NO.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

An essential regulation implementing section 404 of the Clean Water Act directs the U.S. Army Corps of Engineers to "[d]etermine the nature and degree of effect" of proposed discharges of fill material "on the structure *and function* of the aquatic ecosystem and organisms" before authorizing discharge permits. 40 C.F.R. § 230.11(e) (emphasis added). The question presented is whether the Corps lawfully may grant permits for the permanent burial of Appalachian streams under waste from mountaintop removal coal mining operations without first determining any effect such burial will have on the "function of the aquatic ecosystem and organisms" of those streams.

PARTIES TO THE PROCEEDINGS

The petitioners here and plaintiffs-appellees in the case below are the Ohio Valley Environmental Coalition, Coal River Mountain Watch, and the West Virginia Highlands Conservancy. The respondents include the defendants-appellants below, the U.S. Army Corps of Engineers, Lieutenant General Robert L. Van Antwerp in his official capacity as Chief of Engineers of the Corps, and Colonel Dana R. Hurst in his official capacity as District Engineer for the Huntington District of the Corps, as well as the intervenors-appellees below, the West Virginia Coal Association, and four subsidiaries of Massey Energy Company: Aracoma Coal Company, Elk Run Coal Company, Alex Energy, Inc., and Independence Coal Company, Inc.

RULE 29.6 DISCLOSURE

Petitioners, the Ohio Valley Environmental Coalition, Coal River Mountain Watch, and the West Virginia Highlands Conservancy, neither have parent corporations nor have they issued shares to the public or any publicly held company.

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INTRODUCTION

Petitioners, the Ohio Valley Environmental Coalition, Coal River Mountain Watch, and the West Virginia Highlands Conservancy, respectfully petition for a writ of certiorari to review the judgment below of the United States Court of Appeals for the Fourth Circuit. This case presents a question of extraordinary importance both for the Appalachian region and for the administration of the Clean Water Act nationwide.

The petitioners challenge the U.S. Army Corps of Engineers' issuance of four permits under section 404 of the Act that would allow mining operations to fill 23 valleys and over 13 miles of Appalachian headwater streams, resulting in "potentially irreversible effects." App. 248a (Wilkinson, J. dissenting from denial of reh'g). The court's divided decision below, *en banc* rehearing of which was denied by a 4-3 vote, expressly disregards the plain language of the governing regulation, 40 C.F.R. § 230.11(e), and allows the Corps to assess only the effects of stream burial on stream "structure," as a purported substitute for assessing such effects on both "structure and function." By "read[ing] the word 'function' right out of the regulation," as Judge Wilkinson described, App. 249a, this decision stands at odds with this Court's precedent requiring courts to give effect to unambiguous regulatory text. *See Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (citing *Auer v. Robbins*, 519 U.S. 452 (1997) and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)).

The environmental devastation authorized by the permits in this case is massive in scale. It will transform the landscape and watersheds in one of the finest natural resource treasures remaining in the eastern United States, and one of the most ecologically valuable mountain regions in the world—the Appalachian range. In addition to the four permits in this case, many more have been proposed for similar operations in the region, largely located in the Fourth and one other circuit, based on the same legal theory approved by the decision below. If not reversed, the court of appeals' decision will permit the Corps to continue to frustrate the Clean Water Act's objective of maintaining the integrity of the nation's waters. It will lead to disastrous effects on the Appalachian environment and the communities it sustains for years to come, and pose risks for the section 404 permitting program nationwide.

The impact of the permits in this case, and many similar proposed permits in the region, will likely be irreparable, as "[o]nce the ecologies of streams and rivers and bays and oceans turn, they cannot be easily reclaimed. More often than not, the waterway is simply gone for good." App. 250a (Wilkinson, J., dissenting from denial of reh'g). With such nationally significant harm occurring in a single region of the country, this is an exceptional case calling for this Court's intervention to end both the current practice of Clean Water Act regulatory violations in Appalachia, and the court of appeals' failure to fulfill its basic duty to serve as a check on unlawful agency action.

OPINIONS BELOW

The panel opinion of the U.S. Court of Appeals for the Fourth Circuit is reported at 556 F.3d 177 (4th Cir. 2009) (Gregory, J., joined by Shedd, J.; Michael, J., dissenting in part, concurring in part) and reprinted at App. 1a-98a. The order denying rehearing *en banc* and accompanying opinions are reported at 567 F.3d 130 (4th Cir. 2009) (Gregory, J., joined by Shedd, J., concurring; Wilkinson, J., joined by Motz, J., dissenting; Michael, J., joined by Motz, J., dissenting), and reprinted at App 244a-52a. The March 2007 opinion of the U.S. District Court is reported at 479 F. Supp. 2d 607 (S.D. W. Va. 2007), and reprinted at App. 99a-212a. Its unpublished June 2007 opinion is reprinted at App. 213a-43a.

JURISDICTION

The court of appeals issued its decision on February 13, 2009. App. 6a. Petitioners' timely petition for rehearing or rehearing *en banc* was denied on May 29, 2009. App. 244a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The following provisions involved in this case are reproduced in the appendix to this petition: Administrative Procedure Act excerpt, App. 253a; Clean Water Act excerpts, App. 254a; U.S. Army Corps of Engineers General Regulatory Policies excerpts, App. 259a; Clean Water Act Section 404(b)(1) Guidelines excerpts, App. 262a.

