

**The Clean Water Act Two-Step:  
The Back-and-Forth Challenges  
to the Corps of Engineers' Permitting Authority  
Under the Clean Water Act**

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### § 6.01. Introduction.

For over a decade, opponents of surface mining have waged an ongoing battle to restrict the ability of federal and state agencies to issue permits for mining-related activities under the federal Clean Water Act, 33 U.S.C. § 1301 *et seq.* (CWA or the “Act”). Because many structures associated with surface mining, such as valley fills and sedimentation ponds, by necessity often occur within streams and wetlands, those structures require a permit for the discharge of “fill material” into “waters of the United States” pursuant to Section 404 of the CWA.<sup>1</sup> Those permits are issued by the U.S. Army Corps of Engineers (Corps), in consultation with the U.S. Environmental Protection Agency (EPA). Environmental organizations have filed a succession of lawsuits aimed at foreclosing or severely limiting the authority of the Corps to issue Section 404 permits for these mining activities. These lawsuits have been characterized by repeated successes for the plaintiffs in the lower courts, only to be reversed repeatedly on appeal, thus preserving the Corps’ traditional permitting practices — for now.

This chapter examines some of the major issues raised by these ongoing efforts to prevent Corps permitting of mining activities under Section 404. First, it examines the basic structure of the CWA, including the separate permitting programs established under Section 402 (administered by EPA) and Section 404 (administered by the Corps).<sup>2</sup> Next, this chapter reviews prior rulemaking and litigation concerning the scope of “fill material” under Section 404, including the Corps’ and EPA’s 2002 rulemaking adopting a joint definition of “fill material” and the Fourth Circuit’s subsequent decision in *Kentuckians for the Commonwealth v. Rivenburgh*.<sup>3</sup> The debate over what qualifies as “fill material” subject to the Corps’ permitting authority has been at the heart of many of the recent litigation battles.

Following this review of the statutory structure and prior litigation, this chapter examines two recent appellate court decisions that addressed the authority of the Corps to permit certain mining-related activities. One case, from the Fourth Circuit, concerned whether the Corps properly authorized

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<sup>1</sup> 33 U.S.C. § 1344.

<sup>2</sup> 33 U.S.C. §§ 1342, 1344.

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

several valley fills and their associated waste treatment systems in West Virginia. The other concerned a challenge to the Corps' issuance of a permit for the discharge of tailings from an Alaskan gold mine into a nearby lake. While these cases involved challenges to particular individual permits in particular locations, they demonstrate the determination of mining opponents to continue their wide-scale attack on the Corps' mining-related permitting activities. And while the Corps' permits in both cases were ultimately upheld on appeal, they demonstrate the serious risks that this continuing offensive poses for the mining industry and the broader regulated community.

## **§ 6.02. Permitting Framework Under the Clean Water Act.**

Section 301 of the CWA prohibits the discharge of pollutants into waters of the United States without a permit issued under the Act.<sup>4</sup> The Act creates two separate permitting regimes: Section 404 permits are issued by the Corps for discharges of dredged or fill material,<sup>5</sup> and Section 402 permits are issued by EPA (or a state that has been delegated such authority by EPA) for discharges of all other pollutants.<sup>6</sup> Congress created two mutually exclusive permitting programs to address fundamentally different types of discharges, and the programs thus take different approaches to regulating the discharges to which they apply.<sup>7</sup>

### **[1] — Section 402 Permitting.**

Section 402 of the Act creates the National Pollutant Discharge Elimination System (NPDES), which focuses primarily on the effects that “end of pipe” discharges of wastewater have on water quality.<sup>8</sup> Accordingly, EPA evaluates whether a proposed discharge will adversely affect the

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<sup>4</sup> 33 U.S.C. § 1311(a).

<sup>5</sup> 33 U.S.C. § 1344.

<sup>6</sup> 33 U.S.C. § 1342.

<sup>7</sup> See *Friends of the Crystal River v. EPA*, 35 F.3d 1073, 1075 (6th Cir. 1994) (Sections 402 and 404 provide for two discrete permitting systems).

<sup>8</sup> See 33 U.S.C. § 1311(e); 33 U.S.C. § 1312.