/us/01water.html?pagewanted=print>. Furthermore, "[c]ompanies that have spilled oil, carcinogens and dangerous bacteria into lakes, rivers and other waters are not being prosecuted, according to [the EPA]." *Id.*

124. NATIONAL WILDLIFE FEDERATION, RECKLESS ABANDON: HOW THE BUSH ADMINISTRATION IS EXPOSING AMERICA'S WATERS TO HARM 2 (2004), available at <http://www.nwf.org/wildlife/pdfs/RecklessAbandon.pdf>.

125. *See* John D. Ostergren, Note, *SWANCC in Duck Country: Will Court-Ordered Devolution Fill the Prairie Potholes?*, 22 STAN. ENVTL. L.J. 381, 388-89 (2003). Mr. Ostergren wisely noted that the Corps's fill material jurisdiction extended to only navigable waters and that if certain wetlands were no longer "navigable," then Clean Water Act protections would be weakened. *Id.* In the midst of the *SWANCC* decision, the Corps and the EPA were quietly working to weaken the Clean Water Act further by changing the definition of fill material. *See* Proposed Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 65 Fed. Reg. 21,292, 21,292 (Apr. 20, 2000) (codified at 40 C.F.R. pt. 232).

126. ASHFORD & CALDART, *supra* note 72, at 258.

127. 467 U.S. 837 (1984).

a two-part test to interpret an unclear phrase in the Clean Air Act.¹²⁸ Simply put, if Congress's intent is unambiguous, then courts give no deference to agency interpretation, but if Congress's intent is unclear from the statute's text, then courts give deference to a permissible agency interpretation.¹²⁹ Thus, courts will defer to the agency's interpretation of a legislative mandate like the Clean Water Act only if Congress has not spoken directly on the matter and if the agency's interpretation is permissible.

In determining Congress's intent, the Court will generally consider three sources. First, the Court may examine prior drafts of the statute to analyze what Congress intentionally omitted from the statute, which may lead to clarification of what is included in the statute.¹³⁰ Second, reports from the House or Senate drafting committees often contain information about legislative intent.¹³¹ Third, the Court may examine the record of legislative debate on the law in order to glean Congress's intent, but records of debate are relatively unpersuasive to the Court.¹³² If neither the statute itself nor the legislative history clarifies an ambiguity, the Court will give deference to a reasonable agency interpretation as long as that "interpretation does not conflict with the language, structure, or legislative history of the statute."¹³³

IV. U.S. SUPREME COURT'S DECISION

The Court used *Chevron* to analyze the statutory and regulatory ambiguities at issue in *Coeur Alaska, Inc.* This Part first details the parties' arguments in *Coeur Alaska, Inc.* Next, this Part explains the Court's decision, which emphasized that the Corps's fill permit authority was not subject to the EPA's pollutant limitations and which relied on an EPA memorandum to determine that the Corps's fill permit did not violate new source performance standards. Finally, this Part discusses the concurring and dissenting opinions.

128. *Id.* at 842-43.

129. *Id.* The *Chevron* Court laid out the following interpretive method:

When a court reviews an agency's construction of the statute it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however . . . Congress has not directly addressed the . . . question . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id.

130. ASHFORD & CALDART, *supra* note 72, at 257.

131. *Id.*

132. *Id.*

133. *Id.*

A. The Conservation Council's Argument

The Conservation Council made two basic arguments. First, it contended that the Corps did not have authority to issue a permit to Coeur Alaska to discharge mine waste into Lower Slate Lake.¹³⁴ Second, the group argued that discharging mine waste into Lower Slate Lake would be illegal regardless of which agency issued a permit because the effluent limitations of section 306 specifically make discharging froth-flotation mine waste unlawful.¹³⁵

The Conservation Council also discussed the Regas memorandum, which was an important interagency memorandum that purported to resolve the statutory conflict.¹³⁶ The Conservation Council asserted that the Regas memorandum was not authoritative enough to change the

134. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2466 (2009). In support of its first argument, the Conservation Council examined the plain language of the Clean Water Act. According to the Conservation Council, section 306(e) clearly prohibited “any owner or operator of any new source to operate . . . in violation of [any new source performance standard].” 33 U.S.C. § 1316(e) (2006). The Conservation Council contended that the Corps incorrectly inferred an exception for permitting fill material. Brief of Respondents, *supra* note 31, at 26. The EPA, in 1982, promulgated a new source performance standard that clearly prohibited discharge of process wastewater from froth-flotation gold mines. *See id.* at 25. In the Conservation Council’s view, Congress intended this standard to apply both because section 306(e) stated that it applied and because the Corps’s section 404 fill permit authority provided no exception. *Id.* at 28.

Exceptions should rarely be inferred. *See id.* In fact, inferring an exception to section 306(e) would contradict prior Supreme Court jurisprudence. *Id.* at 31. The fact that Congress created an exception to section 301(c), allowing timetable modification for certain point sources, but did not create an exception to section 306(e) shows that Congress purposely chose not to provide exception to section 306(e). *See id.* The Conservation Council cited to *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977), a case in which the Court reasoned that an implied exception to section 306(e) would be inappropriate in this circumstance. *Id.* at 31 (citing *Train*, 430 U.S. at 138).

The Conservation Council also argued that the effluent limitations in sections 301 and 306 are applicable independently of other sections. Each section contains language indicating that it is not dependent on any other section. *Id.* at 35. Examples of these statutes’ independent authority include the section 301 requirement that effluent limitations apply to *all* point sources and the section 306 general prohibition of discharges in violation of its performance standards. *Id.* at 34. According to the Conservation Council, this means that a citizen or the EPA could file suit to enforce these sections, notwithstanding the section 404 permitting process. *Id.* at 35-36. Also, the Conservation Council contended that if Congress had wanted sections 301 and 306 to be dependent on the Corps’s section 404 fill permit authority, it would have logically grouped those sections under section 404. *Id.* In other words, nothing in the Clean Water Act indicated that the effluent limitations in sections 301 and 306 would not apply when the Corps issued a section 404 fill permit. In the Conservation Council’s view, the Corps could not issue a fill permit that was not subject to the EPA’s pollution standards. *See id.*

135. *Coeur Alaska, Inc.*, 129 S. Ct. at 2466. In support of its second argument, the Conservation Council examined the history behind 40 C.F.R. § 122.3(b) (2009), a regulation on which Coeur Alaska relied in its argument that effluent limitations do not restrict the Corps’s section 404 fill permit authority. Brief of Respondents, *supra* note 31, at 47. That regulation states that “[d]ischarges of fill material into waters of the United States which are regulated under section 404 of [the Clean Water Act] . . . do not require NPDES permits.” 40 C.F.R. § 122.3(b). The Conservation Council claimed that because a comma does not precede the word “which,” “only those fill material discharges that are regulated under section 404 are exempt from section 402.” Brief of Respondents, *supra* note 31, at 47. Citing the *Chicago Manual of Style*, the Conservation Council explained that Congress should have used the word “that” instead of “which” in order clearly to manifest its intent. *Id.* at 47 n.13. Under these circumstances, the lack of a comma before “which” is the functional equivalent of the word “that.” *Id.* Simply put, the plain language of section 404 shows that some discharges of fill material are regulated by sections other than section 404. *Id.* at 47.

