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# MOUNTAINTOP COAL MINING AND THE CLEAN WATER ACT: THE FIGHT OVER NATIONWIDE PERMIT 21

JULIA FUSCHINO\*

**Abstract:** The Clean Water Act's (CWA) goal of protecting the waters of the United States has been threatened by the Army Corps of Engineers (Corps) increased use of general permits, such as Nationwide Permit 21 (NWP 21). NWP 21 is issued by the Corps to authorize the disposal of material from mountaintop coal mining, even though this type of disposal has serious environmental effects. Recent court rulings have upheld the use of NWP 21. However, by focusing on the questions left unresolved by Congress and the courts, there is an opportunity to help guarantee that the goal of the CWA is achieved. To ensure greater environmental protection, the adequacy of the minimum impact determinations performed by the Corps when it enacts a NWP should be challenged to ensure their adequacy, and minimum impact determinations should be required before any issuance of a NWP.

## INTRODUCTION

Several fatal accidents in early 2006 brought national attention to the dangers of coal mining<sup>1</sup>, an industry that has played a central role in the Appalachian economy since the mid-1800s.<sup>2</sup> Recently, however, the increased use of mountaintop coal mining—a method of surface mining involving the removal of the upper section of a mountain to access underground coal seams—has brought attention to coal mining's harmful environmental impacts, as well.<sup>3</sup>

The Army Corps of Engineers (Corps) currently issues a general permit—Nationwide Permit 21 (NWP 21)—to authorize the disposal of material from mountaintop coal mining.<sup>4</sup> Under section 404 of the Clean Water Act (CWA), the Corps may only grant general permits

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<sup>1</sup> See Ian Urbina, *Senators Have Strong Words for Mine Safety Officials*, N.Y. TIMES, Jan. 24, 2006, at A17 [hereinafter *Senators Have Strong Words*].

<sup>2</sup> See Paul A. Duffy, *How Filled Was My Valley: Continuing the Debate on Disposal Impacts*, 17 NAT. RESOURCES & ENV'T 143, 143 (2003).

<sup>3</sup> See *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 286 (4th Cir. 2001).

<sup>4</sup> See *Issuance of Nationwide Permits*, 67 Fed. Reg. 2020, 2038 (Jan. 15, 2002).

authorizing mountaintop coal mining when no more than “minimal adverse environmental effects” result from the activity.<sup>5</sup> Environmentalists, however, claim that the Corps’s issuance of NWP 21 violates the CWA because mountaintop coal mining has serious damaging environmental effects.<sup>6</sup> This Note addresses the conflict that has arisen as a result of the Corps’s use of NWP 21 and discusses court rulings on the subject, indicating concerns still unresolved.

Part I of this Note describes the current issues surrounding Appalachian coal mining, and provides a brief description of what mountaintop coal mining entails. Part II reviews the history of both the CWA and the authority of the Corps. Part III examines section 404 of the CWA, providing information on its creation and its use by the Corps to grant permits. Part IV discusses the types of permits—general and specific—that can be issued by the Corps under section 404, court rulings affirming such use, and the specific details of NWP 21. Part V reviews the debate over the Corps’s issuance of NWP 21, examining three primary court cases on the topic. Finally, Part VI considers the future of NWP 21 given the Corps’s increasing authority over permitting and recent court rulings. Part VI also points out issues that have not yet been addressed by the courts, and suggests how environmentalists can use these to fight for stronger environmental protection in the future.

## I. APPALACHIAN COAL MINING

### A. *Coal Mining and Safety*

Since the mid-1880s, coal mining has been a major part of the Appalachian economy, and accounted for more than half of the United States’ total production of coal in 2000.<sup>7</sup> In 2005, West Virginia alone produced over 153 million tons of coal,<sup>8</sup> providing almost sixty percent of the state’s business tax revenue.<sup>9</sup> Coal mining, how-

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<sup>5</sup> 33 U.S.C. § 1344(e)(1) (2000).

<sup>6</sup> See *Bragg*, 248 F.3d at 286; *Ohio Valley Env’tl. Coal. v. Bulen (Ohio Valley I)*, 410 F. Supp. 2d 450, 456 (S.D. W. Va. 2004).

<sup>7</sup> Duffy, *supra* note 2, at 143.

<sup>8</sup> Ian Urbina, *West Virginia Governor Urges Mining Moratorium*, N.Y. TIMES, Feb. 2, 2006, at A15 [hereinafter *Mining Moratorium*] (“West Virginia is the nation’s second-largest coal producing state, after Wyoming . . .”).

<sup>9</sup> Ian Urbina, *In Mine Country, Tears, Anguish and a Brief Pause for Safety*, N.Y. TIMES, Feb. 3, 2006, at A16.

ever, is not without risks.<sup>10</sup> Although safety has improved over time, recent coal mining accidents in West Virginia make clear that mining is still dangerous.<sup>11</sup>

In early 2006, devastating coal mining accidents in West Virginia killed fourteen miners and prompted federal officials to take a serious look at federal mining safety regulations and their enforcement.<sup>12</sup> Questions have arisen as to whether the current system of fines is sufficient to induce mine operators to follow safety regulations,<sup>13</sup> while miners are saying “some mining operations see paying fines as less expensive than adhering to rules.”<sup>14</sup> Also, the Federal Mine Safety and Health Administration stated that it could close sections of mines for violations, but it has little ability to close a mine for “accumulated bad acts.”<sup>15</sup>

While federal officials decided what should be done, West Virginia Governor Joe Manchin III acted, “urg[ing] all coal companies in the state to cease operations until safety could be reviewed.”<sup>16</sup> The West Virginia Senate and House of Delegates also responded by unanimously passing a bill requiring greater safety measures in mines.<sup>17</sup> This bill, approved by the Governor on January 26, 2006, requires mine operators to store extra breathing packs in their mines as well as give miners devices that would help them locate the packs in emergencies.<sup>18</sup>

### B. *Mountaintop Coal Mining and the Environment*

Along with attacks over the lack of safety enforcement, the coal mining industry has currently been facing severe criticism over the environmental damage caused by mountaintop coal mining.<sup>19</sup> Although not a new practice, mountaintop coal mining—a method of surface

<sup>10</sup> *See id.*

<sup>11</sup> *See Senators Have Strong Words*, *supra* note 1.

<sup>12</sup> *See id.* An explosion at the Sago Mine in West Virginia killed twelve miners on January 2, 2006, and on January 19, 2006, two miners were killed at the Aracoma Alma Mine No. 1 near Melville from a conveyer belt fire. *Id.*

<sup>13</sup> *Id.* (“According to Mine Safety and Health Administration records, the Sago Mine received 208 citations in 2005, up from 68 in 2004.”).

<sup>14</sup> Gardiner Harris, *Endemic Problem of Safety in Coal Mining*, N.Y. TIMES, Jan. 10, 2006, at A13.

<sup>15</sup> *Senators Have Strong Words*, *supra* note 1.

<sup>16</sup> *Mining Moratorium*, *supra* note 8.

<sup>17</sup> *Senators Have Strong Words*, *supra* note 1.

<sup>18</sup> H.B. 4076, 2006 Leg., 77th Sess. (W. Va. 2006), available at [www.legis.state.wv.us/Bill\\_Text\\_HTML/2006\\_SESSIONS/RS/BILLS/hb4076%20intr.htm](http://www.legis.state.wv.us/Bill_Text_HTML/2006_SESSIONS/RS/BILLS/hb4076%20intr.htm) (last visited Sept. 20, 2006); *Senators Have Strong Words*, *supra* note 1.

<sup>19</sup> *See Duffy*, *supra* note 2, at 143.

mining—only became widespread in Appalachia in the 1990s.<sup>20</sup> Since then, significant debates have arisen over the legality of general permits issued by the Corps.<sup>21</sup> Specifically, many environmentalists contend that the Corps cannot use NWP 21 to authorize the disposal of material from this type of mining.<sup>22</sup>

Mountaintop coal mining involves the removal of the entire upper section of a mountain to access underground coal seams.<sup>23</sup> The rock above the seam is removed and placed in adjacent valleys.<sup>24</sup> After the coal is extracted, the removed rock—known as overburden—is replaced in an effort to achieve the original contour of the mountain.<sup>25</sup> However, because broken-up rock occupies a larger volume than it does in its natural state, excess overburden remains in the valleys.<sup>26</sup>

Considerable disruption to the immediate environment occurs as a result of these practices, causing a clash between environmentalists and mining corporations.<sup>27</sup> Environmentalists claim that mountaintop coal mining has serious environmental effects.<sup>28</sup> Excess overburden that remains in valleys creates valley fills that often bury intermittent and perennial streams and drainage areas near the mountaintop.<sup>29</sup> This can increase the risk of flooding, contribute to landslides, and pollute streams and rivers in the region.<sup>30</sup> However, the most notable effect of mountaintop coal mining is the change in topography—converting areas of high, forested mountains surrounded by deep valleys and gorges into treeless plateaus.<sup>31</sup> This not only changes the aesthetic appeal of the area, but destroys high-quality forest habitats, threatening migratory birds and other wildlife populations in the area.<sup>32</sup>

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<sup>20</sup> *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 286 (4th Cir. 2001); Duffy, *supra* note 2, at 144.

