

***20<sup>th</sup> ANNUAL KENTUCKY  
PROFESSIONAL ENGINEERS IN  
MINING SEMINAR***

***A Decade of Valley Fill Litigation***

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# The Hell of Mountaintop Mining



# ***BRAGG v. ROBERTSON***

## ***Filed: July 1998***

**Two claims:**

**CWA/NEPA claim against Corps of Engineers**

- **Excess spoil is not “fill material”**
- **NWP 21 allows > minimal adverse impact**

**Federal SMCRA claim against WVDEP to enforce state  
“buffer zone” regulation**

# ***BRAGG (Cont'd)***

## ***CWA/NEPA Claims***

**Claims were settled**

- **Plaintiffs agreed not to argue that spoil is “fill material” under § 404**
- **Corps agreed to size limit on fills permitted under its general permit NWP 21 (250 upstream watershed acres)**
- **Corps also agreed to conduct “programmatic” EIS on impact of VFs/MM**

# ***BRAGG (cont'd)***

## ***SMCRA Claim Against WVDEP***

### **Buffer Zone Claims**

- Buffer zone rule – 30 C.F.R. § 816.57 & WVCSR 38-2-5.2.a – prohibits valley fills in intermittent and perennial streams

## ***BRAGG (cont'd)***

### ***District Court's Ruling October 20, 1999***

- Buffer zone rule does apply to fills.
- Fills necessarily have “adverse impact.” Therefore, their presence in intermittent or perennial streams is illegal.
- § 404 permit not functional equivalent of buffer zone rule.
- Even if § 404 permit provided equivalent level of protection, no § 404 available for “waste” fills.

# ***BRAGG (cont'd)***

## ***Fourth Circuit***

***April 2001***

- Bragg v. West Virginia Coal Ass'n, 248 F.3d 275 (4th Cir.2001).
- Fourth Circuit reversed on jurisdictional grounds:
  - State could not be sued in federal court for violation of state law
  - State regulation at issue was state – not federal – law
- Did not address buffer zone issue.

# ***KFTC v. RIVENBURGH***

## **Clean Water Act Background**

- **Discharges of “fill material” fall to Corps under § 404**
- **Discharges of “non-fill” pollutants fall to EPA’s NPDES program**
- **CWA does not define fill material.**
  - **Corps/EPA had inconsistent regulatory definitions: effect vs. purpose tests**

# ***RIVENBURGH (Cont'd)***

## ***Claims***

- **No Corps authority over "waste fills" under CWA § 404**
- **Corps' then-existing rules didn't define "fill" to include waste (same as claim settled in Bragg).**

## ***RIVENBURGH (Cont'd)***

### ***District Court Decision June 2002***

- **CWA § 404—not just Corps' Regs.— prohibit waste fills.**
- **Effectively invalidated 2002 joint EPA/Corps rulemaking**
- **New rule specified that excess spoil = fill**

# ***RIVENBURGH (Cont'd)***

## ***Fourth Circuit January 2003***

### **Reversed District Court**

- **Corps definition of "fill material" to include spoil = permissible**
- **Kentuckians for the Commonwealth v. Rivenburgh, 317 F.3d 425**

# ***OVEC v. BULEN***

## ***August 2003***

**A. OVEC again Plaintiff**

**B. Claim is that both § 404 and NEPA prohibit use of NWP process for valley fills**

- **Sought to require use of Individual Permits (IP) operations identified in complaint**
- **IPs trigger NEPA and can require EISs—bureaucratic death**

## ***BULEN (Cont'd)***

### ***Nationwide Permit (NWP)***

Issued by Rulemaking : 2002 & 2007

- Both NEPA review and “minimal adverse impacts” determination is made at rulemaking stage
  - NWP 21 requires site-specific verification of min. impacts
- No NEPA review for individual use of NWP
- NWPs expire and require reauthorization every 5 years

## ***BULEN (Cont'd)***

### ***Invalidated NWP 21***

- **404(e) clearly authorizes Corps to issue NWPs “only for those activities determined before issuance to have minimal environmental impact.”**
  - **Site-specific verification of NWP 21 impermissibly delays impacts finding.**
- **NWP 21 violated public notice/hearing requirement.**

## ***BULEN (Cont'd)***

***Fourth Circuit November 2005***

***OVEC v. Bulen, 429 F.3d 493***

**A. Corps did make a “minimal impact” determination at outset**

- Corps can rely in part on post-issuance procedures to ensure minimal impacts.
- NWP program could not survive the limits applied by Dist. Ct.

