In the Shadow of the Fourth Circuit: Ohio Valley Environmental Coalition v. United States Army Corps of Engineers

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**INTRODUCTION**

In the past ten years, the Ohio Valley Environmental Coalition (OVEC) and other groups opposed to mountaintop removal coal mining have received favorable district court opinions on the merits, only to be overturned by the Fourth Circuit.\(^1\) While the district court rulings have stymied mountaintop removal activities, the results have been only temporary. Consequently, OVEC has sought new strategies to achieve its goal of stopping coal removal techniques that they allege violate the Clean Water Act (CWA), the National Environmental Policy Act (NEPA), and associated regulations. In the 2007 *Ohio Valley Environmental Coalition v. United States Army Corps of Engineers* decision, the Southern District of West Virginia held that the U.S. Army Corps of Engineers (Corps) violated both statutes in issuing four section 404 permits under the CWA.\(^2\) This decision may finally break environmentalists' losing streak on mountaintop removal in the Fourth Circuit.

**BACKGROUND**

The effects of mountaintop removal coal mining have been described as “the greatest amount of environmental destruction caused by a single type of activity in the country today.”\(^3\) The practice involves blasting 800 to 1000 vertical feet off the top of a mountain to expose the underlying seams of coal.\(^4\) By federal law, the rock must be replaced to the approximate original contour

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of the mountain. But the rock’s volume increases from its natural state by as much as 15 to 25 percent during removal, requiring disposal of the excess rock. Most often, the excess is permanently dumped into adjacent valleys, as was done in 6,700 different valleys in the United States between 1985 and 2001.

Mountaintop removal coal mining and the associated valley fills cause irreparable harm to ecosystems. Between 1985 and 2002, 1,200 miles of headwater rivers and streams were affected by mountaintop removal mining in West Virginia, Kentucky, Virginia, and Tennessee. Mining waste, including heavy metals such as mercury, cadmium, and nickel, can find its way into the water supply of Appalachian towns. While some have argued that a cessation of mountaintop removal coal mining would damage the economy in one of the poorest regions in the United States, the practice actually employs fewer people than traditional mining operations and discourages development of a potentially lucrative tourism industry.

Prior to Ohio Valley Environmental Coalition v. United States Army Corps of Engineers, three major lawsuits were brought in the Southern District of West Virginia to mitigate the impacts of mountaintop removal mining. In the first, Bragg v. Robertson, the plaintiffs alleged that the West Virginia Department of Environmental Protection (WVDEP) and the Corps violated their duties under the Surface Mining Control and Reclamation Act (SMCRA), the CWA, and NEPA. The parties settled most of the claims, but Judge Haden sided with the environmentalists on the outstanding issues, holding, inter alia, that WVDEP violated its duty under SMCRA by approving permits that would unlawfully disturb a one hundred foot zone around streams. The Fourth Circuit overturned the decision, holding that a federal judge did not have the authority to issue an injunction against state officials.

In the second lawsuit, Kentuckians for the Commonwealth, Inc. v. Rivenburgh, the plaintiff argued that valley fill materials were not “fill material” as defined under section 404 of the CWA, but rather were waste
products for which a section 404 permit could not be issued. As the decision was pending, the Bush Administration changed the CWA definitions of fill material to explicitly allow “overburden from mining or other excavation activities” to fall within the scope of a section 404 permit. Despite these amendments, the district court, again in an opinion by Judge Haden, held that the new rules were “ultra vires, exceeding the statutorily granted authority of EPA or the Corps.” The court found therefore that valley fill should be considered waste, and that the issuance of a section 404 permit violated the CWA. The Fourth Circuit again reversed, finding that valley fill was not a waste product under section 404 of the CWA and that the district court’s invalidation of the Bush Administration’s new rules was beyond the scope of the issue.

In the third lawsuit, OCEV brought suit in 2003 against the Corps over Nationwide Permits (NWPs), which are issued to mining companies for their national operations and require little environmental review. Although the district court held that the issuance of NWPs for valley fills was incompatible with the language, structure, and legislative history of the CWA, the Fourth Circuit reversed, finding the NWP provided sufficient environmental review.

