

# FILL MATERIAL POLLUTION UNDER THE CLEAN WATER ACT: A NEED FOR LEGISLATIVE CHANGE

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## I. INTRODUCTION

For thirty-nine years, the Clean Water Act (“CWA”) has protected the United States’ navigable waters from discharges containing dangerously high levels of pollution.<sup>1</sup> Since its inception in 1972, the purpose of the CWA has been “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>2</sup> It is generally common knowledge that discharges from industrial and wastewater-processing plants into lakes and rivers must meet some type of water quality standard. The CWA puts legal force behind the Environmental Protection Agency (“EPA”) to regulate plants like these as point sources of pollution under the National Pollutant Discharge Elimination System (“NPDES”).<sup>3</sup> Conversely, a different entity, the United States Army Corps of Engineers (“Corps”), is responsible for issuing permits for discharge of fill material<sup>4</sup> under the CWA.<sup>5</sup> Surprisingly, however, under current case law certain types of discharge that would be strictly regulated by the EPA under an NPDES permit are not similarly regulated under the Corps’s permit for fill material.<sup>6</sup> Therefore, although a mining company may be inoperable due to the difficulty of attaining NPDES permitting standards for the discharge of mine processing waste, the mine company may avoid those strict regulations and operate at a profit by pursuing a fill material permit from the Corps.

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1. 33 U.S.C. §§ 1251–1387 (2006).

2. 33 U.S.C. § 1251(a).

3. 33 U.S.C. § 1342.

4. Fill material is currently defined as material placed in waters of the United States where the material 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. 33 C.F.R. § 323.2(e) (2009).

5. 33 U.S.C. § 1344(d).

6. *See* *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2469–77 (2009).

The overlap in regulation of material that may constitute pollution under the NPDES permitting scheme and fill under the Corps permitting scheme has forced the courts to define which entity has the authority to permit discharge of certain material.<sup>7</sup> Although one would presume harmful mining waste byproducts are considered pollution, some courts have found differently.<sup>8</sup> A legal grey area exists regarding materials that could be considered both pollution and fill. The evolution of this area of the law has demonstrated that many types of discharge materials an average person would traditionally classify as pollution, or even the EPA would classify as pollution, nonetheless, may fall under the Corps's lesser-regulated fill permitting scheme.

There are two reasons why the scope of the EPA's and the Corps's permitting schemes are important. First, regulated entities need to know who, if either of the regulatory agencies, controls permitting for the type of material they plan to discharge. Entities have a legitimate interest in efficiently pursuing the most economical alternative to accomplish their developmental goals. For example, if an entity wants to discharge mine waste slurry<sup>9</sup> composed of a large percentage of solid rock with small percentages of mercury and phosphorus, it needs to know whether that discharge will constitute fill material because of its large percentage of solid rock, or whether that discharge will constitute pollution because of its mercury and phosphorus content. The entity has an important interest in its proper allocation of time and money for its application for one permit.

Second, the regulating agencies, the EPA and the Corps, need to know the extent of their jurisdiction over permitting applications so that they do not overreach during their analysis of applications. For example, if an entity improperly applies to the Corps for a fill permit, rather than to the EPA for a pollution permit, the Corps should be able to notify that entity

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7. *Coeur Alaska*, 129 S. Ct. at 2477 (holding gold froth flotation discharge from mining facility to be fill); *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 448 (4th Cir. 2003) (holding mining overburden discharged into valley was fill material); *W. Va. Coal Ass'n v. Reilly*, Nos. 90-2034, 90-2040, 1991 WL 75217 at \*4 (4th Cir. May 13, 1991) (upholding EPA policy to prohibit discharge of mining spoil as fill material); *Res. Inv., Inc. v. U.S. Army Corps of Eng'rs*, 151 F.3d 1162, 1168 (9th Cir. 1998) (holding solid waste disposed into landfill on wetland was not fill). See discussion *infra* Part II.D.

8. Compare *Rivenburgh*, 317 F.3d at 448 (holding mining overburden discharged into valley to be fill material), with *Reilly*, 1991 WL 75217, at \*4 (upholding EPA policy to prohibit discharge of mining spoil as fill material).

9. Tailings is the mine waste produced by the extraction of minerals from host rocks or sediments by the mining industry. Ore is finely ground to liberate minerals of interest, producing sand or silt sized milled tailings. . . . In most cases, the milling/extraction uses large quantities of water and produces a water-mineral tailings slurry which is pipelined from the extraction plant/mill . . . .

G. McKenna & V. Cullen, *Landscape Design for Soft Tailings Deposits*, in *TAILINGS AND MINE WASTE '08*, 165, 165-66 (2009).

immediately that it needs to file for a permit with the EPA and not the Corps. Otherwise, the Corps may, without authorization, permit an entity to unlawfully discharge actual pollution.

To remedy these hypothetical situations, as well as further conflicts over the jurisdiction of the EPA's and the Corps's respective permitting schemes under the CWA, legislative action is needed. The Clean Water Act should be amended by adding language to change the procedural designation of jurisdiction over applicants for fill material discharge permits. An automatic presumption of invalidity should be given to applicants that wish to discharge pure waste. Only if applicants rebut a presumption of invalidity by presenting a reasonable benefit to be obtained from the resultant change in bottom elevation of the receiving water shall the Corps have jurisdiction. Otherwise, the EPA should attain jurisdiction pursuant to the NPDES.

This Comment explores how courts have articulated the ambiguous jurisdiction of the EPA and the Corps with respect to pollution and fill material permitting and suggests a legislative action to cure the ambiguity in the CWA, thereby redirecting the evolution of this area of the law towards a more environmentally sound direction. Section II charts the development of permitting under the CWA. This section begins in Part A with a brief history of the CWA. Parts B and C analyze the two permitting schemes in sections 402 and 404 of the CWA respectively. Part D examines the current legal state of permitting under the CWA as interpreted through case law. Section III provides an analysis of the problem with the current state of permitting and a legislative solution to the problem. This section starts in Part A by identifying the shortcomings of the fill permitting scheme. Part B recognizes the competing interests which must be considered before legislative action. Finally, Part C proposes a balanced legislative change in the section 404 permitting scheme to rectify the current loophole in the CWA.

