

---

---

## Filling the Regulatory Gap: A Proposal for Restructuring the Clean Water Act's Two-Permit System

Robert B. Moreno\*

*The Clean Water Act (CWA) was passed in response to increased pollution in the nation's navigable waters caused by industrial actors and others. Congress sought to achieve two goals with the CWA: eliminate pollution discharges into the nation's waters, and achieve national uniformity in a water pollution control scheme. However, Congress recognized that complete elimination of all pollution discharges was not immediately achievable. As a result, it created a dual-permitting scheme under the CWA, authorizing the Environmental Protection Agency (EPA) to issue permits for the discharge of pollutants into navigable waters, and the U.S. Army Corps of Engineers (Corps) to issue permits for the discharge of "dredged or fill" material into navigable waters.*

*The 2009 Supreme Court decision in Coeur Alaska, Inc. v. Southeast Alaska Conservation Council reveals that the line separating the EPA's and the Corps' respective permitting authority has become blurred. In this case, the Court upheld the Corps' issuance of a "fill" permit to a gold mining project seeking to discharge mining waste into a nearby lake. The Court held that the Corps, and not the EPA, possesses the authority to issue permits for the discharge of fill material, regardless of whether the fill is also considered a pollutant under the CWA. Additionally, the Court held that the strict EPA-promulgated effluent discharge limitations for new sources of discharge do not apply to Corps permits. The Court's opinion threatens to undermine the two goals of the CWA because it opens the door for industrial actors to circumvent the stricter EPA permit requirements by simply ensuring their waste disposal contains a sufficient amount of fill.*

---

Copyright © 2010 by the Regents of the University of California.

\* J.D. Candidate, University of California, Berkeley, School of Law (Boalt Hall), 2010; B.S., Business Administration, University of Florida. I would like to thank Holly Doremus for her guidance and suggestions, and the *Ecology Law Quarterly*, especially Rachel Jones and Sara Clark, for their invaluable editorial prowess.

*The EPA's uniform, technology-based permit requirements are stricter than the Corps', which evaluates permit applications on a case-by-case basis with no governing effluent limitations. After Coeur Alaska, the CWA could be upended by industrial actors seeking to avoid a stricter EPA permit in favor of a Corps permit. Although the EPA may veto any Corps permit, this power is rarely used. I propose multiple solutions to ensure both of Congress's goals of the CWA are met, ultimately advocating for an amendment to the CWA that would force Corps permits to comply with EPA-promulgated effluent pollution standards. This solution would have prevented the Corps permit issuance in the Coeur Alaska case, and it would uphold the integrity of the CWA into the future.*

Introduction .....	287
I. The Clean Water Act and Agency Regulations Interpreting It ..	290
A. Pollution Discharge Permitting System .....	292
B. Dredged or Fill Material Permitting System .....	294
II. <i>Coeur Alaska, Inc. v. Southeast Alaska Conservation Council</i> ....	299
A. Factual Background and Procedural History .....	300
B. SEACC's Two Arguments and the Court's Holding .....	301
III. Hiding Elephants in Mouse Holes: Why the Majority in <i>Coeur Alaska</i> Got It Wrong .....	302
A. <i>Coeur Alaska</i> Threatens to Undermine the CWA .....	302
B. Implications for Disposal Activities Outside of the Mining Context .....	303
C. America's Legal Doppelganger: Dangerous Precedent in Canada's Mine Tailings Disposal Law .....	305
IV. <i>Coeur Alaska</i> Reveals Underlying Fundamental Problems with the CWA That Must Be Addressed .....	308
A. Problem #1: The Agency Discretion Problem.....	308
B. Problem #2: The Section 402 Circumvention Problem .....	310
V. Extracting Elephants from Mouse Holes: Solutions to the Problems Identified in Parts III and IV.....	311
A. Preferred Solution: Amend the CWA to Apply All EPA-Promulgated Effluent Standards to Section 404 Permitting Decisions .....	312
B. Other Potential Solutions .....	313
1. New Joint Regulation or Memorandum of Agreement..	313
2. Presidential Memorandum .....	314
3. CWA Amendment Defining Fill .....	315
Conclusion.....	316

## INTRODUCTION

In delegating Clean Water Act (CWA or the Act) permitting authority to both the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps), Congress meant for these agencies to champion the Act's purposes. The CWA's overarching goal was simple: to ensure that all navigable waters of the United States become or remain pollution-free.<sup>1</sup> It seems logical to task the EPA—the agency nominally responsible for environmental protection—with upholding this goal. Unfortunately for the nation's waters, recent jurisprudence reveals that the EPA is not the Act's linchpin. Although the CWA gives the EPA the authority to issue permits for the discharge of pollutants into navigable waters, it also gives the Corps authority to issue permits for “dredged or fill material.”<sup>2</sup> The Supreme Court's decision in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council* places the Corps and not the EPA in charge of permitting decisions for the discharge of certain pollutants.<sup>3</sup> Since potential dischargers may now seek a Corps permit in lieu of the more stringent EPA permit, the Corps now holds the fate of the CWA, and the nation's waters, in its regulatory hands.

Intergovernmental tensions between the Corps and the EPA have resulted from the agencies' dual-permitting authority under the Act. Since the inception of the CWA permitting scheme, the two agencies' policies have often been at odds. A large reason for the tension is the inherent conflict in section 404 of the CWA. While the EPA has authority to issue permits for the discharge of pollutants under section 402, the section 404 permitting scheme essentially carves out an exception to this authority by allowing the Corps to issue permits for the discharge of “dredged or fill material” into navigable waters.<sup>4</sup> The Corps often uses its section 404 authority to regulate activities in wetlands.<sup>5</sup> “To its critics, the 404 permit program represents an unprecedented federal presence in land use regulation. To its defenders, section 404 remains the most effective means of preserving the nation's diminishing wetland resources.”<sup>6</sup> This constant struggle has led to “congressional battles over

---

1. See 33 U.S.C. § 1251(a)(1) (2006).

2. *Id.* §§ 1342, 1344.

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

4. 33 U.S.C. § 1344.

5. See 33 C.F.R. § 323 (2008).

6. Michael C. Blumm & D. Bernard Zaleha, *Federal Wetlands Protection under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform*, 60 U. COLO. L. REV. 695, 698–99 (1989).

the scope and content of 404 regulation, as well as continuous administrative reforms.”<sup>7</sup>

The Supreme Court’s 2009 decision in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council* threatens to undermine the CWA by effectively securing excessive section 404 permitting authority for the Corps while denying permitting authority to the EPA.<sup>8</sup> In this case, the Court upheld a Corps permit allowing the Kensington Gold Mine to dump its mining waste into an Alaskan lake.<sup>9</sup> The discharge will kill the lake’s fish and most of its other aquatic life, and “[w]hether aquatic life will eventually be able to inhabit the lake again is uncertain.”<sup>10</sup> This waste discharge, known as “slurry,” is comprised of crushed rock and water, and contains aluminum, copper, lead, and mercury.<sup>11</sup> Despite the CWA’s classification of both industrial discharges and crushed rock as pollutants, and the EPA’s authority to permit “pollutant” discharges,<sup>12</sup> the Court held that the Corps alone had the authority to issue a discharge permit for the mining slurry.<sup>13</sup>

The Court also held that EPA-promulgated regulations that otherwise would have prohibited the discharge were inapplicable to Corps-issued permits.<sup>14</sup> This decision undermines Congress’s clear intention to eliminate discharges into water bodies and create a uniform system of water pollution regulation.<sup>15</sup> The *Coeur Alaska* decision will inevitably result in industrial actors seeking permits from the Corps for the discharge of “fill” material, thereby avoiding a stricter, costlier permit issued by the EPA under section 402. Allowing the Corps to permit industrial waste disposal threatens to relegate the nation’s waters to their polluted, pre-CWA status and creates a slippery slope that could undermine the intent and purposes of the CWA.

The procedural safeguards in section 404 are not enough to prevent sliding down this slippery slope. The Corps, an agency with the discretion to evaluate permits based on its malleable “public interest” balancing test, is watched over by the EPA, which has the sole discretion to decide whether to veto a Corps permit.<sup>16</sup> While the EPA is authorized by CWA section 404(c) to veto any proposed Corps permit,<sup>17</sup> it rarely exercises this

---

7. *Id.*

8. *See Coeur Alaska*, 129 S. Ct. at 2466-67.

9. *Id.* at 2463.

10. *Id.* at 2480, n.1 (Ginsburg, J., dissenting).

11. *Id.* at 2464 (majority opinion); *id.* at 2480 (Ginsburg, J., dissenting).

12. 33 U.S.C. §§ 1342, 1362(6) (2006).

13. *Coeur Alaska*, 129 S. Ct. at 2469.

14. *Id.* at 2463.

15. *See* 33 U.S.C. § 1251.

16. *See id.* § 1344.

17. *See id.* § 1344(c).

option.<sup>18</sup> On a more fundamental level, the CWA's "[r]eliance on ad hoc vetoes [like section 404(c)] . . . undermines Congress'[s] aim to install uniform water-pollution regulation."<sup>19</sup> As a result, section 404 is governed by too much discretion to be reliable for upholding the purposes of the Act.

Additionally, since the Corps has the exclusive ability to regulate activities involving fill under section 404, a discharge of dredged or fill material that includes pollutants will nevertheless fall under the purview of the Corps, not the EPA.<sup>20</sup> As a result, the Corps is the Act's linchpin: whether a project includes fill now controls whether polluting activities are regulated under section 402 or 404. This expansion of the Corps' permitting authority frustrates Congress's intent of tasking the EPA with the authority to apply exacting technology-forcing requirements to eliminate pollution discharges into water.<sup>21</sup> The *Coeur Alaska* decision threatens to undermine the entire CWA by making fill the Act's most salient issue in permitting, and could lead to some disastrous consequences.

