No. 09-247

In The Supreme Court of the United States

OHIO VALLEY ENVIRONMENTAL COALITION, et al.,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF TROUT UNLIMITED AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

REASONS FOR GRANTING THE PETITION 8

I. Confusion and Conflict Among the Courts of Appeals Over *Seminole Rock* and Its Progeny Justifies This Court's Intervention 8

II. The Fourth Circuit's Analysis of *Seminole Rock* Deference Conflicts with This Court's Precedents, and with the Majority of Other Circuits 11

A. The Fourth Circuit Ignored This Court's Precedents in Finding the Regulation Ambiguous 11

B. The Fourth Circuit Failed to Follow This Court's Instruction to Consider the Agency's Intent at the Time It Promulgated the Regulation 16

III. This Case Warrants Review Because Freshwater Fishing and Tourism Are Important Components of the National and Appalachian Economies 22

CONCLUSION 25

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Advanta USA, Inc. v. Chao, 350 F.3d 726 (8th Cir. 2003) 19

Alaska Trojan P'ship v. Gutierrez, 425 F.3d 620 (9th Cir. 2005) 9, 13

Albemarle Corp. v. Herman, 221 F.3d 782 (5th Cir. 2000) 19

Am. Airlines, Inc. v. United States, 551 F.3d 1294 (Fed. Cir. 2008).....9

Amerada Hess Pipeline Co. v. FERC, 117 F.3d 596 (D.C. Cir. 1997).....10

Auer v. Robbins, 519 U.S. 452 (1997).....8, 21

Belt v. EmCare, Inc., 444 F.3d 403 (5th Cir. 2006) 10

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) .....*passim*

Christensen v. Harris County, 529 U.S. 576 (2000) .....*passim*

City of Chicago v. Envtl. Def. Fund, 511 U.S. 328 (1994) 15

Edmonds v. Hammett, 450 F.3d 917 (9th Cir. 2006) 10

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TABLE OF AUTHORITIES – Continued

Page

Fed. Express Corp. v. Holowecki, 128 S. Ct. 1147 (2008) 9

Gardebring v. Jenkins, 485 U.S. 415 (1988) 6, 8, 9, 11

Gonzales v. Oregon, 546 U.S. 243 (2006) 16

Gose v. USPS, 451 F.3d 831 (Fed. Cir. 2006) 10

K-Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988) 15

Kennedy v. Plan Admin. for DuPont Savings & Inv. Plan, 129 S. Ct. 865 (2009) 8

Lal v. INS, 255 F.3d 998 (9th Cir. 2001) 9, 16, 17

MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218 (1994) 15

Mercy Catholic Med. Ctr. v. Thompson, 380 F.3d 142 (3d Cir. 2004) 9

Moore v. Hannon Food Serv., 317 F.3d 489 (5th Cir. 2003) 7, 10

S.G. Loewendick & Sons, Inc. v. Reich, 70 F.3d 1291 (D.C. Cir. 1995) 10

Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994) 8, 9, 11, 16, 21

United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365 (1988) 13

United States v. Deaton, 332 F.3d 698 (4th Cir. 2003) 10

Whetsel v. Network Prop. Servs., 246 F.3d 897 (7th Cir. 2001) 10

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

Clean Water Act ("CWA"), CWA § 101, 33 U.S.C. § 1251 2
CWA § 104(r), 33 U.S.C. § 1254(r) 13
CWA § 403, 33 U.S.C. § 1343 18
CWA § 404(b)(1), 33 U.S.C. § 1344(b)(1) 18, 19, 21

FEDERAL REGULATIONS

15 C.F.R. § 971.601 14
33 C.F.R. § 151.1504 14
40 C.F.R. § 125.122(a)(3) 18
40 C.F.R. § 230.1(c) 20
40 C.F.R. § 230.2(c) 15, 16
40 C.F.R. § 230.4-1(a)(3) 17
40 C.F.R. § 230.5 12
40 C.F.R. § 230.9 21
40 C.F.R. § 230.10 ..... 12, 19
40 C.F.R. § 230.11(e) ..... *passim*

FEDERAL REGISTER

40 Fed. Reg. 41,291 (Sept. 5, 1975) 17
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TABLE OF AUTHORITIES – Continued

Page

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73 Fed. Reg. 19,627 (Apr. 10, 2008) 21

LEGISLATIVE HISTORY

H.R. REP. NO. 92-911 (1972), *reprinted in* 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 (Jan. 1973) 14

S. REP. NO. 92-414 (1972), *reprinted in* 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 (Jan. 1973) 14

ADDITIONAL AUTHORITIES

1990 MEMORANDUM OF AGREEMENT BETWEEN THE CORPS AND THE EPA 12

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TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

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INTEREST OF THE *AMICUS* CURIAE[1]

Trout Unlimited ("TU") is a nonprofit membership organization dedicated to conserving, protecting, and restoring North America's coldwater fisheries and watersheds. Founded in 1959, TU currently has 30 offices, 130 professional staff, and 140,000 volunteers and members nationwide, including 1,600 members in West Virginia.