## II. DEVELOPMENT OF PERMITTING UNDER THE CLEAN WATER ACT

The scope of fill material under the CWA is controversial. In order to understand the controversy, some important background information will be provided. First, the history of the CWA will be examined. Next, the relevant statutory sections and regulatory rules will be discussed. Finally some decisions interpreting the ambiguous statutory and regulatory language will be explained.

### A. History of the Clean Water Act

In 1948, Congress enacted the Federal Water Pollution Control Act (“WPCA”).<sup>10</sup> The WPCA changed the federal government’s policy on water pollution, declaring the new purpose to be “to recognize, preserve, and protect the primary responsibilities and rights of the States in controlling water pollution . . . and to provide Federal technical services to State and interstate agencies . . . in the formulation and execution of their stream pollution abatement programs.”<sup>11</sup> Essentially, the federal government’s position was to support and assist the States as they lead the effort to prevent, control, and abate water pollution.<sup>12</sup>

Congress subsequently passed the Water Quality Act of 1965 (“WQA”), further expanding the federal role in water quality control.<sup>13</sup> The WQA required states to develop standards for water quality themselves, or adhere to those set forth by the secretary.<sup>14</sup> The standards were then to be applied to all interstate navigable waters flowing through the state, although intrastate waters were not included.<sup>15</sup> Additionally, the WQA created an agency then known as the Federal Water Pollution Control Administration to oversee submission of new state water quality standards.<sup>16</sup> Over time, Congress found the water pollution control program to be ineffective because many states did not implement approved standards.<sup>17</sup> The main problem with the WQA came from “the great difficulty associated with establishing reliable and enforceable precise effluent limitations on the basis of a given stream quality.”<sup>18</sup> In other words, the law required the quality of water in a given stream to be at a certain level. In order to achieve those levels, effluent limitations for dischargers had to be imprecisely modeled for every single discharger to ensure downstream water quality achieved the water quality standard.<sup>19</sup> Congress found these inadequacies unworkable.<sup>20</sup>

In 1972, the WPCA was amended by the Federal Water Pollution Control Amendments of 1972 (“WPCAA”).<sup>21</sup> This amendment provided

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10. Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155 (1948).

11. § 1, 62 Stat. at 1155.

12. *See id.*

13. Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (1965).

14. § 5(a), 79 Stat. at 907-09.

15. § 5(a), 79 Stat. at 908.

16. § 3, 79 Stat. at 903-05. The duties of this agency were later turned over to the Federal Environmental Protection Agency.

17. S. REP. NO. 92-414 at 7 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3675.

18. *Id.*

19. *Id.*

20. *Id.*

21. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816.

the principal body of law that controls water pollution in the U.S. today. The WPCAA implemented a point-source<sup>22</sup> effluent permitting scheme.<sup>23</sup> Therefore, instead of regulating the amount of pollutants in a given body of water, effluent limitations would be controlled at the source of the discharge.<sup>24</sup> Additionally, oversight of permitting was consolidated to the Administrator of the Environmental Protection Agency.<sup>25</sup>

Again, in 1977, the WPCA was amended by the Clean Water Act of 1977 (“CWA”).<sup>26</sup> The “Clean Water Act” is now the common name for the U.S. water pollution control area of law.<sup>27</sup> The CWA contains the two permitting schemes at issue in this Comment. The NPDES permitting scheme regulates point-source discharge of pollutants and is run by the EPA.<sup>28</sup> The fill material permitting scheme regulates the discharge of fill material into waters of the U.S. and is run by the Corps.<sup>29</sup>

#### B. The Section 402 National Pollutant Discharge Elimination System Permit

Sections 301 and 402 of the CWA combine to create a nationwide permitting scheme.<sup>30</sup> Section 301 provides that the discharge of any pollutant by any person is unlawful unless the entity is in compliance with a limited number of other sections of the CWA.<sup>31</sup> Section 402 of NPDES’s permitting scheme is cross referenced as one of such exceptions allowing for pollutant discharge.<sup>32</sup> Under the NPDES, permits are issued by either the EPA or by a state which has been given NPDES permitting authority.<sup>33</sup> NPDES permits are required for discharge of pollutants which are defined as “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage

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22. The term ‘point source’ means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14) (2006).

23. Water Pollution Control Amendments of 1972, Pub. L. No. 92–500, sec. 2, § 101(a)(5), 86 Stat. 816.

24. See discussion *infra* Part II.B.

25. Water Pollution Control Amendments of 1972, Pub. L. No. 92–500, sec. 2, § 104, 86 Stat. 816, 819–25.

26. Clean Water Act of 1977, Pub. L. No. 95–217, 91 Stat. 1566.

27. Clean Water Act of 1977, Pub. L. No. 95–217, sec. 2, § 518, 91 Stat. 1566.

28. 33 U.S.C. § 1342 (2006).

29. 33 U.S.C. § 1344.

30. 33 U.S.C. §§ 1311, 1342.

31. 33 U.S.C. § 1311(a).

32. *Id.*

33. 33 U.S.C. § 1342(b).

sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.”<sup>34</sup>

NPDES permits are to be conditioned on compliance with section 306 of the CWA.<sup>35</sup> Section 306 grants authority to the Administrator of the EPA to promulgate regulations for new source performance standards.<sup>36</sup> Section 306 lists several sources—facilities from which there may be the discharge of pollutants—over which the Administrator must provide standards of control in order to reduce the pollutant discharge.<sup>37</sup> Accordingly, the Administrator has since promulgated performance standards for numerous industries and pollutants under the CWA authority.<sup>38</sup>

### C. The Section 404 Fill Material Permit

The CWA grants the United States Army Corps of Engineers jurisdiction over the discharge of fill material under section 404 with some oversight by the EPA.<sup>39</sup> The legal definition of fill material has eluded courts because of conflicting regulatory definitions promulgated by the EPA and the Corps.<sup>40</sup> Unfortunately, there is no statutory definition of “fill material.”

