

The LOGBOOK of CSP²

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THE KENSINGTON DECISION - WHAT IT MEANS



Slate Lakes as they looked before preparations for mining began

US Supreme Court

In a ruling on June 22, 2009, the US Supreme Court confirmed the Bush administration rule that will allow the use of lakes as rivers for the disposal of mine waste.

This was an extremely disappointing ruling. The ruling itself was a very narrow interpretation of the Clean Water Act, and basically said the Act was not specific in its intent or definition of the uses of waste material to fill waters of the US, and that the Bush administration was therefore free to define mine wastes as “fill” for the purpose of ‘raising the bottom of the lake’.

Background

In 2002 the Bush administration finalized a regulatory change, initiated at the assistant secretary level between the EPA and the Army Corps of Engineers, which allows mine tailings to be used as

“fill” material. It allows the Corps to issue Clean Water Act permits to dump mine tailings directly into lakes, rivers, or the ocean – something that has not been allowed since the passage of the Clean Water Act in 1972. This change was done without congressional approval.

The first mine to receive a permit under this rule change is the Kensington mine, near Juneau, Alaska. Tailings will be dumped into Lower Slate Lake, a natural lake with fish. The fish would not survive during mining, but mining company experts argue that fish habitat would actually be improved after mine closure.

The Ruling

The vote by the Court was 6-3 in favor of the decision, with Justice Brennan joining the conservatives on the court to overturn a very strong Ninth Circuit opinion.

In his opinion for the majority Justice Kennedy noted that the Army Corps of Engineers said the tailings

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Slate Lake during preparations for tailings disposal

would "... rise twice as high as the Pentagon and cover three times as many acres" and "the Corps concluded that placing the tailings in the lake will cause less damage to the environment than storing them above ground."

The Corps' representation of the size of the of the planned paste tailings facility is a significant exaggeration and many, including this writer, would argue that it would be easier to restore a low-value

wetland like the one pictured on this page, than to restore the ecological functions of a lake. Yet it is now the Corps, rather than the EPA, that will be making these determinations for the use of lakes and rives for mine waste disposal.

The Dissent

Justice Ginsberg, in her dissent to the majority ruling, accurately described the intent of the Act:



Juneau conservationists touring wetlands that would have been destroyed for a paste tailings facility

"... 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. 'The use of any river, lake, stream or ocean as a waste treatment system,' the Act's drafters stated, 'is unacceptable.'"

"... The Court's reading, in contrast, strains credulity. A discharge of a pollutant, otherwise prohibited by firm statutory command, becomes lawful if it contains sufficient solid matter to raise the bottom of a water body, transformed into a waste disposal facility. Whole categories of regulated industries can thereby gain immunity from a variety of pollution-control standards. The loophole would swallow not only standards governing mining activities, ... but also standards for dozens of other categories of regulated point sources,"

"... Providing an escape hatch for polluters whose discharges contain solid matter, it bears noting, is particularly perverse; the Act specifically focuses

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on solids as harmful pollutants.”

“... Congress, we have recognized, does not “alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes. ... Would a rational legislature order exacting pollution limits, yet call all bets off if the pollutant, discharged into a lake, will raise the water body’s elevation? To say the least, I am persuaded, that is not how Congress intended the Clean Water Act to operate.”

The majority ruling overturns 35 years of applied procedure and public policy under the Clean Water Act. Unfortunately, it also speaks the majority’s lack of basic research and fundamental understanding of how the mining industry in particular, and industry in general, will use this “mousehole” to subvert the intent of the Clean Water Act.

Where do we go from here?

The old administration (Bush) made this rule, so the new administration (Obama) can unmake it. Sounds simple, but politics will inevitably make this complicated. The most obvious complication is that if every administration is free to change this rule at the bequest of its supporters, we will have an ongoing cascade of changes to the waste disposal policies of federal agencies that will ultimately result in the further loss lakes and streams over the long term.

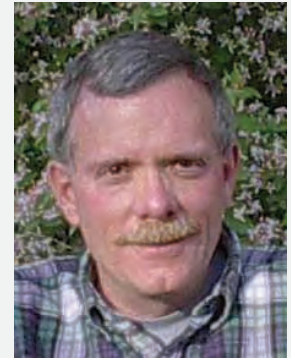
The second way to address this ruling is to have congress explicitly state that waste cannot be discharged into lakes or streams as “fill.” This could be a one-line fix, and in fact such a proposal has been introduced into the House for the past several congressional sessions. However, this particular “fix” would also address the issue of mountain top removal for coal, which is a controversial issue that crosses party lines. This means that it will be a difficult issue to move procedurally through the congress, even though it is clearly the right thing to do.

Ultimately this issue is not about the ambiguity of the law, or even protecting the environment, it is about money – waste disposal in lakes and streams is orders of magnitude less expensive than building a treatment plant or waste storage facility.

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FROM THE EXECUTIVE DIRECTOR

In the previous issue of the Logbook, the main focus was the issue of Subaqueous Disposal. I cautioned then that if this method of waste disposal were allowed in the US, it will be aggressively pursued by the mining industry because of the significant cost saving involved. We now face that predicament.



Dave Chambers is the Executive Director of CSIP

We in the conservation community not only lost this decision, but a significant majority of the US Supreme Court supports the use of lakes and rives as a place for mine waste disposal. Quite frankly, I would have been disappointed if even one justice had voted to approve the use of lakes and streams for the disposal of mine waste. To have a majority of the court approve this procedure is extremely disappointing and troubling.

The case also speaks to the Army Corps of Engineers ability to correctly analyze the facts of these permits - they misrepresented the size of the paste tailings facility to the court, and concluded that the destruction of wetlands was less environmentally preferable than the destruction of a lake.

For me this is clearly a demonstration that the Corps will focus on results-oriented decisions instead of decisions based on a thorough analysis of the facts - an approach I have seen them employ in the past.

We now have the Corps, which is an organization focused on engineering, controlling the fate of our lakes and rivers with regard to mine waste disposal. I will argue that when it comes to the environmental analysis of impacts to our lakes and rivers, we should have a science-oriented agency (like the EPA), rather than an engineering-oriented agency (like the Corps) making these determinations.

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(→ continued) Mountain top removal is cheaper than underground or even strip mining. Unfortunately this economic reality is an incentive that many (perhaps most) in industry will not be able to ignore or resist. Our lakes and streams will suffer for it, beginning with Slate Lake in Alaska, and ending with ...?

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