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Recommended Citation
Available at: http://scholarship.law.berkeley.edu/elq/vol30/iss3/18

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z389R96

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Fourth Circuit Upholds the Army Corps of Engineers' Decision to Permit Mountaintop Waste Disposal in America's Rivers

Kentuckians for the Commonwealth, Inc. v. Riverburgh, reveals a tension within the U.S. Army Corps of Engineers (the "Corps"), in carrying out its duty to administer permits that authorize the disposal of fill material in America's waterways under Section 404 of the Clean Water Act (CWA). Through the CWA, Congress charged the Corps with balancing the competing interests of the political and economic need to mine for natural resources against the environmental and social need to maintain the health and beauty of nature. The tension among these interests came to the forefront in Kentuckians v. Riverburgh when a non-profit group brought a legal challenge to the Corps' interpretation of Section 404. The citizens group questioned the Corps' practice of issuing permits to mining companies allowing the miners to place the excess debris from the mountain top mining operations in river valleys. The plaintiffs argued that the primary purpose of such a practice was waste disposal, and as such was beyond the scope of the Corps' Section 404 authority.

Kentuckians v. Riverburgh originated within the Huntington District of the U.S. Army Corps of Engineers, an area that includes portions of Kentucky, Ohio, Virginia, West Virginia, and North Carolina, where coal mining is big business. In connection with its mountaintop mining operations, Martin Coal applied for a permit from the Corps to remove soil and rock overlying the coal. The company wanted to take this debris, known as overburden, and place it in the riverbeds of twenty-seven
Acting under their now-superseded 1977 regulation implementing Section 404, the Corps authorized Martin Coal’s project which would fill in 6.3 miles of streams. A small local social justice organization, Kentuckians for the Commonwealth, Inc. (hereinafter "Kentuckians"), sought review of this decision.

Kentuckians brought this action on behalf of state residents who would be affected by Martin Coal’s visually disturbing mountaintop mining. Their complaint alleged that the Corps exceeded its authority under Section 404 in issuing the permit to Martin Coal because 404 regulates “fill material” only and overburden constituted a “waste” properly regulated under Section 402 by the Environmental Protection Agency (EPA). As such, Kentuckians asserted that the Corps had violated the purpose of the CWA and acted in a manner that was “arbitrary, capricious, an abuse of discretion, and otherwise contrary to law in violation of the [Administrative Procedures Act].” The plaintiffs moved for summary judgment seeking declaratory and injunctive relief to stop the mountaintop mining by obtaining a ruling that revoked or suspended Martin Coal’s permit.

The plaintiffs’ motion was matched by the defendant Corps’ cross motion for summary judgment. The Corps recognized a distinction between their own narrower definition of “fill material,” which excluded waste, and the EPA’s, which did not. However, the Corps claimed that in practice EPA and the CWA was repeatedly interpreted within the agencies to “authorize the Corps to regulate valley fills in connection with coal mining activities.” Thus, the defendants claimed they were within their authority and acting consistently with regulatory history.

During the development of this case, the Corps and the EPA were amending the rules regarding the definition of “fill material” and the division of authority in this area. While the cross motions were pending in the district court, the Corps’ and the EPA’s joint final rule (the “New Rule”) was published. According to the regulatory entities, the New

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7. Id. at 430.
8. See infra note 16 and accompanying text (explaining the promulgation of a “new rule” that superseded the Corps’ prior regulation).
10. Id. at 431-32.
11. Id. at 432; Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 204 F. Supp. 2d 927, 930 (S.D.W.V. 2002) [hereinafter Kentuckians I].
12. Kentuckians II, supra note 1, at 437 (quoting the Administrative Procedures Act, 5 U.S.C. §706(2)).
13. Id. at 430.
14. Id. at 432.
15. Id.
16. Id. at 431.
17. Id. at 432-3. The final rule is codified at 33 C.F.R. § 323.2 (2002).
Rule "clarified" that "fill material" under Section 404 included overburden among other substances. The New Rule attempted to distinguish fill materials from wastes by abandoning the former "primary purpose test" and adopting in its place an "effects-based test." This effects-based test established that fill materials have the effect of displacing water with dry land. Only wastes such as trash and garbage were excluded from the definition of fill material. Thus, had the amended regulations been controlling, Martin Coal would have properly received authorization under Section 404 because it met the effects-based test by replacing navigable waters with dry land made of overburden.

