



1 federal respondents, in support of the Petitioners.

2 THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf of  
3 the Petitioners.

4 THOMAS S. WALDO, ESQ., Juneau, Alaska; on behalf of the  
5 Respondents.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	GEN. GREGORY G. GARRE, ESQ.	
4	On behalf of federal respondents, in	
5	support of the Petitioners	4
6	THEODORE B. OLSON, ESQ.	
7	On behalf of the Petitioners	16
8	THOMAS S. WALDO, ESQ.	
9	On behalf of the Respondents	27
10	REBUTTAL ARGUMENT OF	
11	THEODORE B. OLSON, ESQ.	
12	On behalf of the Petitioners	55
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument first this morning in Case 07-984, Coeur Alaska  
5 v. The Southeast Alaska Conservation Council, and Case  
6 07-990, Alaska v. The Southeast Alaska Conservation  
7 Council.

8 General Garre.

9 ORAL ARGUMENT OF GEN. GREGORY G. GARRE  
10 ON BEHALF OF FEDERAL RESPONDENTS,  
11 IN SUPPORT OF THE PETITIONERS

12 GENERAL GARRE: Thank you,  
13 Mr. Chief Justice, and may it please the Court:

14 The expert agencies charged by Congress with  
15 implementing the Clean Water Act have concluded that the  
16 discharge of fill material, like the mine tailings at  
17 issue in this case, should be permitted by the Army  
18 Corps of Engineers under section 404 of the Act, and are  
19 not -- are not subject to the effluent guidelines  
20 applicable to permits issued by the EPA under section  
21 402 of the Act.

22 That interpretation is grounded on more than  
23 three decades of agency pronouncements and reflects the  
24 collective judgment and expertise of the Army Corps of  
25 Engineers and the EPA in administering the Act.

1 JUSTICE KENNEDY: If the discharge comes  
2 from a single pipe, is it always one or the other, or  
3 can it ever be both fill and --

4 GENERAL GARRE: Justice Kennedy, it's always  
5 one or the other. The Clean Water Act establishes two  
6 permitting regimes. And I think this is actually  
7 something where the parties agree. Either it's going to  
8 be permitted under section 402 of the Act, which covers  
9 pollutants generally but not the discharge of dredged  
10 material, or fill material, which is covered by section  
11 404 of the Act.

12 CHIEF JUSTICE ROBERTS: That's a legal  
13 answer to Justice Kennedy's question. What is the  
14 physical answer? Can a pipe both emit sludge, fill, and  
15 effluent?

16 GENERAL GARRE: As a practical matter, for  
17 example, if you take the slurry in this case, which is  
18 55 percent solid by volume, there is going to be liquid  
19 coming out of that pipe with the slurry, but under the  
20 definition that the agencies administer of fill  
21 material, this is fill material under that definition.

22 JUSTICE SCALIA: Fill material trumps  
23 effluent, in other words?

24 GENERAL GARRE: Fill material trumps  
25 effluent. That's --

1 JUSTICE SOUTER: But it does -- here's the  
2 problem that I am having and I think others may have.  
3 We start, number one, with a definition, as I understand  
4 it, of a pollutant that includes suspended solids.  
5 Number two, there is an existing regulation to the  
6 effect that wastewater from this particular method of  
7 extracting gold shall simply not be released, shall not  
8 be put into a water body. And then the two agencies  
9 come along and in effect they say by regulation, if the  
10 suspended solid in effect comes out of a mine, or if the  
11 wastewater has got suspended solid in it, we are going  
12 to call it "fill" and leave it entirely to the Army  
13 Engineers under 404, subject to an EPA veto.

14 And on the face of it, it sounds as though  
15 they are simply, number one, defining one -- one variant  
16 of pollution out of the EPA's jurisdiction, and, number  
17 two, with respect to the wastewater, in effect coming up  
18 with a contradictory determination about what should be  
19 done with it.

20 And it sounds as though, under the  
21 Administrative Procedure Act, that with the statutory  
22 and the regulatory regime on the one hand and this joint  
23 regulation on the other, you've simply got a flat  
24 contradiction, and query whether that can be anything  
25 other than arbitrary and capricious under the APA. Will

1     you address that?

2                   GENERAL GARRE:   Sure, Justice Souter.   First  
3     of all, I those concerns really go to the definition of  
4     "fill material," and I don't think that the Respondent  
5     SEACC has squarely challenged that definition in this  
6     case.   And I would point you to two parts of the record.

7                   JUSTICE SOUTER:   Well, let's assume -- and I  
8     don't mean to cut you off there, but before you're done  
9     -- I am at least raising it because I find it very  
10    difficult to get a handle on this case without dealing  
11    with that problem.   So you may say, well, they didn't  
12    raise it well enough, but I still want you to deal with  
13    it on the merits.

14                  GENERAL GARRE:   Sure.   And let me just point  
15    to the two parts of the record:   The JA at 541 note 12,  
16    where the Ninth Circuit acknowledged they didn't  
17    challenge it; and also I would point you to the  
18    complaint, where the complaint is directed to the  
19    permits and does not seek a determination that the Fill  
20    Rule definition is arbitrary and capricious.

21                  We think that that definition reflects the  
22    settled understanding and expertise of both agencies,  
23    the Army Corps of Engineers --

24                  JUSTICE GINSBURG:   How could it be settled,  
25    because isn't it a fact that before 2002 if the primary

1 purpose was disposing of waste that the 402 permit  
2 applied?

3 GENERAL GARRE: That is correct,  
4 Justice Ginsburg. By "settled," I mean it was settled  
5 in 2002. They adopted this rule.

6 JUSTICE GINSBURG: So it's not in 30 years'  
7 experience, and when it was disposing of waste, it was  
8 under 402 until 2002.

9 GENERAL GARRE: I think the EPA has always  
10 adopted and applied an effects test for determining  
11 whether or not a discharge is fill material --

12 JUSTICE GINSBURG: But in fact, was there  
13 ever a permit by the Corps of Engineers when the purpose  
14 was disposal of waste? Was there ever a 404 permit,  
15 rather than a 402, for disposal of what they call  
16 "processed wastewater" or "wastewater"?

17 GENERAL GARRE: There was a period, of  
18 course, Justice Ginsburg -- you are right -- where the  
19 Army Corps of Engineers adopted a primary purpose test.  
20 During that period -- you are right -- 404 permits were  
21 not -- were not issued for the discharge of things where  
22 the purpose was not to fill the lake; it was to dispose  
23 of material.

24 Now, during that period, though, those  
25 discharges were not regulated under section 402 of the



1 Act and under Section 306, the effluent guidelines, but  
2 for a different reason. The reason why that they  
3 weren't regulated under 402 during that period is  
4 because of the agencies' wastewater treatment exception,  
5 which is found at 40 C.F.R. 122.2, where the agencies  
6 excepted from the definition of the "waters of the  
7 United States" discharges into an impoundment area.

8 And what you have going on here is the  
9 discharge of fill material into an impoundment area,  
10 which is dammed off with a 50-foot dam. Those  
11 discharges, in this case, are governed by section 404 of  
12 the Act. But any discharges from that impoundment area  
13 into downstream waters of the United States are subject  
14 to section 402 of the Act -- there's a separate permit  
15 in this case -- and are subject to the effluent  
16 guidelines and the new source performance standards.

17 So you have those two. The agencies have  
18 come together. They've reconciled the statutory  
19 regimes, and they have the 404 permit of dredged  
20 material, material that's going to fill the bottom of  
21 the lake, raise it by 50 feet, governed by section 404  
22 of the Act. That impoundment area then is sealed off,  
23 and any discharged material out of that impoundment area  
24 into waters of the United States is going to be governed  
25 by 402 and the separate effluent guidelines there. That

1    --

2                   JUSTICE SOUTER:  That's pretty cold comfort  
3    when you treat as an impoundment area a natural lake.  I  
4    suppose if the -- if it's proper to do what they're  
5    doing here, then the lake in the middle of the  
6    Everglades is an impoundment area, or a Great Salt Lake  
7    is an impoundment area.

8                   GENERAL GARRE:  Well, any -- we're talking  
9    about --

10                  JUSTICE SOUTER:  This is a long way from a  
11    settling pond.

12                  GENERAL GARRE:  Well, let me address that in  
13    two different ways:  First of all, at the end of this  
14    project, when the lake is going to be reclaimed, the  
15    agencies determined that it's going to be  
16    environmentally as sound, if not superior, for the  
17    habitats in Alaska, fish and wildlife.  So at the end of  
18    the project, it is going to be --

19                  JUSTICE SOUTER:  Yes, but what's that --  
20    what's that got to do with the definition of  
21    "impoundment area"?  My problem is that you are  
22    treating -- the Corps is treating as an impoundment area  
23    a whole natural lake as distinct from a settling basin.

24                  GENERAL GARRE:  The statute refers to  
25    specified disposal sites and what you have here, you are

1 right, is a lake. But it's impounded by a 50-foot dam.  
2 The other part I wanted to point to is the section 404  
3 guidelines are rigorous environmental guidelines that  
4 address a number of different concerns, including the  
5 quality of the water, the fish and wildlife habitat, and  
6 at the end of that process you have got the EPA, which  
7 has the right to exercise a veto over --

8 JUSTICE SOUTER: You keep saying they are  
9 rigorous. My understanding is -- and I didn't think it  
10 was seriously disputed here -- is that during the period  
11 in which the deposits are going to be made, the natural  
12 life of this water body is going to be destroyed.

13 GENERAL GARRE: That's true.

14 JUSTICE SOUTER: And the Corps comes along  
15 and says, oh, when it's all over, it will come back.  
16 But when you're destroying the entire living sort of  
17 corpus of this lake, it seems to me that it's getting  
18 more lenient to say that there are rigorous  
19 environmental standards.

20 GENERAL GARRE: That's true, Justice Souter,  
21 but it's important to keep in mind that the reason why  
22 the lake -- the fish in the lake are not going to  
23 survive is because of the fill effect of the material,  
24 not because of any toxics put into the water.

25 JUSTICE SOUTER: No, but as I understand it,

1 and you correct me if I am wrong here, I thought  
2 "suspended solids," I guess is the buzz word for it, is  
3 a form of pollution. So you're saying, well, we're  
4 destroying the fish with one form of pollution rather  
5 than another form of pollution. And I don't know that  
6 that advances the ball for your side.

7 GENERAL GARRE: Any time you have fill  
8 material going into the waters of the United States --  
9 of course, section 404 doesn't apply until you've got  
10 fill material going into the waters of the United  
11 States.

12 JUSTICE SOUTER: Yes, but this comes back to  
13 my initial question. You are simply, or the Corps is  
14 simply, defining what would otherwise be a pollutant,  
15 suspended solids discharged into the water, by calling  
16 it fill material. And it -- in effect it's defining one  
17 subject of -- of discharge regulation right out of the  
18 law of the United States by redefining it and saying,  
19 oh, it doesn't exist if it's coming out of a mine.

20 GENERAL GARRE: I think what the agencies  
21 have done to reconcile their definitions is to apply  
22 this effects test. Now, if Coeur Alaska sought to fill  
23 the entire lake --

24 JUSTICE SOUTER: But to apply the effects  
25 test, the legal effect, is it not, is to define one form

1 of pollution as no longer existent so long as that form  
2 of pollution falls within the Corps of Engineers  
3 definition of "fill."

4 GENERAL GARRE: I don't think that's  
5 correct.

6 JUSTICE SOUTER: Is that correct?

7 GENERAL GARRE: The legal effect is to  
8 regulate that pollution under section 404.

9 JUSTICE ALITO: General Garre, I don't want  
10 to take up your rebuttal time, but what's the  
11 environmental alternative to what was done here?

12 GENERAL GARRE: The primary environmental  
13 alternative considered was a dry tailings alternative.  
14 And that would be been problematic in two different  
15 ways. One, it would have required the destruction of  
16 some 100 acres of wetlands; and two, it would have  
17 resulted in enormous stacks of tailings, 100 to 200  
18 high, thousands of feet wide, that would actually dwarf  
19 the Pentagon and be visible from nearby Berners Bay.

20 Now, the Army Corps of Engineers, the State  
21 of Alaska, and the Forest Service determined that the  
22 wet tailings option, putting the tailings into a lake,  
23 and reclaiming that lake so that it would be  
24 environmentally superior, was the preferable option.

25 I do want to emphasize that if this Court

1 has any doubt about the statutory text the regulatory  
2 decisions here go back more than 30 years. In 1973 the  
3 EPA adopted a rule that said that the discharge of fill  
4 material is not regulated under the section 402  
5 permitting system. In 2002, in the preamble to the fill  
6 rule, the agency made clear again EPA has never  
7 regulated the discharge of fill material under the  
8 effluent guidelines.

9 JUSTICE GINSBURG: Weren't they then  
10 thinking of fill material as material that was used  
11 either to fill in, to reclaim land, or in a construction  
12 project? I mean, to call filling a lake, to call that a  
13 fill, when what it's doing is providing a disposal place  
14 for a mining operation, it's not what one ordinarily  
15 thinks of as a filling operation.

16 GENERAL GARRE: Not the Environmental  
17 Protection Agency. The Environmental Protection Agency  
18 since the passage of the Clean Water Act has taken the  
19 position that discharge that has the effect of changing  
20 the bottom elevation of a water is going to be fill.  
21 And that makes sense as a practical matter. The  
22 agencies with 30 years of experience determined that the  
23 purpose definition that the Corps had adopted for a  
24 period was unworkable, unpredictable and didn't make  
25 sense. And I think that if there's any judgment that

1 the courts ought to defer to here, it's the judgment of  
2 the agencies based on their collective experience as to  
3 the proper definition of "fill material."

4 JUSTICE GINSBURG: There's one question that  
5 Justice Souter raised and before you sit down I would  
6 like to get your answer, and that is, can anything, any  
7 water of the United States that the Corps of Engineers  
8 decides is appropriate to be used as a disposal place,  
9 can any waterway be a settling pond? That is, here we  
10 have a lake. And is it just up to the Corps of  
11 Engineers? They say this is a settling pond, it's a  
12 settling pond?

13 GENERAL GARRE: I think as a practical  
14 matter if you put discharge into a river and it may not  
15 change the bottom elevation, that wouldn't be fill  
16 material. But, Justice Ginsburg, there have been a  
17 number of hypotheticals raised by Respondents here. Let  
18 me address those. The section 404 process is a rigorous  
19 environmental process, the EPA does have veto authority.  
20 We haven't seen these problems at all in the six years  
21 that the fill definition has been in place and I think  
22 it's simply untenable to suggest that these standards,  
23 which in section 4 require water quality determinations,  
24 wildlife, aquatic determination, would result in the  
25 sort of environmental harm that Respondents have

1 hypothesized, and the prospect of that harm is no basis  
2 for this Court to override the statutory scheme that  
3 Congress created with two distinct permitting regimes,  
4 one for fill material, one for other pollutants, and to  
5 override the agency's pronouncements, interpretations  
6 for more than 30 years.

7           And the other agency document I wanted to  
8 point to is very important. It's the 2004 mine tailings  
9 memorandum, which is contained at JA-141 to 146. In  
10 that memorandum, which is a 2004 memo by the heads of  
11 the EPA water divisions, they explain the application of  
12 the statutory and the regulatory scheme to these types  
13 of discharges, discharges that fill material into the  
14 impoundment is going to be subject to 404 and the  
15 rigorous process there. Any discharges out of that  
16 impoundment area is going to be subject to the rigorous  
17 requirements of 402 and that agency interpretation is  
18 entitled to deference.

19           CHIEF JUSTICE ROBERTS: Thank you, General.

20           GENERAL GARRE: Thank you, Your Honor.

21           CHIEF JUSTICE ROBERTS: Mr. Olson.

22           ORAL ARGUMENT OF THEODORE B. OLSON

23           ON BEHALF OF THE PETITIONERS

24           MR. OLSON: Mr. Chief Justice and may it  
25 please the Court: Let me reemphasize one point. The



1 Clean Water Act itself, Congress created two distinct,  
2 mutually exclusive but complementary permitting regimes.  
3 One is fill material, which is governed by, administered  
4 by the Corps of Engineers. The other is "other, except  
5 as permitted under section 404," administered by the  
6 EPA.

7 A discharge, in answer to your question,  
8 Justice Kennedy, may be governed by one program or the  
9 other, not both. Everybody admits that, including the  
10 Respondents.

