Chapter 8

Section 404 Permits, Valley Fills and In-Stream Ponds: What’s Next?

Allyn G. Turner
Jason C. Pizatella
Spilman Thomas & Battle, PLLC
Charleston, West Virginia

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1 The authors acknowledge and thank Andrew B. McCallister and Victoria K. Holmes, Spilman, Thomas & Battle, PLLC, for their valuable assistance in preparing this chapter.
§ 8.01. **Introduction.**

West Virginia is home to some of the nation’s most valuable coal reserves and to some of the country’s most active anti-coal mining groups. The result has been seemingly continuous legal challenges to the environmental permits granted for coal mining operations. Challenges have been filed in state and federal courts, and have challenged the mining and water permits that are needed to authorize coal mining. A number of these challenges have focused on the Clean Water Act, including several active federal court cases in West Virginia and more recently in Kentucky.

The most recent of these lawsuits is *Ohio Valley Environmental Coalition v. Army Corps of Engineers* (hereinafter OVEC or the “Chambers” case). The lawsuit, filed by several anti-mining groups, challenged the issuance of five Section 404 permits authorizing the filling of “waters of the United

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2 33 U.S.C. 1251 *et seq.*

3 The United States District Court Judge in this case is the Honorable Robert C. Chambers and thus the case is commonly referred to as the Chambers case.
CHALLENGES TO ENVIRONMENTAL PERMITS § 8.02

States” by the United States Army Corps of Engineers (the Corps). The suit alleges violations of both the Clean Water Act (CWA) and the National Environmental Policy Act (NEPA). The district court’s rulings have raised significant questions and hurdles relating to mitigation for impacts associated with valley fills, and have thrown out historic interpretations of the “waste treatment exclusion” that authorizes in-stream treatment ponds. Appeals of these rulings to the United States Court of Appeals for the Fourth Circuit are currently pending. Other aspects of the case are still pending before the district court.

This chapter evaluates the most significant aspects of the district court’s March and June 2007 rulings in the Chambers case as viewed against the backdrop of the established climate of blocking or limiting coal mining operations through environmental permit challenges, and then explores what’s next for permitting coal mining operations in the wake of the OVEC rulings.

§ 8.02. Historic Context of the “Chambers” Litigation: Recent History of the Clean Water Act (CWA), Surface Mining Control and Reclamation Act (SMCRA) and National Environmental Policy Act (NEPA) Litigation Against Coal Operations.

Several key cases preceded the Chambers case, and helped to create the current atmosphere of environmental litigation and permitting uncertainty for coal mining activities. Those cases have raised numerous CWA, SMCRA, and NEPA challenges, and have all focused on allegations that state and federal laws prohibit filling of streams in conjunction with a coal mining operation. While these claims have in most respects been rejected by the Fourth Circuit Court of Appeals, this has not slowed the filing of new legal challenges against permit holders in West Virginia and clearly does not predict future action by the circuit court.

This section provide a summary of key cases, giving some context to the newest Chambers rulings and appeal.

This case, filed in July 1998, sought declaratory and injunctive relief against the Corps and the West Virginia Department of Environmental Protection (DEP).\(^4\) The complaint alleged that DEP violated the buffer zone rule under SMCRA when the director of DEP allegedly “abdicated his responsibilities to withhold approval of permit applications that will result in unlawful disturbances to 100-foot buffer zones around streams, destruction of riparian vegetation, violations of the requirement to restore mined and reclaimed areas to their approximate original contours, and improper post-mining land uses.”\(^5\)

The plaintiffs in *Bragg* asserted that the Corps routinely violated its duty under SMCRA, CWA and NEPA and caused substantial environmental harm to the mountaintop ecosystem.\(^6\) The complaint alleged that the Corps also failed to review permit applications and as a result granted permits to companies whose applications clearly violated the statutory schemes.\(^7\) Further, the plaintiffs argued that the Corps also routinely failed to conduct Environmental Impact Statements (EIS), as they argued were mandated by NEPA.\(^8\)

The *Bragg* case was assigned to the Honorable Judge Charles Haden, II, then-Chief Judge of the U.S. District Court for the Southern District of West Virginia in Charleston. One of the proposed permits alleged to have run afoul of the CWA was the Spruce Fork #1 mine operated by Hobet Mining Company. The plaintiffs argued that mining at the proposed Spruce Fork mine would bury a stream and a forested hollow, permanently destroying the indigenous wildlife and flora as well as the unique topography of a portion of southern West Virginia.\(^9\) Arguments about the Spruce Fork mine were

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\(^5\) *Id.* at 639.
\(^6\) *Id.*
\(^7\) *Id.*
\(^8\) *Id.* at 638.
\(^9\) *Id.*
first brought before the court in November 1998 when the plaintiffs sought a temporary restraining order (TRO) to force DEP to rescind the initial surface mining permit.\textsuperscript{10} The company agreed to give the plaintiffs at least one week’s notice before beginning any mining activity at Spruce Fork.\textsuperscript{11} Because the plaintiffs could not demonstrate irreparable harm in light of the company’s concession, the court denied the motion for a TRO.\textsuperscript{12}

On December 22, 1998, the parties reached a settlement that required the Corps to conduct an EIS to identify ways to limit the harm caused by mountaintop removal mining and valley fills.\textsuperscript{13} The Corps also agreed to stop issuing nationwide permits without individualized review of permit applications for projects with valley fills covering more than 250-acre watersheds, and also to conduct environmental studies.\textsuperscript{14}

The Settlement Agreement called for “an inter-agency coordination process . . . to ensure compliance with all applicable federal and state laws and guidance, improve the permit process, and minimize any adverse environmental effects associated with excess spoil created by mountaintop mining operations in West Virginia.”\textsuperscript{15} The goal of that process was “coordinated permit decisions that minimize adverse environmental effects.”\textsuperscript{16}