Instead, the district court's ruling evaluated "fill material" using the then controlling primary purpose test from the 1977 regulation. Applying the primary purpose test, the district court found that Section 404 "refers to material deposited for some beneficial primary purpose...not waste material discharged solely to dispose of waste." The district court ruled that depositing overburden in America's waterways has no beneficial primary purpose and is instead primarily an act designed to dispose of waste. Given this conclusion, the district court found that the Corps' practice of issuing permits that authorized the deposit of overburden in riverbeds - although long-standing - was nonetheless illegal. Thus, under Section 404 the Corps had no authority to issue Martin Coal the permit and the plaintiffs were granted summary judgment. In turn, the district court issued a permanent injunction against the Corps "prohibiting it from issuing 'any further Section 404 permits that have no primary purpose or use but the disposal of waste'" in the Huntington District. It also declared that the New Rule, which improperly took advantage of the ambiguous interpretation of "fill material" and departed from the CWA's history and purpose, was ultra vires.

On appeal, the Corps asserted four main arguments: (1) the injunction was overbroad; (2) the Corps had authority under Section 404 to regulate the overburden valley fill permitting process; (3) the regulatory agencies' interpretation of "fill material" was reasonable; and

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18. Id. at 432.
20. Id.
21. Id. at 431.
22. Id. at 437; Kentuckians I, supra note 11, at 931.
23. Id. at 437.
24. Kentuckians II, supra note 1, at 438; Kentuckians I, supra note 11, at 946.
26. Kentuckians II, supra note 1, at 434 (quoting from the district court opinion, Kentuckians I, supra note 11, at 946) (after the court was asked to clarify the scope of its ruling, it limited the injunction to the Huntington District in a revised memorandum).
27. Kentuckians II, supra note 1, at 433, 434, 438; Kentuckians I, supra note 11, at 945.
(4) the district court erred by not giving deference to the interpreting agencies.\(^{28}\)

In a majority opinion written by Judge Niemeyer, the of the Court of Appeals for the Fourth Circuit resolved the first issue - the breadth of the injunction - in the Corps' favor. The court found that "the injury anticipated from future permits is far broader than the scope of injury for which Kentuckians sought relief."\(^{29}\) The court stated that an injunction with appropriate scope would address only the effects of Martin Coal's fill disposal within Kentucky, not the entire Huntington District.\(^{30}\) Finding it was neither necessary to relieve the plaintiff's injury nor appropriately tailored to the circumstances, the court vacated the injunction as overbroad.\(^{31}\) The reviewing court also vacated the lower court's order declaring the New Rule \textit{ultra vires}, because that order was also beyond the scope of the issue presented.\(^{32}\)

In addressing the second issue - whether the Corps had authority under Section 404 to issue overburden valley fill permits to Martin Coal - the court reviewed the consistency of the agency's interpretation of the regulation with the purpose of its statute.\(^{33}\) The majority determined that the CWA's purpose was to regulate pollution discharged into the water. Next, the court reviewed the Corps' evidence regarding the division of authority between Section 402 and Section 404.\(^{34}\) The court determined that the primary purpose test the district court had applied was the source of confusion regarding the division of authority, and this was clarified by the New Rule which "codified" the existing practice and the agencies' roles.\(^{35}\) Therefore, the majority held that the Corps' distinction between Sections 404 and 402 was not plainly erroneous or inconsistent with the CWA. As such, the court ruled that the agency permissibly interpreted the CWA as authorizing the Corps to issue valley fill permits in connection with coal mining activities, even when they served no purpose other than to dispose of excess overburden.\(^{36}\)

The third issue – the appropriateness of the Corp's interpretation of "fill material" - occupied the majority of the opinion. To determine whether the CWA precluded the Corps' interpretation, the court first looked to the language of the statute itself, and found that Congress had