TU's members are predominantly anglers with an abiding commitment and intimate connection to America's rivers, streams, and watersheds. Each year, TU's members devote over 618,000 volunteer hours to and invest $21 million in watershed protection, including more than $11 million in watershed restoration. Throughout Appalachia in particular, TU devotes significant resources to the restoration of hundreds of miles of streams that have been damaged or destroyed by mining activities, including mountaintop removal mining.

TU's staff and members have considerable scientific expertise in, and hands-on experience with, headwater streams and the critical role headwaters

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of Trout Unlimited's intention to file this brief. All parties have consented to the filing of this brief and copies of their consent letters have been filed with the Clerk. No counsel for any party authored this brief either in whole or in part. No persons other than *amicus* or its counsel has made any monetary contribution to the preparation or submission of this brief.

play in the health of the rivers and streams they feed and the watersheds in which they are located. U.S. Army Corps of Engineers ("Corps") permits, including those at issue in this case, that authorize extensive and permanent filling of headwater streams, damage or destroy thousands of miles of streams and rivers throughout Appalachia. These permits violate the Clean Water Act ("CWA") 33 U.S.C. § 1251, *et seq.*, and frustrate the efforts of Congress, TU, and many others to protect and restore our nation's waters.

As a national organization of committed trout and salmon anglers, TU also has an interest in the economic consequences that such permits have on both the Appalachian region and the nation at large. Recreational pursuits, tourism, and travel – all of which depend on the maintenance and preservation of clean water – make important contributions to state and local economies and the well-being of their citizens.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a particularly destructive type of coal mining, aptly named "mountaintop removal mining" because the tops of mountains are blasted off and an immense quantity of rock and debris is

dumped into the valleys and waterways below.[2] The mining debris buries the headwaters of rivers and streams, permanently destroying the headwaters and damaging the fish, biota, and watersheds that depend on the headwaters. In just ten years, between 1992 and 2002, approximately 1,200 miles of headwater streams in four Appalachian states have been buried.[3] According to the U.S. Environmental Protection Agency ("EPA"), headwaters are "critical to fish and other aquatic species throughout an entire river" and thus "important ecologically."[4] Filling headwaters has dire environmental ramifications that, in turn, damage the freshwater fishing industry and the health of local economies. Freshwater fishing generates annual retail sales of $31 billion in the U.S. and $347 million in West Virginia.[5]

This case involves the Corps' reliance on an unlawful interpretation of a CWA regulation to issue four permits authorizing the burial of more than 13

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[2] CLAUDIA COPELAND, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS: MOUNTAINTOP MINING: BACKGROUND ON CURRENT CONTROVERSIES 1-2 (Feb. 1, 2005), *available at* https://www.policyarchive.org/handle/10207/3692.

[3] U.S. EPA, ET AL., MOUNTAINTOP MINING/VALLEY FILLS IN APPALACHIA: FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT 3 (2005), *available at* http://www.epa.gov/region3/mtntop/eis2005.htm.

[4] *Id.* at 4.

[5] AM. SPORTFISHING ASS'N, SPORTFISHING IN AMERICA 9 (2008), *available at* http://www.asafishing.org/images/statistics/resources/Sportfishing%20in%20America%20Rev.%207%2008.pdf.

miles of Appalachian streams. While these permits are seriously destructive in their own right, the pendency of almost 100 additional permit appliations drastically raises the stakes of this case.[6] The Petitioners amply demonstrate that the Court should grant certiorari because the Fourth Circuit violated this Court's precedent by ignoring the plain language of the regulation at issue and because Appalachia is a national resource of unique and exceptional importance.

This brief sets forth two additional reasons why the Court should grant certiorari:

First, the outcome of this case will have momentous environmental and economic impacts in Appalachia and beyond. As *amici* William Schlesinger, et al., detail in their brief, the ecological harms to this nation's waterways from mountaintop removal mining include destruction of species, increased flood hazards, degradation of water quality and loss of habitat. The damage is "both profound and irreversible." App. 251a (Michael, J., dissenting from denial of reh'g en banc).