**Ohio Valley Environmental Coalition v. United States Army Corps of Engineers: An Analysis**

Between July 2005 and August 2006, the Corps issued four section 404 permits to coal mining companies in West Virginia. These permits allowed the companies to dispose of nearly 200 million cubic yards of overburden in valleys adjacent to mountaintop coal mines. The valley fills would permanently bury streams and adjacent riparian areas, “permanently alter the normal water flow within the area under the fill,” and “destroy or disrupt the living organisms and their habitats within the valley.” OVEC brought an action in the Southern District of West Virginia against the Corps, seeking declaratory judgment that the Corps violated the CWA and NEPA when it

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18. 204 F. Supp. 2d. at 943.
19. Id. at 929.
20. 317 F.3d at 430.
22. Id. at 453.
23. 429 F.3d at 496.
25. Id. at 629–31.
26. Id. at 629.
issued the four permits.\textsuperscript{27} OVEC also sought judicial review under the Administrative Procedure Act (APA) of the Corps' decision to issue the permits: a court must set aside any agency action, findings or conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."\textsuperscript{28}

Under both NEPA and the CWA, the Corps is required to determine the probable impacts and effects of issuing a section 404 permit.\textsuperscript{29} OVEC alleged that the Corps violated NEPA by failing to adequately assess the environmental impact of the valley fills, by improperly limiting the scope of the environmental assessment, and by ignoring evidence regarding the cumulative effects of valley fills on the environment.\textsuperscript{30} If the Corps had followed these requirements, OVEC argued, it would have been obliged to produce an Environmental Impact Statement (EIS). OVEC also alleged that the Corps violated the CWA by improperly evaluating the structure and function of the impacted streams, by relying on untested mitigation measures, by failing to characterize streams as "riffle and pool" complexes, and by ignoring relevant evidence relating to water runoff.\textsuperscript{31}

The court thoroughly reviewed the Corps' environmental assessment of the fill permits and held that the Corps had failed to meet the standards of both NEPA and the CWA.\textsuperscript{32} To determine the function of the streams that were to be filled with the excess mountaintop rock, the Corps had conducted a one-time measurement of existing conditions and relied on the "subjective" judgment of functional values lost rather than conducting additional measurements.\textsuperscript{33} The Corps had therefore failed to take a "hard look" at the structure and function of the aquatic ecosystem as required by its own regulations.\textsuperscript{34}

Second, the court held that the Corps had failed to properly consider the unique functional role of headwater streams and "failed to evaluate their destruction . . . in conformity with its own regulations and policies."\textsuperscript{35} Without this evaluation, the court held that the Corps was unable to evaluate whether the proposed mitigation offered as part of the permit would be sufficient.\textsuperscript{36}

In deciding to issue the permits, the Corps had determined that mitigation work, including stream restoration and creation covering an equal or greater length of the filled streams, rendered insignificant the impact of the permanent destruction of the valley streams.\textsuperscript{37} This determination was essential to the

\begin{itemize}
  \item \textsuperscript{27} Id. at 614, 616.
  \item \textsuperscript{28} 5 U.S.C. § 705(2)(A); Ohio Valley, 479 F. Supp. 2d. at 614, 621.
  \item \textsuperscript{29} Ohio Valley, 479 F. Supp. 2d. at 627–30.
  \item \textsuperscript{30} Id. at 616.
  \item \textsuperscript{31} Id.
  \item \textsuperscript{32} Id. at 626.
  \item \textsuperscript{33} Id.
  \item \textsuperscript{34} Id. at 635 (citing 40 C.F.R. § 230.11).
  \item \textsuperscript{35} Id. at 639.
  \item \textsuperscript{36} Id. at 638.
  \item \textsuperscript{37} Id. at 642.
\end{itemize}
issuance of the section 404 permits and the Finding of No Significant Impact (FONSI) under NEPA. The court held, however, that the mitigation proposed in the permits was insufficient for three reasons. First, the Corps failure to evaluate the impact of the valley fills meant that its mitigation proposal was incomplete. Second, the court found that the mitigation benefits of the “stream creation” projects proposed by the Corps were not supported by any scientific studies. As such, the Corps acted in an arbitrary and capricious manner in widely approving of their use. Finally, the court found that the Corps had improperly neglected to explain or support its reasoning for adopting a “Stream Habitat Unit” model proposed by the mining companies for monitoring mitigation projects.