11 The fill rule --

12 JUSTICE STEVENS: But doesn't the EPA have a  
13 veto power over the fill material permit?

14 MR. OLSON: Yes, it does, Justice Stevens.

15 JUSTICE STEVENS: So they're not totally  
16 mutually exclusive.

17 MR. OLSON: It's mutually exclusive in terms  
18 of the issuing agency, and I think that's a very  
19 important point. We want to emphasize that, that the  
20 rules pursuant to which the Corps of Engineers  
21 administers the fill permit are the 404(b)(1) rules  
22 which Congress specified to be enacted by the EPA. So  
23 the rigorous rules governing the quality of the water  
24 that's going to be affected by these fill permits are  
25 established by the EPA.

1                   Furthermore, the State is involved, the  
2   fisheries departments are involved, the conservation  
3   area of the State of Alaska. Many different agencies  
4   are involved in this permitting process. The permits in  
5   this case followed 900 studies, the expenditure of \$26  
6   million, an evaluation by the EPA, the Corps of  
7   Engineers, the department of conservation of Alaska,  
8   and, Justice Stevens' point, finally before the permit  
9   could be issued it had to go to the EPA and the EPA had  
10  the power to veto the permit.

11                   Now, Congress determined --

12                   CHIEF JUSTICE ROBERTS: Could they veto it  
13   due to its failure to comply with effluent limitations?

14                   MR. OLSON: No, they could not do that,  
15   Justice -- Chief Justice Roberts, because the --  
16   Congress made a choice under sections 404 and 402.  
17   Section 402, the EPA program, is governed by those  
18   effluent limitations under 301 and 306 and standards of  
19   performance.

20                   Congress made a choice of applying section  
21   307, which are toxic effluent limitations that apply to  
22   the 404 permits. That 307 regime which Congress  
23   selected, which is also endorsed by the EPA in the rules  
24   that the -- that the Corps must follow in administering  
25   the permit -- that 307 provision to which I just

1 referred to is in the 404(b)(1) regime rules. So all of  
2 this, the permitting process, which Congress made the  
3 decision to put into two baskets: Either it's fill  
4 material or it's except permits under --

5 JUSTICE KENNEDY: What happens if the  
6 agencies disagree as to whether it's fill? If 404 says  
7 it's fill, EPA says it isn't, can the EPA then veto it  
8 on that ground?

9 MR. OLSON: The -- the -- yes. I -- I think  
10 the answer to that is yes. But the better answer to  
11 that, Justice Kennedy, is for a while, as -- as General  
12 Garre pointed out, the EPA had a different concept of  
13 what was fill than the Corps of Engineers. The EPA  
14 right from the beginning said it would be the effect on  
15 the -- on the water.

16 The Corps for a while had that definition.  
17 Then it used a purpose test. Both agencies, the EPA and  
18 the Army Corps of Engineers, agreed in 2002 that that  
19 "purpose" definition of the word "fill" was not  
20 workable. It was too subjective.

21 JUSTICE KENNEDY: But there are still going  
22 to be cases, I would assume very close cases, even under  
23 the present standard, where there could be disagreement.

24 MR. OLSON: Well, there could be  
25 disagreement, but I was just about to say that this rule

1 was jointly adopted by the Corps of Engineers and the  
2 EPA in 2002. To the extent there is any ambiguity as to  
3 what fill material is, both the Army Corps of Engineers  
4 and the EPA agree that it includes slurry from mines.  
5 So that --

6 JUSTICE GINSBURG: The definition that was  
7 adopted, if I have it right, was the EPA definition.  
8 That was the effect. And it was the Corps that had the  
9 purpose test. And yet, until 2002, if I understand  
10 correctly, if the only reason of raising the elevation  
11 of the lake was to dispose of waste, you didn't get a  
12 404 permit. That was not a 404 situation until 2002.

13 MR. OLSON: That's -- that's -- except in  
14 the early stage, as I understand it, the Corps and --  
15 the Corps also used the "effects" test. Then there was  
16 a period of time when it used a "purpose" test. The EPA  
17 consistently used the -- the "effects" test. In --

18 JUSTICE GINSBURG: But in an application  
19 that never included filling a lake, raising the  
20 elevation of a lake simply for the purpose of disposing  
21 of waste.

22 MR. OLSON: That's -- that's -- until that  
23 point, that's correct, Justice Ginsburg. But the two  
24 agencies that were involved in this process determined  
25 that that was not a workable test. It didn't function

1 well. It allowed too much evasion and -- and  
2 manipulation, and they both came together after long  
3 studies and decided a reasonable interpretation that was  
4 effective, consistent, and workable.

5 Under the Clean Water Act, both agencies  
6 came together and decided that the definition included  
7 the placement of overburden, slurry, tailings, or  
8 similar mining-related materials.

9 Now, to the extent there is any ambiguity in  
10 the statute, this is the reasoned judgment, notice-and-  
11 comment rulemaking by the two agencies given  
12 responsibility.

13 JUSTICE BREYER: I -- I perhaps am missing  
14 this. I -- this is in general what I don't understand,  
15 how this works. My understanding is that under 404  
16 something is "fill" -- they have a definition. And it's  
17 "fill," among other things, if it changes the bottom  
18 level of any portion of water in the United States. Is  
19 that right?

20 MR. OLSON: That's correct.

21 JUSTICE BREYER: And somewhere I have the  
22 idea -- but I can't find it in the briefs now -- that it  
23 has to raise the bottom level by 55 feet.

24 MR. OLSON: No, I don't -- that does not --

25 JUSTICE BREYER: There is some number of

1 feet.

2 MR. OLSON: I don't know where you got that.  
3 That is the result in this case.

4 JUSTICE BREYER: That's the result of this  
5 case. But, anyway, it raises the level. I guess it has  
6 to raise it some significant amount. All right. So  
7 what happens in this situation?

8 Let us think of the worst pollutant you can  
9 think of. Think of that. I don't know what it is.  
10 Maybe it's saturated fat in potato chips, something  
11 absolutely terrible.

12 MR. OLSON: Cholesterol.

13 JUSTICE BREYER: All right. We are going to  
14 think of that pollutant. And now let's suppose that  
15 with the agreement of the Army Corps of Engineers a  
16 company takes this pollutant, which is the worst one you  
17 could think of, that the EPA would never let you go  
18 within 50 feet of it, and they take it, and they fill a  
19 lake with it up to the level of 55 feet, or 20 feet, or  
20 whatever number of feet.

21 I mean, it just can't be that simply because  
22 they poured a lot of it in and it fills up the bottom of  
23 the lake that suddenly the EPA can't regulate it any  
24 more. Now, that -- that -- since that's so  
25 counterintuitive, that all you have to do is take a

1     terrible pollutant and fill the bottom of the lake with  
2     it and now it's up to the Army Corps of Engineers and  
3     not up to the EPA -- that's so counterintuitive that I  
4     assume I don't understand the statute, and you will  
5     explain it to me.

6                 MR. OLSON:   Yes, I will, Justice Breyer.  If  
7     it's fill, the administering, permitting agency is the  
8     Army Corps of Engineers.

9                 JUSTICE BREYER:  Uh-huh.

10                MR. OLSON:  But in granting that permit, in  
11     evaluating that permit, they must follow the 404(b)(1)  
12     guidelines that were drafted and written by the EPA.  So  
13     that -- and EPA has all sorts of provisions.  It can't  
14     have an adverse effect on the water.  There cannot be a  
15     preferable environmental alternative.  It must go  
16     through the Marine Fisheries.  It cannot contain that  
17     toxic material that you are talking about, that worst  
18     material in the world.

19                JUSTICE SCALIA:  But it can contain it so  
20     long as it is -- as it -- as it is not transitory.

21                MR. OLSON:  No --

22                JUSTICE SCALIA:  I mean, isn't it arguable  
23     that the best place for -- for really toxic stuff is at  
24     the bottom of a lake so long as it stays there and is  
25     not carried --

1 MR. OLSON: That -- that may be, but the  
2 Rule 404(b)(1) guidelines address both that point, and I  
3 understand your point, too. But in -- on 11(a) of the  
4 Government's brief the -- the 404(b)(1) guidelines are  
5 set forth, and it includes a provision, number 2 on that  
6 page, "violates any applicable toxic effluent standard  
7 or prohibition under section 307 of the Act." So the  
8 water quality is going to be regulated according to EPA  
9 standards.

10 JUSTICE BREYER: It is identical. So it  
11 doesn't make any difference.

12 MR. OLSON: Pardon me?

13 JUSTICE BREYER: I -- I heard you say before  
14 that it was not identical. That -- I mean if, of  
15 course, EPA takes all its regs and applies those regs  
16 when the Army Corps of Engineers considers a permit  
17 under 404 so that you couldn't get an Army Corps of  
18 Engineers permit unless you complied with the 402  
19 etcetera regs, then this all could come to nothing.

20 MR. OLSON: Every -- every --

21 JUSTICE BREYER: So there must be something  
22 missing in that.

23 MR. OLSON: Yes, there is.

24 JUSTICE BREYER: What?

25 MR. OLSON: The difference that a regulation



1 --

2 JUSTICE BREYER: What is the most important  
3 thing that is missing?

4 MR. OLSON: The -- there is not -- it's --  
5 it's -- the most important thing that is present is that  
6 Congress decided that these regulations that the --  
7 "fill" is different stuff. It was for a different -- it  
8 had different consequences and should be regulated in a  
9 different way. The definition --

10 JUSTICE BREYER: I think what might be  
11 missing --

12 JUSTICE SCALIA: Is nontoxic covered by 402?

13 MR. OLSON: Pardon me?

14 JUSTICE SCALIA: Nontoxic is covered by 402.  
15 You -- you can violate the effluent guidelines by -- by  
16 pouring into the waters of the United States even  
17 nontoxic materials, isn't that right?

18 MR. OLSON: Yes, yes.

19 JUSTICE SCALIA: And under 404 it'S only  
20 toxic.

21 MR. OLSON: That's correct.

22 JUSTICE SCALIA: And that's the big  
23 difference.

24 MR. OLSON: And -- and -- and I'm going to  
25 reserve the balance, if I might, for rebuttal. But let

1 me just say "pollutant" includes sand and rock. And  
2 what's being put in this settling area, this lake, is  
3 the sand, which is the same consistency of the bottom of  
4 the lake. It's inert material. It does not changing  
5 the chemical composition. It is not hurting the water  
6 quality of the lake.

7 JUSTICE SOUTER: But it's going to kill  
8 every living creature in the lake, right?

9 MR. OLSON: Putting sand or rocks --

10 JUSTICE SOUTER: Wait a minute. It is going  
11 to kill everything in the lake.

12 MR. OLSON: Yes, it is, Justice Souter.  
13 Putting sand in the bottom of the lake is going to do  
14 that. They are going to reintroduce the fish. It will  
15 be a bigger lake with a better aquatic system when it's  
16 finished. But, yes, you are correct, in the interim the  
17 sand at the bottom of the lake will kill those fish.

18 JUSTICE GINSBURG: And how do we know that  
19 life will ever be restored? I mean, that's a guess.  
20 Nobody knows.

21 MR. OLSON: It's a -- it's a condition for  
22 the permit, and every agency which examined this,  
23 including the Fisheries Department, the -- the  
24 conservation agencies of the State of Alaska -- and  
25 specifically said in the administrative record that

1 under the worst-case scenario they believe that all of  
2 that is going to take place, and there will be more fish  
3 in a bigger lake and more livable living conditions for  
4 the fish and aquatic life after this process is  
5 finished.

6 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
7 Olson.

8 Mr. Waldo.

9 ORAL ARGUMENT OF THOMAS S. WALDO  
10 ON BEHALF OF THE RESPONDENTS

11 MR. WALDO: Mr. Chief Justice, and may it  
12 please the Court:

13 In section 306(e), Congress enacted an  
14 unqualified prohibition against operating any new source  
15 in violation of any standard of performance applicable  
16 to the source. The standard of performance at issue in  
17 this case is applicable on its face to the formula at  
18 the Kensington mine. It says there shall be no  
19 discharge of processed wastewater into navigable waters  
20 from mills that use the froth-flotation process.

21 CHIEF JUSTICE ROBERTS: Of course, the  
22 provision that authorizes permits begins by saying  
23 "Except as provided in sections 1328 and 1344," and 1344  
24 is 404. So why doesn't that just take the 404 regime  
25 completely out of what you were just talking about?

1                   MR. WALDO: Because that's only a statement  
2 about whether section 402 applies. It means that if you  
3 have a section 404 permit, you don't also need a section  
4 402 permit. It doesn't say anything about whether a 404  
5 permit is appropriate under any particular  
6 circumstances, and it doesn't say anything about whether  
7 section 306 is applicable. In fact --

8                   JUSTICE ALITO: The standard has to be --  
9 the standard has to be applicable and this is an EPA  
10 regulation, isn't it?

11                  MR. WALDO: Yes.

12                  JUSTICE ALITO: And the EPA has said this  
13 isn't applicable to this situation.

14                  MR. WALDO: But that determination was based  
15 on a misinterpretation of the Clean Water Act. That  
16 prefatory clause that the Chief Justice was asking about  
17 doesn't say anything about whether section 306 applies.  
18 306 does not have a prefatory clause like that, which  
19 strongly suggests that it's not intended to apply there.  
20 In other --

21                  JUSTICE ALITO: So your position requires us  
22 to determine that EPA's interpretation of those, the  
23 statutory regime that you are talking about, 306 and  
24 402, is contrary to the statute?

25                  MR. WALDO: That the interpretation as it's

1 presented in this case is contrary to the statute.

2 JUSTICE SCALIA: If EPA were to amend the  
3 performance standard to say that it doesn't apply in the  
4 situation in which the fill rule applies, would that be  
5 a valid regulation?

6 MR. WALDO: Well, I doubt that EPA could --  
7 could lawfully under the Clean Water Act enact such a  
8 thing, because the Clean Water Act requires EPA to  
9 regulate suspended solids and EPA has always regulated  
10 suspended solids through effluent limitations.

11 JUSTICE SCALIA: Could the -- could the EPA  
12 allow a point source to discharge sand slurry -- there's  
13 nothing in it but sand -- into a river? Wouldn't you  
14 have to -- wouldn't you need some permission from the  
15 EPA to do that? Wouldn't that violate the Act?

16 MR. WALDO: If it -- I'm sorry, so it --

17 JUSTICE SCALIA: I want to discharge. I  
18 have a pipe and there is sand on my land which is being  
19 washed away. I'm discharging all that sand into a  
20 river.

21 MR. WALDO: Yes --

22 JUSTICE SCALIA: Would that violate --

23 MR. WALDO: That's a discharge of a  
24 pollutant, that's correct.

25 JUSTICE SCALIA: Discharge of a pollutant.

1 MR. WALDO: Yes. And so --

2 JUSTICE SCALIA: Now, if I do the same thing  
3 in a lake, because I want to fill the lake, of what  
4 possible application is the fill standard unless it  
5 permits what would otherwise be prohibited under --  
6 under the earlier sections?

7 MR. WALDO: Well, the Corps of Engineers has  
8 the authority under section 404 to grant fill material  
9 permits --

10 JUSTICE SCALIA: Even though it violates  
11 effluent standards.

12 MR. WALDO: No, not when it violates  
13 effluent standards.

14 JUSTICE SCALIA: But you say -- you say that  
15 if you discharge sand into -- into a river it violates  
16 effluent standards.

17 MR. WALDO: Oh, that doesn't -- oh, I'm  
18 sorry. I didn't understand that part of your question.  
19 Yes, if -- if there is an effluent limitation for a  
20 particular source -- remember, effluent limitations are  
21 adopted for industrial sources, so you would have to  
22 look at what the source of that discharge was.

23 And if EPA had identified that source, a  
24 particular kind of factory of some kind, a mill, you  
25 know, a leather tanning facility or something like that,

1 if EPA had adopted effluent limitations that were  
2 applicable to that source, then discharges have to  
3 comply with those effluent limitations.

4 It's important to realize here that the  
5 Clean Water Act, contrary to the way the Petitioners try  
6 to present it, is not just one big permitting statute.  
7 It's not simply 402 and 404 and that determines  
8 everything. The effluent limitations under sections 301  
9 and 306 have independent applicability directly to  
10 discharges. They are separately enforceable by EPA and  
11 through citizens.