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[6] *See* Letter from Lisa P. Jackson, Administrator, EPA, to Terrence Salt, (Acting) Assistant Secretary, Civil Works, Department of the Army (June 11, 2009), *available at* http://www.epa.gov/wow/wetlands/pdf/Final_EPA_MTM_letter_to_Army_6-11-09.pdf.; U.S. EPA, Factsheet: Appalachian Surface Coal Mining: Initial List Resulting from Enhanced Coordination Procedures (Sept. 11, 2009), *available at* http://www.epa.gov/owow/wetlands/pdf/ECP_Factsheet_09-11-09.pdf.

The economic consequences are equally dire. The 40 million anglers in the United States spend $45 billion a year on their sport[7] – significantly more than the revenues of all of the major professional sports leagues in the U.S. combined.[8] Tens of thousands of jobs in Appalachia alone depend upon the fishing industry.[9] Related activities – hunting and wildlife watching – account for annual expenditures of $286 million and $213 million in West Virginia.[10] These activities, too, are put at risk by the extensive environmental damage caused by mountaintop removal mining. *See* U.S. EPA, et al., *supra* note 3, at 39 (stating that adverse water quality resulting from mountaintop mining can "pose a risk to fish-eating birds" as well as to birds "that depend upon aquatic insects as a food supply"). Moreover, because "a clean and healthy natural environment is an essential

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[7] AM. SPORTFISHING ASS'N, *supra* note 5, at 4.

[8] These revenues in 2009 were: Major League Baseball, $6.2B; National Basketball Association, $3.2B; National Football League, $6.0B; National Hockey League, $2.4B. Plunkett Research, Ltd., Sports Industry Overview, *available at* http://www.plunkettresearch.com/Industries/Sports/SportsStatistics/tabid/273/Default.aspx.

[9] *See* AM. SPORTFISHING ASS'N, *supra* note 5, at 9.

[10] U.S. FISH & WILDLIFE SERV., 2006 NATIONAL SURVEY OF FISHING, HUNTING & WILDLIFE-ASSOCIATED RECREATION 26, 29 (2007), *available at* http://library.fws.gov/Pubs/nat_survey2006_state.pdf.

ingredient for tourism growth," further environmental degradation will reduce the value of tourism.[11]

Second, courts of appeals across the country are confused about the proper application of *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), which instructs that courts must defer to an agency's interpretation of a regulation unless it "is plainly erroneous or inconsistent with the regulation," *id*. at 414. There are inconsistencies and conflicts among the circuits about both the substance and structure of the legal test to be applied.

In the first place, the circuits differ markedly in their willingness to strike down agency interpretations when the interpretation runs counter to "the [agency's] intent at the time of the regulation's promulgation." *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988). One scholar notes that "most courts suggest measuring the agency's interpretation only against the unadorned text of the regulation . . . only a few add mention of the agency's intent at the time that it promulgated the regulation," even though "the latter formulation most closely approximates the Supreme Court's announced guidance." Lars Noah, *Divining Regulatory Intent: The Place For A "Legislative History" Of Agency Rules*, 51 HASTINGS L.J. 255,

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[11] U.S. EPA ET AL., MOUNTAINTOP MINING/VALLEY FILLS IN APPALACHIA, DRAFT PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT III.T-1 (2003), http://www.epa.gov/region3/mtntop/eis2003.htm (incorporated in Final Programmatic EIS, EPA 9-03-R-05002 (2005).

291 (2000). Here, by failing to examine the agency's intent at the time the regulation was promulgated, the Fourth Circuit improperly deferred to the Corps.

The circuits also disagree about the structure of the test to apply in the wake of *Christensen v. Harris County*, 529 U.S. 576 (2000). Some circuits interpret *Christensen* to require a two-part test; other circuits apply a one-step test.

For instance, the Fifth Circuit has criticized the Seventh Circuit for utilizing the one-step approach, remarking that

> "under *Christensen*, this approach is backwards. The presence or lack of ambiguity in a regulation should be determined without reference to proposed interpretations; otherwise, a regulation will be considered 'ambiguous' merely because its authors did not have the forethought expressly to contradict any creative contortion that may later be constructed to expand or prune its scope."

Moore v. Hannon Food Serv., 317 F.3d 489, 497 (5th Cir. 2003). The Fourth Circuit, by failing to consider whether the regulation was ambiguous *before* examining the Corps' interpretation, committed precisely the error the *Moore* court cautioned against.

Because the courts are asked daily to decide whether to defer to agency interpretations of regulations, this dissonance is an issue of immediate national importance. The decision below offers a clear example of this confusion and inconsistency. As a

result, this Court should grant certiorari to provide direction on this significant administrative law issue.

