Lower Slate Lake, slurry disposal site for the Kensington Gold Mine (EarthJustice)

As Dan noted below, yesterday the Supreme Court decided its final environmental case of the year, Coeur Alaska v. Southeast Alaska Conservation Council. While *Coeur Alaska* was not a mountaintop removal case, it does have ramifications for the argument about whether the Clean Water Act allows mountaintop removal coal mining.

The central issue in *Coeur Alaska* was which of the Clean Water Act's two permitting programs applied to a gold mine's operations. The mine would use a "froth flotation" technique, which involves crushing the ore and churning it in tanks of frothing water. The gold-bearing minerals float to the surface and are skimmed off, leaving a slurry of wastewater and crushed rock. Rather than construct a tailing pond, Coeur Alaska wanted to dispose of that slurry in nearby Lower Slate Lake. Over time, the tailings would completely fill the lake, turning it into a wider, shallower, waterway. All the fish and most of the other aquatic life in the lake would be killed, although later when the tailings are capped with native material a wetlands ecosystem might develop.

The Clean Water Act prohibits the addition of any pollutant to the waters of the United States from a point source without a permit. Everyone agreed that Lower Slate Lake is a navigable water subject to federal jurisdiction, and that the mine would be a point source. The question was which of the Clean Water Act's two very different permitting pathways apply. Section 402 of the Act allows EPA to issue NPDES permits, typically but not always for industrial point sources disposing of their wastewater. Section 404 allows the Corps of Engineers (subject to EPA veto power) to issue permits for the filling of waterways with solid material.

The problem here (as for mountaintop removal operations) is that mine tailings are *both* industrial wastes and fill material. Congress did not make clear in the Clean Water Act what should happen in that situation. There are three possibilities — the operations might need permits under both sections, they might need just a section 402 permit, or they might need just a section 404 permit. From 1977 to 2002, the regulatory definition of "fill material" used by the Corps covered only "material used for the primary purpose" of creating dry land or raising the bottom of the water body, specifically excluding discharges "primarily to dispose of waste" because those discharges were, according to the Corps, regulated under section 402.

Despite that clear definition, the Corps routinely approved valley fills associated with mountaintop removal mining, which are all about disposing of mining waste. The federal courts, prodded by a series of citizen suits, started to notice that discrepency in the late 1990s. (See, e.g., Bragg v. Robertson, 72 F. Supp. 2d 642 (S.D. W.Va. 1999), vacated on other grounds, 248 F.3d 275 (4th Cir. 2001).)

The response was to change the regulation rather than to stop the practice. In 2002, the Corps of Engineers and EPA rewrote the definition of fill material to remove the "primary purpose" test and the waste exclusion. The definition now covers any material which "has the effect of" replacing waters of the US with dry land or changing the bottom elevation of a waterway, specifically including "overburden from mining or other excavation activities," and excluding only "trash or garbage." The Corps relied on it in issuing a permit to Coeur Alaska, and has used it to justify its general permit covering coal-related valley fills.

The choice of section 402 or section 404 matters. In part, that's because a different entity makes the decision. Columnist Ted Williams once described the Corps of Engineers as a bloated bureaucracy "that when beaten upon by developers, spews wetland destruction permits as if it were a piñata." EPA is at least supposed to be a stronger advocate for the environment, although that's not necessarily true of the state agencies responsible for issuing most NPDES permits.

More importantly, the substantive standards are different. NPDES permits require use of the best available technology, and are supposed to get as close as possible to the overall goal of no discharge of pollutants to waters. For new froth-flotation mining operations like the one proposed by Coeur Alaska, EPA has decided that zero discharge is achieveable. Its New Source Performance Standard for mines like this flat out forbids the discharge of wastewater slurry to the waters of the United States. Relying on the internal memo that Dan mentioned in his post, the Court deferred to EPA's position that those technology-based standards do not apply if only a 404 permit is required.

EPA did require that Coeur Alaska cut Lower Slate Lake off from the waters it would naturally empty into, so the damage caused by the mine should be limited to this one lake. But after this decision, it's not entirely clear where EPA got the authority to impose that requirement. Luckily Coeur Alaska didn't challenge it.

The bottom line after this decision is that Coeur Alaska is better off because it was able to find a convenient nearby lake (which by the way sits in a national forest) to dump its waste in. That means that destroying a lake gives the mine a competitive advantage, which is exactly what the section 404 permit requirement is meant to prevent. And it means that the

nation's highest court has endorsed the use of waterways as waste dumps, which is exactly what the section 402 permit requirement is meant to prevent.

The way out of this topsy-turvy world lies with Congress and the executive branch. H.R. 1310, which has attracted some 150 co-sponsors, would take care of it by defining "fill material" for purposes of section 404 to exclude "any pollutant discharged into the water primarily to dispose of waste." The administration could do the same thing through a rulemaking. And with the stroke of a pen it could disavow the internal memo on which the Court majority relied, making it clear that when EPA has issued technology-based standards for an industry those standards apply whether a permit is issued through section 402 or section 404.

UPDATE: NRDC's Rob Perks notes that there is also a Senate bill pending to revise the definition of fill, and that the Environment and Public Works Committee's subcommittee on water and wildlife will hold a hearing on that bill this Thursday, 6/25.