

Chapter 5

Additions and Discharges

I. Regulated Activities

As noted in the previous Chapter, [Section 301 of the Clean Water Act](#) regulates the “discharge” of pollutants, which the statute defines to mean “addition” of a pollutant to navigable waters from a point source. [33 U.S.C. § 1362\(12\)](#). [Section 404](#) of the Act authorizes the Corps of Engineers to issue permits for the “discharge of dredged or fill material into the navigable waters at specified disposal sites.” As a result, whether an activity in wetlands or regulated waters is regulated under the Clean Water Act frequently depends on whether it involves the **addition** of pollutants and on whether it involves the **discharge of dredged or fill material**.

The terms “addition,” “dredged material,” “fill material,” and “discharge of dredged or fill material” are not defined in the Clean Water Act, but the Corps and EPA have defined most of them by regulation. The Corps first adopted regulations defining many of those terms in 1977. See [42 Fed. Reg. 37,121 \(July 19, 1977\)](#). In those regulations, the agency defined **dredged material** and **fill material** as follows:

- **Dredged material:** material that is excavated or dredged from the waters of the United States
- **Fill material:** 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 * * *

Id. While the definition of “dredged material” was simply tied to the nature of the material, the definition of “fill material” was tied to the **purpose** for which the material was being used. The regulations also included a definition of “discharge of dredged material” (“addition of dredged material into the waters of the United States”) and a definition of “discharge of fill material” (“addition of fill material into the waters of the United States”), but neither was particularly illuminating. *Id.* The regulations did **not** define “addition.”

The regulations that EPA adopted in 1980 included a similar definition of “dredged

material,” but they defined “fill material” as: “any ‘pollutant’ which replaces portions of the ‘waters of the United States’ with dry land or which changes the bottom elevation of a water body for any purpose.” See 45 Fed. Reg. 33290, 33421 (May 19, 1980). Thus, the EPA definition of “fill material” **was not** tied to the purpose for which a material was used, but rather the effect of the use of the material. For many years, the EPA and Corps regulatory definitions of “fill material” diverged in that manner.

Since 2002, however, the Corps and EPA have defined the terms “dredged material” and “fill material” consistently in their regulations. The current regulatory definitions of the terms are:

- **Dredged material:** material that is excavated or dredged from waters of the United States.
- **Fill material:** 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](#) (Corps’ regulations); [40 C.F.R. § 232.2](#) (EPA’s regulations). Both agencies also include a non-exclusive list of materials that constitute “fill material” within their definition of the term. The list includes “rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.” *Id.*

The evolution of the definitions of “dredged material,” “fill material,” “discharge of dredged material,” and “discharge of fill material” are discussed at length in the sections that follow. However, neither agency has defined “addition” by regulation.

Hypothetical

Ellen Marshall is an attorney who specializes in real estate development and she represents Stewart Griffith, a shopping mall developer. While meeting with Griffith last week to review a contract to purchase property in Wilmington, Delaware, she learned that Griffith had instructed some of the contractors who were building a mall for him on property near Dover, Delaware to fill in an acre of coastal wetlands without seeking a permit from the Corps of Engineers. Griffith told Marshall that the contractors had found several Black Rail nests in the wetlands. Since Black Rails are an endangered bird, Griffith was sure that the Corps of Engineers would never issue him a permit for the development if he applied for one, so he thought it would be best to fill in the wetlands and hope no one found out about it. Marshall encouraged Griffith to tell the Corps about his actions and to apply for an after the fact permit, but he refused and told her that he would take his chances, because he didn't think anyone other than the contractors knew that the wetlands had been filled. Marshall believes that Griffith will be subject to much more stringent penalties if the Corps discovers the violation independently than if Griffith reports the violation to the Corps. Marshall is also concerned because there are only a few Black Rails left in Delaware and Griffith's action destroyed vital habitat for the birds. If Griffith reports the violation and creates, restores or enhances wetlands in the vicinity of the mall development in Dover, the birds have a better chance for survival. Can Marshall notify the Corps about Griffith's illegal filling activities if Griffin does not want to report the violation? See [American Bar Association, Model Rule of Professional Conduct 1.6](#) (and associated comments). Would your answer be different if the filling significantly increased the likelihood that a hospice near the mall in Dover would be flooded in the event of a hurricane or major tropical storm in the region?

A. Landclearing

Because neither the statute nor agency regulations define "addition", there has been significant litigation regarding whether certain activities constitute the "addition" of a pollutant. One question that has arisen frequently concerns whether there is an "addition" of a pollutant when a material is removed from wetlands or other waters of the United States and then replaced within the same waters. This issue arose shortly after the enactment of the 1977 amendments to the Clean Water Act in the context of landclearing. If a person cuts down trees or vegetation in a wetland or other water in order to clear the land, and some of those trees or vegetation are disposed of in the wetlands or water, has there been an "addition" of a pollutant, even though the trees and vegetation were in the wetland or water at the outset of the landclearing activities? The following case explores that issue.

Avoyelles Sportsmen's League, Inc. v. Marsh

715 F.2d 897 (5th Cir. 1983)

RANDALL, Circuit Judge:

Resources for the Case

[EDF Website](#) (plaintiffs)

[Unedited opinion](#) (From Justia)

[EPA's JD for the property](#)

[Google Map of all the cases in the coursebook](#)



Photo by [Nigel Corby](#)

This is an appeal from a district court judgment that enjoined the private defendants¹ from any additional clearing, except by permit under 33 U.S.C. § 1344 (Supp. V 1981), of certain lands determined by the district court to be wetlands. The federal defendants² contend that the district court should have reviewed the Environmental Protection Agency's ("EPA") final wetlands determination (attached as an appendix to this opinion) on the basis of the administrative record, and that the court erred in adopting its own wetlands determination instead of reviewing the agency's determination under the arbitrary and capricious standard. The federal defendants also dispute the district court's conclusion that the mere removal of vegetation from wetlands constitutes a discharge of a pollutant under section 301(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1311(a) (1976). * * * The private defendants contest the validity of the district court's determination that approximately ninety percent of their land is a wetland, as well as the court's conclusion that their landclearing activities fall under the CWA's prohibition on the

¹ The private defendants are the owners of the land that is the subject of this litigation.
* * *

² The federal defendants are United States Army Corps of Engineers and Environmental Protection Agency officials. * * *

discharge of pollutants into waters of the United States.

For the reasons set forth below, to the extent that the district court's decision that ninety percent of the Lake Long Tract is a wetland is inconsistent with the EPA's determination, the decision of the district court is reversed. The court's determination that the private defendants' actual landclearing activities require permits is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

This case concerns an approximately 20,000 acre tract of land (the "Lake Long Tract") in Avoyelles Parish, Louisiana. The tract lies within the Bayou Natchitoches basin, an area of approximately 140,000 acres, which, along with the Ouachita, Black and Tensas river basins, makes up the Red River backwater area. The Bayou Natchitoches basin is subject to flooding during the spring months, and it experiences an average rainfall of sixty inches per year.

Much of the basin had been cleared of forest before the private defendants began their landclearing activities, but 80,000 acres were still forested. The Lake Long Tract made up a quarter of this forested area. The topography of the tract itself is uneven, resulting in some areas with permanent water impoundments and other drier areas that support a variety of plant species.

The private defendants own the Lake Long Tract. They decided that the land could be put to agricultural use, specifically soybean production. Consequently, they began a program of large-scale deforestation in June of 1978. * * * Using bulldozers with shearing blades that "floated" along the ground, the defendants cut the timber and vegetation at or just above ground level. The trees were then raked into windrows, burned, and the stumps and ashes were disced into the ground by other machinery. The shearing and raking caused some leveling of the tract, and the defendants dug one drainage ditch.

On August 25, 1978, the Vicksburg District of the Army Corps of Engineers ordered defendant Prevot to halt his activities pending a wetlands determination by the Corps. Thereafter, Dr. Donald G. Rhodes, an expert consultant employed by the Corps, undertook a comprehensive vegetative mapping of the Lake Long Tract and determined that thirty-five percent of it was a wetland. In October, 1978, the Fish and Wildlife Service wrote a letter to the Corps stating that the Service believed that the entire tract was a wetland. After Dr. Rhodes had made his determination, the landowners resumed their activities on the portion of the tract that the Corps had not designated as a wetland.

On November 8, 1978, the plaintiffs⁵ brought this citizens' suit * * * against a number of Corps and EPA officials, as well as against the private landowners. The plaintiffs claimed, *inter alia*, that the landclearing activities would result in the discharge of dredged and fill material into the waters of the United States in violation of sections 301(a) and 404 of the

⁵ The plaintiffs are a number of environmental groups and one interested individual.

* * *

CWA, * * * and also result in the discharge of pollutants into the waters of the United States in violation of section 402 of the CWA, * * * The plaintiffs requested a declaration that the tract was a wetland within the scope of the CWA, * * * that the private defendants could not engage in their landclearing activities without obtaining a permit from the EPA or the Corps, and that the federal defendants had failed to exercise their "mandatory duty" * * * to designate the tract a wetland and to order the private defendants to cease and desist from discharging pollutants and dredged materials. The plaintiffs also sought injunctive relief against the federal defendants to require them to exercise their jurisdiction over the property and to issue cease-and-desist orders until the private defendants obtained the requisite permits. The district court immediately issued a temporary restraining order, preventing the private defendants from engaging in landclearing activities pending the court's action on the plaintiffs' motion for a preliminary injunction. On January 17, 1979, the district court granted the plaintiffs' motion for a preliminary injunction and ordered the federal defendants to prepare a final wetlands determination within sixty days. All of the private parties were to have the opportunity to participate in the administrative proceedings, and the federal defendants were to file a preliminary report within forty-five days. The court allowed the private defendants to engage in normal cultivation on the more than 10,000 acres that had been cleared, but ordered them to apply for a permit with respect to the area already designated by the government as a wetland and enjoined them for sixty days from engaging [*903] in landclearing activities on the remainder of the tract.

The parties complied with the court's preliminary order, and the EPA submitted its final wetlands determination on March 26, 1979. * * * After examining the vegetation, soil conditions, and hydrology of the tract, the EPA concluded that approximately eighty percent of the land was a wetland. In a brief final paragraph, the EPA also offered its views of the types of activities that would require a section 404 permit.

At the private defendants' request, the district court agreed to bifurcate the consideration of the two major issues in the case: (1) how much of the Lake Long Tract was a wetland, and (2) which activities required a section 404 permit. After extensive trials on both issues, the court decided that a section 404 permit was required for the landclearing activities and that over ninety percent of the Lake Long Tract was a wetland. * * * The court then enjoined the private defendants from engaging in any additional landclearing activities, without a section 404 permit, on the land that the court had determined to be a wetland, other than the land already cleared. The defendants timely appealed.

* * *

[In Part II of the opinion, the court concluded that the district court used the wrong standard to review EPA's determination regarding the extent of wetlands on the private defendants' property. The court held that the district court substituted its judgment for the agency and reviewed the determination de novo, when the court should have accorded deference to the agency's determination and upheld it as long as it was not arbitrary or capricious. However, instead of remanding the case to the district court to allow that court to review EPA's determination under the proper standard, the appellate court reviewed it and upheld the agency's finding that eighty percent of the private defendants' property

was wetlands on the grounds that the agency's determination was not arbitrary or capricious. The court also rejected claims that the agency's regulations asserting jurisdiction over wetlands exceeded the agency's authority under the Clean Water Act and that Congress unconstitutionally delegated legislative power to the agency in the Act.]

* * *

III. ACTIVITIES REQUIRING A PERMIT

[The court began Part III by indicating that the court would uphold the district court's factual findings unless they were clearly erroneous. After describing the evidence presented below, the court concluded that it could not find on the basis of the record that the district court's factual findings were clearly erroneous. The major factual findings were summarized at the beginning of this opinion.] * * *

B. The Discharge of Pollutants

The district court held that the private defendants' landclearing activities constituted a "discharge of a pollutant" into the waters of the United States, and that engaging in those activities without a section 404 dredge-and-fill permit was a violation of Section 301(a) of the CWA. * * * As the district court did, we must look beyond section 301(a) itself, to the statutory and regulatory definitions, in order to determine whether the district court's holding was correct.

Section 502(12) defines the term "discharge of a pollutant" as "(a) any addition of any pollutant to navigable waters from any point source" * * * The question in this case is whether the landclearing activities were (1) a discharge (2) of a pollutant (3) from a point source (4) into navigable waters. Further, we must determine whether the activities were "normal agricultural activities" exempted from the permit requirements by 33 U.S.C. § 1344(f).

As discussed in Part II, these activities did occur in navigable waters, as that term is defined in the statute. Further, we agree with the district court that the bulldozers and backhoes were "point sources," since they collected into windrows and piles material that may ultimately have found its way back into the waters. * * * The question then is whether these activities constituted a "discharge" of a "pollutant."

Emphasizing that the removal of all of the vegetation would destroy the vital ecological function of the wetlands, the district court concluded that the landclearing activities constituted a "discharge" within the meaning of the CWA. Both the federal and private defendants argue that the "mere removal" of wetlands vegetation was not a discharge because the term discharge is defined as the "addition" of pollutants, not the removal of materials. The district court rejected this argument as "untenable" because it believed that the federal defendants' interpretation would frustrate the ecological purposes of the CWA. * * * In the court's view, the federal defendants' argument implied that "the excavation of [a] ditch 6 feet deep and 100 feet long requires a § 404 permit (is destructive of wetlands)

but that the clearing of 20,000 acres of forest wetlands by methods involving only de minimis movement of earth does not (is not destructive of wetlands)." * * *

A brief analysis of the district court's factual findings indicates that the dispute about whether the CWA covers the mere removal of vegetation is a false issue in this case. The EPA has explained on appeal that it agrees with the district court that "if vegetation or other materials are redeposited in the wetland, that activity is a discharge. [Their] point of disagreement with the district court was with its apparent conclusion that removal activities [were] covered by the Act even when nothing is redeposited on the land." Federal Defendants' Reply Brief at 2 n.1⁴⁰ The district court's factual findings demonstrate that this is not a "mere removal" case. The court found that "during the clearing process small sloughs were filled in and larger ones partially filled thereby levelling the land." * * * The landowners' own witness admitted to burying logs in holes that he had dug, and the plaintiffs' witnesses testified that material that would not burn was buried. Since the landclearing activities involved the redeposit of materials, rather than their mere removal, we need not determine today whether mere removal may constitute a discharge under the CWA.⁴¹ Any suggestion made by the district court that the term "discharge" does cover removal is pure dicta.

The word "addition", as used in the definition of the term "discharge," may reasonably be understood to include "redeposit." As the district court recognized, this reading of the definition is consistent with both the purposes and legislative history of the statute. The CWA was designed to "restore and maintain the chemical, physical and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and as discussed in Part II, the legislative history indicates that Congress recognized the importance of protecting wetlands as a means of reaching the statutory goals. * * * There is ample evidence in the record to support the district court's conclusion that the landowners' redepositing activities would significantly alter the character of the wetlands and limit the vital ecological functions served by the tract. * * * Since we have concluded that the term "discharge" covers the redepositing of materials taken from the wetlands, we hold that the district court correctly decided that the landclearing activities on the Lake Long Tract constituted a discharge within the meaning of the Act.⁴³

⁴⁰ After persistent questioning at oral argument, the federal defendants explained further that, in their view, if the vegetation was cut down without significant disturbance of the soil and then removed to dry land, no permit would be required. They further explained that, in their view, if the vegetation were cut down and put back into the wetlands soil, however, then there would have been a redeposit in the wetland, and hence a discharge.

⁴¹ It is equally clear from the record that the activities in this case did not involve a "de minimis" disturbance; hence we have no reason to determine whether de minimis disturbances are exempted from the Act. * * *

⁴³ In *National Wildlife, supra*, the EPA argued that an activity was a discharge requiring a § 402 permit only if materials were introduced into the water "from the outside world." 693 F.2d at 165. No one has urged here that the materials must come from an external

Similarly, we agree with the district court, the plaintiffs and the federal defendants that the material discharged in this case was "fill," if not "dredged," material and hence subject to the Corps' regulation under section 404, as long as the activities did not fall within the section 404(f) exemption. The term "fill material" is defined in the Corps' regulations 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 of the Federal Water Pollution Control Act Amendments of 1972.

33 C.F.R. § 323.2(m). The regulations define the "discharge of fill material" as:

the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary to the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products.

33 C.F.R. § 323.2(n).

As discussed above, the burying of the unburned material, as well as the discing, had the effect of filling in the sloughs on the tract and leveling the land. The landowners insist that any leveling was "incidental" to their clearing activities and therefore the material was not deposited for the "primary purpose" of changing the character of the land. The district court found, however, that there had been significant leveling. The plaintiffs' witnesses testified that sloughs that had contained rainwater in the past had been filled in; thus, the activities were "changing the bottom elevation of the waterbody." Certainly, the activities were designed to "replace the aquatic area with dry land." Accordingly, we hold that the district court correctly concluded that the landowners were discharging "fill material" into the wetlands.

source in order to constitute a discharge necessitating a § 404 permit, nor would we expect them to, since § 404 refers to "dredged" or "fill" material. As discussed infra, "dredged" material is by definition material that comes from the water itself. A requirement that all pollutants must come from outside sources would effectively remove the dredge-and-fill provision from the statute. * * *

The district court also found that removal of the vegetation constituted dredging. The regulations define "dredged material" as "material that is excavated or dredged from waters of the United States." 33 C.F.R. § 323.2(k). The district court reasoned that since the vegetation was part of the wetlands, it was also part of the "waters of the United States;" therefore, removal of the vegetation constituted dredging.

The landowners emphasize that dredging is "excavation." They argue that the vegetation is a wetland indicator, not a part of the wetland itself; therefore, the removal of the vegetation from the surface of the wetland is not "dredging." The federal defendants agree with the landowners that the removal of vegetation from above ground is not dredging, but they do not view this as a crucial issue in this case because they agree with the district court that the landowners were discharging "fill material." * * * We note that there was testimony that the landowners' activities included the digging of ditches and holes, which would constitute "dredging" even under the landowners' interpretation of the regulation. Like the federal defendants, however, we do not believe that a decision whether there was a discharge of dredged material is necessary here, since we have concluded that there was a discharge of fill material.

* * *

[The court then determined that the defendants' activities were not exempt from the permit requirements of Section 404 as "normal farming operations."]

* * *

V. CONCLUSION

* * *

With respect to the activities at issue, we hold: * * *

(2) that in filling in the sloughs and leveling the land, the landowners were redepositing fill material into waters of the United States, and that therefore, [*930] these activities constituted a 'discharge of a pollutant,' * * *

Accordingly, we affirm the district court's judgment that these landclearing activities may not be carried out without a section 404 dredge-and-fill permit; however, we note that should a section 404 permit application be filed, the Corps will be free to apply its expertise to that permit determination without any constraint from the district court's injunctive determinations except those we have expressly affirmed.

Questions and Comments

1. This was not a government enforcement action. Who sued? What was the "mandatory duty" that the government failed to perform? Does the government have a duty to bring enforcement actions whenever a person violates the Clean Water Act? Government enforcement and citizen suits will be explored more fully

in Chapter 10.

2. Does the court rely on the plain meaning of the term “addition” to conclude that the redeposit of material in the wetlands constitutes an “addition?” On what tools of statutory interpretation did the court rely to reach that determination?
3. Although the court found that the trees and vegetation in this case met the regulatory definition of “fill material,” the same appellate court concluded that trees and vegetation that would be cut and left in wetlands to facilitate the construction of a electricity transmission line were not “fill material” because the wetlands would remain wetlands at the end of the project and would not be converted. See [Save Our Wetlands v. Sands, 711 F.2d 634 \(5th Cir. 1983\)](#).
4. At the time of this lawsuit, the Corps still defined “fill material” based on the purpose for which the material was used. Was that important in this case? Would the court have reached a different determination if the Corps defined “fill material”, as they do today, to include material 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?
5. The court does not determine whether the trees and vegetation constitute “dredged material” because the court concludes that they are “fill material.” Note, though, that the court suggests that the term “addition” must include some redeposit of materials into waters, since the statute authorizes the Corps to issue permits for the discharge of “dredged material,” which “is by definition material that comes from the water itself.” See *infra*, n.43.
6. If the landowner could have cleared the land without redepositing any of the trees or vegetation in the wetlands, would that activity have been regulated as an “addition” of a pollutant under the court’s opinion? What if the activity involved only the redeposit of a small amount of vegetation or other material?
7. Note the difference between the Corps’ delineation of the wetlands on the property (35%), EPAs’ (80%), and the district court’s (90%). If all were relying on the same delineation manual, why was there such a disparity in results?
8. **The Rest of the Story:** The controversy underlying the *Avoyelles* litigation is recounted in detail in Oliver A. Houck, *Rescuing Ophelia: Avoyelles Sportsmen's League and the Bottomland Hardwoods Controversy*, 81 Miss. L.J. 1473 (2012).