REASONS FOR GRANTING THE PETITION

I. Confusion and Conflict Among the Courts of Appeals Over *Seminole Rock* and Its Progeny Justifies This Court's Intervention.

This Court first articulated the principle that a court should defer to an agency's interpretation of its regulations unless the interpretation "is plainly erroneous or inconsistent with the regulation" in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

In recent years, the Court's decisions have introuced differing articulations of this general principle. For instance, *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988), and *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994), explained that the reviewing court must consider the intent of the agency at the time of promulgation. *See Thomas Jefferson*, 512 U.S. at 512 (holding that a court must defer to an agency's interpretation unless an "alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation").

However, in *Auer v. Robbins*, 519 U.S. 452, 461 (1997), and in some subsequent decisions, *see*, *e.g.*, *Kennedy v. Plan Admin. for DuPont Savings & Inv.*

Plan, 129 S. Ct. 865, 872 (2009); *Fed. Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1155 (2008), the Court itself did not scrutinize the intent of the agency at the time the regulation was issued and also did not cite either *Thomas Jefferson* or *Gardebring*.

In *Christensen v. Harris County*, 529 U.S. 576 (2000), the Court held that "deference is warranted only when the language of the regulation is ambiguous," *id.* at 588, suggesting that a two-step analysis is necessary: first evaluating the plain language of the regulation without reference to the agency's proffered interpretation and, only if there is ambiguity, then examining the regulation and its history as a whole and comparing them with the agency's interpretation.

The result of these varying articulations of the *Seminole Rock* deference principle has been confusion and inconsistency among the courts of appeals. Some decisions apply the *Gardebring*/*Thomas Jefferson* formulation, finding the agency's intent at the time it promulgated the regulation to be a decisive factor in rejecting an agency's subsequent interpretation.[12]

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[12] *See, e.g.*, *Am. Airlines, Inc. v. United States*, 551 F.3d 1294, 1302 (Fed. Cir. 2008) (rejecting government's argument for deference because "both the plain language of the regulations and [the agency's] prior inconsistent statements" when it amended regulations "weigh against the government's interpretation"); *Mercy Catholic Med. Ctr. v. Thompson*, 380 F.3d 142, 152-54 (3d Cir. 2004) ("[T]he intent of the rule supports our" rejection of the Secretary's interpretation.); *Alaska Trojan P'ship v. Gutierrez*, 425 F.3d 620 (9th Cir. 2005); *Lal v. INS*, 255 F.3d 998, 1005 (9th Cir. 2001) ("Even aside from the plain language of

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Other courts, including the panel below, ignore this analysis.[13] Some cases construe *Christensen* to create a sequential, two-part test.[14] Others collapse the two parts into a single inquiry or apply the "plainly erroeous or inconsistent with the regulation" analysis without first determining whether the regulation is ambiguous.[15]

In the case at hand, the Fourth Circuit neither properly scrutinized the regulation nor determined the agency's intent at the time of promulgation. Its failure to conduct the required analysis before deferring to the Corps' interpretation of the regulation under review is symptomatic of the confusion that reigns among the courts of appeals regarding the proper application of this Court's precedents. The Court

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the regulation, we still need not defer to the BIA's interpretation because it contravenes the clear intent of the agency in creating the rule."); *S.G. Loewendick & Sons, Inc. v. Reich,* 70 F.3d 1291, 1295 (D.C. Cir. 1995).

[13] *See, e.g.*, *OVEC*, App. 1a; *Edmonds v. Hammett*, 450 F.3d 917, 919-20 (9th Cir. 2006); *Amerada Hess Pipeline Co. v. FERC*, 117 F.3d 596, 600 (D.C. Cir. 1997).

[14] *See, e.g.*, *Gose v. USPS*, 451 F.3d 831, 839 (Fed. Cir. 2006); *Belt v. EmCare, Inc.*, 444 F.3d 403, 407-08 (5th Cir. 2006); *United States v. Deaton*, 332 F.3d 698, 710 (4th Cir. 2003) ("Before deferring to the agency interpretation under *Seminole Rock*, we first decide whether the regulation is ambiguous.").

[15] *See OVEC*, App. 1a; *Moore v. Hannon Food Service*, 317 F.3d 489 (5th Cir. 2003) (criticizing *Whetsel v. Network Prop. Servs.*, 246 F.3d 897, 901 (7th Cir. 2001) as finding ambiguity "only by contrasting the regulation's language with the Secretary's interpretation" because "[u]nder *Christensen*, this approach is backwards").

should take this opportunity to provide direction on this fundamental issue of administrative law.