If industry actors such as the Kensington Gold Mine are allowed to dump waste into the nation's waters, the benefits of water pollution reduction achieved in the past few decades will likely be lost, and the spirit of the CWA violated. The CWA specifically categorizes industrial waste as a "pollutant" to be regulated by the EPA,<sup>22</sup> so section 404 should not provide an escape from section 402 regulation an industrial process results in fill material. To protect against industrial discharges like the one in *Coeur Alaska*, the CWA should be amended to apply all EPA-promulgated effluent limitations to section 404 permits. This proposed solution would prevent industrial actors from avoiding EPA-promulgated effluent standards, regardless of whether the discharge is permitted under section 402 or 404. Since the technology-based standards in section 402 are often strict and may ban a discharge altogether, seeking a section 404 permit would in essence apply the technology-based standards of section 402 to all CWA permits.

Part I of this Note summarizes the CWA's statutory scheme with particular attention given to its dual-permitting process. Part II discusses the 2009 Supreme Court decision in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, giving particular attention to the Court's

---

18. See EPA, Clean Water Act Section 404(c) "Veto Authority" 1, <http://www.epa.gov/owow/wetlands/pdf/404c.pdf> (last visited Mar. 15, 2010).

19. *Coeur Alaska*, 129 S. Ct. at 2483 n.5 (Ginsburg, J., dissenting).

20. See 33 U.S.C. § 1344.

21. See *id.* § 1251.

22. See *id.* § 1362(6).

discussion of the relationship between sections 402 and 404.<sup>23</sup> Part III considers the dangerous impact *Coeur Alaska* could have on the nation's waters, as well as how the Supreme Court's decision undermines the purposes behind the CWA. Part IV analyzes the fundamental problems of the CWA that were revealed as a result of the *Coeur Alaska* decision. Part V proposes solutions to the problems presented in Parts III and IV, suggesting ultimately that Congress should amend the CWA to apply all EPA technology-based effluent discharge limitations to section 404 permitting decisions.

#### I. THE CLEAN WATER ACT AND AGENCY REGULATIONS INTERPRETING IT

History reveals that adequate water protection cannot be achieved without government action. Ecological degradation became a national issue in the 1960s.<sup>24</sup> To address this concern, Congress enacted a flurry of environmental statutes in the 1960s and 1970s.<sup>25</sup> This period of "environmental law energized a shifting social order that was fundamentally at odds with the commodification of natural resources."<sup>26</sup>

In 1972, Congress made important amendments to the Federal Water Pollution Control Act<sup>27</sup> that signified a shift in its view toward water protection. The CWA established a statutory regime to reduce and eventually eliminate water pollution in the nation's navigable waters.<sup>28</sup> Congress, which overrode President Nixon's veto in establishing the CWA, was "[m]otivated by public outrage at oil spills covering hundreds of square miles, massive fish kills due to pollution, and rivers so laden with pollutants that they actually caught fire."<sup>29</sup> Technology standards also played a role in forcing CWA passage, as "there was mounting frustration over the slow pace of pollution cleanup efforts and a suspicion that control technologies were being developed but not applied to the problems."<sup>30</sup> In 1977, the Federal Water Pollution Control Act was

---

23. *Coeur Alaska*, 129 S. Ct. at 2458.

24. See WILLIAM L. ANDREEN & SHANA JONES, THE CLEAN WATER ACT: A BLUEPRINT FOR REFORM 2 (2008), available at [http://progressivereform.org/articles/CW\\_Blueprint\\_802.pdf](http://progressivereform.org/articles/CW_Blueprint_802.pdf).

25. See Christopher H. Schroeder, *Rational Choice Versus Republican Moment—Explanations for Environmental Laws, 1969-73*, 9 DUKE ENVTL. L. & POL'Y F. 29, 29 (1998).

26. Jeffrey Rudd, *The Evolution of the Legal Process School's "Institutional Competence" Theme: Unintended Consequences for Environmental Law*, 33 ECOLOGY L.Q. 1045, 1046 (2006).

27. 33 U.S.C. § 1251–1376.

28. See 33 U.S.C. § 1251.

29. ANDREEN & JONES, *supra* note 24, at 2.

30. CLAUDIA COPELAND, CONG. RESEARCH SERV., CLEAN WATER ACT: A SUMMARY OF THE LAW CRS-2 (2008), available at <http://www.nationalaglawcenter.org/assets/crs/RL30030.pdf>.

amended again to further address issues aimed at protecting U.S. waters.<sup>31</sup>

Congress elucidated specific aims of the CWA. The CWA's overarching objective is to "restore and maintain the chemical, physical, and biological integrity of the [n]ation's waters."<sup>32</sup> To achieve this objective, Congress set a national goal of eliminating the discharge of pollutants into navigable waters by 1985.<sup>33</sup> Additionally, the CWA called for "an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water . . . by July 1, 1983."<sup>34</sup>

The CWA makes the "discharge of any pollutant by any person" unlawful unless the discharger first obtains a CWA permit.<sup>35</sup> It defines the "discharge of pollutants" as "any addition of any pollutant to navigable waters from any point source."<sup>36</sup> The CWA also differentiates between point source and non-point source pollution.<sup>37</sup> "Point source" is broadly defined in the CWA as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."<sup>38</sup>

In addition to the Act's broad definition of "point source," Congress also included a broad definition of "pollutant."<sup>39</sup> Pollutants include, among other things, "dredged spoil, solid waste, . . . rock, sand . . . and industrial, municipal, and agricultural waste."<sup>40</sup> Congress was not content to limit the definition of "pollutant" to specifically enumerated substances such as rock and sand. Instead, it made sure to brand all industrial process waste as a pollutant, not to be discharged without a

---

31. See 33 U.S.C. § 1251(a).

32. *Id.* § 1251.

33. *Id.*

34. *Id.*

35. *Id.* § 1311.

36. *Id.* § 1362.

37. *Id.* §§ 1329, 1362.

38. *Id.* Point sources are not the only barrier to pollution-free water. The CWA's purposes are also being frustrated by nonpoint source pollution such as "stormwater runoff from agricultural lands, forests, construction sites, and urban areas." COPELAND, *supra* note 30, at CRS-4. Pre-1987 regulation was "primarily directed at point source pollution" and ignored nonpoint source pollution. *Id.* However, 1987 legislation finally regulated nonpoint source pollution, which is estimated to represent "more than 50% of the nation's remaining water pollution problems." *Id.*

39. 33 U.S.C. § 1362(6).

40. *Id.*

permit.<sup>41</sup> The Act's encompassing definition of pollutant dovetails with Congress's goal of preventing water bodies from becoming waste depositories for industrial actors.

Although the Act's objective is to eliminate all effluent discharges into U.S. waters, Congress recognized that this goal was not immediately achievable and created a discharge permitting system. The CWA divides authority to permit discharges between two agencies—the EPA and the Corps.<sup>42</sup> The EPA is authorized under section 402 to issue permits for pollutant discharges,<sup>43</sup> and the Corps is authorized under section 404 to issue permits for dredge or fill activities.<sup>44</sup>

#### A. Pollution Discharge Permitting System

The section 402 permitting scheme, also known as the National Pollution Discharge Elimination System (NPDES), authorizes the EPA to grant permits for pollutant discharges into navigable waters.<sup>45</sup> Permittees must meet technology-based standards designed to reduce effluent discharges.<sup>46</sup> Accordingly, “[t]he [CWA] has been termed a technology-forcing statute because of the rigorous demands placed on those who are regulated by it to achieve higher and higher levels of pollution abatement” by specified deadlines.<sup>47</sup>

CWA section 304(b) directs the EPA to develop effluent limitation standards for categories of existing point source discharges.<sup>48</sup> Effluent standards are defined in the CWA to include “any restriction established by [the EPA] . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters.”<sup>49</sup> After creating various industry

---

41. *Id.* § 1362. I use the term “industrial process waste” throughout this Note to refer to “industrial, municipal, and agricultural waste,” as defined in the CWA’s definition of “pollutant” under 33 U.S.C. § 1362(6).

42. *See id.* §§ 1342, 1344.

43. *Id.* § 1342.

44. *Id.* § 1344.

45. *Id.* § 1342.

46. *See id.* §§ 1311, 1314, 1317.

47. COPELAND, *supra* note 30, at CRS-3. Technology-based standards are not the only weapon used in fighting water pollution. “In waters where industrial and municipal sources have achieved technology-based effluent limitations, yet water quality standards have not been met, dischargers may be required to meet additional pollution control requirements. For each of these waters, the act requires states to set a total maximum daily load (TMDL) of pollutants at a level that ensures that applicable water quality standards can be attained and maintained. A TMDL is both a planning process for attaining water quality standards and a quantitative assessment of pollution problems, sources, and pollutant reductions needed to restore and protect a river, stream, or lake. Based on state reports, EPA estimates that nearly 34,000 U.S. waters are impaired and require preparations of TMDLs.” *Id.* at CRS-4.

48. 33 U.S.C. § 1314(b).

49. *Id.* § 1362(11).

categories, the EPA promulgates effluent standards applicable to all actors that fall into each category, such as those governing “Cement Manufacturing” and “Coal Mining.”<sup>50</sup> These section 304 categorical effluent standards are technology-based, and the EPA “require[s] application of the *best available technology* [(BAT)] economically achievable for [each] category or class which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants.”<sup>51</sup>

The CWA mandates the EPA to “require the elimination of discharges of all pollutants if the [EPA] finds . . . that such elimination is technologically and economically achievable for a category or class of point sources.”<sup>52</sup> Further, the EPA is prohibited from issuing a section 402 permit if the effluent discharge does not meet applicable EPA standards promulgated under section 304.<sup>53</sup> All applicable EPA-promulgated effluent standards are incorporated into section 402 NPDES permits, mandating that industrial discharges comply with all effluent standards in the discharger’s particular industry category.<sup>54</sup>

While effluent discharge limitations promulgated under section 304 apply to existing point sources, Congress wanted new sources to achieve higher levels of pollution abatement.<sup>55</sup> Thus, section 306(b) of the CWA requires the EPA to promulgate effluent limitations for certain new sources of effluent discharge.<sup>56</sup> Consistent with the CWA’s technology-forcing goal, the EPA is required “from time to time, as technology and alternatives change, [to] revise” these “new source performance standards” (NSPSs).<sup>57</sup>

Like the effluent guidelines, the NSPS requirements are also effectuated through the EPA-administered NPDES permitting scheme.<sup>58</sup> Under CWA section 306, the EPA must set point source pollution limitations for new sources that achieve the “greatest degree of effluent reduction which the Administrator determines to be achievable through application of the *best available demonstrated control technology*, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.”<sup>59</sup> CWA section 306(e) makes it “unlawful for . . . any new source to operate . . . in

---

50. See generally 40 C.F.R. § 411, 434 (2009).

51. 33 U.S.C. § 1311(b)(2)(A) (emphasis added).