STATEMENT OF THE CASE

A. Factual and Legal Background on Valley Fills and § 404 of the Clean Water Act

This case arises out of the U.S. Army Corps of Engineers' issuance of four permits authorizing surface mining operations engaged in "mountaintop removal mining" to discharge waste rock and dirt to fill streams in southern West Virginia. "Mountaintop removal mining" is so called because such mining operations, primarily employed in Appalachia, use explosive charges to blast away hundreds of feet of mountaintops in order to reach coal seams below. This process leaves excess rock, dirt, and other detritus, called "overburden," that cannot be replaced on the mountaintop. Mining companies then propose to discharge this overburden as fill material into mountain streams, by dumping the waste into valleys adjacent to the mined mountaintops and permanently burying those valleys and the streams that flow through them, in what are known as "valley fills." App. 10a.

Any such discharge of fill material into streams requires a permit from the Corps under section 404 of the Clean Water Act ("CWA"). 33 U.S.C. §§ 1311(a), 1344(b)(1). The purpose of the Act and of such permits is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* § 1251(a). Section 404 authorizes the Army Corps of Engineers to issue permits for the discharge of fill material into waters only "through the application of guidelines developed by the [EPA] Administrator, in conjunction with the

[Army] Secretary." *Id.* § 1344(b)(1). Pursuant to this provision, EPA promulgated the "Section 404(b)(1) Guidelines" in conjunction with the Corps, and codified them at 40 C.F.R. Part 230. EPA, *Guidelines for Specification of Disposal Sites for Dredged or Fill Material*, 45 Fed. Reg. at 85,336 (Dec. 24, 1980) ("404(b)(1) Guidelines"). The Guidelines prohibit "modifications to the basic application, meaning, or intent" of the regulations contained therein, except through notice-and-comment rulemaking undertaken by EPA. 40 C.F.R. § 230.2(c).

The 404(b)(1) Guidelines bind the Corps. 33 U.S.C. § 1344(b)(1) (site specification for fill permit "shall be specified . . . by the Secretary (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary"); *see* 33 C.F.R. § 320.2(f) (directing that Corps § 404 permits "will be in accordance with guidelines developed by the Administrator of EPA in conjunction with the Secretary of the Army"). Thus, for any "activities involving 404 discharges, a permit will be denied if the discharge that would be authorized by such permit would not comply with the Environmental Protection Agency's 404(b)(1) guidelines." 33 C.F.R. § 320.4(a)(1); *see also* 40 C.F.R. § 230.2(a) (applying the 404(b)(1) Guidelines to section 404 permits). The Guidelines prohibit the Corps from issuing a section 404 discharge permit unless the discharge will not "cause or contribute to significant degradation of the waters of the United States," 40 C.F.R. § 230.10(c). In sum:

> Fundamental to the[] Guidelines is the precept that . . . 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 either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern.

Id. § 230.1(c).

For a section 404 permit to be lawful, section 230.11 of the Guidelines directs that the Corps:

> shall determine in writing the potential short-term or long-term effects of a proposed discharge of . . . fill material on the physical, chemical, and biological components of the aquatic environment in light of subparts C through F. Such factual determinations shall be used in § 230.12 in making findings of compliance or non-compliance with the restrictions on discharge in § 230.10 . . . . The determinations of effects of each proposed discharge shall include the following:
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> * * *
>
> (e) Aquatic ecosystem and organism determinations. Determine 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. . . .

Id. § 230.11 (App. 268a-73a) (emphasis added).

Understanding the effects of discharges on stream function is integral to the section 404 permitting scheme. The factual determinations

required by § 230.11(e), including the determination "of effect . . . on the . . . function of the aquatic ecosystem and organisms" at issue here, are mandatory prerequisites to the issuance of a section 404 permit. *See* 40 C.F.R. § 230.5(a) (referring to § 230.11 as one of the "principal regulatory provisions of the Guidelines"); *id.* § 230.10(c) (requiring that "[f]indings of significant degradation related to the proposed discharge shall be based upon appropriate factual determinations, evaluations, and tests" pursuant to § 230.11(e) and subparts of the Guidelines). Burying a stream with rock and dirt alters not only its structure, but also its ability to perform functions that sustain life. An assessment of effect on stream function is essential for the Corps to ascertain whether a discharge will significantly degrade or have an unacceptable adverse impact on the aquatic environment, and if so, whether to impose mitigation measures that will preclude such significant degradation of the stream. 40 C.F.R. §§ 230.1(c), 230.10(c). The Corps must make each determination in order to satisfy the compliance certification necessary to issue a section 404 permit, *id.* § 230.12 (citing §§ 230.10-11 requirements); *see also* 33 C.F.R. §§ 320.2(f), 320.4(a)(1).

EPA has not performed notice-and-comment rulemaking to alter the meaning of section 230.11 pursuant to 40 C.F.R. § 230.2(c). Moreover, in 1990, the Corps and EPA reiterated the regulatory requirement of § 230.11(e) in a joint memorandum of agreement relating to section 404 permits ("MOA"), which states that "functional values lost by the resource to be impacted must be considered" in developing a mitigation plan for a 404 permit. App. 293a, 298a (Feb. 6, 1990, published as corrected at

55 Fed. Reg. 9210 (Mar. 12, 1990)). The MOA also requires functional values to 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*." *Id.* at 300a (emphasis added).