The Corps initially promulgated a rule in 1975 to define fill material using an effects-based test.<sup>41</sup> The rule defined fill material as “any pollutant used to create fill in the traditional sense of replacing an aquatic area with dry land or of changing the bottom elevation of a water body for *any* purpose.”<sup>42</sup> Just two months later, the EPA essentially adopted the same effects-based test.<sup>43</sup> However, the definition of fill material was changed by the Corps two years later.<sup>44</sup> Departing from the effects-based test, the Corps began using a purpose-based test.<sup>45</sup> The purpose-based definition did

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34. 33 U.S.C. § 1362(6).

35. 33 U.S.C. § 1342(a)(1).

36. 33 U.S.C. § 1316(b).

37. 33 U.S.C. § 1316(b)(1)(A).

38. 40 C.F.R. §§ 401.10–471.106 (2009).

39. 33 U.S.C. § 1344. This section also covers dredge material which will not be considered in this Comment.

40. *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 431 (4th Cir. 2003).

41. *Permits for Activities in Navigable Waters or Ocean Waters*, 40 Fed. Reg. 31,320, 31,325 (July 25, 1975).

42. *Id.* (emphasis added).

43. *See Discharge of Dredged or Fill Material*, 40 Fed. Reg. 41,292, 41,298 (Sept. 5, 1975).

44. *See Regulatory Programs of the Corps of Engineers*, 42 Fed. Reg. 37,122, 37,145 (July 19, 1977).

45. *Id.*

not allow pure waste to be disposed of with a 404 permit.<sup>46</sup> The Corps justified this change, finding that the prior definition allowed for “the disposal of waste materials such as sludge, garbage, trash, and debris in water.”<sup>47</sup> The Corps found that these waste materials were more rightly regulated as pollutants under the NPDES by the EPA.<sup>48</sup>

Differing regulatory definitions of fill material generated confusion for the regulated industry, thus encumbering effective implementation of the CWA.<sup>49</sup> Consequently, in 2002 the EPA and the Corps finalized a joint rule reconciling the definition of fill material to an objective effects-based test.<sup>50</sup> The following case law analyzes both the effects-based test and the purpose-based test and their application to different types of materials requiring one of these permits and their correct designation as pollution or fill material.

#### D. Current State of Permitting as Reflected by Case Law

In recent years, there have been numerous battles in the courts over the scope of discharge covered by 402 and 404 permits. Parties have been arguing over the limits of what may lawfully be considered fill material and what must lawfully be considered a pollutant. For instance, in *Resource Investments, Inc. v. U.S. Army Corps of Engineers*, the plaintiff brought suit challenging the Corps’s decision to deny its request for a dredge and fill permit under the CWA.<sup>51</sup> The plaintiff sought to develop a municipal solid waste landfill and wanted to obtain a permit from the Corps to dispose of municipal solid waste in a wetland.<sup>52</sup> The Ninth Circuit Court of Appeals held municipal solid waste did not fall within the definition of fill material

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46. Nathaniel Browand, Note, *Shifting the Boundary Between the Sections 402 and 404 Permitting Programs by Expanding the Definitions of Fill Material*, 31 B.C. ENVTL. AFF. L. REV. 617, 625 (2004) (discussing the history of the fill material definition).

47. Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. at 37,130.

48. Browand, *supra* note 46, at 625.

49. Final Revisions to the Clean Water Act Regulatory Definitions of “Fill Material” and “Discharge of Fill Material,” 67 Fed. Reg. 31,129,131 (May 9, 2002).

50. The regulation defined fill material as:

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. (2) Examples of such fill material include, but are not limited to: 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. (3) The term fill material does not include trash or garbage.

Final Revisions to the Clean Water Act Regulatory Definitions of “Fill Material” and “Discharge of Fill Material,” 67 Fed. Reg. at 31,142–43 (codified at 33 C.F.R. § 323.2(e) (2009), 40 CFR § 232.2 (2009)).

51. *Res. Inv., Inc. v. U.S. Army Corps of Eng’rs.*, 151 F.3d 1162, 1164–65 (9th Cir. 1998).

52. *Id.*

because it was not “material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody.”<sup>53</sup> Further, the court held, solid waste was an exception in the definition of fill: “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.”<sup>54</sup> This decision appears quite obvious under the former definition of fill.

In other cases, the 402 and 404 permitting schemes seem to overlap, leading to ambiguity. Take, for example, *West. Virginia Coal Ass’n v. Reilly*, a case where the plaintiff filed a declaratory judgment action to determine which permit was required for the disposal of waste or spoil associated with a surface coal mining operation.<sup>55</sup> The court held that a memorandum of agreement (“MOA”), from February 28, 1986, controlled.<sup>56</sup> According to the MOA, discharge will be subject to 402 permitting

if it is a discharge in liquid, semi-liquid, or suspended form or if it is a discharge of solid material of a homogenous nature normally associated with single industry wastes and from a fixed conveyance, or if trucked, from a single site and set of known processes. These materials include placer mining wastes, phosphate mining wastes, titanium mining wastes, sand and gravel wastes, fly ash, and drilling muds.<sup>57</sup>

Accordingly, the court held the fill and discharge at issue fell under the EPA’s permitting authority.<sup>58</sup>

Conversely, in *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, the Fourth Circuit Court of Appeals held that mining overburden<sup>59</sup> was subject to the Corps jurisdiction under section 404 as fill material.<sup>60</sup> This case was brought prior to an alteration of the definition of fill material. On May 3, 2002, during litigation, the Corps and the EPA signed a joint rule to clarify the definition of fill material.<sup>61</sup> The joint rule

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53. *Id.* at 1168 (citing 33 C.F.R. § 323.2(e) (1994)).

54. *Id.*

55. *W. Va. Coal Ass’n v. Reilly*, Nos. 90–2034, 90–2040, 1991 WL 75217 at \*2 (4th Cir. May 13, 1991).

56. *See id.* at \*4–5.

57. *Id.* at \*4 (citing Memorandum of Agreement on Solid Waste, 51 Fed. Reg. 8, 871 (Mar. 14, 1986)).

58. *Id.* at \*4–5.