Post-script: In light of the court’s decision in *Avoyelles*, the Corps issued a Regulatory Guidance Letter, RGL 85-04, that indicated that the Corps would apply the approach taken by the Fifth Circuit on a national level and would require 404 permits for landclearing activities with mechanized equipment if “the activity would involve burying logs or burying burn residue, or totally or partially filling in sloughs or low areas, or leveling the land.” See [Regulatory Guidance Letter 85-04, Avoyelles ¶ 2 \(March 29, 1985\)](#). The RGL also

provided that sidestepping of materials from the construction of ditches would require a permit. *Id.* With regard to some of the questions that the *Avoyelles* court did **not** address, the Corps' RGL provided that a 404 permit would not be required for the mere removal of vegetation from wetlands or waters, *id.* ¶ 5, and that a 404 permit would not be required if the landclearing only involved a de minimis discharge of dredged or fill material. *Id.* ¶ 4. The RGL also clarified that a permit would not be required for the felling of a tree, piling of trees, brush and stumps (which don't totally or partially fill in sloughs or level the land), filling in stump holes, or many types of discing, plowing or raking the soil surface in regulated waters. *Id.* ¶ 6.

However, five years later, the Corps issued another Regulatory Guidance Letter, RGL 90-05, in which the agency indicated that "it is our position that mechanized land-clearing activities in jurisdictional wetlands result in a redistribution of soil that is subject to regulation under section 404." See [Regulatory Guidance Letter 90-05, Landclearing Activities Subject to Section 404 Jurisdiction, ¶ 2 \(July 18, 1990\)](#). The guidance indicated that some limited exceptions might occur, "such as cutting trees above the soil's surface with a chain saw." *Id.* Today, the Corps regulates landclearing activities fairly broadly, in part due to changes in the regulatory definition of "discharge of dredged material", which will be discussed in the next section.

B. Ditching, Draining and Dredging

While the Clean Water Act 404 permit requirement is triggered by the "discharge of dredged or fill material" into "waters of the United States", "draining" a wetland, by pumping out the water, constructing ditches outside of the wetlands to drain the water, or otherwise, does not require a permit unless the draining activity involves a "discharge of dredged or fill material" into the wetland. See [Save Our Community v. EPA, 971 F.2d 1155 \(5th Cir. 1992\)](#). However, draining activities frequently involve "discharges of dredged or fill material," and when they do, they require a 404 permit.

In addition, since 1990, the Corps has taken the position that wetlands that are subject to 404 jurisdiction and are drained remain subject to 404 jurisdiction even after they are drained, and a permit will be required for any subsequent filling activities on the converted wetlands. See Memorandum from Lance Wood to All Division and District Counsels, *Evading 404 Jurisdiction by Pumping Water from Wetlands* (Apr. 10, 1990). Since the Corps and EPA define "wetlands" as areas that "under normal circumstances" support wetland vegetation, the Corps has taken the position that wetlands that are drained remain subject to jurisdiction because, "under normal circumstances" (i.e., if they had not been drained), they would support wetland vegetation. *Id.* This reduces the incentive for landowners to drain the wetlands, since the ultimate development activity will still require a permit even though the draining may not.



Photo 1 By U.S. Army Corps of Engineers from USA [[CC-BY-2.0](#)]

“Dredging,” like “draining,” does not require a Section 404 permit unless there is some discharge (addition of a pollutant) into the “waters of the United States” associated with the dredging. The act of “dredging” is generally regulated under the [Rivers and Harbors Act](#), and similar laws. However, dredging in wetlands and other waters of the United States will almost always involve some incidental redeposit of dredged material in the waters during the dredging process. The Corps’ regulation of that material has evolved over the years.

In a 1986 rulemaking defining “discharge of dredged material,” the Corps noted that the material that “incidentally” falls back into the water during the dredging process is considered a “de minimis” discharge and does not require a permit. See [51 Fed. Reg. 41206, 41210 \(Nov. 13, 1986\)](#). The regulation adopted at the time excluded “de minimis, incidental soil movement occurring during normal dredging operations.” *Id.* at 41232. The agency indicated that if it regulated the fallback, “we would, in effect, be adding the regulation of dredging to section 404 which we do not believe was the intent of Congress.” *Id.* at 41210.

The Corps changed its policy several years later in response to a lawsuit. In 1992, the North Carolina Wildlife Federation sued the Corps of Engineers and Colonel Walter Tulloch, the District Engineer for the Corps’ Wilmington District, because the Corps did not require a landowner to apply for a section 404 permit when the landowner ditched

and drained wetlands to convert them and build a housing development. See *North Carolina Wildlife Federation, et al. v. Tulloch*, E.D.N.C. C90-713-CIV-5-BO (E.D. N.C. 1992). Since the ditching and draining only involved de minimis discharges of material into the wetlands, the Corps had declined to require the developer to obtain a 404 permit. *Id.* In order to settle the lawsuit, EPA and the Corps agreed to propose a revision and clarification of the definition of “dredged or fill material.” See [58 Fed. Reg. 45007, 45008 \(Aug. 25, 1993\)](#).

The Tulloch Rule: The regulations that the Corps and EPA adopted broadly defined “discharge of dredged or fill material” to mean “any addition, including any redeposit, of dredged material within the United States.” *Id.* at 45,035. The regulations also indicated that the term included “any addition, including redeposit, of dredged material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization and other excavation.” *Id.* At the same time, though, the regulations provided that a permit was not required for “any incidental addition, including redeposit, of dredged material associated with any activity that does not have or would not have the effect of destroying or degrading an area of waters of the United States,” provided that the person undertaking the activity demonstrated to the Corps or EPA, before undertaking the activity, that it would not destroy or degrade an area of waters of the United States.” *Id.* In effect, therefore, incidental fallback would be regulated unless a developer could demonstrate that the fallback would not harm the wetlands or waters of the United States. The rulemaking that the agencies issued to settle the lawsuit became known as “the Tulloch Rule” (in reference to Colonel Tulloch, the defendant in the lawsuit).

The “Tulloch Rule” generated controversy and was challenged, and struck down, in the following case:

National Mining Association v. U.S. Army Corps of Engineers

145 F.3d 1399 (D.C. Cir. 1998)

WILLIAMS, Circuit Judge:

* * * In 1986 the Corps issued a regulation defining the term “discharge of dredged material,” as used in § 404, to mean “any addition of dredged material into the waters of the United States,” but expressly excluding “*de minimis*, incidental soil movement occurring during normal dredging operations.” * * * In 1993, responding to litigation, the Corps issued a new rule removing the *de minimis* exception and expanding the definition of discharge to cover “any addition of dredged material into, *including any redeposit of dredged material within*, the waters of the United States.” 33 C.F.R. § 323.2(d)(1) (emphasis added). Redeposit occurs when material removed from the water is returned to it; when redeposit takes place in substantially the same spot as the initial removal, the parties refer to it as “fallback.” In effect the new rule subjects to federal regulation virtually all excavation and dredging performed in wetlands.

Resources for the Case

[33 C.F.R. 323.2](#) (1994) (incorp.Tulloch rule)
[Unedited opinion](#) (From Justia)
[Google Map of all the cases in the coursebook](#)
[NMA website](#)

The plaintiffs, various trade associations whose members engage in dredging and excavation, mounted a facial challenge to the 1993 regulation, claiming that it exceeded the scope of the Corps's regulatory authority under the Act by regulating fallback. The district court agreed and granted summary judgment for the plaintiffs. *American Mining Congress v. United States Army Corps of Engineers*, 951 F. Supp. 267 (D.D.C.1997). The district court also entered an injunction prohibiting the Corps and the Environmental Protection Agency, who jointly administer § 404, from enforcing the regulation anywhere in the United States. *Id.* at 278. We affirm.

* * *

As mentioned above, the Tulloch Rule alters the preexisting regulatory framework primarily by removing the *de minimis* exception and by adding coverage of incidental fallback. Specifically, the rule defines "discharge of dredged material" to include "[a]ny addition, *including any redeposit*, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation." 33 C.F.R. § 323.2(d)(1)(iii) (emphasis added).³

* * *

It is undisputed that by requiring a permit for "*any redeposit*," 33 C.F.R. § 323.2(d)(1)(iii) (emphasis added), the Tulloch Rule covers incidental fallback. According to the agencies, incidental fallback occurs, for example, during dredging, "when a bucket used to excavate material from the bottom of a river, stream, or wetland is raised and soils or sediments fall from the bucket back into the water." Agencies Br. at 13 (There is no indication that the rule would not also reach soils or sediments falling out of the bucket even *before* it emerged from the water.) Fallback and other redeposits also occur during mechanized landclearing, when bulldozers and loaders scrape or displace wetland soil, * * * as well as during ditching and channelization, when draglines or backhoes are dragged through soils and sediments. * * * Indeed, fallback is a practically inescapable by-product of all these activities. In the preamble to the Tulloch Rule the Corps noted that "it is virtually impossible to conduct mechanized landclearing, ditching, channelization or excavation in waters of the United States without causing incidental redeposition of dredged material (however small or temporary) in the process." * * * As a result, the Tulloch Rule effectively requires a permit for all those activities, subject to a limited exception for ones that the Corps in its discretion deems to produce no adverse effects on waters of the United States.

The plaintiffs claim that the Tulloch Rule exceeds the Corps's statutory jurisdiction under § 404, which, as we have noted, extends only to "discharge," defined as the "addition of any pollutant to navigable waters." 33 U.S.C. §§ 1344, 1362(12). It argues that fallback,

³ EPA promulgated a parallel rule, which is codified at 40 C.F.R. § 232.2(1)(iii).

which returns dredged material virtually to the spot from which it came, cannot be said to constitute an *addition* of anything. Therefore, the plaintiffs contend, the Tulloch Rule conflicts with the statute's unambiguous terms and cannot survive even the deferential scrutiny called for by *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

* * *

The agencies argue that the terms of the Act in fact demonstrate that fallback may be classified as a discharge. The Act defines a discharge as the addition of any pollutant to navigable waters, 33 U.S.C. § 1362(12), and defines "pollutant" to include "dredged spoil," as well as "rock," "sand," and "cellar dirt." *Id.* § 1362(6). The Corps in turn defines "dredged material" as "material that is excavated or dredged from waters of the United States," 33 C.F.R. § 323.2(c), a definition that is not challenged here. Thus, according to the agencies, wetland soil, sediment, debris or other material in the waters of the United States undergoes a legal metamorphosis during the dredging process, becoming a "pollutant" for purposes of the Act. If a portion of the material being dredged then falls back into the water, there has been an addition of a pollutant to the waters of the United States. Indeed, according to appellants National Wildlife Federation et al. ("NWF"), who intervened as defendants below, this reasoning demonstrates that regulation of redeposit is actually *required* by the Act.

We agree with the plaintiffs, and with the district court, that the straightforward statutory term "addition" cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back. Because incidental fallback represents a net withdrawal, not an addition, of material, it cannot be a discharge. As we concluded recently in a related context, "the nearest evidence we have of definitional intent by Congress reflects, as might be expected, that the word 'discharge' contemplates the addition, not the withdrawal, of a substance or substances." *North Carolina v. FERC*, 112 F.3d 1175, 1187 (D.C. Cir.1997). The agencies' primary counterargument--that fallback constitutes an "addition of any pollutant" because material becomes a pollutant only upon being dredged--is ingenious but unconvincing. Regardless of any legal metamorphosis that may occur at the moment of dredging, we fail to see how there can be an addition of *dredged material* when there is no addition of *material*. Although the Act includes "dredged spoil" in its list of pollutants, 33 U.S.C. § 1362(6), Congress could not have contemplated that the attempted removal of 100 tons of that substance could constitute an addition simply because only 99 tons of it were actually taken away. * * *

In fact the removal of material from the waters of the United States, as opposed to the discharge of material into those waters, is governed by a completely independent statutory scheme. Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, makes it illegal "to excavate or fill" in the navigable waters of the United States without the Corps's approval. As the general counsel of the Army noted in a law review article published a few years after the passage of the Clean Water Act, Congress enacted "two separate statutory frameworks. Section 10 of the 1899 Act covers the act of dredging, while Section 404 [of the Clean Water Act] covers the disposal of the dredged material."

* * *

The agencies, though acknowledging that the Tulloch Rule effectively requires a permit for all mechanized landclearing, ditching, channelization or excavation in waters of the United States, * * * locate their permitting requirement under § 404, not under the Rivers and Harbors Act's explicit coverage of "excavat[ion]." The explanation for this choice is apparently that the scope of the Corps's geographic jurisdiction is narrower under the Rivers and Harbors Act than under the Clean Water Act, extending only to waters subject to the ebb and flow of the tide, or waters that are used, have been used, or may be susceptible for use to transport interstate or foreign commerce. 33 C.F.R. § 329.4; see also id. § 328.1 (noting difference between geographic jurisdiction under the two statutes).

There may be an incongruity in Congress's assignment of extraction activities to a statute (the Rivers and Harbors Act) with a narrower jurisdictional sweep than that of the statute covering discharges (the Clean Water Act). This incongruity, of course, could be cured either by narrowing the jurisdictional reach of the Clean Water Act or broadening that of the Rivers and Harbors Act. But we do not think the agencies can do it simply by declaring that incomplete removal constitutes addition.

* * *

NWF complains that our understanding of "addition" reads the regulation of dredged material out of the statute. They correctly note that since dredged material comes from the waters of the United States, 33 C.F.R. § 323.2(c), any discharge of such material into those waters could technically be described as a "redeposit," at least on a broad construction of that term. The Fifth Circuit made a similar observation fifteen years ago: "[D]redged' material is by definition material that comes from the water itself. A requirement that all pollutants must come from outside sources would effectively remove the dredge-and-fill provision from the statute." *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 924 n.43 (5th Cir. 1983). But we do not hold that the Corps may not legally regulate some forms of redeposit under its § 404 permitting authority.⁶ We hold only that by asserting jurisdiction over "any redeposit," including incidental fallback, the Tulloch Rule outruns the Corps's statutory authority. Since the Act sets out no bright line between incidental fallback on the one hand and regulable redeposits on the other, a reasoned attempt by the agencies to draw such a line would merit considerable deference. *Cf. Dubois v. U.S. Dep't of Agriculture*, 102 F.3d 1273, 1296-99 (1st Cir. 1996) (although movement of pollutants within the same body of water might not constitute an "addition" for purposes of NPDES permit requirement, movement from one body of water to a separate one with different water quality is an addition). But the Tulloch Rule makes no effort to draw such a line, and indeed its overriding purpose appears to be to expand the Corps's permitting authority to encompass incidental fallback and, as a result, a wide

⁶ Even the plaintiffs concede that under a broad reading of the term "redeposit," "a redeposit could be an addition to [a] new location and thus a discharge." Plaintiffs' Br. at 17.

range of activities that cannot remotely be said to "add" anything to the waters of the United States.

* * *

In a press release accompanying the adoption of the Tulloch Rule, the White House announced: "Congress should amend the Clean Water Act to make it consistent with the agencies' rulemaking." * * * While remarkable in its candor, the announcement contained a kernel of truth. If the agencies and NWF believe that the Clean Water Act inadequately protects wetlands and other natural resources by insisting upon the presence of an "addition" to trigger permit requirements, the appropriate body to turn to is Congress. Without such an amendment, the Act simply will not accommodate the Tulloch Rule. The judgment of the district court is

Affirmed.

SILBERMAN, Circuit Judge, concurring:

I join the opinion of the court and write separately only to make explicit what I think implicit in our opinion. We hold that the Corps's interpretation of the phrase "*addition* of any pollutant to navigable waters" to cover incidental fallback is "unreasonable," which is the formulation we use when we have first determined under *Chevron* that neither the statutory language nor legislative history reveals a precise intent with respect to the issue presented--in other words, we are at the second step of the now-familiar *Chevron* Step I and Step II analysis. See, e.g., *Whitecliff, Inc. v. Shalala*, 20 F.3d 488 (D.C. Cir.1994); *Fedway Associates, Inc. v. United States Treasury*, 976 F.2d 1416 (D.C. Cir.1992); *Abbott Labs. v. Young*, 920 F.2d 984 (D.C. Cir.1990); *Associated Gas Distribs. v. FERC*, 899 F.2d 1250 (D.C. Cir.1990). As our opinion's discussion of prior cases indicates, the word addition carries both a temporal and geographic ambiguity. If the material that would otherwise fall back were moved some distance away and then dropped, it very well might constitute an "addition." Or if it were held for some time and then dropped back in the same spot, it might also constitute an "addition." But the structure of the relevant statutes indicates that it is unreasonable to call incidental fallback an addition. To do so perforce converts all dredging--which is regulated under the Rivers and Harbors Act--into discharge of dredged material which is regulated under the Clean Water Act.

Moreover, that Congress had in mind either a temporal or geographic separation between excavation and disposal is suggested by its requirement that dredged material be discharged at "specified disposal sites," 33 U.S.C. § 1344 (1994), a term which simply does not fit incidental fallback.

* * *

Questions and Comments

1. Did this lawsuit arise in the context of an enforcement action? Had the Corps applied the Tulloch rule to require members of the National Mining Association to

obtain permits for the incidental fallback during mining activities? If not, why was there no problem with standing or ripeness of the challenge? Chapter 3 (Administrative Law) and Chapter 10 (Administrative Appeals, Enforcement and Judicial Review) will examine questions like this in more detail.

2. Does the court resolve the case at *Chevron* step one or two? Is the statutory language clear?
3. What impact, if any, does the court's opinion, have on the Corps' regulation of "fill material" under the Clean Water Act?
4. The court appears to leave open the possibility that the Corps can require a Section 404 permit for some redeposit of material that occurs during dredging in wetlands and waters of the United States. In what circumstances might it be appropriate to require a permit? Is that inconsistent with the majority's statement that incidental fallback cannot be a discharge because it "represents a net withdrawal, not an addition, of material"?
5. If, as the court notes, dredging activities are already regulated under the Rivers and Harbors Act, why didn't the Corps rely on its Rivers and Harbors Act authority to protect wetlands?
6. Take a moment to review the APA's standards for judicial review of agency action, particularly [5 U.S.C. § 706\(2\)\(C\)](#). What do you think about the White House's press release in light of those standards?

Post-script: In the wake of the D.C. Circuit's ruling, thousands of acres of wetlands were ditched and converted to other uses. See [Carl H. Herschner, *Tulloch Drilling, Wetlands Technical Report 99-4* \(Virginia Institute of Marine Science, May 1999\)](#). The Virginia Institute of Marine Science at the College of William and Mary estimated that 12,000 acres of wetlands in North Carolina and Virginia alone were converted through "Tulloch ditching" in the year after the decision. *Id.* In an attempt to limit those impacts, the agencies, in a 1999 rulemaking, interpreted the *National Mining Association* decision narrowly to prohibit the regulation of "incidental fallback," but to allow regulation of other redeposit of material in waters of the United States. See [64 Fed. Reg. 25120 \(May 10, 1999\)](#).

Tulloch II: Only two years later, the agencies amended their regulations and to clarify the definition of "discharge of dredged material." The regulations that the agencies adopted in 2001 defined "discharge of dredged material" as "any addition of dredged material into, including any redeposit of dredged material other than incidental fallback within, the waters of the United States." See [66 Fed. Reg. 4550 \(Jan. 17, 2001\)](#). The agencies defined "incidental fallback" as "the redeposit of *small volumes* of dredged material that is incidental to excavation activity in waters of the United States when such material falls back in *substantially the same place as the initial removal.*" (emphasis added). *Id.*

More controversially, though, the agencies included a presumption in the rule that "the

use of mechanized earth-moving equipment to conduct landclearing, ditching, channelization, instream mining or other earth-moving activity in waters of the United States” results in a discharge of dredged material “unless project-specific evidence shows that the activity results in only incidental fallback. *Id.* Those regulations (“Tulloch II”) were codified at [33 C.F.R. § 323.2 \(2002\)](#).

Not surprisingly, the regulations generated more controversy and the National Association of Home Builders and several other industry trade organizations challenged the rule as exceeding the Corps’ authority under the Clean Water Act, the APA, and the Tenth Amendment of the Constitution. See *National Association of Home Builders v. U.S. Army Corps of Engineers*, No. 01-0274, 2007 U.S. Dist. LEXIS 6366 (D.D.C. 2007). In 2007, the United States District Court for the District of Columbia held that the agency’s definition of “incidental fallback” was invalid and enjoined the agency from enforcing and applying that definition. *Id.* at *15. The court held that the Corps should have defined “incidental fallback” in terms of the amount of time that material was removed from waters, in addition to the location where it was replaced, and that the agency should not have defined it with respect to the volume of the material being removed. *Id.* at *11-*13. In light of the court’s decision, [EPA and the Corps re-adopted the definition of “discharge of dredged material” that they adopted in 1999](#), which did not include a definition for “incidental fallback” or the presumption that the use of mechanized earth moving equipment results in a discharge of dredged material. See [73 Fed. Reg. 79641 \(Dec. 30, 2008\)](#). The current definition is codified at [33 C.F.R. § 323.2 \(2013\)](#).

Interview



Jan Goldman Carter, Senior Manager and Counsel for the National Wildlife Federation's Wetlands and Water Resources Program, discusses the Tulloch litigation (in which she was involved) and the aftermath of the litigation. ([YouTube](#)).