12 CHIEF JUSTICE ROBERTS: The discharges we  
13 are talking about have to be discharges of effluent,  
14 right?

15 MR. WALDO: Something that is governed by an  
16 effluent limitation, yes.

17 CHIEF JUSTICE ROBERTS: My question is, does  
18 it apply to solids?

19 MR. WALDO: Absolutely. EPA is required in  
20 the Clean Water Act to regulate suspended solids through  
21 effluent limitations.

22 CHIEF JUSTICE ROBERTS: Well, I guess, I  
23 mean, does suspended solids mean there is some liquid  
24 involved?

25 MR. WALDO: That implies some liquid, right;

1     that -- that the solids are present in the liquid, like  
2     the discharge here.

3                 CHIEF JUSTICE ROBERTS:   Like the discharge  
4     here.   Now, I think Mr. Olson said these are 55 percent  
5     solid by volume.

6                 MR. WALDO:   By weight.   By volume it is 30  
7     percent solids.

8                 CHIEF JUSTICE ROBERTS:   Is there a point at  
9     which it's proper to speak of it as a solid rather than  
10    a suspended solid?   I mean, 90 percent by weight or by  
11    volume, whichever it is, solid?

12                MR. WALDO:   Well, the standard in this case  
13    prohibits a discharge of processed wastewater.

14                CHIEF JUSTICE ROBERTS:   Right.

15                MR. WALDO:   And so, it --

16                CHIEF JUSTICE ROBERTS:   You wouldn't think  
17    something that's 90 percent solid is wastewater?

18                MR. WALDO:   There might be some point at  
19    which the liquid content of a solid waste is so small  
20    that EPA wouldn't regard it as processed wastewater  
21    anymore.   But that's not the case here.   In this case,  
22    there is no dispute that the discharge is processed  
23    wastewater.   The government has conceded that point.

24                And -- and it's extremely important, because  
25    EPA is required to, as I said, regulate suspended solids



1 through effluent limitations and to adopt a zero --

2 CHIEF JUSTICE ROBERTS: So if they were just  
3 putting whatever it is that doesn't have any water,  
4 concrete, into this lake, then you agree that it would  
5 be just the Corps of Engineers through the fill -- fill  
6 provisions that would govern that?

7 MR. WALDO: As long as there is no effluent  
8 limitation governing it, yes.

9 CHIEF JUSTICE ROBERTS: And so, if they chop  
10 up the concrete and put a little water in so that it's  
11 easier to move, then all of a sudden it comes under 402  
12 and the EPA's jurisdiction?

13 MR. WALDO: It depends on if EPA has adopted  
14 an effluent limitation for it. So if that waste stream  
15 that you are describing comes from some kind of factory,  
16 concrete -- for example, cement manufacturing is a  
17 source category that EPA --

18 CHIEF JUSTICE ROBERTS: I guess I'm just  
19 curious how that makes any sense, since we are talking  
20 about putting something into water. I mean, does it  
21 really matter whether you add the water before it goes  
22 into the lake or just the lake adds the water when you  
23 put in the solid?

24 MR. WALDO: EPA --

25 CHIEF JUSTICE ROBERT: Either way, I guess

1 your friends on the other side would argue, I assume,  
2 that it's properly regarded as fill material, because  
3 that is the effect of it, rather than as effluent  
4 subject to 402.

5 MR. WALDO: EPA has always regulated  
6 industrial sources that -- whose raw processed  
7 wastewater contains high levels of suspended solids,  
8 high enough that it would have the effect of fill  
9 material and can be considered fill. In fact -- and, in  
10 fact, EPA has always had a definition of fill material  
11 that was based on the effects.

12 So for more than 30 years, EPA has been  
13 regulating sources like ore processing mills, cement  
14 manufacturing plants, aluminum smelters, coal-fired  
15 power plants, all of which and many more require the use  
16 of settling ponds to remove the solids.

17 JUSTICE KENNEDY: So do we decide -- we  
18 decide this case on the assumption that this is fill?  
19 Do you agree that this is fill?

20 MR. WALDO: It's both. It's fill material  
21 and it's processed wastewater that is subject to an  
22 effluent limitation.

23 JUSTICE KENNEDY: Well, then the question  
24 that we've put earlier is whether or not a single pipe  
25 contained both, and you say that it can contain both.

1                   MR. WALDO: Well, it's -- it's one slurry.  
2     It meets both definitions. The solids are part of the  
3     processed wastewater.

4                   JUSTICE KENNEDY: It's one -- visibly, it's  
5     one stream, but you say it consists of two things.

6                   MR. WALDO: Well, it is -- it is a slurry  
7     that contains water, chemicals --

8                   JUSTICE KENNEDY: Is it both slurry -- is it  
9     both fill and non-fill?

10                  MR. WALDO: It's -- it's fill and it's  
11     processed wastewater.

12                  JUSTICE ALITO: Well, if it's both -- do you  
13     agree that there can be only one permit; there can't be  
14     a 402 and a 404 permit?

15                  MR. WALDO: No. In this case there can't be  
16     any permit because there is a new source performance  
17     standard that prohibits --

18                  JUSTICE ALITO: All right. So, let's change  
19     that. What if the -- what if the new source performance  
20     standard was not a total prohibition? What if there was  
21     an effluent limitation in there, so that a permit could  
22     be issued, provided that there was compliance with the  
23     effluent limitation? Now, who issues the permit? And I  
24     repeat, I understand it's your position that there can't  
25     be both a 402 and a 404 permit.

1                   MR. WALDO: If there is an effluent  
2   limitation applicable, it will end up having to be EPA  
3   that issues the permit, and that's -- that's simply  
4   because the Corps of Engineers just doesn't have the  
5   tools available to apply effluent limitations in its 404  
6   permits, except for toxic substances.

7                   JUSTICE ALITO: Where do you find that in  
8   the statute?

9                   MR. WALDO: Well --

10                  JUSTICE ALITO: Where there's a situation  
11   where possibly there could be a 402 and a 404 permit,  
12   the 402 permit trumps the 404 permit?

13                  MR. WALDO: Well, it's just that -- where we  
14   find that is in section 306(e), which says -- which is a  
15   prohibition against offering -- operating sources in  
16   violation of performance standards. And here --

17                  JUSTICE ALITO: This wouldn't be an  
18   operation in violation of a performance standard. There  
19   would be a performance standard.

20                  MR. WALDO: The performance standard that  
21   says --

22                  JUSTICE ALITO: That can be put into a 402  
23   permit.

24                  MR. WALDO: Oh, I see what you are saying.  
25   Yeah. Well, even -- the -- what the problem is is that

1 section 404 doesn't make any provision for application  
2 of effluent limitations and performance standards under  
3 sections 301 and 306.

4 JUSTICE ALITO: And 402 doesn't make any  
5 application for -- for the 404 regulations.

6 MR. WALDO: Yeah, that's correct. But it  
7 does provide the tool for EPA to apply those effluent  
8 limitations that you were asking about. The effluent  
9 limitations have to be complied with, and EPA is the  
10 agency under section --

11 JUSTICE ALITO: Where does it make the --  
12 where does it make provision for application of the  
13 standards that should apply to fill under 404?

14 MR. WALDO: Well, those standards apply if  
15 you have fill material that is not subject to some  
16 effluent limitation. Effluent limitations are only  
17 adopted for industrial sources --

18 JUSTICE ALITO: Where does the statute say  
19 that?

20 MR. WALDO: Where does it say -- I'm sorry.  
21 Could you clarify the question?

22 JUSTICE ALITO: Where does it say that? You  
23 say that there can't be two permits and you say 402  
24 trumps 404. And I'm asking where in the statute does it  
25 say that?

1                   MR. WALDO: It is an absence of a provision  
2 in 404, but -- but the thing is, even if 404 has -- even  
3 if the Corps of Engineers -- and I should say, we agree  
4 with the Government and with the agencies about this.  
5 The agencies have never interpreted section 404 to  
6 provide for the application of effluent limitations in  
7 404 permits. The 404(b) guidelines don't provide for  
8 it; it's not provided in the statute. And so, they just  
9 don't have the ability to do it.

10                   The problem is, they try to carry that a  
11 step farther and take that absence of provision to say  
12 that it's an exception from effluent limitations, to say  
13 that they don't have to comply with section 301 and 306,  
14 but it doesn't say that; and that's an implied  
15 exception, and the Court should only find an implied  
16 exception if it's necessary to avoid absurd results.

17                   JUSTICE BREYER: Could you go --

18                   MR. WALDO: No one --

19                   JUSTICE BREYER: Excuse me. Could you go  
20 back for a second to my discussion with Mr. Olson? I'm  
21 thinking of it in very simplified terms. The simplified  
22 terms is, I think of a pipe and I think of a  
23 circumstance where some terrible pollutant comes out of  
24 the pipe that would be subject to 306; and if the pipe  
25 goes up in a river or a lake, a regular lake, it could

1 fill up the bottom. Seems possible.

2 MR. WALDO: Yes.

3 JUSTICE BREYER: All right. So if it fills  
4 up the bottom, it's called fill and comes under 404.

5 MR. WALDO: It doesn't even have to fill it  
6 up very much --

7 JUSTICE BREYER: Yes, I know, I know that.  
8 I see the point. But I mean, it seems to me if it fills  
9 up to the bottom to whatever point, it's fill, and now  
10 it's the Army Corps of Engineers. If it has effluent in  
11 it, it's effluent and so now it's under EPA. In other  
12 words, you have both.

13 MR. WALDO: That's the situation.

14 JUSTICE BREYER: It's only been going on for  
15 40 years. I'm sure this isn't the first time they've  
16 had both.

17 MR. WALDO: That's exactly right.

18 JUSTICE BREYER: And -- and so I don't  
19 understand. What I would think of is if you have two  
20 sets of standards and it's both, they should satisfy  
21 both. I'm not writing these statutes.

22 MR. WALDO: Well, let me -- I think --

23 JUSTICE BREYER: Now, I heard from -- and I  
24 might interpret Mr. Olson -- he may not have really said  
25 this, but the way I heard it was: Well, don't worry,

1 because if it's fill and you get it over to the Corps of  
2 Engineers, they are going to apply the effluent standard  
3 anyway. And now you are sort of saying: Well, or they  
4 are going to apply some standard. And then there was a  
5 question of well, what standard, and we got a little  
6 vague there.

7 Now, what happens if it goes to the EPA as  
8 effluent? Justice Alito's question is, well, do they  
9 apply the fill standard? And between my response to  
10 these two answers, I still don't understand how it  
11 works. It's -- help me.

12 MR. WALDO: The Corps of Engineers only  
13 applies toxic effluent limitations. There are other  
14 pollutants that are nontoxic --

15 JUSTICE BREYER: Okay. So now, if you lose  
16 this case, what we are going to have is all the fish are  
17 going to be killed by some horrible pollutant, and the  
18 -- the Army Corps of Engineers can't do anything about  
19 it, and the only reason is we put enough of the  
20 pollutant in there to fill it up to ten feet from the  
21 bottom. And then if you did it the other way, if the  
22 EPA regulated it, it might do something terrible under  
23 404, and they couldn't do anything about it.

24 Now it's very hard for me to believe that  
25 that's really how these agencies have been operating for



1 40 years.

2 MR. WALDO: Well, that's not; and let me  
3 explain how they have been operating, because I think  
4 that will help clarify it. For 40 years EPA has  
5 regulated sources like ore processing mills, aluminum  
6 smelters, others that I have named, others that are  
7 listed in our brief, and has applied effluent  
8 limitations to those discharges. Now, you hear --

9 CHIEF JUSTICE ROBERTS: Even when they --  
10 even fill -- even when they fill a lake?

11 MR. WALDO: Yes, absolutely -- and let me  
12 explain that, because you hear this statement a lot:  
13 "EPA never regulates fill material." Well, that's  
14 because when you apply the effluent limitations, it's  
15 not fill material anymore.

16 The effluent limitations require the use of  
17 settling ponds that are not in navigable waters. The  
18 settling ponds or other technologies remove almost all  
19 of the solids so that the discharge that is permitted by  
20 EPA in the section 402 permit might have a limitation of  
21 20 or 30 milligrams per liter, something that wouldn't  
22 have a measurable filling effect on the receiving water  
23 body.

24 CHIEF JUSTICE ROBERTS: So when EPA  
25 regulates has regulated these for 40 years, which I

1     assume is up until 2002, then it's -- it's because they  
2     don't go into lakes; it's because they go into settling  
3     ponds?

4                     MR. WALDO:   Settling ponds.

5                     CHIEF JUSTICE ROBERTS:   Which are not  
6     navigable waters of the United States.

7                     MR. WALDO:   Exactly.

8                     CHIEF JUSTICE ROBERTS:   So the new  
9     regulation says the EPA does not regulate it when it  
10    goes into -- I can understand why the Army Corps of  
11    Engineers doesn't care if it's an impoundment pond or a  
12    settling pond, but they do care when it's a lake.

13                    MR. WALDO:   When they adopted the new  
14    regulation, they were very clear that they intended to  
15    continue their past practice.   The agencies never stated  
16    an intent to repeal or modify or change the  
17    applicability of any effluent limitations, and in fact  
18    this question came up repeatedly:   What happens if it's  
19    fill material but it's subject to an effluent  
20    limitation; and every time they addressed it, they said  
21    the same thing.   Effluent limitations will continue to  
22    apply and will be applied through section 402 permits.

23                    CHIEF JUSTICE ROBERTS:   To fill material as  
24    defined in the 2002 regulation?

25                    MR. WALDO:   That's what it's all about, yes.

1 That's what they were talking about. That was addressed  
2 over and over again in the -- in the Fill Rule, and they  
3 never --

4 CHIEF JUSTICE ROBERTS: Which, which, which  
5 -- I'm sorry, which Fill Rule?

6 MR. WALDO: The -- I'm talking about the  
7 Federal Register preamble and the --

8 CHIEF JUSTICE ROBERTS: Yes. You are  
9 talking about the preamble. I'm looking at the  
10 definition of fill material in -- whatever -- it's  
11 reproduced at page 7a and 8a of the government's brief.

12 MR. WALDO: Right.

13 CHIEF JUSTICE ROBERTS: The -- definition --

14 MR. WALDO: The definition of fill material  
15 is simply a definition. By itself it doesn't have any  
16 operative effect. It doesn't -- it doesn't authorize  
17 any particular kinds of discharges.

18 JUSTICE SCALIA: Yes, but -- but do you have  
19 a -- a case over these 40 years where a company was  
20 trying to use the emission from the mine as a fill  
21 material in a lake rather than in a settling pond, and  
22 where the EPA, despite the fact that it was using it to  
23 fill a lake, applied its effluent standards?

24 MR. WALDO: No, it's been permitted --  
25 prohibited.

1 JUSTICE SCALIA: Well, then --

2 MR. WALDO: It's been prohibited. It's  
3 illegal for EPA to permit the discharge of the processed  
4 wastewater --

5 JUSTICE SCALIA: Evidently not. I mean, the  
6 EPA says not. Do you have a -- an instance where it was  
7 prohibited where a company wanted to -- to emit fill  
8 material into a lake and the EPA said no, you can't do  
9 it, because of the effluent limitations?

10 MR. WALDO: Well, if any -- I don't know if  
11 anyone ever asked to do that, but if they did the answer  
12 would have been no. I can't come up with an answer  
13 because that's what the effluent limitations require.

14 JUSTICE SCALIA: But your -- your 40 years  
15 of experience then really don't -- don't cover this  
16 case. People have been putting it into settling ponds.

17 Let me ask you another question. The other  
18 side says that the alternative to this would be even  
19 worse, or it sounds worse to me, anyway. What -- what  
20 is your solution, closing down the mine? Is there --

21 MR. WALDO: No, no, no. We -- we agree with  
22 EPA on this point. There is a different of opinion  
23 between EPA and Corps of Engineers as to which was the  
24 preferred site. EPA preferred the dry land disposal  
25 site, and -- and we agree that has much less adverse

1     affect on the ecosystem.

2                   JUSTICE GINSBURG:   -- your description of  
3     that effect?  The other solution we were told would  
4     involve filling in a vast expanse of wetlands and then  
5     having these huge piles that could be seen by all the  
6     tourist boats.

7                   MR. WALDO:  Yes, it has -- it does have  
8     adverse impacts, that is, some; but in EPA's view and in  
9     our view is not as bad as filling up a lake and killing  
10    all the fish and aquatic life in the lake.