In 2002, however, the Corps and EPA distributed a Corps regulatory guidance letter stating that the Corps "will determine, on a case-by-case basis, whether to use a functional assessment or acreage surrogates for determining mitigation and for describing authorized impacts." App. 308a (Regulatory Guidance Letter No. 02-2 (Dec. 24, 2002)) ("RGL 02-2"). This guidance letter purports to authorize the Corps to jettison the requirement for a functional assessment "where functional assessment is not practical," and instead require mitigation based on a structural assessment only, that "should generally replace linear feet of streams on a one-to-one basis." *Id.* at 310a.

B. The Corps' Permit Decisions at Issue

The Corps issued the four permits challenged in this case in 2005 and 2006, authorizing the burial of 23 valleys and 13 miles of streams. *See* App. 12a-13a. By that time, the Corps had already permitted many other surface mining operations in the same watersheds. *Id.* at 338a (map of surface mining permits in watersheds affected by the four permits). None of the four permit decisions included an assessment of the individual or cumulative effects of

the permits on the "function" of streams that would be buried, as required by section 230.11(e), apart from its effects on their "structure." *Id.* at 37a ("The Corps currently does not have a functional assessment protocol in place for use in West Virginia . . . . As a result, the Corps relies on the best professional judgment of its staff to assess aquatic impacts and potential mitigation measures. This generally means assessing stream structure as a surrogate for function."); *id.* at 145a ("the Corps acknowledged that it has no functional assessment standard currently available for use in the Appalachian coalfields, and therefore, it relies upon the best professional judgment of its staff to assess aquatic values—in this case, by the structure measurements submitted by the applicants"); *see also id.* at 80a (Michael, J., dissenting) (citing Corps' Br. at 36); *id.* at 249a (Wilkinson, J., dissenting from denial of reh'g); *id.* at 251a (Michael, J., dissenting from denial of reh'g). Absent a Corps protocol for assessing effects on stream function, the Corps decided it could rely on the RGL 02-2 which purported to excuse the requirement of a functional assessment when "not practical." *Id.* at 37a, 48a-49a.

Thus, in deciding to issue these permits, the Corps did not gather information on the effects of burying streams on the function of those streams in order to determine whether discharges allowed under the permits would degrade the streams. Nor did it assess any effects on function in the streams to be buried in order to determine whether mitigation would succeed in reducing environmental harm to an insignificant level. Instead, it relied upon the one-to-one linear foot approach of the RGL 02-2 that

purports to allow the agency to avoid assessing effects on function, and then to "mitigate" for burying streams on a purely structural basis—by prescribing measures to be performed in *other* stream segments *based only on the number of feet of streams* that would be buried permanently by the fill. *Id.* at 310a.[1]

The Corps acknowledged that the discharges would cause significant adverse environmental impacts unless the approved mitigation measures were successful. App. 90a (Michael, J., dissenting); *see also id.* at 138a ("The Corps does not dispute that these impacts, standing alone, would require a finding that the proposed discharges violate the CWA and mandate a full EIS under NEPA."). It based its issuance of each permit on the central premise that the structural measures described in the permit applications both satisfied section 230.11(e) and allowed the Corps to devise mitigation plans to cancel out any significant impairments of stream function, such that "the permitted activity would not result in significant environmental impacts given planned mitigation measures." *Id.* at 13a. In this case, those mitigation measures include

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[1] This practice, as described by the chief of the Corps' regulatory branch, involves "determin[ing] what you believe with your view, without measuring variables, without measuring attributes at all, measuring function." J.A. 4170. Then, "[i]n the absence of an approved functional assessment," the Corps relies on "the best professional judgment of the regulator doing the work" and whether "he or she believe[s] the mitigation site will occur [sic]." *Id.* at 4173.

Note that in this petition, the abbreviation "J.A." refers to the parties' Joint Appendix filed with the court of appeals.

plans to create new "streams" from drainage ditches, without data on function to assess either the impairment of function caused by the streams lost or whether those functions could be adequately provided by such ditches. Nonetheless, the Corps certified that each permit would not cause or contribute to "significant degradation of the waters of the United States," either individually or cumulatively, under the Guidelines, 40 C.F.R. § 230.10(c), issued a Finding of No Significant Impact for each of the challenged permits under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and decided not to require an environmental impact statement for any of the permits. App. 13a.

C. Proceedings Below

Petitioners challenged the Corps' permit decisions in federal district court, bringing claims pursuant to the Clean Water Act, 33 U.S.C. § 1344(b), the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, and NEPA, 42 U.S.C. § 4332. Petitioners contended that the permits should be set aside under 5 U.S.C. § 706(2) because, among other reasons, the Corps did not assess the permits' effects on both "structure and function," as required by 40 C.F.R. § 230.11(e), and that this failure rendered each permit decision unlawful under section 404 of the CWA. App. 13a. The Corps responded that "the 'structure' factors reported by the applicants and discussed by the Corps [in its permit decisions] provide sufficient information to serve as surrogates for functional characteristics and meet regulatory

requirements." *Id.* at 143a-144a. The Corps relied on the 1990 MOA and RGL 02-2 to justify its substitution of structure for function. *Id.*

The district court granted judgment in favor of the petitioners and remanded the permits to the Corps, ruling that the Corps' "judgment must constitute a full assessment of the streams' ecological functions before the Corps may conclude that the structure and function of the resources buried by the valley fills is offset by the imposed mitigation measures," *id.* at 148a, 155a, 211a. As the district court explained, "the Corps has failed to take a hard look at the destruction of headwater streams and failed to evaluate their destruction as an adverse impact on aquatic resources in conformity with its own regulations and policies." *Id.* at 157a.