59. Mining overburden is “material, loose or condensed, lying over a mineral deposit of ore or coal.” George E. Aiken & John W. Gunnet, *Overburden Removal*, in *SURFACE MINING* 584, 584 (Bruce E. Kennedy ed., 2d ed. 1990).

60. *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 448 (4th Cir. 2003).

61. *Id.* at 432 (citing 33 C.F.R. § 323.2 (2002)).



changed the definition back to an effects-based test, thereby allowing waste disposal of mining overburden to qualify as fill.<sup>62</sup> Apparently disagreeing with the Corps at trial, the district judge held that fill material under section 404 refers to “material deposited for some beneficial primary purpose: for construction work, infrastructure, improvement and development in the waters of the United States, not waste materials discharged solely to dispose of waste.”<sup>63</sup> Thus, the district court held that section 404 may not be used to dispose of waste and issued a permanent injunction against the Corps, prohibiting it from issuing such permits.<sup>64</sup> The Corps appealed the trial court decision and the Fourth Circuit Court of Appeals vacated the district court’s injunction and reversed its holding.<sup>65</sup> The Fourth Circuit Court of Appeals found that the CWA authorized the Corps to issue such fill permits.<sup>66</sup> As a result of this decision, the Corps’s authority to issue permits under the CWA broadened to give it jurisdiction over permits for discharge of mining waste characterized as fill material.

In *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, the Supreme Court recently dealt with a similar issue and characterized mining waste as fill material.<sup>67</sup> The mining waste in this case was slurry discharge from a froth-flotation gold mining mill.<sup>68</sup> The issue here was that the EPA, under the authority of section 306 of the CWA, has in force a new source performance standard to govern various discharges from ore-mining facilities.<sup>69</sup> Within that regulation, the EPA has adopted a zero-discharge standard for gold mines using froth-flotation mill processes such as the one at issue in *Coeur Alaska*.<sup>70</sup> Therefore, the issue in *Coeur Alaska* became which agency had the authority to permit discharge of material that qualified as fill material yet also fell under a prohibition of the section 306 performance standards.<sup>71</sup>

The court looked to the dual regulation issued by the EPA and Corps discussed above and found the Corps, under that regulation,<sup>72</sup> had the

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62. *See id.*

63. *Id.* at 433 (quoting *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 204 F. Supp. 2d 927, 946 (S.D.W.V. 2002)).

64. *Rivenburgh*, 204 F. Supp. 2d at 946–47.

65. *Rivenburgh*, 317 F.3d at 448.

66. *Id.*

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

68. *Id.* at 2464.

69. 40 C.F.R. § 440.104 (2009).

70. 40 C.F.R. § 440.104(a).

71. *See Coeur Alaska*, 129 S. Ct. at 2469–79.

72. 33 C.F.R. § 323.2(e)-(f) (2009) Fill constitutes any material that has the effect of a change in the bottom elevation of water and expressly includes slurry or tailings or similar mining-related materials. *Id.*

authority to permit the discharge of slurry as fill material.<sup>73</sup> In doing so, the Court found that the Corps, not the EPA, had the authority to govern discharge of fill material because section 402 expressly excepted section 404 from NPDES permitting.<sup>74</sup> The Court also noted that although this may allow the Corps to permit discharge of waste characterized as fill material, the EPA retains veto authority over the Corps's 404 permits.<sup>75</sup> Therefore, the effect of the *Coeur Alaska* decision on the current state of the 402 and 404 permitting jurisdictions is that some mining waste disposal may be characterized as fill material, despite prohibition under the section 402 NPDES.

The state of the current law under the permitting scheme of the CWA has been unstable since its inception in 1972. Some courts previously held mining waste to be pollution that must be regulated under the NPDES. However, more recently the courts and the agencies have re-defined the definition of fill material to allow mining waste to be discharged as fill. The next section focuses on the causes for concern with the aforementioned case developments and the current state of permitting authority of the Corps.

### III. ANALYSIS

As illustrated in the background, the jurisdiction of the EPA and the Corps over fill material has been evolving since 1975. Currently, the EPA and the Corps share the same regulatory definition of fill material. However, this equivalent definition does not solve all the problems that so many litigants have argued over in the past. The law is still ambiguous with respect to the jurisdiction over waste material characterized as fill material.

#### A. Inadequacies Under the Current Legal State of Permitting

Although the Corps and the EPA have agreed on a joint definition of fill, they did not achieve the best solution. The agencies' decisions to allow for waste disposal using a fill permit and the Supreme Court's decision in *Coeur* have both created a hole in the law that is waiting to be exploited.

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

74. *Id.* at 2467.

75. *Id.*

*1. The EPA and the Corps Improperly Allowed Waste To Be Discharged as Fill Under the Joint Rule Defining Fill Material*

Implementation of the joint rule removed important broad language from the Corps's prior definition of fill material. Prior to the 2002 regulation, the Corps's definition of fill material expressly provided that fill material did "not include any pollutant discharged into the water primarily to dispose of waste . . . ." <sup>76</sup> This provision was very important because it protected U.S. navigable waters from pure waste material being disposed of as fill material.

The EPA and the Corps justified the inclusion of waste disposal in the new rule for numerous reasons. First, they asserted that a categorical exclusion of waste is overbroad because of the similarities of some waste to traditional fill. <sup>77</sup> For example, the agencies suggested that mine overburden typically consists of soil, rock, and earth—a similar composition to traditional fill. <sup>78</sup> Second, the agencies recognized that the waste disposal of fill may cause chemical contamination under certain circumstances. <sup>79</sup> However, the agencies claimed the section 404 permitting process is designed to deal with environmental concerns arising from fill material by providing comprehensive provisions addressing physical, chemical and biological impacts. <sup>80</sup> One such provision provides that practicable alternatives must be examined, <sup>81</sup> and others require that practicable steps be taken to both minimize effects on the aquatic environment and compensate for the loss of aquatic functions and values. <sup>82</sup>

In theory these arguments are reasonable, however, in practice the rules have failed to protect U.S. navigable waters as the agencies envisioned. The agencies were right that many types of mine overburden have a similar physical composition as a traditional fill material, <sup>83</sup> but underestimated the Corps's adherence to the statutory provisions addressing environmental concerns. As a result, there remains a grave danger that chemically hazardous mine overburden will be permitted for discharge as fill material into U.S. navigable waters. Exactly that happened in *Coeur*

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76. 33 C.F.R. § 323.2(e) (2001).

77. Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129, 31,133 (May 9, 2002).

78. *Id.*

79. *Id.*

80. *Id.* (citing Guidelines for Specification or Disposal Sites for Dredged or Fill Material, 40 C.F.R. § 230 (2001)).

81. Guidelines for Specification or Disposal Sites for Dredged or Fill Material, 40 C.F.R. § 230.5(c) (2009).

82. 40 C.F.R. §§ 230.20–45, 230.70–75.

83. Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. at 31,133.

*Alaska* where the Court approved the Corps's permit which allowed the discharge of gold froth-flotation mining waste into U.S. navigable waters.<sup>84</sup>

Next, the agencies conceded that Congress did not intend for U.S. waters to be utilized as unlicensed dumping grounds for waste material.<sup>85</sup> However, the agencies believed waste was not banned outright by Congress, but merely restricted by the imposition of carefully tailored limitations on discharge of pollutants.<sup>86</sup> To support the agencies' theory, they noted sections of the CWA.<sup>87</sup> One such section was 306, the new source performance standards which regulate the discharge of gold froth-flotation mining waste.<sup>88</sup> Ironically, gold froth-flotation mining waste is the same type of waste discharge the Corps was given jurisdiction over by the Court in *Coeur Alaska*.<sup>89</sup> Although the agencies specifically mentioned section 306 as a safeguard against unlicensed dumping of waste into U.S. navigable waters, the Court in *Coeur Alaska* held that section 306 did not apply to permits for fill material.<sup>90</sup>

Arguably the restriction on waste disposal under the definition of fill material was removed prematurely. As a result, companies may be able to pass pure waste disposal off as fill material by receiving a permit from the Corps. However, there is some limitation. The joint rule included a more narrow prohibition on trash or garbage.<sup>91</sup> According to the agencies, trash or garbage constitutes "debris, junk cars, used tires, discarded kitchen appliances, and similar materials . . . ."<sup>92</sup> Nevertheless, blatant types of waste such as these are not at issue in this Comment. Further, it is probably not common that companies legitimately apply for permits to dump this kind of trash into U.S. navigable waters. Therefore, because the definition provides that fill material permits may be used to discharge pure waste, there is a potential for abuse of the permitting scheme.

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84. *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2477 (2009).

85. Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. at 31,133–34.

86. *Id.* at 31,134. It is particularly noteworthy that the agencies cited the new source performance standards here to support their argument that waste disposal should be limited by such restrictions.

87. *Id.*

88. *Id.*

89. *Coeur Alaska*, 129 S. Ct. at 2477.

90. *Id.*

91. 33 C.F.R. § 323.2(e)(3) (2009); 40 C.F.R. § 232.2 (2009).

92. Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. at 31,134.

## 2. *The Supreme Court's Decision in Coeur Alaska Has Created a Loophole in the CWA Permitting Scheme*

The joint rule finalized on May 9, 2002, allows fill permits to be issued to discharge waste.<sup>93</sup> Because of this change, mining companies may discharge byproducts of their mining operation—discharge specifically allowed for and discussed by the agencies prior to promulgation of the rule<sup>94</sup>—directly into U.S. navigable waters. *Coeur Alaska*, discussed previously,<sup>95</sup> presented such a factual scenario that will be examined in more detail below.<sup>96</sup>

In *Coeur Alaska*, the Court upheld a permit issued by the Corps to Coeur Alaska.<sup>97</sup> Coeur Alaska was a gold mining company that received a permit to discharge gold froth-filtration process wastewater directly into Lower Slate Lake.<sup>98</sup> The Corps approved a staggering 210,000 gallons per day discharge into the 23-acre subalpine lake in Tongass National Forest.<sup>99</sup> The process wastewater was a mixture of water and tailings, and it contained concentrations of aluminum, copper, lead, and mercury.<sup>100</sup> Throughout the duration of the mining operation, about 4.5 million tons of solid tailings would be discharged into the lake, effectively raising the bottom level by 50 feet.<sup>101</sup> Even more egregious, it was “undisputed that the discharge would kill all of the lake’s fish and nearly all of its other aquatic life.”<sup>102</sup>

Ostensibly, the safeguards the agencies anticipated to protect waters like this were not strictly adhered to.<sup>103</sup> Even more interesting, however, was the issue that arose under the CWA with the allocation of jurisdiction over fill material. The issue was whether the EPA under section 402 or the Corps under section 404 had jurisdiction over fill material when its discharge would violate the section 306 new source-performance standards.<sup>104</sup> The Court held that the Corps had jurisdiction under section 404 fill permitting, despite the EPA’s new source performance standards

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93. *Id.* at 31,133.

94. *Id.*

95. *See* discussion *supra* Part II.D.

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

97. *Id.* at 2477.

98. *Id.* at 2480.

99. *Id.*

100. *Id.* These chemicals are all regulated by section 402 NPDES permitting.

101. *Id.*

102. *Id.* (noting uncertainty as to whether aquatic life would ever return).

103. The agency justified its acceptance of waste disposal under 404 permitting because it required the examination of alternatives. Final Revisions to the Clean Water Act Regulatory Definitions of “Fill Material” and “Discharge of Fill Material,” 67 Fed. Reg. 31,129, 31,133 (May 9, 2002).

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

specifically limiting the discharge of gold froth-filtration process wastewater.<sup>105</sup>

Consequently, pure waste may be disposed of into U.S. navigable waters by obtaining a section 404 permit, regardless of whether the chemical composition of the waste is restricted by a section 306 new standard of performance. This is dangerous because it completely evades the effluent limitation safeguards of the NPDES.