136. Brief of Respondents, *supra* note 31, at 58. The Court ultimately relied on the Regas memorandum, a memorandum written by an EPA administrator stating that section 402 did not limit section 404, to determine the meaning of 40 C.F.R. § 122.3. *Coeur Alaska, Inc.*, 129 S. Ct. at 2473.

agencies' clear interpretation of the 2002 definition of fill material (2002 fill rule)¹³⁷ and past practices.¹³⁸ To the Conservation Council's knowledge, the Corps had never previously granted a fill material permit for a froth-flotation mine, and doing so, therefore, constituted a major change in practice.¹³⁹

B. Coeur Alaska's Argument

Coeur Alaska made a statutory interpretation argument to show that although Congress intended the sections 301 and 306 effluent limitations to apply to section 402 pollutant-limitation permitting, it did not require the same for the Corps's section 404 fill permit authority.¹⁴⁰ Second, Coeur Alaska argued that the Ninth Circuit's conclusion that all discharges that could possibly be subject to effluent limitations under sections 301 and 306 must be permitted by the EPA was clearly erroneous.¹⁴¹ Third, Coeur Alaska argued that 40 C.F.R. § 122.3, which ex-

137. The 2002 definition of fill material is referred to interchangeably as the "2002 fill rule" throughout this Comment.

138. Brief of Respondents, *supra* note 31, at 58.

139. *Id.* at 55. Allowing the Corps to take this action would, in the Conservation Council's view, contradict the preamble to the jointly adopted 2002 fill rule, which specified that the agencies did not wish to change existing practices. *Id.* at 56. The Conservation Council also relied on one portion of the regulations, which stated that the 2002 fill rule would not grant discharges that were previously unauthorized. *Id.* (citing Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material, 67 Fed. Reg. 31,129, 31,133 (May 9, 2002) (codified at 40 C.F.R. pt. 232)). The Conservation Council argued that reliance on the Regas memorandum would violate prior Supreme Court jurisprudence because the agencies' statements in the Federal Register were clear, making those statements "dispositive." *Id.* at 58. The Conservation Council contended that *United States v. Mead Corp.*, 533 U.S. 218 (2001) made clear that the Regas memorandum could not be authoritative when agency regulations were clear. *Id.* at 59. Furthermore, reliance on a document written by a subordinate official would seriously undermine the agencies' regulations.

140. Brief of Petitioner Coeur Alaska, Inc. at 11-12, *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458 (2009) (Nos. 07-984, 07-990). Section 402 clearly states that EPA permits must comply with effluent limitations, but the Corps's section 404 fill permit authority contains no such provision. *Id.* at 13. Coeur Alaska argued that this omission was purposeful and that it showed that Congress did not want the Corps's section 404 fill permits to be subject to EPA effluent limitations. *Id.* Furthermore, Coeur Alaska contended that the effluent limitations of sections 301 and 306 were blanket provisions that applied to many permitting systems, whereas section 404 covered only fill permits. *Id.* Existing case law holds that the more specific section governs when sections conflict. *Id.* at 28 (citing *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 335 (2002)). Thus, in Coeur Alaska's view, the Corps's section 404 fill permit authority should have been construed as an exception to the effluent limitations of sections 301 and 306, which means that effluent limitations would not apply to the section 404 fill permit that the Corps issued to Coeur Alaska. *Id.* at 27-28.

141. *Id.* at 11. The United States Court of Appeals for the Ninth Circuit interpreted section 301(a) to mean that all discharge permits must comply with sections 301, 306, 402, and 404, in addition to others. *Id.* at 22. Coeur Alaska argued that this interpretation was unreasonable when read in the context of the entire Clean Water Act. *Id.* at 22-23. Specifically, the effluent limitations of sections 301 and 306 (which clearly apply to section 402 pollutant limitations) are mutually exclusive, and requiring all permits to comply with both sections would be unreasonable. *Id.* at 26. Coeur Alaska asserted that section 301 governed effluent limitations for existing sources, whereas section 306 governed effluent limitations for new sources. *Id.* at 23 (citing 40 C.F.R. § 401.11(i) (1994)). Additionally, "[t]he plain text of [s]ection 402 makes clear that it applies only when [s]ection 404 does not." *Id.* at 24 (citing 33 U.S.C. § 1342(a)(1) (2006)). Coeur Alaska argued that this showed Congress's intent to make the Corps's section 404 fill permit authority exclusive of other sections, meaning that the Ninth Circuit erroneously concluded that the effluent limitations of sections 301 and 306 bind the Corps. *Id.* at 26.

plains that fill material discharges permitted by the Corps need not also be permitted by the EPA, clearly showed that the agencies did not want to regulate fill material through the use of effluent-limitations guidelines.¹⁴²

C. *The Court's Decision*

In a six-to-three decision written by Justice Kennedy, the Court decided in *Coeur Alaska's* favor, upholding the Corps's permit.¹⁴³ The Court decided that the Corps rather than the EPA had authority to issue a fill permit for mine waste based on a simple interpretation of section 404 of the Clean Water Act, which "is best understood to provide that if the Corps has authority to issue a permit for a discharge under [section] 404, then the EPA lacks authority to do so under [section] 402."¹⁴⁴ The Court recognized that the EPA has created regulations that steer the Corps's permitting decisions but held that none of those regulations affect the Corps's ultimate authority to issue permits for the discharge of fill material into navigable waters.¹⁴⁵

