Supreme Court Decision Resolves Conflict between Corps and EPA Regulation of "Fill"

On June 22, the United States Supreme Court decided *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, construing the applicability of the Environmental Protection Agency's (EPA's) new source performance standards to discharges of "fill" under the Clean Water Act (CWA). *See*: http://www.supremecourtus.gov/opinions/08pdf/07-984.pdf.

The Court ruled that because the tailings from a froth-floatation gold mine constituted "fill" within the meaning of Section 404 of the Act, the discharge of tailings into navigable waters required a permit from the United States Army Corps of Engineers under CWA § 404, and not an EPA § 402 permit. The Court also ruled that the discharge was not subject to EPA's new source performance standard promulgated under CWA § 306(b), which expressly forbids mining operations like Coeur Alaska from discharging "process wastewater" except in compliance with the standard. In reaching this decision, the Court extended the deference given to agencies' interpretation of environmental statutes in their regulations ("*Chevron* deference") to an internal EPA memorandum outlining the interplay between the Corps' and EPA's respective jurisdiction over the mine.

Coeur Alaska plans to reopen the Kensington Gold Mine, employing a "froth-flotation" process that separates gold-bearing minerals from crushed rock. The remaining water and crushed rock ("slurry") is discharged to a retention pond where the crushed rock ("tailings") settles in the basin. The water in the pond is returned to the mine or discharged to a receiving stream.

Rather than building a dedicated slurry pond, Coeur Alaska proposed using the Lower Slate Lake, a small, 50-foot deep water body located nearby. Over time, the operation would fill the Lake. In the interim (as tailings accumulate and the Lake bottom progressively rises), the company would discharge water from the Lake to a downstream navigable creek. Coeur Alaska obtained the Corps' § 404 permit to discharge the tailings into the Lake and EPA's § 402 permit to discharge Lake water into downstream receiving waters. These Lake water discharges would comply with EPA's § 306(b) new source performance standards for wastewater discharges from mines that produce copper, lead, zinc, gold, silver or molybdenum-bearing ores.

Environmental groups sued the Corps, arguing that the § 404 permit was unlawful because (1) Coeur Alaska was required to obtain an EPA § 402 permit, not a § 404 permit, to discharge slurry to the Lake; and (2) the discharge of slurry to the Lake violated EPA's § 306(b) new source performance standards.

The Supreme Court held that the Corps — not EPA — had authority to allow the discharge of slurry to the Lake, and that EPA's new source performance standards do not apply to discharges authorized by a Corps § 404 permit. Section 402 gives EPA authority to issue "permit[s] for the discharge of any pollutant," with one important exception: EPA cannot issue discharge permits for fill material which fall under the Corps' § 404 permitting authority. The EPA still has an important role in the Corps' process. The Corps must follow EPA's § 404(b)(1) guidelines in determining whether to issue the fill permit, and EPA retains § 404(c) authority to veto the Corps permit. The Court also found that the agencies' regulations and joint definition of "fill" supported this conclusion.

The more salient question, the Court explained, was whether the EPA's § 306 new source performance standards must be applied to the Corps' § 404 permit, such that the permit was unlawful if the discharge would violate performance standards. The Court held that Congress has not "directly spoken" to the issue and that the CWA is ambiguous on the question. Moreover, the agencies' regulations, which are entitled to deference if they resolve the ambiguity in a reasonable manner, did not refer to each other and thus could not answer the question.

The Court turned to an internal EPA memorandum from the Director of EPA's Office of Wetlands to the EPA official with regulatory responsibility for the mine. That Memorandum interpreted one of the regulations [40 C.F.R. § 122.3] that the Court had found ambiguous, concluding that "[d]ischarges of dredged or fill material . . . which are regulated under § 404 do not require § 402 permits." The memorandum further reasoned that, because no § 402 permit was required, the § 306 standards did not apply to the fill activity. The Court ruled – granting *Chevron* deference to this EPA memorandum – that its interpretation was reasonable: it preserved the Corps' authority to determine whether a discharge was in the public interest, and it did not threaten the EPA's authority to regulate discharge of toxic pollutants or to regulate discharges of solid wastes (*i.e*., suspended solids or solid wastes other than those that qualify as fill). Therefore, the Court ruled that § 306 performance standards do not apply to § 404 permits and that the Coeur Alaska permit was lawful.

Significance: The *Coeur Alaska* decision may have limited significance. Unlike Alaska, which did not have an EPA-approved § 402 program when the Corps permit was issued, most states have approved § 402 programs. Unless their state statutes and regulations are similarly restricted, these states can require § 402 permits for fill (pollutant discharge) activities and impose limitations based on § 306 new source performance standards and other standards, where applicable. Also, the EPA has authority to veto a State-issued § 402 which does not require compliance with such standards. However, where the state decides not to require a permit, neither the EPA nor any citizen may have a remedy under federal law. Such state actions, allowing applicants to avoid national categorical pollution control standards, would be inconsistent with the central premise of the 1972 Federal Water Pollution Control Act Amendments that industries everywhere must meet minimum pollution control requirements.

The other important holding of *Coeur Alaska* is that courts may grant *Chevron* deference not only to an agency's reasonable interpretation of environmental statutes, as set forth in its formally-promulgated regulations, but also to the agency's less formal interpretations — including policy statements and intra-agency memoranda.

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