<sup>21</sup> See Duffy, *supra* note 2, at 143.

<sup>22</sup> See, e.g., *Ohio Valley Env'tl. Coal. v. Bulen (Ohio Valley II)*, 429 F.3d 493, 505 (4th Cir. 2005); *Kentuckians for the Commonwealth, Inc. v. Rivenburgh (Rivenburgh III)*, 317 F.3d 425 (4th Cir. 2003); *Bragg*, 248 F.3d 275.

<sup>23</sup> *Bragg*, 248 F.3d at 286.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Bragg*, 248 F.3d at 286; Duffy, *supra* note 2, at 144.

<sup>30</sup> *Bragg*, 248 F.3d at 286; Duffy, *supra* note 2, at 144.

<sup>31</sup> Duffy, *supra* note 2, at 144.

<sup>32</sup> *Id.*

In section 404 of the Clean Water Act (CWA), Congress tried to appease both environmentalists and mining corporations.<sup>33</sup> Accordingly, the Corps may only grant general permits authorizing disposal of dredge and fill material from mountaintop coal mining when no more than “minimal adverse environmental effects” result from the activity.<sup>34</sup> While conceding that mining does have some environmental impacts, mining companies emphasize that the land is reclaimed when the mining operations are completed.<sup>35</sup> Mountaintop removal is thought to be the most profitable and efficient mountaintop mining technique, enabling companies to maximize coal production at comparatively low costs and thereby supply jobs and increased tax revenues to Appalachian communities.<sup>36</sup> Companies also stress that coal mining is not only critical to the local economies, but is also necessary for generating electricity for the entire country.<sup>37</sup> Therefore, there has been considerable debate over whether the Corps’s issuance of general permits for mountaintop mining violates section 404 of the CWA.<sup>38</sup>

## II. THE HISTORY OF THE CWA AND THE RIVERS AND HARBORS APPROPRIATIONS ACT

### A. *Overview of the CWA*

The CWA, derived from the old Federal Water Pollution Control Act (FWPCA), was given its modern form in its 1972 amendments.<sup>39</sup> Through these amendments, Congress intended to create a national program to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>40</sup> This goal was to be achieved by

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<sup>33</sup> See Kenneth M. Murchison, *Learning from More Than Five-and-a-Half Decades of Federal Water Pollution Control Legislation: Twenty Lessons for the Future*, 32 B.C. ENVTL. AFF. L. REV. 527, 536–37 (2005).

<sup>34</sup> 33 U.S.C. § 1344(e)(1) (2000).

<sup>35</sup> *Bragg*, 248 F.3d at 286; Mountaintop Mining, <http://www.mountaintopmining.com/#back> (last visited Dec. 28, 2006).

<sup>36</sup> Duffy, *supra* note 2, at 144.

<sup>37</sup> Lisa Lambert, *Mountaintop Mining Would Be Safer, Some Say*, REUTERS NEWS SERVICE (Jan. 25, 2006), available at <http://www.planetark.com/dailynewsstory.cfm/newsid/34661/story.htm>.

<sup>38</sup> Duffy, *supra* note 2, at 143.

<sup>39</sup> ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 620 (3d. ed. 2004). Although the Federal Water Pollution Control Act had come to be known as the CWA, the label “Clean Water Act” was not officially acknowledged by Congress until the 1977 amendments. Murchison, *supra* note 33, at 557.

<sup>40</sup> 33 U.S.C. § 1251(a) (2000).

prohibiting the discharge of any pollutant into the waters of the United States without a permit.<sup>41</sup>

Although the CWA has placed restrictions on what can be released into the waters of the United States, it does not cover all discharges.<sup>42</sup> It divides sources of pollution into two types—point sources and nonpoint sources<sup>43</sup>—and defines “discharge of a pollutant” as the “addition of any pollutant to navigable waters from any point source.”<sup>44</sup> The CWA sets effluent limitations only upon the discharge of pollutants from point sources.<sup>45</sup> Nonpoint sources are not covered; therefore, no strict effluent limitations are imposed on these sources by the CWA.<sup>46</sup>

It has been ruled that certain conditions created by, or equipment used in, mining operations and land clearing constitute point sources subject to regulation under the CWA.<sup>47</sup> The U.S. Court of Appeals for the Fifth Circuit held that surface runoff from rainfall, when collected or channeled by mine operators, constitutes a point source of pollution.<sup>48</sup> Hence, spoil piles—waste removed from a coal extraction—are classified as point sources of pollution if pollutants are transported from the piles by rainfall runoff through erosion-created ditches and gulleys and eventually deposited in navigable waters.<sup>49</sup> Also, certain pieces of clearing equipment that cause discharge of soil elsewhere—such as bulldozers fitted with V-blades and raking blades and ditch excavation equipment—were found to be point sources of pollution.<sup>50</sup>

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<sup>41</sup> See *id.* § 1342(a)(1).

<sup>42</sup> See *id.* § 1311(b)(1)(A).

<sup>43</sup> See *id.* §§ 1311(b)(1)(A), 1362(12).

The term “point source” means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

*Id.* § 1362(14).

<sup>44</sup> *Id.* § 1362(12).

<sup>45</sup> See 33 U.S.C. § 1311(b)(1)(A).

<sup>46</sup> See *id.* § 1311.

<sup>47</sup> *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45, 47 (5th Cir. 1980).

<sup>48</sup> *Id.* at 47.

<sup>49</sup> *Id.* at 45.

<sup>50</sup> *Avoyelles Sportmen’s League v. Alexander*, 473 F. Supp. 525, 532 (W.D. La. 1979).

Except for those exempted under section 404(f)(1),<sup>51</sup> point sources of pollution are regulated by permit programs under sections 402 and 404 of the CWA.<sup>52</sup> Section 402 of the CWA established the National Pollutant Discharge Elimination System (NPDES), giving the Environmental Protection Agency (EPA) authority to issue permits limiting discharges of specific concentrations of pollutants.<sup>53</sup> However, as a result of Congress's concern that the NPDES would prohibit work needed to maintain navigation, section 404 of the CWA was also enacted.<sup>54</sup>

Section 404 authorizes the Corps to regulate discharges of dredge and fill material into the navigable waters<sup>55</sup> of the United States.<sup>56</sup> Dredge material is defined by the Corps as "material that is excavated or dredged from waters of the United States."<sup>57</sup> Fill is defined as "material placed in waters of the United States where the material has the effect of: (i) [r]eplacing any portion of a water of the United States with dry land; or (ii) [c]hanging the bottom elevation of any portion of a water of the United States."<sup>58</sup> Rocks, soil, sand, clay, and overburden from mining or other excavation activities are examples of fill material regulated by the Corps under section 404.<sup>59</sup>

### B. A Brief History of the Corps's Authority

Created by Congress in 1802, the Corps began as a military and civil works agency.<sup>60</sup> Over the course of the nineteenth century, the Corps's activities expanded to include altering rivers and harbors to

<sup>51</sup> This section exempts from the permitting process the discharge of dredge and fill material from certain activities, such as normal farming and some forms of maintenance and construction. 33 U.S.C. § 1344(f)(1).

<sup>52</sup> See *id.* §§ 1342, 1344.

<sup>53</sup> *Id.* § 1342.

<sup>54</sup> Thomas Addison & Timothy Burns, *The Army Corps of Engineers and Nationwide Permit 26: Wetlands Protection for Swamp Reclamation?*, 18 *ECOLOGY L.Q.* 619, 627 (1991).

<sup>55</sup> 33 U.S.C. § 1362(7) ("The term 'navigable waters' means the waters of the United States, including the territorial seas."); 33 C.F.R. § 329.4 (2005) ("Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.").

<sup>56</sup> 33 U.S.C. § 1344.

<sup>57</sup> 33 C.F.R. § 323.2(c). Discharge of dredged materials includes any runoff or overflow from a contained land or water disposal area, as well as any addition of dredged material into the waters of the United States that is incidental to any activity, other than incidental fallback—the redeposit of small amounts of dredged material into essentially the same place as the initial removal. *Id.* § 323.2(d).