The Settlement Agreement specifically excepted, and allowed a plaintiffs’ challenge of the Spruce Fork mining permit process by filing an amended complaint.\textsuperscript{17} The plaintiffs subsequently amended their complaint and asked Judge Haden to issue an injunction blocking the Spruce Fork mine. In an

\begin{flushleft}
\textsuperscript{10} Id. \\
\textsuperscript{11} Id. \\
\textsuperscript{12} Id. \\
\textsuperscript{14} Id. at 658. \\
\textsuperscript{15} Id. at 659. \\
\textsuperscript{16} Id. \\
\textsuperscript{17} Id. 
\end{flushleft}
order dated March 3, 1999, Judge Haden granted the plaintiffs’ motion for a preliminary injunction against the defendants related to the application for permits for the Spruce Fork mine. At the time, the injunction was believed to be the first such injunction issued in the history of SMCRA. Nevertheless, shortly before the trial in the underlying case began, the Corps abandoned the proposed permit.

The Bragg plaintiffs settled most of their remaining claims against DEP in a consent decree requiring the agency to strengthen its permitting practices, but they could not settle their remaining claim concerning the stream buffer zone requirement.

While the motion to enter the consent decree was still pending, the plaintiffs and the defendants, conceding that agreement could not be reached on the remaining issues in the complaint, filed cross-motions for summary judgment. The district court resolved both counts in favor of the plaintiffs, and enjoined DEP from approving any further surface mining permits under current law in violation of the buffer zone rule.

In entering summary judgment in favor of the plaintiffs, the district court ruled that “the Director [of DEP] has a nondiscretionary duty to make the findings required under the buffer zone rule before authorizing any incursions, including valley fills, within one hundred feet of an intermittent or perennial stream;” and (2) that “the Director [of DEP] has a nondiscretionary duty under the buffer zone rule to deny variances for valley fills in intermittent and perennial streams because they necessarily adversely affect stream flow, stream gradient, fish migration, related environmental values, water quality and quantity, and violate state and federal water quality standards.”

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18 See March 1999 Opinion.
20 Id.
21 October 1999 Opinion at 664.
23 Id. at 663.
Based on these rulings, the court enjoined DEP “from approving any further surface mining permits under current law that would authorize placement of excess spoil in intermittent and perennial streams for the primary purpose of waste disposal.”\(^{24}\) The district court stayed its injunction, however, pending appeal to the Fourth Circuit Court of Appeals.\(^{25}\)

The Fourth Circuit reversed Judge Haden’s buffer zone injunction on April 24, 2001, holding that a federal judge did not have the authority to issue an injunction against state officials because doing so violated the Eleventh Amendment.\(^{26}\) Over the objection of the coal industry, however, the appeals court affirmed the consent decree entered by the district court that approved the preexisting settlements with the federal and state governments.\(^{27}\)

**[2] — Kentuckians for the Commonwealth v. Rivenburgh.**

The plaintiffs in the *Rivenburgh* case opposed mountaintop removal coal mining by challenging the Corps’ issuance of a Nationwide Permit (NWP) 21 for the filling of streams with “waste.” The citizens group Kentuckians for the Commonwealth initiated this case in August 2001 challenging the placement of mining overburden in streams under the CWA and its regulations. Following the Fourth Circuit’s holding in *Bragg*, only the federal officers of the Corps were named as defendants.

The complaint sought injunctive and declaratory relief regarding a mining permit issued under NWP 21 to Martin County Coal Corporation (MCCC). The NWP 21 authorization for the Martin County Coal project allegedly permitted the company to create twenty-seven valley fills and to “fill over six miles of streams in Martin County, Kentucky with waste rock and dirt from surface coal mining activities.”\(^{28}\)

\(^{24}\) *Id.*

\(^{25}\) *See* *Bragg* v. Robertson, 190 F.R.D. 194, 196 (S.D. W. Va. 1999).

\(^{26}\) *Bragg* v. West Virginia Coal Ass’n, 248 F.3d 275, 285 (4th Cir. 2001) (“Appellate Opinion”).

\(^{27}\) *Id.*

The plaintiffs alleged the Corps had no authority under the CWA to permit disposal of waste rock from surface coal mining in streams. They asserted that the valley fills were not “fill material” as contemplated by Section 404 of the CWA, but rather were “waste,” which was excluded from the Corps’ discretionary regulatory authority. The complaint further alleged that interpreting twenty-seven valley fills as “fill material” instead of “waste” violated the clear intent of the CWA to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters.”

Once again, Judge Charles Haden presided over this case, which had been filed in the Southern District of West Virginia. While he was drafting his opinion, the Bush Administration changed the CWA regulations on May 3, 2002 to allow mining overburden to be placed as fill in streams. The new rule clarified that valley fills were fill material as contemplated by the CWA. Nevertheless, Judge Haden enjoined the Corps from permitting waste disposal in streams and found that the new rules violated the CWA. The judge ruled that “the agency’s proposed rule was contrary to the spirit and letter of the CWA, inconsistent with the statutory scheme, and therefore ultra vires.”

On January 29, 2003, the Fourth Circuit again reversed Judge Haden, vacated the injunction and the judge’s orders from May 8 and June 17, 2002, and remanded the case. The Fourth Circuit found that the Corps’ practice of issuing Section 404 permits, including the permit for the Martin County Coal Corporation project to create valley fills with the spoil of mountaintop coal mining, was not ultra vires under the Clean Water Act and that the injunction issued by the district court was overbroad.