*3. Potential Implications after the Joint Rule Definition of Fill Material and the Supreme Court Decision in Coeur Alaska*

According to the new source performance standards, the concentration of pollutants discharged in mine drainage from mines that produce copper, lead, zinc, gold, silver, or molybdenum bearing ores cannot exceed certain limits.<sup>106</sup> Under the holding in *Coeur Alaska*, however, these new source performance standards do not apply to fill material. Therefore, any mine company applying for a fill permit to discharge mining overburden as process wastewater containing high effluent levels of these ores will not be regulated by the new source standards. However, the EPA and the Corps still both have discretion to deny permitting. Yet, based on the egregiousness of the permit upheld in *Coeur Alaska*, it is speculative as whether the EPA will deny permits in the future with its oversight<sup>107</sup> or whether the Corps will deny permits at all.

Unfortunately, the Court in *Coeur Alaska* did not directly address this slippery slope argument. Southeast Alaska Conservation Council (“SEACC”) argued in its brief that Coeur’s interpretation of the regulatory scheme permits the discharge of other solids that are now restricted, “for example, ‘feces and uneaten food,’ ‘litter,’ and waste produced in ‘battery manufacturing.’”<sup>108</sup> The Court merely dismissed this argument by concluding that those extreme instances were not presented to it at that time.<sup>109</sup> Thus, the Court put off the issue for another day.

However, more realistic scenarios involving, for example, seafood processors and log transfer facilities must be considered.<sup>110</sup> Seafood

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105. *Id.* at 2474.

106. New Source Performance Standards, 40 C.F.R. § 440.104(a) (2009).

107. The EPA may veto the Corps permit if it found the plan to have “an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas . . . , wildlife, or recreational areas.” *Coeur Alaska*, 129 S. Ct. at 2465 (quoting 33 U.S.C. § 1344(c) (2009)).

108. *Id.* at 2468 (quoting Brief for Respondents Se. Alaska Conservation Council, Sierra Club, & Lynn Canal Conservation at 44–45, *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458 (2009) (Nos. 07–984, 07–990), 2008 WL 4892761).

109. *Id.*

110. Mark A. Ryan, *New Supreme Court Clean Water Decision: Here We Go*, 24 NAT. RESOURCES & ENV’T 48, 49 (2009).

processors often grind up parts of the fish and shellfish they cannot sell and discharge them back into the ocean.<sup>111</sup> As a result of constant discharge, the ground up fish and shells accumulate, raising the elevation of the sea floor.<sup>112</sup> This “zone of deposit” covers the ocean floor including bottom dwelling creatures.<sup>113</sup> Additionally, log transfer facilities discharge wood, bark, particulate matter and related material into receiving water as a result of the placement of logs into the water.<sup>114</sup> These materials which are dislodged during the log transfer process settle and accumulate on the bottom of the receiving water body.<sup>115</sup> The wood material deposits have both an adverse physical and chemical impact on the maritime environment.<sup>116</sup> These dischargers, formerly regulated under an NPDES permit, may now be able to make a strong argument for a fill material permit from the Corps after the *Coeur Alaska* decision.<sup>117</sup> Although the EPA does have veto authority if the Corps approved such a permit, it has only used its power twelve times since 1972.<sup>118</sup>

Accordingly, the present state of fill material regulation is vulnerable. Mining companies can apply to the Corps to try and discharge chemicals that should be regulated by the EPA. Moreover, entities currently regulated under section 402 may be strategically thinking of ways to qualify their discharge for the less stringent 404 permits from the Corps. The current state of fill material permitting is treading on a slippery slope and is in need of change.

#### B. The Competing Interests Between the Regulated Industry and the Government

On one side is the economic industry composed of numerous entities regulated by the CWA. For example, one major type of entity regulated is mining companies. These large companies supply many jobs to the geographic area in which they are located and pay taxes which help boost the local economy. Additionally, if coal is the mineral being mined, it likely provides the source of electricity for the locality. Most mining companies are privately owned and are run for a profit. They will operate

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111. *Id.*

112. *Id.*

113. *Id.*

114. Notice of Draft Permit for Log Transfer Facilities in the State of Alaska, 49 Fed. Reg. 6788, 6790 (Feb. 23, 1984).

115. *Id.*

116. *Id.* The physical impact is the actual smothering effect the debris has on the floor of the receiving water. *Id.* The chemical impact consists of the leachate from logs and bark causing increased biological oxygen demand and chemical oxygen demand, or other toxins.

117. Ryan, *supra* note 111, at 49.

118. *Id.*

in the most efficient manner to save costs and increase profits. Unfortunately, this means they will mine at the expense of the environment and public health,<sup>119</sup> hence the implementation of laws and regulations like the CWA. Theoretically, mining companies will abide by the legal requirements imposed on them by the government. Therefore, mining companies have a large interest in the rules and regulations enforced under the CWA.

On the opposite side is the government, representing the people of the United States of America. The public has a general interest in public safety and welfare. This includes, among many other rights, protection from polluting entities. The CWA was enacted by Congress to protect “the natural chemical, physical, and biological integrity of the Nation’s waters . . . .”<sup>120</sup> More specifically, those members of the public that are directly affected by an entity’s discharge have a substantial interest in the proper legal regulation of that discharge. Additionally, the government, as a regulating entity, has an interest in a clear rule or definition that can be analyzed and applied fairly and uniformly to discharging entities. Efficiency in the application of a rule or definition to the regulated industry is favored.

The most controversial issue between these two competing interests will be the scope of 404 permitting. The regulated industry will argue for broad coverage so that numerous types of discharge can be regulated as fill. Conversely, the public will argue for more narrow coverage to protect the environment and navigable waters from dangerous pollutants that may be contained in alleged fill material. There are two questions that must be analyzed in anticipation of a change in the 404 permitting coverage to balance the competing interests.

First, from a regulated entity’s standpoint, what higher burden is entailed in achieving and maintaining a 402 permit versus a 404 permit? A 402 NPDES permit application is more burdensome because of the standard by which a permit is granted. The 402 permit evaluates discharged material by determining whether it adversely affects the chemical, physical, or biological characteristics of the waterway. Each discharged pollutant is looked at under a narrow scope and evaluated. Conversely, the 404 permit evaluates discharge of fill for construction purposes. “The standard for issuance of a 404 permit is consideration of the full public interest by

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119. RAMÓN LLAMAS & EMILIO CUSTODIO, *INTENSIVE USE OF GROUNDWATER: CHALLENGES AND OPPORTUNITIES* 119 (2003) (“Uncontrolled leakages of wastewater from ore washing and dressing facilities, coal preparation and other post-extraction processing of mining material, uncontrolled leakages from tailings, piles, evaporation ponds and further disposal sites of extracted mine materials and excessive pumping of mine waters, produce a wide range of impacts on groundwater quality.”).