<sup>58</sup> *Id.* § 323.2(e)(1).

<sup>59</sup> *Id.* § 323.2(e)(2). Trash and garbage are not considered fill. *Id.* § 323.2(e)(3).

<sup>60</sup> Addison & Burns, *supra* note 54, at 623–24.



promote navigation.<sup>61</sup> In response to the 1888 Supreme Court decision in *Willamette Iron Bridge Co. v. Hatch*—holding that where there was no federal regulatory scheme, states could authorize or prohibit dams, bridges, and other obstructions to navigation<sup>62</sup>—Congress enacted the Rivers and Harbors Act of 1899 (RHA).<sup>63</sup> RHA required approval from the Corps for all construction activities and other obstructions to navigation, as well as for depositing refuse into navigable waters.<sup>64</sup>

Although the Corps initially limited its monitoring and enforcement activities under the RHA, in the late 1950s and 1960s it felt pressure to broaden its regulation to cover water quality and natural resource conservation.<sup>65</sup> The Corps thus adopted a “public interest” criterion for granting permits under the RHA.<sup>66</sup> The Corps, however, was not expressly required to protect the environment until the enactment of the CWA.<sup>67</sup> With the creation of section 404, the Corps’s authority was extended beyond the coverage of the RHA to include permitting for dredge and fill materials in waters of the United States.<sup>68</sup>

### III. THE EXCEPTION: SECTION 404

Unique in the CWA, section 404 operates as an exception to both the CWA’s general prohibition against pollution in waterways and the National Pollutant Discharge Elimination System.<sup>69</sup> In the absence of section 404, dredged spoil disposal could violate the CWA by smothering benthic life,<sup>70</sup> displacing water with land, and potentially discharging prohibited chemicals into the water.<sup>71</sup> In addition, section 404 goes against the CWA’s general scheme by placing discharge permitting authority in the Corps rather than EPA, which was otherwise

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<sup>61</sup> *Id.*

<sup>62</sup> 125 U.S. 1, 17 (1888).

<sup>63</sup> Rivers and Harbors Act of 1899, ch. 425, 30 Stat. 1121 (codified as amended at 33 U.S.C. §§ 401–418 (2000)).

<sup>64</sup> *See* 33 U.S.C. § 407.

<sup>65</sup> *See* Addison & Burns, *supra* note 54, at 625.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 626.

<sup>68</sup> Murchison, *supra* note 33, at 548.

<sup>69</sup> Addison & Burns, *supra* note 54, at 627.

<sup>70</sup> Benthic life consists of organisms that live at or near the bottom of the sea. THE OXFORD ENGLISH DICTIONARY 117 (2d ed. 1989).

<sup>71</sup> Addison & Burns, *supra* note 54, at 627.

given administrative responsibility for the CWA.<sup>72</sup> The Corps, however, does not exercise its authority under section 404 independently.<sup>73</sup> Sharing responsibility for the control of dredge or fill materials, EPA has authority to promulgate guidelines governing the Corps's issuance of permits.<sup>74</sup> Also, EPA can veto a permit granted by the Corps when it finds that the activity would have "an unacceptable adverse effect" on water quality.<sup>75</sup>

A. *The History of Section 404: National Resource Defense Council, Inc. v. Callaway*

The scope of section 404 extends to navigable waters, making the definition of "navigable waters" highly important.<sup>76</sup> The Corps and EPA initially had vastly different meanings for the term.<sup>77</sup> Consistent with the RHA, the Corps interpreted "navigable waters" to mean waters that are "subject to the ebb and flow of the tide or were, are, or could be made navigable in fact."<sup>78</sup> However, EPA relied on the legislative history of the CWA and adopted a broader definition that included non-navigable tributaries in addition to waters covered by the Corps's definition.<sup>79</sup>

The conflict between the two definitions was resolved in *Natural Resources Defense Council, Inc. v. Callaway*, a lawsuit brought by citizen environmental groups.<sup>80</sup> The D.C. District Court held in favor of EPA's definition, reasoning that Congress did not intend the term "navigable waters" to be restricted solely to traditional tests of navigability.<sup>81</sup> Instead, the court found that "navigable waters," having been defined as "the waters of the United States, including the territorial seas," was meant to assert jurisdiction to the maximum extent permissible under the Commerce Clause of the Constitution.<sup>82</sup> The court concluded that the Secretary of the Army and Chief of the Corps acted "unlawfully and in derogation of their responsibilities" under

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<sup>72</sup> See 33 U.S.C. § 1344 (2000).

<sup>73</sup> See *id.* § 1344(c).

<sup>74</sup> See *id.* § 1344(b).

<sup>75</sup> See *id.* § 1344(c).

<sup>76</sup> See *id.* § 1344.

<sup>77</sup> Addison & Burns, *supra* note 54, at 628.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> 392 F. Supp. 685, 686 (D.D.C. 1975).

<sup>81</sup> *Id.* at 686.

<sup>82</sup> *Id.*

the CWA by adopting a different definition.<sup>83</sup> Thus, by requiring the Corps to adopt the broader meaning of “navigable waters,” this decision vastly extended the Corps’s regulatory domain.<sup>84</sup>

### B. *Beginning of Permitting for the Corps*

After the decision in *Callaway*, the Corps proposed regulations for implementing section 404.<sup>85</sup> After receiving numerous comments on the proposed regulations,<sup>86</sup> the Corps promulgated a set of interim final section 404 regulations and requested further comment.<sup>87</sup> As part of these regulations, a procedure for processing general permits was created.<sup>88</sup> The Corps hoped that this mechanism would facilitate the establishment of a more administratively manageable regulatory program.<sup>89</sup> Accordingly, instead of issuing individual permits, the District Engineer was to issue a single permit for certain “clearly described categories of structures or work.”<sup>90</sup> Conditions specifying the maximum quantity of material authorized to be discharged, the category or categories of activities, and the type of waters in which the activity could occur were to be set by the District Engineer when issuing a general permit.<sup>91</sup>

Although the Corps may not have anticipated that its expanded jurisdiction would last, it continued.<sup>92</sup> In 1977, Congress amended the CWA, affirming prior developments in the section 404 program.<sup>93</sup> Accordingly, section 404 still applied to the discharge of dredge or fill material into navigable waters, with these waters now being defined as “waters of the United States.”<sup>94</sup> Thus, Congress confirmed the broad

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<sup>83</sup> *Id.*

<sup>84</sup> Addison & Burns, *supra* note 54, at 629.

<sup>85</sup> *See id.*

<sup>86</sup> Charles D. Ablard & Brian Boru O’Neill, *Wetland Protection and Section 404 of the Federal Water Pollution Control Act Amendments of 1972: A Corps of Engineers Renaissance*, 1 VT. L. REV. 51, 80 n.114 (1976) (noting that the interim regulations received over 1500 comments).

<sup>87</sup> Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31,320 (July 25, 1975).

<sup>88</sup> *Id.* at 31,335.

<sup>89</sup> *Id.* at 31,322.

<sup>90</sup> *Id.* at 31,335.

<sup>91</sup> *Id.*

<sup>92</sup> Addison & Burns, *supra* note 54, at 631.

<sup>93</sup> *Id.* at 632.

<sup>94</sup> *See* 22 U.S.C. § 1362(7) (2000); 33 U.S.C. § 1344(a) (2000).

scope given section 404 by the *Callaway* court.<sup>95</sup> In doing so, it rejected the idea of limiting the jurisdictional scope of section 404, which had been brought up by the previous Congress.<sup>96</sup>

When the Corps issued revisions to its regulations in July 1977, it reorganized its entire regulatory program.<sup>97</sup> Altering its jurisdictional limits, the Corps extended the scope of its regulation.<sup>98</sup> To cope with the new expansive definitions, the Corps increased its use of general permits, issuing a number of them under both section 10 of the RHA<sup>99</sup> and section 404 of the CWA.<sup>100</sup>

#### IV. ISSUANCE OF PERMITS FOR DREDGE AND FILL UNDER THE CWA

##### A. *Types of Permits*

The Corps has authority to issue two types of permits—individual and general—for the discharge of dredged or fill materials.<sup>101</sup> Section 404(a) of the CWA authorizes the Corps to issue individual permits for the discharge of this material into the navigable waters at specified disposal sites only after notice and opportunity for public hearings.<sup>102</sup> The Corps authorizes an individual permit following an intensive case-by-case evaluation of a specific project.<sup>103</sup>

To reduce paper work and delay, and thereby alleviate some of the Corps's burden, Congress added section 404(e) to the CWA.<sup>104</sup> This enabled the Corps to “define categories of discharge activities that do not require permittees and the Corps to undergo the exten-

<sup>95</sup> See *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975).