52. *Id.*

53. *Id.* § 1342(a)(1).

54. See *id.* § 1342.

55. See *id.* § 1316.

56. *Id.* § 1316(b).

57. *Id.* § 1316(b)(1)(B).

58. See *id.* § 1316.

59. *Id.* (emphasis added).

violation of” any promulgated effluent standard.<sup>60</sup> As a result, all new point sources must comply with all applicable NSPS limitations before they can be granted a section 402 permit.<sup>61</sup>

*B. Dredged or Fill Material Permitting System*

The CWA does not give the EPA authority to issue permits for all activity involving navigable waterways. Under section 404, the Corps may issue permits “after notice and opportunity for public hearings for the discharge of dredged or fill material into . . . navigable waters.”<sup>62</sup> The CWA does not affirmatively define what constitutes “fill,” and therefore the Corps and the EPA are left to define this crucial term. However, “[t]he Corps and [the] EPA have had different definitions of what constitutes fill material for most of the history of the section 404 program.”<sup>63</sup> Until 1977, the Corps employed a so-called “effects-based” test to determine what constituted fill material.<sup>64</sup> This effects-based test defined fill as material used in “replacing an aquatic area with dry land or of changing the bottom elevation of a water body for any purpose.”<sup>65</sup>

In 1977, the Corps rejected its “effects-based” test and adopted a “primary purpose” test.<sup>66</sup> The Corps’ primary purpose test defined fill as “any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a water body.”<sup>67</sup> The Corps was explicit in noting that its fill regulation did “not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under Section 402.”<sup>68</sup> This definition was in-line with the agencies’ understanding that the section 404 permitting scheme was meant as an exception to the section 402 program, reaching only “some of the remaining material that was not within the reach of the NPDES program.”<sup>69</sup>

The EPA did not adopt the Corps’ 1977 primary purpose test. In 1980, while the Corps was employing a primary purpose definition of fill,

---

60. *Id.* § 1316(e).

61. *Id.* § 1316.

62. *Id.* § 1344.

63. 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, 623 (2004). For a detailed analysis of the history of the agencies’ fill regulations, *see id.* at 623–32.

64. 33 C.F.R. § 209.120(d)(4) (1975).

65. *Id.* § 209.120(d)(6) (1976).

66. *Id.* § 323.2(e) (2001).

67. *Id.*

68. *Id.*

69. Browand, *supra* note 63, at 643 (analyzing Corps and EPA regulations such as Regulatory Programs of the Corps, 42 Fed. Reg. 37,122, 37,130 (July 19, 1977)).

the EPA adopted an effects-based definition.<sup>70</sup> The EPA's move to an effects-based test was grounded in its belief that the section 404 program was better suited to address wetlands regulation.<sup>71</sup> This new EPA definition had the effect of moving pollutants that would otherwise be regulated by the EPA under section 402 to regulation by the Corps under section 404. Despite acknowledging that an "effects-based test [would] likely include more activities than a primary purpose test," the EPA "continued to believe that a broad implementation of the section 404 program [would] best protect[] the nation's water."<sup>72</sup> The EPA noted that a more encompassing section 404 program was necessary to "minimize damage to wetlands which are especially valuable for propagation and support of fish and wildlife, as well as other beneficial uses."<sup>73</sup>

After decades of inconsistent regulations, in 2002 the Corps and the EPA issued a joint regulation defining fill that is still in effect today.<sup>74</sup> It established an effects-based test that differed slightly from previous effects-based fill regulations promulgated by both the Corps and the EPA.<sup>75</sup> This current effects-based test defines fill as "material placed in waters of the United States" that has the "effect of . . . replacing any portion of a water of the United States with dry land; or . . . changing the bottom elevation of any portion of a water of the United States."<sup>76</sup> This joint regulation notably changed the Corps' earlier practice of assuming that section 404 does not apply to pollutants.<sup>77</sup> Before the 2002 regulation, "fill material and the section 404 program did not encroach upon pollutants that could potentially be covered by the NPDES program."<sup>78</sup>

Although the EPA solely administers a majority of the CWA (including the NPDES permitting scheme), both the EPA and the Corps jointly administer section 404.<sup>79</sup> Despite this joint responsibility, only the Corps has authority to issue section 404 permits for the discharge of dredged or fill material, while the EPA is limited to issuing guidelines governing section 404 permits and exercising a discretionary veto power

---

70. Consolidated Permit Regulations: CWA Section 404 Dredge or Fill Programs, 45 Fed. Reg. 33,290, 33,299 (May 19, 1980).

71. *Id.* Prior to 1980, the EPA did not have the same effects-based test as did the Corps, but the EPA "did look to the purpose of the disposal activity by defining fill material as 'any pollutant used to create fill in the traditional sense of replacing an aquatic area with dry land or of changing the bottom elevation of a water body for any purpose.'" Browand, *supra* note 63, at 626 (quoting 40 C.F.R. pt. 230, app. A (1976)).

72. Browand, *supra* note 63, at 626-27.

73. Permits for Activities in Navigable Waters, 40 Fed. Reg. 19,766, 19,794 (May 6, 1975).

74. 33 C.F.R. § 323.2 (2008); 40 C.F.R. § 232.2 (2008).

75. 33 C.F.R. § 323.2; 40 C.F.R. § 232.2.

76. 33 C.F.R. § 323.2; 40 C.F.R. § 232.2.

77. *See, e.g.*, Regulatory Programs of the Corps, 42 Fed. Reg. 37,122, 37,130 (July 19, 1977).

78. Browand, *supra* note 63, at 644.

79. *See* 33 U.S.C. § 1344 (2006).

over the Corp's permits.<sup>80</sup> Unlike the technology-based standards that govern the section 402 permitting scheme, the section 404 permitting scheme does not require permittees to meet specific technology-based discharge limits.<sup>81</sup> Instead, the Corps makes section 404 permitting decisions using a public interest balancing test.<sup>82</sup>

According to Corps regulations, the public interest balancing test consists of "an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest."<sup>83</sup> The Corps notes that it performs a "careful weighing" of all the factors which "become relevant in each particular case," with "the benefits which reasonably may be expected to accrue from the proposal . . . balanced against its reasonably foreseeable detriments."<sup>84</sup> The factors the Corps must consider in section 404 permit proposals include everything but the kitchen sink:

conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs,

---

80. *Id.*

81. *See id.* § 1344. Many scholars have focused on section 404's inadequacies in protecting wetlands. *See, e.g.,* Alyson C. Flournoy, *Section 404 at Thirty-Something: A Program in Search of a Policy*, 55 ALA. L. REV. 607 (2004). The letter of the Clean Water Act predominately fails to mention wetlands. The 1977 Clean Water Act amendments do include mention of wetlands, but it is not in the conservation context but in the jurisdictional context:

The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto).

33 U.S.C. § 1344(g)(1) (2006). Wetlands require a statutory conservation scheme, rather than a regulatory scheme. With no statute adequately addressing wetlands, the Corps treats them as falling under its section 404 jurisdiction. The use of section 404 to protect wetlands has resulted in inadequate protection layered with unclear national wetland policy goals. Congress must establish national wetlands policy through legislation, as CWA section 404 has proven too unwieldy to adequately safeguard wetlands. The Clean Water Act is not equipped to address wetlands, since "protecting functions and values of wetlands is a goal related to natural resource conservation, which is generally achieved through resource management legislation." 83 IND. L.J. 537, 539 (2008). Ultimately, the need for congressional action regarding wetlands is beyond the scope of this Note. However, until Congress enacts legislation tailored to specifically address these concerns, the Clean Water Act's section 404 program must be used to protect wetlands.

82. 33 C.F.R. § 320.4(a)(1) (2008).

83. *Id.*

84. *Id.*

considerations of property ownership and, in general, the needs and welfare of the people.<sup>85</sup>

To further increase the Corps' discretion, the weight of each factor changes with each permit application. Corps regulations provide that "[t]he specific weight of each factor is determined by its importance and relevance to the particular proposal."<sup>86</sup> Additionally, some of the factors are "not readily susceptible to quantification (conservation, aesthetics, and floodplain values)" while others are "extremely broad and ambiguous (the needs and welfare of the people, land use, economics, wetlands)."<sup>87</sup> The test's "broad-based balancing of a host of economic and environmental factors authorizes Corps District Engineers to weigh a panoply of values on a case-by-case basis."<sup>88</sup> As a result, section 404 permitting decisions by the Corps are effectively unconstrained.<sup>89</sup> The test has been "described as a 'parody of standardless administrative choice.'"<sup>90</sup>

The weaknesses of the Corps' public interest review are exemplified in the wetlands context. Despite the public interest test's purpose of "protect[ing] wetlands from unnecessary destruction by requiring that the benefit of a project outweigh the detriment of wetlands loss," wetlands are being destroyed by developers at an alarming rate.<sup>91</sup> The many criteria the Corps considers in making its public interest determination "suggest that the Corps' section 404 program . . . is an ill-defined federal land use program" and "[a]s a result of these regulatory failings, the current manner of . . . wetland permitting bears little relation to the goal of preserving wetland function."<sup>92</sup> The public interest balancing test's

---

85. *Id.*

86. *Id.* § 320.4(a)(3).

87. Alyson C. Flournoy, *Supply, Demand, and Consequences: The Impact of Information Flow on Individual Permitting Decisions under Section 404 of the Clean Water Act*, 83 IND. L.J. 537, 553 (2008).

88. Blumm & Zaleha, *supra* note 6, at 731.

89. 33 C.F.R. § 320.1(a)(1); see also John H. Davidson, *The New Public Lands: Competing Models for Protecting Public Conservation Values on Privately Owned Lands*, 39 ENVTL. L. REP. (ENVTL. LAW INST.) 10368, 10372 (2009) (noting that "the substantive criteria for permitting provide a layer of uncertainty, a result of the Corps' vague and manipulable public interest review standard" and that "in an effort to make regulation more flexible, the Corps has recognized that when a development will destroy wetland values and there is no real alternative, the developer may acquire a drainage permit after agreeing to invest in the restoration of wetlands elsewhere in the area.").