C. Sidecasting

The *National Mining Association* decision focused on the incidental redeposit of material in wetlands in the *same place* and at the *same time* as it is being removed from the wetlands. However, it is quite common, during ditching or dredging activities, to remove material from a wetland or water of the United States and place it in a *different* location within the same wetland or water of the United States. As noted above, the Corps has



Corps of Engineers Photo ([Corps Website](#))

consistently interpreted that activity, which is known as **sidecasting**, to constitute a “discharge” or “addition” of material (dredged or fill), which requires a Section 404 permit. See, e.g. [Regulatory Guidance Letter 85-04, Avoyelles ¶ 2 \(March 29, 1985\)](#). In 1997, a divided panel of the United States Court of Appeals for the Fourth Circuit could not reach consensus on whether “sidecasting” required a Section 404 permit. See [United States v. Wilson, 133 F.3d 251 \(4th Cir. 1997\)](#). However, three years later, a different panel of the Fourth Circuit concluded that “sidecasting” requires a 404 permit in the *United States v. Deaton* case, which follows.

United States v. Deaton

209 F.3d 331 (4th Cir. 2000)

MICHAEL, Circuit Judge:

The United States sued James and Rebecca Deaton, alleging that they violated §§ 301 and 404 of the Clean Water Act, * * * by sidecasting dredged material as they dug a drainage ditch through a wetland. The district court ultimately awarded summary judgment to the Deatons, and the government appeals. We reverse, holding that sidecasting in a jurisdictional wetland is the discharge of a pollutant under the Clean Water Act. We dismiss the Deatons' cross-appeal for lack of appellate jurisdiction.

Resources for the Case

[Unedited opinion](#) (From Justia)

[Google Map of all the cases in the coursebook](#)

I

On November 22, 1988, James Deaton signed a contract to buy a twelve-acre parcel of land in Wicomico County, Maryland, subject to the condition that it was suitable for developing a small residential subdivision. Deaton immediately applied to the Wicomico County Health Department for a sewage disposal permit for a five-lot "single family

subdivision." The Health Department denied the permit on April 26, 1989, because the groundwater elevations were unacceptably high at the disposal sites proposed by Deaton and his consultant. The department commented that "[t]he majority of the parcel... is very poorly drained and would severely restrict the function of the onsite sewage disposal systems." There was a "very limited area" that might warrant evaluation, the department said, if it proved to be within the property boundary. In late April 1989, after the permit was denied, Deaton contacted the U.S. Department of Agriculture, Soil Conservation Service (SCS), to discuss the wetness problem on the twelve-acre parcel. Deaton was referred to Glen Richardson, who agreed to examine the site. According to Deaton, Richardson suggested that the problem could be corrected by digging a ditch through the middle of the property. Deaton and his wife (Rebecca) decided to go ahead with the purchase of the land, and title was transferred to them in June 1989.

Before any ditching work began, the property was also inspected by Michael Sigrist, District Conservationist at the SCS in Wicomico County. Deaton and Sigrist walked over the property together, and Deaton told Sigrist that he wanted to dig a large ditch to drain the area. Sigrist saw hydric soils (which are typical of wetland areas), areas of standing water, "a large, low wet area" in the center of the parcel, and non-tidal wetlands. Water was flowing from the property into a culvert that connects to (or is part of) Perdue Creek. (The waters of Perdue Creek end up in the Wicomico River, a tributary of the Chesapeake Bay.) Sigrist advised Deaton that a large portion of his property contained non-tidal wetlands and that he would need a permit from the U.S. Army Corps of Engineers (the Corps) before undertaking any ditching work. Deaton ignored Sigrist's advice and hired a contractor to dig a drainage ditch across the property. Using a back hoe, a front-end track loader, and a bulldozer, the contractor dug a 1,240 foot ditch that intersected the areas that Sigrist had identified as wetlands. As he dug, the contractor piled the excavated dirt on either side of the ditch, a practice known as sidecasting.

In July 1990 the Corps learned of possible Clean Water Act violations on the Deaton property. A Corps ecologist, Alex Dolgos, inspected the site and concluded that it contained wetlands, that those wetlands were "waters of the United States" under the Clean Water Act, and that the ditching and fill work that had taken place required a permit. On August 7 and 8, 1990, the Corps issued stop-work orders to Deaton and his contractor, warning them that their placement of fill material in a non-tidal wetland violated § 404 of the Clean Water Act, * * * and that no further work should be done without a permit. Deaton filed a joint state and federal application in December 1990, seeking permits to ditch and fill wetlands in order to construct an eighteen-lot subdivision. That application was returned as incomplete on February 15, 1991, and was never resubmitted. Over the next three years Deaton engaged several consultants to inspect the property, negotiate with the Corps, and prepare a remediation plan. No remediation ever took place, however, and on July 21, 1995, the government filed a civil complaint alleging that the Deatons had violated the Clean Water Act by discharging fill material (the dirt excavated from the ditch) into a regulated wetland.

* * *

[In the district court, both parties moved for summary judgment. The court initially granted partial summary judgment to the government, holding that sidecasting into wetlands on the property was the “discharge of a pollutant.” However, while the litigation in the district court continued, the 4th Circuit issued the *United States v. Wilson* decision described above. Although there was no majority holding in that case regarding whether sidecasting is regulated under Section 404, the district court vacated its prior determination that sidecasting was the “discharge of a pollutant” and granted summary judgment for the Deatons. The government then appealed.] * * *

II.

The Clean Water Act prohibits the discharge, without a permit, of any pollutant into “navigable waters.” See 33 U.S.C. §§ 1311(a), 1362(6), (7), (12). * * *

The Corps argues and we assume for purposes of this appeal that the Deatons' property contains wetlands that are subject to the Clean Water Act. The narrow issue before us today is whether sidecasting (that is, the deposit of dredged or excavated material from a wetland back into that same wetland) constitutes the discharge of a pollutant under the Clean Water Act. We hold that it does.

The Clean Water Act defines “discharge of a pollutant” to mean “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12)(A). The definition of pollutant, in turn, specifically includes “dredged spoil” that has been “discharged into water.” *Id.* § 1362(6). The piles of dirt dredged up by the Deatons' contractor were, without question, “pollutants” within the meaning of the Act. See *Wilson*, 133 F.3d at 259 (op. of Niemeyer, J.) (“[D]redged materials, including the native soils excavated by ditching activities, may constitute a pollutant within the meaning of the Clean Water Act.”); *id.* at 269, 274 & n.12 (op. of Payne, J.) (dredged earth is a pollutant). This conclusion, instead of resolving the dispute, merely brings us to its center because the parties disagree fundamentally about what it means to “discharge... a pollutant” into the waters of the United States.

The Deatons seize on the word “addition” in the phrase “addition of any pollutant” in the statutory definition of discharge. 33 U.S.C. § 1362(12). They argue that the “ordinary and natural meaning of ‘addition’ means something added, i.e., the addition of something not previously present.” * * * Thus, according to the Deatons, no pollutant is discharged unless there is an “introduction of new material into the area, or an increase in the amount of a type of material which is already present.” *Wilson*, 133 F.3d at 259 (op. of Niemeyer, J.). Because sidecasting results in no net increase in the amount of material present in the wetland, the Deatons argue, it does not involve the “addition” (or discharge) of a pollutant. See *National Mining Ass’n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1404 (D.C. Cir. 1998) (“[W]e fail to see how there can be an addition of dredged material when there is no addition of material.”). We are not convinced by this argument.

Contrary to what the Deatons suggest, the statute does not prohibit the addition of material; it prohibits “the addition of any pollutant.” The idea that there could be an

addition of a pollutant without an addition of material seems to us entirely unremarkable, at least when an activity transforms some material from a nonpollutant into a pollutant, as occurred here. In the course of digging a ditch across the Deaton property, the contractor removed earth and vegetable matter from the wetland. Once it was removed, that material became "dredged spoil," a statutory pollutant and a *type* of material that up until then was not present on the Deaton property. It is of no consequence that what is now dredged spoil was previously present on the same property in the less threatening form of dirt and vegetation in an undisturbed state. What is important is that once that material was excavated from the wetland, its redeposit in that same wetland added a pollutant where none had been before. See 33 U.S.C. § 1362 (6), (12). Thus, even under the definition of "addition" (that is, "something added") offered by the Deatons, sidecasting adds a pollutant that was not present before.

Although we conclude that the Clean Water Act's definition of discharge and its use of the term "addition" are unambiguous, the underlying rationale for defining dredged spoil as a pollutant provides further support for our conclusion. In deciding to classify dredged spoil as a pollutant, Congress determined that plain dirt, once excavated from waters of the United States, could not be redeposited into those waters without causing harm to the environment. Indeed, several seemingly benign substances like rock, sand, cellar dirt, and biological materials are specifically designated as pollutants under the Clean Water Act. See 33 U.S.C. § 1362(6). Congress had good reason to be concerned about the reintroduction of these materials into the waters of the United States, including the wetlands that are a part of those waters.

Wetlands perform a vital role in maintaining water quality by trapping sediment and toxic and nontoxic pollutants before they reach streams, rivers, or other open bodies of water. See *Office of Technology Assessment, U.S. Congress, Wetlands: Their Use and Regulation* 48-50 (1984). Given sufficient time, many (but not all) of these pollutants will decompose, degrade, or be absorbed by wetland vegetation. See *id.* at 48-49. When a wetland is dredged, however, and the dredged spoil is redeposited in the water or wetland, pollutants that had been trapped may be suddenly released. See *id.* at 49 ("Natural or manmade alterations of the wetland caused by lowering the water table, dredging, and the like, could mobilize large quantities of toxic materials."); *id.* at 124 ("A long-term effect of the disposal of contaminated dredged spoil in or near wetlands is the potential bioavailability of toxic chemicals such as oil and grease, pesticides, arsenic, and heavy metals, when the sediments are resuspended periodically."); *Wilson*, 133 F.3d at 273-74 (op. of Payne, J.) (describing how sidecasting dredged material threatens to release pollutants contained in sub-surface soil). At the same time, the increased drainage brought about by the dredging may render the surrounding wetland unable to reabsorb and filter those pollutants and sediment (the very purpose of dredging is to destroy wetland characteristics). 40 C.F.R. § 230.41(b) (explaining how discharge of dredged or fill material in wetlands "can degrade water quality by obstructing circulation patterns that flush large expanses of wetland systems, by interfering with the filtration function of wetlands, or by changing the aquifer recharge capability of a wetland"). Even in a pristine wetland or body of water, the discharge of dredged spoil, rock, sand, and biological materials threatens to increase the amount of suspended sediment, harming

aquatic life. See *id.*; *Office of Technology Assessment, supra*, at 48; see also *Wilson*, 133 F.3d at 274 (op. of Payne, J.).

These effects are no less harmful when the dredged spoil is redeposited in the same wetland from which it was excavated. The effects on hydrology and the environment are the same. Surely Congress would not have used the word "addition" (in "addition of any pollutant") to prohibit the discharge of dredged spoil in a wetland, while intending to prohibit such pollution only when the dredged material comes from outside the wetland. In reaching this conclusion, our understanding of the word "addition" is the same as that of nearly every other circuit to consider the question. See *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923-25 (5th Cir. 1983) (interpretation of "addition" to include "redeposit" of trees and vegetation dredged or excavated from the wetland itself is consistent with both the purposes and legislative history of the Clean Water Act); *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1506 (11th Cir. 1985) (redeposit of spoil churned up by tugboat propellers constituted the discharge of a pollutant under the Clean Water Act), vacated and remanded on other grounds, 481 U.S. 1034 (1987), readopted in relevant part, 848 F.2d 1133 (11th Cir. 1988); *Rybachek v. EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990) (dirt and gravel extracted by gold miners and redeposited into the stream bed from which it was extracted constituted an "addition" of a pollutant under the Clean Water Act); see also *United States v. Bay-Houston Towing Co.*, 33 F. Supp.2d 596, 606 (E.D. Mich. 1999) (adopting reasoning of Judge Payne's *Wilson* opinion). *But cf. National Mining Ass'n*, 145 F.3d at 1404, 1406 (concluding that "incidental fallback" of dredged material into waterway does not constitute the addition of a pollutant, but distinguishing between incidental fallback and sidecasting).

For these reasons, we hold that the Clean Water Act's definition of discharge as "any addition of any pollutant to navigable waters" encompasses sidecasting in a wetland. We therefore reverse the district court's June 23, 1998, judgment to the contrary.

Questions and Comments

1. **Transformation:** The court seems to concede that no "material" is being added to the wetlands in the case, but holds that "pollutants" are being added. How can pollutants be added when no material is added?
2. Is the court suggesting that sidecasting *always* constitutes an addition of a pollutant? What is the basis for the court's determination that it is appropriate for the Corps to regulate sidecasting in this case? The plain meaning of the statutory terms? Legislative history? The purposes of the statute?
3. **Time and Place Matter:** Although the Deatons seek to rely on the D.C. Circuit's *National Mining Association* decision, what direction, if any, did that court provide regarding whether, or when, the Corps could regulate redeposit of material in waters of the United States? Did that court address the issue of sidecasting?

D. Deep Ripping

Another activity that alters wetlands or other waters of the United States, but does not involve the addition of material from outside of those waters is “deep ripping.” Deep ripping is a technique used to break up compacted soil, and involves dragging four to seven foot metal blades through the soil. It is generally used to improve site drainage and facilitate deep root growth. Like sidecasting, the activity involves only redeposit of material that was previously in the waters into which it is being placed. However, because the activity can destroy the hydrological integrity of wetlands, the Corps generally requires a Section 404 permit for deep ripping. See [Regulatory Guidance Letter 96-02, Applicability of Exemptions under Section 404\(f\) to “Deep Ripping” Activities in Wetlands \(Dec. 12, 1996\)](#). The United States Court of Appeals for the Ninth Circuit addressed the Corps’ authority to regulate deep-ripping in the *Borden Ranch Partnership v. United States Army Corps of Engineers* case that follows.

Borden Ranch Partnership v. United States Army Corps of Engineers
261 F.3d 810 (9th Cir. 2001)

HAWKINS, Circuit Judge:

This appeal concerns the authority of the U.S. Army Corps of Engineers (“the Corps”) and the Environmental Protection Agency (“EPA”) over a form of agricultural activity called “deep ripping” when it occurs in wetlands. We conclude that the Clean Water Act applies to this activity and affirm the district court’s findings that Borden Ranch violated the Act by deep ripping in protected wetland swales. * * *

Resources for the Case

[Deep Ripping information](#) - from the Western Australia Dept. of Agr. and Food
Deep Ripping Videos - [YouTube](#) and [Facebook](#)
[Unedited Opinion](#) (from Justia)
[Oral Argument Audio](#) - from the Oyez Project
[Google Map of all the cases in the coursebook](#)

Facts and Procedural Background

In June of 1993, Angelo Tsakopoulos, a Sacramento real estate developer, purchased Borden Ranch, an 8400 acre ranch located in California’s Central Valley. Prior to Tsakopoulos’s purchase, the relevant areas of the ranch had been used primarily as rangeland for cattle grazing. The ranch contains significant hydrological features including vernal pools, swales, and intermittent drainages. Vernal pools are pools that form during the rainy season, but are often dry in the summer. Swales are sloped wetlands that allow for the movement of aquatic plant and animal life, and that filter water flows and minimize erosion. Intermittent drainages are streams that transport water during and after rains. All of these hydrological features depend upon a dense layer of soil, called a “restrictive layer” or “clay pan,” which prevents surface water from penetrating deeply into the soil.

Tsakopoulos intended to convert the ranch into vineyards and orchards and subdivide it into smaller parcels for sale. Vineyards and orchards, however, require deep root systems, much deeper than the restrictive layer in the relevant portions of Borden Ranch

permitted. For vineyards and orchards to grow on this land, the restrictive layer of soil would first need to be penetrated. This requires a procedure known as "deep ripping," in which four-to seven-foot long metal prongs are dragged through the soil behind a tractor or a bulldozer. The ripper gouges through the restrictive layer, disgorging soil that is then dragged behind the ripper.

Under the Clean Water Act, an individual seeking to fill protected wetlands must first obtain a permit from the Corps. Since 1993, Tsakopoulos and the Corps have disagreed about the Corps' authority to regulate deep ripping in wetlands. Tsakopoulos initiated deep ripping without a permit in the fall of 1993, and the Corps granted him a retrospective permit in the spring of 1994, when Tsakopoulos agreed to various mitigation requirements. In the fall of 1994, the Corps and the EPA informed Tsakopoulos that he could deep rip in uplands and that he could drive over swales with the deep ripper in its uppermost position, but that he could not conduct any deep ripping activity in vernal pools. The next spring, the Corps discovered that deep ripping had occurred in protected wetlands and promptly issued a cease and desist order. From July 1995 through November 1995, Tsakopoulos again initiated deep ripping on various parcels of land without a permit. The Corps concluded that more protected wetlands had been ripped and again issued a cease and desist order.

In May of 1996, the Corps and the EPA entered into an Administrative Order on Consent with Tsakopoulos that was intended to resolve his alleged Clean Water Act violations. Under the agreement, Tsakopoulos set aside a 1368-acre preserve and agreed to refrain from further violations.

* * *

In March of 1997 the Corps concluded that Tsakopoulos had continued to deep rip wetlands without permission. That April, EPA investigators visited the ranch and observed fully engaged deep rippers passing over jurisdictional wetlands. EPA then issued an Administrative Order to Tsakopoulos.

Tsakopoulos responded by filing this lawsuit, challenging the authority of the Corps and the EPA to regulate deep ripping. The United States filed a counterclaim seeking injunctive relief and civil penalties for Tsakopoulos's alleged violations of the Clean Water Act.

Both parties filed motions for summary judgment. The district court ruled that the Corps has jurisdiction over deep ripping in jurisdictional waters. However, the court found disputed facts with respect to whether such deep ripping had actually occurred. These facts were litigated in a bench trial that began on August 24, 1999, and concluded on September 16, 1999. The district court heard evidence from over twenty witnesses and received hundreds of documentary exhibits.

The district court subsequently entered findings of fact and conclusions of law determining that Tsakopoulos had repeatedly violated the Clean Water Act. The court found 348 separate deep ripping violations in 29 drainages, and 10 violations in a single vernal pool.

The district court gave Tsakopoulos the option of paying a \$1.5 million penalty or paying \$500,000 and restoring four acres of wetlands. Tsakopoulos chose the latter option. After denying a motion for more specific findings of fact, the district court entered its final order in favor of the United States.

Tsakopoulos then brought this timely appeal. We have jurisdiction under 28 U.S.C. §§ 1291.

Analysis

Corps Jurisdiction over Deep Ripping

* * *

A. Discharge of a Pollutant

Tsakopoulos initially contends that deep ripping cannot constitute the "addition" of a "pollutant" into wetlands, because it simply churns up soil that is already there, placing it back basically where it came from. This argument is inconsistent with Ninth Circuit precedent and with case law from other circuits that squarely hold that redeposits of materials can constitute an "addition of a pollutant" under the Clean Water Act. *Rybachek v. United States Env'tl. Prot. Agency*, 904 F.2d 1276 (9th Cir. 1990), considered a claim that placer mining activities were exempt from the Act. We held that removing material from a stream bed, sifting out the gold, and returning the material to the stream bed was an "addition" of a "pollutant." *Id.* at 1285. The term "pollutant" encompassed "the materials segregated from gold in placer mining." *Id.*

Our reasoning in *Rybachek* is similar to that of the Fourth Circuit in *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000). In *Deaton*, a property owner alleged that the Corps could not regulate "sidecasting," which is "the deposit of dredged or excavated material from a wetland back into that same wetland." *Id.* at 334. The property owner asserted that "sidecasting results in no net increase in the amount of material present in the wetland" and therefore could not constitute the "addition of a pollutant." *Id.* at 335. The Fourth Circuit squarely rejected this argument, in language that is worth quoting in full:

Contrary to what the Deatons suggest, the statute does not prohibit the addition of material; it prohibits the "addition of any pollutant." The idea that there could be an addition of a pollutant without an addition of material seems to us entirely unremarkable, at least when an activity transforms some material from a nonpollutant into a pollutant, as occurred here Once [earth and vegetable matter] was removed [from the wetland], that material became "dredged spoil," a statutory pollutant and a type of material that up until then was not present on the Deaton property. It is of no consequence that what is now dredged spoil was previously present on the same property in the less threatening form of dirt and vegetation in an undisturbed state. What is important is that once that material was

excavated from the wetland, its redeposit in that same wetland added a pollutant where none had been before.

Id. at 335-36. As the court concluded, "Congress determined that plain dirt, once excavated from waters of the United States, could not be redeposited into those waters without causing harm to the environment." *Id.* at 336; see also *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983) (holding that the word "addition" may be reasonably understood to include "redeposit").

