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U.S. v. GODFREY

See Count '5' Section 4

No. 2:14-cr-00323 JAM.

112 F.Supp.3d 1097 (2015)

The UNITED STATES of America, Plaintiff-Appellee, v. John E. GODFREY, Defendant-Appellant.

United States District Court, E.D. California.

Signed June 4, 2015.

Attorney(s) appearing for the Case

Peter Michael Mularczyk, U.S. Attorney's Office, Sacramento, CA, for Plaintiff-Appellee.

Linda C. Harter, Rachelle Barbour, Federal Public Defender's Office, Sacramento, CA, for Defendant-Appellant.

ORDER AFFIRMING IN PART AND REVERSING IN PART DEFENDANT'S CONVICTIONS

JOHN A. MENDEZ, *District Judge.*

This matter is before the Court on Defendant John Godfrey's ("Defendant") appeal from his conviction on three counts following a trial before Magistrate Judge Kendall Newman (Doc. # 36). With leave of the Court, The New 49'ers Legal Fund ("Amicus") filed an amicus curiae brief (Doc. # 38). Oral argument was held before the Court on June 2, 2015. For the following reasons, Defendant's conviction is affirmed in part, and reversed in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises from Defendant's gold mining operation on the Lucky Bob Mining Claim in the Tahoe National Forest. Doc. # 32, Reporter's Transcript, Day 1 ("RT1") at 1-224. The Lucky Bob claim is a placer claim, which means that gold was found within gravels or sedimentary deposits, rather than in hard rock or quartz. RT1 at 1-42. Because the Lucky Bob claim is unpatented, the United States Forest Service retains jurisdiction to manage the non-mineral surface resources on the land. RT1 at 1-42. During the relevant time period, Defendant had received permission from the holder of the Lucky Bob claim to mine the claim. RT1 at 1-224. As detailed below, Defendant took a number of actions to improve land and trails on the claim. RT1 at 1-50-1-

54. Defendant also installed a non-motorized hand sluice, which was described at trial as follows: "A sluice box is an elongated piece of metal with sides and with little partitions in the lower half of the box that

[112 F.Supp.3d 1100]

you run water through. And you take material that's had the rocks and stones removed from it, and put it in that box and let water flow over it and wash out everything but hopefully heavy metals and gold." RT1 at 1-214 (testimony of defense witness, Larry Latta). Defendant's convictions arise from his failure to comply with various regulations — promulgated by the United States Secretary of Agriculture and enforced by the United States Forest Service — in mining the Lucky Bob claim.

On August 21, 2014, the Government filed a five-count superseding information, which charged Defendant with five federal Class B misdemeanor counts for allegedly conducting various unauthorized activities on National Forest lands and for causing damage to surface resources, in violation of 16 U.S.C. § 551 and 36 C.F.R. § 261.1 et seq. Doc. # 12. In Count One, Defendant was charged with unauthorized cutting and damaging of any timber, tree, and forest product, in violation of 36 C.F.R. § 261.6(a). *Id.* In Count Two, Defendant was charged with causing timber, trees, slash, brush, and grass to burn without a permit, in violation of 36 C.F.R. § 261.5(c). *Id.* In Count Three, Defendant was charged with damaging any natural feature or property of the United States, in violation of 36 C.F.R. § 261.9(a). *Id.* In Count Four, Defendant was charged with unauthorized trail and significant surface disturbance on National Forest System land, in violation of 36 C.F.R. § 261.10(a). *Id.* Finally, in Count Five, Defendant was charged with placing in or near a creek any substance which may pollute, in violation of 36 C.F.R. § 261.11(c). *Id.*

On September 9-10, 2014, a two-day bench trial was held before Magistrate Judge Newman. Doc. # 18; Doc. # 21. Acting as the finder of fact, Magistrate Judge Newman found Defendant not guilty of Counts One and Two, because Defendant's actions were mining-related. Doc. # 33, Reporter's Transcript, Day 2 ("RT2") at 2-46. However, the Magistrate Judge found Defendant guilty of Counts Three, Four, and Five, noting it was "not possible to look at the photographs in this case and find that there was not significant resource disturbance in this case, and that does include the cutting of trees; the removing of bushes and brush; the burning; the breaking up of boulders, and using chains and using a drill to do so; the use of chemicals, whether non-toxic or otherwise; the use of a hose, even if only for a few times, but then to use a hydraulic method; the damming of the water." RT2 at 2-49.

On November 5, 2014, Defendant was sentenced to five years of probation, which may terminate in three years if he complies with all terms of probation, including the payment of restitution. Doc. # 27. Defendant was also ordered to complete 200 hours of unpaid community service, pay $7,500 in restitution, and pay a $30 special assessment. *Id.*

Pursuant to 18 U.S.C. § 3402, Federal Rule of Criminal Procedure 58(g)(2)(B), and Local Rule 422, Defendant now appeals his convictions on Counts Three, Four, and Five.

II. OPINION

A. *Legal Standard*

On appeal, questions of statutory construction and statutory interpretation are reviewed *de novo. United States v. Montes-Ruiz,* 745 F.3d 1286, 1289 (9th Cir.2014). As Defendant timely moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29, the Court's review of the denial of the motion is *de novo. United States v. French,* 748 F.3d 922, 935 (9th Cir.) *cert. denied,* ____ U.S. ____, 135 S.Ct. 384, 190 L.Ed.2d 271 (2014). As with any sufficiency of evidence

[112 F.Supp.3d 1101]

challenge, the Court must consider the evidence presented at trial in the light most favorable to the Government. *Id.* Thus, the ultimate inquiry for the Court is "whether this evidence, so viewed, is adequate to allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." *United States v. Nevils,* 598 F.3d 1158, 1164 (9th Cir.2010).

B. *Statutory and Regulatory Framework*

The United States Mining Laws Act of 1872 reserved to "locators of all mining locations" the "exclusive right of possession and enjoyment of all the surface included within the lines of their locations." 30 U.S.C. § 26. This "exclusive right" was modified and limited by the Surface Resources and Multiple Use Act of 1955, which reserved to the United States the right "to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof." 30 U.S.C. § 612(b). However, regulations passed pursuant to the Surface Resources and Multiple Use Act of 1955 may not "endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto." *Id.*

In accordance with 30 U.S.C. § 612(b) — and pursuant to the statutory authority granted in 16 U.S.C. § 551 — the Secretary of Agriculture promulgated a series of regulations that prohibit certain activities within the National Forest System. 36 C.F.R. § 261.1 et seq. These regulations are qualified by the limitation that "nothing in this part shall preclude activities as authorized by the U.S. Mining Laws Act of 1872 as amended." 36 C.F.R. § 261.1(b). Consistent with this language, the Ninth Circuit has upheld the Secretary of Agriculture's authority to regulate mining operations in the Natural Forest System, provided that such operations are not "prohibited nor so unreasonably circumscribed as to amount to a prohibition." *United States v. Weiss,* 642 F.2d 296, 299 (9th Cir.1981). As relevant in this case, the Ninth Circuit has held that the Forest Service may require prospective miners to submit either a notice of intent or a plan of operations for approval under 36 C.F.R. § 228.4, provided that these requirements apply only to operations "which might cause significant disturbance of surface resources." 36 C.F.R. § 228.4(a); *United States v. Doremus,* 888 F.2d 630, 632 (9th Cir.1989).

As set forth in 36 C.F.R. § 228.4, "a notice of intent to operate is required from any person proposing to conduct operations which might cause significant disturbance of surface resources." 36 C.F.R. § 228.4(a). "Operations" is defined as including "[a]ll functions, work, and activities in connection with prospecting, exploration, development, mining or processing of mineral resources and all uses reasonably incident thereto[.]" 36 C.F.R. § 228.3(a). The regulations provide that "[s]uch notice of intent shall be submitted to the District Ranger having jurisdiction over the area in which the operations will be conducted." 36 C.F.R. § 228.4(a). The regulations further provide that a notice of intent to operate is not required for certain activities, although these exceptions incorporate the central standard of "significant surface resource disturbance." 36 C.F.R. § 228.4(a)(1). For example, a notice of intent to operate is not required for "[p]rospecting and sampling which will not cause significant surface resource disturbance and will not involve

removing small mineral samples or specimens, gold panning, metal detecting, non-motorized hand sluicing, using battery operated dry washers, and collecting of

[112 F.Supp.3d 1102]

mineral specimens using hand tools[.]" 36 C.F.R. § 228.4(a)(1)(ii). Similarly, a notice of intent to operate is not required for "[o]perations which will not involve the use of mechanized earthmoving equipment, such as bulldozers or backhoes, or the cutting of trees, unless those operations otherwise might cause a significant disturbance of surface resources[.]" 36 C.F.R. 228.4(a)(1)(vi). Thus, even for these enumerated "exceptions," the central inquiry remains whether operations might cause significant disturbance of surface resources.