II. The Fourth Circuit's Analysis of *Seminole Rock* Deference Conflicts with This Court's Precedents, and with the Majority of Other Circuits.

Petitioners demonstrate that the lower court ignored this Court's precedents by failing to honor the unambiguous language of the regulation. Pet. at 16-20.

We have two points to add to Petitioner's argument. First, had the court below applied the standard tools of regulatory interpretation – as it must under this Court's precedents – it would have found the regulation to be plain and unambiguous. Second, an analysis of EPA's intent at the time it promulgated the regulation demonstrates that the interpretation proffered by the Corps and accepted by the Fourth Circuit is inconsistent with that intent and is therefore not entitled to deference under *Gardebring* and *Thomas Jefferson*.

A. The Fourth Circuit Ignored This Court's Precedents in Finding the Regulation Ambiguous.

Pursuant to 40 C.F.R. § 230.11(e), the Corps must "[d]etermine the nature and degree of effect that the proposed discharge will have, both individually and cumulatively, on the *structure and function* of the

aquatic ecosystem and organisms" *before* proceeding to analyze the applicant's proposed compensatory mitigation. 40 C.F.R. §§ 230.5, 230.10, 230.11(e) (App. 263a-273a) (emphasis added).

In the decision below, a split panel of the Fourth Circuit declared the regulation ambiguous because it "offer[s] no definition of the word 'function' or any explanation of how 'structure' and 'function' are to be assessed." App. 39a. As a result, the court deferred to the Corps' conclusion that it could conflate the two terms and "use[ ] stream structure as a surrogate for assessing stream function," rather than performing an actual assessment of stream function as required by the regulation. App. 39a, 43a.[16]

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[16] The court accepted the Corps' argument that it had interpreted 40 C.F.R. § 230.11(e) in two guidance documents purporting to allow the Corps to approve mitigation measures that "replace linear feet of stream on a one-to-one basis" whenever the Corps concluded that a "functional assessment is not practical." App. 48a-49a. These documents are not applicable to § 230.11(e) which requires the Corps to analyze the impact of the proposed discharge on the structure and function of the aquatic ecosystem *before* it turns to an analysis of compensatory mitigation. 40 C.F.R. §§ 230.5, 230.10, 230.11. By their express terms, the two guidance documents apply only in the context of compensatory mitigation – not to the antecedent impact assessment determination. *See* App. 294a (1990 Memorandum of Agreement between the Corps and the EPA ("1990 MOA") at 2) (stating that the MOA "must be adhered to when considering mitigation requirements for standard permit applications"); App. 305a (U.S. Army Corps of Engineers 2002 Regulatory Guidance Letter 02-02 ("RGL 02-02") at 1) ("This guidance applies to all

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Contrary to the lower court's conclusion, a regulation is not ambiguous merely because a term is undefined. As this Court has instructed, "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme. . . ." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988); *see Alaska Trojan P'ship*, 425 F.3d at 628 ("Defendants are correct that 'harvest' is not defined in the LLP regulations. However, this court must look at the regulations as a whole in determining the plain meaning of a term."). In such a situation, before declaring the regulation to be ambiguous, a court must apply the standard principles of construction. *See United Sav. Ass'n*, 484 U.S. at 371 (observing that the interpretation of a statute "is a holistic endeavor"); *see also EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring in part and concurring in the judgment) ("[D]eference is not abdication, and it requires us to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ.").[17]

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compensatory mitigation proposals associated with permit applications submitted for approval after this date.").

[17] The text of the CWA and its legislative history demonstrate that Congress itself distinguished between structure and function. For example, section 104 authorizes EPA "to make grants to colleges and universities to conduct basic research into the *structure and function* of freshwater aquatic ecosystems." CWA § 104(r), 33 U.S.C. § 1254(r) (emphasis added). The House Report explains that "the word 'integrity' [in the Act] . . . refers

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The panel below was therefore incorrect in concluding that the regulation was ambiguous merely because the term "function" was undefined. Instead, it should have applied the standard tools of regulatory interpretation. First, as Petitioners indicate, *see* Pet. at 17-19, the court should have considered the ordinary and technical meanings of the words "structure and function." Second, as Judge Michael correctly stated in dissent, the panel's interpretation violates the presumption against superfluity: the Corps' interpretation and the Court's holding render the term "function" superfluous, and consequently the Corps' interpretation "is impossible to reconcile with the plain language of the regulation, which clearly mandates that the Corps assess both structure and function." App. 78a (Michael, J., dissenting).[18]

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to a condition in which the natural structure and function of ecosystems is maintained." H.R. REP. NO. 92-911, at 76 (1972), *reprinted in* 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 763 (Jan. 1973); *see also* S. REP. NO. 92-414, at 76 (1972), *reprinted in* 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1494 (Jan. 1973) (stating that the maintenance of "chemical, physical and biological integrity . . . requires that . . . the aquatic ecosystem will return to a state *functionally* identical to the original") (emphasis added).