11                  CHIEF JUSTICE ROBERTS:  All the fish, there  
12    are a thousand fish in this lake, right?

13                  MR. WALDO:  Yes.  Right.

14                  CHIEF JUSTICE ROBERTS:  And those aren't  
15    endangered fish; there are millions of them somewhere  
16    else, right?

17                  MR. WALDO:  That's right.  But it's -- it's  
18    also an important point for us here that this is a  
19    national rule, and EPA considered these kind of  
20    alternative land use requirements as an effect of its  
21    no-discharge rule.  When the -- EPA specifically  
22    addressed the fact that if you prohibit discharges of  
23    processed wastewater into navigable waters, it's going  
24    to require using more land to dispose of all that solid  
25    waste somewhere, and they determined that the benefits

1 of keeping processed wastewater out of the navigable  
2 waters was worth it. And so it's both site-specifically  
3 preferable, and it's a determination that was based  
4 on --

5 JUSTICE ALITO: Wasn't there a decision in  
6 the lower courts that the alternative was unacceptable  
7 as well? And would you represent that if the case were  
8 remanded, that would not be your position on remand?

9 MR. WALDO: Oh, we've already taken that  
10 position, yes. We've been working -- we -- we were  
11 working with the mining company after the Ninth Circuit  
12 decision to identify --

13 JUSTICE ALITO: It was never your position  
14 that that was unacceptable?

15 MR. WALDO: I'm sorry?

16 JUSTICE ALITO: It was never your client's  
17 position that creating these permanently destroyed  
18 wetlands and creating a mound that was bigger than the  
19 Pentagon was an unacceptable solution to the --

20 MR. WALDO: I don't want to make any  
21 representations about what a client may have said over  
22 the last 20 years of this mine, but I can tell you that  
23 we were working with the agencies and with Coeur to  
24 identify an alternative site they -- or the Coeur  
25 applied for the permits to do that, and pursuant to this

1 mediation we were having and then abruptly pulled out a  
2 few weeks ago.

3 JUSTICE SCALIA: Why do you said the EPA  
4 preferred the -- the solution of filling in the wetlands  
5 and creating an ash Pentagon?

6 MR. WALDO: When -- when the Corps of  
7 Engineers proposed the draft 404 permit, EPA commented  
8 on it and said, we disagree with your conclusion that  
9 filling up the lake is the least environmentally  
10 dangerous.

11 JUSTICE SCALIA: Well, if it really felt  
12 that way, couldn't it simply have vetoed the permit?

13 MR. WALDO: Yes, EPA can veto --

14 JUSTICE SCALIA: So it couldn't have felt  
15 very strongly about it.

16 MR. WALDO: Well, EPA -- the veto authority  
17 is a discretionary authority.

18 JUSTICE SCALIA: Right.

19 MR. WALDO: It's for unacceptable adverse  
20 consequences. And for understandable reasons, EPA very  
21 rarely exercises that authority. But EPA never changed  
22 its position about whether the -- about which was the  
23 preferred alternative. The EPA --

24 JUSTICE SCALIA: It couldn't have preferred  
25 it very much, or it would have vetoed this one.

1 MR. WALDO: It -- apparently not enough to  
2 come to the conclusion that it was one of those  
3 situations where they wanted to veto based on  
4 unacceptable adverse consequences.

5 CHIEF JUSTICE ROBERTS: Is there any aquatic  
6 life in this lake other than a thousand fish?

7 MR. WALDO: Well, sure. There's  
8 microinvertebrae and --

9 CHIEF JUSTICE ROBERTS: Microinvertebrae?

10 MR. WALDO: I mean, all sorts of the things  
11 that fish feed on. Plant life and animal life, and all  
12 that stuff.

13 JUSTICE SCALIA: Plankton and stuff.

14 MR. WALDO: Yes. Whatever. I'm not an  
15 expert on the ecology of this lake, but there is a  
16 couple of different kinds of fish and other life that  
17 make it possible for those fish to live there, and  
18 essentially --

19 JUSTICE BREYER: Is it right --

20 MR. WALDO: -- it would all be destroyed.

21 JUSTICE BREYER: Is it right -- now, I am  
22 back on my hobby horse -- but is it right that this  
23 slurry is pushing into this lake 50 feet or 75 feet  
24 covering the bottom with some stuff? A lot of it's  
25 dirt, and some of it's the worst chemical ever, except



1 it's not toxic? Okay. I guess cyanide isn't toxic.

2 But the -- the -- now I just heard that if  
3 the EPA doesn't give the permit, but the Corps of  
4 Engineers does, the EPA has the power to veto the  
5 permit. Is that right?

6 MR. WALDO: EPA can veto for unacceptable  
7 adverse consequences. It's not a way to enforce  
8 effluent limitations.

9 JUSTICE BREYER: Why not? If they have a  
10 veto power --

11 MR. WALDO: Because that's all 404(c) says.

12 JUSTICE BREYER: I know it comes under a  
13 different statute, but in any instance where in fact  
14 they see that some of their rules that they promulgate  
15 are being violated and they think the Corps of Engineers  
16 is not paying attention to those rules, they can veto  
17 it.

18 MR. WALDO: Well, but then --

19 JUSTICE BREYER: If they don't veto it, then  
20 that would be a way of reconciling these two things.

21 MR. WALDO: The -- the position that EPA has  
22 taken in this case, unfortunately, is that, if the  
23 discharge meets that definition of fill material, no  
24 matter how bad the consequences are for water quality,  
25 it's fill material, and it's therefore exempt from

1 effluent limitations --

2 JUSTICE BREYER: So couldn't they veto it?

3 MR. WALDO: Only if it was for adverse --

4 well, if they found adverse -- unacceptable adverse

5 consequences --

6 JUSTICE BREYER: And wouldn't an

7 unacceptable adverse consequence be that it puts all

8 this effluent into the water?

9 MR. WALDO: It's a different standard from  
10 whether it violates an effluent limitation. That's all  
11 I'm saying.

12 And I want to be clear that the effluent in  
13 this case, although it doesn't necessarily violate any  
14 toxic pollutant effluent, it is toxic. It's toxic with  
15 conventional pollutants. It has a pH of 10, which is  
16 toxic to aquatic life. It's very high. It's about the  
17 pH of ammonia, is what this slurry effluent is that's  
18 being discharged in this case. And the --

19 JUSTICE ALITO: Isn't that the pH at the  
20 point where it's discharged, and not the general pH in  
21 the lake?

22 MR. WALDO: It will dilute in the lake.  
23 They are using the lake as their diluting settling pond.  
24 That's right. They're using a navigable water body --

25 JUSTICE ALITO: What's the answer to the

1 question, when -- once it's released into the lake,  
2 what's the pH of the lake as opposed to the --

3 MR. WALDO: Oh, it will dilute in the lake,  
4 so it will revert to normal levels, but --

5 JUSTICE ALITO: Within how long?

6 MR. WALDO: Oh, I mean, that happens, you  
7 know, in a -- some sort of a mixing zone just outside  
8 the pipe. That happens pretty quickly.

9 Now, for the lake to recover --

10 JUSTICE ALITO: The pH that you just cited  
11 was the pH --

12 MR. WALDO: Of the slurry.

13 JUSTICE ALITO: -- just at the point of the  
14 discharge?

15 MR. WALDO: Of the slurry. That's right.  
16 And -- now I want to talk about this allegation that  
17 it's like dumping wet sand in the lake. That's not true  
18 at all. They tested the tailings sediment from this  
19 discharge with two organisms, and with one of them, it  
20 killed 95 percent of the organisms in the test, which is  
21 way over the top for EPA's toxicity threshold. In the  
22 other organism they had, it -- the organism survived,  
23 but their reproduction rate was significantly reduced,  
24 also meeting the toxicity test standards that EPA  
25 establishes. So this --

1 CHIEF JUSTICE ROBERTS: Just to follow up,  
2 that's the same point, though, that Justice Alito made:  
3 You're testing that right as it comes out, not as it's  
4 diluted in the lake.

5 MR. WALDO: No. No, Your Honor, that's not  
6 right. That's what the solids -- that's the affect of  
7 the solids, and that's why, as a result of that, they  
8 established this rule that --

9 CHIEF JUSTICE ROBERTS: I'm sorry, I didn't  
10 understand you. I thought you said that the toxicity in  
11 the slurry was tested and killed 99 or whatever percent  
12 of these invertebrates.

13 MR. WALDO: They took that slurry, they let  
14 the solids settle down in the bottom, and then they  
15 tested the solids for what effect it would have on some  
16 fresh water organisms, because they were trying to  
17 determine whether the lake would be able to recover from  
18 depositing all these solids into the lake. And they  
19 found that it had a very high toxicity level. And so  
20 what they did to try to remedy that was require  
21 depositing native vegetation on the top of all of that,  
22 after the mine closes. And they are hoping that that  
23 will have the effect of letting the lake recover. But  
24 EPA concluded that it will take decades, if ever, before  
25 the lake can recover from that.

1                   So this is not some benign wet-sand kind of  
2   discharge. It's a toxic slurry with a high pH level and  
3   with effects that are going to last for decades. And if  
4   EPA -- if section 404 is interpreted to allow these  
5   kinds of discharges to be emitted exempt from effluent  
6   limitations, it eviscerates key requirements of the  
7   Clean Water Act. EPA is required to regulate sources of  
8   this type through effluent limitations. EPA is required  
9   to regulate the suspended solids through effluent  
10  limitations from industrial sources like this. So --

11                  JUSTICE BREYER: If, in fact, you have this  
12  mix, and it satisfies -- it goes to an effluent part and  
13  a fill part, in your view, what -- if the statute says  
14  both agencies regulate, they have to meet both, one or  
15  the other? How does it work?

16                  MR. WALDO: If there's an effluent  
17  limitation, the effluent -- there's a performance  
18  standard under section 306. The performance standard  
19  must be complied with under section 306(e). And the  
20  only way --

21                  JUSTICE KENNEDY: You say this is 404; it's  
22  not 402 --

23                  MR. WALDO: No.

24                  JUSTICE KENNEDY: It is 306?

25                  MR. WALDO: 404 is not appropriate here

1 because there is an effluent limitation. With fill  
2 material --

3 JUSTICE KENNEDY: But it is fill.

4 MR. WALDO: It's fill material, but it's not  
5 fill material that is available for a section 404  
6 permit. And EPA has always regulated discharges from  
7 sources like this, that meet that definition of fill  
8 material. EPA has had an effects-based definition of  
9 fill material since virtually the beginning of the Clean  
10 Water Act.

11 JUSTICE BREYER: So fill material is only  
12 that material as to which no effluent standard applies?

13 MR. WALDO: No, it's fill material. In this  
14 case, it's fill material, but this fill material is not  
15 eligible for a 404 permit.

16 JUSTICE BREYER: 404 material is material  
17 such that it is fill material and there is no effluent  
18 standard applicable?

19 MR. WALDO: Yes, that's correct. And --

20 JUSTICE ALITO: So, it's 95 percent solid,  
21 but there's an effluent limitation, and your position is  
22 that there can't be a 404 permit; it has to be a 402  
23 permit?

24 MR. WALDO: If it's covered -- if that  
25 discharge is covered by an effluent limitation, yes,

1 that's correct. And I want to be clear about this  
2 point, that EPA -- well, I guess my time is up.

3 CHIEF JUSTICE ROBERTS: Go ahead. Finish  
4 your thought.

5 MR. WALDO: Okay. EPA amended its  
6 regulations in 1979 specifically to recognize the fact  
7 that some discharges of fill material are not eligible  
8 for section 404 permits and require NPDES permits. At  
9 that time, the regulations said you don't need an NPDES  
10 permit if it's fill material. EPA amended that  
11 regulation to say you don't need an NPDES permit if it's  
12 fill material and it's subject to section 404 of the  
13 Clean Water Act. And the purpose of that --

14 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
15 Waldo.

16 MR. WALDO: Thank you.

17 CHIEF JUSTICE ROBERTS: Mr. Olson, you have  
18 three minutes remaining.

19 REBUTTAL ARGUMENT OF THEODORE B. OLSON  
20 ON BEHALF OF THE PETITIONERS

21 MR. OLSON: What the Respondents would wish  
22 to do is to have this Court disagree with the agencies'  
23 interpretation of the statutes which they administer,  
24 their consistent interpretations of those statutes, and  
25 the factual findings that a whole slew of agencies made

1 with respect to the subject matter of these permits.

2 The preamble of the 202 -- the 2002 fill  
3 regulations specifically says -- this is 31,135 of  
4 Federal Register Volume 67 -- EPA has never sought to  
5 regulate fill material under effluent guidelines.  
6 Never.

7 There was an agreement, a memorandum of  
8 agreement between EPA and the Corps of Engineers in  
9 1986. It is cited at the United States Government brief  
10 at page 27. The EPA and the Corps agree -- and this is  
11 in response to your question, Justice Breyer, and I  
12 think something Justice Kennedy said and something  
13 Justice Souter said with respect to what if there are  
14 two things in the stream going into the water. Fill  
15 material remains subject to 404 permitting even if they  
16 occur in association with discharges meeting 402  
17 criteria. That's the answer to that question. And the  
18 -- and the EPA --

19 JUSTICE KENNEDY: But I thought -- I thought  
20 your brother would say: But that does not respond to  
21 306 effluent.

22 MR. OLSON: 306 provisions in the statute  
23 are not made applicable to 404 permitting, and the  
24 consistent regulatory history from 1973 -- and it's all  
25 set out on page 27, or summarized on page 27 of the



1 government's brief -- are that 301 and 306 are not  
2 applicable under the 404 process.

3           And if there was any doubt at all, there is  
4 a -- the so-called mine tailings memorandum at pages 141  
5 through 145 of the joint appendix in which three top  
6 officials of the EPA construe what they call the rules,  
7 the regulations, and the statute. This is both  
8 agencies. Under the plain regulation language of the  
9 rule -- this is page 145a -- under the plain language of  
10 the rule and the agency's interpretation of the  
11 regulation in its preamble, the mine tailings that are  
12 to be placed into an impoundment are covered by 404.  
13 And it specifically addresses this --

14           JUSTICE SOUTER: Why does that mean anything  
15 more than you've got to get a 404 permit without  
16 addressing the question whether you can get a 404 permit  
17 if it has, in effect, the -- the -- if it has the  
18 effects which are supposed to be regulated by the  
19 effluent limitations?

20           MR. OLSON: That precise question,  
21 Justice Souter, is addressed on pages 143, 144, and 145  
22 of this memorandum from top officials of the EPA,  
23 applicable to this particular mine and these particular  
24 discharges --

25           JUSTICE SOUTER: Where is -- where is that

1 in the appendix?

2 MR. OLSON: That's on pages 141 through 145a  
3 of the joint appendix.

4 JUSTICE STEVENS: But as I read that  
5 sentence, Mr. Olson, it says they are subject to both  
6 permitting.

7 MR. OLSON: No, it doesn't. It says -- with  
8 due respect, Justice Stevens, it says on the bottom of  
9 page 144: "As a result, the regulatory regime  
10 applicable to the discharges under section 402," and so  
11 forth. What -- I think one thing that --

12 JUSTICE STEVENS: You are talking about the  
13 last sentence on --

14 MR. OLSON: There is a 402 permit in this  
15 case, too there is a 404 permit with respect to material  
16 going into the lake and a 402 permit for the material  
17 coming out of the lake into the waters of the United  
18 States.

19 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
20 Olson. The case is submitted.

21 (Whereupon, at 11:06 a.m., the case in the  
22 above-entitled matter was submitted.)