These cases recognize that activities that destroy the ecology of a wetland are not immune from the Clean Water Act merely because they do not involve the introduction of material brought in from somewhere else. In this case, the Corps alleges that Tsakopoulos has essentially poked a hole in the bottom of protected wetlands. That is, by ripping up the bottom layer of soil, the water that was trapped can now drain out. While it is true, that in so doing, no new material has been "added," a "pollutant" has certainly been "added." Prior to the deep ripping, the protective layer of soil was intact, holding the wetland in place. Afterwards, that soil was wrenched up, moved around, and redeposited somewhere else. We can see no meaningful distinction between this activity and the activities at issue in *Rybachek* and *Deaton*. We therefore conclude that deep ripping, when undertaken in the context at issue here, can constitute a discharge of a pollutant under the Clean Water Act.²

Tsakopoulos also contends that no case has ever held a plow to be a point source, and that a prohibited discharge must be from a point source. This argument has no merit. The statutory definition of "point source" ("any discernible, confined, and discrete conveyance") is extremely broad, 33 U.S.C. §§ 1362(14), and courts have found that "bulldozers and backhoes" can constitute "point sources," *Avoyelles*, 715 F.2d at 922. In this case, bulldozers and tractors were used to pull large metal prongs through the soil. We can think of no reason why this combination would not satisfy the definition of a "point source."

[The court also concluded that the deep ripping did not fit within the "normal farming operations" exemption from the 404 permit requirements because the purpose of the deep ripping was to "bring an area of the navigable waters into a use to which it was not previously subject." 33 U.S.C. § 1344(f)(2).]

* * *

GOULD, Circuit Judge, *dissenting*:

² *National Mining Assoc. v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998), upon which Tsakopoulos heavily relies, does not persuade us to the contrary. That case distinguished "regulable redeposits" from "incidental fallback." *Id.* at 1405. Here, the deep ripping does not involve mere incidental fallback, but constitutes environmental damage sufficient to constitute a regulable redeposit.

I respectfully dissent. The crux of this case is that a farmer has plowed deeply to improve his farm property to permit farming of fruit crops that require deep root systems, and are more profitable than grazing or other prior farm use. Farmers have been altering and transforming their crop land from the beginning of our nation, and indeed in colonial times. Although I have no doubt that Congress could have reached and regulated the farming activity challenged, that does not in itself show that Congress so exercised its power. I conclude that the Clean Water Act does not prohibit "deep ripping" in this setting.

I would follow and extend *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), and hold that the return of soil in place after deep plowing is not a "discharge of a pollutant." In *National Mining*, the court held that the Corps exceeded its authority under section 404 of the Clean Water Act by regulating the redeposit of dredged materials that incidentally fall back in the course of dredging operations. The court explained that "the straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back." *Id.* at 1404. The court rejected the agencies' primary argument that incidental fallback constitutes an "addition" because once dredged the material becomes a pollutant:

Regardless of any legal metamorphosis that may occur at the moment of dredging, we fail to see how there can be an addition of dredged material when there is no addition of material. Although the Act includes "dredged spoil" in its list of pollutants, Congress could not have contemplated that the attempted removal of 100 tons of that substance could constitute an addition simply because only 99 tons of it were actually taken away.

Id. at 1404 (emphasis omitted).

Those considerations are persuasive here as deep ripping does not involve any significant removal or "addition" of material to the site. The ground is plowed and transformed. It is true that the hydrological regime is modified, but Congress spoke in terms of discharge or addition of pollutants, not in terms of change of the hydrological nature of the soil. If Congress intends to prohibit so natural a farm activity as plowing, and even the deep plowing that occurred here, Congress can and should be explicit. Although we interpret the prohibitions of the Clean Water Act to effectuate Congressional intent, it is an undue stretch for us, absent a more clear directive from Congress, to reach and prohibit the plowing done here, which seems to be a traditional form of farming activity.

Rybachek v. United States Environmental Protection Agency, 904 F.2d 1276 (9th Cir. 1990), in my view, is distinguishable. In *Rybachek*, we held that placer mining, "a process in which miners excavate dirt and gravel in and around waterways and, after extracting the gold, discharge the left-over material back into the water," fell within the scope of section 404 of the Clean Water Act. *Id.* at 1285. There, the *Rybachek* court identified the regulable discharge as the discrete act of dumping leftover material into the stream after it had been processed. *Id.* As the concurrence in *National Mining* makes clear, however,

"the word addition carries both a temporal and geographic ambiguity. If the material that would otherwise fall back were moved some distance away and then dropped, it very well might constitute an `addition.' Or if it were held for some time and then dropped back in the same spot, it might also constitute an `addition.' "National *Mining*, 145 F.3d at 1410 (Silberman, J., concurring). Because deep ripping does not move any material to a substantially different geographic location and does not process such material for any period of time, *Rybachek* is not controlling.

Nor is the Fourth Circuit's opinion in *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000), relied on by the majority, persuasive to me in the context presented. A farmer who plows deeply is not, in my view, redepositing dredged or excavated materials. While the Fourth Circuit relied on the fact that a "dredged spoil" is a statutory pollutant, the deep plowing activity here, in my view, is not the same as dredging dirt from and redepositing it in waters.

Questions and Comments

1. The majority cites the *Rybachek* and *Deaton* cases in support of its decision. Is it relevant that those cases involved redeposit of material in a different place or at a different time? Is it important that the court suggests that the soil is "dragged behind the ripper"? The dissent refers to the "return of soil in place."
2. The majority adopts the transformation theory that *Deaton* adopted and *National Mining Association* rejected. Is the ruling based on the text of the statute, legislative history, or the purposes of the statute? On what does the dissent rely?
3. On appeal, Tsakopoulos argued that the Corps had relied on RGL 96-02 to determine that a permit was required for his deep ripping and that the guidance was invalid because it was a substantive rule that was not adopted pursuant to notice and comment rulemaking. The court declined to address the issue because it was not addressed below. The district court did, however, determine that it was not clear that the Corps relied on the guidance in determining that a permit was required in the case. If the appellate court *had* addressed Tsakopoulos' challenge to RGL 96-02, how might the court have ruled?

4. On Tsakopoulos' petition for certiorari, the Supreme Court agreed to review the Ninth Circuit's decision. Justice Kennedy, born and raised in Sacramento, California, was a friend of Tsakopoulos, the Sacramento real estate developer, so Kennedy did not participate in the case. Without his involvement, the Court split 4-4 and, therefore, affirmed the Ninth Circuit's decision, which upheld the Corps' jurisdiction over deep ripping. See *Borden Ranch Partnership v. Army Corps of Engineers*, [537 U.S. 99 \(2002\)](#).

Hypothetical

Jeremy and Casey Wright purchased an 80 acre tract of land in northern Minnesota near the Saint Louis River. The Wrights planned to build a house on the property, but discovered that 60 acres of the property were wetlands that are regulated as "waters of the United States" under the Clean Water Act. Rather than building the house on the 20 acres that are not wetlands, Jeremy rented a backhoe and dug a ditch in the wetlands located on the western portion of the property to drain those wetlands. Jeremy used most of the excavated material to level an upland portion of the property where he planned to build a garage, but he placed some of the excavated material in the wetlands located a few acres east of the ditch. In addition, while he was digging the ditch, small amounts of the soil and vegetation that he was removing from the wetlands spilled out of the bucket of the backhoe into the wetlands that he was draining. After he completed construction of the ditch, a consultant that he retained to delineate the wetlands on the property indicated that there were only 30 acres of wetlands on the property, and that the wetlands were located on the portion of the property situated east of the drainage ditch. Based on that information, Jeremy cleared 10 acres of the western portion of the property that formerly were wetlands, re-graded the area, incorporating several hundred cubic yards of dirt that he purchased from the Minnesota Sand and Gravel Company, and built his new home on that portion of the property. Jeremy did not obtain a Section 404 permit for any of his activities.

Should a permit have been required for (1) the construction of the drainage ditch; (2) the placement of the excavated material in the wetlands east of the ditch; (3) the use of the excavated materials to level the property for the garage; or (4) the placement of the dirt and construction of the home on the western portion of the property?

Should a permit have been required for the construction of the drainage ditch if no soil or vegetation spilled out of the backhoe bucket during the construction of the ditch?



Photo 3 By JW Randolph (Friend's work) [[Public domain](#)]



Photo 2 By Roston (Own work) [[Public domain](#)]



Photo 30 By Flashdark (Own work) [[Public domain](#)]

E. Competing Permitting Programs - 404 versus 402 - What is Fill Material?

As noted in Chapter 4, there are two permit programs in the Clean Water Act that regulate the addition of pollutants into the navigable waters. EPA administers the [Section 402](#) permit program, which applies generally to point source discharges of pollutants into the navigable waters, while the Corps administers the [Section 404](#) permit program, which applies to discharges of dredged or fill material into the navigable waters. More than 90% of the activities regulated under the Section 404 permit program are authorized pursuant to general permits and the Corps generally denies less than 1% of individual Section 404 permit applications. See [Claudia Copeland, Wetlands: An Overview of Issues, Congressional Research Service RL 33483 \(July 12, 2010\)](#). Needless to say, EPA's Section 402 permit program is somewhat more demanding. Consequently, persons engaging in activities that involve addition of pollutants into navigable waters have frequently argued that, if their activities are regulated at all, they involve the discharge of fill material and require a Section 404 permit rather than a Section 402 permit.

For many years, this issue was central to the controversy over the regulation of mountaintop removal mining. Mountaintop removal mining is a surface mining practice that involves removing the tops of mountains to expose coal seams that lie below the mountaintops. See U.S. Environmental Protection Agency, *Surface Coal Mining in Appalachia*, available at: <https://www.epa.gov/sc-mining> To extract the coal, large amounts of rock and soil (called "spoils") are removed from the mountain. See [Claudia Copeland, Mountaintop Mining: Background on Current Controversies, Congressional Research Service RS21421 \(Dec. 2, 2013\) \[hereinafter "CRS Mountaintop Mining Report"\]](#) Although the Federal Surface Mining Control and Reclamation Act (SMCRA) requires mining companies to return the spoils to the mined area to return the area to its "approximate original contour" (AOC), [30 U.S.C. § 1265\(b\)\(3\)](#), it is normally impossible to do that with mountaintop removal mining because "broken rock takes up more volume than did the rock prior to mining and because there are stability concerns with the spoil pile." *CRS Mountaintop Mining Report, supra*, at 1. SMCRA includes a provision that provides for waiver of the AOC requirement in certain circumstances, though, see [30 U.S.C. § 1265\(c\)\(3\)](#), and, as a result, the spoils from mountaintop removal are usually placed in "valley fills" on the sides of the mountains, frequently burying streams in the valley below. See *CRS Mountaintop Mining Report, supra*, at 1. The practice became very popular in the Appalachian region of the United States in the 1990s. *Id.* Almost 1.2 million acres of land have been surface mined in the Central Appalachian region and 500 mountains have been severely impacted or destroyed by mountaintop mining in that region. See [Appalachian Voices, Mountaintop Removal 101](#).

Residents of the Appalachian region and environmentalists raised concerns about the environmental impacts of mountaintop mining for years and, in a recent report, EPA concluded that mountaintop removal mining and valley fills have the following impacts:

- (1) springs, and ephemeral, intermittent streams, and small perennial streams are permanently lost with the removal of the mountain and from burial under fill,
- (2) concentrations of major chemical ions are persistently elevated downstream,
- (3) degraded water quality reaches levels that are acutely lethal to standard laboratory test organisms,
- (4) selenium (Se) concentrations are elevated, reaching concentrations that have caused toxic effects in fish and birds, and
- (5) macroinvertebrate and fish communities are consistently and significantly degraded.

See [U.S. Environmental Protection Agency, The Effects of Mountaintop Mines and Valley Fills on Aquatic Ecosystems of the Central Appalachian Coalfields 1 \(EPA 600/R-09/138f\) \(March 2011\)](#).

In the Clean Water Act context, residents of Appalachia and environmentalists argued that the valley fills required Section 402 permits from EPA. The mining companies, on the other hand, argued that the mining spoils that were being disposed of in the streams were “fill material,” which could be authorized by the Corps of Engineers under Section 404.

As noted above, for many years, EPA and the Corps relied on different regulatory definitions of “fill material.” The Corps’ 1977 regulation, which remained in place until 2002, defined “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.” See [42 Fed. Reg. 37,121, 37,145 \(July 19, 1977\)](#). EPA’s regulations, on the other hand, at least since 1980, have focused on whether materials have the “effect” of replacing water with dry land or changing the bottom elevation of water, regardless of the “purpose” of the placement of the material. See [45 Fed. Reg. 33290, 33421 \(May 19, 1980\)](#). Pursuant to the Corps’ regulations, opponents of mountaintop mining argued that the purpose of the valley fills was waste disposal, regulated by EPA under Section 402, while the mining companies argued that the valley fills involved the discharge of fill material and were regulated under Section 404. In the 1990s, when mountaintop removal mining was becoming increasingly popular, the Corps authorized most valley fills under a general permit, Nationwide Permit 21, instead of requiring mining companies to obtain individual Section 404 permits. See [33 C.F.R. § 330.5\(a\)\(21\) \(1992\)](#).

In 1998, several environmental groups and concerned citizens sued the Corps, arguing that valley fills should be regulated by EPA under the Section 402 permit program, rather than under Section 404. See *Bragg v. Robertson*, 54 F. Supp. 2d. 635 (S.D. W.Va. 1999), *aff’d in part, vacated in part sub nom* [Bragg v. West Virginia Coal Ass’n, 248 F.3d 275 \(4th](#)

[Cir. 2001](#)). The Fourth Circuit did not resolve the question of whether Section 402 or 404 applied to the valley fills, but the case did result in some changes to the federal regulation of valley fills. Pursuant to a partial settlement agreement of the case, the Corps agreed to require companies to obtain individual permits, rather than rely on the agency's nationwide permit, for many of the larger valley fills, and the Corps agreed to prepare an environmental impact statement on mountaintop removal mining and valley fills. 54 F. Supp. 2d at 639. The Corps, along with EPA, the Fish and Wildlife Service, and the West Virginia Department of Environmental Protection, completed the final environmental impact statement in 2005. See [U.S. Environmental Protection Agency, Final Programmatic Environmental Impact Statement \(PEIS\) on Mountaintop Mining/Valley Fills in Appalachia, EPA 903-R-05-002 \(Oct. 2005\)](#).

Although the Fourth Circuit, in *Bragg*, did not resolve the question of whether Section 402 or 404 applied to valley fills, the court was faced with the question again a few years later in the following case. Prior to the court's decision, the Corps began the process of amending its regulations to adopt a definition of "fill material" that mirrored EPA's definition and would define material as "fill material" if it had the effect of replacing a water of the United States with dry land or of changing the bottom elevation of a water of the United States. See [65 Fed. Reg. 21,292 \(Apr. 20, 2000\)](#). In the proposal, EPA and the Corps indicated that, prior to the proposal, the agencies generally agreed that valley fills would be regulated under Section 404 and, while the proposal would change the Corps' definition of "fill material," it would not change the division of authority between the agencies with regard to valley fills. *Id.* at 21,295. However, the action challenged in the case was taken by the Corps under the existing Corps' regulations, which defined "fill material" in terms of the purpose for which the material was used.

Kentuckians for the Commonwealth v. Rivenburgh

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

NIEMEYER, Circuit Judge:

This appeal presents the issue of whether the U.S. Army Corps of Engineers has authority under the Clean Water Act and under its now-superseded 1977 regulation implementing the Act to issue permits for valley fills in connection with mountaintop coal mining. It does not present the question of whether mountaintop coal mining is useful, desirable, or wise.

Kentuckians for the Commonwealth, Inc., a nonprofit corporation formed to promote "social justice and quality of life for all Kentuckians," commenced this action for declaratory and injunctive relief to declare illegal the Corps' interpretation of the Clean Water Act and to require the Corps to revoke the permit that it issued to Martin County Coal Corporation under § 404 of the Act, authorizing Martin Coal to place excess overburden from one of its coal mining projects into 27 valleys in Martin County, Kentucky.

Resources for the Case

[Corps letter authorizing Beech Fork Mine under NWP 21 Unedited opinion](#) (From Justia)
[Google Map of all the cases in the coursebook](#)
Videos of Mountaintop Removal from [Appalachian Voices](#), [Smithsonian](#), and [Discovery](#)
[Kentuckians for the Commonwealth web page](#)

On cross-motions for summary judgment, the district court "found and concluded" that "fill material" as used in § 404 referred only to "material deposited for some beneficial primary purpose," not for waste disposal, and therefore that the Corps' "approval of waste disposal as fill material under § 404 [of the Clean Water Act] [was] *ultra vires*" and "beyond the authority" of the Corps. Because Martin Coal's assignee of the permit, Beech Fork Processing, Inc., proposed "to re-engineer [the] existing mine plan to place no spoil in waters of the United States without a constructive primary purpose," the court found there to be no "imminent probable irreparable injury" to Kentuckians for the Commonwealth. The court determined that in the absence of injury, Kentuckians' application for injunctive relief with regard to the Martin Coal authorization "must be denied." But on the basis of its conclusion that the Corps acts *ultra vires* whenever it issues permits for valley fills without a beneficial primary purpose, the district court entered a purely prospective permanent injunction against the Corps. This injunction prohibits the Corps from "issuing any further § 404 permits within the Huntington District [covering portions of five states] that have no primary purpose or use but the disposal of waste," in particular, any permit to create valley fills with the spoil of mountaintop coal mining for the sole purpose of waste disposal.

Because we conclude that the Corps' practice of issuing § 404 permits, including the permit to Martin Coal, to create valley fills with the spoil of mountaintop coal mining is not *ultra vires* under the Clean Water Act and that the injunction issued by the district court was overbroad, we reverse the court's declaratory judgment; we vacate its injunction and the memorandums and orders of May 8 and June 17, 2002; and we remand for further proceedings not inconsistent with this opinion.

I.

Martin County Coal Corporation ("Martin Coal"), having obtained a mining permit from the Commonwealth of Kentucky in November 1999 to undertake a surface mining project in Martin County, Kentucky, applied to the U.S. Army Corps of Engineers ("the Corps") for authorization under § 404 of the Clean Water Act and under the Corps' Nationwide Permit 21 ("NWP 21") "to construct hollow fills and sediment ponds in waters of the United States" in connection with the proposed mining project. On June 20, 2000, the Corps "authorized" Martin Coal's project, permitting it to place mining-operations "spoil" from "excess overburden" in 27 valleys, filling about 6.3 miles of streams. "Overburden" is the soil and rock that overlies a coal seam, and overburden that is excavated and removed is "spoil." In connection with surface mining operations in mountains where the mine operator must return the mountains to their approximate original contour, the spoil is placed temporarily in valleys while the coal is removed from the seam and then returned to the mining location. However, because spoil takes up more space than did the original overburden, all surface mining creates excess spoil that must be placed somewhere. The permit in this case authorized Martin Coal to create 27 valley fills with the excess spoil, which in turn would bury some 6.3 miles of streams at the heads of the valleys.

The Corps' exercise of authority under NWP 21 to permit the creation of valley fills in

connection with mining operations was consistent with its past practices and with the understanding of the Corps and the EPA as to how the Clean Water Act divides responsibility for its administration. While court cases have, over the years, evinced confusion over that division based on the agencies' differing approaches to defining "fill material" in their regulations, see, e.g., *Resource Investments, Inc. v. U.S. Army Corps of Eng'rs*, 151 F.3d 1162 (9th Cir.1998); *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897 (5th Cir.1983), the Corps and the EPA have in fact exercised their authority consistently in interpreting the Clean Water Act to give the Corps authority to issue permits for the creation of valley fills in connection with surface coal mining activities.

At the time that the Corps issued its authorization to Martin Coal in this case, it had already published notice, together with the EPA, of their intent to amend their regulations to resolve ambiguities in both agencies' regulatory definitions of "fill material" and to clarify the division of authority between the two agencies. As the Corps and the EPA stated in the public notice of the intended amendments, issued on April 20, 2000:

With regard to proposed discharges of coal mining overburden, we believe that the placement of such material into waters of the U.S. has the effect of fill and therefore, should be regulated under CWA section 404. This approach is consistent with existing practice and the existing EPA definition of the term "fill material." In Appalachia in particular, such discharges typically result in the placement of rock and other material in the heads of valleys, with a sedimentation pond located downstream of this "valley fill." This has required authorization under CWA section 404 for the discharges of fill material into waters of the U.S., including the overburden and coal refuse, as well as the berms, or dams, associated with the sedimentation ponds. The effect of these discharges is to replace portions of a water body with dry land. Therefore, today's proposal makes clear that such material is to be regulated under CWA section 404.

65 Fed. Reg. 21,292, 21,295 (Apr. 20, 2000). This public notice also pointed out that the EPA would, in connection with coal mining activities, continue to regulate "effluent discharged into waters of the U.S. from sedimentation ponds," pursuant to § 402 of the Clean Water Act. *Id.* at 21,296.