The Corps and intervenor coal companies (collectively "respondents") appealed this ruling to the Fourth Circuit. The court of appeals reversed the district court in a 2-1 decision, affirming the Corps' failure to assess the effect on stream function, and concluding that it was not arbitrary and capricious for the Corps to "use[] stream structure as a surrogate for assessing stream function" rather than to perform an actual assessment of stream function. App. 39a, 43a. In so holding, the court of appeals deferred to the Corps' internal guidance document, RGL 02-2, which purports to allow the Corps to approve mitigation measures that "replace linear feet of stream on a one-to-one basis" when Corps staff conclude that a "functional assessment is not practical." *Id.* at 48a-49a.

Judge Michael dissented because "[r]ather than basing its decision on the (binding) language of the regulations, the majority focuses instead on the

Corps' compliance with an internal guidance document that is at odds with the regulations' clear requirements." *Id.* at 78a. In particular, the panel majority's interpretation of 40 C.F.R. § 230.11(e), like that of the Corps, "is impossible to reconcile with the plain language of the regulations, which clearly mandates that the Corps assess both structure and function." App. 78a. Further, Judge Michael would have held, "[t]he Corps' determination that stream structure can be used as a surrogate for function under § 230.11(e) constitutes a clear abuse of discretion." App. 82a. "[B]ecause . . . the Corps has failed to establish that the permitted valley fill projects will not significantly degrade the waters of the United States," as required by the CWA and the Guidelines, Judge Michael concluded that the Corps "has likewise failed to establish that the projects will have no significant adverse environmental impact," as required by NEPA to avoid preparation of an environmental impact statement. *Id.* at 97a. Accordingly, he would have vacated the permits unless and until the Corps "adequately determine[s] the effect that the valley fills will have on the function of the aquatic ecosystem." *Id.* at 98a.

The Fourth Circuit denied the petitioners' request for rehearing by a 4-3 vote *en banc*, with Judges Wilkinson, Michael, and Motz in dissent, and four judges abstaining from the vote. *Id.* at 245a.

Explaining his vote for rehearing, Judge Wilkinson, joined by Judge Motz, stated that "the Corps' current practice appears to read the word 'function' right out of the regulation," which "poses a real danger to the vitality of the waterways and ecology of the affected areas." *Id.* at 249a. He observed that "the dissenting panel opinion makes a

strong case that the Corps acted arbitrarily when it failed to comply with the plain language of its regulations and conducted an inadequate assessment of the environmental impact of permitting mining operations." *Id.* at 248a. Judge Michael, joined by Judge Motz, filed a separate dissent concluding that the Corps' "claim that an assessment of stream structure provides an adequate substitute cannot amount to a permissible construction of the regulations," and the "court should not defer to the Corps until the agency has done its job" by "fulfil[ling] each distinct obligation under the controlling regulations." *Id.* at 251a-52a. Each dissent emphasized the "potentially irreversible" and "profound" adverse effects on the Appalachian ecosystem to be caused by the four permits. *Id.* at 248a (Wilkinson, J.); *id.* at 251a (Michael, J.).

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit Majority Contravened Supreme Court Precedent by Failing to Give Effect to the Text of an Essential Clean Water Act Regulation and Deferring to a Conflicting Interpretation.

In *Bowles v. Seminole Rock & Sand Co.*, this Court decided that "a court must necessarily look to the administrative construction of [a] regulation *if the meaning of the words used is in doubt.*" 325 U.S. 410, 414 (1945) (emphasis added). This principle led to this Court's *Auer* doctrine, under which an agency's regulatory interpretation receives deference if the regulation is unclear, but does not if the

proposed interpretation is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citation and quotation marks omitted). The doctrine provides that agency "deference is warranted *only* when the language of the regulation is ambiguous," as the Court held in *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (emphasis added).

Thus, the Court's precedent requires courts to give effect to unambiguous regulatory text to prevent agencies from violating or ignoring the requirements of federal regulations. For example, in a case where the Fourth Circuit had accepted an agency's interpretation contained in internal agency guidance letters, the Court held that "it answers the citation of the . . . [guidance] letters to realize that an isolated opinion of an agency official does not authorize a court to read a regulation inconsistently with its language." *See, e.g.*, *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 580-81 (2007).[2]

The cases following *Seminole Rock* therefore impose a bright-line constraint on an agency's exercise of its statutorily delegated authority. Unless changed pursuant to law, federal regulations bind the executive. *United States v. Nixon*, 418 U.S. 683, 696 (1974) ("So long as this regulation remains in force the Executive Branch is bound by it, and