90. Blumm & Zaleha, *supra* note 6, at 731 (quoting 2 W. RODGERS, ENVIRONMENTAL LAW: AIR AND WATER § 4.12, at 205 (1986)).

91. Ellen K. Lawson, *The Corps of Engineers' Public Interest Review Under Section 404 of the Clean Water Act: Broad Discretion Leaves Wetlands Vulnerable to Unnecessary Destruction*, 34 WASH. U. J. URB. & CONTEMP. L. 203, 226 (1988).

92. Paul J. Schlauch & Thomas I. Strickland, *Changing Land into Water—The Alchemy of the Federal Wetlands Regulatory Scheme*, 27 ROCKY MTN. MIN. L. INST. 635 (1982).

inadequacies give little assurance that wetlands will not continue to be lost. “Without an objective methodology with which the [Corps] can evaluate and compare wetland function at each site, between sites, and intertemporally, the goals of section 404 cannot be met.”<sup>93</sup>

Additionally, since the public interest balancing test requires many factors to be weighed during the Corps’ evaluation of each section 404 permit application, the applicant “has an incentive to provide information on one category of relevant information (benefits) and a disincentive to provide information on adverse effects or costs.”<sup>94</sup> The Corps’ public interest balancing test unfortunately gives applicants incentive “to provide positive and adverse information about a project” and “does not seem well designed to generate the information needed to ensure that unacceptable degradation [to wetlands] does not occur.”<sup>95</sup> As a result, section 404 “grants the Corps substantial discretion to determine both what information will be supplied and what consequences will attend an information shortfall.”<sup>96</sup> This discretion can result in arbitrary Corps action on section 404 permits, as “a broad grant of discretion to the Corps to determine what information should be supplied . . . leave[s] much of the impact of the information regime uncertain, to be resolved on a case by case basis by the Corps.”<sup>97</sup>

Despite the Corps’ ultimate authority to grant permits under section 404, the CWA grants the EPA some involvement in the section 404 permitting process. The EPA’s role in section 404 includes “review[ing] and comment[ing] on individual permit applications.”<sup>98</sup> The EPA also has the authority under section 404(b) to establish guidelines that constrain Corps action under section 404.<sup>99</sup> The current EPA-promulgated guidelines direct that “no discharge of dredged or fill material shall be permitted if there is a *practicable alternative* to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.”<sup>100</sup>

The EPA may also exert control over the section 404 permitting process by using its ability to veto a proposed section 404 permit. In order

---

93. Michael J. Mortimer, *Irregular Regulation Under Section 404 of the Clean Water Act: Is the Congress or the Army Corps of Engineers to Blame?*, 13 J. ENVTL. L. & LITIG. 445, 469 (1998).

94. Flournoy, *supra* note 87, at 581.

95. *Id.* at 582.

96. *Id.*

97. *Id.*

98. 33 U.S.C. § 1344 (2006); *see also* EPA, Wetland Regulatory Authority 1, [http://www.epa.gov/owow/wetlands/pdf/reg\\_authority.pdf](http://www.epa.gov/owow/wetlands/pdf/reg_authority.pdf) (last visited Mar. 15, 2010).

99. 33 U.S.C. § 1344(b).

100. 40 C.F.R. § 230.10 (2008) (emphasis added).

to exercise this veto power, the EPA must first determine that the proposed discharge “will have an *unacceptable adverse effect* on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.”<sup>101</sup> If the EPA exercises its section 404(c) veto power on a particular permit, the Corps is prohibited from issuing that permit.<sup>102</sup> However, the EPA retains full discretion on whether to exercise its veto.<sup>103</sup> Tellingly, it has only exercised its veto on twelve applications in thirty-six years.<sup>104</sup>

## II. *COEUR ALASKA, INC. V. SOUTHEAST ALASKA CONSERVATION COUNCIL*

In *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, the Supreme Court clarified what it perceived to be an unclear interaction between section 402 and section 404.<sup>105</sup> By resolving ambiguities in the CWA and applicable agency regulations regarding the disposal of mine tailings in waters protected by the CWA,<sup>106</sup> the *Coeur Alaska* Court established the reach of the EPA’s authority under section 402 when a

---

101. 33 U.S.C. § 1344(c) (emphasis added).

102. *See id.*

103. The language of section 404(c) is discretionary not mandatory, as the EPA is “authorized” but not required to prohibit a proposed site as a disposal site. *See id.*

104. *See* EPA, Clean Water Act Section 404(c) “Veto Authority” 1, <http://www.epa.gov/owow/wetlands/pdf/404c.pdf> (last visited Mar. 15, 2010). On March 26, 2010, the EPA announced its proposal to veto the Spruce No. 1 Surface Mine, a mountaintop removal mining project located in West Virginia. 75 Fed. Reg. 16,788 (Apr. 2, 2010). The Spruce Mine was granted a section 404 permit by the Corps in 2007 and is “one of the largest surface mining operations ever authorized in Appalachia.” *Id.* at 16,788; Department of the Army (DA) Permit No. 199800436-3 (Section 10: Coal River) (Jan. 22, 2007). If allowed to proceed, the Spruce Mine project would “directly impact 2,278 acres, including more than seven miles of stream,” and indirectly impact other water bodies. 75 Fed. Reg. at 16,789. The section 404 permit authorizes the permittee to “construct six ‘valley fills’ and numerous sedimentation ponds . . . by discharging excess overburden (or spoil) generated by surface coal mining operations.” *Id.* at 16,789. The EPA is “requesting public comments on this proposal. *Id.* at 16,788. The proposed Spruce Mine veto could signal the EPA’s intention to exercise its veto power more frequently than in the past. Conversely, the EPA’s section 404(c) veto power could continue to be an ineffective limit on the Corps’ discretion in the section 404 permitting process. The EPA could withdraw its proposed veto in light of adverse political response following the June 1, 2010 close of the public comment period and any public hearing on the proposal (should the EPA decide such a hearing would be in the public interest). *Id.* at 16,789–90; 40 C.F.R. § 231.4. Additionally, even if the Spruce Mine project is not allowed to proceed, it remains unclear how the EPA will exercise its veto power over future 404 permit proposals for mountaintop removal mining projects. The EPA may veto the Spruce Mine proposal and choose not to exercise its veto over other smaller mountaintop removal mining projects. The EPA could also limit the exercise of its section 404(c) veto power to mountaintop removal mining projects; therefore, the Spruce Mine veto could give little indication of how the EPA will exercise its veto power on section 404 fill discharge permits outside of the mountaintop removal mining context.

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

106. *Id.* at 2471–72.

discharger seeks to dispose of fill material.<sup>107</sup> First, the Court confirmed that the CWA tasks the Corps, and not the EPA, with issuing permits for disposal of mining waste.<sup>108</sup> Second, because it found that the EPA's effluent standards are not applicable to disposal of fill material, the Court also held that the Corps acted lawfully when it issued a disposal permit to Coeur Alaska.<sup>109</sup> In doing so, the Court opened the door for industrial actors to seek similar permits from the Corps for their waste disposals.<sup>110</sup>

#### A. *Factual Background and Procedural History*

In this case, Coeur Alaska sought to reopen the Kensington Gold Mine in Alaska.<sup>111</sup> The company planned to procure gold from the mine via "froth flotation," a process that separates gold from the mine's crushed rock.<sup>112</sup> Slurry, a mixture of water and crushed rock, is the resulting waste produced by the froth flotation process.<sup>113</sup> Although slurry is usually disposed of in a tailings pond, Coeur Alaska wanted to dispose of its slurry by pumping it into Lower Slate Lake, a 23-acre subalpine lake located three miles from the Kensington Gold Mine.<sup>114</sup> Coeur Alaska sought a section 404 permit from the Corps to allow it to pump approximately 4.5 million tons of solid tailings into Lower Slate Lake, at a rate of 210,000 tons per day.<sup>115</sup>

Three environmental groups—Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation (collectively "SEACC")—filed suit against the State of Alaska and Coeur Alaska in the United States District Court for the District of Alaska.<sup>116</sup> SEACC's suit challenged the Corps' decision to issue Coeur Alaska a section 404 permit, and asked the court to vacate the permit and enjoin the company from disposing its slurry into Lower Slate Lake.<sup>117</sup> The district court upheld the Corp's permitting decision and dismissed SEACC's complaint.<sup>118</sup> The Ninth Circuit Court of Appeals reversed on appeal, holding that the district court erred in granting the defendant's summary judgment motion, and remanded the matter back to the district court to

---

107. *Id.* at 2463.

108. *Id.*

109. *Id.* at 2473.

110. *See generally id.*

111. *Id.* at 2458, 2463–64.

112. *Id.* at 2464.

113. *Id.* at 2463–64.

114. *Id.* at 2464; *id.* at 2480 (Ginsburg, J. dissenting).

115. *Id.* at 2480 (Ginsburg, J., dissenting).

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

117. *Id.*

118. *Id.* at \*5–6.

vacate Coeur Alaska's slurry disposal permit.<sup>119</sup> The Supreme Court granted certiorari.<sup>120</sup>

*B. SEACC's Two Arguments and the Court's Holding*

To challenge Coeur Alaska's section 404 permit, SEACC first alleged that the EPA, not the Corps, possesses the sole authority to issue a permit for Coeur Alaska's slurry discharge.<sup>121</sup> To address this argument, the Court focused on an EPA regulation which states that "[d]ischarges of dredged or fill material into waters of the United States which are regulated under section 404 of CWA . . . do not require NPDES permits."<sup>122</sup> While SEACC argued the regulation's syntax implies that only some fill material discharges are regulated under section 404 and that others are regulated under section 402,<sup>123</sup> the Court rejected this argument.<sup>124</sup> Instead, it deferred to the EPA's and the Corps' interpretation of the regulation and held that the Corps held the authority to issue Coeur Alaska's section 404 permit.<sup>125</sup>

Second, SEACC argued that the permit violated both CWA section 306(e), which makes it illegal for new sources to violate any applicable effluent standard, and the EPA's NSPS for process wastewater.<sup>126</sup> In a 1982 rulemaking, the EPA promulgated an NSPS for mining facilities like Kensington that use the froth flotation technique.<sup>127</sup> The NSPS states "there shall be no discharge of process wastewater to navigable waters from mills that use the froth-flotation process alone, or in conjunction with other processes, for the beneficiation of copper, lead, zinc, gold, silver, or molybdenum ores or any combination of these ores."<sup>128</sup>

To determine whether "EPA performance standards, and § 306(e) [ ] apply to discharges of fill material,"<sup>129</sup> the Court analyzed the text of the CWA, the EPA's and the Corps's interpretations of the CWA, and the EPA's interpretation of its own regulation.<sup>130</sup> Finding both the CWA and the EPA's implementing regulations ambiguous on the question, the Court looked to an internal EPA memorandum (the "Regas

---

119. *Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 486 F.3d 638, 655 (9th Cir. 2007).

120. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 128 S. Ct. 2995 (2008).

121. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 128 S. Ct. 2458, 2466 (2009).

122. *Id.* at 2467-68 (citing 40 CFR § 122.3).

123. *Id.* at 2468.

124. *Id.*

125. *Id.* at 2467.

126. *Id.* at 2466; 33 U.S.C. § 1316(e) (2006); 40 CFR § 440.104(b)(1) (2008).

127. 40 C.F.R. § 440.104 (2009).

128. *Id.*

129. *Coeur Alaska*, 129 S. Ct. at 2469.

130. *Id.*

memorandum”), which declared that NSPSs do not apply to discharges of fill material.<sup>131</sup> Although this memorandum was subject to no procedural safeguards such as notice and comment rulemaking, the Court found it sufficient to resolve the issue of whether NSPSs are applicable to fill discharges.<sup>132</sup> Because it determined that the memo’s interpretation of the EPA’s regulations was not “plainly erroneous or inconsistent with the regulation[s],” the Court held that section 404 permits need not comply with the EPA’s NSPSs or CWA section 306(e).<sup>133</sup> Had the Court found CWA § 306 and the NSPS promulgated under it apply to all permitting decisions, the Kensington Mine would be prohibited from discharging mining effluent into Lower Slate Lake.

### III. HIDING ELEPHANTS IN MOUSE HOLES: WHY THE MAJORITY IN *COEUR ALASKA* GOT IT WRONG

*Coeur Alaska* confirms that the Corps can issue fill permits unencumbered by EPA-promulgated effluent standards.<sup>134</sup> In deferring to the agencies’ decision not to apply EPA NSPSs to section 404 permits, the Court ignored the purposes behind the CWA. As discussed below, this case could allow more lakes to become de jure industrial waste sites. Additionally, the case could create complications outside of the mining waste context by establishing precedent allowing any solid waste to be disposed of into a water body so long as it satisfies the agencies’ definition of “fill.”

#### A. *Coeur Alaska Threatens to Undermine the CWA*

*Coeur Alaska* threatens to undermine two goals of the Act: eliminating pollution discharge into waters, and achieving uniformity in national pollution regulation.<sup>135</sup> Congress created the CWA to respond to

---

131. Memorandum from Diane Regas, Director, Office of Wetlands, Oceans and Watersheds, United States Environmental Protection Agency to Randy Smith, Director, Office of Water, Region X, United States Environmental Protection Agency (May 17, 2004).

132. *Coeur Alaska*, 129 S. Ct. at 2470, 2472–77.

133. *Id.* at 2470 (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

134. *Id.* at 2469–70.

135. The legislative history to the CWA provides insight into Congress’s goal of national uniformity among pollution regulation. *See, e.g.*, *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 129 (1977) (“In presenting the Conference Report to the Senate, Senator Muskie, perhaps the Act’s primary author, emphasized the importance of uniformity in setting § 301 limitations. He explained that this goal of uniformity required that EPA focus on classes or categories of sources in formulating effluent limitations.”); 118 Cong. Rec. 33696 (1972); Leg. Hist. 170 (1970) (“The Conferees agreed upon [a] limited cost-benefit analysis [in CWA § 304] in order to maintain uniformity within a class and category of point sources subject to effluent limitations, and to avoid imposing on the Administrator any requirement to consider the location of sources within a category or to ascertain water quality impact of effluent controls, or

water pollution, as “the impetus for the Clean Water Act was a legacy of contamination and public health concerns caused by industrial companies, municipalities, and agriculture historically treating waterways as convenient, expendable repositories for waste.”<sup>136</sup> The Supreme Court’s decision to uphold Coeur Alaska’s permit undermines the CWA because it allows industrial waste pollution to be discharged into a water body. This decision upends congressional intent by allowing the mining company to treat Alaska’s Lower Slate Lake as a tailings impoundment dump. Ironically, Congress sought to prevent this precise sort of wanton degradation of water quality when it first passed the CWA.<sup>137</sup>

The Court’s decision to uphold Coeur Alaska’s permit also undermines Congress’s goal to achieve uniformity under the Act. If the Corps granted Coeur Alaska this permit but does not plan on granting similar permits, Congress’s goal will be frustrated. Since the Corps makes decisions constrained only by its nebulous public interest balancing test, industrial actors will not be able to predict whether their individual permits will be granted or denied; the Corps could conceivably grant a section 404 permit and subsequently deny an identical permit application. Inconsistency in granting section 404 permit applications would directly conflict with Congress’s aim that CWA regulation be predictable.

#### *B. Implications for Disposal Activities Outside of the Mining Context*

Recall from Part I that the CWA charges the Corps with authority to regulate fill discharges, and that the Corps and the EPA have jointly defined fill to include material that has the effect of changing the bottom elevation of any water body.<sup>138</sup> The majority’s opinion in *Coeur Alaska* removes fill material from the purview of all EPA-promulgated regulations. As Justice Ginsburg pointed out in her dissenting opinion in *Coeur Alaska*, as a result of the majority’s decision, the “discharge of a pollutant, otherwise prohibited by firm statutory command, becomes

---

to determine the economic impact of controls on any individual plant in a single community.”). See also *Reynolds Metals Co. v. U.S. EPA*, 760 F.2d 549, 552 n.7, 558 (4th Cir. 1985) (“The standards normally are to apply uniformly [with permit variances being the exception] in certain instances. . . . The Act expresses a congressional insistence to eliminate water pollution within a short time-span through the use of uniform effluent limitations imposed on an industry-wide basis.”); *E. I. du Pont de Nemours*, 430 U.S. at 138 n.28 (1977) (“[A] variance provision would be inappropriate in a standard that was intended to insure national uniformity and ‘maximum feasible control of new sources.’” (quoting S. Rep. No. 92-414 (1971))). See generally P.L. 92-500, S. Rep. No. 92-414 (1972).

136. Todd Wilkinson, *Alaskan Lake’s Fate Could Echo Across Continent*, CHRISTIAN SCI. MONITOR, Mar. 25, 2009, available at <http://features.csmonitor.com/environment/2009/03/24/alaskan-lake’s-fate-could-echo-across-continent>.

137. See generally Andreen & Jones, *supra* note 24, at 2.

138. 40 C.F.R. § 232 (2008); 33 C.F.R. § 323 (2008).

lawful if it contains sufficient solid matter to raise the bottom of a water body.”<sup>139</sup> The majority’s opinion effectively creates a loophole allowing “[w]hole categories of regulated industries [to] thereby gain immunity” from EPA-promulgated effluent limitations and NSPSs.<sup>140</sup>

As a result, the ability of waste dischargers to bypass section 402 and EPA effluent limitations may not be limited to the mining context. *Coeur Alaska* could lead to myriad industrial actors seeking to dispose of their waste in U.S. waters. The Supreme Court’s decision could pave the way for companies to avoid “not only [EPA] standards governing mining activities [such as ore mining, coal mining, and mineral mining] . . . but also standards for dozens of other categories of regulated point sources.”<sup>141</sup> Industrial dischargers whose waste contains a sufficient amount of solid matter may seek a permit from the Corps under section 404 regardless of whether the disposal would violate an EPA effluent limitation. This exception provides industrial dischargers with an “escape hatch” from section 402 regulation, which “is particularly perverse . . . because the CWA acknowledges that solid waste is a harmful pollutant.”<sup>142</sup> Indeed, “most industrial discharges contain solids that are regulated under” an EPA standard.<sup>143</sup> There are over fifty categories of point sources for which the EPA has promulgated effluent standards that could be completely ignored by companies procuring section 404 permits.<sup>144</sup> For example, regulated point sources include: “12 subcategories of dairy products processing . . . 10 subcategories of grain mills . . . 3 subcategories of cement manufacturing . . . 9 subcategories of leather tanning and finishing . . . 16 subcategories of timber products processing . . . and 12 subcategories of meat and poultry products processing.”<sup>145</sup> Only time, not logic or statutory limitation, will tell where the Corps draws the line in section 404 permitting.

Unfortunately, nothing in the *Coeur Alaska* majority opinion assuages concerns that the decision “will lead to § 404 permits authorizing the discharges of other solids that are now restricted by EPA [effluent] standards.”<sup>146</sup> Instead, the majority avoided the issue, noting that “extreme instances” of future section 404 fill discharges were not before the Court.<sup>147</sup> It then noted that if a future case involving solids restricted

---

139. *Coeur Alaska*, 129 S. Ct. 2458, 2483 (2009) (Ginsburg, J., dissenting).

140. *Id.*

141. *Id.*

142. *Id.* (citing 33 U.S.C. § 1314(a)(4)).

143. Brief for American Rivers et al. as Amici Curiae Supporting Respondents, *Coeur Alaska*, 129 S. Ct. 2458 (Nos. 07-984, 07-990).

144. See generally 40 C.F.R. § 405 (2008).

145. Brief for American Rivers, *supra* note 143 (citing 40 C.F.R. § 440 *et seq.*).

146. *Coeur Alaska*, 129 S. Ct. at 2468.

147. *Id.*

by EPA effluent standards were to arise, “the dispositive question for the agencies would be whether the solid at issue—for instance, ‘feces and uneaten feed’—came within the [agencies’] regulation[s]’ definition of ‘fill.’” However, the majority did not address how the Coeur Alaska discharge or any theoretical future discharge of solids restricted by EPA effluent standards would not violate the clear purpose of the CWA to prevent such solid waste discharges. As a result, the majority’s opinion seemed to imply that future industrial actors can discharge waste into waters without limit so long as the Corps grants a section 404 permit and the EPA does not veto it. Without any discussion of how a future case might be decided, the Court expressed no limits on the Corps’ ability to issue section 404 permits to myriad industrial dischargers that might satisfy the fill definition.