As noted above, Part 261 sets forth a number of activities which are prohibited within the National Forest System, violations of which form the bases of the criminal charges against Defendant. 36 C.F.R. § 261.1 specifically provides that "Forest Officers may permit in the ... approved [operating] plan an act or omission that would otherwise be a violation" of Part 261. 36 C.F.R. § 261.1a. Defendant did not however file a notice of intent or a proposed plan of operations, and did not obtain an approved operating plan. For these reason he was prosecuted for violations of individual sections of Part 261, 36 C.F.R. § 261.1a notwithstanding.

C. Discussion

1. *Significant Disturbance of Surface Resources*

Much of Defendant's appeal rests on his position that his operations did not cause significant disturbance of surface resources. This issue requires the Court to determine whether sufficient evidence was presented at trial for a rational trier of fact to conclude, beyond a reasonable doubt, that Defendant's operations caused significant surface disturbance. For the following reasons, the evidence was sufficient to so conclude.

At trial, Nicholas Shope, a law enforcement officer with the U.S. Forest Service, testified that, while approaching the Lucky Bob mining claim, he personally watched as Defendant "used his drill [and] was drilling on rocks[.]" RT1 at 1-121. Richard Weaver, a minerals and geology program manager for the U.S. Forest Service, testified that he observed the following conditions at the Lucky Bob mining claim: (1) "some clearing of riparian vegetation"; (2) "piles of riparian vegetation, brush and other vegetation that had been cut"; (3) "a pile where logs and cleared brush ... and riparian vegetation had been burned"; and (4) "a new trail" constructed by Defendant. RT1 at 1-50 — 1-54. Evidence was also introduced that Defendant cut 11 alder trees, as well as one cedar tree that was already dead. RT1 at 1-196. Moreover, the Government introduced at trial a letter submitted by Defendant to the Bureau of Land Management, in which Defendant acknowledged (1) "clearing brush ... to reopen the trail"; (2) stacking and burning "three large piles of brush" which "took a total of eight days"; (3) working for eight hours at stacking rocks; (4) "repairing an existing trail"; and (5) spending "two days removing brush and five days burning[.]" Gov't Exhibit 100 at 3; RT1 at 1-211. This evidence was plainly sufficient for a rational fact-finder to conclude, beyond a reasonable doubt, that Defendant's operations caused significant disturbance to surface resources. Even under a *de novo* standard of review, which the Ninth Circuit has suggested may be appropriate in determining whether a plan of operations is required, the Court would — and does — reach the same conclusion: Defendant's unauthorized operations caused significant disturbance to surface resources. *See United States v. Brunskill,* 792 F.2d 938, 940 (9th Cir.1986) (noting that "[w]hether a plan of operations is required is a question of law reviewed *de novo*").

To the extent Defendant argues that his use of a non-motorized hand sluice and

[112 F.Supp.3d 1103]

other hand tools necessarily requires a finding that he did not cause a significant disturbance of surface resources, this argument is unpersuasive. In arguing that "[b]oth hand tools and a non-motorized hand sluice are explicitly listed as examples of activities which will not cause significant surface resource disturbance," Defendant misreads 36 C.F.R. § 228.4(a)(1)(ii). Reply at 7. In its entirety, 36 C.F.R. § 228.4(a)(1)(ii) provides that a notice of intent to operate is not required for "[p]rospecting and sampling which will not cause significant surface resource disturbance and will not involve removal of more than a reasonable amount of mineral deposit for analysis and study which generally might include searching for and occasionally removing small mineral samples or specimens, gold panning, metal detecting, non-motorized hand sluicing, using battery operated dry washers, and collecting of mineral specimens using hand tools[.]" 36 C.F.R. § 228.4(a)(1)(ii). By its plain terms, this language only exempts those conducting prospecting and sampling *which will not cause significant surface resource disturbance.* For the reasons stated above, Defendant's operation did not meet this requirement. Moreover, although this section specifically refers to non-motorized hand sluicing and collecting of mineral specimens using hand tools, the regulation merely notes that exempted operations "might include" these activities. This is far from the blanket exclusion urged by Defendant. Reply at 7.

Finally, this argument overlooks the cumulative effect of Defendant's operations: while non-motorized hand sluicing, alone, may not constitute significant surface resource disturbance, the combination of each of Defendant's actions did, in fact, cause significant surface resource disturbance. For this same reason, Defendant's arguments regarding the breaking of rocks, and the cutting of timber for clearance purposes, fail. Reply at 7. The Court does not hold that these activities, in all forms, would necessarily constitute significant surface resource disturbance. Rather, the Court merely holds that, in this specific case, considering the totality of Defendant's activity on the Lucky Bob Mining Claim, Defendant's operation constituted such a disturbance.

2. *Count 3*

In Count 3, Defendant is alleged to have violated 36 C.F.R. § 261.9(a), which prohibits "[d]amaging any natural feature or other property of the United States[.]" Defendant argues that cutting down common trees or brush cannot sustain a conviction under 36 C.F.R. § 261.9(a), because another, more specific provision, in the same subsection, prohibits "[d]amaging any plant that is classified as a threatened, endangered, sensitive, rare, or unique species." Opening Brief at 12 (citing 36 C.F.R. § 261.9(c)). Thus, Defendant argues, "natural feature" in 36 C.F.R. § 261.9(a) cannot be read to include common, non-endangered, plants because such a reading would render 36 C.F.R. § 261.9(c) mere surplusage. *Id.* at 13. Although not presented with this exact argument, the Ninth Circuit has indicated that "live green trees are a feature of nature." *Doremus,* 888 F.2d at 635. Regardless, the Court need not reach this issue because Defendant clearly damaged a "natural feature or other property of the United States" by "drilling on rocks[.]" RT1 at 1-121 (testimony of Nicholas Shope). As Defendant "engage[d] in some conduct that is clearly proscribed" by 36 C.F.R. § 261.9(a), it is immaterial whether

489, 495, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) ("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of

[112 F.Supp.3d 1104]

the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.").

Defendant argues that "[w]hen the magistrate judge explained his determination that Mr. Godfrey was guilty of Count Three, he concluded that there had been damage to trees and brush, but did not refer to the rocks." Reply at 8-9. This argument is belied by the record. In addressing the evidence "as to each individual count," the Magistrate Judge concluded that significant resource disturbance had occurred, pointing, in part, to "the breaking up of boulders, and using chains and using a drill to do so[.]" RT2 at 2-49. This factual finding was supported by the testimony of Nicholas Shope (RT1 at 1-121). Defendant's conviction on Count 3 is therefore affirmed.

3. *Count 4*

In Count 4, Defendant is alleged to have violated 36 C.F.R. § 261.10, which prohibits "constructing, placing, or maintaining any kind of road, trail, structure, fence, enclosure, communication equipment, significant surface disturbance, or other improvement on National Forest System lands or facilities without a special-use authorization, contract, or approved operating plan when such authorization is required." 36 C.F.R. § 261.10(a). As discussed above, Defendant's mining operation caused significant disturbance of surface resources. Moreover, much of Defendant's activity was in service of creating a "new trail" to access his mining claim. RT1 at 1-54. As Defendant's unauthorized trail work constituted a significant surface disturbance, and he failed to obtain an approved plan of operations, this work was in violation of 36 C.F.R. § 261.10(a). Accordingly, Defendant's conviction on Count 4 is affirmed.

4. *Count 5*

In Count 5, Defendant is alleged to have violated 36 C.F.R. § 261.11, which prohibits "[p]lacing in or near a stream, lake, or other water any substance which does or may pollute a stream, lake, or other water[.]" 36 C.F.R. § 261.11(c). Defendant argues that his conviction on this count must be reversed because "[p]utting materials from the creek back into the creek does not constitute the `placing' of a `pollutant' into the creek." Opening Brief at 17. Defendant cites language from a Supreme Court case concerning the Clean Water Act: "If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not `added' soup or anything else to the pot." Opening Brief at 16-17 (citing *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians,* 541 U.S. 95, 110, 124 S.Ct. 1537, 158 L.Ed.2d 264 (2004)). Defendant contends that the evidence offered at trial shows that he "did not introduce pollutants such as chemicals, oils, outside dirt, other liquids, or trash into Poorman Creek." Opening Brief at 17. The Magistrate Judge appeared to acknowledge as much during the second day of trial: "We know he was breaking up rocks. We know he was pouring some chemicals, whether non-toxic or otherwise, but there wasn't any evidence that I'm aware of that any of those broken up rocks or chemicals ended up in the creek." RT2 at 2-44 — 2-45.