[18] Other agencies also use the terms "structure" and "function" to describe distinct aspects of ecosystems, demonstrating that these terms are widely understood to be distinct concepts with clear meanings. *See, e.g.*, 15 C.F.R. § 971.601 (NOAA); 33 C.F.R. § 151.1504 (Coast Guard); U.S. Fish & Wildlife Service, Mitigation Policy, 46 Fed. Reg. 7656, 7659 (Jan.

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Even if there were some ambiguity in the term "function," the Corps' and the Fourth Circuit's interpretation "goes beyond the scope of whatever ambiguity" the regulation contains. *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 339 (1994). Limited definitional ambiguity does not permit the Corps or the Fourth Circuit "to read the word 'function' right out of the regulation." App. 249a (Wilkinson, J., dissenting from denial of reh'g en banc). Whatever the term "function" means, it does *not* mean "structure." *Cf. MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994) ("[A]n agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear."); *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 318 (1988) (Scalia, J., dissenting) ("The authority to clarify an ambiguity in a statute is not the authority to alter even its unambiguous applications. . . .").

As the Court cautioned in *Christensen*, to "defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." 529 U.S. at 588. Accepting the Corps' interpretation of 40 C.F.R. § 230.11(e) here constitutes such a modification of the regulation and therefore violates 40 C.F.R. § 230.2(c), which provides that no "modifications to the basic application, meaning, or intent of [40 C.F.R. Part 230]

23, 1981) ("Changes in . . . ecosystem structure and function may not result in a biologically adverse impact.").

will be made without rulemaking by the Administrator under the Administrative Procedure Act." Section 230.2(c) therefore prohibits the Corps from interpreting the "structure and function" language in section 230.11(e) so as to conflate the two words into one. The Corps' interpretation of "function" as synonymous with "structure" is impermissible.

B. The Fourth Circuit Failed to Follow This Court's Instruction to Consider the Agency's Intent at the Time It Promulgated the Regulation.

In addition to misapplying this Court's precedents in its analysis of ambiguity, the Fourth Circuit failed altogether to analyze whether the Corps' reading of the regulation was inconsistent with "other indications of the [agency's] intent at the time of the regulation's promulgation." *Thomas Jefferson*, 512 U.S. at 512.

As this Court recently reiterated, when "the current interpretation runs counter to the 'intent at the time of the regulation's promulgation' . . . deference is unwarranted." *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006). The majority of courts of appeals routinely examine the agency's intent at the time the regulation was promulgated to determine whether to defer to a subsequent interpretation of the agency.[19] For example, *Lal v. INS*, 255 F.3d 998 (9th Cir. 2001),

[19] *See* cases cited in footnote 12, *supra*.

rejected the Board of Immigration Appeals's (BIA's) interpretation of an INS regulation. Because the preamble to the INS regulation explicitly stated that it was intended to codify an earlier BIA decision, the court found policy statements in that case to be "strong indicators of [regulatory] intent." *Id.* at 1005. The court rejected the BIA's subsequent interpretation in part because the BIA could not point to any of its own, prior language in the earlier case to support its position. *Id.* at 1006-07.

Here, there are unambiguous indications of EPA's intent at the time it promulgated 40 C.F.R. § 230.11(e) that plainly conflict with the interpretation advanced by the Corps.

First, EPA's careful development of the language in section 230.11(e) indicates that it consistently distinguished between the terms "structure" and "function." EPA's 1975 interim final regulation required the Corps to evaluate whether a proposed discharge would result in "the covering of benthic communities with a subsequent change *in community structure or function*." Navigable Waters: Discharge of Dredged or Fill Material, 40 Fed. Reg. 41,291 (Sept. 5, 1975) (formerly codified at 40 C.F.R. § 230.4-1(a)(3)) (emphasis added).

This distinction was maintained in the next iteration of the regulation, published in 1979. That version of what is now codified as section 230.11(e) mandated that "[a] determination shall be made of the nature and degree of effect that the proposed

discharge will have [both individually and cumulatively] *on the structure, function and habitat of wetland and other aquatic biota.*" Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 44 Fed. Reg. 54,222, 54,235 (Sept. 18, 1979) (to be codified at 40 C.F.R. pt. 230) (emphasis added) (second alteration in original).