The Fourth Circuit upheld the Corps’ determination that the waste used in valley fills was not “waste” in the sense of garbage, sewage, and effluent contemplated by Congress when it enacted the CWA. Moreover, the court held that the Corps’ exercise of authority under NWP 21 to permit the creation

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29 May 2002 Opinion at 946-47.
30 Appellate Opinion at 430.
of valley fills in connection with mining operations was consistent with its past practices and with the understanding of the Corps and the EPA as to how the CWA divides responsibility for its administration. The court held that because the CWA did not specify a definition for “fill material,” the corps was entitled to deference in its interpretation under the original statute.

The Fourth Circuit also decided that Judge Haden’s ruling was beyond the scope of the issue before the court because “[n]one of the parties sought a declaration that the New Rule was illegal or inconsistent with the Clean Water Act.”

The Fourth Circuit’s decision in the *Rivenburgh* case was examined, and aspects of it followed, by the Ninth Circuit in *Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers*. The issue in that case was whether a Corps permit for discharge of process wastewater containing tailings from a gold mine in the navigable waters of the United States was issued in violation of the CWA. The Ninth Circuit considered the different definitions of “fill material” in the Corps’ and EPA regulations, and, in light of the *Rivenburgh* discussion of the same issue, held that the permit was issued improperly, and should have been evaluated in light of the applicable EPA performance standards in Sections 301 and 306, rather than Section 404 of the Clean Water Act.


In October 2003 the Ohio Valley Environmental Coalition (OVEC), Coal River Mountain Watch (CRMW), and the National Resources Defense Council (NRDC) filed a lawsuit against the Corps in federal court in the Southern District of West Virginia. Judge Joseph R. Goodwin presided over the case and, as in *Bragg* and *Kentuckians for the Commonwealth*, the focus of the case was the permitting process used to authorize valley fills. This

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31 Appellate Opinion at 438.
32 *Southeast Alaska Conservation Council v. U.S. Army Corps of Eng’rs*, 486 F.3d 638 (9th Cir. 2007).
lawsuit challenged the use of NWP 21 in the issuance of permits for valley fills under Section 404(e) of the Clean Water Act.

Section 404(e) states:

(c) General permits on State, regional, or nationwide basis

(1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving dredged or fill material if the Secretary 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...

The plaintiffs argued that NWP 21 permits should only be issued, as mandated by Section 404(e), when they are likely to cause only minimal environmental damage.\textsuperscript{33} The plaintiffs maintained that the Corps had haphazardly issued NWP 21 permits resulting in extreme environmental damage, including the burial of hundreds of miles of West Virginia streams.\textsuperscript{34}

The plaintiffs argued that the coal companies should adhere to the stricter requirements involved in obtaining individual permits and claimed that the authorization of fills for hundreds of miles of streams and the destruction of hundreds of acres of forests does not amount to the minimal environmental impacts required for permitting under NWP 21. The suit listed dozens of

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\textsuperscript{34} Id. at 456-57.
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valley fill authorizations which were either already approved at the time the plaintiffs filed suit, or expected to gain approval in the near future.\footnote{35} The list showed “nearly 64,000 acres of mining permits in a dozen West Virginia watersheds.”\footnote{36}

Judge Goodwin denied requests by coal industry groups and the Corps to dismiss the case. The complaint specifically noted a Nicholas County valley fill permit issued to Green Valley Coal Company (Green Valley), a subsidiary of Massey Energy (Massey).\footnote{37} Even though the Corps had agreed to have Green Valley seek an individual permit, on March 25, 2004 the Corps approved a NWP 21 permit for the filling of 431 feet of a local stream. On April 6, 2004, acting at the plaintiffs’ request, Judge Goodwin temporarily blocked a Massey permit for a preparation plant waste fill. While filling in a relatively small amount of stream (\emph{e.g.}, 431 feet), Goodwin observed that if the covered stream could not be repaired, the eventual destination for the disposal and home to a high quality trout stream was at risk.

The fill would actually have been the beginning of a larger fill for Green Valley. The smaller fill was proposed to be a temporary, eight-month fix for the company which stated that it needed the area to dispose of fill for the next eight months and to maintain employment for 150 workers. The initial proposal would have expanded the company’s original permit by 75 acres and would have begun a small area of stream fill. The permit would have eventually allowed the placement of mining overburden necessary for mining over an estimated 10-year period.

Green Valley had detailed plans to reroute the stream, and claimed that the water running under the valley fill might even be healthier for a trout stream because water flowing from the toe of the fill would maintain more consistently low temperatures. Arguments were raised, however, that if the headwater stream was filled, the subsequent loss of “macroinvertebrates” would be detrimental to downstream trout populations.

\footnotetext[35]{Id.}
\footnotetext[36]{Id.}
\footnotetext[37]{Bulen, 410 F. Supp. 2d at 456.}
In April 2004, Judge Goodwin placed a more permanent halt to Green Valley’s fill. Acting on a motion for a preliminary injunction or a temporary restraining order in the Green Valley smaller fill issue, the judge agreed with the plaintiffs that the Corps illegally segmented the initial permit request by breaking it into two smaller requests to avoid a more detailed environmental review. In his decision, Goodwin also ruled that the approval of the smaller fill was “an abuse of NWP 21” because all documentation in the case made it apparent that the company had not re-written any mitigation plans for the 431-linear-foot fill area.

Judge Goodwin further ruled in July 2004 that the Corps violated Section 404(e) of the Clean Water Act by issuing nationwide permits authorizing discharges of dredged or fill material into waters of the United States associated with surface coal mining and reclamation operations without determining that the discharge of material associated with surface coal mining would have minimal environmental effects. Judge Goodwin’s memorandum opinion and injunctive order concluded that NWP 21 conflicts with the unambiguous meaning of Section 404(e) for several reasons.

