

In an opinion by Justice Kennedy, the Supreme Court decided two issues in this case, over a dissent by Justice Ginsburg. The first was whether the Clean Air 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 slurry. The second question was whether the Corps acted lawfully in issuing the permit. The Court held that the Corps was the appropriate agency to issue the permit and that the permit is lawful.

This case involved a federal permit for a mining operation. Over the life of the mine, Coeur Alaska intends to put 4.5 million tons of tailings in the lake. This will raise the lake bed 50 feet—to what is now the lake’s surface—and will increase the lake’s area from 23 to about 60 acres. 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. It is undisputed that the discharge would kill all of the lake’s fish and nearly all of its other aquatic life. The Corps of Engineers issued a permit to Coeur Alaska, Inc. to discharge of slurry into a lake in Southeast Alaska.

From the perspective of administrative law scholars, the most interesting aspect of the case is the Court found the statute and regulations ambiguous, but deferred to an internal EPA memorandum. In the Court’s view, the question was addressed and resolved in a reasonable and coherent way by the practice and policy of the two agencies, as recorded in a memorandum written in May 2004 by Diane Regas, then the Director of the EPA’s Office of Wetlands, Oceans and Watersheds, to Randy Smith, the Director of the EPA’s regional Office of Water with responsibility over the mine. The Court deferred to the memo for the following reasons:

The Regas Memorandum’s interpretation of the agencies’ regulations is consistent with the regulatory scheme as a whole. The Memorandum preserves a role for the EPA’s performance standards; it guards against the possibility of evasion of those standards; it employs the Corps’ expertise in evaluating the effects of fill material on the aquatic environment; it does not allow toxic pollutants to be discharged; and we have been offered no better way to harmonize the regulations. We defer to the EPA’s conclusion that its performance standard does not apply to the initial discharge of slurry into the lake but applies only to the later discharge of water from the lake into the down-stream creek.