At trial, the Government presented the testimony of Jeff Huggins, a water control engineer for the Central Valley Regional Water Quality Control Board in Rancho Cordova. RT1 at 1-161. Huggins was accepted by the Court as an expert witness. RT1 at 1-163. Huggins testified that he personally observed mining wastes in Poorman Creek, downstream of Defendant's mining operation. RT1 at 1-171. When asked to define "mining wastes,"

[112 F.Supp.3d 1105]

Huggins noted that it is "a very wide definition" which includes "the process fluids, the process solids, the overburden... the sand, silts, and clays, gravels, coarser grain fraction, overburden waste rock, processing fluids, processing solution." RT1 at 1-174. However, Huggins did not define any of these terms, and only testified that he personally observed "sands, silts and clays and bottom deposits" in Poorman Creek "downstream of the operation." RT1 at 1-171. Huggins further testified that the location of Defendant's mining operation was "all within the high water mark within the flood plain of Poorman Creek, so the mining activities are being conducted within the normal high water mark of Poorman Creek." RT1 at 1-170. Huggins testified that both "sediment" and "mining waste" are "pollutant[s]." RT1 at 1-173. Of course, this final piece of testimony is a legal conclusion, and does not aid the Court's ultimate analysis.

In finding Defendant guilty of violating 36 C.F.R. § 261.11(c), the Magistrate Judge noted that Defendant's operation presented "something very different" than "removing a ladle of soup and putting it back in the soup pot." RT2 at 2-50. The Magistrate Judge reasoned that it differed from the "one ladle of soup" example:

> not only because of the trench, but again, the government also did present expert testimony in terms of the impact by the defendant here. This is not someone speculating well, you've moved some small amount through your mineral and we think this may be harming. There is a reason why these basins to — water's such a precious resource here, and when it's flowing into other rivers and it's affecting usage for people, farms, agriculture, habitat and while I recognize water flows will vary during high water months and low water, and rain and snow melt, again we've been in a drought here, it is very easy looking at the photographs to realize the significant impact that the defendant had on Poorman's Creek through damming, blocking, altering that creek.
>
> RT2 at 2-52 — 2-53.

Accepting the evidence at trial in the light most favorable to the Government, the Court finds that these factual findings are supported by sufficient evidence. Specifically, Defendant's mining operations resulted in the addition of "sands, silts and clays and bottom deposits" into Poorman Creek downstream of the operation. Additionally, the evidence supports the Magistrate Judge's factual finding that these additions could have a significant effect on larger ecosystems. *See* RT1 at 1-177 (testimony of Jeff Huggins that the "beneficial uses" of Poorman Creek include "domestic and municipal water supply, agricultural water supply, power supply, recreation, esthetics [sic], fish and — fish and wildlife habitat, spawning").

However, the legal issue of whether the release of materials found within the high water mark of Poorman Creek constitutes "placing a pollutant" into the creek remains. As this is an issue of statutory construction, the Court's review is *de novo. United States v. Montes-Ruiz,* 745 F.3d 1286, 1289 (9th Cir.2014).

As an initial matter, the structure of 36 C.F.R. § 261.11 is informative. The subsection is labeled "Sanitation" and 36 C.F.R. § 261.11(c) is surrounded by

prohibitions on (1) depositing in a toilet or plumbing fixture a substance which could interfere with its operation; (2) leaving refuse, debris, or litter in an unsanitary condition; (3) failing to properly dispose of all garbage; and (4) improperly dumping refuse, debris, trash, or litter. 36 C.F.R. § 261.11(a)-(e). Thus, the provisions surrounding 36 C.F.R. § 261.11(c) lend support to Defendant's argument that "any substance which does or may pollute" must

[112 F.Supp.3d 1106]

be a foreign substance, not a substance which is already found within the high water mark of the river.

Although "pollute" is not defined within Part 261, the dictionary definition of "pollute" is instructive. *See Phillips v. AWH Corp.,* 415 F.3d 1303, 1319 (Fed.Cir.2005) (noting that "dictionaries, encyclopedias and treatises are particularly useful resources to assist the court in determining the ordinary and customary meanings of [relevant] terms"). The Merriam-Webster Dictionary offers two definitions of "pollute:" (1) "to make physically impure or unclean;" and (2) "to contaminate (an environment) especially with man-made waste." As with the structure of the regulation, these definitions suggest that "placing any substance which does or may pollute" necessarily entails the introduction of a foreign substance, possibly even a man-made substance.

Returning to the Supreme Court's "one ladle of soup" example, the Court agrees that the present case is not closely analogous. *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians,* 541 U.S. 95, 110, 124 S.Ct. 1537, 158 L.Ed.2d 264 (2004). Defendant did not merely remove water from one location in Poorman Creek and return that same water to another location in Poorman Creek. Rather, he diverted the water through his mining operation, and returned it, along with "sands, silts and clays and bottom deposits" to Poorman Creek, downstream of his operation. However, as noted by the Magistrate Judge and as emphasized now by Defendant, the entire mining operation occurred beneath the high water mark of Poorman Creek. Importantly, there is no evidence that any foreign substance (such as a chemical) was introduced to Poorman Creek. *See* RT2 at 2-44 — 2-45 (the Magistrate Judge, noting that "there wasn't any evidence that I'm aware of that any of those broken up rocks or chemicals ended up in the creek"); *see also* RT1 at 182 (testimony of Huggins, noting that "chemicals getting into the water" was "not the major concern in this case"). In this sense, a more apt analogy may be that of a bowl of cereal. At its low point, Poorman Creek is much like a bowl of Cherrios with very little milk in it, with a number of Cherrios pieces "stranded" up on the sides of the bowl. Filling the bowl with milk releases those "stranded" Cherrios pieces back into the milk, but nothing foreign has been added to the bowl. Similarly, Defendant's operation merely released sediment that was already part of the creek-bed back into the creek. As testified to by Jeff Huggins, this activity may have a caused a significant effect on Poorman Creek and those ecosystems which rely on it. RT1 at 1-177. Indeed, as discussed above, Defendant has been properly convicted of causing an unauthorized significant disturbance to surface resources. However, the Government's evidence was insufficient to sustain Defendant's conviction under 36 C.F.R. § 261.11 for *polluting* the creek. Accordingly, Defendant's conviction on Count 5 is reversed.

5. ***Notice***

The New 49'ers Legal Fund ("Amicus"), as amicus curiae, argues that the Forest Service's failure to give Defendant formal notice of his violations runs afoul of both the regulatory framework of 36 C.F.R. § 228.1 et seq., as well as broader constitutional principles of due process. Amicus Brief at 7, 13. With regard to the regulatory framework, Amicus argues that Part 228 places the burden on the Forest Service to conduct inspections of all mining operations within the National Forest System, and to give formal notice to individuals that their operations are in violation of the regulations. Amicus Brief at 7. Because Defendant never received a formal "notice of noncompliance" under 36 C.F.R.

[112 F.Supp.3d 1107]

§ 228.7, Amicus argues that cannot be prosecuted under Part 261. Amicus Brief at 7. Practically, as the Magistrate Judge observed, this approach would make little sense: miners would essentially be immune from prosecution under Part 261 for any mining-related activity, regardless of its severity, as long as the operations were conducted before a Forest Service officer learned of the violation and gave formal notice. RT1 at 1-191 ("The Court: ... If he went out and clear-cut 20 acres, pushing a backhoe and bulldozer, would your position be that you can't cite him for that, you haven't given him a notice of non-compliance? [Defense Counsel]: Yes"). Such a policy would provide little incentive for prospective miners to submit either a notice of intent to operate or plan for approval of mining operations, as required by 36 C.F.R. § 228.4(a), and would provide a perverse incentive of immunity from prosecution to miners who could avoid detection by the Forest Service.