*C. America’s Legal Doppelganger: Dangerous Precedent in Canada’s Mine Tailings Disposal Law*

Concerns about the dangerous implications of the *Coeur Alaska* decision ring true when one considers that Coeur Alaska’s disposal will not be the first time a North American lake has been used as a tailings impoundment area. About a decade ago, the Canadian Parliament allowed a mine to do what the Court’s decision in *Coeur Alaska* will allow the Kensington mine to do—“transform a lake into a tailings pond.”<sup>148</sup> Although “[t]he [Canadian] government said it would be a rare exception . . . other mines lined up to do the same.”<sup>149</sup> The Canadian example, discussed in this subpart, illustrates how a water pollution control scheme can evolve in a way that directly undermines its initial purpose.

Resembling the CWA, Canada’s Fisheries Act was enacted in 1985 to protect fish habitats and prevent pollution of waters containing fish.<sup>150</sup> In 2002 the Metal Mining Effluent Regulations (MMERs) were promulgated under the Fisheries Act.<sup>151</sup> Similar to the EPA-promulgated effluent limitations, the MMERs govern both existing and new mines and prescribe effluent discharge limits.<sup>152</sup> Effluent deposit of suspended solids must fall within certain pH and solute concentration ranges.<sup>153</sup>

---

148. Kate Golden, *Coeur Alaska Wins Supreme Court Case*, JUNEAU EMPIRE, June 23, 2009, at 1, available at [http://www.juneauempire.com/stories/062309/loc\\_453703862.shtml](http://www.juneauempire.com/stories/062309/loc_453703862.shtml).

149. *Id.*

150. Fisheries Act, R.S.C., ch. F-14 (1985).

151. Metal Mining Effluent Regulations SOR/2002-222 (Can).

152. *Id.*

153. The effluent discharge limitations in the MMER govern arsenic, copper, cyanide, lead, nickel, zinc, suspended solids, and radium 226. *Id.*

The owner or operator of a mine may apply to an authorization officer for a transitional authorization that permits only the deposit of an effluent containing any

In 2002, Schedule 2 of the MMERs authorized the use of lakes and rivers as tailings impoundments.<sup>154</sup> “Once a lake or river has been put on Schedule 2 . . . it is no longer protected by the Fisheries Act . . . and a mining company can use it as a dumping ground for millions of tonnes of tailings and waste rock.”<sup>155</sup> Mirroring arguments in Justice Kennedy’s majority opinion in *Coeur Alaska*, proponents of Schedule 2 argue that “if properly evaluated, implemented and compensated for,” disposing tailings into lakes “can be a safe, environmentally sound and permanent disposal option.”<sup>156</sup> Additionally, similar to the de facto subsidy Coeur Alaska will receive by avoiding construction of a tailings impoundment area for its waste from Kensington Mine, Schedule 2 essentially amounts to a subsidy to mining companies. As profit margins are down due to “rising costs and fewer high grade ore bodies . . . left to mine, the industry has found that seeking a Schedule 2” inclusion makes any project more profitable.<sup>157</sup>

Schedule 2 is especially ominous because its original purpose was not as far-reaching as its current form. “[T]he original intention of Schedule 2 of the MMER was to grandfather existing tailings impoundment areas that were adversely impacting fisheries habitat.”<sup>158</sup> Over time, Schedule 2 expanded from grandfathering already polluted lakes to allowing “relatively pristine water bodies” to become tailings impoundment areas

---

concentration of total suspended solids, but may not apply if another law of the jurisdiction where the mine is located requires that the mine produce an effluent containing total suspended solids in a concentration equal to or less than the limits set out in Schedule 4 or if, during the 12-month period preceding the application, the results of two consecutive effluent monitoring tests conducted under sections 12 to 16 indicate that (a) the concentration in the effluent of any of the deleterious substances referred to in any of items 1 to 6 or 8 of Schedule 4 exceeded the applicable authorized limits set out in that Schedule; (b) the pH of the effluent was less than 6.0 or greater than 9.5; or (c) the effluent was acutely lethal.

*Id.*

154. *Id.*

155. MiningWatch Canada, Urgent Action: Stop Canadian Lakes from Becoming Mine Waste Dumps! (Nov. 28, 2008), <http://www.miningwatch.ca/en/urgent-action-stop-canadian-lakes-becoming-mine-waste-dumps>.

156. MINING ASS’N OF CANADA, METAL MINING EFFLUENT REGULATIONS (MMER) AND THE ENVIRONMENTAL EFFECTS MONITORING (EEM), TOWARDS SUSTAINABLE MINING PROGRESS REPORT 2007, at 1 (2007), [http://www.mining.ca/www/media\\_lib/TSM\\_Publications/TSM\\_2007\\_Eng/13\\_mmer\\_eng.pdf](http://www.mining.ca/www/media_lib/TSM_Publications/TSM_2007_Eng/13_mmer_eng.pdf).

157. There are some costs associated with securing Schedule 2 listing, but the mine’s “costs of consultants and staff time to go through the amendment process is much less than the tens or hundreds of millions of dollars saved by not having to build a tailings impoundment.” MiningWatch Canada, *supra* note 155.

158. Compilation of Gazette I Comments, <http://www.cen-rce.org/eng/caucuses/mining/docs/Compilation%20of%20Gazette%20I%20Comments.pdf> (last visited Mar. 29, 2010) (comments of Justin Duncan, Sierra Legal Defense Fund, Toronto, Ontario, Canada).

for both old and new mining projects.<sup>159</sup> Additional amendments to MMER are often proposed, with the threat of adding new lakes to Schedule 2 in the future.<sup>160</sup> “Though contrary to both the intent and the letter of the Fisheries Act,” dischargers are receiving Schedule 2 exemptions from the MMER.<sup>161</sup>

Just as Schedule 2 was transformed beyond original intention, the CWA could be similarly undermined by the Supreme Court’s recent decision. The *Coeur Alaska* majority failed to consider how its decision might impact section 404 fill permitting,<sup>162</sup> and the majority did not discuss how to limit the decision’s effect on other effluents. As a result, it is not clear whether *Coeur Alaska* will result in one lake becoming a de jure tailings impoundment area, or many.<sup>163</sup> The end result could be an opening of the floodgates for industrial effluent into the nation’s waters.

Despite the differing legal systems, Schedule 2 in Canada reveals the problems that could result from allowing mining waste discharges into U.S. waters. The water degradation that Schedule 2 has caused in Canada is now apparent, and *Coeur Alaska* potentially creates a similar subversion of the CWA. The lack of a mechanism to limit section 404 permits for industrial waste discharges could allow lakes to become industrial waste dumps sanctioned by the federal government. Since dumping waste into a lake could save money that would otherwise be spent on proper waste disposal, companies will inevitably seek section 404 permits and under *Coeur Alaska*, the Corps has the authority to grant them.

---

159. *Id.*

160. In 2006, additional mining regulations were passed amending the MMER to add more lakes to Schedule 2. Metal Mining Effluent Regulations SOR/2006-239 (Can).

In 2008, four more water bodies were added to Schedule 2. Two of these are previously damaged lakes receiving wastes from operating mines; the others are healthy lakes in Nunavut. Eight proposed mine projects have indicated their preference to use Schedule 2. Another Schedule 2 project, Kemess North, in northern British Columbia, was rejected by an environmental assessment panel where MiningWatch was an active intervener, and another, the Red Chris mine, also in northern British Columbia, is on hold due to MiningWatch’s legal challenge of its environmental assessment.

MiningWatch Canada, *supra* note 155.

161. MiningWatch Canada, *supra* note 155.

162. See generally *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458 (2009).

163. *Id.*

IV. COEUR ALASKA REVEALS UNDERLYING FUNDAMENTAL PROBLEMS  
WITH THE CWA THAT MUST BE ADDRESSED

*Coeur Alaska* reveals two main problems underlying the CWA that must be addressed to avoid the potentially disastrous implications discussed in Part III. First, agency discretion is inherent in section 404 permitting decisions because the Corps evaluates permits using an ad hoc balancing test, and the EPA decides whether to veto a permit on an ad hoc basis.<sup>164</sup> As a result, inconsistent and questionable individual permitting decisions will inevitably thwart Congress's goal of uniform water pollution regulation. Second, the CWA's goal of regulating industrial pollutants under section 402 is undermined when industrial processes produce waste that qualifies as both a pollutant and as fill. The *Coeur Alaska* decision revealed that the section 402 and section 404 permitting schemes are mutually exclusive.<sup>165</sup> As a result, a discharger whose industrial waste pollution contains sufficient fill material can move forward under a section 404 permit and avoid compliance with the stricter section 402 effluent limitations.

A. *Problem #1: The Agency Discretion Problem*

The history of the agencies' fill regulations, as discussed briefly in Part I, reveals that the EPA has tried to expand the Corps' permitting jurisdiction while contracting its own.<sup>166</sup> This "avoidance dynamic" is the result of too much discretion, and the nation's waters and wetlands are suffering as a result.<sup>167</sup> While "Congress has resisted efforts to weaken [section 404] legislatively," the EPA's and the Corps' "regulatory changes and inconsistent implementation" have hindered the program internally.<sup>168</sup> Two main internal problems are the Corps' historical "regulatory ambivalence" and the "intergovernmental tension" between the Corps and the EPA as a result of the EPA's oversight role in section 404.<sup>169</sup> The Corps' regulatory ambivalence results from its unbridled discretion under section 404.<sup>170</sup>

---

164. See 33 C.F.R. § 320.4(a)(1) (2008); 33 U.S.C. § 1344(c) (2006).

165. See *Coeur Alaska*, 129 S. Ct. at 2467.

166. Browand, *supra* note 63, at 618.

167. *Id.* The term "avoidance dynamic" refers to how "[the] EPA has sought to give the Corps broad authority, while the Corps has imposed more restrictive terms over its own authority." *Id.*

168. *Id.*

169. Blumm & Zaleha, *supra* note 6, at 698. These two conflicts have contributed to wetland losses of between "300,000 and 500,000 acres" in previous years. *Id.*

170. *Id.*

Both the Corps and the EPA possess significant discretion under section 404.<sup>171</sup> The Corps' nebulous public interest balancing test gives it significant discretion in determining whether to issue a permit.<sup>172</sup> The Corps conducts the balancing test on a case-by-case basis.<sup>173</sup> As discussed in Part I, there is little substantive limit constraining the Corps test.<sup>174</sup> Inevitably, Corps permitting decisions will not always be consistent. By definition, then, case-by-case permitting decisions are inherently contrary to Congress's purpose of achieving uniform regulation of water pollution.

