

**American Bird Conservancy · American Rivers · Clean Water Action ·
Earthjustice · EARTHWORKS · Environment America · Friends of the Earth ·
Greenpeace · League of Conservation Voters · National Wildlife Federation · Native
American Rights Fund · Natural Resource Defense Council · Sierra Club · Southeast
Alaska Conservation Council · Union of Concerned Scientists · Waterkeeper Alliance**

July 17, 2009

President Barack Obama
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500

Dear Mr. President:

We write to request that you direct the Environmental Protection Agency (EPA), the Army Corps of Engineers (Corps), and the Council on Environmental Quality (CEQ) to take immediate coordinated action to avert the adverse effects of the Supreme Court's recent decision in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, No. 07-984 (June 22, 2009). This decision has significant national implications, threatening to undo decades of progress in improving water quality. We urge you to act quickly to prevent this threat to our nation's waters.

In *Coeur Alaska*, the Court upheld a Bush-era decision by the Corps to permit the discharge of over 200,000 gallons per day of toxic wastewater from a gold ore processing mill directly into a lake, with the effect of killing all the lake's fish and nearly all other aquatic life, despite the fact that the discharge violates EPA rules for the mining industry in effect since 1975. The agencies accomplished this by a ruse: they redefined the wastewater as "fill material." For about three decades, Corps regulations allowed "fill material" permits only for discharges intended for constructive purposes, typically to build useful structures like docks and levees in water. In 2002, however, EPA and the Corps jointly redefined "fill material" to include anything that would raise the bottom elevation of a water body, even industrial pollution and other wastes. The Supreme Court upheld the Bush Administration's position that any such "fill material" discharges are now exempt from the effluent limitations painstakingly adopted by EPA over the last 37 years to provide maximum feasible protection of water quality.

This decision poses a grave threat to the nation's lakes, rivers, streams, and wetlands. There are innumerable manufacturing industries that, like ore mills, generate pollution containing significant levels of suspended solids. To name just a few examples, coal-fired power plants, aluminum and copper smelters, cement manufacturing plants, beef cattle feedlots, and chemical manufacturers have, until now, been subject to EPA effluent limitations requiring settling ponds and other technologies to remove solids from their wastewater. The untreated effluents from these sources now frequently could meet the definition of "fill material" and are therefore potentially eligible for Corps permits that do not have to comply with EPA's effluent limitations. This approach turns the Clean Water Act on its head: pollution discharges with the highest levels of suspended solids are exempt from EPA's rules, providing a strong incentive for

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polluters *not* to treat their wastewater. As the *Coeur Alaska* case illustrates, “fill material” permits can allow even massive discharges of toxic pollutants that may kill an entire water body.

This destructive result is entirely unnecessary. The growth of the nation’s economy and the simultaneous great improvement in water quality since enactment of the Clean Water Act in 1972 show that clean water is good for business. For example, for the Kensington Mine at issue in *Coeur Alaska*, there is an alternative waste disposal option—a “paste tailings” facility—supported by conservation groups and EPA, which would require no discharge of process wastewater into any waters. We were pleased that EPA Region 10 recently wrote a letter asking the Corps to consider this viable and less damaging alternative. The use of a lake as a mine tailing disposal site is irresponsible, both in the case of the Kensington and for future mines.

Fortunately, the Court’s decision provides a clear roadmap to solve the problem. The Court found that the Act as well as the agencies’ regulations are ambiguous on the questions at issue in the case and therefore simply deferred to an internal 2004 Bush-era EPA guidance memorandum, called the Regas Memo. The *Coeur Alaska* ruling cries out for the agencies to amend and clarify their regulations and guidance.

For these reasons, we respectfully ask that you direct EPA, the Corps, and CEQ to work together to: (1) rescind immediately the Regas Memo, which directed that discharges of waste meeting the definition of “fill material” be exempt from applicable effluent limitations; and (2) initiate a process to amend the 2002 fill rule to reinstate the longstanding rule that “fill material” permits may not be used for waste disposal.

We would welcome the opportunity to meet with your staff and the heads of the relevant agencies at their earliest convenience to address the problems created by the *Coeur Alaska* decision.

Thank you for your prompt attention to this matter.

Respectfully Yours,

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Executive Director
Sierra Club

Larry Schweiger
President and CEO
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cc: Lisa Jackson, Administrator, U.S. Environmental Protection Agency
Nancy Sutley, Chair, White House Council on Environmental Quality
Terrence Salt, Principal Deputy to the Assistant Secretary of the Army, Civil Works