23

24

25

<p><b>A</b></p> <p><b>ability</b> 38:9</p> <p><b>able</b> 52:17</p> <p><b>above-entitled</b> 1:20 58:22</p> <p><b>abruptly</b> 47:1</p> <p><b>absence</b> 38:1,11</p> <p><b>absolutely</b> 22:11 31:19 41:11</p> <p><b>absurd</b> 38:16</p> <p><b>acknowledged</b> 7:16</p> <p><b>acres</b> 13:16</p> <p><b>Act</b> 4:15,18,21 4:25 5:5,8,11 6:21 9:1,12,14 9:22 14:18 17:1 21:5 24:7 28:15 29:7,8 29:15 31:5,20 53:7 54:10 55:13</p> <p><b>add</b> 33:21</p> <p><b>address</b> 7:1 10:12 11:4 15:18 24:2</p> <p><b>addressed</b> 42:20 43:1 45:22 57:21</p> <p><b>addresses</b> 57:13</p> <p><b>addressing</b> 57:16</p> <p><b>adds</b> 33:22</p> <p><b>administer</b> 5:20 55:23</p> <p><b>administered</b> 17:3,5</p> <p><b>administering</b> 4:25 18:24</p> <p><b>administers</b> 17:21</p> <p><b>administrating</b> 23:7</p> <p><b>administrative</b> 6:21 26:25</p> <p><b>admits</b> 17:9</p> <p><b>adopt</b> 33:1</p>	<p><b>adopted</b> 8:5,10 8:19 14:3,23 20:1,7 30:21 31:1 33:13 37:17 42:13</p> <p><b>advances</b> 12:6</p> <p><b>adverse</b> 23:14 44:25 45:8 47:19 48:4 49:7 50:3,4,4,7</p> <p><b>affect</b> 45:1 52:6</p> <p><b>agencies</b> 4:14 5:20 6:8 7:22 9:4,5,17 10:15 12:20 14:22 15:2 18:3 19:6 19:17 20:24 21:5,11 26:24 38:4,5 40:25 42:15 46:23 53:14 55:22,25 57:8</p> <p><b>agency</b> 4:23 14:6,17,17 16:7,17 17:18 23:7 26:22 37:10</p> <p><b>agency's</b> 16:5 57:10</p> <p><b>ago</b> 47:2</p> <p><b>agree</b> 5:7 20:4 33:4 34:19 35:13 38:3 44:21,25 56:10</p> <p><b>agreed</b> 19:18</p> <p><b>agreement</b> 22:15 56:7,8</p> <p><b>ahead</b> 55:3</p> <p><b>AL</b> 1:8,16</p> <p><b>Alaska</b> 1:3,6,12 1:15 2:4 4:4,5 4:6,6 10:17 12:22 13:21 18:3,7 26:24</p> <p><b>Alito</b> 13:9 28:8 28:12,21 35:12 35:18 36:7,10</p>	<p>36:17,22 37:4 37:11,18,22 46:5,13,16 50:19,25 51:5 51:10,13 52:2 54:20</p> <p><b>Alito's</b> 40:8</p> <p><b>allegation</b> 51:16</p> <p><b>allow</b> 29:12 53:4</p> <p><b>allowed</b> 21:1</p> <p><b>alternative</b> 13:11,13,13 23:15 44:18 45:20 46:6,24 47:23</p> <p><b>aluminum</b> 34:14 41:5</p> <p><b>ambiguity</b> 20:2 21:9</p> <p><b>amend</b> 29:2</p> <p><b>amended</b> 55:5 55:10</p> <p><b>ammonia</b> 50:17</p> <p><b>amount</b> 22:6</p> <p><b>animal</b> 48:11</p> <p><b>answer</b> 5:13,14 15:6 17:7 19:10,10 44:11 44:12 50:25 56:17</p> <p><b>answers</b> 40:10</p> <p><b>anymore</b> 32:21 41:15</p> <p><b>anyway</b> 22:5 40:3 44:19</p> <p><b>APA</b> 6:25</p> <p><b>apparently</b> 48:1</p> <p><b>APPEARAN...</b> 1:23</p> <p><b>appendix</b> 57:5 58:1,3</p> <p><b>applicability</b> 31:9 42:17</p> <p><b>applicable</b> 4:20 24:6 27:15,17 28:7,9,13 31:2 36:2 54:18</p>	<p>56:23 57:2,23 58:10</p> <p><b>application</b> 16:11 20:18 30:4 37:1,5,12 38:6</p> <p><b>applied</b> 8:2,10 41:7 42:22 43:23 46:25</p> <p><b>applies</b> 24:15 28:2,17 29:4 40:13 54:12</p> <p><b>apply</b> 12:9,21,24 18:21 28:19 29:3 31:18 36:5 37:7,13 37:14 40:2,4,9 41:14 42:22</p> <p><b>applying</b> 18:20</p> <p><b>appropriate</b> 15:8 28:5 53:25</p> <p><b>aquatic</b> 15:24 26:15 27:4 45:10 48:5 50:16</p> <p><b>arbitrary</b> 6:25 7:20</p> <p><b>area</b> 9:7,9,12,22 9:23 10:3,6,7 10:21,22 16:16 18:3 26:2</p> <p><b>arguable</b> 23:22</p> <p><b>argue</b> 34:1</p> <p><b>argument</b> 1:21 3:2,10 4:4,9 16:22 27:9 55:19</p> <p><b>Army</b> 4:17,24 6:12 7:23 8:19 13:20 19:18 20:3 22:15 23:2,8 24:16 24:17 39:10 40:18 42:10</p> <p><b>ash</b> 47:5</p> <p><b>asked</b> 44:11</p>	<p><b>asking</b> 28:16 37:8,24</p> <p><b>association</b> 56:16</p> <p><b>assume</b> 7:7 19:22 23:4 34:1 42:1</p> <p><b>assumption</b> 34:18</p> <p><b>attention</b> 49:16</p> <p><b>authority</b> 15:19 30:8 47:16,17 47:21</p> <p><b>authorize</b> 43:16</p> <p><b>authorizes</b> 27:22</p> <p><b>available</b> 36:5 54:5</p> <p><b>avoid</b> 38:16</p> <p><b>a.m</b> 1:22 4:2 58:21</p> <p><b>B</b></p> <p><b>B</b> 2:2 3:6,11 16:22 55:19</p> <p><b>back</b> 11:15 12:12 14:2 38:20 48:22</p> <p><b>bad</b> 45:9 49:24</p> <p><b>balance</b> 25:25</p> <p><b>ball</b> 12:6</p> <p><b>based</b> 15:2 28:14 34:11 46:3 48:3</p> <p><b>basin</b> 10:23</p> <p><b>basis</b> 16:1</p> <p><b>baskets</b> 19:3</p> <p><b>Bay</b> 13:19</p> <p><b>beginning</b> 19:14 54:9</p> <p><b>begins</b> 27:22</p> <p><b>behalf</b> 1:25 2:2 2:4 3:4,7,9,12 4:10 16:23 27:10 55:20</p> <p><b>believe</b> 27:1 40:24</p>
--	--	---	---	---

<b>benefits</b> 45:25	<b>carried</b> 23:25	<b>chop</b> 33:9	43:19 44:7	<b>consistent</b> 21:4
<b>benign</b> 53:1	<b>carry</b> 38:10	<b>Circuit</b> 7:16	46:11	55:24 56:24
<b>Berners</b> 13:19	<b>case</b> 4:4,5,17	46:11	<b>complaint</b> 7:18	<b>consistently</b>
<b>best</b> 23:23	5:17 7:6,10	<b>circumstance</b>	7:18	20:17
<b>better</b> 19:10	9:11,15 18:5	38:23	<b>complementary</b>	<b>consists</b> 35:5
26:15	22:3,5 27:17	<b>circumstances</b>	17:2	<b>construction</b>
<b>big</b> 25:22 31:6	29:1 32:12,21	28:6	<b>completely</b>	14:11
<b>bigger</b> 26:15	32:21 34:18	<b>cited</b> 51:10 56:9	27:25	<b>construe</b> 57:6
27:3 46:18	35:15 40:16	<b>citizens</b> 31:11	<b>compliance</b>	<b>contain</b> 23:16,19
<b>boats</b> 45:6	43:19 44:16	<b>clarify</b> 37:21	35:22	34:25
<b>body</b> 6:8 11:12	46:7 49:22	41:4	<b>complied</b> 24:18	<b>contained</b> 16:9
41:23 50:24	50:13,18 54:14	<b>clause</b> 28:16,18	37:9 53:19	34:25
<b>bottom</b> 9:20	58:15,20,21	<b>Clean</b> 4:15 5:5	<b>comply</b> 18:13	<b>contains</b> 34:7
14:20 15:15	<b>cases</b> 19:22,22	14:18 17:1	31:3 38:13	35:7
21:17,23 22:22	<b>category</b> 33:17	21:5 28:15	<b>composition</b>	<b>content</b> 32:19
23:1,24 26:3	<b>cement</b> 33:16	29:7,8 31:5,20	26:5	<b>continue</b> 42:15
26:13,17 39:1	34:13	53:7 54:9	<b>conceded</b> 32:23	42:21
39:4,9 40:21	<b>challenge</b> 7:17	55:13	<b>concept</b> 19:12	<b>contradiction</b>
48:24 52:14	<b>challenged</b> 7:5	<b>clear</b> 14:6 42:14	<b>concerns</b> 7:3	6:24
58:8	<b>change</b> 15:15	50:12 55:1	11:4	<b>contradictory</b>
<b>Breyer</b> 21:13,21	35:18 42:16	<b>client</b> 46:21	<b>concluded</b> 4:15	6:18
21:25 22:4,13	<b>changed</b> 47:21	<b>client's</b> 46:16	52:24	<b>contrary</b> 28:24
23:6,9 24:10	<b>changes</b> 21:17	<b>close</b> 19:22	<b>conclusion</b> 47:8	29:1 31:5
24:13,21,24	<b>changing</b> 14:19	<b>closes</b> 52:22	48:2	<b>conventional</b>
25:2,10 38:17	26:4	<b>closing</b> 44:20	<b>concrete</b> 33:4,10	50:15
38:19 39:3,7	<b>charged</b> 4:14	<b>coal-fired</b> 34:14	33:16	<b>Corps</b> 4:18,24
39:14,18,23	<b>chemical</b> 26:5	<b>Coeur</b> 1:3 4:4	<b>condition</b> 26:21	7:23 8:13,19
40:15 48:19,21	48:25	12:22 46:23,24	<b>conditions</b> 27:3	10:22 11:14
49:9,12,19	<b>chemicals</b> 35:7	<b>cold</b> 10:2	<b>Congress</b> 4:14	12:13 13:2,20
50:2,6 53:11	<b>Chief</b> 4:3,13	<b>collective</b> 4:24	16:3 17:1,22	14:23 15:7,10
54:11,16 56:11	5:12 16:19,21	15:2	18:11,16,20,22	17:4,20 18:6
<b>brief</b> 24:4 41:7	16:24 18:12,15	<b>come</b> 6:9 9:18	19:2 25:6	18:24 19:13,16
43:11 56:9	27:6,11,21	11:15 24:19	27:13	19:18 20:1,3,8
57:1	28:16 31:12,17	44:12 48:2	<b>consequence</b>	20:14,15 22:15
<b>briefs</b> 21:22	31:22 32:3,8	<b>comes</b> 5:1 6:10	50:7	23:2,8 24:16
<b>brother</b> 56:20	32:14,16 33:2	11:14 12:12	<b>consequences</b>	24:17 30:7
<b>buzz</b> 12:2	33:9,18,25	33:11,15 38:23	25:8 47:20	33:5 36:4 38:3
	41:9,24 42:5,8	39:4 49:12	48:4 49:7,24	39:10 40:1,12
	42:23 43:4,8	52:3	50:5	40:18 42:10
<b>C</b>	43:13 45:11,14	<b>comfort</b> 10:2	<b>conservation</b>	44:23 47:6
<b>C</b> 3:1 4:1	48:5,9 52:1,9	<b>coming</b> 5:19	1:7,16 4:5,6	49:3,15 56:8
<b>call</b> 6:12 8:15	55:3,14,17	6:17 12:19	18:2,7 26:24	56:10
14:12,12 57:6	58:19	58:17	<b>considered</b>	<b>corpus</b> 11:17
<b>called</b> 39:4	<b>chips</b> 22:10	<b>comment</b> 21:11	13:13 34:9	<b>correct</b> 8:3 12:1
<b>calling</b> 12:15	<b>choice</b> 18:16,20	<b>commented</b>	45:19	13:5,6 20:23
<b>capricious</b> 6:25	<b>Cholesterol</b>	47:7	<b>considers</b> 24:16	21:20 25:21
7:20	22:12	<b>company</b> 22:16	<b>consistency</b> 26:3	26:16 29:24
<b>care</b> 42:11,12				

<p>37:6 54:19 55:1 <b>correctly</b> 20:10 <b>Council</b> 1:7,16 4:5,7 <b>counterintuitive</b> 22:25 23:3 <b>couple</b> 48:16 <b>course</b> 8:18 12:9 24:15 27:21 <b>Court</b> 1:1,21 4:13 13:25 16:2,25 27:12 38:15 55:22 <b>courts</b> 15:1 46:6 <b>cover</b> 44:15 <b>covered</b> 5:10 25:12,14 54:24 54:25 57:12 <b>covering</b> 48:24 <b>covers</b> 5:8 <b>created</b> 16:3 17:1 <b>creating</b> 46:17 46:18 47:5 <b>creature</b> 26:8 <b>criteria</b> 56:17 <b>curious</b> 33:19 <b>cut</b> 7:8 <b>cyanide</b> 49:1 <b>C.F.R</b> 9:5</p> <hr/> <p><b>D</b></p> <p><b>D</b> 4:1 <b>dam</b> 9:10 11:1 <b>dammed</b> 9:10 <b>dangerous</b> 47:10 <b>deal</b> 7:12 <b>dealing</b> 7:10 <b>decades</b> 4:23 52:24 53:3 <b>decide</b> 34:17,18 <b>decided</b> 21:3,6 25:6 <b>decides</b> 15:8 <b>decision</b> 19:3</p>	<p>46:5,12 <b>decisions</b> 14:2 <b>defer</b> 15:1 <b>deference</b> 16:18 <b>define</b> 12:25 <b>defined</b> 42:24 <b>defining</b> 6:15 12:14,16 <b>definition</b> 5:20 5:21 6:3 7:3,5 7:20,21 9:6 10:20 13:3 14:23 15:3,21 19:16,19 20:6 20:7 21:6,16 25:9 34:10 43:10,13,14,15 49:23 54:7,8 <b>definitions</b> 12:21 35:2 <b>department</b> 1:25 18:7 26:23 <b>departments</b> 18:2 <b>depends</b> 33:13 <b>depositing</b> 52:18 52:21 <b>deposits</b> 11:11 <b>describing</b> 33:15 <b>description</b> 45:2 <b>despite</b> 43:22 <b>destroyed</b> 11:12 46:17 48:20 <b>destroying</b> 11:16 12:4 <b>destruction</b> 13:15 <b>determination</b> 6:18 7:19 15:24 28:14 46:3 <b>determinations</b> 15:23 <b>determine</b> 28:22 52:17</p>	<p><b>determined</b> 10:15 13:21 14:22 18:11 20:24 45:25 <b>determines</b> 31:7 <b>determining</b> 8:10 <b>difference</b> 24:11 24:25 25:23 <b>different</b> 9:2 10:13 11:4 13:14 18:3 19:12 25:7,7,8 25:9 44:22 48:16 49:13 50:9 <b>difficult</b> 7:10 <b>dilute</b> 50:22 51:3 <b>diluted</b> 52:4 <b>diluting</b> 50:23 <b>directed</b> 7:18 <b>directly</b> 31:9 <b>dirt</b> 48:25 <b>disagree</b> 19:6 47:8 55:22 <b>disagreement</b> 19:23,25 <b>discharge</b> 4:16 5:1,9 8:11,21 9:9 12:17 14:3 14:7,19 15:14 17:7 27:19 29:12,17,23,25 30:15,22 32:2 32:3,13,22 41:19 44:3 49:23 51:14,19 53:2 54:25 <b>discharged</b> 9:23 12:15 50:18,20 <b>discharges</b> 8:25 9:7,11,12 16:13,13,15 31:2,10,12,13 41:8 43:17 45:22 53:5</p>	<p>54:6 55:7 56:16 57:24 58:10 <b>discharging</b> 29:19 <b>discretionary</b> 47:17 <b>discussion</b> 38:20 <b>disposal</b> 8:14,15 10:25 14:13 15:8 44:24 <b>dispose</b> 8:22 20:11 45:24 <b>disposing</b> 8:1,7 20:20 <b>dispute</b> 32:22 <b>disputed</b> 11:10 <b>distinct</b> 10:23 16:3 17:1 <b>divisions</b> 16:11 <b>document</b> 16:7 <b>doing</b> 10:5 14:13 <b>doubt</b> 14:1 29:6 57:3 <b>downstream</b> 9:13 <b>draft</b> 47:7 <b>drafted</b> 23:12 <b>dredged</b> 5:9 9:19 <b>dry</b> 13:13 44:24 <b>due</b> 18:13 58:8 <b>dumping</b> 51:17 <b>dwarf</b> 13:18 <b>D.C</b> 1:18,25 2:2</p> <hr/> <p><b>E</b></p> <p><b>E</b> 3:1 4:1,1 <b>earlier</b> 30:6 34:24 <b>early</b> 20:14 <b>easier</b> 33:11 <b>ecology</b> 48:15 <b>ecosystem</b> 45:1 <b>effect</b> 6:6,9,10 6:17 11:23 12:16,25 13:7</p>	<p>14:19 19:14 20:8 23:14 34:3,8 41:22 43:16 45:3,20 52:15,23 57:17 <b>effective</b> 21:4 <b>effects</b> 8:10 12:22,24 20:15 20:17 34:11 53:3 57:18 <b>effects-based</b> 54:8 <b>effluent</b> 4:19 5:15,23,25 9:1 9:15,25 14:8 18:13,18,21 24:6 25:15 29:10 30:11,13 30:16,19,20 31:1,3,8,13,16 31:21 33:1,7 33:14 34:3,22 35:21,23 36:1 36:5 37:2,7,8 37:16,16 38:6 38:12 39:10,11 40:2,8,13 41:7 41:14,16 42:17 42:19,21 43:23 44:9,13 49:8 50:1,8,10,12 50:14,17 53:5 53:8,9,12,16 53:17 54:1,12 54:17,21,25 56:5,21 57:19 <b>either</b> 5:7 14:11 19:3 33:25 <b>elevation</b> 14:20 15:15 20:10,20 <b>eligible</b> 54:15 55:7 <b>emission</b> 43:20 <b>emit</b> 5:14 44:7 <b>emitted</b> 53:5 <b>emphasize</b> 13:25 17:19</p>
---	---	---	---	--