First, the judge concluded that NWP 21 defines a procedure instead of permitting a category of activities. Second, he concluded that Section 404(e) “unambiguously requires determination of minimal impact before, not after, the issuance of a nationwide permit,” and that, in violation of this requirement, “NWP 21 provides for a post hoc, case-by-case evaluation of environmental impact.” Third, Judge Goodwin wrote that Section 404(e) unambiguously requires that general permits authorize discharges to proceed without further involvement from the Corps, and NWP 21 violates this requirement because it authorizes projects to proceed only after receiving individualized approval from the Corps. Finally, the judge concluded that

38 Id. at 465.
39 Id. at 467.
40 Id. at 467-68.
41 Id. at 468.
NWP 21 violates the statutory requirement that the Corps provide notice and opportunity for public hearing before issuing a permit.\footnote{Id.}

Judge Goodwin’s ruling meant that the Corps could no longer approve mining valley fills through a streamlined permit process provided by the NWP 21. Coal companies would have to seek individual permits from the Corps for filling activities associated with mining. In addition to halting future permitting pursuant to NWP 21, the judge required the Corps to revoke seventeen NWP 21 permits it had previously granted where construction had not yet commenced. The court’s rulings were sweeping and programmatic. Judge Goodwin stated that anyone with an interest in coal mining in the Southern District of West Virginia was on notice that the general permitting process does not comply with the CWA.\footnote{Id. at 470.} The judge stated that the use of NWP 21 disregarded Congress’s intent to create two separate categories of permits, one which required individual project review and approval by the Corps and one which did not, and that NWP eliminated public involvement in decision-making at a stage where meaningful input in the minimal impact determination was possible.

The Fourth Circuit subsequently overturned the lower court’s decision and took issue with each of the reasons given by Judge Goodwin as the basis for his ruling.\footnote{Ohio Valley Envtl. Coalition v. Bulen, 429 F.3d 493 (4th Cir. 2005) “Fourth Circuit Opinion.”} The circuit court held that the general permitting process used by the Corps authorized categories of activities and that the Corps did, in fact, make the necessary “minimal-impact determinations” required by the CWA.\footnote{Id. at 498.} Moreover, the court ruled that the Corps could make pre-issuance [of permits] minimal impact determinations under the CWA by relying in part on its post-issuance procedures.\footnote{Id. at 498-99.}
Finally, the court stated that the Corps’ post-issuance, case-by-case, policing of activities authorized by general permits was reasonable under the CWA and that the Act did not require notice and hearing before the Corps authorized individual projects under a general permit. In reversing Judge Goodwin’s decision, the court of appeals deferred to the Corps’ interpretation of Section 404 and held the NWP 21 scheme to be a reasonable interpretation under the law.

In March 2006, OVEC asked Judge Goodwin to reopen the case and address a variety of arguments that the judge did not address in his earlier decision overturned by the Fourth Circuit. OVEC again asked Judge Goodwin to block the Corps from approving new mining operations through the NWP 21 streamlined permitting process. Among the issues not addressed in Goodwin’s original ruling include the following:

- The Corps did not consider the nationwide impacts of its streamlined permitting process;
- Corps officials did not examine the impacts of mountaintop removal on “the whole environment,” but only looked at water quality effects;
- The Corps arbitrarily failed to place a limit on the length or size of streams that could be buried by permits processed through a streamlined review;
- The Corps’ determination that its streamlined permits have minimal effects on the environment is “arbitrary and capricious”; and,
- The Corps’ decision that this process had “insignificant environmental effects” – and therefore did not need a more detailed study – was arbitrary and capricious.

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47 Id. at 503-04.
48 Id. at 497-98.
Lawyers for both sides briefed these issues in June 2006 but Judge Goodwin never ruled on the remaining issues. In the meantime, Magnum Coal Company subsidiary Apogee Coal Company (Apogee) applied for an individual permit for its North Run mine in Logan County. While the OVEC case over individual permits was pending in Judge Chambers’ Court, Apogee asked the Corps to approve its mine under the nationwide permit program. In March, 2007, the Corps approved the request. In April 2007, lawyers for several environmental groups went to court and asked Judge Goodwin to issue a temporary restraining order blocking the Apogee mine.

The environmental groups argued that the North Run operation would bury a longer section of streams than one of the Corps’ individual permits that Judge Chambers had already blocked. Judge Goodwin held a hearing on the TRO on April 25, 2007, but did not immediately rule on the request. He asked for more legal briefs and scheduled another hearing for May 31, 2007. Before the May 31 hearing could be held, however, Apogee filled the streams in question and in response the citizen groups asked Judge Goodwin to withdraw their request for a preliminary injunction.49

The United States District Court for the Middle District of Florida examined and followed important aspects of the Fourth Circuit’s Bulen decision when it held that the Corps had not violated the CWA and NEPA, among other things, in relying on post-permit conditions, including mitigation, to make its pre-permit determination that a regional general permit would have minimal adverse environmental effects.50


There remains one pending citizen suit case involving a challenge to NWP 21 in the case of Kentucky Riverkeeper, Inc. v. Rowlette.51

50 Sierra Club v. U.S. Army Corps of Eng’rs, 464 F. Supp. 2d 1171, 1211 (M.D. Fla. 2006), aff’d 508 F.3d 1332 (11th Cir. 2007).
51 No. 05-181 (E.D. Ky. July 22, 2008).
Riverkeeper also challenges the use of NWP 21 and is essentially a copy-cat lawsuit which mirrors the complaint filed in the Bulen case. It challenges 61 authorizations granted by the Louisville, Huntington, and Nashville Districts of the Army Corps of Engineers. The plaintiffs have filed a motion for summary judgment and all response and reply briefs are scheduled to be submitted by September 2008.\footnote{The style of this case has since changed to reflect a new superintendent for the Corps district at issue. The case is now Kentucky Riverkeeper, Inc. v. Midkiff.}

§ 8.03. The “Chambers” Litigation: Ohio Valley Environmental Coalition v. Army Corps of Engineers.