The majority's opinion started by resolving the parties' dispute over the meaning of 40 C.F.R. § 122.3, the EPA regulation describing which discharges require pollutant permits under section 402.¹⁴⁶ The Court relied on the agencies' regulatory interpretation, which indicated that the EPA could not issue pollutant permits for section 404 fill material discharges.¹⁴⁷ Because that interpretation was not "plainly erroneous or inconsistent with the regulation," the Court accepted it as correct.¹⁴⁸ The Court determined that if the Corps had fill permit authority under section 404, then the EPA could not regulate pursuant to section

142. *Id.* at 36. *Coeur Alaska* pointed out that the Ninth Circuit selectively chose statements in the regulations to bolster its interpretation of the regulatory history. *Id.* ("The Ninth Circuit quoted statements in the regulatory history indicating that the agencies 'did not intend to change their longstanding practice,' but ignored the agencies' explanation of what that practice was . . .") (citation omitted)). *Coeur Alaska* cited to various instances since 1986 in which the Corps issued a section 404 fill material permit for mine tailings that could have been regulated by effluent limitations but were not. *See id.* at 40. Most notably, *Coeur Alaska* cited to the coal mining industry, which has been subject to effluent limitations for twenty years. *Id.* at 41-42. The EPA promulgated effluent limitations for coal mining point sources in 1985. Coal Mining Point Source Category; Effluent Limitations Guidelines and New Source Performance Standards, 50 Fed. Reg. 41,296, 41,305 (Oct. 9, 1985) (codified at 40 C.F.R. pt. 434). Despite the effluent limitations on the coal mining industry, the Corps has issued and reissued a nationwide section 404 fill material permit covering minimal discharges, which indicates that the agencies' existing practice was to allow the Corps to issue fill permits to mining operations that were subject to EPA effluent limitations. Brief of Petitioner *Coeur Alaska, Inc.*, *supra* note 140, at 41-42.

143. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2477 (2009).

144. *Id.* at 2467.

145. *Id.* at 2469.

146. *Id.* at 2468.

147. *Id.* Citing to a brief that the EPA filed, the Court reasoned that the agencies' interpretation rendered ineffective the Conservation Council's argument that the lack of a comma before the word "which" in 40 C.F.R. § 122.3 showed that some fill material discharges could be regulated under section 402. *Id.*; *see supra* text accompanying note 135.

148. *Coeur Alaska, Inc.*, 129 S. Ct. at 2468 (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

402.¹⁴⁹ With this point clarified, the Court could properly analyze whether the Corps had authority to issue the fill permit in this case.¹⁵⁰

The Court then noted that the parties agreed that the mine tailings to be discharged into Lower Slate Lake met the 2002 definition of fill material.¹⁵¹ Examining the statutory text and the regulations, the Court determined that the Corps's fill permit authority under section 404 did not contain an explicit exception (as the Conservation Council argued) for discharges of fill material that could be regulated under the effluent limitations of sections 301 and 306.¹⁵² First, section 404's text did not state that section 404 would be subject to effluent limitations.¹⁵³ Second, in the Court's view, the EPA regulations did not indicate that the Corps's fill permit authority was limited to the extent that the Conservation Council argued that it was.¹⁵⁴ Although section 404(b) required the Corps to adhere to EPA guidelines promulgated at 40 C.F.R. § 230, the Court reasoned that "[t]hose guidelines [did] not strip the Corps of power to issue permits for fill in cases where the fill is also subject to an EPA new source performance standard."¹⁵⁵ Thus, the Court held that the regulatory framework gave the Corps rather than the EPA the power to issue a permit for Coeur Alaska's mine tailings discharge.¹⁵⁶

The Court then addressed its second question of whether the Corps's section 404 fill material permit violated the EPA's performance standards in sections 301 and 306.¹⁵⁷ The central dispute was whether section 306(e), which forbade any discharge of solid waste, also prevented a discharge of fill material containing 30% solid waste.¹⁵⁸ The Court determined that the Clean Water Act was "ambiguous on the question of whether [section] 306 applie[d] to discharges of fill material regulated under [section] 404."¹⁵⁹ Relying on *Chevron*, the Court examined the agencies' regulations and determined that they also were am-

149. *Id.* at 2467.

150. *Id.* at 2468.

151. *Id.*

152. *Id.* at 2469.

153. *Id.*

154. *Id.*

155. *Id.* The Court reasoned that the Conservation Council's argument that the Corps should have to determine if its section 404 permits could possibly be regulated by hundreds of other EPA performance standards was neither reasonable nor intended by Congress. *Id.* In the Court's view, the 2002 fill rule was clear: If the discharge fits the definition, then it is regulated under section 404, otherwise, the discharge is subject to effluent limitations. *Id.* (citing 40 C.F.R. § 232.2 (2009)).

156. *Id.*

157. *Id.*

158. *Id.* at 2470-71.

159. *Id.* at 2471. The Court seemed to agree with Coeur Alaska's argument that sections 306 and 404 were in conflict. *Id.* Specifically, the Court noted the following:

On the one hand, [section] 306 provides that a discharge that violates an EPA new source performance standard is "unlawful" — without any exception for fill material. On the other hand, [section] 404 grants the Corps blanket authority to permit the discharge of fill material — without any mention of [section] 306.

Id. at 2471-72.

biguous.¹⁶⁰ Then the Court relied on the Regas memorandum to examine the two agencies' practices and procedures regarding permitting for Lower Slate Lake.¹⁶¹

Diane Regas, one-time EPA Office of Wetlands Director, wrote a memorandum in 2004 to another EPA director involved with permitting for mining activities at Lower Slate Lake.¹⁶² The Court found that the memorandum resolved the question of whether the Corps permit was in accordance with the law.¹⁶³ Specifically, the Regas memorandum explained that when a section 402 pollutant limitation permit is not required, then the EPA's sections 301 and 306 effluent limitations do not apply.¹⁶⁴ Although the Court did not consider the Regas memorandum worthy of *Chevron* deference, it gave five reasons why it relied on the Regas memorandum to hold that the Corps permit was lawful.¹⁶⁵

The Court concluded that the preamble to the 2002 fill rule, stating that the new rule did not change existing practice, was consistent with

160. *Id.* at 2472-73. The Court primarily considered three regulations: 40 C.F.R. § 440.104(b)(1) (2009) (stating that discharge from froth-flotation gold mines is illegal); 40 C.F.R. § 232.2 (2002 fill rule); and 40 C.F.R. § 122.3 (2009) (stating that fill permits do not need NPDES permits). *Coeur Alaska, Inc.*, 129 S. Ct. at 2472. Because none of the regulations refer to each other or create any exceptions for fill discharges, the Court considered them to be ambiguous. *Id.* Furthermore, 40 C.F.R. § 122.3, in the Court's view, merely stated that a permit for mine tailings could not be issued by the EPA; it said nothing about whether a section 404 permit was lawful if it violated section 306 performance standards. *Id.*

161. *Id.* at 2473.