**B. Corps did provide public notice/opportunity for hearing**

- Also, NWP 21 incorporates SMCRA permit, which itself is subject to notice/hearing requirements

**C. Case remanded to Dist. Ct.**

- Complaint amended to challenge 2007 version of NWP

## ***Clean Water Act***

- **Requires permits for discharges of pollutants, including "fill material"**
- **Mandates NPDES permits for non-fill pollutants under CWA § 402**
  - **Example: pond discharges**
- **Corps issues "fill" permits under CWA § 404**
  - **Valley fills/refuse impoundments**

## ***Clean Water Act, cont'd.***

- **General vs. Individual "Fill" Permits**
- **GPs:**
  - **Not subject to case-by-case NEPA review**
- **IPs:**
  - **Subject to case-by-case NEPA review**
  - **Subject to CWA § 404(b)(1) Guidelines**

- **CWA § 404(b)(1) Guidelines: (40 C.F.R. Part 230)**
  - **Prohibits “significant degradation” to waters of U.S.**
  - **Cannot be a practicable alternative with less adverse aquatic impacts**
  - **Adverse impacts to be minimized with appropriate and practicable steps (mitigation)**

# **NEPA**

- Applies to major federal actions *significantly affecting* the quality of the human environment—including Corps permits
- EA: Requires a "hard look" at potential environmental effects: no substantive stds. for issuing/denying permits
- EA: Yields FONSI or EIS

***Ohio Valley Environmental Coalition v. U.S. Army Corps of Engineers, 2007 WL 902097 (S.D. W.Va. March 23, 2007)***

- **Corps issued five permits with FONSI**
- **Court invalidated CWA § 404 "fill" permits for "valley fills" at four mines and stalled a fifth project**
  - **Affects: 50 – 52 million tons total production;  
634 jobs in southern West Virginia**

- **Ruling: Corps did not adequately consider potentially adverse effects under CWA and NEPA**
  - **Corps failed to discuss/analyze importance of and effects on "headwater streams"**
  - **Functions vs. structure**
  - **Corps failed to demonstrate how mitigation plans will compensate for adverse impacts**
- **NEPA Scope:**
  - **EA must evaluate entire VF area**

- **Mitigation Plans**
  - **Restoration of pond area**
  - **Enhancement of off-site degraded areas**
  - **Stream creation**

# STREAM CREATION PHOTOS





# ENHANCEMENT PHOTOS









## ***Pond Issue: June 13, 2007 Order***

- **EPA: Ponds are means for meeting “effluent limits” on “point source discharges”**
  - **NPDES permits impose limits at discharge point from ponds**
- **Issue: Must limits be applied at discharge into “in-stream” ponds rather than from ponds?**
  - **Are ponds “waters of U.S.”?**

***U.S.: Waters impounded for “treatment” ponds are excluded from “waters of U.S.”:***

**Waste treatment systems or lagoons designed to meet the requirements of CWA . . . are not waters of the United States.**

**This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [Suspended 1980]**

**45 Fed. Reg. 33,424 (May 19, 1980).**

- **Holding: “Waste treatment exclusion does not apply to in-stream waste treatment systems incorporating waters already within the regulatory definition of waters of the United States.”**
- **Holding conflicts with studies/rules of federal agencies**

## ***Preamble to 1979 OSM Rulemaking***

**§ 816.46 Sedimentation ponds.**

**§ 816.46(a)**

***General requirements.* [OSM] has decided to require sedimentation ponds . . . as "best technology currently available" to prevent . . . additional contributions of suspended solids to streamflow. . . .**

**\* \* \***

**The Environmental Protection Agency (EPA) has . . . concluded that sedimentation ponds are the key to controlling sediment.**

## **§ 816.46(a) (Cont'd)**

**Because of the physical, topographic, or geographical constraints in steep slope mining areas, the valley floor is often the only possible location for a sediment pond. Since the valleys are steep and quite narrow, dams must be high and must be continuous across the entire valley in order to secure the necessary storage.**

**There are two other alternatives. One would be to use an area to one side of the stream for the pond. This will not be physically possible in most cases, and if pursued, might cause serious additional disturbance to the environment. The other alternative would be to declare the area unsuitable for mining.**

## § 816.46(a) (Cont'd)

[OSM] recognizes that mining and other forms of construction are presently undertaken in very small perennial streams. Many Soil Conservation Service (SCS) structures are also located in perennial streams. \* \* \* Therefore, the regulations have been modified to permit construction of sedimentation ponds in perennial streams. . . .