<b>enact</b> 29:7	29:9,11,15	<b>exclusive</b> 17:2	40:20 48:23,23	11:22 12:4
<b>enacted</b> 17:22	30:23 31:1,10	17:16,17	<b>felt</b> 47:11,14	26:14,17 27:2
27:13	31:19 32:20,25	<b>Excuse</b> 38:19	<b>fill</b> 4:16 5:3,10	27:4 40:16
<b>endangered</b>	33:13,17,24	<b>exempt</b> 49:25	5:14,20,21,22	45:10,11,12,15
45:15	34:5,10,12	53:5	5:24 6:12 7:4	48:6,11,16,17
<b>endorsed</b> 18:23	36:2 37:7,9	<b>exercise</b> 11:7	7:19 8:11,22	<b>fisheries</b> 18:2
<b>enforce</b> 49:7	39:11 40:7,22	<b>exercises</b> 47:21	9:9,20 11:23	23:16 26:23
<b>enforceable</b>	41:4,13,20,24	<b>exist</b> 12:19	12:7,10,16,22	<b>flat</b> 6:23
31:10	42:9 43:22	<b>existent</b> 13:1	13:3 14:3,5,7	<b>follow</b> 18:24
<b>Engineers</b> 4:18	44:3,6,8,22,23	<b>existing</b> 6:5	14:10,11,13,20	23:11 52:1
4:25 6:13 7:23	44:24 45:19,21	<b>expanse</b> 45:4	15:3,15,21	<b>followed</b> 18:5
8:13,19 13:2	47:3,7,13,16	<b>expenditure</b>	16:4,13 17:3	<b>Forest</b> 13:21
13:20 15:7,11	47:20,21,23	18:5	17:11,13,21,24	<b>form</b> 12:3,4,5,25
17:4,20 18:7	49:3,4,6,21	<b>experience</b> 8:7	19:3,6,7,13,19	13:1
19:13,18 20:1	51:24 52:24	14:22 15:2	20:3 21:16,17	<b>formula</b> 27:17
20:3 22:15	53:4,7,8 54:6,8	44:15	22:18 23:1,7	<b>forth</b> 24:5 58:11
23:2,8 24:16	55:2,5,10 56:4	<b>expert</b> 4:14	25:7 29:4 30:3	<b>found</b> 9:5 50:4
24:18 30:7	56:8,10,18	48:15	30:4,8 33:5,5	52:19
33:5 36:4 38:3	57:6,22	<b>expertise</b> 4:24	34:2,8,9,10,18	<b>fresh</b> 52:16
39:10 40:2,12	<b>EPA's</b> 6:16	7:22	34:19,20 35:9	<b>friends</b> 34:1
40:18 42:11	28:22 33:12	<b>explain</b> 16:11	35:10 37:13,15	<b>froth-flotation</b>
44:23 47:7	45:8 51:21	23:5 41:3,12	39:1,4,5,9 40:1	27:20
49:4,15 56:8	<b>ESQ</b> 1:24 2:2,4	<b>extent</b> 20:2 21:9	40:9,20 41:10	<b>function</b> 20:25
<b>enormous</b> 13:17	3:3,6,8,11	<b>extracting</b> 6:7	41:10,13,15	<b>Furthermore</b>
<b>entire</b> 11:16	<b>essentially</b> 48:18	<b>extremely</b> 32:24	42:19,23 43:2	18:1
12:23	<b>established</b>		43:5,10,14,20	
<b>entirely</b> 6:12	17:25 52:8	<b>F</b>	43:23 44:7	<b>G</b>
<b>entitled</b> 16:18	<b>establishes</b> 5:5	<b>face</b> 6:14 27:17	49:23,25 53:13	<b>G</b> 1:24 3:3 4:1,9
<b>environmental</b>	51:25	<b>facility</b> 30:25	54:1,3,4,5,7,9	<b>Garre</b> 1:24 3:3
11:3,19 13:11	<b>ET</b> 1:7,16	<b>fact</b> 7:25 8:12	54:11,13,14,14	4:8,9,12 5:4,16
13:12 14:16,17	<b>etcetera</b> 24:19	28:7 34:9,10	54:17 55:7,10	5:24 7:2,14 8:3
15:19,25 23:15	<b>evaluating</b>	42:17 43:22	55:12 56:2,5	8:9,17 10:8,12
<b>environmenta...</b>	23:11	45:22 49:13	56:14	10:24 11:13,20
10:16 13:24	<b>evaluation</b> 18:6	53:11 55:6	<b>filling</b> 14:12,15	12:7,20 13:4,7
47:9	<b>evasion</b> 21:1	<b>factory</b> 30:24	20:19 41:22	13:9,12 14:16
<b>EPA</b> 4:20,25	<b>Everglades</b> 10:6	33:15	45:4,9 47:4,9	15:13 16:20
6:13 8:9 11:6	<b>Everybody</b> 17:9	<b>factual</b> 55:25	<b>fills</b> 22:22 39:3,8	19:12
14:3,6 15:19	<b>Evidently</b> 44:5	<b>failure</b> 18:13	<b>finally</b> 18:8	<b>GEN</b> 1:24 3:3
16:11 17:6,12	<b>eviscerates</b> 53:6	<b>falls</b> 13:2	<b>find</b> 7:9 21:22	4:9
17:22,25 18:6	<b>exactly</b> 39:17	<b>farther</b> 38:11	36:7,14 38:15	<b>general</b> 1:24 4:8
18:9,9,17,23	42:7	<b>fat</b> 22:10	<b>findings</b> 55:25	4:12 5:4,16,24
19:7,7,12,13	<b>examined</b> 26:22	<b>federal</b> 2:1 3:4	<b>Finish</b> 55:3	7:2,14 8:3,9,17
19:17 20:2,4,7	<b>example</b> 5:17	4:10 43:7 56:4	<b>finished</b> 26:16	10:8,12,24
20:16 22:17,23	33:16	<b>feed</b> 48:11	27:5	11:13,20 12:7
23:3,12,13	<b>excepted</b> 9:6	<b>feet</b> 9:21 13:18	<b>first</b> 4:4 7:2	12:20 13:4,7,9
24:8,15 28:9	<b>exception</b> 9:4	21:23 22:1,18	10:13 39:15	13:12 14:16
28:12 29:2,6,8	38:12,15,16	22:19,19,20	<b>fish</b> 10:17 11:5	15:13 16:19,20

<p>19:11 21:14 50:20 <b>generally</b> 5:9 <b>getting</b> 11:17 <b>Ginsburg</b> 7:24 8:4,6,12,18 14:9 15:4,16 20:6,18,23 26:18 45:2 <b>give</b> 49:3 <b>given</b> 21:11 <b>go</b> 7:3 14:2 18:9 22:17 23:15 38:17,19 42:2 42:2 55:3 <b>goes</b> 33:21 38:25 40:7 42:10 53:12 <b>going</b> 5:7,18 6:11 9:8,20,24 10:14,15,18 11:11,12,22 12:8,10 14:20 16:14,16 17:24 19:21 22:13 24:8 25:24 26:7,10,13,14 27:2 39:14 40:2,4,16,17 45:23 53:3 56:14 58:16 <b>gold</b> 6:7 <b>govern</b> 33:6 <b>governed</b> 9:11 9:21,24 17:3,8 18:17 31:15 <b>governing</b> 17:23 33:8 <b>government</b> 32:23 38:4 56:9 <b>government's</b> 24:4 43:11 57:1 <b>grant</b> 30:8 <b>granting</b> 23:10 <b>Great</b> 10:6</p>	<p><b>GREGORY</b> 1:24 3:3 4:9 <b>ground</b> 19:8 <b>grounded</b> 4:22 <b>guess</b> 12:2 22:5 26:19 31:22 33:18,25 49:1 55:2 <b>guidelines</b> 4:19 9:1,16,25 11:3 11:3 14:8 23:12 24:2,4 25:15 38:7 56:5</p> <hr/> <p><b>H</b> <b>habitat</b> 11:5 <b>habitats</b> 10:17 <b>hand</b> 6:22 <b>handle</b> 7:10 <b>happens</b> 19:5 22:7 40:7 42:18 51:6,8 <b>hard</b> 40:24 <b>harm</b> 15:25 16:1 <b>heads</b> 16:10 <b>hear</b> 4:3 41:8,12 <b>heard</b> 24:13 39:23,25 49:2 <b>help</b> 40:11 41:4 <b>high</b> 13:18 34:7 34:8 50:16 52:19 53:2 <b>history</b> 56:24 <b>hobby</b> 48:22 <b>Honor</b> 16:20 52:5 <b>hoping</b> 52:22 <b>horrible</b> 40:17 <b>horse</b> 48:22 <b>huge</b> 45:5 <b>hurting</b> 26:5 <b>hypothesized</b> 16:1 <b>hypotheticals</b> 15:17</p>	<p><b>I</b> <b>idea</b> 21:22 <b>identical</b> 24:10 24:14 <b>identified</b> 30:23 <b>identify</b> 46:12 46:24 <b>illegal</b> 44:3 <b>impacts</b> 45:8 <b>implementing</b> 4:15 <b>implied</b> 38:14 38:15 <b>implies</b> 31:25 <b>important</b> 11:21 16:8 17:19 25:2,5 31:4 32:24 45:18 <b>impounded</b> 11:1 <b>impoundment</b> 9:7,9,12,22,23 10:3,6,7,21,22 16:14,16 42:11 57:12 <b>included</b> 20:19 21:6 <b>includes</b> 6:4 20:4 24:5 26:1 <b>including</b> 11:4 17:9 26:23 <b>independent</b> 31:9 <b>industrial</b> 30:21 34:6 37:17 53:10 <b>inert</b> 26:4 <b>initial</b> 12:13 <b>instance</b> 44:6 49:13 <b>intended</b> 28:19 42:14 <b>intent</b> 42:16 <b>interim</b> 26:16 <b>interpret</b> 39:24 <b>interpretation</b> 4:22 16:17 21:3 28:22,25</p>	<p>55:23 57:10 <b>interpretations</b> 16:5 55:24 <b>interpreted</b> 38:5 53:4 <b>invertebrates</b> 52:12 <b>involve</b> 45:4 <b>involved</b> 18:1,2 18:4 20:24 31:24 <b>issue</b> 4:17 27:16 <b>issued</b> 4:20 8:21 18:9 35:22 <b>issues</b> 35:23 36:3 <b>issuing</b> 17:18</p> <hr/> <p><b>J</b> <b>JA</b> 7:15 <b>January</b> 1:19 <b>JA-141</b> 16:9 <b>joint</b> 6:22 57:5 58:3 <b>jointly</b> 20:1 <b>judgment</b> 4:24 14:25 15:1 21:10 <b>Juneau</b> 2:4 <b>jurisdiction</b> 6:16 33:12 <b>Justice</b> 1:25 4:3 4:13 5:1,4,12 5:13,22 6:1 7:2 7:7,24 8:4,6,12 8:18 10:2,10 10:19 11:8,14 11:20,25 12:12 12:24 13:6,9 14:9 15:4,5,16 16:19,21,24 17:8,12,14,15 18:8,12,15,15 19:5,11,21 20:6,18,23 21:13,21,25 22:4,13 23:6,9</p>	<p>23:19,22 24:10 24:13,21,24 25:2,10,12,14 25:19,22 26:7 26:10,12,18 27:6,11,21 28:8,12,16,21 29:2,11,17,22 29:25 30:2,10 30:14 31:12,17 31:22 32:3,8 32:14,16 33:2 33:9,18,25 34:17,23 35:4 35:8,12,18 36:7,10,17,22 37:4,11,18,22 38:17,19 39:3 39:7,14,18,23 40:8,15 41:9 41:24 42:5,8 42:23 43:4,8 43:13,18 44:1 44:5,14 45:2 45:11,14 46:5 46:13,16 47:3 47:11,14,18,24 48:5,9,13,19 48:21 49:9,12 49:19 50:2,6 50:19,25 51:5 51:10,13 52:1 52:2,9 53:11 53:21,24 54:3 54:11,16,20 55:3,14,17 56:11,12,13,19 57:14,21,25 58:4,8,12,19</p> <hr/> <p><b>K</b> <b>keep</b> 11:8,21 <b>keeping</b> 46:1 <b>Kennedy</b> 5:1,4 17:8 19:5,11 19:21 34:17,23 35:4,8 53:21</p>
--	---	--	---	---

