

07-984 COEUR ALASKA, INC. V. SOUTHEAST ALASKA CONSERVATION COUNCIL

DECISION BELOW: 486 F3 638

LOWER COURT CASE NUMBER: 06-35679

QUESTION PRESENTED:

The Clean Water Act provides two separate programs for the permitting of discharges into navigable waters of the United States. Under Section 404 of the Act, the Army Corps of Engineers may issue permits for discharges of "fill material," subject to the water-quality restrictions imposed by Section 404(b)(1). Under Section 402 of the Act, the Environmental Protection Agency may issue permits for the discharge of all other pollutants, subject to the effluent limitations prescribed under Sections 301 and 306 of the Act. In 2002, after notice and comment, the EPA and the Corps jointly promulgated a regulation defining the statutory term "discharge of fill material" to include "tailings or similar mining-related materials." Pursuant to its authority under Section 404 to grant permits for the discharge of "fill material," the Corps granted petitioner a permit to deposit certain mine tailings in a lake. In the decision below, the Ninth Circuit invalidated that permit even though it acknowledged that the proposed discharge "facially meets the current regulatory definition of 'fill material.'" Upsetting 35 years of established agency practice, the court of appeals held that the Corps may not issue a Section 404 permit for the discharge of fill material if the fill material in question otherwise would be subject to a Section 301 or 306 effluent limitation.

The question presented is whether the Ninth Circuit erred in reallocating the Corps' and EPA's permitting authority under the Act.

CONSOLIDATED WITH 07-990 FOR ONE HOUR ORAL ARGUMENT ORDERED 5/4/2009: THE PARTIES ARE DIRECTED TO FILE SUPPLEMENTAL BRIEFS ADDRESSING THE FOLLOWING QUESTIONS: (1) IF THE DISCHARGE OF THE SLURRY INTO THE LAKE WOULD VIOLATE SECTION 301 OR SECTION 306 OF THE CLEAN WATER ACT, WOULD THAT FUTURE VIOLATION AUTHORIZE A COURT TO SET ASIDE THE PERMITS ISSUED BY THE UNITED STATES ARMY CORPS OF ENGINEERS, AND THE RECORD OF DECISION ISSUED BY THE UNITED STATES FOREST SERVICE, AS "NOT IN ACCORDANCE WITH LAW," 5 U.S.C. §706(2)(A)? SEE *PENSION BENEFIT GUARANTY CORP. V. LTV CORP.*, 496 U.S. 633, 646 (1990). (2) IF A DISCHARGE COMES WITHIN THE SCOPE OF THE ENVIRONMENTAL PROTECTION AGENCY'S EFFLUENT LIMITATIONS AND SATISFIES THE DEFINITION OF FILL MATERIAL, MAY THE DISCHARGER OBTAIN PERMITS UNDER BOTH SECTION 402 AND SECTION 404 OF THE CLEAN WATER ACT? MUST THE DISCHARGER DO SO?

CERT. GRANTED 6/27/2008