The Corps issued individual Section 404 CWA permits to five coal companies between July 2005 and August 2006 that were challenged in Ohio Valley Environmental Coalition v. Army Corps of Engineers. The plaintiffs – OVEC, Coal River Mountain Watch (CRMW) and the West Virginia Highlands Conservancy (collectively referred to as OVEC) – filed a suit under the CWA and NEPA seeking injunctive and other relief.

OVEC alleged that the Corps acted arbitrarily and capriciously in issuing the individual permits contrary to NEPA because the Corps (1) did not prepare Environmental Impact Statements, (2) improperly limited the scope of analysis, and (3) ignored relevant evidence regarding the cumulative effects of the permits on the environment. Moreover, OVEC argued that the Corps failed to comply with the CWA and its governing regulations by (4) improperly evaluating the structure and function of the streams impacted, (5) failing to characterize the affecting streams as riffle and pool complexes, (6) ignoring relevant evidence relating to storm runoff and flooding, and (7) relying on untested and questionable mitigation measures to offset the impacted streams.\footnote{Ohio Valley Envtl. Coalition v. U.S. Army Corps of Eng’rs, 479 F. Supp. 2d 607 (S.D. W. Va. 2007).}
These claims were raised as a challenge to five specific permits.\textsuperscript{54} Because the challenge to the fifth permit was filed after deadlines for adding parties and too late to be adequately addressed by the October trial date, the trial proceeded as to the first four challenged permits. The Corps argued for the case to proceed based only on the administrative record, but the court allowed plaintiffs to present expert testimony in support of their claims, and a six-day bench trial was held.

The Corps’ authorization of in-stream treatment ponds pursuant to a Section 404 permit was not addressed during trial but was briefed separately pursuant to summary judgment motions.\textsuperscript{55} The Corps permits addressed these required treatment ponds by authorizing the embankment for each pond, with the pond and any stream segment between the toe of the fill and the pond treated as secondary impacts. The Corps required mitigation for the secondary impacts and restoration of the streams affected by the ponds upon reclamation and pond removal.

Plaintiffs generally argued that in-stream ponds were not permissible under Section 404 of the CWA, but could only be authorized by a Section 402 discharge permit.\textsuperscript{56} The Corps and intervening defendants responded that in-stream ponds were specifically allowed under the waste treatment

\textsuperscript{54} The first complaint filed challenged the permit issued for the Camp Branch Surface Mine. Subsequent amendments to the complaints added prior to trial challenged to the Black Castle Contour Surface Mine, the Republic No. 2 Mine, the Laxare East Surface Mine, and the Republic No. 1 Surface Mine. An amended permit, second amended permit and third amended permit were filed prior to trial in October 2006. Subsequently, plaintiffs have continued to add permits to the case through amended complaints even though they have purportedly not filed the case as a programmatic challenge to individual Corps permits.

\textsuperscript{55} Each of the challenged permits authorized both valley fills for the necessary disposal of overburden and in-stream treatment ponds for each fill to treat discharges from each fill during fill construction and reclamation phases.

exclusion set forth in federal regulations and have historically been authorized based on this exemption.  


After trial in a March 2007 ruling, Judge Chambers ruled that the Corps had improperly granted the four permits which were the subject of the October 2006 bench trial. He rescinded the four permits, enjoined activities authorized by the permits, and remanded the permits to the Corps for further proceedings consistent with the court’s ruling. Other courts have since followed his reasoning. Key aspects of that ruling are outlined below.

[a] — Not a “Blanket” or Programmatic Decision.

The court’s March 2007 opinion resulted from OVEC’s multiple CWA and NEPA arguments against the Corps’ issuance of four individual

57  Id.
58  Chambers March Ruling at 663.
59  The March 2007 decision was examined, and closely followed, by the decision of the United States District Court for the Southern District of Florida in Sierra Club v. Strock, 495 F. Supp. 2d 1188 (S.D. Fla. 2007). The decision addressed the propriety of the issuance of CWA Section 404(b) limestone mining permits for mining in water conservation areas. Using much of the same reasoning as Chambers, the court in Strock held that the permits issued by Corps and the U.S. Fish and Wildlife Service (FWS) to members of the limestone mining industry to conduct mining in water conservation areas should not have been issued and must be set aside, pursuant to NEPA, CWA, and the Endangered Species Act (ESA). The court found that the mitigation proposed by the permittees – keeping limestone products available for purchase from local producers and collecting funds from mining companies to be used to acquire wetlands for restoration – did not outweigh the risk of contamination, destruction of wetlands including foraging habitat for endangered wood stork, and potentially damaging impacts which had yet to be fully studied. The vacating of the permits was temporarily stayed until the completion of a Supplemental EIS.

Additionally, the District Court for the District of Columbia in Environmental Defense v. U.S. Army Corps of Engineers, 515 F. Supp. 2d 69, 83 (D.D.C. 2007), held that the Corps’ analysis of the environmental impact of a flood control project on the Mississippi River in Missouri was deficient. In deciding this case, the Environmental Defense court agreed with Judge Chambers’ conclusion that “[u]nless the effects of the activity are properly identified, the [Corps] has not met its legal obligation and any proposed mitigation measures dependent upon an incomplete environmental impact analysis necessarily fail.”