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[2] *See also Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 356 (2000) (refusing to apply agency's interpretation of its own regulation because it "contradicts the regulation's plain text"); *Dir., Ofc. of Workers' Compensation Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 271 (1994) (refusing to defer to agency's interpretation because the Court did "not think this regulation can fairly be read" as interpreted).

indeed the United States as the sovereign composed of the three branches is bound to respect and enforce it."); *see also Service v. Dulles*, 354 U.S. 363, 388 (1957). Such restrictions upon agency action are crucial because "[i]f agencies were permitted unbridled discretion, their actions might violate important constitutional principles of separation of powers and checks and balances." *Fed. Comm'cns Comm'n v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1823 (2009) (Kennedy, J., concurring in part and concurring in the judgment); 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW 815 (4th ed. 2002) ("An agency whose powers are not limited either by meaningful statutory standards or by legislative rules poses a serious potential threat to liberty and to democracy.").

To allow an agency to evade a binding, unambiguous regulation "would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen*, 529 U.S. at 588. Yet this is precisely what the court of appeals permitted the Corps to do by affirming its practice of "assessing stream structure as a surrogate for function," App. 37a.

The central regulatory requirement at issue here obligated the Corps to determine the effects of a proposed discharge on "the structure and function" of the aquatic ecosystem and organisms, 40 C.F.R. § 230.11(e); *see* 33 U.S.C. § 1344(b)(1) (requiring Corps to follow the Guidelines). The regulation places "and" between the words "structure" and "function." Thus, "the plain language . . . clearly mandates that the Corps assess *both* structure and function." App. 78a (Michael, J., dissenting) (emphasis added). This Court has long held that the conjunctive word "and"

is to be interpreted as connecting different requirements, denoting that each is necessary. *See, e.g.*, *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 528 (2007) (interpreting the term "and" to mean "as well as" because "otherwise the grammatical structure would make no sense"); *Crooks v. Harrelson*, 282 U.S. 55, 59 (1930) (holding that use of "and" led to conclusion that "whether stated separately or in combination, the second condition contains two distinct requirements, expressed conjunctively, and may not be read as though stated disjunctively").[3] By every indication, the word "and" serves in the usual way in section 230.11(e): to connect two independently important terms, "structure" and "function," neither of which may be ignored or treated as superfluous. *See, e.g.*, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (court must give meaning to each term in a legal text).

The terms "structure" and "function" in this regulation represent different concepts. In ordinary usage, the term "structure" is defined as the "arrangement" of various "parts" (or what something is), while function is defined as an "action," or "activity" performed by such parts (or what

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[3] *See also United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241-42 (1989); *City of Rome v. United States*, 446 U.S. 156, 172-73 (1980); *United States v. Field*, 255 U.S. 257, 262 (1921).

something does).[4] *Cf. Perrin v. United States*, 444 U.S. 37, 42 (1979) ("unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning"). And, in the specific context of waters and streams, the Corps has acknowledged that there are important differences between the terms "structure" and "function," that function matters, and that focusing on structure alone does not suffice to determine effects on stream function. *See, e.g.*, J.A. 4138-39 (Corps' regulatory chief stating that "structure alone won't do it"). Stream "structure" generally refers to the tangible features and physical condition of the stream environment—such as its form, length, and shape, or how a stream looks, whereas stream "function" generally refers to the ecological processes that a stream performs over time to support healthy

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[4] AM. HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1718 (4th ed. 2000) (defining "structure" as: "1. Something made up of a number of parts that are held or put together in a particular way . . . . 2. The way in which parts are arranged or put together to form a whole. . . . 3. The interrelation or arrangement of parts in a complex entity. . . .5. Biology; a. The arrangement or formation of the tissues, organs, or other parts of an organism.; b. An organ or other part of an organism."); *id.* at 711 (defining "function" as "1. The action for which a person or thing is particularly fitted or employed. 2. a. Assigned duty or activity. b. A specific occupation or role . . . . 4. Something closely related to another thing and dependent on it for its existence, value, or significance . . . 6. Biology The physiological activity of an organ or body part. 7. Chemistry The characteristic behavior of a chemical compound, resulting from the presence of a specific functional group. 8. Computer Science A procedure within an application"). The term "functional" is commonly defined in opposition to structure. AM. HERITAGE SCI. DICTIONARY 249 (1st ed. 2005) (defining "functional" as "Affecting . . . functions but not organic structure . . . .").

streams and rivers, or what the stream does, such as filtering pollutants, purifying water, cycling water and nutrients, and sustaining the aquatic food web. App. 142a.[5] Recognizing that "[i]t is well understood that the health of entire watersheds [is] dependent on functions provided by headwater streams," *id.* at 251a (Michael, J., dissenting from denial of reh'g) (quoting J.A. 1823), the Corps even created a list of critical stream functions that in its judgment play a vital role in the watershed, although it did not make a determination regarding effects on such functions. *See id.* at 89a & n.3 (Michael, J., dissenting, quoting Corps' list).