As discussed in Part I, the EPA clearly has broad discretion under section 404(c) to veto a proposed Corps permit. The EPA need only find that a proposed discharge "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas."<sup>175</sup> However, the EPA retains the sole authority to decide whether to exercise its veto on a proposed Corps permit.<sup>176</sup> The environment may suffer as a result of this discretion. For example, in *Coeur Alaska*, the EPA concluded that the lake disposal was not the most environmentally sound option, yet refused to exercise its section 404(c) veto on the permit.<sup>177</sup>

The EPA's failure to veto the Corps permit in *Coeur Alaska* is not the first time the EPA has refused to exercise its veto power.<sup>178</sup> In practice, the EPA's discretionary veto has not impacted section 404 permitting by the Corps as might be expected due to the EPA's rare use of it. Since 1972, the EPA has vetoed only twelve in the more than one million permit applications.<sup>179</sup> As a result, the threat of veto is insufficient to prevent problematic Corps permit approvals, such as the one in *Coeur Alaska*.

Perhaps the EPA does not veto very many permits because it prefers to work with the Corps to restructure a proposed section 404 permit rather than to simply veto it. In fact, the EPA claims its "preference is to address environmental concerns effectively prior to permit issuance."<sup>180</sup> Indeed, the EPA often gives the Corps material to influence its judgment.

---

171. See 33 U.S.C. §§ 1344(b)–(c) (2006).

172. 33 C.F.R. § 320.4(a)(1) (2008).

173. *Id.*

174. *See id.*

175. 33 U.S.C. § 1344(c).

176. *See id.*

177. *See* *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2465 (2009).

178. *See* EPA, *supra* note at 104, at 1.

179. *Id.* at 1–2.

180. EPA, Spruce No. 1 Mine 404(c) Questions & Answers, [http://www.epa.gov/region03/mntnopr/Spruce\\_QA.html](http://www.epa.gov/region03/mntnopr/Spruce_QA.html) (last visited Mar. 15, 2010).

However, the EPA has become essentially an information supplier and not the gatekeeper of pollution discharges, since it can no longer use its authority under section 402 to regulate pollution that also fits the definition of “fill.”<sup>181</sup>

Not only is the veto insufficiently robust to give adequate oversight over the Corps because of its discretionary nature, it may even be less protective than existing citizen remedies under the CWA.<sup>182</sup> Even if a Corps permitting decision is truly egregious, the EPA still cannot be forced to exercise its veto.<sup>183</sup> However, a citizen suit may successfully challenge a truly egregious Corps permitting decision under the Administrative Procedures Act (APA) as arbitrary and capricious.<sup>184</sup>

In sum, section 404 leaves too much room for agency discretion, because a Corps permitting decision is decided on a case-by-case, ad-hoc basis using its “vague and manipulable public interest review.”<sup>185</sup> And, once those decisions are made, the EPA rarely uses its discretion under section 404(c) to veto section 404 permits. As a result, the EPA and its section 404(c) veto effectively amount to a rubber stamp on Corps decisions, and neither can be relied upon to effectuate the purposes of the CWA.

#### B. Problem #2: The Section 402 Circumvention Problem

The *Coeur Alaska* case reveals another problem underlying the CWA. Although the dissent posited that the current CWA framework is sufficient to deny the Corps’ permit issuance to Coeur Alaska,<sup>186</sup> the majority’s decision established that EPA-promulgated NSPSs do not apply to Corps permits.<sup>187</sup> Thus, the majority’s opinion ensures that the CWA’s purported ambiguity will be read to undermine Congress’s overarching objective of avoiding industrial pollution discharges.

As the case illustrates, the CWA does not clearly delineate the boundary between the activities that should require a section 402 permit and those that should require a section 404 permit. Justice Ginsburg noted in her dissenting opinion that congressional intent behind the CWA would be upheld by applying EPA technology-based standards to section 404 discharges.<sup>188</sup> The *Coeur Alaska* majority, however, held that Congress had not spoken to whether NSPS should apply to section 404

---

181. *Coeur Alaska*, 129 S. Ct. at 2467.

182. See 33 U.S.C. § 1365 (2006).

183. As discussed above, the EPA’s veto power is discretionary. See 33 U.S.C. § 1344(c).

184. 5 U.S.C. § 706(2)(A).

185. Davidson, *supra* note 89, at 10372.

186. See *Coeur Alaska*, 129 S. Ct. at 2484 (Ginsburg, J., dissenting).

187. *Id.* at 2476–77 (majority opinion).

188. *Id.* at 2484 (Ginsburg, J., dissenting).

permits, thus allowing the agency to determine whether the NSPS should apply.<sup>189</sup> Implicit in the majority's opinion is the notion that Congress did not specify how materials that qualify as both pollutants and fill should be regulated.

Since the CWA fails to define "fill," Congress's tacit deferral to the agencies allows the EPA and the Corps to shift the boundary between section 402 and section 404 through their regulatory definitions of "fill." Part I's discussion of the history of the agencies' fill regulations reveals that this line has unpredictably shifted back and forth as the two agencies differed on how best to effectuate section 404's goals. This "avoidance dynamic" culminated with creation of the 2002 joint fill regulation, which no longer subordinates section 404 to section 402. As a result, the initial intention for section 404 to constitute "an exception to the NPDES program" has been undermined by both agency fill regulations determinations and the *Coeur Alaska* decision.<sup>190</sup>

In sum, the *Coeur Alaska* case reveals that section 404 is no longer an exception to section 402, as fill material now "defines the extent of the NPDES program."<sup>191</sup> Activities that Congress and the agencies initially intended be regulated under section 402 are being regulated under section 404 instead. As a result, when fill material is produced by industrial processes, industrial actors can effectively avoid both section 402's stricter technology-based requirements and EPA-promulgated effluent standards.<sup>192</sup>

#### V. EXTRACTING ELEPHANTS FROM MOUSE HOLES: SOLUTIONS TO THE PROBLEMS IDENTIFIED IN PARTS III AND IV

Multiple solutions could address the problems presented by the *Coeur Alaska* decision. However, not all of these solutions solve every problem identified in Parts III and IV. In this Part, I first explain the best potential solution to these problems: a legislative amendment that would apply the EPA's technology-based effluent standards to all section 404 permitting decisions. Then, I describe several alternative solutions that are less ideal but potentially easier to implement.

---

189. *Id.* at 2471–72 (majority opinion).

190. *See* Browand, *supra* 63, at 620. *See generally* *Coeur Alaska*, 129 S. Ct. 2458, at 2471–72.

191. Browand, *supra* note 63, at 644.

192. *Coeur Alaska*, 129 S. Ct. at 2469.

A. *Preferred Solution: Amend the CWA to Apply All EPA-Promulgated Effluent Standards to Section 404 Permitting Decisions*

Section 402 permit applicants are required to provide quantitative analytical data on the pollutants present in their effluent.<sup>193</sup> If issued, the NPDES permit includes effluent limitations with which the facility must comply.<sup>194</sup> To solve the problems highlighted in *Coeur Alaska*, Congress should amend section 404 to force all Corps permit applicants to submit analytical data on any pollutants contained in their fill, as well as where the fill originated. If the fill came from an industrial process, the EPA's effluent guidelines for both existing and new sources should apply to the discharge.

This solution would solve the problems discussed in Parts III and IV and prevent a future decision similar to *Coeur Alaska*, since the existing effluent standards prohibit discharge of process wastewater into water bodies. For the same reason, it would create uniformity in the regulation of many industrial processes for which the EPA has promulgated effluent standards.

The solution would also solve the agency discretion problem because section 404 permitting decisions for industrial polluters would hinge on promulgated effluent standards, not ad hoc determinations. While the EPA cannot be forced to use its section 404(c) veto, requiring that all EPA-promulgated effluent standards be met in section 404 permits would limit the potential for the EPA to succumb to political pressure. In this way, section 402's technology-based standards effectively act as a bright-line veto, requiring the denial of a fill permit where the proposed discharge would violate any EPA effluent limitations. The agencies could no longer choose not to apply the EPA's effluent standards to industrial wastes, regardless of whether the waste could be classified as fill.<sup>195</sup>

The solution would also prevent permit applicants from circumventing section 402 by applying for a section 404 permit. Since EPA effluent standards would apply to both section 402 and section 404 permits, industrial waste dischargers would be subject to effluent standards anytime they fell under CWA jurisdiction. Thus, there would be no incentive for industrial waste disposers to circumvent section 402 because section 404 would limit their discharges in the exact same way.

---

193. 40 C.F.R. § 122 (2008).

194. *Id.*

195. The Corps would violate the APA if it chose not to include an EPA-promulgated effluent standard in a section 404 permit because such an action would "not [be] in accordance with law." 5 U.S.C. § 706(1)(A) (2006).

Had my preferred congressional solution been in place at the time of the *Coeur Alaska* decision,<sup>196</sup> the Corps permit granted to Coeur Alaska would not be lawful because the EPA's NSPSs would prohibit any discharge from the Kensington Gold Mine into Lower Slate Lake. Additionally, Congress's goal of uniformity in regulation would be achieved. No longer would the Corps' malleable, unpredictable public interest balancing test and the EPA's discretionary veto determine the fate of fill materials. By researching the appropriate effluent standards for their discharge, industrial actors could know in advance whether their section 404 permit would be denied.