More importantly, this argument fails because of the structure of 36 C.F.R. § 228.1 et seq. Prior to any mention of notices of noncompliance, 36 C.F.R. § 228.4(a) provides that "a notice of intent to operate is required from any person proposing to conduct operations which might cause significant disturbance of surface resources" and that "[s]uch notice of intent shall be submitted to the District Ranger having jurisdiction over the area in which the operations will be conducted." In a subsequent subsection, titled "Inspection, noncompliance[,]" the regulations provide that "Forest Officers shall periodically inspect operations to determine if the operator is complying with the regulations in this part *and an approved plan of operations.*" 36 C.F.R. § 228.7(a) (emphasis added). The regulations go on to provide that, "[i]f an operator fails to comply with the regulations or *his approved plan of operations* ... the authorized officer shall serve a notice of noncompliance upon the operator[.]" 36 C.F.R. § 228.7(b). Given the structure of Part 228, and the specific references to "an approved plan of operations," this subsection must be read as requiring periodic inspections and notice of noncompliance *subsequent* to the submission of a notice of intent to operate, and the receipt of an approved plan of operations by the miner. As Defendant did not submit the requisite notice of intent to operate, nor did he obtain an approved plan of operations, 36 C.F.R. § 228.7 is not applicable and the Forest Service was not obligated to provide him with a notice of noncompliance prior to citing him for violations of Part 261.

With regard to Amicus' constitutional due process challenge, the Court need not determine whether citing a miner under Part 261 — without giving prior actual notice that he was in danger of violating the regulations — runs afoul of due process. Reply at 13. At trial, David Brown, a minerals administrator with the Forest Service, testified that, on April 2, 2013, he received a phone call from Defendant, during which he informed Defendant that "he would need a plan of operations" because his mining "activities might be causing significant surface disturbance and that would require a plan of operations." RT1 at 1-31. Brown also testified that Defendant had informed him that he would stop work at his mining site until he had contacted the appropriate Forest Service personnel. RT1 at 1-32. While testifying, Defendant himself acknowledged that this phone call occurred, although he did not remember the substance of the conversation. RT1 at 1-249. Thus, even without a formal notice of noncompliance, Defendant was on actual notice that a notice of intent to operate was required, and that continued operations were improper. Amicus proposes an "as applied" constitutional challenge, and the Court need not consider the constitutional implications of a counterfactual case

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in which no notice was provided. *Acosta v. City of Costa Mesa,* 718 F.3d 800, 821-22 (9th Cir.2013).

KX (pp 6 of 6)

III. ORDER

For the reasons set forth above, the Court AFFIRMS Defendant's convictions on Count 3 and Count 4 and REVERSES Defendant's conviction on Count 5. This matter is remanded to Magistrate Judge Newman for further proceedings, including reconsideration of the restitution Order entered by him on November 5, 2014.

IT IS SO ORDERED.

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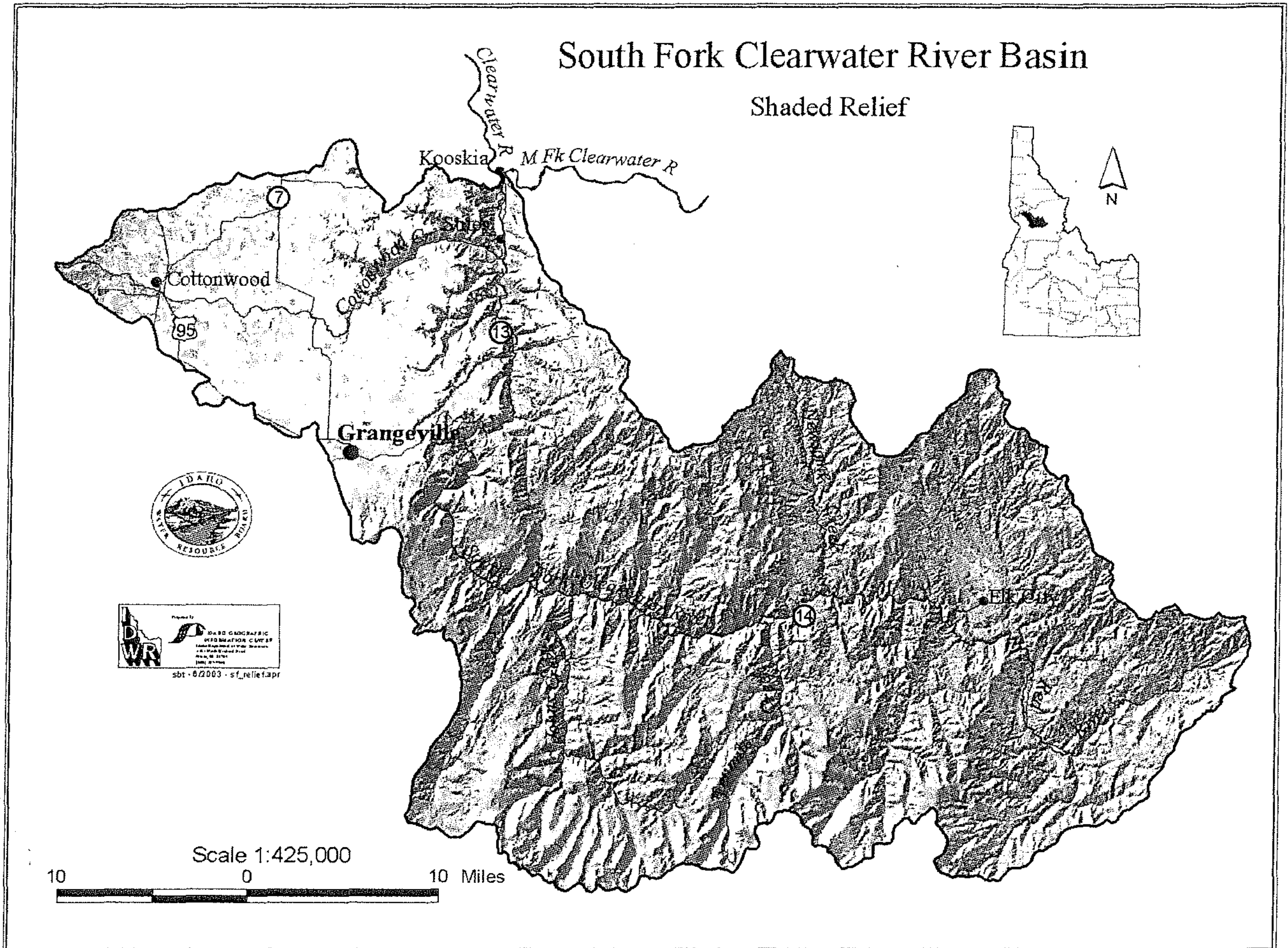
PP 1 of 2

Comprehensive State Water Plan
South Fork Clearwater River Basin
Executive Summary