In this regulation, consistent with their ordinary use in both general and scientific contexts, the terms "structure" and "function" refer to different determinations. Where they are joined by the word "and," as in section 230.11(e), "[i]t would distort the plain meaning of the sentence to substitute the word 'or' for the word 'and,'" as "radical surgery would be required to separate" the two terms. *See Chisom v. Roemer*, 501 U.S. 380, 397 (1991). Thus, under *Christensen,* 529 U.S. at 588, the court of appeals was prohibited from interpreting the regulation to allow one term to substitute for the other because section 230.11(e) expressly directs that structure and

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[5] During the course of this litigation, EPA and the Corps each promulgated a definition of "functions" under the § 404(b)(1) Guidelines and Corps' permitting regulations, further confirming that function is important and different from the Corps' use of structure in this case. 40 C.F.R. § 230.92 (2008) ("Functions means the physical, chemical, and biological processes that occur in ecosystems."; "Functional capacity means the degree to which an area of aquatic resource performs a specific function."); 33 C.F.R. § 332.2 (2008) (same).

function are different, and each assessment is required.

Yet the Corps failed to conduct an assessment of the effects of these permits upon stream function and instead "relie[d] on the best professional judgment of its staff" for "assessing stream structure as a surrogate for function." App. 37a-38a; *see also id.* at 80a (Michael, J., dissenting), 145a (Michael, J., dissenting from denial of reh'g); *see also id.* at 248-49a (Wilkinson, J., dissenting from denial of reh'g) (describing the Corps as "fudging on an essential element of [the CWA] regulations," and noting that the Corps itself has suggested that "the Corps' current protocols fail to address stream function" by protesting that it "will only now work to develop a stream function assessment protocol."); *supra* note 1. Indeed, by invoking a provision of the RGL 02-2 that by its terms is triggered only "where functional assessment is not practical," App. at 308a, 310a, the Corps effectively conceded that it had not performed such an assessment, as Judge Michael explained, *see id.* at 89a-90a (dissenting). Moreover, the RGL 02-2 approach, which allows mitigation to be measured in feet, is by its own terms a purely structural measurement. *See id.* at 310a.

Because the Corps failed to conduct the functional assessment required to satisfy section 230.11(e), the plain language of the regulation should have been the end of the matter for the Fourth Circuit under this Court's precedent. The court should have given effect to the regulatory requirement in section 230.11(e) by insisting that the Corps treat the two terms as different and as determinations that each must be made under section 230.11(e). Doing so was necessary for the

Corps to make two determinations under the Guidelines: whether issuance of a permit would significantly degrade the aquatic ecosystem, and whether mitigation would prevent all significant degradation, 40 C.F.R. § 230.10(c); *id.* § 230.1(c); *see also id.* § 230.12. Even though the Corps did not assess impact on stream function in violation of the unambiguous regulatory requirement to do so, the court of appeals did not vacate the permits because, as the panel majority explained, it "found that the Corps was not obligated to engage in a full functional assessment." App. 43a.

Instead, the court of appeals decided, because there was no regulatory definition for "function," it could defer to the Corps' internal guidance (RGL 02-2) that substituted the requirement to determine effects on "structure" for the requirement to determine effects on "function." *Id.* at 39a; *see id.* at 305a. That there was no definition of "function" within the Guidelines at the time of the Corps' decision, however, *but see supra* note 5, could not excuse the Corps from following the plain regulatory requirement, or validate its unlawful refusal to assess function. The regulation, supported by its

regulatory history,[6] identifies structure and function as separate items that must both be assessed; thus, whatever discretion the Corps might have with respect to defining the term "function" in this context, that discretion cannot extend to rendering the term entirely duplicative of "structure." *Cf. Reiter*, 442 U.S. at 339. As Judge Michael elaborated, "[i]t is not within the bounds of permissible interpretation to say that the word 'function' as used in § 230.11(e) is merely a redundancy for 'structure.'" App. 80a-81a (Michael, J., dissenting). The Corps' interpretation, upheld by the court of appeals, was equivalent to transforming the text of the regulation from "structure and function" to *structure and function, except when staff decide to assess structure alone*—a significant change, and one that the Corps is not authorized to make, 33 U.S.C. § 1344(b)(1); 40 C.F.R. § 230.2(c). The Fourth Circuit's decision approving this interpretation and the application of it to these

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[6] That history demonstrates EPA's careful choice of words in promulgating the regulation. *See Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988) ("indications of the [agency's] intent at the time of the regulation's promulgation" may bar deference to an agency's later contrary interpretation). Specifically, when EPA used the two terms "structure and function" it did so as part of a broader effort to "eliminate[] duplicative material," "improve the clarity of the regulations," and make them "more concise." 45 Fed. Reg. at 85,338. As part of this effort, it changed the proposed regulation that is now § 230.11(e) from one that referred to effects on "structure, function, and habitat" to say only "structure and function," demonstrating the intention that each be given independent effect as neither was duplicative of the other. *Compare* 44 Fed. Reg. 54,222, 54,235 (Sep. 18, 1979) (proposing 40 C.F.R. § 230.20(d)), *with* 45 Fed. Reg. at 85,349 (finalizing § 230.11(e)).

permits, as Judge Wilkinson observed, "appears to read the word 'function' right out of the regulation," allowing the Corps to "skirt[] the requirements of [the CWA] regulations." App. 249a.