162. *Id.*

163. *Id.*

164. *Id.* Instead of according the Regas memorandum *Chevron* deference, the Court, citing *United States v. Mead Corp.*, 533 U.S. 218 (2001) and *Auer v. Robbins*, 519 U.S. 452 (1997), relied on the Regas memorandum because "it [was] not 'plainly erroneous or inconsistent with the regulation[s].'" *Coeur Alaska, Inc.*, 129 S. Ct. at 2473 (quoting *Auer*, 519 U.S. at 461).

165. *Id.* at 2473-74. The five reasons that the Court gave are as follows: (1) The memorandum still allowed the EPA's NPDES regulations to apply to the water flowing from the lake, thus, limiting the memorandum's authority to closed water bodies; (2) In the Court's view, Coeur Alaska was not trying to "smuggle" pollutants into waters by circumventing EPA effluent limitations; (3) The memorandum allowed the Corps to decide whether a fill permit was the best alternative for the public in accordance with the guidelines at 40 C.F.R. § 230.10 (2009); (4) The memorandum would still prevent toxic discharges because it did not render ineffective the Corps's section 307 mandate to deny fill permits for toxic material; and (5) The Court determined that the Regas memorandum was a more "sensible and rational" approach to reconciling sections 306, 402, and 404 than either party advised. *Id.*

In the majority's view, the Court's reliance on the Regas memorandum was not *Chevron* deference because the Court was not relying on the agencies' regulations but rather on an EPA memorandum (the "Regas Memorandum"). *Id.* at 2473. The Court cited *Mead Corp.* for its assertion that *Chevron* deference was not warranted by the memorandum. *Id.* In *Mead Corp.*, the Court held that a U.S. Customs Service tariff classification ruling was not entitled to *Chevron* deference because a multitude of similar classifications were issued each year, each one having no precedential effect on the others. *Mead Corp.*, 533 U.S. at 226-27. In other words, because the classification was not promulgated by a part of the agency directly charged with interpreting the legislative mandate, it did not merit *Chevron* deference. *Id.* at 229-30. Although the tariff classification did not merit *Chevron* deference, the Court made clear that the tariff classification and similar items could be entitled to *some* deference, depending on their reasonableness. *Id.* at 234-35. *Mead Corp.* essentially clarified that not all documents issued by an agency are entitled to the level of deference articulated in *Chevron*. In his concurrence in *Coeur Alaska, Inc.*, Justice Scalia sharply criticized the majority's assertion that it did not apply *Chevron* deference. *Coeur Alaska, Inc.*, 129 S. Ct. at 2479-80 (Scalia, J., concurring). In his view, reliance on the agencies' interpretation of their own regulations perfectly comported with *Chevron*, and declaring otherwise unnecessarily muddled a clear interpretive method. *Id.*

the Regas memorandum.¹⁶⁶ The Court focused on a statement in the preamble that indicated that the EPA had no intention of ever regulating fill material with effluent limitations.¹⁶⁷ In addition, the Court determined that the agencies' comments about the conflict between the 2002 fill rule and the EPA's 1982 new source performance standard that barred froth-flotation gold mine discharges were unenlightening.¹⁶⁸ The agencies' comments indicated that the 1982 performance standard would still apply, and the Court reasoned that it *was* applied in this case because the EPA issued an NPDES permit for subsequent discharges into the stream flowing from Lower Slate Lake.¹⁶⁹ Finally, the Court decided that the comments indicated nothing about whether the EPA would apply performance standards to fill material.¹⁷⁰

D. Concurrences

In a short concurring opinion, Justice Breyer opined that the agencies' approach in this instance was reasonable.¹⁷¹ In Justice Breyer's view, the EPA's decision not to veto the Corp's permit, but to require a permit for the lake's downstream discharge, was an appropriate compromise that the EPA was authorized to make.¹⁷² The Corps's section 404 fill material permit would prevent Coeur Alaska from piling the mine tailings on top of nearby wetlands and, at the same time, would limit the discharge of pollutants downstream from the lake.¹⁷³ Moreover, Justice Breyer reasoned that sections 306, 402, and 404 allow the agencies to decide, as long as the decision is reasonable, whether material is a pollutant regulated by section 402 or fill material regulated by section 404.¹⁷⁴ The Court's reliance on the Regas memorandum to determine the agencies' reasonableness was appropriate in Justice Breyer's view.¹⁷⁵ Additionally, although he saw a potential for polluters to use the Corps's fill permit authority as a "loophole" to discharge pollutants by adding enough solid material to constitute fill material, Justice Breyer thought that there were sufficient "safeguards" to prevent this potential problem.¹⁷⁶

166. *Coeur Alaska, Inc.*, 129 S. Ct. at 2475 (citing Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129 (May 9, 2002) (codified at 40 C.F.R. pt. 232)).

167. *Id.* at 2476.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 2477 (Breyer, J., concurring).

172. *Id.* at 2478.

173. *Id.*

174. *Id.* at 2477.

175. *See id.* at 2479.

176. *Id.* at 2478. Justice Breyer mentioned three safeguards: (1) The statutes require the agencies' decision to be reasonable; (2) The EPA retains the power to veto the Corps's section 404 permits; and (3) The EPA has not indicated that it will interpret the regulations to circumvent section

E. Dissent

Justice Ginsburg, with whom Justices Stevens and Souter joined, opined that the *Coeur Alaska, Inc.* case presented only one question: “Is a pollutant discharge prohibited under § 306 of the [Clean Water Act] eligible for a § 404 permit as a discharge of fill material?”¹⁷⁷ The dissent’s answer was a resounding “no” for three reasons.¹⁷⁸ First, the relevant statutes and regulations, in the dissent’s view, clearly showed that all discharges subject to effluent limitations must be permitted by the pollutant limitations of section 402 and not the fill permits of section 404.¹⁷⁹ Second, the dissent reasoned that the majority’s interpretation of the statutory and regulatory scheme would create a “loophole” for polluters.¹⁸⁰ The dissent worried that “[w]hole categories of regulated industries [could] . . . gain immunity from a variety of pollution-control standards” simply by adding enough solid matter to their pollutants to make them constitute fill material.¹⁸¹ Finally, the dissent reasoned that Congress never intended the Corps’s fill permit authority to overrule the effluent limitations of section 306.¹⁸²