\(^{28}\) \textit{Kentuckians II, supra} note 1, at 434.
\(^{29}\) \textit{Id.} at 436.
\(^{30}\) \textit{Id.}
\(^{31}\) \textit{Id.}
\(^{32}\) \textit{Id.} at 438.
\(^{33}\) \textit{Id.} at 441-42.
\(^{34}\) \textit{Id.} at 445.
\(^{35}\) \textit{Id.} at 445-46.
\(^{36}\) \textit{Id.} at 447.
failed to define "fill material."\textsuperscript{37} Because the statute is "silent or ambiguous on the issue," the majority, like the district court, looked to other statutes to determine whether the Corps’ definition was "permissible."\textsuperscript{38} The court concluded that none of those other statutes made it clear the Corps was only allowed to regulate beneficial fills under Section 404, rather the statute’s undefined term gave rise to ambiguity.\textsuperscript{39}

This brought the court to the last issue - deference to the Corps as an interpretive agency. Given the court’s finding that “fill material” was an ambiguous term, the court proceeded to evaluate the agency’s interpretation under a \textit{Chevron} analysis.\textsuperscript{40} The majority stated that if an agency “defines a term in a way that is reasonable in light of the legislature’s revealed design, we give the administrator’s judgment ‘controlling weight’.”\textsuperscript{41} Having already found that the Corps interpretations did not depart from the language and purpose of the CWA, the majority found that deference was due to the Corps’ interpretation.\textsuperscript{42} Reversing the district court, the Fourth Circuit found “[t]he Corps’ issuance of the permit to Martin Coal on June 20, 2000, therefore, was not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.”\textsuperscript{43}

In a strong partial dissent, Judge Luttig emphatically asserted that the analysis of this case, by the courts as well as the parties, far exceeded the scope of the question presented.\textsuperscript{44} According to the minority opinion, the revised interpretation of “fill material” in the New Rule had no bearing on a permit not issued under that regulation.\textsuperscript{45} While not necessarily disagreeing with the substance of the majority’s analysis, Judge Luttig would have vacated the injunction as overbroad and remanded for consideration of the lawfulness of the Martin Coal permit under the 1977 regulations.\textsuperscript{46}

The district court was “aware of the immense political and economic pressures on the agencies to continue to approve mountaintop removal coal mining valley fills for waste disposal, and to give assurances that

\begin{itemize}
  \item \textsuperscript{37} \textit{Id.} at 440.
  \item \textsuperscript{38} \textit{Id.} at 441 (evaluating statutes related to CWA, including the Rivers and Harbors Acts and the Surface Mining Control and Reclamation Act).
  \item \textsuperscript{39} \textit{Id.} at 441-43.
  \item \textsuperscript{40} \textit{Id.} at 439.
  \item \textsuperscript{41} \textit{Id.} at 439 (quoting \textit{Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.}, 467 U.S. 837, 844 (1984)).
  \item \textsuperscript{42} \textit{Kentuckians II, supra} note 1, at 447-48.
  \item \textsuperscript{43} \textit{Id.} at 448.
  \item \textsuperscript{44} \textit{Id.} at 448-50.
  \item \textsuperscript{45} \textit{Id.} at 450-51.
  \item \textsuperscript{46} \textit{Id.} at 452.
\end{itemize}
future legal challenges to the practice will fail." The pressures became even more pronounced for the appellate court, where the number of industry association amici curiae briefs submitted made it plain that, at least in the Huntington District, the coal mining industry intends to continue its mountaintop mining operations. The court could have narrowed the impact of its decision if it had limited the holding to the question presented, ruling only on the reasonableness of the Corps' definition of "fill material" in the 1977 regulation. However, by reaching beyond the narrow issue presented and addressing the validity of the New Rule, the district court opened the door for the Fourth Circuit to do the same, virtually assuring the continuance of an environmentally destructive mining practice far into the future. As a result, Kentuckians v. Rivenburgh, resolved the Corps' tension of balancing competing interests over natural resources decidedly in favor of the economic and political players represented by the coal industry.

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47. Kentuckians I, supra note 11, at 946.
48. The following groups submitted Amici Curiae in support of the defendants/intervenors: Interstate Mining Compact Commission; National Mining Association; Alabama Coal Association; Coal Operators and Associates, Incorporated; Indiana Coal Council; Ohio Coal Association; Pennsylvania Coal Association; Virginia Coal Association; West Virginia Coal Association; and the State of Virginia.