<sup>96</sup> Addison & Burns, *supra* note 54, at 632.

<sup>97</sup> Regulatory Program of the Corps of Engineers, 42 Fed. Reg. 37,122 (July 19, 1977).

<sup>98</sup> Addison & Burns, *supra* note 54, at 631. The Corps expanded its jurisdiction from areas below the headwaters to the entire length of streams and removed the size limit on the definition of lakes. *Id.*

<sup>99</sup> 33 U.S.C. § 403 (2000) (authorizing the Corps to regulate dredging, filling, and construction activities in navigable waters).

<sup>100</sup> Regulatory Program of the Corps of Engineers, 42 Fed. Reg. at 37,126–32.

<sup>101</sup> 33 U.S.C. § 1344(a), (e) (2000).

<sup>102</sup> *Id.* § 1344(a)–(c).

<sup>103</sup> *Crutchfield v. County of Hanover*, 325 F.3d 211, 214 (4th Cir. 2003) (recognizing that individual permits “require[] a resource-intensive review that entails submission of voluminous application materials, extensive site-specific research and documentation, promulgation of public notice, opportunity for public comment, consultation with other federal agencies, and a formal analysis justifying the ultimate decision to issue or refuse the permit.”); 33 C.F.R. § 323.2(g) (2005).

<sup>104</sup> *Ohio Valley Envtl. Coal. v. Bulen (Ohio Valley I)*, 410 F. Supp. 2d 450, 454 (S.D. W. Va. 2004).

sive individual permit review process of Section 404(a).”<sup>105</sup> Unlike the individual permits under section 404(a), general permits under section 404(e) allow certain activities to go forward with minimal involvement by the Corps.<sup>106</sup>

A general permit is issued on a national or regional basis for a category of activities when the activities are “substantially similar in nature and cause only minimal individual and cumulative environmental impacts.”<sup>107</sup> General permits can also be issued when doing so “would result in avoiding unnecessary duplication of regulatory control exercised by another Federal, State, or local agency provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal.”<sup>108</sup>

Nationwide permits (NWP) are general permits which are national in scope.<sup>109</sup> According to the Corps, these permits are used to authorize minor activities that are generally uncontroversial.<sup>110</sup> When issuing, reissuing, or modifying a NWP, the Corps complies with the National Environmental Policy Act (NEPA) by issuing an Environmental Assessment (EA), which “consider[s] the environmental effects of each NWP from a national perspective.”<sup>111</sup> Although the Corps is preparing a voluntary programmatic environmental impact statement (EIS) for the NWP program, it contends that the program does not reach the level of significant impacts that requires the preparation of an EIS.<sup>112</sup> The Corps based this determination on the fact that NWPs are authorized only for activities that have no more than minimal adverse effects

<sup>105</sup> *Id.*

<sup>106</sup> See 33 U.S.C. § 1344. The relevant portion states:

In carrying out his functions relating to the discharge of dredged or fill material under this section, the [Corps] may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the [Corps] determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall . . . set forth the requirements and standards which shall apply to any activity authorized by such general permit.

*Id.* § 1344(c).

<sup>107</sup> 33 C.F.R. § 323.2(h).

<sup>108</sup> *Id.*

<sup>109</sup> *Ohio Valley I*, 410 F. Supp. 2d at 455.

<sup>110</sup> Issuance of Nationwide Permits, 67 Fed. Reg. 2020, 2022 (Jan. 15, 2002).

<sup>111</sup> *Id.* at 2025.

<sup>112</sup> *Id.*

on the aquatic environment.<sup>113</sup> The Corps also reasoned that the reissuance process of NWPs every five years helps ensure there are no more than minimal impacts.<sup>114</sup>

### B. *The Courts' Views on Section 404*

Although Congress appears satisfied with the extent of the Corps's authority over dredge and fill activities, the courts have still had to address the issue on numerous occasions.<sup>115</sup> In *Buttrey v. United States*, for example, the U.S. Court of Appeals for the Fifth Circuit confirmed the constitutionality of the Corps's role under section 404.<sup>116</sup> Rejecting the plaintiff's claim that section 404 is unconstitutional because it delegates jurisdiction to a part of the military, the court noted that the constitutional authority for section 404 rests in the Commerce Clause, and that administration by the Corps does not infringe upon any of the provisions of the Constitution.<sup>117</sup> However, the court made it clear that "the Corps is limited in its authority to that which Congress provides and remains subject to revocation of that authority at any time at the will of Congress."<sup>118</sup>

In the absence of further congressional action, the courts—having been left to address section 404 questions—usually rely on the congressional intent.<sup>119</sup> Thus, in *United States v. Riverside Bayview Homes, Inc.*, the Supreme Court affirmed the constitutionality of the Corps's broad authority,<sup>120</sup> holding that the Corps acted reasonably in interpreting the CWA to require permits for the discharge of fill material into all wetlands adjacent to navigable or interstate waters and their tributaries.<sup>121</sup> The Court has, however, recognized that some constitutional limits exist as to how far Congress can extend the CWA's coverage beyond navigable-in-fact waters.<sup>122</sup> In *Solid Waste Agency v.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> See *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 171, 174 (2001); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129–30 (1985); *United States v. Rapanos*, 339 F.3d 447, 453–54 (6th Cir. 2003).

<sup>116</sup> 690 F.2d 1186, 1189–90 (1982).

<sup>117</sup> *Id.* at 1189.

<sup>118</sup> *Id.* at 1190.

<sup>119</sup> See *Solid Waste Agency*, 531 U.S. at 172–73; *Riverside*, 474 U.S. at 130.

<sup>120</sup> See 474 U.S. at 134 (concluding that frequent flooding is not required to be considered waters of the United States).

<sup>121</sup> *Id.* at 133 (“[T]he evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term ‘waters’ to encompass wetlands adjacent to waters as more conventionally defined.”).

<sup>122</sup> See *Solid Waste Agency*, 531 U.S. at 173.

*U.S. Army Corps of Engineers*, the Court held that permanent and seasonal ponds with no hydrological connection to other waterways are beyond section 404's regulatory authority.<sup>123</sup> The Court stated that for there to be jurisdiction under the CWA, there must be a "significant nexus between the wetlands and 'navigable waters.'"<sup>124</sup>

Although it has been argued that *Solid Waste Agency* was meant to significantly restrict the Corps's jurisdiction, the lower courts have not always agreed.<sup>125</sup> In *United States v. Deaton* and *United States v. Rapanos*, the Fourth and Sixth Circuits held that where wetlands drain into a ditch which must pass through other waterways to get to navigable-in-fact water, there is jurisdiction under the CWA.<sup>126</sup> Similarly, in *United States v. Hubenka*, the Tenth Circuit reasoned that non-navigable tributaries which enable potential pollutants to migrate to navigable waters downstream can constitute a "significant nexus."<sup>127</sup>

In *Rapanos v. United States*, the U.S. Supreme Court ruled on the definition of "navigable waters" under the CWA.<sup>128</sup> It held that the term "navigable waters" includes only relatively permanent, standing or flowing bodies of water and does not include intermittent or ephemeral flows of water.<sup>129</sup> Thus, the Court articulated limits—although broad ones—to the Corps's authority.<sup>130</sup>

### C. *Nationwide Permit 21 (NWP 21)*

Relying on section 404(e) of the CWA, the Corps issued NWP 21.<sup>131</sup> NWP 21 is a general permit for discharges into the waters of the United States of dredged or fill material associated with surface coal mining and reclamation operations.<sup>132</sup> According to NWP 21, project

<sup>123</sup> *Id.* at 163, 173–74.

<sup>124</sup> *Id.* at 167.

<sup>125</sup> See *United States v. Deaton*, 332 F.3d 698, 702, 712 (4th Cir. 2003); *United States v. Rapanos*, 339 F.3d 447, 449, 453 (6th Cir. 2003).

<sup>126</sup> *Deaton*, 332 F.3d at 702, 712; *Rapanos*, 339 F.3d at 449, 453.

<sup>127</sup> 438 F.3d 1026, 1034 (10th Cir. 2006).

<sup>128</sup> 126 S. Ct. 2208, 2225 (2006).

<sup>129</sup> *Id.*

<sup>130</sup> See *id.*

<sup>131</sup> See Issuance of Nationwide Permits, 67 Fed. Reg. 2020, 2022 (Jan. 15, 2002).