V. COMMENTARY

The Court’s decision failed to consider the proper context in which the 2002 fill rule was promulgated. The Bush Administration changed the definition of fill material in 2002 in response to pressure from coal

402 simply because the discharge technically constitutes fill material. *Id.*

Justice Scalia also wrote a concurring opinion. He joined in the substance of the opinion but wrote separately to express his disagreement with the majority’s “protestation that it is not according *Chevron* deference to the reasonable interpretation set forth in the [Regas] memorandum.” *Id.* at 2479 (Scalia, J., concurring) (internal reference omitted). In Justice Scalia’s view, the majority unnecessarily muddled its framework for interpreting ambiguous statutory mandates to administrative agencies. *Id.* at 2479-80. Justice Scalia would have overruled *Mead Corp.* because, in his view, *Chevron* is the simplest, most rational approach, whereas *Mead Corp.* unnecessarily confused the *Chevron* guidance. *Id.*; see *supra* text accompanying note 165.

177. *Coeur Alaska, Inc.*, 129 S. Ct. at 2480 (Ginsburg, J. dissenting).

178. See *id.* at 2482.

179. *Id.* To the dissent, the 1982 new source performance standard at 40 C.F.R. § 440.104(b)(1) (2009) prohibiting discharges from froth-flotation gold mines was unqualified and not excepted by the Corps’s section 404 fill permit authority. *Id.* All that mattered to the dissent was that the Corps’s section 404 fill permit authority did not create an exception to the section 306 effluent limitations. *Id.* The fact that section 306 also did not mention the Corps’s section 404 fill permit authority was apparently of no consequence to the dissent. *Cf. id.* at 2482-83 (Ginsburg, J., dissenting). The dissent stated that section 404 did not mention section 306 effluent limitations, which, in its view, meant that the Corps’s section 404 authority had to be considered in conjunction with section 306 effluent limitations. *Id.* The dissent did not consider the alternative, however, that Congress intended section 306 effluent limitations to be subordinate to the Corps’s section 404 authority. In other words, Congress could have intended the opposite of what the dissent concluded, but the dissent made no mention of this fact.

180. *Id.* at 2483 (Ginsburg, J., dissenting).

181. *Id.*

182. *Id.* at 2484. In the dissent’s view, the majority’s interpretation of the statutory scheme was flawed because the legislature would not have created “exacting pollution limits” under section 306 and then allowed the Corps’s section 404 fill permit authority to render section 306 useless simply because the discharge constituted fill material. *Id.*

mining companies in Appalachia that wanted to dump into streams the remnants of mountaintops that result from blasting operations.¹⁸³ This Part discusses why the Court should have analyzed the 2002 fill rule in the coal mining context as well as why the Court was too quick to rely on the Regas memorandum. Finally, this Part analyzes the policy ramifications of the Court's decision.

A. *The Court Should Have Considered the Rivenburgh Case*

Although *Rivenburgh* is merely a Fourth Circuit case dealing with the pre-2002 definition of fill material, the Court should have considered the case in its analysis because it is instructive to providing the context in which the 2002 fill rule was promulgated.¹⁸⁴ That context is much narrower than the Court's interpretation of the 2002 fill rule in *Coeur Alaska, Inc.*¹⁸⁵ As the *Rivenburgh* court explained, prior to the 2002 fill rule, there was confusion about whether the agencies' separate definitions of fill material allowed the Corps to issue section 404 fill material permits to coal miners.¹⁸⁶ The *Rivenburgh* court pointed to the agencies' public notice of their proposed joint definition in 2000, which made clear that fill material permits for coal mining in "Appalachia in particular" would be permitted under section 404.¹⁸⁷ Thus, as the *Rivenburgh* court clearly showed, the agencies indicated that the 2002 fill rule was

183. See Baller & Pantilat, *supra* note 92, at 644-46. As further evidence of the Bush Administration's support for the mining industry, Professor Clifford Rechtschaffen documented how the Bush Administration cut funding to the EPA and reassigned many EPA investigators to other agencies in the early 2000s. Clifford Rechtschaffen, *Enforcing the Clean Water Act in the Twenty-First Century: Harnessing the Power of the Public Spotlight*, 55 ALA. L. REV. 775, 790 (2004). Furthermore, in at least one instance, the Bush Administration allowed the Federal Office of Surface Mining to take control of a financially unfit state agency's mining division that was also having problems funding its pollutant discharge elimination system. See *id.* at 789.

184. *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 431 (4th Cir. 2003).

185. Compare *id.* (discussing the district court's analysis of the 2002 fill rule in the coal mining context), with *Coeur Alaska, Inc.*, 129 S. Ct. at 2463 (discussing the 2002 fill rule in the froth-flotation gold mining context). The Bush Administration changed the definition of fill material in response to various court rulings like the district court's ruling in *Rivenburgh* that prevented coal miners from dumping the remnants of mountaintops that result from blasting operations into streams. See Baller & Pantilat, *supra* note 92, at 645. The Fourth Circuit held that the district court in *Rivenburgh* was incorrect to determine that the agencies' promulgation of the 2002 fill rule was beyond their powers because the 2002 fill rule was not properly before that court. *Rivenburgh*, 317 F.3d at 438. The *Coeur Alaska, Inc.* Court expanded the 2002 fill rule's scope beyond coal mining when it held that the rule allowed a froth-flotation gold mine to discharge mine waste into a lake. See *Coeur Alaska, Inc.*, 129 S. Ct. at 2477.

186. *Rivenburgh*, 317 F.3d at 431 (citing *Res. Invs., Inc. v. U.S. Army Corps of Eng'rs*, 151 F.3d 1162 (9th Cir. 1998); *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983)). The agencies promulgated the 2002 fill rule to clarify their separate definitions of fill material. Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129, 31,130 (May 9, 2002) (codified at 33 C.F.R. pt. 323). In the preamble to the final rule, the agencies explained that "[t]he proposal was intended to clarify the Section 404 regulatory framework and generally to be consistent with existing regulatory practice." *Id.* The agencies made clear that the Corps was to permit fill material discharge under section 404 and clarified for the public what constituted fill material. See *id.* at 31,130.