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Section 404 permits to coal companies. The March opinion is not a “blanket decision” that declares an entire class of critical activities illegal such as the rulings by Judge Haden in the *Bragg* case (on buffer zones and fill versus waste, which affected all sites with valley fills) or Judge Goodwin in the *Bulen* case (invalidating NWP 21). However, the pre-mining environmental assessments and proposed mitigation measures approved by the Corps, and found to be deficient by Judge Chambers, are the common assessment and mitigation methods used by many in the coal industry to comply with Section 404 regulatory requirements. Thus, the ruling has broad industry-wide implications despite being limited to the four permits for which evidence was presented at trial.

The limitation of the ruling to the four permits should assist subsequent permittees to present evidence in support of their pre-mining assessments and mitigation plans. The court, though, has continued to allow challenges to additional permits even after the trial. Accordingly, Section 404 permits issued by the Huntington District have been added to the underlying Chambers case. Plaintiffs have raised arguments to the court that new permits, such as those sought to be added to the case by their fifth and sixth amended complaints, are “the same” as the original four permits.60 Most of the coal mining 404 permits issued by the Corps since March 2007 have been challenged by the plaintiffs by adding them to the Chambers case.61

[b] — Stream Assessments and Mitigation Methods Unacceptable.

At the heart of the decision is the court’s finding that the pre-mining assessments of areas to be impacted that are currently required by the Corps

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60 Agreements were reached between the plaintiffs and the four original permittees to limit work to certain areas where fills had been started, and to provide notice to the plaintiffs of an intention to work in additional areas to allow the plaintiffs to pursue a temporary restraining order if desired. The companies with permits challenged in the fifth amended complaint, and the still-pending sixth amended complaint, have reached similar agreements.
61 The court has not yet ruled on the most recent motion to amend their complaint.
and conducted by mining companies are inadequate and therefore the Corps cannot reasonably conclude that the mitigation measures proposed by the applicants will replace the impacted aquatic resources.\footnote{62} The court devoted a substantial portion of its analysis to stream functions as set forth in the 404(b)(1) Guidelines, 40 C.F.R. \S 230.11, which require a review of the effects of an activity on the structure and function of the impacted stream ecosystems.\footnote{63}

The court discussed the elements of the 404(b)(1) guidelines, and described the plaintiffs’ expert testimony on stream structure and function.\footnote{64} It characterizes the elements set forth in 40 C.F.R. \S 230.11(e) as a minimum list of structure and function to consider.\footnote{65} The court then concluded that the Corps was “entitled to deference on how to measure the structure and function of a particular stream” and was entitled to use its best professional judgment in evaluating functions that may be lost as the result of a proposed activity.\footnote{66}

Without adopting the plaintiffs’ proposed approach to directly measuring certain stream functions, however, the court found that the Corps had failed to exercise its best professional judgment in assessing stream functions for the four challenged permits in an objective, scientific and reasoned way.\footnote{67}

[i] — The Remanded Permits Relied on Widely-Used Assessment and Mitigation Methods.

The four permits directly impacted by Judge Chambers’ decision proposed a combination of (1) on-site stream creation within the reclaimed mining area to replace directly impacted ephemeral and intermittent

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62  Chambers March Ruling at 624-25.
63  \textit{Id.}
64  \textit{Id.} at 638-39.
65  \textit{Id.}; see also \S 8.05 below for more detailed list of functional elements specifically mentioned by the court.
66  Chambers March Ruling at 635.
67  \textit{Id.}
}
streams and (2) off-site, downstream enhancement of larger, non-impacted perennial streams for the balance of the required mitigation. These mitigation techniques – enhancement, restoration, and to a lesser extent creation – are the most widely-practiced mitigation methods in the coal industry.

[ii] — Mitigation Other than On-Site, In-Kind Is Now Questionable.

The court’s March ruling found that the mitigation proposed for each of the four permits could not be determined to be sufficient because no pre-impact analysis of functions was conducted and because the mitigation did not replace the functions of the streams to be impacted. Based on Judge Chambers’ analysis of mitigation, it appears that forms of mitigation that are acceptable under the Corps’ program (in-lieu fee payment, stream creation, and off-site stream enhancement or restoration) may fall short of satisfying the court.

Because the court was critical of using off-site perennial stream enhancement to offset the loss of headwater, ephemeral and intermittent streams, the ruling also casts doubts on “watershed scale” mitigation plans that are favored by DEP and the recently adopted Joint Mitigation Rule. This part of the court’s ruling, if upheld, is one of the most important for future permitting. The ruling seems to require on-site creation but questions it at the same time as speculative or unproven. Further, future headwater stream impacts for non-coal projects – although probably not the target of lawsuits – should in theory be held to the same requirements and should have the same constraints for mitigation as set forth in Judge Chambers’ March ruling.

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68 Id. at 643.
69 See § 8.03.
[c] — Permits Cannot Be Issued If Significant Degradation Will Occur.

Under the CWA, the Corps must determine the short-term and long-term effects of the discharge on the “physical, chemical, and biological components of the aquatic environment” and points out that no permit shall be issued if . . . (2) the proposed discharge will cause or contribute to significant degradation to the waters of the United States; or (3) potential adverse impacts to the aquatic ecosystems are not minimized through appropriate and practicable steps.70


Under NEPA, agencies must take a “hard look at environmental consequences” before taking any action that may affect the environment.71 The Corps must prepare an EIS for actions that will “significantly affect the quality of the human environment.”72 Judge Chambers stopped short of requiring an EIS for these permits, but held that the Corps did not meet its obligations under the CWA and NEPA, and indicated that after a full review by the court, impacts of valley fills may well be significant and adverse. Although recognizing the Corps’ ability to forego an EIS through use of a mitigated FONSI,73 the decision specifically states as follows:

For no matter how thorough, an [Environmental Assessment] can never serve as a substitute for the preparation of an EIS if the proposed action could significantly affect the environment. An EA simply determines whether there will be a significant impact on the environment whereas an EIS, in contrast, weighs any significant negative impacts of the action against the positive objectives of the project.74

70 Chambers March Ruling at 624.
71 Id. at 625.
72 Id.
73 A “FONSI” is a finding of no significant impact.
74 Anderson v. Evans, 371 F.3d 475, 494 (9th Cir. 2004).
Judge Chambers also criticized the Combined Decision Document (CDD) for each permit because he determined that they did not include sufficient analysis, leaving uncertainty regarding impacts to headwater streams, and regarding the ability of approved mitigation plans to compensate for the adverse impacts of filling activities.