In August 2001, Kentuckians for the Commonwealth, Inc. ("Kentuckians"), commenced this action against the Corps under the Administrative Procedure Act ("APA"), challenging the Corps' action in issuing the June 20, 2000 permit to Martin Coal to create 27 valley fills and to bury 6.3 miles of streams. * * * In support of their request for declaratory and injunctive relief, Kentuckians alleged that the Corps had violated § 404 of the Clean Water Act as well as its own regulations and had "acted in a manner that is arbitrary, capricious, an abuse of discretion, and otherwise contrary to law, in violation of the APA, 5 U.S.C. § 706(2)." Kentuckians asked the court to "[d]eclare that Defendants' June 20, 2000 decision granting authorization under NWP 21 to [Martin Coal] is contrary to Section 404 of the CWA and its implementing regulations ... in violation of the APA," and to "[i]ssue an order requiring Defendants to revoke [Martin Coal's] authorization under NWP 21 or, in the alternative, to suspend that authorization pending completion of EPA's Section

404(c) proceeding and/or unless and until Defendants comply with their obligations herein under the APA, CWA, and NEPA [National Environmental Policy Act]." * * *

[O]n May 8, 2002, the district court ruled on the pending cross-motions for summary judgment, concluding that the efforts of the Corps and the EPA, as well as their past applications of § 404, were inconsistent with the Clean Water Act. *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 204 F. Supp. 2d 927 (S.D.W.Va.2002). The court declared that "fill material" as used in § 404 of the Clean Water Act "refers to material deposited for some beneficial primary purpose: for construction work, infrastructure, improvement and development in waters of the United States, not waste material discharged solely to dispose of waste." Accordingly, the court declared that the Corps' "approval of a waste disposal as fill material under § 404 is ultra vires, that is, beyond the authority of either [the Corps or the EPA]." * * *

Although the court refused to grant Kentuckians' motion for an injunction requiring the Corps to revoke its permit to Martin Coal because Martin Coal's assignee was prepared to reengineer the project so as not to create valley fills of waste material,* * * it issued a permanent injunction against the Corps prohibiting it from issuing "any further § 404 permits that have no primary purpose or use but the disposal of waste." As the court restated its order, it enjoined the issuance of "mountaintop removal overburden valley fill permits solely for waste disposal under § 404." The court did not, however, strike down the New Rule, as no party had challenged it. But it declared the New Rule to be *ultra vires*: * * *

The district court issued a revised memorandum and order dated June 17, 2002, in which it stated that the injunction did not have nationwide application; rather, it prohibited the Corps from issuing § 404 permits "from their ordinary place of business, the Huntington District," which the court stated would have "substantial national impact" because 97% of "stream length affected by valley fills in the nation" was approved in the Huntington District in 2000. *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 206 F. Supp. 2d 782 (S.D. W.Va.2002). The court also stated that the injunction did not enjoin the New Rule, 33 C.F.R. § 323.2 (2002). The court repeated, however, its declaration that the New Rule was "inconsistent with the statutory scheme, and therefore *ultra vires*." * * *

[In Part II of the opinion, the court concluded that the injunction issued by the district court was overbroad and the court vacated the injunction.]

III

[At the beginning of Part III of the opinion, the court discussed which parts of the district court's opinion were dicta and which parts would be reviewed on appeal.]

* * *

The judgment of the district court, as contained in its two orders of May 8 and June 17, 2002, and the positions of the parties thus bring us to the single question whether § 404

of the Clean Water Act, in providing that the Corps "may issue permits... for the discharge of dredged or fill material into navigable waters," authorizes the Corps to issue permits for the creation of valley fills in connection with coal mining activities, when the valley fills serve no purpose other than to dispose of excess overburden from the mining activity. This question is presented particularly in Kentuckians' challenge of the Corps' action in issuing the permit to Martin Coal.

B

When reviewing a particular agency action challenged under § 706(2) of the APA, "[t]he court is first required to decide whether the [agency] acted within the scope of [its] authority." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). The first step in this analysis is an examination of the statute providing authority for the agency to act. As the Supreme Court explained in *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995):

[W]hen we confront an expert administrator's statutory exposition, we inquire first whether "the intent of Congress is clear" as to "the precise question at issue." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). If so, "that is the end of the matter" *Ibid.* But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment "controlling weight." *Id.* at 844.

This analytical approach applies not only when a regulation is directly challenged, as in *Chevron*, but also when a particular agency action is challenged, as in *NationsBank*.

Moreover, when an agency acts pursuant to a regulation, a reviewing court must, if there is any dispute about the meaning of the regulation, interpret the meaning of the regulation to determine whether the agency's action is consistent with the regulation. The reviewing court does not have much leeway in undertaking this interpretation, however, because the agency is entitled to interpret its own regulation and the agency's interpretation is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks and citation omitted). This requirement of binding deference to agency interpretations of their own regulations, unless "plainly erroneous or inconsistent with the regulation," is known as *Seminole Rock* deference, having first been articulated in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

Finally, if there is any question whether an agency action taken pursuant to a regulation exceeds the agency's statutory authority, the statutory inquiry under *Chevron* step one (whether the intent of Congress is clear) must take place prior to interpreting the agency's own regulation. This ordering is a function of the *Chevron* test itself: If Congress has spoken clearly to the issue, then the regulation is inapplicable. See *Chevron U.S.A. Inc.*

v. Echazabal, 536 U.S. 73 (2002) (applying an analytical approach by which the validity of an action taken in reliance a regulation depends, in the first instance, on whether the regulation itself exceeds the issuing agency's statutory authority); see also John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 627 n.78 (1996) ("It is important to note that because a regulation must be consistent with the statute it implements, any interpretation of a regulation naturally must accord with the statute as well.... [T]o get to *Seminole Rock* deference, a court must first address the straightforward *Chevron* question whether an agency regulation, as interpreted, violates the statute. *Seminole Rock* addresses the further question whether the agency's interpretation is consistent with the regulation").

C

In this case the Corps contends that "[t]he district court erred as a matter of law in holding that the Corps lacks authority under CWA Section 404 to regulate as 'fill material' the discharge of excess spoil from surface coal mining into waters of the United States." * * * It notes that Congress did not define "fill material" and left that to the agencies charged with administering § 404. It concludes that the practice followed by it and by the EPA over the years is "a permissible one entitled to deference" under *Chevron*. It claims that the new dual-agency construction in the New Rule reflects the agencies' past practices and "falls easily within the most obvious reading of the term 'fill material,'" and is consistent with the statutory scheme and purposes of the Clean Water Act.

* * *

Kentuckians contends that "[t]he district court correctly held that the Corps lacks authority under § 404 of the Clean Water Act to allow the filling of waters of the United States solely for waste disposal," but Kentuckians asserts that it "reaches that conclusion on grounds that differ, in part, from those relied on by the district court." Although Kentuckians agrees that "fill material" has not been defined in the Clean Water Act, it argues that Congress' intent is clear from the context of the Clean Water Act and that Congress did not mean for any provision of the Act to permit the Corps to "evade the water quality standards" mandated by the Act. Kentuckians asserts that to construe "fill material" in any way other than that given by the district court would violate the clear intent of the Clean Water Act "to restore and maintain the chemical, physical and biological integrity of the nation's waters." 33 U.S.C. § 1251(a). Kentuckians contends alternatively that even if the Act is ambiguous, the Corps' interpretation is unreasonable and impermissible because "[e]vasion of a statute's core mandate and purpose can scarcely be considered a 'reasonable' interpretation." Finally, Kentuckians asserts that the Corps' interpretation is internally inconsistent because the Corps' construction gives it authority over "mining waste, but excludes trash and garbage." It argues that such a construction produces an absurd result because the burial of a stream by mining waste is "much more devastating" than degradation of water by trash or garbage.

As with any issue of statutory interpretation, we begin with the language of the statute. If congressional intent is clear from application of "traditional tools of statutory construction,"

Brown & Williamson Tobacco Corp. v. FDA, 153 F.3d 155, 161 (4th Cir.1998), *aff'd*, 529 U.S. 120 (2000), "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress," *Chevron*, 467 U.S. at 842-43. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

Because the Clean Water Act does not define "fill material," nor does it suggest on its face the limitation of "fill material" found by the district court, the statute is silent on the issue before us, and such silence "normally creates ambiguity. It does not resolve it." *Barnhart v. Walton*, 535 U.S. 212 (2002); *see also Piney Run Preservation Ass'n v. County Comm'rs*, 268 F.3d 255, 267 (4th Cir.2001) * * *

The district court concluded, however, that its facial interpretation -- that a permit issued under § 404 can only authorize the discharge of fill material into navigable waters "for some beneficial primary purpose... not waste material discharged solely to dispose of waste" -- was supported by § 404(f)(2) of the Clean Water Act, by the Act's succession to the Rivers and Harbors Act, and by the Act's relation to the Surface Mining Control and Reclamation Act ("SMCRA"). We examine each of these to determine whether any unambiguously indicates a clear congressional intent with respect to the definition of "fill material" as used in § 404(a). * * *

[The court then examined, and rejected, each of those findings of the district court and disagreed with the district court's conclusion that the statutory language was clear.]

The district court's application of traditional tools of statutory construction thus could not leave it with a clear congressional intent that the undefined term "fill material" as used in § 404 means material deposited for a beneficial primary purpose. Indeed, the lack of clarity in the term itself prompted the agencies to undertake efforts to develop the term's meaning from the context of the permit programs and the interrelationship between § 402 permits and § 404 permits. While the statute authorizes the EPA to issue permits "for the discharge of any pollutant," defining "pollutant" to include "rock, sand, dirt and industrial, municipal and agricultural waste," 33 U.S.C. § 1362(6), the EPA is not authorized to issue a permit for "fill material," 33 U.S.C. § 1342(a)(1). Yet, when a permit is issued by the Corps under § 404 for the discharge of fill material that has a substantive adverse effect on municipal waters, fish, and wildlife, the EPA can veto the Corps' permit. 33 U.S.C. § 1344 (c). The statute's silence on the definition of "fill material" thus gives rise to ambiguity, particularly when a broad definition of "fill material" is employed.

Based on our de novo review of whether Congress has spoken clearly on the meaning of "fill material," *see Holland v. Pardee Coal Co.*, 269 F.3d 424, 430 (4th Cir. 2001) (holding that an issue of statutory construction is a "pure question of law" subject to de novo review), we conclude that Congress has not clearly spoken on the meaning of "fill material" and, in particular, has not clearly defined "fill material to be material deposited for some beneficial primary purpose." Accordingly, we proceed into *Chevron* step-two analysis to determine whether the Corps' action is based on a permissible construction of

§ 404. See *Capitol Mortgage Bankers, Inc. v. Cuomo*, 222 F.3d 151, 155 (4th Cir.2000) (determining that the district court's *Chevron* step-one holding was incorrect and stating that "[w]e must therefore proceed to the second step of the *Chevron* analysis and consider, with deference to [the agency's] expertise in this area, whether the agency's interpretation of the statute ... is based on a permissible construction of the statute").

D

Although the district court rested its holding principally on a statutory interpretation of the Clean Water Act under *Chevron* step one, concluding that "§ 404 is neither silent nor ambiguous on the issue of § 404 fills and their purposes," it addressed alternatively, albeit conclusorily, the reasonableness of the Corps' interpretation of the statute under *Chevron* step two. The court stated that its "examination of the legislative and regulatory history, interagency agreements, and related statutes demonstrates any interpretation of § 404 fill material that ignores and deliberately eliminates the primary purpose test for fill authorization is contrary to the purpose, principles, and policy of the CWA. [Citation omitted]. Such an agency interpretation is not permissible." The court thus reiterated the conclusion it reached in its *Chevron* step-one analysis, and its *Chevron* step-two analysis did not give any deference to the agency's interpretation of this regulation nor did it explain why such deference would be inappropriate.

Because the agency action at issue in this case was taken at a time when the Corps' 1977 Regulation was in effect, the appropriate inquiry under *Chevron* step two is whether that regulation, as interpreted by the Corps, is based on a permissible reading of the Clean Water Act, and, if so, whether the agency acted consistently with the regulation in issuing a permit to Mountain Coal to create valley fills in connection with coal mining activities.

The Corps' 1977 Regulation defines "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." 33 C.F.R. 323.2(e) (2001). The regulation provides further that "[t]he term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the Clean Water Act." *Id.* At the time when this 1977 Regulation was promulgated, the Corps, explaining the "waste" exclusion, stated that in its experience:

several industrial and municipal discharges of solid waste materials have been brought to our attention which technically fit within our definition of "fill material" but which are intended to be regulated under the NPDES program [i.e., the EPA's program created under § 402]. These include the disposal of waste materials such as sludge, garbage, trash, and debris in water.

* * *

The Corps and the Environmental Protection Agency feel that the initial decision relating to this type of discharge should be through the NPDES program.

42 Fed. Reg. 37,122, 37,130 (July 19, 1977).

To demonstrate that the Corps' understanding of its authority to issue permits for valley fills was based on a longstanding division of authority between the Corps and the EPA that reflected the interpretations of both agencies with regard to their respective regulatory authority under the Clean Water Act, the Corps submitted to the district court over 120 pages of correspondence with the EPA and with regulated parties addressing valley fill permits issued under Section 404. This correspondence, which spans approximately ten years from 1990 through 2000, includes actual permit grants, EPA objections to Corps actions, and evaluations by the Corps and the EPA of mitigation plans. To the extent that this correspondence reveals any disputes about the Corps' exercise of its permitting authority, these disputes focus on whether the impact of a particular valley fill would be more than minimal, thus requiring the issuance of an individual permit rather than authorization under a nationwide permit. The basic division of authority, including the Corps' authority to issue valley fill permits, is apparent throughout this record of both agencies' practices. The Corps also submitted the affidavit of Michael B. Cook, the director of EPA's Office of Wastewater Management in Washington, D.C. since 1991. According to Mr. Cook:

While the effluent guidelines address certain discharges of pollutants associated with coal mining operations (e.g., coal preparation plants and mine drainage), the regulations do not address discharges of soil, rock and vegetation (i.e., overburden) that is excavated in order to access coal reserves and then placed in waters of the United States, as in the case of valley fills. To our knowledge, such discharges have only been authorized by permits issued under section 404 of the CWA by the Army Corps of Engineers.

In short, the evidence submitted to the district court revealed a longstanding and consistent division of authority between the Corps and the EPA with regard to the issuance of permits under CWA Section 402 and CWA Section 404.

Moreover, when the Corps issued the permit to Martin Coal on June 20, 2000, it continued to operate with an understanding that it was authorized to regulate discharges of fill, even for waste, unless the fill amounted to effluent that could be subjected to effluent limitations. It certainly did not interpret its own 1977 Regulation to impose a beneficial primary purpose requirement. This is evidenced by its public notice given on April 17, 2000, two months prior to the issuance of the permit at issue in this action, when the Corps joined with the EPA to propose a joint rule that would "not alter current practice," but rather was "intended to clarify what constitutes 'fill material' subject to CWA section 404." 65 Fed. Reg. at 21,292. The Corps and the EPA recognized that some courts had interpreted the Corps' regulation to impose a primary-purpose test applied without regard to the traditional division of authority between the Corps and the EPA, and that the ambiguities of this test had caused confusion. As one specific example of this confusion, the Corps and the EPA pointed to dicta in an opinion issued by the district court in an earlier valley-fill case in which the district court determined that "the Corps lacked

authority to regulate under CWA section 404 the placement into waters of the U.S. of rock, sand, and earth overburden from coal surface mining operations, because the `primary purpose' of the discharge was waste disposal." *Id.* at 21,295. Disclaiming any interpretation of the Corps' 1977 Regulation that would strip the Corps of authority to issue § 404 permits for valley fills, the Corps and the EPA described what they understood the appropriate division of labor to be:

The section 402 program is focused on (although not limited to) discharges such as wastewater discharges from industrial operations and sewage treatment plants, stormwater and the like.... Pollutant discharges are controlled under the section 402 program principally through the imposition of effluent limitations, which are restrictions on the "quantities, rates, and concentrations of chemical, physical, biological and other constituents which are discharged from point sources into navigable waters".... There are no statutory or regulatory provisions under the section 402 program designed to address discharges that convert waters of the U.S. to dry land.

* * *

[S]ection 404 focuses exclusively on two materials: dredged material and fill material. The term "fill material" clearly contemplates material that fills in a water body, and thereby converts it to dry land or changes the bottom elevation. Fill material differs fundamentally from the types of pollutants covered by section 402 because the principal environmental concern is the loss of a portion of the water body itself. For this reason, the section 404 permitting process focuses on different considerations than the section 402 permitting program.

Id. at 21,293.

This contemporaneous explanation by the two agencies charged with the responsibility of administering the Clean Water Act provides a rational interpretation of the 1977 Regulation that is neither plainly erroneous nor inconsistent with the text of the regulation. The 1977 Regulation seeks to divide the statutory responsibilities between the agencies charged with different responsibilities by defining "fill material" that is subject to regulation by the Corps and "waste" that is subject to regulation by the EPA through the administration of effluent limitations. Moreover, the resolution among agencies of the line dividing their responsibilities is just the type of agency action to which the courts must defer. *See Echazabal*, 122 S. Ct. at 2052 (noting that the EEOC's resolution of a tension between the Americans with Disabilities Act and the Occupational Safety and Health Act "exemplifies the substantive choices that agencies are expected to make when Congress leaves the intersection of competing objectives both imprecisely marked and subject to administrative leeway").

A reviewing court can set aside the agency's interpretation of its own regulation only if that interpretation is "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (internal quotation marks and citation omitted). When we examine the Corps' 1977 Regulation and its interpretations of that regulation, we conclude that the Corps'

interpretations of the 1977 Regulation -- made both by interpretations published in the Federal Register and by its application of that regulation in issuing permits -- were neither plainly erroneous nor inconsistent with the text of the regulation.

We next determine whether the 1977 Regulation itself, as construed by both the Corps and the EPA, was also a permissible reading of the Clean Water Act.

The stated goal of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To that end, the Clean Water Act prohibits discharges of pollutants into the waters of the United States, except in compliance with a permit issued by one of the permit regimes established by the Act. 33 U.S.C. § 1311(a). Two principal regimes are created in §§ 402 and 404 of the Act. Section 402 creates a permit program under the National Pollutant Discharge Elimination System, a combination of State and EPA regulatory activities that is administered by the EPA. Section 404 creates a permit program administered by the Corps, authorizing the Corps to issue permits only in connection with the "discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). The two sections are linked by cross-references, exclusions, and vetoes. Section 402 authorizes the EPA to issue permits for the discharge of any pollutant or combination of pollutants, except as provided in § 404. And § 404 in turn provides that the Corps may issue permits for the limited discharges relating to dredged or fill material, providing that the Corps' permits are always subject to the veto power of the EPA when the dredged or fill material would have "an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas ... wildlife, or recreational areas." 33 U.S.C. § 1344(c). Thus, a § 404 permit is always subject to the EPA's determination that a discharge will have an "unacceptable adverse effect" on certain specified waters, reinforcing the fill-effluent distinction that has been followed by the agencies.

Because the Clean Water Act clearly intended to divide functions between the Corps and the EPA based on the type of discharge involved, we conclude that it was consistent with the Act for the Corps to have adopted its 1977 Regulation defining "fill material" to be

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. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under Section 402 of the Clean Water Act.

33 C.F.R. § 323.2(e) (2001). The first sentence of this regulation adopts an inclusive test that focuses on the purposeful displacement of water with solid material. The second sentence provides, as construed by the agencies, an exclusion which defers to the EPA's authority to regulate "waste." Because it was not plainly erroneous or inconsistent with the regulation for the Corps to have asserted that its use of the term "waste" in the 1977 Regulation was not intended to defer to the EPA on all material deposited for disposal, as we have already concluded, we read the 1977 Regulation to include that interpretation and, as so interpreted, conclude that the 1977 Regulation was a rational interpretation of the Clean Water Act. Section 404 confers on the Corps all responsibility to issue permits

for the discharges of "fill material," but it gives the EPA a veto when those discharges might adversely affect the quality of certain waters. Section 402 confers on the EPA responsibility to regulate the discharge of pollutants into waters under mechanisms to administer effluent limitations. The two authorizations might overlap on certain types of "fill material" that adversely affect the quality of water, and the 1977 Regulation, as interpreted by the Corps, reasonably addresses this potential ambiguity.

In sum, we conclude that the Corps' interpretation of "fill material" as used in § 404 of the Clean Water Act to mean all material that displaces water or changes the bottom elevation of a water body except for "waste" -- meaning garbage, sewage, and effluent that could be regulated by ongoing effluent limitations as described in § 402 -- is a permissible construction of § 404. And as an interpretation of its 1977 Regulation, it is neither plainly erroneous nor inconsistent with the text of the regulation.

The Corps' issuance of the permit to Martin Coal on June 20, 2000, therefore, was not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law insofar as Kentuckians alleged in Count I of the complaint. On this issue, we reverse the judgment of the district court.