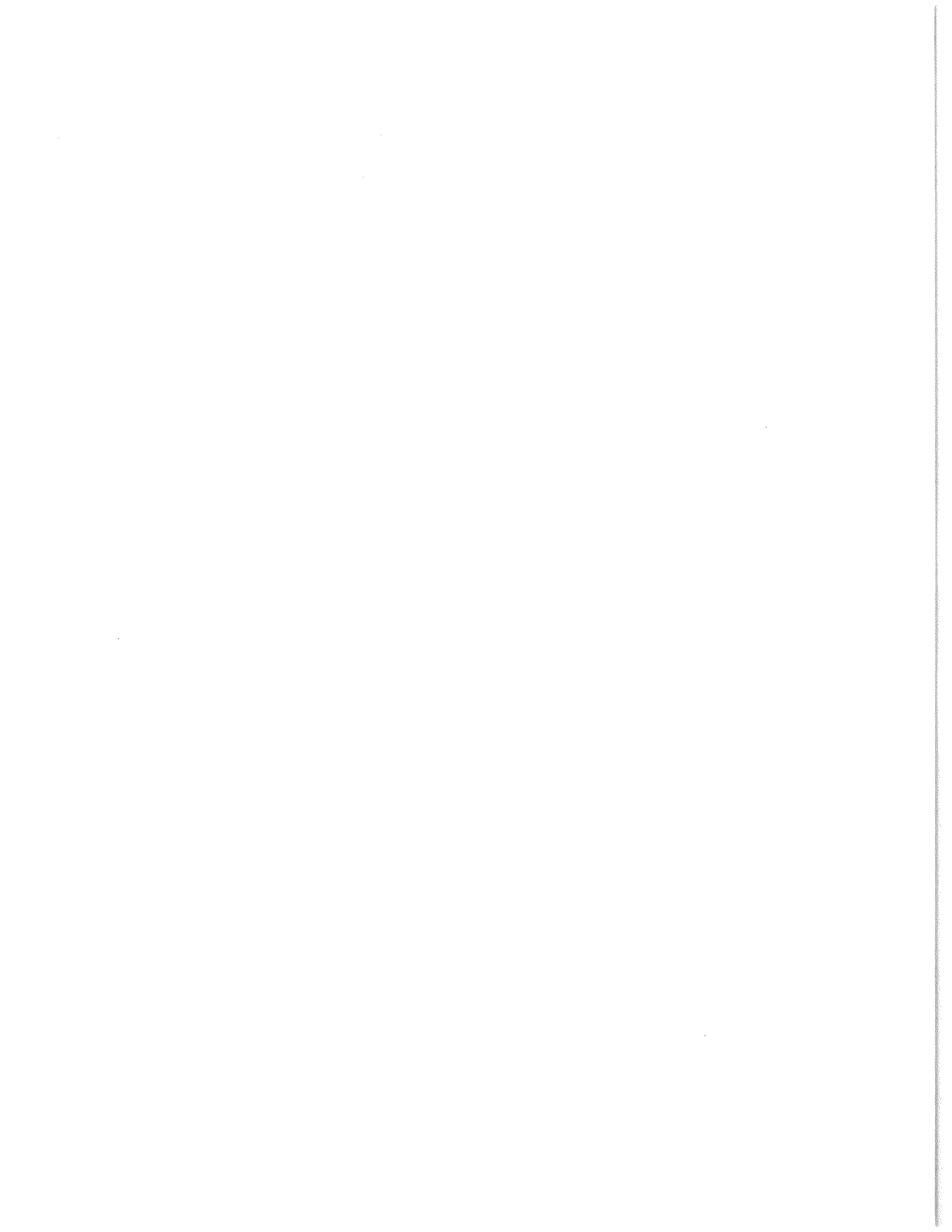


Basin Overview

The South Fork Clearwater River subbasin (U.S. Geological Survey Hydrologic Unit 17060305) extends from the headwaters above Elk City and Red River to the confluence with the Middle Fork of the Clearwater River at Kooskia.

Annual runoff from the South Fork Clearwater River basin averages about 739,000 AF, as measured by the USGS stream gage at Stites. (NPFLA) The mean annual stream flow is 1,060 cfs. Stream flows are highest in May with an average of 3,370 cfs with lowest flows the September average of 258 cfs (TMDL).

Water use in the South Fork Clearwater River basin is mostly consumptive, although consumptive water use is low relative to the total amount of available water. Water claims for commercial and industrial uses, approximately 900 acre feet per year, comprise the largest potential water use in the basin. Appropriations for commercial and industrial uses are about 95% from ground water. Surface and spring water use is about



RX 21
PP 2062

III. Issues, Analysis and Considerations

3.1 ISSUE: Recreational dredge mining

A. Issue Statement: Recreational dredge mining permit/regulation process is adequate in the South Fork Clearwater River basin.

Discussion

Recreational dredge mining is defined as mining with power sluices, small recreational suction dredges with a nozzle 5 inches in diameter or less and equipment rated at a maximum of 15 horsepower. Recreational dredge mining is regulated in Idaho under the Stream Channel Protection Act. This statute requires dredge miners to obtain a permit from IDWR before recreational dredge mining can be started. The state's One Stop Recreational Dredge Mining Permit does not require a National Pollution Discharge Elimination System (NPDES) permit. State regulations also specify the streams where recreational dredging is prohibited. Suction dredging that is not considered "recreation" is currently considered a "point source" of pollution requiring a National Pollution Discharge Elimination System permit from the U.S. Environmental protection agency. Recreational dredge mining is only allowed on the mainstem South Fork Clearwater River. Due to budgetary constraints of the Stream Channel Unit of the Resource Protection Bureau at IDWR, and to possible dredge mining limitations from the TMDL for the South Fork Clearwater River, current management and regulation of recreation dredge mining on the South Fork Clearwater River may be changing in 2005.

- The State of Idaho forbids use of recreational dredges within 500 feet of a developed campground, and the USFS prohibits their use in national recreation areas and protected rivers.

- Recreational suction dredges or sluices operated properly in a stream channel do not cause a great deal of environmental damage unless they are used in fish spawning beds (redds) at the wrong time of year. Redds could be damaged or totally destroyed by dredging. Eggs of salmonids prior to the eyed-up stage and sac fry would suffer high mortality if entrained by dredging (Griffith and Andrews 1981).

- Operation of recreational dredges on the South Fork Clearwater River would have some minor impacts on aquatic invertebrates (Griffith and Andrews 1981). Few insects would be killed but some would likely be displaced downstream. Thomas (1985) found lower densities of aquatic insects in a [illegible] meter section of dredged stream. Recolonization was complete in a month after dredging.

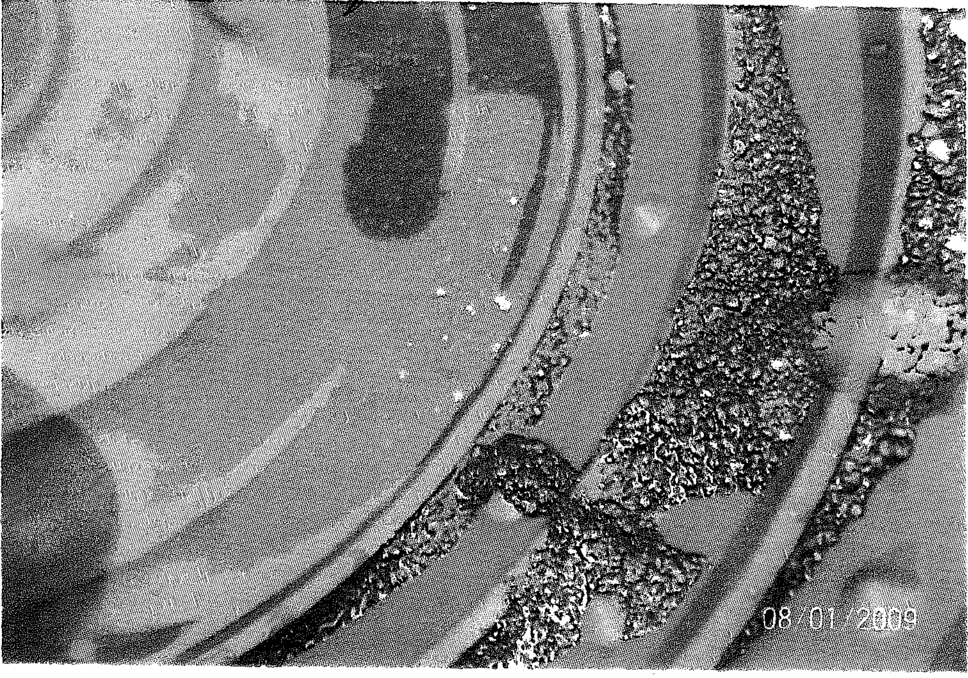
- The South Fork Clearwater River may be dredged from July 15 to Aug 15 under the Recreational Dredging Permit if request is made on the Special Supplement. The site must also be inspected by IDWR with a fishery biologist. With that authorization, IDWR will issue a letter of approval. The rest of the drainage is closed under the Recreational Dredging Permit, but approval may be granted to dredge in the waters not open under the recreational permit if application is made using form 3804-B (Joint Application for a Permit). The limited season and permits minimize the impacts discussed under the two previous bullets.

EX 22
1 of 6

RX 22
2 of 6

– Rx 22 3 of 6 — This is a tailings pile!

Rx 22 4 of 6 ✓



Rx 22

Rx 23
Rx 23
pp 1 of 20

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Nos. 07-984 and 07-990

In the Supreme Court of the United States

COEUR ALASKA, INC., PETITIONER

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.

STATE OF ALASKA, PETITIONER

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Army Corps of Engineers' authority to issue a permit for the discharge of dredged or fill material, pursuant to the statutory scheme that specifically addresses such material, is displaced by the Environmental Protection Agency's promulgation of an effluent limitation or new-source performance standard pursuant to other provisions of the Clean Water Act, 33 U.S.C. 1251 *et seq.*, that address the discharge of pollutants generally.

tion 404 permitting regime in favor of EPA's Section 402 permitting program. *Id.* at 17a-18a.

The court of appeals stated that the regulatory history "further demonstrates that neither the Corps nor EPA intended for the current regulatory definition of 'fill material' to replace the performance standard for froth-flotation mills." Pet. App. 19a. The court acknowledged that, in the 2002 fill rule, EPA and the Corps had jointly adopted an effects-based definition of "fill material" and had defined "discharge of fill material" to include "placement of overburden, slurry, or tailings or similar mining-related materials." *Id.* at 29a (quoting 33 C.F.R. 323.2(e) and (f); 40 C.F.R. 232.2). The court interpreted other language in the preamble to the fill rule, however, as indicating a contrary intent, and it concluded that "the performance standard governs because it is more specific." *Id.* at 26a-27a, 32a.