120. S. REP. NO. 92-414, at 6 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3674.



balancing the favorable impacts against the detrimental impacts of a proposed activity to reflect the national concerns for both the protection and utilization of important resources.”<sup>121</sup> For example, harmful chemical characteristics of mining overburden are not narrowly and compartmentally evaluated during evaluation for a 404 permit. If mining overburden were being evaluated for a 402 permit, every pollutant contained in the overburden would be compartmentalized and evaluated for compliance with effluent limits.

Second, is compliance with an increased burden reasonable for the waste disposing industry? This is the issue central to the controversy between the competing interests involved. The regulated entities will argue that the increased economic demand associated with compliance under the 402 permitting scheme will substantially hurt the industry. The counter-argument from the public, however, is that 402 permitting has successfully been implemented for many other types of industries across the nation. Therefore, there is no reasonable expectation that the industries disposing high solid content waste will fail if 402 permitting is required for discharge. More complex issues arise with respect to discharge of specific types of waste. For example, mining overburden, although waste, is recognized by the EPA as appropriate fill material. Therefore, before impulsively considering legislation to redefine the definition of fill to specifically exclude waste, current policy should be acknowledged. Accordingly, the flat out exclusion of waste disposal under the definition of fill is unreasonable in light of current policy.

### C. Congressional Action is the Best Solution to the Problem

The regulatory definition of fill material could be changed to help remedy the current problem in the Clean Water Act with respect to fill material permitting. Congressional action, however, is the most definitive solution to the controversy over fill material jurisdiction that has eluded courts and regulated entities for the past 35 years. Even if regulations were changed, they are still subject to Congressional action. Thus, the problem needs to be solved by the lawmakers.

#### 1. *The Amendment to the Clean Water Act*

The solution to the current problem in the law is Congressional action to amend the Clean Water Act. Section 404 of the CWA should be

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121. CLAUDIA COPELAND, CONTROVERSIES OVER REDEFINING “FILL MATERIAL” UNDER THE CLEAN WATER ACT 2 (2009), available at <http://ncseonline.org/nle/crsreports/09July/RL31411.pdf>.

amended to cross reference sections 301 and 401 of the CWA—essentially the NPDES—under certain circumstances. Specifically, the following limiting language should be added to section 404(f)(2): “If the discharge of dredged or fill material into navigable waters has the effect of waste disposal, the discharger shall provide a reasonably justifiable benefit for the resultant change in bottom elevation or otherwise shall be subject to compliance with section 1311(a) and 1342 of this title.” This amendment would remedy the current problem with the CWA. The amendment’s placement and language in the statutory regime is critical to its successful implementation. The following subsections will discuss why this amendment should be located in this particular context within the fill permitting section, as well as why this particular language is necessary to fix the problem.

## *2. Logical Placement of the Language in the Fill Permitting Section*

The new language must be located within the fill permitting section for a number of reasons. First, the problem only arises in the context of fill material permitting. Entities looking to discharge waste will be subject to the strict water quality regulations imposed if they apply for and obtain a permit through the NPDES section 402 permitting scheme.<sup>122</sup> However, when entities’ discharge is composed of a sufficiently high percentage of suspended solids, the organization may consider applying for a fill material permit under section 404 because that discharge may raise the bottom elevation of the receiving water. As previously discussed, herein lies the potential for abuse. An entity, discharging waste composed of a high percentage of suspended solids, may obtain a fill permit through the Corps without a strict analysis of the harmful physical, chemical, and biological effects the discharge may have on the water quality of the receiving navigable water.

Second, the new language must be located under subsection (f) because this section lays out the basic framework for the allowable fill material discharges.<sup>123</sup> Section (f)(1) provides a number of dredged and fill material discharges that are excepted from sections 1311(a) and 1342.<sup>124</sup> All of these exceptions will still apply. They are important to provide for a streamlined obtainment of fill material permits without the strictures of the NPDES permit. One of the exceptions provides for discharge of fill

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122. 33 U.S.C. § 1342 (2006). This Comment does not address any issues with the current regulatory permitting process of the NPDES. If permits are granted under the NPDES scheme, the issues addressed in this Comment will not arise.

123. 33 U.S.C. § 1344(f).

124. 33 U.S.C. § 1344(f)(1).

material “for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters.”<sup>125</sup> This exception is the only one which would cover some of the waste disposal activity at issue. However, this exception would still be applicable and not conflict with the suggested language because it only provides for discharge of fill material on a construction site which does not include placement of fill material into navigable waters.

Finally, the language should be a subset of the catch-all provision in section 404(f)(2) because the language is only applicable for certain limited circumstances. Section 404(f)(2) generally provides a broad catch-all requirement providing that a dredge or fill material permit is required when dredge or fill material is discharged into navigable waters with the purpose of bringing the navigable waters into a new use.<sup>126</sup> The new language provides for a limitation on fill permitting—when the purpose is waste disposal—and therefore is logically placed as a subset of the general catch all. These three arguments provide the basis for the addition of new language to section 404(f)(2) of the CWA.

### *3. The Language Is Critical to Successful Elimination of the Fill Material Problem*

The language of this proposed amendment is targeted at fixing the problem with the current state of the law under the Clean Water Act—the ability of entities discharging waste with high concentrations of suspended solids to call their waste fill material and forgo the strict NPDES permitting scheme. The first part of the new rule targets the effect of the discharge, waste disposal. In many mining operations undesirable materials remain in contaminated wastewater after the crushing and extraction of the desirable materials. Similarly, as previously discussed, seafood processors discharge ground up parts of fish and crustaceans, and log transfer facilities discharge wood and bark materials. There are numerous other examples of industries that discharge effluent with high concentrations of solids that may try and take advantage of waste disposal under the current 404 fill material permit.<sup>127</sup> The common factor among these more problematic fill discharges, however, is that the discharge is waste.