Questions and Comments

1. This case involved a question of whether the 1977 Corps regulatory definition of "fill material" was authorized by the Clean Water Act and whether the Corps' interpretation of that regulation was appropriate. As in the Supreme Court's *Riverside Bayview Homes* case, the Fourth Circuit noted, in this case, that the *Chevron* analysis applied to the first question, while the *Auer* analysis applied to the second question. The order in which the court addressed those questions, though, is a bit unorthodox. The court begins the opinion with a focus on *Chevron* step 1, moves to *Auer*, then returns to *Chevron* step 2. Why might the court have structured the opinion in that manner?
2. **Chevron:** Although the district court determined that the Clean Water Act was clear and did not authorize the Corps to regulate valley fills as "fill material," the appellate court concluded that the statute is ambiguous, so the agency's interpretation is entitled to deference at *Chevron* step 2. At *Chevron* step 1, the appellate court seems to focus solely on the text of the statute to find that the Clean Water Act is ambiguous with regard to whether "fill material" means "material deposited for some primary beneficial purpose." On what basis, then, does it conclude, at *Chevron* step 2, that the Corps' interpretation of the **statute** (rather than the regulation) is reasonable? Has the court set the *Chevron* bar very high?
3. Kentuckians for the Commonwealth argued that permits issued under Section 402 of the Clean Water Act incorporate standards to protect water quality that are not included in Section 404 permits, and that the Corps could not define "fill material" in a way that would include valley fills because such a regulation would evade the implementation of those standards and violate the water quality protection

purposes of the statute. Does the appellate court address that argument or focus on those purposes of the statute in interpreting it? A regulation that defined “fill material” to be limited to materials primarily used for a beneficial purpose would seem to advance that purpose.

4. **Auer:** When will an agency’s interpretation of its regulations be “plainly erroneous or inconsistent with the regulation” under *Auer*? The Corps’ regulations provided that “fill material” “does not include any pollutant discharged into the water primarily to dispose of waste.” Regardless of the long-standing nature of the Corps and EPA’s interpretation of the Corps’ regulation, is there any purpose for the disposal of the mining spoils in the valley other than waste disposal?
5. The district court also concluded that the rule that the Corps proposed in 2000 to redefine “fill material” (the “new rule”) was outside of the agency’s authority. Why do you think that the appellate court vacated that determination without much discussion?
6. After the case was decided, the Corps finalized the “new rule” mentioned in the case and adopted EPA’s definition of “fill material,” which is based on the “effect” of the placement of material, rather than its purpose. See [33 C.F.R. § 323.2](#). Under the new regulation, it is certainly easier to argue that “valley fills” have the “effect” of changing the bottom elevation of waters of the United States or replacing a portion of the waters of the United States with dry land, regardless of their purpose. Thus, the Corps’ interpretation of the new rule would clearly seem to be entitled to *Auer* deference. Could the new rule still be challenged as beyond the Corps’ statutory authority, though? Would such a challenge likely be successful in the Fourth Circuit?
7. **Scope of Injunction:** The injunction issued by the district court was a regional injunction, rather than a national injunction. Note, however, that the appellate court pointed out that activities authorized by one district office of the Corps of Engineers in Kentucky accounted for 97% of the stream length affected by valley fills in the nation in 2000.
8. **Environmental Justice:** Note that the plaintiff, Kentuckians for the Commonwealth, is described in the opinion as “a nonprofit corporation formed to promote ‘social justice and quality of life for all Kentuckians.’” Numerous studies over several decades have demonstrated that low income and minority communities are disparately impacted by pollution. See Stephen M. Johnson, *Economics v. Equity: Do Market-Based Environmental Reforms Exacerbate Environmental Injustice?*, 56 Wash. & Lee L. Rev. 111, 117 (1999). The mountaintop removal mining issue is another example of this trend. See Patrick McGinley, *Collateral Damage: Turning a Blind Eye to Environmental and Social Injustice in the Coalfields*, 19 J. Env’tl. & Sustainability L. 305 (2013). The Appalachia region, where most mountaintop removal mining takes place, is one of the poorest regions in the country. See e.g. [Appalachian Regional Commission](#),

[Economic Overview of Appalachia - 2011](#) (per capita income in Appalachia is 18% lower than the national average). As Professor Patrick McGinley notes, “After a century of mining in the ‘billion dollar coalfields’, local communities lack funds to upgrade aging schools, tens of thousands live below the federal ‘poverty line’; and public services such as fire, police, sewage treatment, and libraries struggle to survive . . .” [Patrick C. McGinley, *From Pick & Shovel to Mountaintop Removal: Environmental Injustice in the Appalachian Coalfields*, 34 *Envir. L.* 21, 23 \(2004\)](#). Because of the implementation of new technologies and practices like mountaintop removal mining, mining employment decreased in Kentucky by two thirds between 1980 and 2006, although production from the mines decreased only slightly. See [Kentuckians for the Commonwealth, *How Does Mountaintop Removal Affect the Economy?*](#) Perhaps these factors played some role in the court’s statement at the outset of the opinion that the case “does *not* present the question of whether mountaintop coal mining is useful, desirable, or wise.”

9. **More Resources:** Additional information about mountaintop removal mining is available on the websites of [EPA](#), [NRDC](#), [Sierra Club](#), [Earthjustice](#), [Appalachian Voices](#), and [Kentuckians for the Commonwealth](#).
10. **Post-Script:** After another Fourth Circuit ruling in 2009, [Ohio Valley Environmental Coalition v. Aracoma Coal Company](#), 556 F.3d 1777 (4th Cir. 2009), in which the court rejected challenges that the Corps violated the National Environmental Policy Act and acted arbitrarily in approving four valley fill permits, EPA announced that it would review all pending surface coal mining permit requests in Appalachia pursuant to its authority under Section 404 to review and comment on permits issued by the Corps. In June, 2009, EPA, the Corps and the Department of Interior signed a Memorandum of Understanding that established a series of actions to reduce the environmental impacts of mountaintop mining. See [Memorandum of Understanding among the U.S. Department of the Army, U.S. Department of the Interior, and U.S. Environmental Protection Agency Implementing the Interagency Action Plan on Appalachian Surface Coal Mining \(June 11, 2009\)](#). As part of the action plan in that MOU, EPA and the Corps began using an Enhanced Coordination Procedure (“ECP”) for evaluating 79 coal mining permits that EPA identified for additional environmental review. See [CRS Mountaintop Mining Report](#), *supra* at 6. Coal companies complained that the process significantly delayed permit decisions and they challenged the ECP in court. In *National Mining Association v. Jackson*, 816 F. Supp. 2d 37 (D.D.C. 2011), the United States District Court for the District of Columbia held that the ECP unlawfully transferred Clean Water act authority from the Corps to EPA. Although the court set aside the ECP, EPA and the Corps subsequently issued memoranda to the field reminding staff that the agencies should coordinate their review of mining permits in accordance with existing agency regulations. See [Nancy Stoner, Acting Assistant Administrator, U.S. Environmental Protection Agency, Office of Water, Transmittal of Department of the Army Memo on “Decision in National Mining Association et al. v. Jackson, et al”](#). The D.C. Circuit later overturned the decision of the district court and upheld the ECP. See [National Mining Association v. McCarthy, No. 12-](#)

[5310 \(D.C. Cir. July 11, 2014\)](#). EPA's role in the 404 permitting process is discussed in detail in Chapter 6 of this book.

In addition to the litigation discussed above, mountaintop removal mining has spurred litigation focusing on the appropriate scope of coverage of nationwide permits and EPA's authority to veto Section 404 permits. Those cases, and the underlying controversies, will be explored in detail in Chapters 6 (Permits) and 8 (EPA Vetoes).

11. **Landfills:** When the Corps amended its regulatory definition of fill material, it included a non-exclusive list of materials that met the definition (rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States) and specifically provided that the term “does not include trash or garbage.” See [33 C.F.R. § 323.2](#). In addition, in the preamble to the rule, the agency indicated that fill material used to create liners, berms and other infrastructure associated with solid waste landfills would be regulated as fill material under Section 404, rather than under section 402. See [67 Fed. Reg. 31129, 31134 \(May 9, 2002\)](#).

Interview

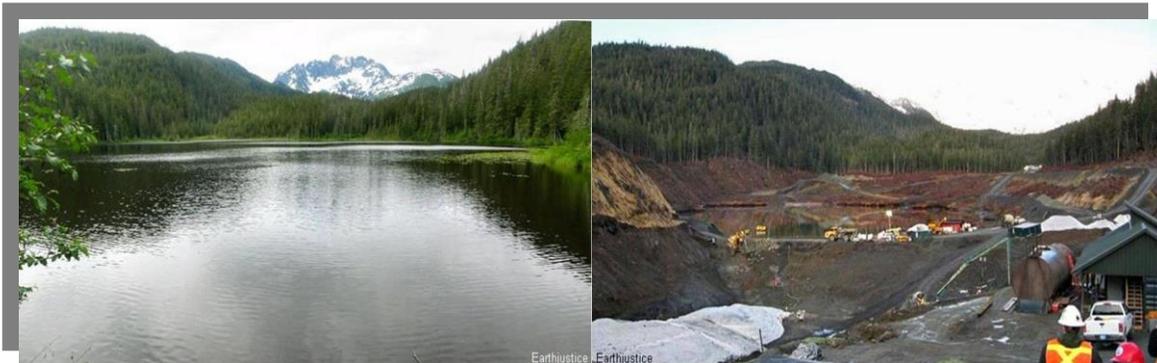


Professor Pat McGinley, Charles H. Haden II Professor of Law at West Virginia College of Law and frequent mountaintop removal mining litigator discusses:

- The history of mountaintop removal mining ([YouTube](#))
- Valley fills and their environmental impacts ([YouTube](#))
- Other impacts of mountaintop removal mining ([YouTube](#))
- Benefits to communities from mountaintop removal mining ([YouTube](#))
- The environmental justice impacts of mountaintop removal mining ([YouTube](#))
- Representing communities affected by mountaintop removal mining ([YouTube](#)).

While there has been significant litigation surrounding mountaintop removal mining, more traditional mining activities have also spawned Section 404 litigation. In 2004, Coeur Mining sought to reopen the Kensington Mine, located near the Tongass National Forest in Alaska, which had ceased operations in 1928. As noted above, EPA and the Corps regulate the disposal of a variety of types of mining waste as the “discharge of fill material,” requiring a Section 404 permit rather than a Section 402 permit. Accordingly, Coeur Mining sought, and received, a Section 404 permit from the Corps of Engineers that authorized the disposal of mining waste from the Kensington Mine in the Lower Slate

Lake in Alaska. As noted above, when EPA issues Section 402 permits, the permits often include limits on pollution discharges based on technology-based and water quality based standards. Those limits are not included in Section 404 permits that the Corps issues. The controversy arose in the Kensington Mine case because EPA had developed technology-based pollution limits that would have significantly limited or precluded Coeur from disposing of its mining waste in the Lower Slate Lake if Coeur were required to obtain a Section 402 permit. However, since Coeur was not required to obtain a Section 402 permit, the EPA standards did not apply to Coeur's disposal of waste in the Lake, but *did* apply to any pollution that was released from the Lake. The Southeast Alaska Conservation Council, a local environmental group, challenged the permit, arguing that the Corps lacked authority under the Clean Water Act to issue the Section 404 permit and that the permit should have been issued by EPA under Section 402.



Lower Slate Lake Before and After – Photo by Earthjustice on [National Wildlife Federation website](#)

Coeur Alaska, Inc. v. Southeast Alaska Conservation Council

557 U.S. 261 (2009)

Justice Kennedy delivered the opinion of the Court

These cases require us to address two questions under the Clean Water Act (CWA or Act). The first is whether the Act gives authority to the United States Army Corps of Engineers, or instead to the Environmental Protection Agency (EPA), to issue a permit for the discharge of mining waste, called slurry. The Corps of Engineers has issued a permit to petitioner Coeur Alaska, Inc. (Coeur Alaska), for a discharge of slurry into a lake in Southeast Alaska. The second question is whether, when the Corps issued that permit, the agency acted in accordance with law. We conclude that the Corps was the appropriate agency to issue the permit and that the permit is lawful.

Resources for the Case

[Unedited opinion](#) (From Justia)
[Google Map of all the cases in the coursebook](#)
[Oral Argument Audio](#) (from the Oyez Project)
[Information on “froth flotation”](#)
[Corps 404 permit for Coeur](#); [EPA NPDES permit](#)
[Coeur operating plan](#)
[Alaska DNR Resource Page](#)
Websites for [Coeur](#) and [SEACC](#)

With regard to the first question, § 404(a) of the CWA grants the Corps the power to “issue permits ... for the discharge of ... fill material.” 86 Stat. 884; 33 U.S.C. § 1344(a). But the EPA also has authority to issue permits for the discharge of pollutants. Section 402 of the Act grants the EPA authority to “issue a permit for the discharge of any pollutant” “[e]xcept as provided in” § 404. 33 U.S.C. § 1342(a). We conclude that because the slurry Coeur Alaska wishes to discharge is defined by regulation as “fill material,” 40 C.F.R. § 232.2 (2008), Coeur Alaska properly obtained its permit from the Corps of Engineers, under § 404, rather than from the EPA, under § 402.

The second question is whether the Corps permit is lawful. Three environmental groups, respondents here, sued the Corps under the Administrative Procedure Act, arguing that the issuance of the permit by the Corps was “not in accordance with law.” 5 U.S.C. § 706(2)(A). The environmental groups are Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation (collectively, SEACC). The State of Alaska and Coeur Alaska are petitioners here.

SEACC argues that the permit from the Corps is unlawful because the discharge of slurry would violate an EPA regulation promulgated under § 306(b) of the CWA, 33 U.S.C. § 1316(b). The EPA regulation, which is called a “new source performance standard,” forbids mines like Coeur Alaska’s from discharging “process wastewater” into the navigable waters. 40 C.F.R. § 440.104(b)(1). Coeur Alaska, the State of Alaska, and the federal agencies maintain that the Corps permit is lawful nonetheless because the EPA’s performance standard does not apply to discharges of fill material.

Reversing the judgment of the District Court, the Court of Appeals held that the EPA’s performance standard applies to this discharge so that the permit from the Corps is unlawful.

I
A

Petitioner Coeur Alaska plans to reopen the Kensington Gold Mine, located some 45 miles north of Juneau, Alaska. The mine has been closed since 1928, but Coeur Alaska seeks to make it profitable once more by using a technique known as “froth flotation.” Coeur Alaska will churn the mine’s crushed rock in tanks of frothing water. Chemicals in the water will cause gold-bearing minerals to float to the surface, where they will be skimmed off.

At issue is Coeur Alaska’s plan to dispose of the mixture of crushed rock and water left behind in the tanks. This mixture is called slurry. Some 30 percent of the slurry’s volume is crushed rock, resembling wet sand, which is called tailings. The rest is water.

The standard way to dispose of slurry is to pump it into a tailings pond. The slurry separates in the pond. Solid tailings sink to the bottom, and water on the surface returns to the mine to be used again.

Rather than build a tailings pond, Coeur Alaska proposes to use Lower Slate Lake, located some three miles from the mine in the Tongass National Forest. This lake is small — 800 feet at its widest crossing, 2,000 feet at its longest, and 23 acres in area. See App. 138a, 212a. Though small, the lake is 51 feet deep at its maximum. The parties agree the lake is a navigable water of the United States and so is subject to the CWA. They also agree there can be no discharge into the lake except as the CWA and any lawful permit allow.

Over the life of the mine, Coeur Alaska intends to put 4.5 million tons of tailings in the lake. This will raise the lakebed 50 feet — to what is now the lake’s surface — and will increase the lake’s area from 23 to about 60 acres. *Id.*, at 361a (62 acres), 212a (56 acres). To contain this wider, shallower body of water, Coeur Alaska will dam the lake’s downstream shore. The transformed lake will be isolated from other surface water. Creeks and stormwater runoff will detour around it. *Id.*, at 298a. Ultimately, lakewater will be cleaned by purification systems and will flow from the lake to a stream and thence onward. *Id.*, at 309a–312a.

B

Numerous state and federal agencies reviewed and approved Coeur Alaska’s plans. At issue here are actions by two of those agencies: the Corps of Engineers and the EPA.

1

The CWA classifies crushed rock as a “pollutant.” 33 U.S.C. § 1362(6). On the one hand, the Act forbids Coeur Alaska’s discharge of crushed rock “[e]xcept as in compliance” with the Act. CWA §301(a), 33 U.S.C. §1311(a). Section 404(a) of the CWA, on the other hand, empowers the Corps to authorize the discharge of “dredged or fill material.” 33 U.S.C. § 1344(a). The Corps and the EPA have together defined “fill material” to mean any “material [that] has the effect of ... [c]hanging the bottom elevation” of water. 40 C.F.R. § 232.2. The agencies have further defined the “discharge of fill material” to include “placement of ... slurry, or tailings or similar mining-related materials.” *Ibid.*

In these cases the Corps and the EPA agree that the slurry meets their regulatory definition of “fill material.” On that premise the Corps evaluated the mine’s plan for a § 404 permit. After considering the environmental factors required by § 404(b), the Corp issued Coeur Alaska a permit to pump the slurry into Lower Slate Lake. App. 340a–378a.

In granting the permit the Corps followed the steps set forth by § 404. Section 404(b) requires the Corps to consider the environmental consequences of every discharge it allows. 33 U.S.C. § 1344(b). The Corps must apply guidelines written by the EPA pursuant to § 404(b). See *ibid.*; 40 C.F.R. pt. 230 (EPA guidelines). Applying those guidelines here, the Corps determined that Coeur Alaska’s plan to use Lower Slate Lake as a tailings pond was the “least environmentally damaging practicable” way to dispose of the tailings. App. 366a. To conduct that analysis, the Corps compared the plan to the proposed alternatives.

The Corps determined that the environmental damage caused by placing slurry in the lake will be temporary. And during that temporary disruption, Coeur Alaska will divert waters around the lake through pipelines built for this purpose. *Id.*, at 298a. Coeur Alaska will also treat water flowing from the lake into downstream waters, pursuant to strict EPA criteria. *Ibid.*; see Part I–B–2, *infra*. Though the slurry will at first destroy the lake’s small population of common fish, that population may later be replaced. After mining operations are completed, Coeur Alaska will help “recla[im]” the lake by “[c]apping” the tailings with about 4 inches of “native material.” App. 361a; *id.*, at 309a. The Corps concluded that

“[t]he reclamation of the lake will result in more emergent wetlands/vegetated shallows with moderate values for fish habitat, nutrient recycling, carbon/detrital export and sediment/toxicant retention, and high values for wildlife habitat.” *Id.*, at 361a.

If the tailings did not go into the lake, they would be placed on nearby wetlands. The resulting pile would rise twice as high as the Pentagon and cover three times as many acres. Reply Brief for Petitioner Coeur Alaska 27. If it were chosen, that alternative would destroy dozens of acres of wetlands—a permanent loss. App. 365a–366a. On the premise that when the mining ends the lake will be at least as environmentally hospitable, if not more so, than now, the Corps concluded that placing the tailings in the lake will cause less damage to the environment than storing them above ground: The reclaimed lake will be “more valuable to the aquatic ecosystem than a permanently filled wetland ... that has lost all aquatic functions and values.” *Id.*, at 361a; see *also id.*, at 366a.

2

The EPA had the statutory authority to veto the Corps permit, and prohibit the discharge, if it found the plan to have “an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas ... , wildlife, or recreational areas.” CWA § 404(c), 33 U.S.C. § 1344(c). After considering the Corps findings, the EPA did not veto the Corps permit, even though, in its view, placing the tailings in the lake was not the “environmentally preferable” means of disposing of them. App. 300a. By declining to exercise its veto, the EPA in effect deferred to the judgment of the Corps on this point.

The EPA’s involvement extended beyond the agency’s veto consideration. The EPA also issued a permit of its own—not for the discharge from the mine into the lake but for the discharge from the lake into a downstream creek. *Id.*, at 287a–331a. Section 402 grants the EPA authority to “issue a permit for the discharge of any pollutant,” “[e]xcept as provided in [CWA § 404].” 33 U.S.C. § 1342(a). The EPA’s § 402 permit authorizes Coeur Alaska to discharge water from Lower Slate Lake into the downstream creek, subject to strict water-quality limits that Coeur Alaska must regularly monitor. App. 303a–304a, 309a.

The EPA’s authority to regulate this discharge comes from a regulation, termed a “new source performance standard,” that it has promulgated under authority granted to it by §306(b) of the CWA. Section 306(b) gives the EPA authority to regulate the amount of

pollutants that certain categories of new sources may discharge into the navigable waters of the United States. 33 U.S.C. § 1316(b). Pursuant to this authority, the EPA in 1982 promulgated a new source performance standard restricting discharges from new froth-flotation gold mines like Coeur Alaska's. The standard is stringent: It allows "no discharge of process wastewater" from these mines. 40 C.F.R. § 440.104(b)(1).

Applying that standard to the discharge of water from Lower Slate Lake into the downstream creek, the EPA's § 402 permit sets strict limits on the amount of pollutants the water may contain. The permit requires Coeur Alaska to treat the water using "reverse osmosis" to remove aluminum, suspended solids, and other pollutants. App. 298a; *id.*, at 304a. Coeur Alaska must monitor the water flowing from the lake to be sure that the pollutants are kept to low, specified minimums. *Id.*, at 326a–330a.