187. *Rivenburgh*, 317 F.3d at 431 (citing Proposed Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 65 Fed. Reg. 21,292, 21,295 (Apr. 20, 2000) (codified at 40 C.F.R. pt. 432)).

promulgated in response to coal mining activities in Appalachia.¹⁸⁸

The *Coeur Alaska, Inc.* Court should have considered the *Rivenburgh* case because it made clear that the 2002 fill rule was promulgated partly, if not entirely, to clarify that the Corps had authority to issue section 404 fill material permits for coal mining in Appalachia.¹⁸⁹ As previously discussed, Kentuckians for the Commonwealth, Inc. sued the Corps in August of 2001 because the Corps had issued a section 404 permit to a coal mining company to dump mine overburden into 6.3 miles of streams.¹⁹⁰ The agencies responded by promulgating the final definition of fill material in May of 2002 that specifically included “overburden from mining,” which provides further evidence that a more limited interpretation of the 2002 fill rule was appropriate.¹⁹¹ Thus, as evidenced by *Rivenburgh*, the 2002 fill rule should properly be understood as the agencies’ response to questions about whether the Corps could issue section 404 permits for *coal* mining overburden.

In addition to ignoring the context in which the 2002 fill rule was promulgated, the Court selectively analyzed the regulations in which it was promulgated. The Court considered the preamble to the 2002 fill rule to be consistent with the Regas memorandum because it stated that the EPA never intended to regulate fill material.¹⁹² However, the Court did not fully analyze the other part of the preamble that stated that the agencies did not want to change their “existing approach” to regulating pollutants and fill.¹⁹³ *Rivenburgh* shows that their existing approach was to allow the Corps to issue section 404 permits to coal mining companies, which are quite different from froth-flotation gold mining compa-

188. See Proposed Revisions to the Clean Water Act Regulatory Definitions of “Fill Material” and “Discharge of Fill Material,” 65 Fed. Reg. at 21,295; see also discussion *infra* note 191.

189. See Baller & Pantilat, *supra* note 92, at 644-45.

190. *Rivenburgh*, 317 F.3d at 430.

191. 40 C.F.R. § 232.2 (2009). The agencies had proposed reconciling their definitions of fill material in 2000. Proposed Revisions to the Clean Water Act Regulatory Definitions of “Fill Material” and “Discharge of Fill Material,” 65 Fed. Reg. at 21,294. The agencies proposed what eventually became the 2002 fill rule (with some changes) partly in response to a case presided over by the same judge who decided *Rivenburgh*. See *id.* at 21,295 (discussing the then undecided case *Bragg v. Robertson*, 83 F. Supp. 2d 713 (S.D. W. Va. 2000)). The agencies wanted to clarify that the assertion in *Bragg* that mountaintop removal coal mining discharges should be regulated by section 402 was incorrect. *Id.* According to the agencies, mountaintop removal coal mining discharges should have been regulated by the Corps under section 404 in accordance with past practices. *Id.*

In addition, the regulations promulgated in 2000 proposed to include “coal mining overburden” in the definition of fill material. *Id.* But the final rule included only “overburden from mining.” 33 C.F.R. § 323.2(e)(2) (2009). Without more information, one could argue that the agencies were attempting to expand the definition to include more than coal mining, but the agencies dispelled this notion in the final regulations, wherein they clarified that the new definition does not affect current effluent limitations. Final Revisions to the Clean Water Act Regulatory Definitions of “Fill Material” and “Discharge of Fill Material,” 67 Fed. Reg. 31,129, 31,135 (May 9, 2002) (codified at 40 C.F.R. pt. 232). Thus, the 1982 new source performance standard barring discharges from froth-flotation gold mines was not affected by the 2002 fill rule.

192. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2475-76 (2009).

193. Final Revisions to the Clean Water Act Regulatory Definitions of “Fill Material” and “Discharge of Fill Material,” 67 Fed. Reg. at 31,135.

nies.¹⁹⁴ There is also evidence—the 1982 new source performance standard—that the agencies’ existing approach was to disallow discharges from froth-flotation gold mines.¹⁹⁵ Thus, the agencies’ existing approach was to allow the Corps to issue fill permits under section 404 for coal mines but not for froth-flotation gold mines.¹⁹⁶ Had the Court considered *Rivenburgh* in conjunction with the 1982 new source performance standard, it would have deduced a clear and sensible version of the agencies’ existing practice, which they did not want to change.¹⁹⁷

B. The Court Should Have Interpreted the 2002 Fill Rule in a More Limited Way

The 2002 re-definition of fill material was crucial to the outcome of the *Coeur Alaska, Inc.* case. The Court determined that if a discharge did not qualify as fill material, then the EPA new source performance standard would apply, whereas if a discharge *did* qualify as fill material, then the performance standard would not apply.¹⁹⁸ That determination is crucial because mining companies that can tailor their discharges to fit the definition of fill material will be able to circumvent the EPA’s effluent limitations on pollutants. The discharges permitted in *Coeur Alaska, Inc.* were comprised of 30% pollutants, so mining companies will presumably be able to discharge a concoction of 30% pollutants with 70% traditional fill material, such as rocks, sand, or clay.¹⁹⁹

The Court should have properly limited its interpretation of the 2002 fill rule to the coal-mining context.²⁰⁰ The Corps and the EPA promulgated the rule in that context for a limited purpose, and interpre-

194. *Rivenburgh*, 317 F.3d at 431.

195. 40 C.F.R. § 440.104 (2009). Yet, the Court did not examine the 1982 new source performance standard in the context of an existing practice. *Coeur Alaska, Inc.*, 129 S. Ct. at 2472. The Court considered the 1982 new source performance standard to be unhelpful because it did not explicitly state whether it applied to section 404 permits. *Id.* The Court essentially disregarded the performance standard for this reason. *Id.*

196. *See* 40 C.F.R. § 440.104.

197. *See* Final Revisions to the Clean Water Act Regulatory Definitions of “Fill Material” and “Discharge of Fill Material,” 67 Fed. Reg. at 31,135 (codified at 33 C.F.R. pt. 323). The agencies also specified that new source performance standards (under which the 1982 ban on froth-flotation gold mine discharges was promulgated) were unaffected by the 2002 fill rule. *Id.*

198. *Coeur Alaska, Inc.*, 129 S. Ct. at 2476.