While this preferred solution would solve the problems discussed in Parts III and IV, *supra*, it is not without its potential roadblocks. The preferred solution may be more politically complex than the other solutions discussed *infra* because it requires passing a statute. However, it is the most secure way to prevent future section 404 permits from allowing industrial waste disposal without applicable effluent standard compliance. Had this preferred solution been in place before *Coeur Alaska* was decided, the case would have been decided differently because the EPA has already promulgated an NSPS prohibiting effluent discharge from mines.

### B. Other Potential Solutions

There are three less preferable solutions to the problems presented by the *Coeur Alaska* case.<sup>197</sup> While these solutions are not as durable as the preferred solution, they are potentially easier to implement. First, the EPA and the Corps could issue a joint regulation or memorandum of agreement stating that all EPA-promulgated effluent standards apply to section 404 permits. Second, President Obama could issue a presidential directive in the form of a memorandum that rejects the EPA's "Regas memorandum" and establishes that section 404 permits are subject to EPA-promulgated effluent standards. Finally, instead of amending section 404, Congress could redefine the term fill in the CWA to exclude mining waste.

#### 1. New Joint Regulation or Memorandum of Agreement

First, the Corps and the EPA could issue a joint regulation or a memorandum of agreement stating that all EPA-promulgated effluent limitations apply to section 404 permittees. Promulgating a joint regulation would require the agencies to follow the formalities of notice

---

196. *Id.*

197. *Coeur Alaska*, 129 S. Ct. at 2458.

and comment rulemaking under the APA.<sup>198</sup> The agencies could accomplish the same result by issuing a memorandum of agreement stating that EPA-promulgated effluent standards apply to section 404 permits. Presumably, a court would defer to this memorandum, much like the Supreme Court deferred to the Regas memorandum in *Coeur Alaska*.<sup>199</sup>

However, neither of these solutions is sufficiently robust. A Corps-EPA joint regulation may not stand the test of time because the agencies have changed regulations many times in the past and could conceivably do so in the future.<sup>200</sup> Additionally, because a memorandum of agreement would likely not require the agencies to go through informal rulemaking procedures under the APA, there are no guarantees that it would remain in effect.<sup>201</sup> For example, a new presidential administration might persuade one or both of the agencies to repudiate the agreement. Despite these weaknesses, a joint regulation or a memorandum of agreement would have solved the situation presented in *Coeur Alaska* because the EPA's NSPS for "process wastewater" would have applied to the discharge, prohibiting Coeur Alaska's mining slurry disposal into Lower Slate Lake.

## 2. Presidential Memorandum

Second, President Obama could swiftly address the *Coeur Alaska* decision by rejecting the internal memorandum to which the *Coeur Alaska* majority deferred.<sup>202</sup> Just as the Obama administration has reversed other Bush administration policies,<sup>203</sup> the President could issue a memorandum for immediate release that would effectively end the EPA policy of treating its effluent standards and NSPSs as not applicable to section 404 permitting decisions.

The President can lawfully submit any written document to establish that all EPA effluent standards are applicable to section 404 permitting

---

198. See 5 U.S.C. § 553.

199. See *Coeur Alaska*, 129 S. Ct. at 2474.

200. See *supra* Part I.

201. The agencies could be required under the APA to initiate a notice and comment rulemaking as per 5 U.S.C. § 553 if such a memorandum of agreement does not fall under the exception to notice and comment rulemaking for "interpretive rules" and "general statements of policy." 5 U.S.C. § 553(b)(1)(A).

202. *Coeur Alaska*, 129 S. Ct. at 2476-77.

203. See, e.g., Barack Obama, *Memorandum for the Heads of Executive Departments and Agencies: Subject: Preemption*, 74 Fed. Reg. 24,693 (May 20, 2009), available at <http://theconstitution.org/blog.history/wp-content/uploads/2009/05/obama-preemption-memo-5202009.pdf>.

decisions.<sup>204</sup> The President could direct the Office of Management and Budget to publish the memorandum in the *Federal Register*, giving the memorandum the force of law.<sup>205</sup> There appears to be

no basis for drawing a distinction as to the legal effectiveness of a presidential action based on the form or caption of the written document through which that action is conveyed . . . . [A]ny presidential determination or directive can be published in the *Federal Register*, regardless of how it is styled.<sup>206</sup>

The memorandum would also “remain effective upon a change in administration, unless otherwise specified in the document” and would “continue to be effective until subsequent presidential action is taken.”<sup>207</sup>

President Obama should issue a memorandum rejecting the Regas memorandum immediately. This action would prevent a court reviewing a section 404 fill permit from having to defer to the Regas memorandum like the Supreme Court did in *Coeur Alaska*.<sup>208</sup> President Obama could conceivably issue such a memorandum immediately, as there are no procedural hurdles such as notice and comment with which the President would need to comply. Ultimately, however, this solution is not sufficiently robust because a subsequent President could rescind this memorandum with the stroke of a pen.

### 3. CWA Amendment Defining Fill

Third, Congress could pass legislation amending the CWA to redefine fill to exclude mining waste. The Clean Water Protection Act (H.R. 1310), a bill introduced in the 111th Congress, would do just that.<sup>209</sup>

---

204. See, e.g., Determination Pursuant to Section 2(c)(1) of the Migration and Refugee Assistance Act of 1962, as amended, 64 Fed. Reg. 65,653 (1999); Report to Congress Regarding Conditions in Burma and U.S. Policy Toward Burma, 64 Fed. Reg. 60,647 (1999); Memorandum for Harold Judson, Assistant Solicitor General, from William H. Rose, *Re: Statement of Policy Regarding Certain Strategic Materials* (Aug. 28, 1945) (concluding that a letter from President Roosevelt stating the government's policy “constitute[d] a Presidential directive having the force and effect of law,” notwithstanding its informality of form). See generally Memorandum for the Counsel to the President, *Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order* (Jan. 29, 2000), available at <http://www.fas.org/irp/offdocs/predirective.html> (“At present, a range of presidential determinations and directives styled other than as executive orders are routinely published in the *Federal Register*.”).

205. See Memorandum for the Counsel to the President, *Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order* (Jan. 29, 2000), available at <http://www.fas.org/irp/offdocs/predirective.html>; see, e.g., Barack Obama, Memorandum for the Heads of Executive Departments and Agencies: Subject: Preemption, 74 Fed. Reg. 24,693 (May 20, 2009), available at <http://theconstitution.org/blog/history/wp-content/uploads/2009/05/obama-preemption-memo-5202009.pdf>.

206. Memorandum for the Counsel to the President, *supra* note 205.

207. *Id.* (emphasis removed).

208. *Coeur Alaska*, 129 S. Ct. 2458, 2476–77 (2009).

209. H. R. 1310, 111th Cong. (2009).

Additionally, there is similar legislation introduced in the Senate, but its scope would be limited to mountaintop removal mining.<sup>210</sup> Despite its promise, there are weaknesses associated with this solution. Congressional bills are far from guaranteed to become law. Almost identical bills have been introduced the past few years and have failed to pass the House of Representatives.<sup>211</sup> Since past bills redefining fill have failed to be enacted into law, there is no guarantee that a new bill such as H.R. 1310 will ever become law. Additionally, a bill that excludes mining waste from the definition of fill does not preclude industrial actors from disposing of other types of waste.

#### CONCLUSION

Over the years, the EPA's and the Corps' various definitions of fill have shifted the line between what is regulated under section 402 and what is regulated under section 404.<sup>212</sup> Although Congress intended the NPDES permitting scheme to be the linchpin of the CWA, with section 404 acting as a subordinated exception,<sup>213</sup> the Supreme Court's decision in *Coeur Alaska* confirms this is no longer the case.<sup>214</sup> By upholding a section 404 permit that allows discharge of industrial waste into a water body,<sup>215</sup> the *Coeur Alaska* majority subjugated the CWA's goal of eliminating waste discharges into navigable waters. Accordingly, *Coeur Alaska* ensures escalating separation between the CWA's purposes and the activities it allows.<sup>216</sup>

The Supreme Court's decision in *Coeur Alaska* also establishes a dangerous precedent that could allow industrial actors to save money by dumping their waste into a nearby water body.<sup>217</sup> Inevitably, many industrial dischargers will seek a section 404 permit from the Corps to do exactly that. The Corps must then decide whether to allow industrial waste discharges that technically meet its definition of fill to dump such effluent into a lake or stream.

However, all of these problems would be solved if Congress amended the CWA to require all section 404 permits to comply with relevant EPA-promulgated effluent standards. This Note proposed

---

210. See S. Res. 696, 111th Cong. (2009).

211. See, e.g., H.R. 2719, 109th Cong. (2005); H.R. 738, 108th Cong. (2003); H.R. 4683, 107th Cong. (2002).

212. See *supra* Part I.

213. Browand, *supra* note 63, at 644 (noting that the "original congressional perspective [was] that the section 404 permitting program was to constitute an exception to [the] EPA's NPDES program").

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

215. *Id.* at 2463.

216. See *Coeur Alaska*, 129 S. Ct. at 2468.

217. *Id.*

various solutions to the problems highlighted in *Coeur Alaska*.<sup>218</sup> Although my preferred solution involves congressional action, other branches of the federal government must take action as well. As soon as possible, President Obama should reject the Regas memorandum to which the *Coeur Alaska* majority paid deference.<sup>219</sup> This action can be taken immediately and unilaterally, and no procedural barriers such as notice and comment stand in its way.

However, the means are just as important as the ends. Legislative solutions will be more time consuming and more difficult to accomplish politically than a rejection of the Regas memorandum. However, a succeeding President could easily reverse any unilateral action taken by President Obama. It is for this very reason that we must push for a legislative solution. Until Congress passes a CWA amendment requiring all section 404 permits to comply with relevant EPA-promulgated effluent standards, agency discretion will continue to hinder CWA enforcement, and industrial actors will continue to circumvent regulation under section 402.

---

218. *Id.*

219. *Id.* at 2476–77; Memorandum from Diane Regas, Director, Office of Wetlands, Oceans and Watersheds, EPA to Randy Smith, Director, Office of Water, Region X, EPA (May 17, 2004).

**We welcome responses to this Note. If you are interested in submitting a response for our online companion journal, *Ecology Law Currents*, please contact [ecologylawcurrents@boalt.org](mailto:ecologylawcurrents@boalt.org). Responses to articles may be viewed at our website, <http://www.boalt.org/elq>.**