<sup>132</sup> *Id.* at 2020, 2081. NWP 21 states:

Discharges of dredged or fill material into waters of the US associated with surface coal mining and reclamation operations provided the coal mining activities are authorized by the DOI, Office of Surface Mining (OSM), or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 and provided the permittee notifies the District Engineer in accordance with the "Notification" General Condition. In addi-

proponents must file a preconstruction notification (PCN) with the appropriate district.<sup>133</sup> Also, unlike other NWPs, the Corps must support all NWP 21 projects by written authorization before the projects can proceed to construction.<sup>134</sup> Historically, however, the Corps has approved almost every application it has received for the disposal of fill in the form of mountaintop spoil placed in valleys.<sup>135</sup>

By law, a NWP is effective for a period of five years.<sup>136</sup> Therefore, every five years the Corps reviews and reissues NWPs.<sup>137</sup> The most recent review occurred in 2002, when the Corps reissued NWP 21 and made several changes.<sup>138</sup> First, the Corps required that before it authorizes any project, it must make a case-by-case determination that the adverse effects to the aquatic environment caused by the proposed activity are minimal both individually and cumulatively.<sup>139</sup> Second, the Corps began to require a compensatory mitigation plan to ensure that losses to the aquatic environment are minimal.<sup>140</sup>

#### V. AUTHORITY OF THE CORPS OVER MOUNTAINTOP MINING: THE NWP 21 DEBATE

The issuance of NWP 21 has caused significant debate over the Corps's authority to grant a general permit for the disposal of material from mountaintop coal mining.<sup>141</sup> District courts in Appalachia have repeatedly ruled in favor of the environmentalists, holding that the Corps does not have the authority to enforce this type of regulation.<sup>142</sup> These recent decisions have run "counter to the Bush administration's

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tion, to be authorized by this NWP, the District Engineer must determine that the activity complies with the terms and conditions of the NWP and that the adverse environmental effects are minimal both individually and cumulatively and must notify the project sponsor of this determination in writing.

*Id.*

<sup>133</sup> *Id.* at 2090.

<sup>134</sup> *Id.*

<sup>135</sup> Duffy, *supra* note 2, at 145.

<sup>136</sup> 33 U.S.C. § 1344(e)(2) (2000).

<sup>137</sup> *See id.*; Issuance of Nationwide Permits, 67 Fed. Reg. at 2020.

<sup>138</sup> Issuance of Nationwide Permits, 67 Fed. Reg. at 2020, 2039.

<sup>139</sup> *Id.* at 2038.

<sup>140</sup> *Id.*

<sup>141</sup> *See generally* Duffy, *supra* note 2, at 143 (discussing the debate over whether the disposal of waste from mountaintop coal mining is illegal under federal environmental laws).

<sup>142</sup> *See* Ohio Valley Envtl. Coal. v. Bulen (*Ohio Valley I*), 410 F. Supp. 2d 450, 470–71 (S.D. W. Va. 2004); Bragg v. Robertson, 72 F. Supp. 2d 642, 656–57 (S.D. W. Va. 1999), *aff'd in part, vacated in part on other grounds sub nom.* Bragg v. W. Va. Coal Ass'n, 248 F.3d 275 (4th Cir. 2001).



stated goals of both maximizing domestic fuel production and easing federal environmental restrictions on coal mining operations.”<sup>143</sup> In contrast, however, the U.S. Court of Appeals for the Fourth Circuit has either avoided the question or ruled in favor of the Corps.<sup>144</sup>

A. *The First Attempt to Challenge the Corps’s Authority: Bragg v. Robertson*

Finding that the primary purpose for disposing spoil is to dispose waste—which is regulated by section 402—the district court in *Bragg v. Robertson* held that the Corps does not have authority under section 404 to regulate the disposal of spoil in valley fills.<sup>145</sup> However, the Fourth Circuit vacated the district court’s injunction, concluding that sovereign immunity bars a citizen-suit challenge against a state official in federal court under the Surface Mining Control and Reclamation Act (SMCRA).<sup>146</sup> Importantly though, the Fourth Circuit upheld the settlements that the parties arrived at with the district court’s approval.<sup>147</sup>

According to the settlements, the Corps and several other federal entities agreed to prepare a comprehensive EIS to analyze the adverse environmental impacts of mountaintop strip mining.<sup>148</sup> The Corps also agreed to postpone issuing NWP 21 permits for valley fills in West Virginia that could affect watersheds greater than 250 acres.<sup>149</sup> Although the Corps agreed to comply with the terms of this settlement when it reissued NWP 21 in 2002, it chose not to extend the 250-acre restriction to jurisdictions outside of West Virginia.<sup>150</sup>

Another result of this lawsuit was that the Corps decided to revise its definition of “discharge of fill material” to be compatible with EPA’s definition.<sup>151</sup> Thus, the Corps removed the “primary purpose” clause from its definition.<sup>152</sup> Under its previous definition of “discharge of fill materials”—which included a “primary purpose” clause—the Corps could not issue a permit if fill was discharged as waste instead of used to

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<sup>143</sup> Duffy, *supra* note 2, at 143.

<sup>144</sup> See *Ohio Valley Envtl. Coal. v. Bulen (Ohio Valley II)*, 429 F.3d 493, 496 (4th Cir. 2005); *Kentuckians for the Commonwealth, Inc. v. Rivenburgh (Rivenburgh III)*, 317 F.3d 425, 436, 448 (4th Cir. 2003); *Bragg*, 248 F.3d at 286.

<sup>145</sup> *Robertson*, 72 F. Supp. 2d at 657.

<sup>146</sup> *Bragg*, 248 F.3d at 286, 289.

<sup>147</sup> *Id.* at 286.

<sup>148</sup> Issuance of Nationwide Permits, 67 Fed. Reg. 2020, 2039 (Jan. 15, 2002).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*; Duffy, *supra* note 2, at 177.

<sup>152</sup> Duffy, *supra* note 2, at 177.

convert water to dry land.<sup>153</sup> Thus, by changing its definition, the Corps hoped to prevent the possibility that a subsequent court ruling would find general permits for valley fills to be illegal.<sup>154</sup>

B. *Challenging the Minimal Impacts: Kentuckians for the Commonwealth v. Rivenburgh*

Following in the footsteps of *Bragg*, Kentuckians for the Commonwealth (KFTC) brought suit in response to the Corps's issuance of a NWP 21, which allowed the Martin County Coal Corporation (MCCC) to fill streams with spoil from coal strip mining.<sup>155</sup> Noting that over the past twenty years, these activities have buried over 1500 miles of streams in Kentucky and West Virginia, KFTC attempted to stop further damage to the environment by pointing out that mountaintop mining causes more than minimal environmental impacts.<sup>156</sup>

As in *Bragg*, the District Court for the Southern District of West Virginia initially heard the case.<sup>157</sup> Again siding with the plaintiffs, the district court concluded that Congress did not intend the Corps's section 404 authority to extend to fill disposed of as waste.<sup>158</sup> Thus, the court sustained the plaintiff's challenge to NWP 21 and enjoined the issuance of the permit in question.<sup>159</sup> In addition, the court enjoined any future permits by the Corps's Huntington District office that have no primary purpose except to allow the disposal of spoil removed from mountaintop mining into the valley.<sup>160</sup>

On appeal, the Fourth Circuit vacated the district court's preliminary injunction against future permits, finding it broader than necessary to grant relief to the plaintiffs.<sup>161</sup> Also, the court found that the Corps did not need a constructive purpose to authorize valley fills.<sup>162</sup> The Corps's interpretation of "fill material" under section 404—

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<sup>153</sup> See *id.* at 177–78.

<sup>154</sup> *Id.*; Issuance of Nationwide Permits, 67 Fed. Reg. at 2039.

<sup>155</sup> See *Kentuckians for the Commonwealth, Inc. v. Rivenburgh (Rivenburgh I)*, 204 F. Supp. 2d 927, 930 (S.D. W. Va. 2002). By authorizing twenty-seven valley fills, the permit would bury 6.3 miles of streams. *Id.*

<sup>156</sup> See Press Release, Kentuckians for the Commonwealth, Appeals Court Overturns Mountaintop Removal Decision (Jan. 17, 2006) (on file with author).

<sup>157</sup> *Kentuckians for the Commonwealth, Inc. v. Rivenburgh (Rivenburgh II)*, 206 F. Supp. 2d 782 (S.D. W. Va. 2002).

<sup>158</sup> *Id.* at 788, 808.

<sup>159</sup> *Id.* at 808.

<sup>160</sup> *Id.*

<sup>161</sup> *Kentuckians for the Commonwealth, Inc. v. Rivenburgh (Rivenburgh III)*, 317 F.3d 425, 436 (4th Cir. 2003).