53:24 54:3 56:12,19 <b>Kennedy's</b> 5:13 <b>Kensington</b> 27:18 <b>key</b> 53:6 <b>kill</b> 26:7,11,17 <b>killed</b> 40:17 51:20 52:11 <b>killing</b> 45:9 <b>kind</b> 30:24,24 33:15 45:19 53:1 <b>kinds</b> 43:17 48:16 53:5 <b>know</b> 12:5 22:2 22:9 26:18 30:25 39:7,7 44:10 49:12 51:7 <b>knows</b> 26:20	<b>language</b> 57:8,9 <b>law</b> 12:18 <b>lawfully</b> 29:7 <b>leather</b> 30:25 <b>leave</b> 6:12 <b>legal</b> 5:12 12:25 13:7 <b>lenient</b> 11:18 <b>letting</b> 52:23 <b>let's</b> 7:7 22:14 35:18 <b>level</b> 21:18,23 22:5,19 52:19 53:2 <b>levels</b> 34:7 51:4 <b>life</b> 11:12 26:19 27:4 45:10 48:6,11,11,16 50:16 <b>limitation</b> 30:19 31:16 33:8,14 34:22 35:21,23 36:2 37:16 41:20 42:20 50:10 53:17 54:1,21,25 <b>limitations</b> 18:13,18,21 29:10 30:20 31:1,3,8,21 33:1 36:5 37:2 37:8,9,16 38:6 38:12 40:13 41:8,14,16 42:17,21 44:9 44:13 49:8 50:1 53:6,8,10 57:19 <b>liquid</b> 5:18 31:23,25 32:1 32:19 <b>listed</b> 41:7 <b>liter</b> 41:21 <b>little</b> 33:10 40:5 <b>livable</b> 27:3 <b>live</b> 48:17 <b>living</b> 11:16 26:8	27:3 <b>long</b> 10:10 13:1 21:2 23:20,24 33:7 51:5 <b>longer</b> 13:1 <b>look</b> 30:22 <b>looking</b> 43:9 <b>lose</b> 40:15 <b>lot</b> 22:22 41:12 48:24 <b>lower</b> 46:6	<b>mean</b> 7:8 8:4 14:12 22:21 23:22 24:14 26:19 31:23,23 32:10 33:20 39:8 44:5 48:10 51:6 57:14 <b>means</b> 28:2 <b>measurable</b> 41:22 <b>mediation</b> 47:1 <b>meet</b> 53:14 54:7 <b>meeting</b> 51:24 56:16 <b>meets</b> 35:2 49:23 <b>memo</b> 16:10 <b>memorandum</b> 16:9,10 56:7 57:4,22 <b>merits</b> 7:13 <b>method</b> 6:6 <b>microinverteb...</b> 48:8,9 <b>middle</b> 10:5 <b>mill</b> 30:24 <b>milligrams</b> 41:21 <b>million</b> 18:6 <b>millions</b> 45:15 <b>mills</b> 27:20 34:13 41:5 <b>mind</b> 11:21 <b>mine</b> 4:16 6:10 12:19 16:8 27:18 43:20 44:20 46:22 52:22 57:4,11 57:23 <b>mines</b> 20:4 <b>mining</b> 14:14 46:11 <b>mining-related</b> 21:8 <b>minute</b> 26:10 <b>minutes</b> 55:18	<b>misinterpreta...</b> 28:15 <b>missing</b> 21:13 24:22 25:3,11 <b>mix</b> 53:12 <b>mixing</b> 51:7 <b>modify</b> 42:16 <b>Monday</b> 1:19 <b>morning</b> 4:4 <b>mound</b> 46:18 <b>move</b> 33:11 <b>mutually</b> 17:2 17:16,17
<b>L</b>		<b>M</b>		<b>N</b>
<b>lake</b> 8:22 9:21 10:3,5,6,14,23 11:1,17,22,22 12:23 13:22,23 14:12 15:10 20:11,19,20 22:19,23 23:1 23:24 26:2,4,6 26:8,11,13,15 26:17 27:3 30:3,3 33:4,22 33:22 38:25,25 41:10 42:12 43:21,23 44:8 45:9,10,12 47:9 48:6,15 48:23 50:21,22 50:23 51:1,2,3 51:9,17 52:4 52:17,18,23,25 58:16,17 <b>lakes</b> 42:2 <b>land</b> 14:11 29:18 44:24 45:20,24		<b>manipulation</b> 21:2 <b>manufacturing</b> 33:16 34:14 <b>Marine</b> 23:16 <b>material</b> 4:16 5:10,10,21,21 5:22,24 7:4 8:11,23 9:9,20 9:20,23 11:23 12:8,10,16 14:4,7,10,10 15:3,16 16:4 16:13 17:3,13 19:4 20:3 23:17,18 26:4 30:8 34:2,9,10 34:20 37:15 41:13,15 42:19 42:23 43:10,14 43:21 44:8 49:23,25 54:2 54:4,5,8,9,11 54:12,13,14,14 54:16,16,17 55:7,10,12 56:5,15 58:15 58:16 <b>materials</b> 21:8 25:17 <b>matter</b> 1:20 5:16 14:21 15:14 33:21 49:24 56:1 58:22		<b>N</b> 3:1,1 4:1 <b>named</b> 41:6 <b>national</b> 45:19 <b>native</b> 52:21 <b>natural</b> 10:3,23 11:11 <b>navigable</b> 27:19 41:17 42:6 45:23 46:1 50:24 <b>nearby</b> 13:19 <b>necessarily</b> 50:13 <b>necessary</b> 38:16 <b>need</b> 28:3 29:14 55:9,11 <b>never</b> 14:6 20:19 22:17 38:5 41:13 42:15 43:3 46:13,16 47:21 56:4,6 <b>new</b> 9:16 27:14 35:16,19 42:8 42:13 <b>Ninth</b> 7:16 46:11 <b>nontoxic</b> 25:12 25:14,17 40:14 <b>non-fill</b> 35:9 <b>normal</b> 51:4 <b>note</b> 7:15 <b>notice-and</b>



21:10 <b>no-discharge</b> 45:21 <b>NPDES</b> 55:8,9 55:11 <b>number</b> 6:3,5,15 6:16 11:4 15:17 21:25 22:20 24:5	16:22 27:9 <b>ordinarily</b> 14:14 <b>ore</b> 34:13 41:5 <b>organism</b> 51:22 51:22 <b>organisms</b> 51:19 51:20 52:16 <b>ought</b> 15:1 <b>outside</b> 51:7 <b>overburden</b> 21:7 <b>override</b> 16:2,5	14:24 20:16 <b>permanently</b> 46:17 <b>permission</b> 29:14 <b>permit</b> 8:1,13,14 9:14,19 17:13 17:21 18:8,10 18:25 20:12 23:10,11 24:16 24:18 26:22 28:3,4,5 35:13 35:14,16,21,23 35:25 36:3,11 36:12,12,23 41:20 44:3 47:7,12 49:3,5 54:6,15,22,23 55:10,11 57:15 57:16 58:14,15 58:16 <b>permits</b> 4:20 7:19 8:20 17:24 18:4,22 19:4 27:22 30:5,9 36:6 37:23 38:7 42:22 46:25 55:8,8 56:1 <b>permitted</b> 4:17 5:8 17:5 41:19 43:24 <b>permitting</b> 5:6 14:5 16:3 17:2 18:4 19:2 23:7 31:6 56:15,23 58:6 <b>Petitioner</b> 1:4 1:13 <b>Petitioners</b> 2:1,3 3:5,7,12 4:11 16:23 31:5 55:20 <b>pH</b> 50:15,17,19 50:20 51:2,10 51:11 53:2 <b>physical</b> 5:14	<b>piles</b> 45:5 <b>pipe</b> 5:2,14,19 29:18 34:24 38:22,24,24 51:8 <b>place</b> 14:13 15:8 15:21 23:23 27:2 <b>placed</b> 57:12 <b>placement</b> 21:7 <b>plain</b> 57:8,9 <b>Plankton</b> 48:13 <b>Plant</b> 48:11 <b>plants</b> 34:14,15 <b>please</b> 4:13 16:25 27:12 <b>point</b> 7:6,14,17 11:2 16:8,25 17:19 18:8 20:23 24:2,3 29:12 32:8,18 32:23 39:8,9 44:22 45:18 50:20 51:13 52:2 55:2 <b>pointed</b> 19:12 <b>pollutant</b> 6:4 12:14 22:8,14 22:16 23:1 26:1 29:24,25 38:23 40:17,20 50:14 <b>pollutants</b> 5:9 16:4 40:14 50:15 <b>pollution</b> 6:16 12:3,4,5 13:1,2 13:8 <b>pond</b> 10:11 15:9 15:11,12 42:11 42:12 43:21 50:23 <b>ponds</b> 34:16 41:17,18 42:3 42:4 44:16 <b>portion</b> 21:18 <b>position</b> 14:19	28:21 35:24 46:8,10,13,17 47:22 49:21 54:21 <b>possible</b> 30:4 39:1 48:17 <b>possibly</b> 36:11 <b>potato</b> 22:10 <b>poured</b> 22:22 <b>pouring</b> 25:16 <b>power</b> 17:13 18:10 34:15 49:4,10 <b>practical</b> 5:16 14:21 15:13 <b>practice</b> 42:15 <b>preamble</b> 14:5 43:7,9 56:2 57:11 <b>precise</b> 57:20 <b>prefatory</b> 28:16 28:18 <b>preferable</b> 13:24 23:15 46:3 <b>preferred</b> 44:24 44:24 47:4,23 47:24 <b>present</b> 19:23 25:5 31:6 32:1 <b>presented</b> 29:1 <b>pretty</b> 10:2 51:8 <b>primary</b> 7:25 8:19 13:12 <b>problem</b> 6:2 7:11 10:21 36:25 38:10 <b>problematic</b> 13:14 <b>problems</b> 15:20 <b>Procedure</b> 6:21 <b>process</b> 11:6 15:18,19 16:15 18:4 19:2 20:24 27:4,20 57:2 <b>processed</b> 8:16
<b>O</b> <b>O</b> 3:1 4:1 <b>occur</b> 56:16 <b>offering</b> 36:15 <b>officials</b> 57:6,22 <b>oh</b> 11:15 12:19 30:17,17 36:24 46:9 51:3,6 <b>Okay</b> 40:15 49:1 55:5 <b>Olson</b> 2:2 3:6,11 16:21,22,24 17:14,17 18:14 19:9,24 20:13 20:22 21:20,24 22:2,12 23:6 23:10,21 24:1 24:12,20,23,25 25:4,13,18,21 25:24 26:9,12 26:21 27:7 32:4 38:20 39:24 55:17,19 55:21 56:22 57:20 58:2,5,7 58:14,20 <b>once</b> 51:1 <b>operating</b> 27:14 36:15 40:25 41:3 <b>operation</b> 14:14 14:15 36:18 <b>operative</b> 43:16 <b>opinion</b> 44:22 <b>opposed</b> 51:2 <b>option</b> 13:22,24 <b>oral</b> 1:21 3:2 4:9	<b>P</b> <b>P</b> 4:1 <b>page</b> 3:2 24:6 43:11 56:10,25 56:25 57:9 58:9 <b>pages</b> 57:4,21 58:2 <b>Pardon</b> 24:12 25:13 <b>part</b> 11:2 30:18 35:2 53:12,13 <b>particular</b> 6:6 28:5 30:20,24 43:17 57:23,23 <b>parties</b> 5:7 <b>parts</b> 7:6,15 <b>passage</b> 14:18 <b>paying</b> 49:16 <b>Pentagon</b> 13:19 46:19 47:5 <b>People</b> 44:16 <b>percent</b> 5:18 32:4,7,10,17 51:20 52:11 54:20 <b>performance</b> 9:16 18:19 27:15,16 29:3 35:16,19 36:16 36:18,19,20 37:2 53:17,18 <b>period</b> 8:17,20 8:24 9:3 11:10			

32:22 34:6,21 35:3,11 44:3 45:23 46:1 <b>processing</b> 34:13 41:5 <b>program</b> 17:8 18:17 <b>prohibit</b> 45:22 <b>prohibited</b> 30:5 43:25 44:2,7 <b>prohibition</b> 24:7 27:14 35:20 36:15 <b>prohibits</b> 32:13 35:17 <b>project</b> 10:14,18 14:12 <b>promulgate</b> 49:14 <b>pronounceme...</b> 4:23 16:5 <b>proper</b> 10:4 15:3 32:9 <b>properly</b> 34:2 <b>proposed</b> 47:7 <b>prospect</b> 16:1 <b>Protection</b> 14:17,17 <b>provide</b> 37:7 38:6,7 <b>provided</b> 27:23 35:22 38:8 <b>providing</b> 14:13 <b>provision</b> 18:25 24:5 27:22 37:1,12 38:1 38:11 <b>provisions</b> 23:13 33:6 56:22 <b>pulled</b> 47:1 <b>purpose</b> 8:1,13 8:19,22 14:23 19:17,19 20:9 20:16,20 55:13 <b>pursuant</b> 17:20 46:25 <b>pushing</b> 48:23	<b>put</b> 6:8 11:24 15:14 19:3 26:2 33:10,23 34:24 36:22 40:19 <b>puts</b> 50:7 <b>putting</b> 13:22 26:9,13 33:3 33:20 44:16 <hr/> <b>Q</b> <hr/> <b>quality</b> 11:5 15:23 17:23 24:8 26:6 49:24 <b>query</b> 6:24 <b>question</b> 5:13 12:13 15:4 17:7 30:18 31:17 34:23 37:21 40:5,8 42:18 44:17 51:1 56:11,17 57:16,20 <b>quickly</b> 51:8 <hr/> <b>R</b> <hr/> <b>R</b> 4:1 <b>raise</b> 7:12 9:21 21:23 22:6 <b>raised</b> 15:5,17 <b>raises</b> 22:5 <b>raising</b> 7:9 20:10,19 <b>rarely</b> 47:21 <b>rate</b> 51:23 <b>raw</b> 34:6 <b>read</b> 58:4 <b>realize</b> 31:4 <b>really</b> 7:3 23:23 33:21 39:24 40:25 44:15 47:11 <b>reason</b> 9:2,2 11:21 20:10 40:19 <b>reasonable</b> 21:3	<b>reasoned</b> 21:10 <b>reasons</b> 47:20 <b>rebuttal</b> 3:10 13:10 25:25 55:19 <b>receiving</b> 41:22 <b>reclaim</b> 14:11 <b>reclaimed</b> 10:14 <b>reclaiming</b> 13:23 <b>recognize</b> 55:6 <b>reconcile</b> 12:21 <b>reconciled</b> 9:18 <b>reconciling</b> 49:20 <b>record</b> 7:6,15 26:25 <b>recover</b> 51:9 52:17,23,25 <b>redefining</b> 12:18 <b>reduced</b> 51:23 <b>reemphasize</b> 16:25 <b>referred</b> 19:1 <b>refers</b> 10:24 <b>reflects</b> 4:23 7:21 <b>regard</b> 32:20 <b>regarded</b> 34:2 <b>regime</b> 6:22 18:22 19:1 27:24 28:23 58:9 <b>regimes</b> 5:6 9:19 16:3 17:2 <b>Register</b> 43:7 56:4 <b>regs</b> 24:15,15,19 <b>regular</b> 38:25 <b>regulate</b> 13:8 22:23 29:9 31:20 32:25 42:9 53:7,9,14 56:5 <b>regulated</b> 8:25 9:3 14:4,7 24:8 25:8 29:9 34:5	40:22 41:5,25 54:6 57:18 <b>regulates</b> 41:13 41:25 <b>regulating</b> 34:13 <b>regulation</b> 6:5,9 6:23 12:17 24:25 28:10 29:5 42:9,14 42:24 55:11 57:8,11 <b>regulations</b> 25:6 37:5 55:6,9 56:3 57:7 <b>regulatory</b> 6:22 14:1 16:12 56:24 58:9 <b>reintroduce</b> 26:14 <b>released</b> 6:7 51:1 <b>remaining</b> 55:18 <b>remains</b> 56:15 <b>remand</b> 46:8 <b>remanded</b> 46:8 <b>remedy</b> 52:20 <b>remember</b> 30:20 <b>remove</b> 34:16 41:18 <b>repeal</b> 42:16 <b>repeat</b> 35:24 <b>repeatedly</b> 42:18 <b>represent</b> 46:7 <b>representations</b> 46:21 <b>reproduced</b> 43:11 <b>reproduction</b> 51:23 <b>require</b> 15:23 34:15 41:16 44:13 45:24 52:20 55:8 <b>required</b> 13:15 31:19 32:25	53:7,8 <b>requirements</b> 16:17 45:20 53:6 <b>requires</b> 28:21 29:8 <b>reserve</b> 25:25 <b>respect</b> 6:17 56:1,13 58:8 58:15 <b>respond</b> 56:20 <b>Respondent</b> 7:4 <b>respondents</b> 2:1 2:5 3:4,9 4:10 15:17,25 17:10 27:10 55:21 <b>response</b> 40:9 56:11 <b>responsibility</b> 21:12 <b>restored</b> 26:19 <b>result</b> 15:24 22:3,4 52:7 58:9 <b>resulted</b> 13:17 <b>results</b> 38:16 <b>revert</b> 51:4 <b>right</b> 8:18,20 11:1,7 12:17 19:14 20:7 21:19 22:6,13 25:17 26:8 31:14,25 32:14 35:18 39:3,17 43:12 45:12,13 45:16,17 47:18 48:19,21,22 49:5 50:24 51:15 52:3,6 <b>rigorous</b> 11:3,9 11:18 15:18 16:15,16 17:23 <b>river</b> 15:14 29:13,20 30:15 38:25 <b>ROBERT</b> 33:25 <b>Roberts</b> 4:3 5:12
--	---	---	---	---