The court next held that the Corps acted arbitrarily and contrary to its own regulations when it limited the scope of its environmental assessment to only the jurisdictional waters affected by the valley fill. According to federal regulations, when a permit issued by the Corps under the CWA is “merely one component of a larger project,” the scope of the document must go beyond the activity requiring the permit. While the impacts of the entire project needed not be addressed, the assessment must have included the impacts to the portion of the project over which the Corps had control and responsibility. In permitting for valley fill, the court found that the Corps had the requisite control over the riparian and upland areas in the valley to require evaluation of the impacts of the permitted activity on these resources.

The court also held for the plaintiffs with respect to the cumulative impact analysis required under both the CWA and NEPA. The Corps argued that a thorough cumulative impact analysis was not warranted because the areas affected by the valley fills were already mined. However, the court found that the Corps’ analysis was insufficient in two ways. First, because there was no consideration of the impacts to upland areas (since the Corps improperly limited its scope of its assessment), the Corps did not fully evaluate the cumulative impacts to the whole system. Second, the Corps did not discuss how it reached the conclusion that the effects on the aquatic environment would be insignificant, but instead just recited facts and its ultimate conclusion.

38. Id.
39. Id. at 642–43.
40. Id. at 648.
41. Id. at 649.
42. Id. at 651.
43. Id. at 653.
44. 33 C.F.R. § 325 (2007).
46. Id.
47. Id. at 656.
48. Id. at 660.
49. Id. at 657.
50. Id. at 659.
The court disagreed with two of the plaintiffs' claims. The Corps relied on a Surface Water Runoff Analysis that had been prepared by the mining companies and submitted to the WVDEP. The court held that the analysis was faulty and that the Corps improperly adopted this analysis without necessary consideration. The court held that the Corps had an adequate basis to rely on these analyses and thus did not violate the APA. Second, the court held that the Corps was entitled to deference on its definition of "riffle and pool" complexes, which are specially protected under CWA section 404(b)(1).

The court's ultimate reaction to the Corps' issuance of the four section 404 permits is a rebuke of the Corps' process. The court concluded that there are "fundamental deficiencies in the Corps' approach, resulting in [Environmental Assessments] which are inadequate and unsupported. The Corps has gone to great lengths to issue a FONSI and avoid conducting an EIS." These efforts did not meet the obligations required under the CWA, NEPA, or the agency's own regulations. As such, the court rescinded the four permits and enjoined the Corps and the mining companies from all activities under the permits, remanding the case for further consideration. The court noted that the Corps could either find that an EIS or a mitigated FONSI was appropriate, or that the permits should be denied.

CONCLUSION

The decision in Ohio Valley Environmental Coalition v. United States Army Corps of Engineers represents judicial acknowledgement of an agency's failure to comply with its own rules and regulations. As has been noted elsewhere, such failure may be the result of "agency capture," where the regulated entity gains access to the agency's decisionmaking process. With the high demand for low-sulfur coal produced inside the United States comes intense political pressure on government agencies to streamline the regulatory process for mining. However, this case might prove to be a tool for environmental groups seeking to force mining companies and their regulatory agencies to comply with the plain language of the statutes enacted to protect the environment. The Southern District of Florida issued a decision following the

51. Id. at 660.
52. Id.
53. Id. at 661.
54. Id. at 662.
55. Id. at 663.
56. Id. at 626.
57. Id. at 663.
58. Id. at 626, 663.
reasoning of *Ohio Valley Environmental Coalition v. United States Army Corps of Engineers*, indicating that this line of judicial thought has support elsewhere.\(^6\) However, the Eleventh Circuit recently vacated that decision, holding that the district court failed to give due deference to the Corps.\(^2\) Even so, the strength and number of the district court holdings for the Ohio Valley Environmental Coalition indicate that the Fourth Circuit might have a more difficult time reversing this decision than previous district court opinions on mountaintop removal coal mining. Time will tell, as the Corps of Engineers has already filed an appeal.\(^3\)

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63. 495 F. Supp. 2d at 1283.