<sup>162</sup> See *id.* at 448.

as defined as “all material that displaces water or changes the bottom elevation of a water body except for ‘waste’” —was determined to be reasonable.<sup>163</sup>

C. *Using NEPA and CWA to Challenge NWP 21: Ohio Valley*  
Environmental Coalition v. Bolen

Not willing to give up the fight over NWP 21, West Virginia environmental groups joined together to sue the Corps, claiming that the issuance of NWP 21 does not comply with the National Environmental Policy Act (NEPA) or the CWA, and is therefore “arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law.”<sup>164</sup> The plaintiffs identified eleven projects approved by the Corps pursuant to NWP 21, together having a total impact on approximately 140,000 feet of waters in West Virginia.<sup>165</sup>

The U.S. District Court for the Southern District of West Virginia held for the plaintiffs, finding that the Corps’s approach to authorizing valley fills and surface impoundments pursuant to NWP 21 fails the first part of the analysis set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>166</sup> because it does not comply with the plain language of the CWA.<sup>167</sup> The district court concluded that 404(e) of the CWA: (1) “directs the Corps to determine that certain activities will invariably have only minimal effects on the environment;” (2) requires the Corps to issue NWPs only for those activities determined before issuance to have minimal environmental impact; and (3) requires that general permits authorize discharges to proceed without further involvement from the Corps.<sup>168</sup>

<sup>163</sup> *Id.* (indicating that “waste” refers to garbage, sewage, and effluent, not mining overburden).

<sup>164</sup> See *Ohio Valley Envtl. Coal. v. Bulen (Ohio Valley I)*, 410 F. Supp. 2d 450, 456 (S.D. W. Va. 2004).

<sup>165</sup> *Id.* at 456–57.

<sup>166</sup> *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). When a court reviews an agency’s construction of a statute which it administers, it must first ask whether Congress has spoken directly to the precise question at issue. If the intent of Congress is clear, then that intent must be followed. However, if Congress has not directly addressed the precise question at issue, the court cannot impose its own construction on the statute. Instead, if the statute is silent or ambiguous with respect to the specific issue, the court must decide whether the agency answer is based on a permissible construction of the statute. *Id.*

<sup>167</sup> *Ohio Valley I*, 410 F. Supp. 2d at 453, 466. The court found that “Nationwide Permit 21 does not comply with the plain language, structure, and legislative history of the Clean Water Act.” *Id.* at 453.

<sup>168</sup> *Id.*

The district court found, however, that NWP 21 violates all of these CWA requirements.<sup>169</sup> In reaching this conclusion, the court reasoned that NWP 21 “defines a procedure instead of permitting a category of activities” as well as “provides for a post hoc, case-by-case evaluation of environmental impact.”<sup>170</sup> It also found that NWP 21 authorized projects to proceed only after receiving individualized approval from the Corps, in contradiction to Congress’s intent for no individualized approval for general permits under the CWA.<sup>171</sup> Finally, the district court concluded that NWP 21 violated the statutory requirement that the Corps provide notice and opportunity for public hearing before issuing a permit.<sup>172</sup>

As a result of these discrepancies between the CWA and the Corps’s NWP 21, the district court determined that the permit was facially invalid, and enjoined the Corps from issuing authorizations pursuant to NWP 21 in the Southern District of West Virginia.<sup>173</sup> The district court also ordered the Corps to suspend authorizations for valley fill and surface impoundments for the specific mining sites challenged by the plaintiff on which construction had not commenced as of July 8, 2004.<sup>174</sup> In August 2004, the court extended its injunction to cover all NWP 21 permits issued prior to its July order, under which fill or impoundment construction had not begun as of the July order.<sup>175</sup>

The Corps appealed to the Fourth Circuit.<sup>176</sup> Although many believed the district court’s ruling would be affirmed,<sup>177</sup> the Fourth Circuit found that the Corps complied with Section 404 of the CWA when it issued NWP 21.<sup>178</sup> Thus, the Fourth Circuit vacated the district court’s decision, reinstating the use of nationwide general per-

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<sup>169</sup> *Id.* at 466–71; *Ohio Valley Env’tl. Coal. v. Bulen (Ohio Valley II)*, 429 F.3d 493, 497 (4th Cir. 2005).

<sup>170</sup> *Ohio Valley I*, 410 F. Supp. 2d at 466.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 470–71.

<sup>174</sup> *Id.*

<sup>175</sup> Lawrence G. McBride, *Mining 2004 Annual Report*, 2004 A.B.A. ENV’T, ENERGY, & RESOURCES L.: YEAR IN REV. 227, 229 (2005).

<sup>176</sup> *Ohio Valley II*, 429 F.3d 493, 497.

<sup>177</sup> Joseph Dawley, *Unintended Consequences: Clean Air Act’s Acid Rain Program, Mountain-top Mining and Related Litigation*, 36 TRENDS: A.B.A. SECTION OF ENV’T, ENERGY & RESOURCES NEWSL. 13, 13 (Jan./Feb. 2005).

<sup>178</sup> *Ohio Valley II*, 429 F.3d at 496.

mits to allow coal companies to dispose of mining waste in valleys and streams.<sup>179</sup>

In reaching this conclusion, the court of appeals discussed the lower court's reasons for its decision, rejecting each one in turn.<sup>180</sup> First, the court concluded that NWP 21 does not define a procedure, as was claimed by the district court, but instead "plainly authorizes a 'category of activities.'"<sup>181</sup> The court also noted that nothing in section 404(e) restricts the use of procedural, along with substantive, parameters to define a category.<sup>182</sup>

Second, the court of appeals found that the district court erred in determining that the Corps did not make the required minimal-impact determinations before issuance of the nationwide permit.<sup>183</sup> The Corps argued that section 404(e) does not unambiguously require these determinations be made before issuance of a nationwide permit.<sup>184</sup> However, the court did not rule on this issue.<sup>185</sup> It simply concluded that minimal-impact determinations were completed by the Corps before issuing NWP 21.<sup>186</sup> Again, however, the court did not consider whether these determinations were arbitrary or capricious.<sup>187</sup> It left the argument up to the plaintiffs to reassert on remand.<sup>188</sup>

<sup>179</sup> See *id.*

<sup>180</sup> *Id.* at 498–504.

<sup>181</sup> *Id.* at 498. The court stated in full:

The category of activities authorized by NWP 21 consists of those discharges of dredged or fill material that (1) are associated with surface coal mining and reclamation operations, so long as those operations are authorized by the Department of Interior or by states with approved programs under the Surface Mining Control and Reclamation Act of 1977, (2) are preceded by notice to the Corps, and (3) are approved by the Corps after the Corps concludes that the activity complies with the terms of NWP 21 and that its adverse environmental effects are minimal both individually and cumulatively.

*Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 498–99.

<sup>184</sup> *Ohio Valley II*, 429 F.3d at 498 n.3.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 499–500 (finding that the Corps took account of a variety of factors, such as public commentators' opinions, the Surface Mining Control and Reclamation Act's (SMCRA) requirements, the nature of the coal mining activities authorized by NWP 21, the applicability of a variety of general conditions to NWP 21, and data about usage of previous versions of NWP 21).

<sup>187</sup> *Id.* at 502 n.6.

<sup>188</sup> *Id.* The plaintiff on remand could assert this claim if, for example, the Corps either relied on erroneous premises or ignored relevant data. *Id.*

The court did, however, find that the issuance of a general permit does not “guarantee *ab initio* that every instance of the permitted activity will have only a minimum impact.”<sup>189</sup> It concluded that the Corps’s *ex ante* determinations of minimal impact could not be anything more than reasoned predictions.<sup>190</sup> The court also stated that no provision of the CWA specifies “how the Corps must make the minimal-impact determinations, the degree of certainty that must undergird them, or the extent to which the Corps may rely on post-issuance procedures in making them.”<sup>191</sup>

Third, the Fourth Circuit concluded that section 404 does not “unambiguously prohibit[] the Corps from creating a general permit that authorizes activities to proceed only after receiving individualized approval from the Corps.”<sup>192</sup> Since the term “general permit” is not defined in the CWA, the court concluded that there is no explicit textual basis for this argument.<sup>193</sup> Also, the court reasoned that section 404 does not prohibit the creation of a general permit with a requirement of individualized consideration of approval simply because it provides separate provisions for individual and general permits.<sup>194</sup>

Finally, overruling the district court’s last basis for invalidating NWP 21, the court of appeals concluded that section 404 does not require notice and a hearing before the Corps authorizes an individual project under a general permit.<sup>195</sup> All that is statutorily required is that notice and opportunity for public hearing be provided before the general permit itself is issued.<sup>196</sup> Thus, the court found that the Corps fulfilled its obligation under the CWA to provide notice and opportunity for public hearing before determining that the category of activi-

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<sup>189</sup> *Id.* at 500–01. (reasoning that section 404(e)(2) recognizes “the possibility that activities authorized by a general permit could result in a more-than-minimal impact, as well as the impossibility of making an *ex ante* guarantee that the authorized activities could *never* result in a more-than-minimal impact”).