C

SEACC brought suit against the Corps of Engineers and various of its officials in the United States District Court for the District of Alaska. The Corps permit was not in accordance with law, SEACC argued, for two reasons. First, in SEACC's view, the permit was issued by the wrong agency—Coeur Alaska ought to have sought a § 402 permit from the EPA, just as the company did for the discharge of water from the lake into the downstream creek. See Part I–B–2, *supra*. Second, SEACC contended that regardless of which agency issued the permit, the discharge itself is unlawful because it will violate the EPA new source performance standard for froth-flotation gold mines. (This is the same performance standard described above, which the EPA has already applied to the discharge of water from the lake into the downstream creek. See *ibid.*) SEACC argued that this performance standard also applies to the discharge of slurry into the lake. It contended further that the performance standard is a binding implementation of § 306. Section 306(e) of the CWA makes it "unlawful" for Coeur Alaska to "operate" the mine "in violation of" the EPA's performance standard. 33 U.S.C. § 1316(e).

Coeur Alaska and the State of Alaska intervened as defendants. Both sides moved for summary judgment. The District Court granted summary judgment in favor of the defendants. The Court of Appeals for the Ninth Circuit reversed and ordered the District Court to vacate the Corps of Engineers' permit. *Southeast Alaska Conservation Council v. United States Army Corps of Engs.*, 486 F.3d 638, 654–655 (2007).

The Court of Appeals concluded that Coeur Alaska required a § 402 permit for its slurry discharge, that the Corps lacked authority to issue such a permit under § 404, and that the proposed discharge was unlawful because it would violate the EPA new source performance standard and § 306(e).

The decision of the Court of Appeals in effect reallocated the division of responsibility that the Corps and the EPA had been following. The Court granted certiorari. We now hold that the decision of the Court of Appeals was incorrect.

The question of which agency has authority to consider whether to permit the slurry discharge is our beginning inquiry. We consider first the authority of the EPA and second the authority of the Corps. Our conclusion is that under the CWA the Corps had authority to determine whether Coeur Alaska was entitled to the permit governing this discharge.

A

Section 402 gives the EPA authority to issue “permit[s] for the discharge of any pollutant,” with one important exception: The EPA may not issue permits for fill material that fall under the Corps’ § 404 permitting authority. * * *

Section 402 thus forbids the EPA from exercising permitting authority that is ‘provided [to the Corps] in § 404.

* * *

The Act is best understood to provide that if the Corps has authority to issue a permit for a discharge under § 404, then the EPA lacks authority to do so under § 402.

Even if there were ambiguity on this point, the EPA’s own regulations would resolve it. Those regulations provide 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 permits” from the EPA. 40 C.F.R. § 122.3.

In SEACC’s view, this regulation implies that some “fill material” discharges are not regulated under § 404—else, SEACC asks, why would the regulation lack a comma before the word “which,” and thereby imply that only a subset of “discharges of ... fill material” are “regulated under section 404.” *Ibid.*

The agencies, however, have interpreted this regulation otherwise. In the agencies’ view the regulation essentially restates the text of § 402, and forbids the EPA from issuing permits for discharges that “are regulated under section 404.” 40 C.F.R. § 122.3(b); cf. CWA § 402(a) (“[e]xcept as provided in ... [§ 404], the Administrator may . . . issue a permit”). Before us, the EPA confirms this reading of the regulation. Brief for Federal Respondents 27. The agency’s interpretation is not “plainly erroneous or inconsistent with the regulation”; and so we accept it as correct. *Auer v. Robbins*, 519 U.S.452, 461 (1997) (internal quotation marks omitted).

The question whether the EPA is the proper agency to regulate the slurry discharge thus depends on whether the Corps of Engineers has authority to do so. If the Corps has authority to issue a permit, then the EPA may not do so. We turn to the Corps’ authority under § 404.

B

Section 404(a) gives the Corps power to “issue permits ... for the discharge of dredged or fill material.” 33 U.S.C. § 1344(a). As all parties concede, the slurry meets the definition of fill material agreed upon by the agencies in a joint regulation promulgated in 2002. That regulation defines “fill material” to mean any “material [that] has the effect of ... [c]hanging the bottom elevation” of water—a definition that includes “slurry, or tailings or similar mining-related materials.” 40 C.F.R. § 232.2.

SEACC concedes that the slurry to be discharged meets the regulation’s definition of fill material. Brief for Respondent SEACC et al. 20. Its concession on this point is appropriate because slurry falls well within the central understanding of the term “fill,” as shown by the examples given by the regulation. See 40 C.F.R. § 232.2 (“Examples of such fill material include, but are not limited to: rock, sand, soil, clay ...”). The regulation further excludes “trash or garbage” from its definition. *Ibid.* SEACC expresses a concern that Coeur Alaska’s interpretation of the statute will lead to §404 permits authorizing the discharges of other solids that are now restricted by EPA standards. Brief for Respondent SEACC et al. 44–45 (listing, for example, “feces and uneaten feed,” “litter,” and waste produced in “battery manufacturing”). But these extreme instances are not presented by the cases now before us. If, in a future case, a discharger of one of these solids were to seek a § 404 permit, the dispositive question for the agencies would be whether the solid at issue—for instance, “feces and uneaten feed”—came within the regulation’s definition of “fill.” SEACC cites no instance in which the agencies have so interpreted their fill regulation. If that instance did arise, and the agencies were to interpret the fill regulation as SEACC fears, then SEACC could challenge that decision as an unlawful interpretation of the fill regulation; or SEACC could claim that the fill regulation as interpreted is an unreasonable interpretation of § 404. The difficulties are not presented here, however, because the slurry meets the regulation’s definition of fill.

Rather than challenge the agencies’ decision to define the slurry as fill, SEACC instead contends that § 404 contains an implicit exception. According to SEACC, § 404 does not authorize the Corps to permit a discharge of fill material if that material is subject to an EPA new source performance standard.

But § 404’s text does not limit its grant of power in this way. Instead, § 404 refers to all “fill material” without qualification. Nor do the EPA regulations support SEACC’s reading of § 404. The EPA has enacted guidelines, pursuant to § 404(b), to guide the Corps permitting decision. 40 C.F.R. pt. 230. Those guidelines do not strip the Corps of power to issue permits for fill in cases where the fill is also subject to an EPA new source performance standard.

SEACC’s reading of § 404 would create numerous difficulties for the regulated industry. As the regulatory regime stands now, a discharger must ask a simple question—is the substance to be discharged fill material or not? The fill regulation, 40 C.F.R. § 232.2, offers a clear answer to that question; and under the agencies’ view, that answer decides the matter—if the discharge is fill, the discharger must seek a § 404 permit from the Corps;

if not, only then must the discharger consider whether any EPA performance standard applies, so that the discharger requires a § 402 permit from the EPA.

Under SEACC's interpretation, however, the discharger would face a more difficult problem. The discharger would have to ask—is the fill material also subject to one of the many hundreds of EPA performance standards, so that the permit must come from the EPA, not the Corps? The statute gives no indication that Congress intended to burden industry with that confusing division of permit authority.

The regulatory scheme discloses a defined, and workable, line for determining whether the Corps or the EPA has the permit authority. Under this framework, the Corps of Engineers, and not the EPA, has authority to permit Coeur Alaska's discharge of the slurry.

[In Part III of the opinion, the Court determined that the Corps did not act unlawfully by failing to include conditions in the Section 404 permit that would be necessary to comply with the new source performance standards of Section 306 of the Clean Water Act.]

* * *

Justice Ginsburg, with whom **Justice Stevens** and **Justice Souter** join, *dissenting*:

Petitioner Coeur Alaska, Inc., proposes to discharge 210,000 gallons per day of mining waste into Lower Slate Lake, a 23-acre subalpine lake in Tongass National Forest. The “tailings slurry” would contain concentrations of aluminum, copper, lead, and mercury. Over the life of the mine, roughly 4.5 million tons of solid tailings would enter the lake, raising the bottom elevation by 50 feet. It is undisputed that the discharge would kill all of the lake's fish and nearly all of its other aquatic life.¹

Coeur Alaska's proposal is prohibited by the Environmental Protection Agency (EPA) performance standard forbidding any discharge of process wastewater from new “froth-flotation” mills into waters of the United States. See 40 C.F.R. § 440.104(b)(1) (2008). Section 306 of the Clean Water Act directs EPA to promulgate such performance standards, 33 U.S.C. § 1316(a), and declares it unlawful for any discharger to violate them, § 1316(e). Ordinarily, that would be the end of the inquiry.

Coeur Alaska contends, however, that its discharge is not subject to EPA's regulatory regime, but is governed, instead, by the mutually exclusive permitting authority of the Army Corps of Engineers. The Corps has authority, under § 404 of the Act, § 1344(a), to issue permits for discharges of “dredged or fill material.” By regulation, a discharge that has the effect of raising a water body's bottom elevation qualifies as “fill material.” See 33

¹ Whether aquatic life will eventually be able to inhabit the lake again is uncertain. Compare *ante*, at 5, with App. 201a–202a; and *Southeast Alaska Conservation Council v. United States Army Corps of Engineers*, 486 F.3d 638, 642 (9th Cir. 2007).

C.F.R. § 323.2(e) (2008). Discharges properly within the Corps' permitting authority, it is undisputed, are not subject to EPA performance standards. See *ante*, at 20; Brief for Petitioner Coeur Alaska 26; Brief for Respondent Southeast Alaska Conservation Council et al. 37.

The litigation before the Court thus presents a single question: Is a pollutant discharge prohibited under § 306 of the Act eligible for a § 404 permit as a discharge of fill material? In agreement with the Court of Appeals, I would answer no. The statute's text, structure, and purpose all mandate adherence to EPA pollution-control requirements. A discharge covered by a performance standard must be authorized, if at all, by EPA.

I

A

Congress enacted the Clean Water Act in 1972 “to restore and maintain the chemical, physical, and biological integrity” of the waters of the United States. 33 U.S.C. § 1251(a). “The use of any river, lake, stream or ocean as a waste treatment system,” the Act's drafters stated, “is unacceptable.” S. Rep. No. 92–414, p. 7 (1971). Congress announced in the Act itself an ambitious objective: to eliminate, by 1985, the discharge of all pollutants into the Nation's navigable waters. 33 U.S.C. § 1251(a).

In service of its goals, Congress issued a core command: “[T]he discharge of any pollutant by any person shall be unlawful,” except in compliance with the Act's terms. § 1311(a). * * *

The Act instructs EPA to establish various technology-based, increasingly stringent effluent limitations for categories of point sources. *E.g.*, §§ 1311, 1314. These limitations, formulated as restrictions “on quantities, rates, and concentrations of chemical, physical, biological, and other constituents,” § 1362(11), were imposed to achieve national uniformity among categories of sources. See, *e.g.*, *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 129–130 (1977). The limitations for a given discharge depend on the type of pollutant and source at issue. * * *

Of key importance, new sources must meet stringent “standards of performance” adopted by EPA under § 306. That section makes it “unlawful for any ... new source to operate ... in violation of” an applicable performance standard. 33 U.S.C. § 1316(e) (emphasis added). In line with Congress' aim “to insure ... ‘maximum feasible control of new sources,’ ” *du Pont*, 430 U.S., at 138, the preferred standard for a new source is one “ ‘permitting no discharge of pollutants,’ ” *id.*, at 137–138 (quoting 33 U.S.C. § 1316(a)(1) (emphasis added)). Moreover, new sources, unlike existing sources, are not eligible for EPA-granted variances from applicable limitations. 430 U.S., at 138. * * *

In 1982, EPA promulgated new source performance standards for facilities engaged in mining, including those using a froth-flotation milling process. See *Ore Mining and Dressing Point Source Category Effluent Limitations Guidelines and New Source*

Performance Standards, 47 Fed. Reg. 54598 (1982). Existing mills, the Agency found, were already achieving zero discharge; it was therefore practicable, EPA concluded, for new mills to do as well. *Id.*, at 54602. Accordingly, under 40 C.F.R. § 440.104(b)(1), new mines using the froth-flotation method, as Coeur Alaska proposes to do, may not discharge wastewater directly into waters of the United States.

B

The nationwide pollution-control requirements just described are implemented through the National Pollution Discharge Elimination System (NPDES), a permitting scheme set forth in § 402 and administered by EPA and the States. The NPDES is the linchpin of the Act, for it transforms generally applicable effluent limitations into the individual obligations of each discharger. *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 (1976). The discharge of a pollutant is generally prohibited unless the source has obtained a NPDES permit. *E.g.*, *EPA v. National Crushed Stone Assn.*, 449 U.S. 64, 71 (1980) (“Section 402 authorizes the establishment of the [NPDES], under which every discharger of pollutants is required to obtain a permit.”).

The Act also establishes a separate permitting scheme, administered by the Corps, for discharges of “dredged or fill material.” 33 U.S.C. § 1344(a). Section 404 hews to the Corps’ established expertise in matters of navigability and construction. The § 404 program does not implement the uniform, technology-based pollution-control standards set out, *inter alia*, in § 306. Instead, § 404 permits are subject to regulatory guidelines based generally on the impact of a discharge on the receiving environment. See § 1344(b); *ante*, at 4–5.

As the above-described statutory background indicates, Coeur Alaska’s claim to a § 404 permit carries weighty implications. If eligible for that permit, Coeur Alaska can evade the exacting performance standard prescribed by EPA for froth-flotation mills. It may, instead, use Lower Slate Lake “as the settling pond and disposal site for the tailings.” App. 360a (Corps’ Record of Decision).

II

Is a pollutant discharge prohibited under § 306(e) eligible to receive a § 404 permit as a discharge of fill material? All agree on preliminary matters. Only one agency, the Corps or EPA, can issue a permit for the discharge. See *ante*, at 10, 22. Only EPA, through the NPDES program, issues permits that implement § 306. See *supra*, at 2. Further, § 306(e) and EPA’s froth-flotation performance standard, unless inapplicable here, bar Coeur Alaska’s proposed discharge. See *ante*, at 14–15.

No part of the statutory scheme, in my view, calls into question the governance of EPA’s performance standard. The text of § 306(e) states a clear proscription: “[I]t shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.” 33 U.S.C. § 1316(e). Under the standard of performance relevant here, “there shall be no discharge of process

wastewater to navigable waters from mills that use the froth-flotation process” for mining gold. 40 C.F.R. § 440.104(b)(1). The Act imposes these requirements without qualification.

Section 404, stating that the Corps “may issue permits” for the discharge of “dredged or fill material,” does not create an exception to § 306(e)’s plain command. 33 U.S.C. § 1344(a). *Cf. ante*, at 12. Section 404 neither mentions § 306 nor states a contrary requirement. The Act can be home to both provisions, with no words added or omitted, so long as the category of “dredged or fill material” eligible for a § 404 permit is read in harmony with § 306. Doing so yields a simple rule: Discharges governed by EPA performance standards are subject to EPA’s administration and receive permits under the NPDES, not § 404.

This reading accords with the Act’s structure and objectives. It retains, through the NPDES, uniform application of the Act’s core pollution-control requirements, and it respects Congress’ special concern for new sources. Leaving pollution-related decisions to EPA, moreover, is consistent with Congress’ delegation to that agency of primary responsibility to administer the Act. Most fundamental, adhering to § 306(e)’s instruction honors the overriding statutory goal of eliminating water pollution, and Congress’ particular rejection of the use of navigable waters as waste disposal sites. *See supra*, at 2–3. *See also* 33 U.S.C. § 1324 (creating “clean lakes” program requiring States to identify and restore polluted lakes). * * *

Questions and Comments

1. Did the case involve any addition of pollutants into wetlands? If not, does it have any implications for disposal of slurry and mining waste in wetlands?
2. In its recitation of the facts, the majority indicates that the Corps determined that disposal of the slurry in Lower Slate Lake was the “least environmentally damaging practicable” way to dispose of the tailings and the court contrasted the harm that would be caused to the lake with the permanent loss of wetlands that would occur under one of the alternative proposals that involved storing the tailings near the mine in a “dry tailings facility.” However, the Court does not mention that the “dry tailings facility” alternative would destroy the most common types of wetlands in Alaska, while the activities associated with disposal in the Lake would affect a greater variety of wetland types. [See U.S. Department of Agriculture, U.S. Environmental Protection Agency, U.S. Army Corps of Engineers, Alaska Department of Natural Resources, Kensington Gold Project, Final Environmental Impact Statement § 4.12.3 \(Dec. 2004\)](#). EPA determined that the alternative involving the construction of the “dry tailings facility” was the “environmentally preferred alternative.” *Id.* at 5. The Court also indicates that EPA deferred to the Corps’ determination that the disposal of the tailings in the Lake was “environmentally preferable” because EPA did not veto the Corps permit. Do you agree? What is the standard for EPA’s exercise of its veto? [See 33 U.S.C.](#)

[§ 1344\(c\)](#). What considerations impact EPA's decision regarding whether to veto a Corps permit? Chapter 8 of this book examines EPA's veto authority in detail.

3. The case involves two questions: (a) whether the Corps or EPA has authority to issue a permit for the addition of the slurry to the Lower Slate Lake; and (b) whether the Corps acted in accordance with the law when it issued the Section 404 permit to Coeur. With regard to the first question, does the Court address the question whether the slurry is "fill" material under the Corps' regulatory definition and, if so, whether the regulatory definition is within the Corps' authority under the Clean Water Act? If not, why not?
4. What is the basis for SEACC's argument that the Corps does not have authority under Section 404 to issue permits for the disposal of the mine slurry in Lower Slate Lake? On what tools of statutory interpretation does the majority rely to conclude that the Corps can issue such permits? In light of the approach taken by the majority, could EPA change its interpretation of the statute and assert jurisdiction over disposal activities like Coeur's in the future? Does the dissent agree with the majority that industries like the mining industry would find it difficult to determine whether EPA had adopted technology based standards that applied to their pollution discharges?
5. Does the Court's decision provide industries with an end run around EPA's technology-based standards? If EPA issued the permit under section 402, rather than the Corps issuing the permit under Section 404, the permit would prohibit Coeur from discharging any "process wastewater" from the mine into the Lake. On what statutory interpretation tools does the dissent rely to determine that EPA, rather than the Corps, should issue permits for discharges of fill material by industries when EPA has adopted technology based standards that apply to those industries?
6. On the second question, regarding whether the Corps acted within its authority in issuing a Section 404 permit for the disposal of the mine slurry without requiring the permittee to comply with EPA's technology based standards, the majority concluded that the statute and regulations were ambiguous, but that the agencies' interpretation of the ambiguous regulations was reasonable and entitled to *Auer* deference. While Justice Scalia concurred in the result, he wrote separately to criticize the majority's approach. He pointed out that [United States v. Mead, 533 U.S. 218 \(2001\)](#), a case from which he dissented, limited the situations in which *Chevron* deference applied. See *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 295 (Scalia, *dissenting*). Although he disagreed with *Mead*, Scalia criticized the majority for, in essence, creating an end run around *Mead* by holding that the agencies' interpretation of the Clean Water Act was not entitled to *Chevron* deference but according the agencies a similar degree of deference in reviewing their interpretation of their regulations. *Id.* He argued that the Court should not accord agencies *Auer* deference when the statute and regulation being interpreted are both ambiguous. *Id.* Nevertheless, he

concurred with the majority's ruling, because he thought that the agencies actions were reasonable, and he wrote, "I favor overruling *Mead*. Failing that, I am pleased to join an opinion that effectively ignores it." 557 U.S. at 296.

7. **Post-script:** The Kensington Mine began operations on July 3, 2010 and currently has over 300 employees. Operating costs at the mine for 2013 were \$890 per ounce. See [Coeur Mining, Kensington, Alaska](#). In 2006, before the mine started operations, it paid a fine of \$18,334 to EPA for stormwater violations associated with construction. See [Elizabeth Bluemink, Kensington Gold Mine Operator to Pay \\$170,000 Federal Fine, Anchorage Daily News \(Dec. 15, 2010\)](#). The following year, it began discharging sediment and acidic stormwater into a nearby creek in violation of the Clean Water Act. *Id.* EPA discovered the violations the following year and the mine operator paid a \$170,000 fine in 2010 for violations between 2006 and 2010. *Id.*

F. Discharges Through Groundwater

In 2019, the Supreme Court addressed another important issue regarding the scope of federal regulation over "discharges" from point sources into navigable waters, when it decided *County of Maui v. Hawaii Wildlife Fund*, 140 S.Ct. 1462 (2019), which involved an indirect discharge of pollution from a wastewater reclamation facility into coastal waters through groundwater.

County Of Maui V. Hawaii Wildlife Fund

140 S.Ct. 1462 (2019)

Justice Breyer delivered the opinion of the Court.