Because there is no ambiguity in the mandate to determine effects on both "structure and function," 40 C.F.R. § 230.11(e), this Court's precedent, *Christensen*, 529 U.S. at 588; *Auer*, 519 U.S. at 461; *Seminole Rock*, 325 U.S. at 413-14, required the court to give effect to the plain meaning of the regulatory text. Regardless of the precise content of such a functional assessment, removing the directive for a functional assessment to be made in addition to a structural one is inherently "inconsistent," *Auer*, 519 U.S. at 461, with the regulation's plain text. Such an approach also flouts the regulation's purpose: to assess effects on function that must be understood for the Corps to be able to satisfy the anti-degradation and mitigation requirements of the Guidelines. The *Seminole Rock* doctrine, as elaborated in *Christensen*, did not allow the court of appeals to "declin[e] to give effect to the unambiguous requirements of the [CWA] regulations," as it did here. App. 78a (Michael, J., dissenting).

The Fourth Circuit's opinion thus contravened this Court's precedent in two major ways. First, it failed to adhere to the unambiguous language of a binding regulation. Second, it deferred to an interpretation contained in internal guidance that changes and conflicts with the regulation to such an extreme that it purports to bypass a critical regulatory term. By accepting a Corps interpretation "that gives no effect to a central term in the controlling regulations," *id.* at 82a (Michael, J.,

dissenting), the court stepped far outside the bounds of permissible deference under *Christensen*, *Auer*, and *Seminole Rock*. Neither the Corps nor the court of appeals should be allowed to ignore "the regulation's obvious meaning," *Christensen*, 529 U.S. at 588, if this Court's precedent is to remain an effective protection from unlawful agency action. The magnitude of this deviation from the Court's precedent, and the far-reaching implications for Appalachia and the Clean Water Act, warrant a grant of certiorari.

II. The Question Presented Is Exceptionally Important to the Appalachian Region, the Clean Water Act, and the Waters of the United States.

It would be difficult to overstate the profound and permanent consequences of the Fourth Circuit decision for the mountains and streams of Appalachia. The immediate impact of the decision below is to authorize the burial of 23 valleys and more than 13 miles of streams in the rubble from exploded mountains. This by itself is highly significant—not only in its own right, but also because each of the watersheds to be affected has already had between 9% and 37% of its headwater streams destroyed by surface mines and valley fills, raising serious questions about the continuing vitality of the watershed. J.A. 521-24; App. 338a. Moreover, this damage is only part of the permanent harm that mining-related valley fills have already done to waters in Appalachia, and the harm poised to occur there if numerous pending permits are issued.

By endorsing a Corps approach that the agency has applied and continues to apply throughout the region, the decision below places the health of entire watersheds in Appalachia at serious risk of permanent degradation.

The regulation being violated in the particular circumstance of this case and in similar permitting decisions in the Appalachian region, 40 C.F.R. § 230.11, is an essential component of the Section 404(b)(1) Guidelines governing the Corps' permitting of discharges under the Clean Water Act. *See* 33 U.S.C. § 1344(b)(1); 40 C.F.R. §§ 230.5(a), (g), (k), 230.10(c), 230.12. The regulation mandates that the agency evaluate the effects of discharges on the function of affected waters as a key prerequisite to the essential determination whether the permitted discharge would degrade those waters. The purpose of this regulation is to protect the "integrity" of waters, 33 U.S.C. § 1251(a), and it goes to the heart of the national policy of the Clean Water Act by using the same key terms, "natural structure and function," used by Congress at the time of enactment to explain the meaning of the Act's use of the word "integrity," *see* 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).

In the absence of an assessment of function under section 230.11(e), the other key determinations, 40 C.F.R. §§ 230.10(c), 230.12; 33 C.F.R. § 320.4(a)(1), cannot be performed as required to prevent the significant degradation of waters. Without a functional assessment, the Corps does not know—as a baseline matter—what stream values, actions, or processes will be lost or changed if the

streams are buried, and whether this burial will cause significant degradation. It thus has based its permit decisions on the presumption that mitigation will offset the harm it has conceded will occur, App. 13a, 90a, 134a, 138a, even though without the requisite functional assessment, such a mitigation determination is meaningless.[7] In sum, "[t]he effect is to completely undermine the goal of mitigation: replacement of what is being lost." *Id.* at 78a-79a (Michael, J., dissenting); *id.* at 93a (explaining why "the Corps should never find itself in a position where it has failed to sufficiently assess stream function" and is attempting to design mitigation without such a determination). The Corps' failure to assess function thus not only violates a key regulatory requirement but also infects the entire permitting process by creating a serious likelihood that ecosystem harm will be significant and that mitigation will be inadequate to prevent that harm.

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[7] This is particularly harmful here where, as the panel majority acknowledged, "[t]he Corps' support for its claim that the proposed stream creation measures have good potential for success is admittedly limited." App. 52a. The record contains no evidence that stream creation (or the use of ditches to substitute for streams) is possible, much less likely to succeed in the long term, and the Corps conceded that the agency does not know of any successful headwater stream creation projects in the Appalachian region that have mitigated harm to an area watershed. *Id.* at 95a-96a (Michael, J., dissenting and citing Fish and Wildlife Service permit comments "expressing a continued belief that it is not possible to fully replace the critical aquatic and terrestrial ecosystem functions of healthy headwater streams"); *id.* at 176a-77a ("the Corps does not know of any successful stream creation projects in the Appalachian region").