<sup>190</sup> *Ohio Valley II*, 429 F.3d at 501.

<sup>191</sup> *Id.* at 500. The court found that because the CWA is silent on the issue of whether the Corps can make its pre-issuance minimal-impact determinations by relying in part on the fact that its post-issuance procedures will ensure that the authorized projects will have only minimal impacts, it must defer to the Corps’s conclusion that it may do so. *Id.* at 501. However, the court suggests that section 404(e) does not permit the Corps to completely defer to minimum-impact determinations until after issuance of the permit. *Id.* at 502.

<sup>192</sup> *Id.* at 503.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* (finding that because the CWA does not speak to this issue, and that the Corps’s interpretation is reasonable, the Corps’s construction is entitled to *Chevron* deference).

<sup>195</sup> *Id.* at 504 (“[O]ne cannot infer such a requirement from the fact that individual permits can issue only after notice and opportunity for public hearing.”).

<sup>196</sup> *Ohio Valley II*, 429 F.3d at 504.

ties authorized by NWP 21 would have only minimal adverse effects on the environment.<sup>197</sup>

## VI. THE FUTURE OF NWP 21

Although recent coal-mining accidents have prompted national attention concerning the dangers to mine workers,<sup>198</sup> the movement to protect the environment from coal-mining dangers has encountered a considerable roadblock.<sup>199</sup> Frequent lawsuits have helped portray the significant damage that can result from mountaintop coal mining;<sup>200</sup> however, the Fourth Circuit's rulings in *Bragg v. W. Va. Coal Ass'n, Kentuckians for the Commonwealth, Inc. v. Rivenburgh (Rivenburgh III)*, and *Ohio Valley Environmental Coalition v. Bulen (Ohio Valley II)* have made the fight to protect the environment difficult by upholding the use of NWP 21.<sup>201</sup> The environmental movement may have stalled, but the numerous questions left unresolved by Congress and the courts indicate that the fight is far from over.<sup>202</sup> Although the use of NWP 21 will likely continue, a better balance can still be reached to ensure greater environmental protection.

### A. *The Corps's Permitting and Its Environmental Consequences*

By finding that NWP 21 does not violate the CWA, the court in *Ohio Valley II* followed the path laid out by numerous earlier court rulings, granting increasing environmental regulatory power to the Corps.<sup>203</sup> However, because the Corps has tried to deal with its expanding workload by increasing the use of general permits—and courts have by and large allowed this<sup>204</sup>—the Corps's growing power has not always been matched with increased environmental protection.

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<sup>197</sup> See *id.* at 503–04.

<sup>198</sup> See *Senators Have Strong Words*, *supra* note 1.

<sup>199</sup> See *Ohio Valley II*, 429 F.3d at 505; *Kentuckians for the Commonwealth, Inc. v. Rivenburgh (Rivenburgh III)*, 317 F.3d 425, 436 (4th Cir. 2003); *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 286 (4th Cir. 2001).

<sup>200</sup> See *Ohio Valley Evtl. Coal. v. Bulen (Ohio Valley I)*, 410 F. Supp. 2d 450, 453 (S.D. W. Va. 2004); *Kentuckians for the Commonwealth v. Rivenburgh (Rivenburgh II)*, 206 F. Supp. 2d 782, 788, 799 (S.D. W. Va. 2002).

<sup>201</sup> See *Ohio Valley II*, 429 F.3d at 505; *Rivenburgh III*, 317 F.3d at 436; *Bragg*, 248 F.3d at 286.

<sup>202</sup> See *Ohio Valley II*, 429 F.3d at 498–99 n.3, 502 n.6.

<sup>203</sup> See *id.* at 505; *Rivenburgh III*, 317 F.3d at 436; *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685, 685–86 (D.D.C. 1975).

<sup>204</sup> See *Ohio Valley II*, 429 F.3d at 505; *Rivenburgh III*, 317 F.3d at 436.

The U.S. District Court for the Southern District of West Virginia was correct in concluding that the Corps's decision to change its definition of "discharge of fill material"—so that it could regulate the disposal of spoil in valley fills with decreased likelihood of a court finding the permit to be illegal—was not in the interest of the environment.<sup>205</sup> However, in *Rivenburgh III*, the Fourth Circuit allowed for this change in definition anyway.<sup>206</sup> This ruling permitted the Corps's increased jurisdiction under its 404 permits, enabling the Corps to issue more general permits, specifically NWP 21.<sup>207</sup>

Although the Corps stated that NWPs are used to authorize minor activities that are generally uncontroversial,<sup>208</sup> it issued NWP 21 for the very controversial activity of discharging dredge or fill materials from mountaintop coal mining, which now includes discharge into valley fills.<sup>209</sup> Because they provide a higher level of environmental protection, specific permits are preferable over nationwide permits.<sup>210</sup> They require notice and opportunity for public hearings before each individual project, and are authorized only after a case-by-case evaluation of the specific project.<sup>211</sup> Nationwide permits, however, allow a project to move forward with minimal involvement by the Corps, and provide notice and opportunity for public hearing only before the Corps issues the general permit, not before each individual project is authorized under the permit.<sup>212</sup> Therefore, it is likely that activities that could cause environmental harm will be overlooked under NWPs.

### B. *Continuing the Fight Against NWP 21 After Ohio Valley II*

Considered a setback for environmental groups, *Ohio Valley II* simply reinstated what the Corps had been doing—issuing NWP 21 for mountaintop coal mining.<sup>213</sup> While seemingly anti-environment, the court in *Ohio Valley II* left many issues in the NWP 21 debate unresolved,

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<sup>205</sup> See *Kentuckians for the Commonwealth, Inc. v. Rivenburgh (Rivenburgh II)*, 206 F. Supp. 2d 782, 808 (S.D. W. Va. 2002); *Bragg v. Robertson*, 72 F. Supp. 2d 642, 656–57 (S.D. W. Va. 1999); Duffy, *supra* note 2, at 177.

<sup>206</sup> *Rivenburgh III*, 317 F.3d at 436.

<sup>207</sup> See *id.*

<sup>208</sup> Issuance of Nationwide Permits, 67 Fed. Reg. 2020, 2022 (Jan. 15, 2002).

<sup>209</sup> See *Rivenburgh III*, 317 F.3d at 436.

<sup>210</sup> See 33 U.S.C. § 1344 (2000).

<sup>211</sup> *Crutchfield v. County of Hanover*, 325 F.3d 211, 214 (4th Cir. 2003).

<sup>212</sup> See 33 U.S.C. § 1344(e).

<sup>213</sup> See *Ohio Valley Envtl. Coal. v. Bulen (Ohio Valley II)*, 429 F.3d 493, 504–05 (4th Cir. 2005).



enabling environmentalists to raise them another time.<sup>214</sup> Thus, although the Fourth Circuit's previous rulings indicate that it is likely to find NWP 21 to be legal,<sup>215</sup> the door is open to future litigation that could have beneficial environmental impacts.

Environmentalists can challenge NWP 21 by arguing that the minimum-impact determinations made by the Corps in enacting NWP 21 were arbitrary, capricious, or an abuse of discretion.<sup>216</sup> In *Ohio Valley II*, the court did not rule on the sufficiency of the minimum-impact determination.<sup>217</sup> It simply found that the Corps had made a minimum-impact determination, and left the arbitrary, capricious or an abuse of discretion argument for the plaintiffs to reassert on remand.<sup>218</sup> Concluding that no provision of the CWA specifies "how the Corps must make the minimal-impact determination, the degree of certainty that must undergird them, or the extent to which the Corps may rely on post-issuance procedures in making them," the Fourth Circuit has left these decisions to the discretion of the Corps.<sup>219</sup>

However, given the courts' tendency to side with the Corps and the priorities of the Bush administration,<sup>220</sup> plaintiffs will have a difficult time showing that the Corps's actions were arbitrary, capricious, or an abuse of discretion.<sup>221</sup> This is especially true because the court has recognized that it is nearly impossible to initially guarantee that an activity authorized under a NWP will result in no more than minimal environmental impacts.<sup>222</sup> Because the Corps must try to forecast the authorized activity's potential environmental consequences if undertaken anywhere in the country under any set of circumstances, such conclusions are bound to be faulty.<sup>223</sup> While conceding that minimum-impact determinations for NWPs cannot be more than reasoned predictions, the court in *Ohio Valley II* still upheld the legality of NWP 21.<sup>224</sup>

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<sup>214</sup> See *id.* at 498 n.3, 502 n.6.