The court of appeals concluded that Coeur's permit "violates § 301 and § 306 of the Clean Water Act." Pet. App. 34a. It remanded to the district court to vacate that permit, as well as Goldbelt's Section 404 permit (on the ground that it depended on the validity of Coeur's permit) and the Forest Service's ROD (approving the plan of operations). *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals erred in holding that a discharge of mine tailings that constitutes a "discharge of fill material" under the plain terms of the agencies' joint definition must be regulated by EPA under Section 402 of the CWA, rather than by the Corps under Section 404 of the CWA. The text, structure, and purpose of both the Act and the 2002 fill rule—as well as the Corps' and EPA's considered construction of the Act and their own

regulation—make clear that discharges of "fill material" are subject only to the Section 404 permitting process. The relevant provisions of law also make clear that the Corps, in determining whether to grant a Section 404 permit application for such a discharge, is not required to apply new-source performance standards adopted by EPA pursuant to Section 306. The Ninth Circuit fundamentally erred in rejecting the agencies' controlling interpretations of the pertinent statutory and regulatory provisions, and in setting aside the Section 404 permits at issue in this case.

A. The text of the pertinent provisions of the CWA unambiguously answer the question presented. CWA Sections 402 and 404 establish a dual-permitting structure, reflecting Congress's determination that discharges of fill material raise concerns distinct from those posed by other pollutant discharges. Section 404 authorizes the Corps to issue permits specifically "for the discharge of dredged or fill material" when certain conditions are satisfied. Section 402 addresses the permitting of discharges *other than* "dredged or fill material" by authorizing EPA to issue permits "[e]xcept as provided in sections [318 and 404]."

While Section 402 emphasizes protection of water-quality concerns by requiring compliance with various effluent limitations, Section 404 takes a broader approach based on the practicability of other alternatives and minimization of overall environmental impacts (including wetlands preservation). The Act and the Section 404(b)(1) Guidelines require that discharges of fill material comply with toxic effluent limitations promulgated under Section 307, but they do *not* require compliance with other effluent limitations.

The Ninth Circuit's decision subverts the Act's careful division of authority between the Corps and EPA and its establishment of distinct criteria for permitting decisions under Sections 402 and 404. The court's reliance on the words "and" and "any" in Sections 301(a), 301(e), and 306(e) was misplaced and overlooks the simple yet crucial point that the provisions require compliance only with *applicable* effluent limitations and performance standards. By the Act's own terms, those limitations and standards do not apply to discharges of fill material.

To the extent that any ambiguity remains, the Corps and EPA have reasonably resolved that ambiguity. Since the Act's initial passage, those agencies consistently have determined that discharges of fill material should be regulated by the Corps under Section 404 and are not subject to EPA effluent limitations (except those promulgated under Section 307). That understanding is reflected in the Section 404(b)(1) Guidelines, in the regulatory definition of "fill material," and in the agencies' final permitting decisions in this case. The Ninth Circuit erred in substituting its own contrary construction for the interpretation reached by the agencies charged with administering the Act.

B. The proposed discharge of tailings at issue in this case constitutes a "discharge of fill material" subject to regulation under Section 404. The 2002 rule jointly promulgated by the Corps and EPA demarcates the line between discharges of fill material regulated under Section 404 and other discharges regulated under Section 402. That carefully drawn line, premised on the effect of the discharge rather than on its purpose, is based on the agencies' expertise and experience.

Under the plain terms of the rule, the tailings slurry at issue here unquestionably constitutes "fill material"

because placement of tailings into the impoundment at Lower Slate Lake would have "the effect of * * * [c]hanging the bottom elevation of any portion of a water of the United States" by 50 feet. 33 C.F.R. 323.2; 40 C.F.R. 232.2. Moreover, the rule specifically provides that a "discharge of fill material" includes the "placement of overburden, slurry, or tailings or similar mining-related materials." *Ibid.* Where (as here) the text provides a clear answer, it is dispositive.

The Ninth Circuit's selective reliance on statements from the preamble to the fill rule and on other regulatory history cannot trump the rule's unambiguous language or the agencies' controlling construction of that text. See *Auer* v. *Robbins*, 519 U.S. 452, 460-461 (1997). In any event, those general statements are contradicted by more specific statements in the preamble clarifying that Section 404 governs mine tailings. EPA's 1982 new-source performance standard, which EPA itself interpreted in light of the 2002 fill rule as inapplicable to the tailings discharge at issue, likewise does not compel a different conclusion.

ARGUMENT

THE PROPOSED DISCHARGES AT ISSUE IN THIS CASE ARE GOVERNED BY SECTION 404 RATHER THAN SECTION 402 OF THE CLEAN WATER ACT

At issue in this case is whether a discharge of fill material should be regulated under Section 404, the provision of the Clean Water Act specifically designed to govern such discharges, or rather under Section 402, simply because EPA has promulgated an otherwise applicable effluent limitation. The text, structure, and purpose of the Act—in particular, its creation of a dual-permitting regime—make clear that Congress intended to subject

the discharge of fill material to the requirements of Section 404 (which are tailored to the unique concerns of such discharges) and not to the separate requirements (including new-source performance standards) applicable to other pollutant discharges under Section 402. To the extent that any ambiguity exists, the Corps and EPA have consistently interpreted the Act as authorizing the Corps to issue Section 404 permits for the discharge of fill material even where an effluent limitation would otherwise apply. The Ninth Circuit erred in disregarding the text of the Act and that permissible administrative interpretation.

Under the controlling regulatory definitions, the tailings at issue in this case constitute "fill material," and the proposed discharge constitutes a "discharge of fill material." Respondents do not challenge the validity of the Corps' and EPA's jointly promulgated definitions of the relevant statutory language, nor do they dispute that the discharge of tailings proposed here falls squarely within the plain terms of those definitions. The Ninth Circuit erred in rejecting the agencies' controlling interpretation of their own regulation. The court's holding unjustifiably undermines the Act's explicit charge to the Corps and EPA to treat the discharge of fill material differently from other discharges, and distorts the dividing line carefully drawn by those agencies after their considered collaboration.

A. A Discharge Of Fill Material Is Subject To Section 404's Permitting Scheme, Notwithstanding EPA's Promulgation Of An Otherwise Applicable Effluent Limitation

As set out above (pp. 2-3, *supra*), the Clean Water Act prohibits the discharge of any pollutant into the waters of the United States, except (with discrete excep-

tions not applicable here) pursuant to a permit. 33 U.S.C. 1311. Permits may be issued pursuant to either Section 404 or Section 402. The basic question in this case is which permitting provision applies to a "discharge of fill material" within the meaning of Section 404, when the substance being discharged would otherwise be covered by an EPA effluent limitation. The text, structure, and purpose of the Act compel the conclusion—reached by the agencies charged with administering the Act—that such discharges are subject to the Section 404 permitting process.

1. The text, structure, and purpose of the Act dictate that a discharge of fill material be regulated under Section 404, not under Section 402

Section 404 of the CWA authorizes the Corps to issue permits specifically "for the discharge of dredged or fill material" into waters of the United States when certain conditions are satisfied. 33 U.S.C. 1344(a). In contrast, Section 402 governs *other* discharges into waters of the United States by stating that, "*[e]xcept as provided in sections [318 and 404]*, the Administrator may * * * issue a permit for the discharge of any pollutant, or combination of pollutants," when certain other requirements are met. 33 U.S.C. 1342(a) (emphasis added).[4] By the

[4] Section 318 allows EPA to issue permits for discharges associated with certain aquaculture projects. 33 U.S.C. 1328. As originally enacted, Section 318 provided only that the EPA Administrator was to "establish * * * procedures and guidelines he deems necessary to carry out this section." Federal Water Pollution Control Act, Pub. L. No. 92-500, § 318, 86 Stat. 877. In 1977, Congress amended that section to authorize EPA to permit aquaculture discharges "pursuant to [Section 402]" and to establish regulations "requir[ing] the application to such discharge[s] of each criterion, factor, procedure, and requirement applicable to a permit issued under section [402]." 33 U.S.C. 1328(a)

use of that "except" clause, Congress mandated that the specific Section 404 permitting regime, rather than the more general Section 402 NPDES permitting regime, be used in regulating discharges of dredged or fill material. For the regulation of discharges of dredged or fill material, Section 404 thus serves as an explicit exception to Section 402's otherwise unqualified reach. It is well established that a specific provision of a statute prevails over a more general section of the same statute. See, *e.g.*, *National Cable & Telecomms. Ass'n* v. *Gulf Power Co.*, 534 U.S. 327, 335 (2002); *Clifford F. MacEvoy* v. *United States for the Use & Benefit of Calvin Tomkins Co.*, 322 U.S. 102, 107 (1944).