16:19,21 18:12 18:15 27:6,21 31:12,17,22 32:3,8,14,16 33:2,9,18 41:9 41:24 42:5,8 42:23 43:4,8 43:13 45:11,14 48:5,9 52:1,9 55:3,14,17 58:19 <b>rock</b> 26:1 <b>rocks</b> 26:9 <b>rule</b> 7:20 8:5 14:3,6 17:11 19:25 24:2 29:4 43:2,5 45:19,21 52:8 57:9,10 <b>rulemaking</b> 21:11 <b>rules</b> 17:20,21 17:23 18:23 19:1 49:14,16 57:6	<b>SCALIA</b> 5:22 23:19,22 25:12 25:14,19,22 29:2,11,17,22 29:25 30:2,10 30:14 43:18 44:1,5,14 47:3 47:11,14,18,24 48:13 <b>scenario</b> 27:1 <b>scheme</b> 16:2,12 <b>SEACC</b> 7:5 <b>sealed</b> 9:22 <b>second</b> 38:20 <b>section</b> 4:18,20 5:8,10 8:25 9:1 9:11,14,21 11:2 12:9 13:8 14:4 15:18,23 17:5 18:17,20 24:7 27:13 28:2,3,3,7,17 30:8 36:14 37:1,10 38:5 38:13 41:20 42:22 53:4,18 53:19 54:5 55:8,12 58:10 <b>sections</b> 18:16 27:23 30:6 31:8 37:3 <b>sediment</b> 51:18 <b>see</b> 36:24 39:8 49:14 <b>seek</b> 7:19 <b>seen</b> 15:20 45:5 <b>selected</b> 18:23 <b>sense</b> 14:21,25 33:19 <b>sentence</b> 58:5,13 <b>separate</b> 9:14,25 <b>separately</b> 31:10 <b>seriously</b> 11:10 <b>Service</b> 13:21 <b>set</b> 24:5 56:25 <b>sets</b> 39:20 <b>settle</b> 52:14	<b>settled</b> 7:22,24 8:4,4 <b>settling</b> 10:11,23 15:9,11,12 26:2 34:16 41:17,18 42:2 42:4,12 43:21 44:16 50:23 <b>side</b> 12:6 34:1 44:18 <b>significant</b> 22:6 <b>significantly</b> 51:23 <b>similar</b> 21:8 <b>simplified</b> 38:21 38:21 <b>simply</b> 6:7,15,23 12:13,14 15:22 20:20 22:21 31:7 36:3 43:15 47:12 <b>single</b> 5:2 34:24 <b>sit</b> 15:5 <b>site</b> 44:24,25 46:24 <b>sites</b> 10:25 <b>site-specifically</b> 46:2 <b>situation</b> 20:12 22:7 28:13 29:4 36:10 39:13 <b>situations</b> 48:3 <b>six</b> 15:20 <b>slew</b> 55:25 <b>sludge</b> 5:14 <b>slurry</b> 5:17,19 20:4 21:7 29:12 35:1,6,8 48:23 50:17 51:12,15 52:11 52:13 53:2 <b>small</b> 32:19 <b>smelters</b> 34:14 41:6 <b>Solicitor</b> 1:24 <b>solid</b> 5:18 6:10	6:11 32:5,9,10 32:11,17,19 33:23 45:24 54:20 <b>solids</b> 6:4 12:2 12:15 29:9,10 31:18,20,23 32:1,7,25 34:7 34:16 35:2 41:19 52:6,7 52:14,15,18 53:9 <b>solution</b> 44:20 45:3 46:19 47:4 <b>sorry</b> 29:16 30:18 37:20 43:5 46:15 52:9 <b>sort</b> 11:16 15:25 40:3 51:7 <b>sorts</b> 23:13 48:10 <b>sought</b> 12:22 56:4 <b>sound</b> 10:16 <b>sounds</b> 6:14,20 44:19 <b>source</b> 9:16 27:14,16 29:12 30:20,22,23 31:2 33:17 35:16,19 <b>sources</b> 30:21 34:6,13 36:15 37:17 41:5 53:7,10 54:7 <b>Souter</b> 6:1 7:2,7 10:2,10,19 11:8,14,20,25 12:12,24 13:6 15:5 26:7,10 26:12 56:13 57:14,21,25 <b>Southeast</b> 1:6,15 4:5,6 <b>so-called</b> 57:4	<b>speak</b> 32:9 <b>specifically</b> 26:25 45:21 55:6 56:3 57:13 <b>specified</b> 10:25 17:22 <b>squarely</b> 7:5 <b>stacks</b> 13:17 <b>stage</b> 20:14 <b>standard</b> 19:23 24:6 27:15,16 28:8,9 29:3 30:4 32:12 35:17,20 36:18 36:19,20 40:2 40:4,5,9 50:9 53:18,18 54:12 54:18 <b>standards</b> 9:16 11:19 15:22 18:18 24:9 30:11,13,16 36:16 37:2,13 37:14 39:20 43:23 51:24 <b>start</b> 6:3 <b>State</b> 13:20 18:1 18:3 26:24 <b>stated</b> 42:15 <b>statement</b> 28:1 41:12 <b>States</b> 1:1,22 9:7 9:13,24 12:8 12:11,18 15:7 21:18 25:16 42:6 56:9 58:18 <b>statute</b> 10:24 21:10 23:4 28:24 29:1 31:6 36:8 37:18,24 38:8 49:13 53:13 56:22 57:7 <b>statutes</b> 39:21 55:23,24
---	--	---	--	--

<b>statutory</b> 6:21 9:18 14:1 16:2 16:12 28:23 <b>stays</b> 23:24 <b>step</b> 38:11 <b>Stevens</b> 17:12 17:14,15 18:8 58:4,8,12 <b>stream</b> 33:14 35:5 56:14 <b>strongly</b> 28:19 47:15 <b>studies</b> 18:5 21:3 <b>stuff</b> 23:23 25:7 48:12,13,24 <b>subject</b> 4:19 6:13 9:13,15 12:17 16:14,16 34:4,21 37:15 38:24 42:19 55:12 56:1,15 58:5 <b>subjective</b> 19:20 <b>submitted</b> 58:20 58:22 <b>substances</b> 36:6 <b>sudden</b> 33:11 <b>suddenly</b> 22:23 <b>suggest</b> 15:22 <b>suggests</b> 28:19 <b>summarized</b> 56:25 <b>superior</b> 10:16 13:24 <b>support</b> 2:1 3:5 4:11 <b>suppose</b> 10:4 22:14 <b>supposed</b> 57:18 <b>Supreme</b> 1:1,21 <b>sure</b> 7:2,14 39:15 48:7 <b>survive</b> 11:23 <b>survived</b> 51:22 <b>suspended</b> 6:4 6:10,11 12:2	12:15 29:9,10 31:20,23 32:10 32:25 34:7 53:9 <b>system</b> 14:5 26:15 <hr/> <b>T</b> <hr/> <b>T</b> 3:1,1 <b>tailings</b> 4:16 13:13,17,22,22 16:8 21:7 51:18 57:4,11 <b>take</b> 5:17 13:10 22:18,25 27:2 27:24 38:11 52:24 <b>taken</b> 14:18 46:9 49:22 <b>takes</b> 22:16 24:15 <b>talk</b> 51:16 <b>talking</b> 10:8 23:17 27:25 28:23 31:13 33:19 43:1,6,9 58:12 <b>tanning</b> 30:25 <b>technologies</b> 41:18 <b>tell</b> 46:22 <b>ten</b> 40:20 <b>terms</b> 17:17 38:21,22 <b>terrible</b> 22:11 23:1 38:23 40:22 <b>test</b> 8:10,19 12:22,25 19:17 20:9,15,16,17 20:25 51:20,24 <b>tested</b> 51:18 52:11,15 <b>testing</b> 52:3 <b>text</b> 14:1 <b>Thank</b> 4:12 16:19,20 27:6	55:14,16 58:19 <b>THEODORE</b> 2:2 3:6,11 16:22 55:19 <b>thing</b> 25:3,5 29:8 30:2 38:2 42:21 58:11 <b>things</b> 8:21 21:17 35:5 48:10 49:20 56:14 <b>think</b> 5:6 6:2 7:4 7:21 8:9 11:9 12:20 13:4 14:25 15:13,21 17:18 19:9 22:8,9,9,14,17 25:10 32:4,16 38:22,22 39:19 39:22 41:3 49:15 56:12 58:11 <b>thinking</b> 14:10 38:21 <b>thinks</b> 14:15 <b>THOMAS</b> 2:4 3:8 27:9 <b>thought</b> 12:1 52:10 55:4 56:19,19 <b>thousand</b> 45:12 48:6 <b>thousands</b> 13:18 <b>three</b> 4:23 55:18 57:5 <b>threshold</b> 51:21 <b>time</b> 12:7 13:10 20:16 39:15 42:20 55:2,9 <b>told</b> 45:3 <b>tool</b> 37:7 <b>tools</b> 36:5 <b>top</b> 51:21 52:21 57:5,22 <b>total</b> 35:20 <b>totally</b> 17:15 <b>tourist</b> 45:6	<b>toxic</b> 18:21 23:17,23 24:6 25:20 36:6 40:13 49:1,1 50:14,14,14,16 53:2 <b>toxicity</b> 51:21,24 52:10,19 <b>toxics</b> 11:24 <b>transitory</b> 23:20 <b>treat</b> 10:3 <b>treating</b> 10:22 10:22 <b>treatment</b> 9:4 <b>true</b> 11:13,20 51:17 <b>trumps</b> 5:22,24 36:12 37:24 <b>try</b> 31:5 38:10 52:20 <b>trying</b> 43:20 52:16 <b>two</b> 5:5 6:5,8,17 7:6,15 9:17 10:13 13:14,16 16:3 17:1 19:3 20:23 21:11 35:5 37:23 39:19 40:10 49:20 51:19 56:14 <b>type</b> 53:8 <b>types</b> 16:12 <hr/> <b>U</b> <hr/> <b>Uh-huh</b> 23:9 <b>unacceptable</b> 46:6,14,19 47:19 48:4 49:6 50:4,7 <b>understand</b> 6:3 11:25 20:9,14 21:14 23:4 24:3 30:18 35:24 39:19 40:10 42:10 52:10	<b>understandable</b> 47:20 <b>understanding</b> 7:22 11:9 21:15 <b>unfortunately</b> 49:22 <b>United</b> 1:1,21 9:7,13,24 12:8 12:10,18 15:7 21:18 25:16 42:6 56:9 58:17 <b>unpredictable</b> 14:24 <b>unqualified</b> 27:14 <b>untenable</b> 15:22 <b>unworkable</b> 14:24 <b>use</b> 27:20 34:15 41:16 43:20 45:20 <hr/> <b>V</b> <hr/> <b>v</b> 1:5,14 4:5,6 <b>vague</b> 40:6 <b>valid</b> 29:5 <b>variant</b> 6:15 <b>vast</b> 45:4 <b>vegetation</b> 52:21 <b>veto</b> 6:13 11:7 15:19 17:13 18:10,12 19:7 47:13,16 48:3 49:4,6,10,16 49:19 50:2 <b>vetoed</b> 47:12,25 <b>view</b> 45:8,9 53:13 <b>violate</b> 25:15 29:15,22 50:13 <b>violated</b> 49:15 <b>violates</b> 24:6 30:10,12,15 50:10 <b>violation</b> 27:15
---	--	---	--	--

36:16,18 <b>virtually</b> 54:9 <b>visible</b> 13:19 <b>visibly</b> 35:4 <b>volume</b> 5:18 32:5,6,11 56:4	<b>Washington</b> 1:18,25 2:2 <b>Wasn't</b> 46:5 <b>waste</b> 8:1,7,14 20:11,21 32:19 33:14 45:25 <b>wastewater</b> 6:6 6:11,17 8:16 8:16 9:4 27:19 32:13,17,20,23 34:7,21 35:3 35:11 44:4 45:23 46:1 <b>water</b> 4:15 5:5 6:8 11:5,12,24 12:15 14:18,20 15:7,23 16:11 17:1,23 19:15 21:5,18 23:14 24:8 26:5 28:15 29:7,8 31:5,20 33:3 33:10,20,21,22 35:7 41:22 49:24 50:8,24 52:16 53:7 54:10 55:13 56:14 <b>waters</b> 9:6,13,24 12:8,10 25:16 27:19 41:17 42:6 45:23 46:2 58:17 <b>waterway</b> 15:9 <b>way</b> 10:10 25:9 31:5 33:25 39:25 40:21 47:12 49:7,20 51:21 53:20 <b>ways</b> 10:13 13:15 <b>weeks</b> 47:2 <b>weight</b> 32:6,10 <b>weren't</b> 9:3 14:9 <b>wet</b> 13:22 51:17 <b>wetlands</b> 13:16 45:4 46:18	47:4 <b>wet-sand</b> 53:1 <b>we're</b> 10:8 12:3 <b>we've</b> 34:24 46:9 46:10 <b>whichever</b> 32:11 <b>wide</b> 13:18 <b>wildlife</b> 10:17 11:5 15:24 <b>wish</b> 55:21 <b>word</b> 12:2 19:19 <b>words</b> 5:23 39:12 <b>work</b> 53:15 <b>workable</b> 19:20 20:25 21:4 <b>working</b> 46:10 46:11,23 <b>works</b> 21:15 40:11 <b>world</b> 23:18 <b>worry</b> 39:25 <b>worse</b> 44:19,19 <b>worst</b> 22:8,16 23:17 48:25 <b>worst-case</b> 27:1 <b>worth</b> 46:2 <b>wouldn't</b> 15:15 29:13,14,15 32:16,20 36:17 41:21 50:6 <b>writing</b> 39:21 <b>written</b> 23:12 <b>wrong</b> 12:1	<b>zero</b> 33:1 <b>zone</b> 51:7  \$ \$26 18:5  0 <b>07-984</b> 1:5 4:4 <b>07-990</b> 1:14 4:6  1 <b>10</b> 50:15 <b>10:04</b> 1:22 4:2 <b>100</b> 13:16,17 <b>11(a)</b> 24:3 <b>11:06</b> 58:21 <b>12</b> 1:19 7:15 <b>122.2</b> 9:5 <b>1328</b> 27:23 <b>1344</b> 27:23,23 <b>141</b> 57:4 58:2 <b>143</b> 57:21 <b>144</b> 57:21 58:9 <b>145</b> 57:5,21 <b>145a</b> 57:9 58:2 <b>146</b> 16:9 <b>16</b> 3:7 <b>1973</b> 14:2 56:24 <b>1979</b> 55:6 <b>1986</b> 56:9  2 <b>2</b> 24:5 <b>20</b> 22:19 41:21 46:22 <b>200</b> 13:17 <b>2002</b> 7:25 8:5,8 14:5 19:18 20:2,9,12 42:1 42:24 56:2 <b>2004</b> 16:8,10 <b>2009</b> 1:19 <b>202</b> 56:2 <b>27</b> 3:9 56:10,25 56:25  3 <b>30</b> 8:6 14:2,22	16:6 32:6 34:12 41:21 <b>301</b> 18:18 31:8 37:3 38:13 57:1 <b>306</b> 9:1 18:18 28:7,17,18,23 31:9 37:3 38:13,24 53:18 53:24 56:21,22 57:1 <b>306(e)</b> 27:13 36:14 53:19 <b>307</b> 18:21,22,25 24:7 <b>31,135</b> 56:3  4 <b>4</b> 3:5 15:23 <b>40</b> 9:5 39:15 41:1,4,25 43:19 44:14 <b>402</b> 4:21 5:8 8:1 8:8,15,25 9:3 9:14,25 14:4 16:17 18:16,17 24:18 25:12,14 28:2,4,24 31:7 33:11 34:4 35:14,25 36:11 36:12,22 37:4 37:23 41:20 42:22 53:22 54:22 56:16 58:10,14,16 <b>404</b> 4:18 5:11 6:13 8:14,20 9:11,19,21 11:2 12:9 13:8 15:18 16:14 17:5 18:16,22 19:6 20:12,12 21:15 24:17 25:19 27:24,24 28:3,4 30:8 31:7 35:14,25 36:5,11,12
--	--	--	---	--

<p>37:1,5,13,24  38:2,2,5,7 39:4  40:23 47:7  53:4,21,25  54:5,15,16,22  55:8,12 56:15  56:23 57:2,12  57:15,16 58:15  <b>404(b)</b> 38:7  <b>404(b)(1)</b> 17:21  19:1 23:11  24:2,4  <b>404(c)</b> 49:11</p> <hr/> <p><b>5</b></p> <hr/> <p><b>50</b> 9:21 22:18  48:23  <b>50-foot</b> 9:10  11:1  <b>541</b> 7:15  <b>55</b> 3:12 5:18  21:23 22:19  32:4</p> <hr/> <p><b>6</b></p> <hr/> <p><b>67</b> 56:4</p> <hr/> <p><b>7</b></p> <hr/> <p><b>7a</b> 43:11  <b>75</b> 48:23</p> <hr/> <p><b>8</b></p> <hr/> <p><b>8a</b> 43:11</p> <hr/> <p><b>9</b></p> <hr/> <p><b>90</b> 32:10,17  <b>900</b> 18:5  <b>95</b> 51:20 54:20  <b>99</b> 52:11</p>				
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