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125. 33 U.S.C. § 1344(f)(1)(D).

126. 33 U.S.C. § 1344(f)(2).

127. Brief for Respondents Se. Alaska Conservation Council, Sierra Club, & Lynn Canal Conservation at 44–45, *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458 (2009) (Nos. 07–984, 07–990), 2008 WL 4892761 (listing examples of industries where settling ponds are required to remove solids from wastewater under the NPDES: aluminum smelting, copper smelting, inorganic chemical manufacturing, ferroalloy manufacturing, cement manufacturing,

In order to combat the less restricted discharge of waste concealed as fill material, the new language presumes as suspect the discharge of fill material that has the effect of waste disposal. In application, this is to be analyzed objectively. In order to rebut the suspect presumption, entities must show a benefit to be derived from the resultant change in bottom elevation of the navigable water. Distinctions should be made between entities applying to discharge in anticipation of some benefit accruing from the resultant change in bottom elevation, and entities discharging to reap only the benefit from the disposal of such materials. This burden and presumption safeguards navigable waters of the United States from opportunistic entities capitalizing on the substandard fill permitting scheme of the Clean Water Act.

Next, the proposed language removes jurisdiction from the Corps to the EPA over the permit application if the applying entity does not meet the burden discussed above. The Corps must initially find whether the effect of the discharge is waste disposal. If the Corps so finds, the Corps must determine whether the entity has successfully rebutted the suspect presumption of waste disposal by providing a reasonable benefit to be gained from the resultant change in bottom elevation. If the presumption is not overcome by the entity applying for a fill permit, its discharge will be subject to the more strict analysis of the EPA through the NPDES permitting scheme under sections 1311(a) and 1342.<sup>128</sup>

The intended outcome of the legislative change is to eliminate the opportunity for entities to discharge pollutant laden waste as fill material under section 404 into navigable waters. Therefore, the rebutting benefit analysis is very important. The anticipated benefit from the change in bottom elevation must be objectively reasonable. For example, an entity wanting to discharge tons of waste material characterized as fill into a navigable water just to raise the bottom elevation so that the navigable water is shallower, is not an objectively reasonable benefit. This type of alleged benefit would swallow the new exception rendering it useless and is, therefore, insufficient. The resulting procedural analysis thus safeguards U.S. navigable waters from discharge of waste characterized as fill material. Additionally, even if the Corps makes an unreasonable initial decision, the EPA Administrator has oversight power pursuant to 404(c).<sup>129</sup> Accordingly, the foregoing interpretation of the proposed new statutory language for section 404 of the Clean Water Act would eliminate the

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concentrated aquatic animal production, beef cattle feedlots, coal-fired power plants, and battery manufacturing).

128. 33 U.S.C. §§ 1311(a), 1342.

129. 33 U.S.C. § 1344(c). The Administrator may prohibit or withdraw a fill permit after notice and opportunity for public hearings. *Id.*

current loophole in the law allowing discharge of effluent under a 404 permit that is prohibited or limited under the NPDES.

#### *4. A Necessary Compromise to Mediate the Competing Interests*

The competing interests of the regulated industry and the government are both well served by this legislative change. First, the regulatory definition of fill material remains unaltered, only the procedure by which fill permit applications are to be analyzed will change. Therefore, the potential for disposing of pure waste with a 404 permit would not be eliminated under this new language. Instead, disposal would have to be justified with a benefit to be derived from the resultant change in bottom elevation of the navigable water to which fill material is discharged. As a result, pure waste disposing entities applying for a 404 permit would be forced to either obtain an NPDES permit under section 402, or contrive a beneficial use for their waste. Potential regulated entities will have to conduct economic analyses to determine which option is more cost efficient. The new burden would likely act as a deterrent to entities attempting to discharge pure waste as fill material thereby decreasing the likelihood of illegitimate 404 permits being approved by the Corps. As previously noted, however, even if some newly discharging entities are forced to conform to NPDES permitting, it is unlikely that compliance will be catastrophic.

Second, the public is safeguarded from the loophole in the Clean Water Act. No longer will new dischargers of pure waste be able to hide pollution discharge into navigable waters under a 404 fill permit. If the application for discharge has the effect of waste disposal, then it is presumed suspect. Only after a showing of a reasonable benefit from the change in bottom elevation may the applicant be considered for a 404 permit. This presumption errs on the side of caution for the sake of public safety and the integrity of the navigable waters of the U.S., a policy of the legislation the public is sure to accept.

Finally, because this legislation only affects the procedure for which 404 permits are granted, only new dischargers will be affected by this proposed legislative change. This facet of the legislative change is sure to bode well for the regulated industry. Current regulated entities discharging with 404 permits will be grandfathered in. Any new 404 permit applicants, however, will have to conform to the new legislation.

In the end, no change in the law is going to please all; however, the most important aspect of changing the law is consideration of and compromise between all the competing interests. This proposed change in the law retains the ability of the regulated entities to discharge waste with a 404 fill

material permit, while limiting the circumstances under which those future discharges will be allowed.

#### IV. CONCLUSION

There currently exists within the Clean Water Act the potential for clever manipulation of the fill material permitting scheme. An entity can theoretically discharge pollutants, regulated under the NPDES, as fill material if the discharge is composed of sufficiently high concentrations of suspended solids. In order to protect navigable waters of the United States from potentially harmful fill material, legislative change is needed to more closely scrutinize section 404 applications for discharge of waste materials.

The best approach is new language that requires a slightly higher burden for those applicants requesting permission to discharge waste as fill material under section 404 of the Clean Water Act. Applicants requesting permission to dispose of waste must offer a reasonable benefit to be gained from the resultant change in bottom elevation from the discharge. Only upon such a showing may the entity then be entitled to consideration by the Corps for a fill material permit under section 404. This approach is consistent with the Clean Water Act's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>130</sup> In applying this new language, potentially harmful waste material that is designated as fill material will be closely examined for compliance with the NPDES and its effluent limitations and standards of performance, thereby preserving the chemical, physical, and biological integrity of the Nation's waters.

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130. 33 U.S.C. § 1251(a).