[e] — Scope of Review for Valley Fills.

The court rejected the Corps’ position that its NEPA and CWA review and analysis only needed to cover aquatic impacts.\(^{75}\) On the contrary, the court ruled that while the CWA “only calls for a determination of potential effects to the aquatic ecosystem itself,” NEPA has a broader scope of review.\(^{76}\) NEPA requires a review of both direct and foreseeable indirect effects from a proposed action.\(^{77}\) In explaining the NEPA scope of review, the court disagrees that the Corps’ permitting of valley fills is a “small but necessary component of the overall project.”\(^{78}\) Instead, the court found that the Corps’ scope of analysis must include uplands:

Thus, while the “entire project” is not within the Corps’ scope of analysis, the streams and valleys to be buried by the fill are. The Corps must include in its scope of analysis consideration of the destruction of the upland valleys where these fills are to be located. The riparian areas next to the stream and the upland areas being buried are portions of the project located at the fill and must be evaluated.\(^{79}\)

[f] — Cumulative Impacts.

Finally, Judge Chambers found that the Corps inadequately evaluated the cumulative impacts of each mining project. The court criticized the Corps

\(^{75}\) Chambers March Ruling at 637-38.
\(^{76}\) Id. at 627.
\(^{77}\) Id.
\(^{78}\) Id. at 653.
\(^{79}\) Id. at 655.
for failing to properly define the scope of the cumulative impacts and not conducting a sufficiently thorough analysis of the cumulative impacts that it did examine. Judge Chambers held that although the entire mine site need not be included in the cumulative impacts analysis, the forested hollows where the proposed fills would be located must be analyzed to determine what impacts would occur and then included in the cumulative impacts analysis. The Corps was found to have violated its duties under CWA and NEPA by only evaluating the cumulative impacts to the streams being filled by the mining operation. Judge Chambers also found fault with the Corps’ analysis of the impacts to the watersheds that were included in the cumulative impact analysis. In the four permits at issue in this case, the Corps had recited facts and statistics about the impacted watersheds and then concluded that the proposed activity would not have an adverse cumulative impact on those watersheds. Judge Chambers stated, “[t]he Corps was obligated to determine the short-term and long-term effects of the discharge under the CWA and if the discharges were significant under NEPA.” The court held that the Corps failed to make these determinations and did not adequately support its conclusions that the challenged mine permits would not have significant cumulative impacts on their watersheds. Judge Chambers also rejected the Corps’ assumption that mitigation would eliminate the impact of the filling activities. The court expressed concern that the Corps’ approach could allow the filling of a large percentage of headwaters streams without the Corps considering the impact to be

80 Id. at 656.
81 Id.
82 Id. at 657.
83 Id. at 657.
84 Id. at 659.
85 Id. at 659-61.
86 Id. at 659.
significant. After asserting that the Corps had to follow the requirements of the CWA and NEPA, Judge Chambers concluded that the Corps was not relieved of its duty to consider the cumulative impacts of the proposed projects within the applicable watersheds merely because it was requiring compensatory mitigation.


[a] — Waste Treatment Exclusion.

In a second ruling on June 13, 2007, Judge Chambers ruled on the summary judgment motions that had been filed regarding the permitting of in-stream ponds before the bench trial. The court concluded that the CWA does not allow coal operators to build in-stream sediment ponds at the bottom of valley fills.

The plaintiffs had argued (1) that the stream segments between the toe of the valley fill and the sediment pond embankments were “waters of the United States,” (2) that the Corps did not have the authority to permit discharges from the valley fill to the stream segments, and (3) the discharge from the valley fill to these segments must be permitted under Section 402 of the CWA. The Corps, along with other intervenors, argued that the stream segments were covered by the “waste treatment system exclusion” and were not “waters of the United States.” The court ruled that the Corps has the authority to permit the placement of fill in the streams, but does not have the authority to permit discharges to waters above impoundments as secondary impacts of the authorized filling activity.

87 Id. at 661.
88 Id. at 659.
90 Id.
[b] — Broad Language of the Ruling.

The court’s language in this opinion is broader than that in the earlier order on the merits in that Judge Chambers explicitly stated that the court “FINDS the ‘waste treatment system’ exclusion inapplicable to the stream segments below valley fills and FINDS the Corps does not possess authority to permit the discharge of pollutants into these stream segments pursuant to the Clean Water Act.”91 Although this ruling only applies to the permits at issue in the case, the opinion can be read to have a more global impact. If applied programmatically, it could require permittees to obtain a NPDES permit for the discharges from the toe of the fill unless an exceptional circumstance exists that would allow for an out-of-stream pond, or unless some other acceptable approach is approved by the Corps.

[c] — Court Found that the Corps Made a Post-Hoc Rationalization.