The permitting violations in this case are not new, but have been the Corps' routine practice for years in Appalachia. Under permits issued on the basis of the regulatory violation challenged in this case, mining companies have filled so many streams that the extent of the destruction of waters in the Appalachian region is unprecedented in the nation. By 2002 the Corps had permitted more than 1,200 miles of streams in Appalachia to be buried in the resulting waste rock, dirt, and rubble; if valley fills from such mining were to continue at the same rate, the government estimates that 2,400 miles of streams would be destroyed by 2013.[8] There are more than 100 additional section 404 permit applications pending in the region, many of which involve mountaintop removal mining.

The "potentially irreversible effects that the permitted operations will have on the Appalachian ecosystem," App. 248a (Wilkinson, J., dissenting from denial of reh'g) are taking place in one of the most ecologically valuable mountain regions in the nation, and thus one of the primary natural resource treasures remaining in the eastern United States. This region is "unique in the world because [it] combine[s] characteristically northern species with their southern counterparts, and thus boast[s] enormous richness and diversity." MTM/VF DEIS at III A-6, *supra* note 8. Appalachian headwater streams slated for destruction under these permits

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[8] U.S. EPA et al., Mountaintop Mining/Valley Fills in Appalachia, Draft Programmatic Environmental Impact Statement IV.B-1 (2003), *available at* http://www.epa.gov/region3/mtntop/eis2003.htm (incorporated in Final Programmatic EIS, EPA 9-03-R-05002 (2005)).

are vitally important to the ecosystem because the functions they perform are critical to watershed health. In the Corps' words, "[i]t is well understood that the health of entire watersheds [is] dependent on functions provided by headwater streams." App. 251a (quoting permit decision document at J.A. 1823).

The importance of the Appalachian region and its waters to our nation is incalculable. If not reversed, the Fourth Circuit's precedent will sanction the continued destruction of many miles of mountain headwater streams by valley fills simply to allow mountaintop removal mining operations to dump their waste.

Because of the existence of a particular type of coal deposits in the Appalachian region, most permits for mountaintop removal surface mining valley fills are issued either in the Fourth Circuit (West Virginia and Virginia) or in the Sixth Circuit (Kentucky and Tennessee), although the latter court has never decided a section 404 permit case that involved mountaintop removal mining. Thus, the legal question in this case may never develop beyond one, or possibly two, federal circuits.

The importance of this Court's exercise of its supervisory authority to address this issue is underscored by the fact that, as in this case, in each of the prior instances where a district court has invalidated federal permitting practices for mountaintop removal mining operations, the Fourth

Circuit has reversed.[9] Indeed, a decade ago, in one of the first challenges to permits for mountaintop removal mining, Judge Haden observed:

> When valley fills are permitted in intermittent and perennial streams, they destroy those stream segments. The normal flow and gradient of the stream is now buried under millions of cubic yards of excess spoil waste material, an extremely adverse effect. If there are fish, they cannot migrate. If there is any life form that cannot acclimate to life deep in a rubble pile, it is eliminated. No effect on related environmental values is more adverse than obliteration. Under a valley fill, the water quantity of the stream becomes zero. Because there is no stream, there is no water quality. . . . [V]alley fills are waste disposal projects so enormous that, rather than the stream assimilating the waste, the waste assimilates the stream.

Bragg v. Robertson, 72 F. Supp. 2d 642, 661-62 (S.D. W. Va. 1999), *rev'd sub nom. Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001). Then, as here, after the district court made strikingly similar findings, App. 134a, the Fourth Circuit reversed, 248 F.3d 275. Time is growing short to require the Corps

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[9] *See Ohio Valley Envtl. Coal. v. Bulen*, 429 F.3d 493 (4th Cir. 2005), *reh'g en banc denied* 437 F.3d 421 (4th Cir. 2006) (King, J., joined by Michael, Motz, JJ., dissenting); *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425 (4th Cir. 2003); *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001).

to follow its legal requirements before too many more mountain streams are permanently destroyed without any assessment of the life-giving functions that will be lost, and without a proper determination of how such loss might be mitigated.

This case also has national implications even beyond the "far-reaching consequences for the environment of Appalachia" at issue here and in all similar permits, App. 97a (Michael, J., dissenting).. The question presented addresses the Corps' unlawful evasion of the Guidelines governing issuance of fill permits across the nation. Allowing the Corps to escape its duty to evaluate a discharge's effect on stream function in Appalachia opens the door for that agency to ignore the importance of the function of aquatic ecosystems elsewhere.

In this mountaintop removal mining case, the court of appeals has allowed a federal agency "to read the word 'function' right out of the regulation," and the word is one that matters. *Id.* at 249a (Wilkinson, J., dissenting from denial of reh'g). In so doing, the appeals court has acceded to the Corps' attempt "to create *de facto* a new regulation," *Christensen*, 529 U.S. at 588, even though the Guidelines expressly bind the Corps' actions under section 404 of the Clean Water Act, 33 U.S.C. § 1344(b)(1). Without a check on the Corps' unlawful practice, and reversal of the court of appeals in this case, Judge Wilkinson's words are likely to ring all too true in Appalachia and beyond—"Once the ecologies of streams and rivers and bays and oceans turn, they cannot be easily reclaimed. More often than not, the waterway is simply gone for good." App. at 250a. Under these exceptional circumstances, this Court should intervene.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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