Applying that basic canon of construction not only provides the most natural reading of the Act's text, but also preserves Congress's different treatment of the two types of discharges in light of their different impacts. As EPA and the Corps have explained, "[i]n keeping with the fundamental difference in the nature and effect of the discharge that each program was intended by Congress to address, sections 404 and 402 employ different approaches to regulating the discharges to which they apply." 65 Fed. Reg. 21,293 (2000); see *Rapanos* v. *United States*, 547 U.S. 715, 745 (2006) (plurality opinion) (discussing distinction between dredged or fill material and other pollutants, and stating that "[t]he Act

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and (b) (amended by Clean Water Act of 1977, Pub. L. No. 95-217, § 63, 91 Stat. 1599). If the Ninth Circuit were correct that all discharges (even those expressly excepted from the reach of Section 402) must comply with Section 402's requirements (principally, EPA effluent limitations), then Congress's amendment to Section 318 would have been unnecessary. Notably, Congress has not added such language to Section 404.

recognizes this distinction by providing a separate permitting program for such discharges in § 1344(a)").

Section 402 covers an array of "discharges such as wastewater discharges from industrial operations and sewage treatment plants, stormwater and the like." 65 Fed. Reg. at 21,293. Section 402 controls pollutant discharges by requiring compliance with various effluent limitations. *Ibid.* In particular, Section 402 expressly requires compliance with new-source performance standards promulgated by EPA pursuant to Section 306. 33 U.S.C. 1342(a)(1). The Section 402 permitting program does *not* require an evaluation of alternatives to a proposed discharge or consideration of impacts from discharges that convert waters of the United States to dry land. 65 Fed. Reg. at 21,293.

By contrast, Section 404 focuses exclusively on discharges of dredged and fill material. 33 U.S.C. 1344(a)(1). As the Corps and EPA have explained, "[f]ill material differs fundamentally from the types of pollutants covered by section 402 because the principal environmental concern [from the discharge of fill material] is the loss of a portion of the water body itself." 65 Fed. Reg. at 21,293. The Section 404 permitting process therefore focuses on considerations different from those implicated by the Section 402 program. *Ibid.*

The distinct concerns arising from the discharge of dredged or fill material are addressed primarily by the Section 404(b)(1) Guidelines, developed jointly by EPA and the Corps. 33 U.S.C. 1344(b). As described above (pp. 3-4, *supra*), the Section 404(b)(1) Guidelines take a broad-scale approach compared to Section 402's more targeted focus on water quality. The Guidelines preclude granting a permit if "there is a practicable alternative to the proposed discharge," including an alternative

that does not involve disposal into navigable waters, "which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." 40 C.F.R. 230.10(a). The Guidelines also require consideration of the effects of the discharge on the aquatic ecosystem as a whole (40 C.F.R. 230.10(c)), as well as evaluation of alternatives to the discharge and measures to minimize and compensate for unavoidable adverse effects (40 C.F.R. 230.10(d)).

That is not to say Section 404(b)(1) Guidelines disregard water-quality concerns. To the contrary, the Guidelines provide for the consideration of the effects of contaminants on water quality in a number of ways, specifically requiring compliance with applicable State water quality standards (40 C.F.R. 230.10(b)(1)); appropriate use of chemical and biological testing to evaluate contaminant effects (40 C.F.R. 230.11(d) and (e), 230.60, 230.61); and compliance with toxic effluent limitations promulgated under Section 307 (40 C.F.R. 230.10(b)(2)).

While the Act itself also authorizes EPA (in consultation with the Corps) to subject discharges of dredged material to toxic effluent limitations (33 U.S.C. 1317(a)(5)), neither Section 404 nor the Section 404(b)(1) Guidelines—in stark contrast to Section 402—require compliance with other effluent limitations, including Section 306's performance standards. That distinction reflects the careful balance struck by Congress and the administering agencies between water quality and the other weighty considerations when it comes to the discharge of dredged and fill material—a balance that the Ninth Circuit's decision fails to respect. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act,

it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted).[5]

Finally, the Act's legislative history confirms that Congress intended to treat discharges of fill material differently from other discharges. As originally proposed in the Senate, the Act did not contain a separate permitting provision for discharges of fill material, but rather would have subjected them to EPA's permitting requirements under Section 402, including its effluent limitations. See S. 2770, 92d Cong. 1st Sess. § 402 (1971). In contrast, the House bill provided the Corps exclusive authority over discharges of fill material with only minimal EPA involvement. See 118 Cong. Rec. 10,632 (1972). The CWA, as enacted, reflects a compromise: it gives the Corps primary permitting authority over discharges of fill material but also gives EPA environmental oversight within the Section 404 process, both

[5] A comparison of Sections 402(k) and 404(p), 33 U.S.C. 1342(k) and 1344(p), reinforces the conclusion that discharges of dredged and fill material are not subject to EPA's Section 306 performance standards. Section 402(k) states that, for purposes of the CWA's enforcement provisions, "[c]ompliance with a permit issued pursuant to [Section 402] shall be deemed compliance * * * with sections" 301, 302, 306, 307, and 403 of the CWA. Section 402(k) ensures that, in a citizen suit (see 33 U.S.C. 1365) alleging that a Section 402 permittee has violated Section 306, EPA's antecedent determination during the permitting process that the authorized discharges will satisfy new-source performance standards will be deemed controlling. With respect to Section 404 permittees, Section 404(p) confers an analogous immunity from enforcement actions but refers only to Sections 301, 307, and 403, not to Section 302 or 306. The absence of any reference to Section 306 would be inexplicable if Congress had anticipated that the Corps would apply new-source performance standards in considering applications for Section 404 permits.

through the Section 404(b)(1) Guidelines and through EPA's Section 404(c) veto power. 33 U.S.C. 1344; see S. Rep. No. 1236, 92nd Cong., 2d Sess. 1, 72-77, 141-142 (1972). Unlike the bill originally proposed in the Senate, the CWA as ultimately enacted does not require that discharges of fill material comply with EPA's effluent limitations under Section 402. See 33 U.S.C. 1344. The effect of the Ninth Circuit's decision in this case is thus to reinsert a requirement that Congress specifically considered but declined to enact, and to upset the balance struck by Congress in the permitting scheme that ultimately became law.

2. The Ninth Circuit's interpretation cannot be reconciled with the unambiguous terms of the Act

Notwithstanding Section 404's clear allocation to the Corps of permitting authority over discharges of fill material, and the absence in Section 404 of any reference to effluent limitations established by EPA (other than those under Section 307), the court of appeals concluded that such discharges must comply with Section 402's permitting requirements (and with Sections 301(e) and 306(e)) whenever a relevant effluent limitation exists. The court first relied (Pet. App. 15a) on Section 301(a)'s requirement that, "[e]xcept as in compliance with [Section 301] and [S]ections [302, 306, 307, 318, 402 and 404] * * * the discharge of any pollutant by any person shall be unlawful," 33 U.S.C. 1311(a). In the court's view, the use of the word "and" in that list means that *all* discharges of pollutants into waters of the United States must comply with the requirements of *all* the listed provisions, including the effluent limitations of Sections 301 and 306.

The Ninth Circuit's reading of the general list of CWA provisions contained in Section 301(a) logically implies that dischargers of fill material must secure both a Section 402 permit and a Section 404 permit (in order to comply with Section 402 "and" Section 404). The court of appeals pointedly declined to embrace that conclusion, however, stating instead that "the NPDES program administered by EPA under § 402 is the only appropriate permitting mechanism for discharges subject to an effluent limitation under § 301 or a standard of performance under § 306." Pet. App. 18a. Respondents likewise recognize that, under the CWA, "only one permitting program is applicable to any given discharge." Br. in Opp. 20. And, under the plain terms of the statute, the determination of *which* permitting scheme applies (*i.e.*, Section 402 or Section 404) depends on whether the relevant pollutant constitutes "dredged or fill material"—not on whether the substance being discharged is otherwise potentially subject to an EPA effluent limitation.