The final (and current) version of 40 C.F.R. § 230.11(e), requires the Corps, before deciding whether to issue a permit, to "[d]etermine the nature and degree of effect that the proposed discharge will have, both individually and cumulatively, on the *structure and function* of the aquatic ecosystem and organisms." 40 C.F.R. § 230.11(e) (emphasis added). EPA struck the word "habitat" but retained both words "structure" *and* "function" in the regulation, indicating its unambiguous intent that the Corps consider both structure and function as independent elements of the analysis of the proposed discharge.[20]

As the development of the regulations indicates, the phrase "structure and function" was not the product of a haphazard or rushed drafting process,

[20] This is consistent with Congress' direction to EPA to base the freshwater discharge regulations EPA was to promulgate under CWA Section 404(b)(1), 33 U.S.C. § 1344(b)(1), on the ocean discharge regulations to be promulgated under CWA Section 403, 33 U.S.C. § 1343. Notably, the Section 403 regulations distinguish between structure and function. 40 C.F.R. § 125.122(a)(3). EPA finalized the ocean discharge regulations barely two months before it finalized the freshwater discharge regulations at issue in this case.

but a carefully constructed formulation designed to analyze "adverse impacts on aquatic ecosystems," 45 Fed. Reg. 85,336 (Dec. 24, 1980), and "improve the clarity of the regulations," *id.* at 85,338. The Corps' – and the panel's – interpretation, which conflates "structure" with "function," is contrary to this intent.

Second, the preambles to the draft and final versions of the regulation confirm EPA's intent that the Corps conduct a broad assessment of all potential impacts of a proposed discharge. *Cf. Advanta USA, Inc. v. Chao*, 350 F.3d 726, 728-29 (8th Cir. 2003) (consulting the preamble to the regulation to determine the agency's intent); *Albemarle Corp. v. Herman*, 221 F.3d 782, 786 (5th Cir. 2000) (same). The preamble to the proposed 1979 regulations emphasizes that "[a]ny finding of acceptability of impact . . . *must* be made on the basis of *all* of the conditions of compliance under these 404(b)(1) [regulations]." 44 Fed. Reg. at 54,224. The preamble also stresses that the "sections [following § 230.10(c)] ensure that the impact of any discharge will be *fully understood* before any decision is made to permit the discharge." *Id.* at 54,225 (emphasis added).

EPA made the same point in the preamble to the final regulations by underscoring the importance of documenting the factual determinations made under section 230.11 in order to "*ensure consideration of all important impacts in the evaluation of a proposed*

discharge of dredged or fill material." 45 Fed. Reg. at 85,343 (emphasis added).[21]

Third, the regulation unequivocally places the burden of proof on the party seeking to discharge the material. "Fundamental" to the regulation "is the precept that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact." 40 C.F.R. § 230.1(c).

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[21] Numerous EPA and Corps internal guidance documents also highlight the importance of the Corps conducting a thorough assessment of all potential impacts on the ecosystem, using the best scientific data available. The 1990 MOA, one of the two documents on which the Fourth Circuit relied, provides that "[f]unctional values should be assessed by applying aquatic site assessment techniques generally recognized by experts in the field and/or the best professional judgment of federal and state agency representatives*, provided such assessments fully consider ecological functions included in the Guidelines.*" App. 300a (emphasis added). A Letter from Richard Pepino, of the Office for Environmental Programs in the EPA, to Michael Gheen, Chief of the Regulatory Branch of the Army Corps of Engineers, Huntington District, emphasizes the importance of an assessment of stream functions:

> The Guidelines also require an evaluation of practicable options for minimizing all unavoidable environmental impacts associated with the proposed discharges of fill. . . . *Assessment of* the biological *functions* and values currently being provided by aquatic resources potentially affected by proposed discharges *is also critical to this evaluation*, which should focus on streams or stream reaches where impacts should be reasonably avoided.

Letter from Richard Pepino to Michael D. Gheen (Oct. 7, 1999) (emphasis added).

Regulatory interpretations that reduce the amount of information the Corps considers when evaluating the acceptability of a proposed discharge conflict with this intent.[22]

In sum, the Corps' conflation of "structure" and "function" does not "ensure[ ] consideration of all important impacts in the evaluation of a proposed discharge of dredged or fill material." 45 Fed. Reg. at 85,343. The Corps' interpretation also subverts EPA's regulatory intent "that the impact of any discharge will be *fully understood* before any decision is made to permit the discharge." 44 Fed. Reg. at 54,225 (emphasis added). Simply put, the Corps' interpretation is "inconsistent with the regulation," *Auer*, 519 U.S. at 461. An "alternative reading is compelled by the regulation's plain language [and] by other indications of [EPA's] intent at the time of the regulation's promulgation. *Thomas Jefferson,* 512 U.S. at 512.