199. In *Coeur Alaska, Inc.*, the “suspended solids” that constituted fill material also constituted pollutants. *Id.* at 2471. Thus, the fill material and the pollutants were the same substance in that case, but the Court’s decision leaves open the option of a mining company receiving a section 404 permit to discharge chemical pollutants with other solid fill material that may not itself constitute a pollutant. *See id.* at 2477.

200. The agencies’ comments in the Federal Register on April 20, 2000, are a clear indication of their intent. Proposed Revisions to the Clean Water Act Regulatory Definitions of “Fill Material” and “Discharge of Fill Material,” 65 Fed. Reg. 21,292, 21,295-97 (Apr. 20, 2000). The agencies dedicated a significant portion of their comments to clarifying that discharges from mountaintop removal coal mining overburden had the effect of fill and should be permitted exclusively by the Corps. *See id.* at 21,295-97. The agencies also clarified, however, that coal mining activities that were subject to effluent limitations would so remain. *Id.* at 21,296. This shows that the agencies were concerned with helping the mountaintop removal coal mining industry (particularly in Appalachia), but that they did not want to scrap the effluent limitations that were already firmly in place. *See id.*

tations of the rule that go beyond that purpose violate the central tenets of the Clean Water Act.²⁰¹ The agencies created the 2002 fill rule to allow Appalachian coal mining companies to fill valleys, which contain streams regulated by the Clean Water Act, with the mountaintops that are blasted away in order to retrieve coal.²⁰² Mountaintops consist of rock and topsoil.²⁰³ The agencies were likely referring to rock and topsoil, not froth-flotation chemicals, when they added the term “overburden” from mining to the definition of fill material.²⁰⁴ The district court’s decision in *Rivenburgh*, which prompted the agencies to re-define “fill material,” also used the term “overburden.”²⁰⁵ These facts strongly indicate that the agencies promulgated the 2002 fill rule in the coal mining context, and the Court should have interpreted the 2002 fill rule in that context.

Additionally, the agencies were not likely considering froth-flotation gold mining when they promulgated the 2002 fill rule because the 1982 new source performance standard clearly prohibits discharges from froth-flotation gold mining²⁰⁶ and the 2002 fill rule says nothing about froth-flotation gold mining.²⁰⁷ Thus, when considered in the context in which it was promulgated, the 2002 fill rule clearly allows only the Corps to permit mountaintop removal coal mining discharges, but it does not allow a froth-flotation gold mine to take the rule out of context and circumvent a specific new source performance standard.

C. The Court Inappropriately Deferred to the Regas Memorandum

The Court was too quick to accept the Regas memorandum as the solution to the issues presented in *Coeur Alaska, Inc.* One EPA director wrote the Regas memorandum.²⁰⁸ The opinion that it gave was not subjected to the rigors typically associated with the promulgation of regulations, such as the 2002 fill rule. Ordinarily, adoption of such a

201. See 33 U.S.C. § 1251(d) (2006). The EPA Administrator was charged with implementing the Clean Water Act in 1972. *Id.* § 1251. Over time, the current permitting system developed, ultimately including the 2002 fill rule. Courts should put the agencies’ rules in their proper context so that they do not override the act’s intent. See *Sierra Club v. EPA*, 294 F.3d 155, 162 (D.C. Cir. 2002).

202. See Claudia Copeland, *Mountaintop Removal Mining*, in *U.S. COAL: A PRIMER ON THE MAJOR ISSUES*, 39, 43 (Marc Humphries ed., 2004). The Clinton Administration initially had an interest in changing the definition of fill material as a favor to the Appalachian coal mining industry, but the Bush Administration ultimately changed the rule. See *id.*

203. *Id.* at 41. Proponents of mountaintop removal coal mining argue that it is necessary from an economic standpoint. *Id.* Coal mining companies are running out of places to dispose of mountaintops, and large streams are currently their best option. See *id.* at 40. In addition, the increased demand for clean burning coal has given the coal mining industry substantial political clout. See *generally id.* at 39-44.

204. See Proposed Revisions to the Clean Water Act Regulatory Definitions of “Fill Material” and “Discharge of Fill Material,” 65 Fed. Reg. at 21,295.

205. *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 204 F. Supp. 2d 927, 929-30 (S.D. W. Va. 2002).

206. 40 C.F.R. § 440.104(b)(1) (2009).

207. 33 C.F.R. § 323.2 (2009).

208. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2473 (2009).

statement requires participation from each agency as well as input from the public. The Court essentially allowed Diane Regas to decide whether the Corps's section 404 permit was lawful.²⁰⁹ Ms. Regas's opinion is no doubt worthy of respect, but it is not worthy of the deference that the Court gave it, especially when the Court failed to consider other evidence in earnest, such as the rule's coal mining context.

The Court appears to have searched for reasons to rely on the Regas memorandum. The primary reason that the Court gave for relying on the memorandum was that it allowed the EPA's 1982 new source performance standard and the Corps's section 404 authority to exist together.²¹⁰ The Court could have achieved that same result had it applied the 2002 fill rule in the context in which it was promulgated, that of coal mining only. Furthermore, the Court reasoned that the memorandum was consistent with the rest of the Clean Water Act because it did not conflict with section 307, which clearly prohibits the discharge of toxic pollutants.²¹¹ That, however, is hardly a convincing reason to defer to the memorandum. No one disputed that toxic pollutants could not be discharged; the EPA guidelines by which the Corps must abide when issuing section 404 permits make that unambiguously clear.²¹² Regardless of whether the Regas memorandum existed, there would be no question about toxic pollutants.

The Court's simplistic analysis suggests that the Court may have viewed the Regas memorandum as a silver bullet because its content resolved the issues. But the memorandum's content alone does not justify reliance on it, and the Court's reasons for relying on it were strained. Although the Regas memorandum should have been considered as one EPA director's opinion on the issue in *Coeur Alaska, Inc.*, it should not have been used to decide a case that will have precedential effect beyond the Kensington gold mine.

D. Policy Implications

The Court's decision to expand the 2002 fill rule beyond coal mining will have an enormous effect on our nation's waters and the mining industry.²¹³ The mining industry will likely benefit because its costs will be reduced if it can discharge mine tailings into existing water bodies rather than construct tailings ponds.²¹⁴ Our nation's waters, on the

209. See *id.* at 2473-74.

210. See *id.* at 2473.

211. *Id.* at 2474.