Congress's use of the word "and" in Section 301(a) is best understood to mean that a discharge of pollutants into navigable waters is unlawful unless it complies with the *overall body of law* established by Sections 301, 302, 306, 307, 318, 402, and 404 taken together. If Congress were to provide in some other statute that particular pollutants may not be discharged "except as in compliance with the CWA," the reference to "the CWA" would of course encompass all of the specific provisions enumerated above. A directive that pollutant discharges comply with "the CWA," however, would not suggest that every CWA provision is applicable to every discharge. Similarly here, Section 301(a)'s requirement that every discharge comply with a defined subset of the

CWA does not answer which permitting regime applies to a particular type of discharges, including those at issue in this case.[6]

The court of appeals also relied on Sections 301(e) and 306(e). Pet. App. 12a-14a. Section 301(e) states that effluent limitations "shall be applied to all point sources of discharge of pollutants *in accordance with the provisions of this chapter*." 33 U.S.C. 1311(e) (emphasis added). Because the term "provisions of this chapter" encompasses the entire Act, that section simply begs the question whether Section 404, the governing provision, requires application of a particular effluent limitation to the discharge of fill material. Similarly, Section 306(e) makes it unlawful to operate any new source "in violation of any standard of performance *applicable to such source*." 33 U.S.C. 1316(e) (emphasis added). To determine whether a performance standard is applicable to a source, one must again refer back to the Act as a whole and, in particular, to Section 404 when the discharge of fill material is at issue. And, as explained above, the availability of a Section 404 permit for a discharge of fill material is not contingent on the regulated party's compliance with any new-source performance standard promulgated under Section 306.[7]

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[6] Congress could not have achieved greater clarity by using the word "or" rather than "and" in Section 301(a). To the contrary, use of the term "or" might have suggested that a discharge governed by Section 402 need only comply with Section 301 effluent limitations *or* Section 306 new-source performance standards—contrary to Section 402's express requirement that discharges subject to the NPDES permitting regime must satisfy both of those provisions. See 33 U.S.C. 1342(a)(1).

[7] The Ninth Circuit also relied (Pet. App. 14a-15a) on this Court's statement in *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 138 (1977) (*du Pont*), that effluent limitations promulgated under Sections

Thus, the text, structure, and purpose of the Act unambiguously establish a straightforward scheme. If a discharge of pollutants into waters of the United States constitutes a discharge of "dredged or fill material," then it is subject to Section 404's extensive permitting requirements, including the Section 404(b)(1) Guidelines. Other pollutant discharges into navigable waters, by contrast, are subject to Section 402's separate requirements, including new-source performance standards promulgated under Section 306. The court of appeals' decision in this case dismantles that carefully constructed framework and cannot be squared with the text of the statute enacted by Congress.

3. The Corps' and EPA's longstanding interpretations of the Act's regulatory scheme resolve any ambiguity

Even if the relevant CWA provisions did not squarely answer the question presented here, the Corps and EPA have reasonably resolved any ambiguity that may exist. See, *e.g.*, *Rapanos*, 547 U.S. at 758 ("Agencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway in interpreting the statute they are entrusted to administer.") (Roberts, C.J., concurring) (citing *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-845 (1984)). Since the Act's passage, those agencies consistently

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301 and 306 are meant to be "absolute prohibitions." The court of appeals' reliance on *du Pont* was misplaced. The Court in *du Pont* simply held that, *where the effluent limitations apply*, the CWA does not authorize variances for individual owners or operators. *Ibid.* The Court did not suggest that the performance standards apply to, or are to be enforced through, Section 404 permits. To the contrary, the Court referenced only permits issued under Section 402. *Id.* at 124. ("The permits granted under § 402 * * * incorporate these across-the-board limitations.").

have determined in rulemakings, permit actions, and official memoranda that discharges of fill material are regulated categorically by the Corps under Section 404 and are not subject to certain EPA effluent limitations, such as Section 306 performance standards. Those long-standing administrative determinations are entitled to respect.

First, in 1973, EPA promulgated a regulation providing that "[d]redged or fill material discharged into navigable waters" does "*not* require an NPDES [*i.e.*, Section 402] permit." 40 C.F.R. 125.4(d) (1973) (emphasis added). That regulation is still in place today, in virtually identical form. 40 C.F.R. 122.3(b). Second, as noted earlier (pp. 21-22, *supra*), the Section 404(b)(1) Guidelines (first issued in 1975)—while requiring discharges of fill material to comply with toxic effluent standards promulgated under Section 307 (40 C.F.R. 230.10(b)(2)) —do not require compliance with other effluent limitations, including Section 306 performance standards. Third, in 1986, the Corps and EPA clarified that "[d]ischarges listed in the Corps' definition of 'discharge of fill material' * * * remain subject to section 404 even if they occur in association with discharges of wastes meeting the criteria * * * for section 402 discharges." 51 Fed. Reg. 8871. Fourth, the Corps and EPA stated in the preamble to the 2002 fill rule that "[e]ffluent limitation guidelines and new source performance standards ('effluent guidelines') promulgated under section 304 and 306 of the CWA establish limitations and standards for specified wastestreams from industrial categories, and those limitations and standards are incorporated into permits issued under section *402* of the Act. *EPA has never sought to regulate fill material under effluent guidelines.*" 67 Fed. Reg. at 31,135 (emphasis added).

The agencies also have made clear that their longstanding administrative interpretations of the CWA's permitting requirements apply to the discharges at issue in this case. For example, EPA concluded in an authoritative 2004 memorandum that, because the proposed discharges at issue here would constitute discharges of fill material, "the regulatory regime applicable to discharges under section 402, *including effluent limitations guidelines and standards, such as those applicable to gold ore mining (see 40 C.F.R. Part 440, Subpart J)*, do *not* apply to the placement of tailings into the proposed impoundment." J.A. 144a-145a (emphasis added). Likewise, the Corps' issuance of the Section 404 permit (accompanied by a 68-page Revised ROD and Permit Evaluation) for Coeur's proposed discharges, notwithstanding the existence of the Section 306 new-source performance standard for mines using the froth-flotation process, confirms the Corps' agreement with EPA's interpretation. J.A. 340a-377a.

Underlying all those agency expressions, spanning from 1973 to the present, is the determination that a discharge of fill material should be regulated under Section 404, notwithstanding EPA's promulgation of a Section 306 performance standard that might otherwise be applicable under Section 402. For all the reasons discussed above (pp. 17-26, *supra*), the Corps' and EPA's interpretations are reasonable. The Ninth Circuit thus erred in substituting its own construction of the Act. See *Chevron*, 467 U.S. at 843.

B. The Corps And EPA Properly Concluded That The Proposed Discharge Of Mine Tailings Constitutes A "Discharge Of Fill Material"

Because a discharge of fill material is subject to regulation under Section 404, and thus not subject to a Section 306 performance standard, the only remaining question is whether the discharge of tailings at issue here qualifies as a "discharge of fill material." The answer from both expert agencies charged with administering the Act—consistent with the plain terms of their jointly promulgated regulation—is yes.

1. *The agencies' considered adoption of an effects-based definition of "fill material" provides an administrable line between Section 402 and Section 404 discharges*

Because the Act does not define the term "fill material," "the question for the Court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. The Corps and EPA have filled the statutory gap by jointly promulgating the 2002 fill rule, which defines "fill material" to mean

> material placed in waters of the United States where the material has the effect of:
>
> (i) Replacing any portion of a water of the United States with dry land; or
> (ii) Changing the bottom elevation of any portion of a water of the United States.

33 C.F.R. 323.2(e)(1) (Corps regulation); 40 C.F.R. 232.2 (EPA regulation). The rule specifically defines "discharge of fill material" to include the "placement of overburden, slurry, or tailings or similar mining-related materials." 33 C.F.R. 323.2(f); 40 C.F.R. 232.2.

That, of course, is not the only conceivable definition. Indeed, the Corps and EPA have modified their respective definitions of "fill material" over the years. The current regulatory definition, however, is reasonable and thus entitled to deference—especially given that the agencies explained at great length their reasons for the 2002 revision. See, *e.g.*, *Chevron*, 467 U.S. at 863-864 ("[T]he agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.").

Before promulgation of the 2002 fill rule, "the Army and EPA definitions of 'fill material' differ[ed] from each other, and this * * * resulted in regulatory uncertainty and confusion." 65 Fed. Reg. at 21,292. The principal difference (at least since 1980) was that the Corps' definition of the term "fill material" was based on the "primary purpose" of the discharge (*i.e.*, whether it was intended to create fill or rather to dispose of waste), whereas EPA's definition was based solely on the *effects* of the discharge (*i.e.*, whether it converted waters to dry land or changed the bottom elevation of the relevant waterbody).[8] The 2002 fill rule, which contains the agen-

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[8] In 1975, the Corps and EPA both defined "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*." 40 Fed. Reg. at 31,325; *id.* at 41,298 (emphasis added). In 1977, the Corps redefined "fill material" as "any material used *for the primary purpose* of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under Section 402." 42 Fed. Reg. at 37,145 (emphasis added). In 1980, EPA revised its definition of "fill material" to mean (consistent with both the 1975 and the current definition) "any 'pollutant' which replaces portions of the 'waters of the United States' with dry land or which changes the bottom elevation of a