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[22] Subsequent rulemaking by the EPA and Corps also emphasizes the importance of a separate analysis of ecosystem function. In 2008, the EPA and Corps published a new set of regulations, as subpart J of the 404(b)(1) regulations, which govern compensatory mitigation activities. 40 C.F.R. pt. 230.9. Notably, the preamble describes the factors that the Corps considers "when evaluating permit applications," including "potential losses of aquatic resource functions and services." 73 Fed. Reg. 19,627 (Apr. 10, 2008).

III. This Case Warrants Review Because Freshwater Fishing and Tourism Are Important Components of the National and Appalachian Economies.

By removing an important Clean Water Act safeguard, the decision below will degrade water quality, thereby harming the freshwater fishing industry and the substantial economic activity it generates. In 2006, U.S. anglers spent a total of $45 billion on travel, fishing equipment, and other fishing-related expenses.[23]

In a number of states, this spending represents a significant source of income. For instance, freshwater fishing in Kentucky generates $871 million in retail sales and more than 14,000 jobs.[24] In Tennessee, freshwater fishing generates $700 million in retail sales and more than 12,000 jobs.[25] And in West Virginia, home to more than 20,000 miles of streams and over 100 public fishing lakes,[26] the freshwater fishing industry generates approximately $347 million in retail sales, resulting in an economic output of over $453 million throughout the state, supporting more

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[23] AM. SPORTFISHING ASS'N, *supra* note 5, at 11.

[24] *Id.* at 9.

[25] *Id.*

[26] W. VA. DEP'T OF NATURAL RES., MOUNTAIN STATE FISHING, *available at* http://www.wvdnr.gov/fishing/PDFFiles/FISHtourweb04.pdf.

than 4,500 jobs and generating over $86 million in wages.[27]

Travel and tourism are becoming increasingly important to economic growth in West Virginia. Preservation of streams and watersheds sustain fishing opportunities, promoting economic growth through increased and enhanced tourism in the state. According to EPA and other federal agencies:

> There is a positive correlation between environmental quality and tourism growth. Most national and international tourism experts believe that a clean and healthy natural environment is an essential ingredient for tourism growth in both urban and rural areas.[28]

Studies have shown that anglers make more trips and spend more money when they can catch more fish or larger fish. *See* John Loomis, *Use of Survey Data to Estimate Economic Value and Regional Economic Effects of Fishery Improvements*, 26 N. Am. J. Fisheries Mgmt. 301 (2006). One study of three reaches of the Snake River in Idaho and Wyoming indicated that each 10% gain in catch rate translates into the creation of 97 new jobs annually. *Id.* at 306.

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[27] AM. SPORTFISHING ASS'N, *supra* note 5, at 9.

[28] U.S. EPA ET AL., *supra* note 11, at III.T-1.

Further damage to the waters and economy of Appalachia from mining should not be tolerated,[29], particularly given that mining employment has been declining. Between 1989 and 1998, there was a 5.8% average annual decrease in total mining employment in West Virginia.[30] Although some of this decrease is due to an overall decline in coal production, a large part of it is also due to the fact that mountaintop removal mining is a more mechanized and less labor intensive method of mining.

In short, mountaintop removal mining and the Corps' permits at issue here are destructive of the environment and the economy and the permits were issued in violation of the Clean Water Act and in contravention of this Court's precedents.

[29] Notably, mining activities generate enormous amounts of coal sludge waste, which has been stored in impoundment dams, often with disastrous consequences. For example, in 1972, a major coal slurry dam impoundment failed, heaving 132 million gallons of black waste water consisting of mine dust, shale, clay, low-quality coal, and other impurities upon coal mining hamlets in Buffalo Creek Hollow. In a matter of minutes, 125 people were killed and 1,121 people were seriously injured. W. Va. Dep't of Culture & History, Buffalo Creek Disaster, *available at* http://www.wvculture.org/history/buffcreek/buff1.html. In 2000, a 2.2 billion gallon coal waste dam in Martin County, Kentucky burst, releasing 300 million gallons of coal waste, which ended up in the Big Sandy River. Roger Alford, *Kentucky Coal Sludge Disaster*, CHARLESTON GAZETTE, Oct. 11, 2005, at 1A.

[30] U.S. DEP'T OF ENERGY, ENERGY INFO. ADMIN., COAL INDUSTRY ANNUAL 1998 (2000).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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