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Chapter 8

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Valley Fills and the Clean Water Act: The Strange Confluence of the Clean Water Act and SMCRA in *Bragg v. Robertson*

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Synopsis

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§ 8.01. Introduction.

On March 3, 1999, the U. S. District Court of the Southern District of West Virginia preliminarily enjoined the Army Corps of Engineers (Corps) and the West Virginia Division of Environmental Protection from issuing permits to authorize a large-scale surface coal mining operation in Logan County, West Virginia. Although styled by the plaintiffs a "pattern and practice" lawsuit to enforce the "non-discretionary" duties of the West Virginia permanent program approved under the Surface Mining Control and Reclamation Act (SMCRA), the suit in fact has employed a sophisticated but skewed interpretation of multiple provisions of the Clean Water Act (CWA) applied to SMCRA in an effort to preclude the construction of valley fills for the disposal of excess spoil during surface mining. The potential it holds for precluding virtually all forms of coal mining, surface and underground, in Central Appalachia has largely been overlooked because the nature of the CWA theories is so little understood.

§ 8.02. Background to the Lawsuit.

[1] — The Media.

On April 16, 1998, the West Virginia Division of Environmental Protection (DEP) received a certified letter notifying the agency that it would be sued. The authors of the letter alleged that the director of the agency had failed to enforce "non-discretionary" duties as required by both the federal Surface Mining Control and Reclamation Act of 1971[3]

3 P.L. 95-87, 30 U.S.C. §§ 1201 - 1328.