<sup>215</sup> See *id.* at 497, 505; *Kentuckians for the Commonwealth, Inc. v. Rivenburgh (Rivenburgh III)*, 317 F.3d 425, 436 (4th Cir. 2003).

<sup>216</sup> See *Ohio Valley II*, 429 F.3d at 502.

<sup>217</sup> See *id.* at 502 & n.6.

<sup>218</sup> *Id.* at 502 n.6.

<sup>219</sup> *Id.* at 500.

<sup>220</sup> See *id.* at 497, 505; *Rivenburgh III*, 317 F.3d at 436; *Bragg v. Robertson*, 248 F.3d 275, 286 (4th Cir. 2001); *Duffy*, *supra* note 2, at 143.

<sup>221</sup> See *Ohio Valley II*, 429 F.3d at 501.

<sup>222</sup> See *id.*

<sup>223</sup> See *id.*

<sup>224</sup> *Id.*

Aside from the courts, environmentalists could encourage EPA to help promote the protectionist goals of the CWA by revoking NWP 21.<sup>225</sup> While the Corps has primary control over the granting of permits, EPA has authority to repeal a permit issued by the Corps.<sup>226</sup> However, the goals of the current Administration— “[to] maximiz[e] domestic fuel production and eas[e] federal environmental restrictions on coal mining operations”—indicate that a push to strengthen the environmental safeguards built into the Corps’s general permitting authority is unlikely.<sup>227</sup>

A stronger argument for environmentalists to make concerns the timing of the minimal-impact determinations.<sup>228</sup> Because the court has held that NWPs are valid even though accurate minimal-impact determinations cannot be performed prior to their authorization,<sup>229</sup> environmentalists must push for a ruling that section 404(e) unambiguously requires minimum-impact determinations *before* issuance of a NWP, and especially before a project commences.<sup>230</sup> If a determination is made prior to the start of the activity—as long as it is based on solid research, even if faulty—it is better than no initial determination at all. Initial research could indicate potential environmental impacts not previously considered, allowing for more adequate mitigation, modification, or even cancellation of the activity.

Not requiring minimal-impact determinations to be made before issuance of a NWP weakens the CWA’s primary purpose of protecting the environment.<sup>231</sup> To ease the burden imposed on the Corps, Congress allowed it to issue general permits; however, Congress was aware that the use of general permits could reduce environmental protection.<sup>232</sup> Therefore, Congress authorized the Corps to issue general permits only after it has concluded that the activity will cause “only

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<sup>225</sup> See 33 U.S.C. §§ 1251, 1344 (2000).

<sup>226</sup> *Id.* § 1344(b)–(c).

<sup>227</sup> See Duffy, *supra* note 2, at 143.

<sup>228</sup> See *Ohio Valley II*, 429 F.3d at 501.

<sup>229</sup> See *id.*

<sup>230</sup> 33 U.S.C. § 1344(e)(1). Section 404 of the CWA states that general permits can only be issued if the Corps determines that the activities “will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.” *Id.*; see *Ohio Valley Env’tl. Coal. v. Bulen (Ohio Valley III)*, 437 F.3d 421, 423 (4th Cir. 2006) (King, J., dissenting) (stating that the Corps’s ability to create post-issuance evaluations does not relieve it of its responsibility under section 404(e) to perform minimal-impact determinations prior to issuance of a NWP).

<sup>231</sup> See *Ohio Valley III*, 437 F.3d at 422.

<sup>232</sup> *Id.*

minimal adverse environmental effects.”<sup>233</sup> Removing this procedural hurdle eviscerates the distinction drawn by Congress between individual and general permits issued under section 404 of the CWA.<sup>234</sup>

If the Corps is unable to make the required minimal-effects determination, it should be required to utilize the more burdensome procedures of section 404(a) and only issue individual permits.<sup>235</sup> Allowing the Corps to issue general permits without first making minimal-impact determinations makes section 404(e) significantly weaker than Congress intended.<sup>236</sup> The strong protectionist goal of the CWA will be undermined and the environment will suffer as a result.<sup>237</sup>

Even putting aside legislative intent, one would be compelled to conclude that the Corps is required to make minimal-impact determinations by following its own rationale for upholding the validity of NWP. <sup>238</sup> The Corps contends that the NWP program is valid without requiring an environmental impact statement (EIS) because NWPs are authorized only for activities that have no more than minimal adverse effects on the aquatic environment.<sup>239</sup> However, if activities are commenced before the potential effects are determined, the Corps’s reasoning fails.<sup>240</sup> The NWP will already have been authorized, even though it has not yet been concluded that the activities permitted will cause no more than minimal impacts.

By requiring minimal-impact determinations before a project commences, the chance of significant environmental harm occurring can be minimized, if not eliminated. However, if these determinations take place after a project begins, and the project causes more than minimal adverse effects, the damage must be mitigated.<sup>241</sup> Under a section 404 permit, a permittee is required to perform mitigation for the environmental damage that results from its activities,<sup>242</sup> but this mitigation is often not completed.<sup>243</sup> Even when it is completed, it is often

<sup>233</sup> See 33 U.S.C. § 1344(e).

<sup>234</sup> See *id.* § 1344; *Ohio Valley III*, 437 F.3d at 422, 423 (noting that “the primary distinction between an individual permit . . . and a general permit . . . is that a general permit requires a pre-issuance determination of minimal environmental effects.”).

<sup>235</sup> See *Ohio Valley III*, 437 F.3d at 423.

<sup>236</sup> See 33 U.S.C. § 1344; *Ohio Valley III*, 437 F.3d at 423.

<sup>237</sup> See *Ohio Valley III*, 437 F.3d at 423.

<sup>238</sup> See Issuance of Nationwide Permits, 67 Fed. Reg. 2020, 2025 (Jan. 15, 2002).

<sup>239</sup> See *id.*

<sup>240</sup> See *id.*

<sup>241</sup> See *id.* at 2092.

<sup>242</sup> See *id.*

<sup>243</sup> See NAT’L RES. COUNCIL, COMPENSATING FOR WETLAND LOSSES UNDER THE CLEAN WATER ACT 101 (2001) [hereinafter NRC REPORT].

either “poorly designed or carelessly implemented.”<sup>244</sup> Thus, the mitigation provisions in the permits cannot be relied upon for effective enforcement.<sup>245</sup> If harm is identified before it occurs, it can be prevented. Thus, it would not be necessary to fall back on the unreliable environmental safety measure of mitigation.<sup>246</sup>

### CONCLUSION

The strength of the CWA—with its goal of protecting of the waters of the United States—has been threatened by the Corps’s increased use of general permitting in mountaintop coal mining. Recent lawsuits have illustrated the significant damage that can result from mountaintop coal mining, but the Fourth Circuit has made it difficult to protect the environment by upholding the use of NWP 21. *Ohio Valley II*, although consistent with previous rulings granting increasing environmental regulatory power to the Corps, did not put an end to this environmental debate. By focusing on the questions left unresolved by Congress and the court, environmentalists still have an opportunity to help guarantee that the goal of the CWA is achieved.

To ensure greater environmental protection, two aspects of the Corps’s general permitting process should be challenged. First, the adequacy of the minimum-impact determinations the Corps was required to perform when it enacted NWP 21 should be contested. The courts have held that authorization of a NWP is not precluded by the impossibility of an initial guarantee that an activity authorized under a NWP will result in no more than minimal environmental effects; however, a more detailed initial investigation should still be mandated.

Second, the wording of section 404, the legislative intent, and the Corps’s own reasoning all indicate that section 404(e) requires that minimum-impact determinations be made *before* issuance of a NWP. Any other ruling would eviscerate the distinction drawn by Congress between individual and general permits, and significantly weaken the protectionist goals of the CWA. If the Corps cannot adequately perform the required minimal-effects determination, it should be required to employ the more cumbersome procedures of section 404(a) and issue individual permits only.

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<sup>244</sup> See William S. Pufko, *The Revised Definition of “Discharge of Dredged Material”: Its Legality, Practicality, and Impact on Wetlands Protection*, 9 ENVTL. LAW. 187, 245 (2003).

<sup>245</sup> See *id.*

<sup>246</sup> See *id.*; NRC REPORT, *supra* note 243, at 101.

Recent coal mining accidents have attracted national attention to the issue of mining safety, resulting in the review of coal mining safety regulations, as well as a push by both the states and federal government toward stricter enforcement of the current regulations. Given this focus on coal mining, it is possible—although unlikely with the current Administration—that the regulations pertaining to mountaintop coal mining will be considered anew. It is a good time, however, for environmentalists to push their cause and make the general public more aware of mountaintop coal mining's adverse environmental effects.