The Clean Water Act forbids the "addition" of any pollutant from a "point source" to "navigable waters" without the appropriate permit from the Environmental Protection Agency (EPA). Federal Water Pollution Control Act, §§301(a), 502(12)(A), as amended by the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act) §2, 86 Stat. 844, 886, 33 U. S. C. §§1311(a), 1362(12)(A). The question

presented here is whether the Act "requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source," here, "groundwater." *** Suppose, for example, that a sewage treatment plant discharges polluted water into the ground where it mixes with groundwater, which, in turn, flows into a navigable river, or perhaps the ocean. Must the plant's owner seek an EPA permit

Resources for the Case

[Unedited opinion](#) (From LII)
[Google Map of all the cases in the coursebook](#)
[Oral Argument Audio](#) (from the Oyez Project)
[EPA Interpretive Statement re: groundwater](#)
[Maui County WWRF webpage](#) and [FAQs re: wastewater injection](#)
[Sierra Club webpage re: facility](#)
[2004 EPA permit](#) for underground injection wells
[EPA study](#) – connection b/w discharge and waters
[Hawaii NPR stories](#) re: site and litigation
Upgrades to WWRF – News stories from [Maui News](#) and [Lahaina News](#)

before emitting the pollutant? We conclude that the statutory provisions at issue require a permit if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from the point source into navigable waters.

I
A

Congress' purpose as reflected in the language of the Clean Water Act is to "restore and maintain the . . . integrity of the Nation's waters," §101(a) *** Prior to the Act, Federal and State Governments regulated water pollution in large part by setting water quality standards. *** The Act restructures federal regulation by insisting that a person wishing to discharge any pollution into navigable waters first obtain EPA's permission to do so. ***

The Act's provisions use specific definitional language to achieve this result. * * * The Act *** states that (with certain exceptions) "the discharge of any pollutant by any person" without an appropriate permit "shall be unlawful." §301, *id.*, at 844. The question here, as we have said, is whether, or how, this statutory language applies to a pollutant that reaches navigable waters only after it leaves a "point source" and then travels through groundwater before reaching navigable waters. In such an instance, has there been a "discharge of a pollutant," that is, has there been "any addition of any pollutant to navigable waters from any point source?"

B

The petitioner, the County of Maui, operates a wastewater reclamation facility on the island of Maui, Hawaii. The facility collects sewage from the surrounding area, partially treats it, and pumps the treated water through four wells hundreds of feet underground. This effluent, amounting to about 4 million gallons each day, then travels a further half mile or so, through groundwater, to the ocean.

In 2012, several environmental groups, the respondents here, brought this citizens' Clean Water Act lawsuit against Maui. *** They claimed that Maui was "discharg[ing]" a "pollutant" to "navigable waters," namely, the Pacific Ocean, without the permit required by the Clean Water Act. The District Court, relying in part upon a detailed study of the discharges, found that a considerable amount of effluent from the wells ended up in the ocean (a navigable water). It wrote that, because the "path to the ocean is clearly ascertainable," the discharge from Maui's wells into the nearby groundwater was "functionally one into navigable water." 24 F. Supp. 3d 980, 998 (Haw. 2014). And it granted summary judgment in favor of the environmental groups. See *id.*, at 1005.

The Ninth Circuit affirmed the District Court, but it described the relevant statutory standard somewhat differently. The appeals court wrote that a permit is required when "the pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water." 886 F. 3d 737, 749 (2018) (emphasis added). The court left "for another day the task of determining when, if ever, the connection between a point source and a navigable water is too tenuous to support liability . . ." *Ibid.*

Maui petitioned for certiorari. In light of the differences in the standards adopted by the

different Courts of Appeals, we granted the petition. Compare, e.g., 886 F. 3d, at 749 (“fairly traceable”), with *Upstate Forever v. Kinder Morgan Energy Partners, L. P.*, 887 F. 3d 637, 651 (CA4 2018) (“direct hydrological connection”), and *Kentucky Waterways Alliance v. Kentucky Util. Co.*, 905 F. 3d 925, 932–938 (CA6 2018) (discharges through groundwater are excluded from the Act’s permitting requirements).

II

The linguistic question here concerns the statutory word “from.” Is pollution that reaches navigable waters only through groundwater pollution that is “from” a point source, as the statute uses the word? The word “from” is broad in scope, but context often imposes limitations. “Finland,” for example, is often not the right kind of answer to the question, “Where have you come from?” even if long ago you were born there.

The parties here disagree dramatically about the scope of the word “from” in the present context. The environmental groups, the respondents, basically adopt the Ninth Circuit’s view—that the permitting requirement applies so long as the pollutant is “fairly traceable” to a point source even if it traveled long and far (through groundwater) before it reached navigable waters. They add that the release from the point source must be “a proximate cause of the addition of pollutants to navigable waters.” ***

Maui, on the other hand, argues that the statute creates a “bright-line test.” *** A point source or series of point sources must be “the means of delivering pollutants to navigable waters.” *** They add that, if “at least one nonpoint source (e.g., unconfined rainwater runoff or groundwater)” lies “between the point source and the navigable water,” then the permit requirement “does not apply.” *** A pollutant is “from” a point source only if a point source is the last “conveyance” that conducted the pollutant to navigable waters.

The Solicitor General, as *amicus curiae*, supports Maui, at least in respect to groundwater. Reiterating the position taken in a recent EPA “Interpretive Statement,” see 84 Fed. Reg. 16810 (2019), he argues that, given the Act’s structure and history, “a release of pollutants to groundwater is not subject to” the Act’s permitting requirement “even if the pollutants subsequently migrate to jurisdictional surface waters,” such as the ocean. ***

We agree that statutory context limits the reach of the statutory phrase “from any point source” to a range of circumstances narrower than that which the Ninth Circuit’s interpretation suggests. At the same time, it is significantly broader than the total exclusion of all discharges through groundwater described by Maui and the Solicitor General.

III

Virtually all water, polluted or not, eventually makes its way to navigable water. This is just as true for groundwater. See generally 2 Van Nostrand’s *Scientific Encyclopedia* 2600 (10th ed. 2008) (defining “Hydrology”). Given the power of modern science, the Ninth Circuit’s limitation, “fairly traceable,” may well allow EPA to assert permitting authority

over the release of pollutants that reach navigable waters many years after their release (say, from a well or pipe or compost heap) and in highly diluted forms. ***

The respondents suggest that the standard can be narrowed by adding a “proximate cause” requirement. That is, to fall within the permitting provision, the discharge from a point source must “proximately cause” the pollutants’ eventual addition to navigable waters. But the term “proximate cause” derives from general tort law, and it takes on its specific content based primarily on “policy” considerations. See *CSX Transp., Inc. v. McBride*, 564 U. S. 685, 701 (2011) (plurality opinion). In the context of water pollution, we do not see how it significantly narrows the statute beyond the words “fairly traceable” themselves.

Our view is that Congress did not intend the point source-permitting requirement to provide EPA with such broad authority as the Ninth Circuit’s narrow focus on traceability would allow. First, to interpret the word “from” in this literal way would require a permit in surprising, even bizarre, circumstances, such as for pollutants carried to navigable waters on a bird’s feathers, or, to mention more mundane instances, the 100-year migration of pollutants through 250 miles of groundwater to a river.

Second, and perhaps most important, the structure of the statute indicates that, as to groundwater pollution and nonpoint source pollution, Congress intended to leave substantial responsibility and autonomy to the States. See, e.g., §101(b) *** (stating Congress’ purpose in this regard). Much water pollution does not come from a readily identifiable source. See 3 Van Nostrand’s Scientific Encyclopedia, at 5801 (defining “Water Pollution”). Rainwater, for example, can carry pollutants (say, as might otherwise collect on a roadway); it can pollute groundwater, and pollution collected by unchanneled rainwater runoff is not ordinarily considered point source pollution. Over many decades, and with federal encouragement, the States have developed methods of regulating nonpoint source pollution through water quality standards, and otherwise. * * *

The Act envisions EPA’s role in managing nonpoint source pollution and groundwater pollution as limited to studying the issue, sharing information with and collecting information from the States, and issuing monetary grants. See §§105, 208 ***; see also Water Quality Act of 1987, §316 *** (establishing Nonpoint Source Management Programs). Although the Act grants EPA specific authority to regulate certain point source pollution (it can also delegate some of this authority to the States acting under EPA supervision, see §402(b) ***), these permitting provisions refer to “point sources” and “navigable waters,” and say nothing at all about nonpoint source regulation or groundwater regulation. We must doubt that Congress intended to give EPA the authority to apply the word “from” in a way that could interfere as seriously with States’ traditional regulatory authority—authority the Act preserves and promotes—as the Ninth Circuit’s “fairly traceable” test would.

Third, those who look to legislative history to help interpret a statute will find that this Act’s history strongly supports our conclusion that the permitting provision does not extend so far. Fifty years ago, when Congress was considering the bills that became the Clean

Water Act, William Ruckelshaus, the first EPA Administrator, asked Congress to grant EPA authority over “ground waters” to “assure that we have control over the water table . . . so we can . . . maintai[n] a control over all the sources of pollution, be they discharged directly into any stream or through the ground water table.” Water Pollution Control Legislation—1971 (Proposed Amendments to Existing Legislation): Hearings before the House Committee on Public Works, 92d Cong., 1st Sess., 230 (1971). Representative Les Aspin similarly pointed out that there were “conspicuou[s]” references to groundwater in all sections of the bill except the permitting section at issue here. Water Pollution Control Legislation—1971: Hearings before the House Committee on Public Works on H. R. 11896 and H. R. 11895, 92d Cong., 1st Sess., 727 (1972). The Senate Committee on Public Works “recognize[d] the essential link between ground and surface waters.” S. Rep. No. 92–414, p. 73 (1971).

But Congress did not accept these requests for general EPA authority over groundwater. It rejected Representative Aspin’s amendment that would have extended the permitting provision to groundwater. Instead, Congress provided a set of more specific groundwater-related measures such as those requiring States to maintain “affirmative controls over the injection or placement in wells” of “any pollutants that may affect ground water.” *** These specific state-related programs were, in the words of the Senate Public Works Committee, “designed to protect ground waters and eliminate the use of deep well disposal as an uncontrolled alternative to toxic and pollution control.” *** The upshot is that Congress was fully aware of the need to address groundwater pollution, but it satisfied that need through a variety of state-specific controls. Congress left general groundwater regulatory authority to the States; its failure to include groundwater in the general EPA permitting provision was deliberate.

Finally, longstanding regulatory practice undermines the Ninth Circuit’s broad interpretation of the statute. EPA itself for many years has applied the permitting provision to pollution discharges from point sources that reached navigable waters only after traveling through groundwater. *** But, in doing so, EPA followed a narrower interpretation than that of the Ninth Circuit. *** EPA has opposed applying the Act’s permitting requirements to discharges that reach groundwater only after lengthy periods. *** Indeed, in this very case (prior to its recent Interpretive Statement ***), EPA asked the Ninth Circuit to apply a more limited “direct hydrological connection” test. *** The Ninth Circuit did not accept this suggestion.

We do not defer here to EPA’s interpretation of the statute embodied in this practice. Indeed, EPA itself has changed its mind about the meaning of the statutory provision. *** But this history, by showing that a comparatively narrow view of the statute is administratively workable, offers some additional support for the view that Congress did not intend as broad a delegation of regulatory authority as the Ninth Circuit test would allow.

As we have said, the specific meaning of the word “from” necessarily draws its meaning from context. The apparent breadth of the Ninth Circuit’s “fairly traceable” approach is inconsistent with the context we have just described.

IV
A

Maui and the Solicitor General argue that the statute's permitting requirement does not apply if a pollutant, having emerged from a "point source," must travel through any amount of groundwater before reaching navigable waters. That interpretation is too narrow, for it would risk serious interference with EPA's ability to regulate ordinary point source discharges.

Consider a pipe that spews pollution directly into coastal waters. There is an "addition of" a "pollutant to navigable waters from [a] point source." Hence, a permit is required. But Maui and the Government read the permitting requirement not to apply if there is any amount of groundwater between the end of the pipe and the edge of the navigable water. *** If that is the correct interpretation of the statute, then why could not the pipe's owner, seeking to avoid the permit requirement, simply move the pipe back, perhaps only a few yards, so that the pollution must travel through at least some groundwater before reaching the sea? *** We do not see how Congress could have intended to create such a large and obvious loophole in one of the key regulatory innovations of the Clean Water Act. Cf. *California ex rel. State Water Resources Control Bd.*, 426 U. S., at 202–204 (basic purpose of Clean Water Act is to regulate pollution at its source); *The Emily*, 9 Wheat. 381, 390 (1824) (rejecting an interpretation that would facilitate "evasion of the law").

B

Maui argues that the statute's language requires its reading. That language requires a permit for a "discharge." A "discharge" is "any addition" of a pollutant to navigable waters "from any point source." And a "point source" is "any discernible, confined and discrete conveyance" (such as a pipe, ditch, well, etc.). Reading "from" and "conveyance" together, Maui argues that the statutory meaning of "from any point source" is not about where the pollution originated, but about how it got there. Under what Maui calls the means-of-delivery test, a permit is required only if a point source itself ultimately delivers the pollutant to navigable waters. Under this view, if the pollutant must travel through groundwater to reach navigable waters, then it is the groundwater, not the pipe, that is the conveyance.

Congress sometimes adopts less common meanings of common words, but this esoteric definition of "from," as connoting a means, does not remotely fit in this context. The statute couples the word "from" with the word "to"—strong evidence that Congress was referring to a destination ("navigable waters") and an origin ("any point source"). Further underscoring that Congress intended this every day meaning is that the object of "from" is a "point source"—a source, again, connoting an origin. That Maui's proffered interpretation would also create a serious loophole in the permitting regime also indicates it is an unreasonable one.

* * *

E

For the reasons set forth in Part III and in this Part, we conclude that, in light of the statute's language, structure, and purposes, the interpretations offered by the parties, the Government, and the dissents are too extreme.

V

Over the years, courts and EPA have tried to find general language that will reflect a middle ground between these extremes. The statute's words reflect Congress' basic aim to provide federal regulation of identifiable sources of pollutants entering navigable waters without undermining the States' longstanding regulatory authority over land and groundwater. We hold that the statute requires a permit when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge. We think this phrase best captures, in broad terms, those circumstances in which Congress intended to require a federal permit. That is, an addition falls within the statutory requirement that it be "from any point source" when a point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means.

Time and distance are obviously important. Where a pipe ends a few feet from navigable waters and the pipe emits pollutants that travel those few feet through groundwater (or over the beach), the permitting requirement clearly applies. If the pipe ends 50 miles from navigable waters and the pipe emits pollutants that travel with groundwater, mix with much other material, and end up in navigable waters only many years later, the permitting requirements likely do not apply.

The object in a given scenario will be to advance, in a manner consistent with the statute's language, the statutory purposes that Congress sought to achieve. As we have said (repeatedly), the word "from" seeks a "point source" origin, and context imposes natural limits as to when a point source can properly be considered the origin of pollution that travels through groundwater. That context includes the need, reflected in the statute, to preserve state regulation of groundwater and other nonpoint sources of pollution. Whether pollutants that arrive at navigable waters after traveling through groundwater are "from" a point source depends upon how similar to (or different from) the particular discharge is to a direct discharge.

The difficulty with this approach, we recognize, is that it does not, on its own, clearly explain how to deal with middle instances. But there are too many potentially relevant factors applicable to factually different cases for this Court now to use more specific language. Consider, for example, just some of the factors that may prove relevant (depending upon the circumstances of a particular case): (1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable

waters, (7) the degree to which the pollution (at that point) has maintained its specific identity. Time and distance will be the most important factors in most cases, but not necessarily every case.

At the same time, courts can provide guidance through decisions in individual cases. The Circuits have tried to do so, often using general language somewhat similar to the language we have used. And the traditional common-law method, making decisions that provide examples that in turn lead to ever more refined principles, is sometimes useful, even in an era of statutes.

The underlying statutory objectives also provide guidance. Decisions should not create serious risks either of undermining state regulation of groundwater or of creating loopholes that undermine the statute's basic federal regulatory objectives.

EPA, too, can provide administrative guidance (within statutory boundaries) in numerous ways, including through, for example, grants of individual permits, promulgation of general permits, or the development of general rules. Indeed, over the years, EPA and the States have often considered the Act's application to discharges through groundwater.

Both Maui and the Government object that to subject discharges to navigable waters through groundwater to the statute's permitting requirements, as our interpretation will sometimes do, would vastly expand the scope of the statute, perhaps requiring permits for each of the 650,000 wells like petitioner's or for each of the over 20 million septic systems used in many Americans' homes. ***

But EPA has applied the permitting provision to some (but not to all) discharges through groundwater for over 30 years. *** In that time we have seen no evidence of unmanageable expansion. EPA and the States also have tools to mitigate those harms, should they arise, by (for example) developing general permits for recurring situations or by issuing permits based on best practices where appropriate. See, e.g., 40 CFR §122.44(k) (2019). Judges, too, can mitigate any hardship or injustice when they apply the statute's penalty provision. That provision vests courts with broad discretion to set a penalty that takes account of many factors, including "any good-faith efforts to comply" with the Act, the "seriousness of the violation," the "economic impact of the penalty on the violator," and "such other matters as justice may require." See 33 U. S. C. §1319(d). We expect that district judges will exercise their discretion mindful, as we are, of the complexities inherent to the context of indirect discharges through groundwater, so as to calibrate the Act's penalties when, for example, a party could reasonably have thought that a permit was not required.

In sum, we recognize that a more absolute position, such as the means-of-delivery test or that of the Government or that of the Ninth Circuit, may be easier to administer. But, as we have said, those positions have consequences that are inconsistent with major congressional objectives, as revealed by the statute's language, structure, and purposes. We consequently understand the permitting requirement, §301, as applicable to a discharge (from a point source) of pollutants that reach navigable waters after traveling through groundwater if that discharge is the functional equivalent of a direct discharge from the point source into navigable waters.

Because the Ninth Circuit applied a different standard, we vacate its judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Questions and Comments

1. Discharges through groundwater: Scientific studies demonstrated that pollutants that originated at the County's wastewater reclamation facility migrated through the groundwater into nearby coastal waters. However, the County discharged its wastewater into the groundwater through injection wells and did not discharge its wastewater directly into the coastal waters. EPA has consistently taken the position that groundwater is not included in the definition of "waters of the United States," so the discharge in the case was an indirect discharge into navigable waters, rather than a direct discharge. When did the environmental groups argue that the federal government should be able to regulate such discharges? When did the County argue that the federal government should be able to regulate such discharges? Did EPA agree with the environmental groups or the County or did the agency propose a different test?

2. Proximate Cause: In interpreting the Endangered Species Act and the National Environmental Policy Act, the Supreme Court has incorporated the tort concept of proximate cause into statutory language. See, e.g., *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004) (agencies are only required to consider "effects" in determining whether to conduct an environmental impact statement for an action when the effects are proximately caused by the action being considered); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995) (Endangered Species Act prohibition on harm caused by actions that indirectly injure species limited to situations where the actions proximately cause the injury). However, the Court refuses to create a test for "addition of a pollutant" in the *Maui* case because it holds that principles of proximate causation do not significantly narrow the "fairly traceable" test. Do you agree? What absurd readings of the statute does the Court suggest could result if it adopted the "fairly traceable" test?

3. Groundwater v. unregulated surface water: Although the case involved discharge of pollutants through groundwater to navigable waters, the scope of the Court's holding could extend further. The majority, for instance, indicated that the question presented as whether the Clean Water Act "requires a permit when pollutants originate from a point source but are **conveyed to navigable water by a nonpoint source**". Similarly, Justice Kavanaugh, in his concurring opinion cites Justice Scalia's plurality opinion in *Rapanos* as support for Clean Water Act jurisdiction over discharges from point sources into unregulated surface waters that convey the pollutants into navigable waters.

4. Textualism v. Purposivism: Does the Court interpret the statute using textualism, purposivism, or some other theory? What purposes of the Clean Water Act does the Court identify and how do those purposes influence the way it interprets the scope of federal jurisdiction over “discharges” to navigable waters? What absurd reading of the statute does the Court suggest could result if it adopted the County’s textualist interpretation of the statute?

5. Chevron deference: Shortly before the Supreme Court decided the *Maui* case, EPA adopted an “interpretive statement” that indicated that discharges into groundwater are not regulated under the Clean Water Act. Did the Court accord the agency’s interpretation *Chevron* deference or any other deference? Why or why not?

6. The Court’s test: The majority ultimately concludes that the statute requires a permit whenever there is “the **functional equivalent** of a direct discharge” of pollution from a point source to navigable waters. How easy is it to identify when a discharge is the functional equivalent of a direct discharge? What factors should be considered? Justice Alito, in dissent, argues that the Court’s test “provides no clear guidance and invites arbitrary and inconsistent application.” How does the majority defend the test in response to that criticism? On January 14, 2021, EPA issued a guidance document to clarify the scope of federal jurisdiction in light of the Court’s decision. See U.S. Environmental Protection Agency, [Applying the Supreme Court’s County of Maui v. Hawaii Wildlife Fund Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System \(NPDES\) Permit Program](#), 86 Fed. Reg. 6321 (Jan. 21, 2021).

Chapter Quiz

Now that you’ve finished the material covering activities regulated under Section 404, why not try a CALI lesson on the material at <http://cca.li/PV>. It should only take about a half hour or less.

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