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Chapter 10

Civil Litigation Under the Clean Water Act

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Synopsis

The modern Clean Water Act (CWA) was enacted in 1972 as the Federal Water Pollution Control Act.[1] The Clean Water Act requires a permit to discharge any "pollutant"[2] to "waters of the United States."[3] Congress created two distinct permitting programs: the Section 404 program for the discharge of "dredged or fill material"[4] which is administered by the United States Army Corps of Engineers (Corps), and the Section 402 National

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1 33 U.S.C. §§ 1251-1387 (2000).

2 The term "pollutant" includes, among other things, dredged spoil, solid waste, rock, sand, and industrial municipal and agricultural waste. 33 U.S.C. § 1362(6)(2000).

3 33 U.S.C. § 1311(a) prohibits the "discharge of any pollutant" except in compliance with several statutory sections, including §§ 1342 (authorizing NPDES permits) and 1344 (authorizing "fill" permits). The "discharge of a pollutant" includes "any addition of any pollutant to navigable waters from a point source." 33 U.S.C. § 1362 (12)(2000). "Navigable waters" is defined to include "waters of the United States." 33 U.S.C. § 1362(7)(2000). This term is currently not limited to waters which were historically navigable. *See* 40 C.F.R. § 122.2. & 33 C.F.R. § 328.3(a)(2000).

4 The CWA does not define "fill material," a fact which long caused confusion when USEPA and the Corps issued conflicting regulatory definitions. The Corps' long-standing regulatory definition of fill material excluded materials discharged for the primary purpose of waste disposal, thereby suggesting that "waste" fills fell to USEPA's NPDES program. USEPA, however, issued a regulatory definition of "fill material," discharges of which are excluded from the NPDES program, which included any discharge with the effect of filling a stream—a definition which seemingly included waste. Thus, each agency was willing to confer upon the other exclusive authority for permitting so-called "waste" fills. *See* Hagerty, T., "Surface Mining and the Clean Water Act: the 402/404 Conflict and the Regulation of Valley Fills," 23 *Energy & Min. L. Inst.* § 10.04 (2003). In 2002, however, the two agencies issued a joint definition of "fill material" to resolve the long-standing problem. 33 C.F.R. § 323.2(e); 67 FR 31129,31142 (2002). "Fill" material is now defined

Pollutant Discharge Elimination System (NPDES) permit program for the discharge from "point sources" of all non-fill related pollutants, which is administered primarily by the United States Environmental Protection Agency (USEPA).

In the mining industry, many operators will require both types of permits: Section 404 fill permits to construct excess spoil valley fills, refuse impoundments and the in-stream[5] sediment control ponds required to be located below the toe (downstream end) of valley fills and refuse impoundments, and Section 402 permits for the discharges of water from ponds and impoundments.[6]

§ 10.01. National Pollutant Discharge Elimination System (NPDES) Permits.

Discharge permits for non-fill pollutants, called NPDES permits, are issued either by the United States Environmental Protection Agency (USEPA), or a state agency approved by USEPA to administer the NPDES program.[7]

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to include any material which, when placed in water, has the effect of creating dry land or raising the stream bed elevation, regardless of the dischargers' purpose. *Id.* Accordingly, spoil and refuse discharged by mine operators to create excess spoil valley fills or refuse disposal facilities fall squarely within the § 404 program as "fill" material. *See* Kentuckians for the Commonwealth v. Rivenburgh, 317 F.3d 425, 448 (4th Cir. 2003).

5 *Rivenburgh*, 317 F.3d at 431 (excess spoil valley fills necessary); Bragg v. West Virginia Coal Ass'n, 248 F.3d 275, 286 (4th Cir. 2001)(rock removed to access coal seam swells 15-25 percent, necessitating placement of rock in valleys); West Virginia Coal Ass'n v. Reilly, 728 F. Supp. 1276, 1280-81 (S.D. W. Va. 1989), *aff'd* 932 F.2d 964 (4th Cir. 1991).

6 The Federal Surface Mining Control and Reclamation Act (SMCRA) requires all drainage from areas disturbed by mining to be routed to a sediment control pond or sump. 30 U.S.C. § 1265(b)(10)(B); 30 C.F.R. § 816.46(b)(2)(2005). The discharges from these structures are regarded as the "discharge of a pollutant" requiring an NPDES permit.

In the case of *Ohio Valley Envtl. Coalition v. Bulen*, 315 F. Supp. 2d 821 (S.D. W. Va. 2004) *reh'g denied* 437 F.3d 421 (4th Cir. 2006), citizens groups have claimed that discharges from the valley fills into any stream segment that leads to a treatment pond itself requires an NPDES permit. The United States has taken the position that any such stream segment is a "treatment system," which is statutorily exempt from the definition of "waters of the United States." 33 U.S.C. § 328.3(a); United States Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction and in Support of United States Motion for Judgment on the Pleadings, OVEC v. USACE, 2006 WL 2431664 (S.D. W. Va. 2006).

7 *See* 33 U.S.C. § 1324(a)(authorizing permits) and 1342(b)(authorizing USEPA to approve state programs).