212. 40 C.F.R. § 230.10(b)(2) (2009) (stating that the Corps has to deny permits for fill material if the material contains toxic pollutants).

213. See May, *supra* note 9, at 24. The immediate result of the Court's decision puts freshwater lakes in jeopardy and "diminish[es] sustainability." See *id.*

214. See Kensington Goldmine, *supra* note 32. Coeur Alaska's website explained that dumping mine tailings into Lower Slate Lake was the best option because, among other reasons, it was the

other hand, will likely suffer from more pollution. Even if the Corps requires reclamation of the waters after the mining process is complete, there is no guarantee that polluted waters can be fully restored.²¹⁵ Moreover, temporary water pollution could have possible side-effects, such as permanent destruction of aquatic life.²¹⁶ There is hope, however, for environmentalists. The United States House of Representatives Subcommittee on Water Resources and Environment is currently considering a bill that would modify the 2002 fill rule to state clearly that fill material cannot contain waste.²¹⁷

The Clean Water Protection Act (H.R. 1310) would add to the 2002 fill rule the following: “The term does not include any pollutant discharged into the water primarily to dispose of waste.”²¹⁸ Although the House proposed H.R. 1310 in reaction to the mountaintop removal associated with coal mining, the proposed definition would effectively reverse the policy that the *Coeur Alaska, Inc.* decision produced because discharge from froth-flotation gold mining is certainly waste.²¹⁹ The current version of the bill has 166 cosponsors.²²⁰ However, the House has taken no action since March of 2009,²²¹ and the Subcommittee on Water Resources and Environment has not indicated when its next action will occur.²²² The bill is far from being enacted into law, but there is another solution. The Obama Administration could simply modify the 2002 fill rule. In the meantime, the *Coeur Alaska, Inc.* decision is expected to have significant ramifications.²²³

By upholding the 2002 fill rule, the Court reinforced mountaintop removal coal miners’ ability to pollute streams and opened the door to allow other mining operations to dump waste into U.S. waters.²²⁴ For

least costly. *Id.*

215. *Coeur Alaska, Inc.*, 129 S. Ct. at 2480 n.1 (Ginsburg, J., dissenting) (“Whether aquatic life will eventually be able to inhabit the lake again is uncertain.”).

216. Side effects include, but are not limited to, destruction of aquatic life with no guarantee of recovery. *See id.* The majority assumed that the aquatic life in Lower Slate Lake would be restored after completion of mining operations. *Id.* at 2465. However, even the solicitor general, Theodore Olson (arguing for *Coeur Alaska* before the Court), agreed that “restoration of the lake was not guaranteed.” Op-Ed., *A Toxic Alchemy*, THE BOSTON GLOBE, Jan. 19, 2009, available at http://www.boston.com/bostonglobe/editorial_opinion/editorials/articles/2009/01/19/a_toxic_alchemy/.

217. Clean Water Protection Act, H.R. 1310, 111th Cong. (2009), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:H.R.1310:>

218. *Id.*

219. *See* End Mountaintop Removal Coal Mining, <http://www.ilovemountains.org/resources#federal> (last visited Apr. 3, 2010).

220. The Library of Congress Thomas, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:H.R.1310:> (last visited Apr. 3, 2010).

221. *Id.*

222. *See* Transportation and Infrastructure Committee, <http://transportation.house.gov/subcommittees/WaterResources.aspx> (last visited Apr. 3, 2010).

223. *See* EarthJustice.org, Supreme Court Clears Way for Mining Company to Destroy Alaskan Lake, <http://www.earthjustice.org/news/press/2009/supreme-court-clears-way-for-mining-company-to-destroy-alaskan-lake.html> (last visited Apr. 3, 2010).

224. *See id.* Although the Clean Water Act supposedly still prevents toxic waste disposal, opponents of the 2002 fill rule have argued that toxic waste will still seep into U.S. waters as a by-product of other wastes. *Id.*

example, the Court's opinion will likely now permit the Pebble Mine in southwest Alaska to dump waste into the streams leading to Bristol Bay, which will affect a prolific salmon fishery.²²⁵ Furthermore, the Court's decision leaves open the possibility that major feedlots will be able to discharge wastewater into streams as fill material.²²⁶ As alarming as these possibilities seem, a more direct risk for which the Court did not account in its decision is that Lower Slate Lake is near a fault-line.²²⁷ Opponents of the Kensington mine argue that if the dam that prevents the lake water from running downstream breaks, potentially toxic material will escape and poison nearby Berners Bay.²²⁸

As the foregoing policy implications illustrate, the Court's decision created the opportunity for miners and other industries to pollute U.S. waters as a matter of routine operation. This proposition is clearly at odds with the original purpose of the Clean Water Act, which was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."²²⁹

VI. CONCLUSION

The U.S. Supreme Court's incomplete analysis in *Coeur Alaska, Inc.* has broadened the 2002 fill rule into an insatiable monster. Instead of limiting the rule to the coal mining context for which it was intended, the Court expanded it to allow the entire mining industry to pollute U.S. waters regardless of directly contrary regulations. What is worse is that the Court relied on a single memorandum from one EPA director in order to justify its decision. *Coeur Alaska, Inc.* continues the line of Supreme Court jurisprudence, which began with *SWANCC* and *Rapanos*, weakening the Clean Water Act. In decision after decision, the Court has held that waters once protected by the Clean Water Act are subject once again to the pollution that the Act was clearly meant to prevent. We can only hope that Congress or the Executive Branch will take action to reverse the effects of *Coeur Alaska, Inc.* and thereby restore, at least in part, the Clean Water Act's ability to protect the integrity of the nation's waters.

225. EarthJustice.org, A Dangerous Precedent for Other Mines and Other Industries, <http://www.earthjustice.org/library/background/a-dangerous-precedent-for-other-mines-and-other-industries.html> (last visited Apr. 3, 2010).

226. *Id.* EarthJustice also contends that other industries such as "[c]oal-fired power plants, aluminum smelters, [and] cement manufacturing plants" will be able to circumvent previously governing effluent limitations as a result of the Court's decision. *Id.*

227. EarthJustice.org, Supreme Court Hears Important Clean Water Act Case Today, <http://www.earthjustice.org/news/press/2009/supreme-court-hears-important-clean-water-act-case-today.html> (last visited Apr. 3, 2010).

228. *Id.*

229. 33 U.S.C. § 1251(a) (2006).