Judge Chambers found that the Corps’ argument with regard to the “waste treatment system exclusion” was entitled to no deference because it did not appear the Corps was exercising its expertise in applying this exclusion to these permits. Three of the permits at issue did not mention the exclusion in their Combined Decision Documents (CDD) when they were first issued and the EPA did not offer guidance to the Corps regarding the use of the “waste treatment system exclusion” until March 2006, after some of the permits had been issued. The court further concluded that the EPA had previously applied this exclusion inconsistently and that EPA’s “change” was not adequately supported by reasoned analysis.


The Corps, permittees, and the coal industry appealed Judge Chambers’ decisions to the Fourth Circuit Court of Appeals. Oral arguments were scheduled for September 23, 2008. Oral arguments for the appeal were

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91 Chambers June Ruling at 13.
originally scheduled for May 2008, but were re-scheduled by order of the court of appeals. The timing of this appeal may result in permit holders currently operating under an agreement with the plaintiffs (e.g., limit their area of work) to give notice to the plaintiffs that they need to work in other areas to avoid shutting down or eliminating jobs. Such notice will likely lead to additional TRO hearings.

Finally, and as mentioned above, OVEC filed a motion in April 2008 seeking to file a sixth amended complaint. At the time of this writing, the motion is still pending. Contemporaneous with the Sixth Amended Complaint Motion, Plaintiffs sought TROs against three additional companies that had received individual Section 404 permits from the Huntington District. Each company reached an agreement with plaintiffs regarding work over the coming months. These agreements may or may not provide sufficient area for these companies to work until a decision is made by the Fourth Circuit.

The timing of a decision by the Fourth Circuit Court of Appeals is potentially quite important for the permit holders affected by the March and June decisions. For those with agreements in place with the plaintiffs, for example, a need to give notice prior to a circuit court decision could result in the need for further district court hearings on the very issues pending appeal.


The “Joint Regulations on Compensatory Mitigation For Losses of Aquatic Resources” (“new rule”) was recently promulgated jointly by the Department of the Army, Corps of Engineers (“DA”), at 33 C.F.R. § 332, and the Environmental Protection Agency, at 40 C.F.R. § 230.

The rule establishes performance standards and criteria for the use of permittee-responsible compensatory mitigation, mitigation banks, and in-lieu fee programs for compensatory mitigation projects for activities authorized by individual and general Department of the Army, Corps of Engineers permits authorized under Section 404 of the Clean Water Act, as well as Sections 9 and 10 of the Rivers and Harbors Act of 1899. The new rule became effective on June 9, 2008.

The new Corps and EPA rules express a goal to improve the planning, implementation and management of compensatory mitigation projects by emphasizing a watershed approach. The Corps rule establishes new preferences for mitigation types (contrary to the current preference for on-site, in-kind, off-site in-kind, on-site out-of-kind, etc., . . .). It includes a top preference for the use of mitigation bank credits. The expressed rationale for this shift in mitigation priorities is that a mitigation bank must have an approved mitigation plan and other assurances in place before any of its credits can be used to offset permitted impacts, which the agencies believe will reduce some of the risks and uncertainties associated with compensatory mitigation.

The rule purports to apply equivalent standards to permittee-responsible compensatory mitigation, mitigation banks and in-lieu fee mitigation to the “maximum extent practicable.”92 The rule applies to compensatory mitigation for all types of aquatic resources that can be impacted by activities authorized by DA permits, including wetlands, streams, and other open waters.

Under this final rule, mitigation plans for all wetland compensatory mitigation projects must contain the following twelve elements: (1) objectives; (2) site selection criteria; (3) site protection instruments (e.g., conservation easements); (4) baseline information (for impact and compensation sites); (5) credit determination methodology; (6) mitigation work plan; (7) maintenance plan; (8) ecological performance standards; (9) monitoring requirements; (10) long-term management plan; (11) adaptive management plan; and (12) financial assurances.93

The rule also requires that every mitigation plan, including stream mitigation plans, include objective and verifiable ecological performance standards to assess whether the compensatory mitigation project is achieving

92 33 C.F.R. § 332.
93 Id.
its objectives as well as the monitoring of mitigation projects for a minimum of five years, with longer monitoring periods required for aquatic resources with slow development rates.\footnote{\textit{Id.}}

Without exploring concerns about the new rule in detail, it is important to understand how the new rule relates to the Chambers decisions. First, the new rule adopts a significantly different approach to the historic hierarchy of mitigation types – expressing a preference for mitigation banks and a “watershed approach” – and is inconsistent with the conclusions of Judge Chambers which seem to demand in-kind mitigation (and likely on-site mitigation as well) for impacts to headwater streams. Second, it is important that the new rule expressly supersedes RGL 02-02, which has served as one of the fundamental sources of guidance for mitigation ratios and has been relied upon by the Corps in approving mitigation plans for mining (and other) projects in recent years.

Third, the new rule appears not to shed any additional light on the job of assessing baseline stream functions, identifying functional measures, or specifically understanding ecological performance standards. Fourth, the new rule’s preference for a “watershed approach” seems to allow the Corps to rely on non-governmental, non-sanctioned watershed plans. Accordingly, it appears that the Corps may seek mitigation based on a watershed plan totally unknown to the applicant.

As the new rule is implemented, applicants should expect to face these and other issues that may make the development and approval of mitigation plans for coal projects more difficult. In addition, the new rule, as with any new rule, may serve as a basis for a whole new series of legal challenges against Corps permits.

§ 8.05. What’s Next? Section 404 Permitting After “Chambers.”

Before the Chambers ruling, the process for obtaining a Section 404 permit to authorize necessary fills for a coal mining operation – at least in

\footnote{\textit{Id.}}
the Corps’ Huntington District—was time consuming, expensive, and often contentious. The Chambers rulings in March and June of 2007 brought permitting to a virtual standstill in the Huntington District.

With appeals to the Fourth Circuit pending, both applicants and the Corps have taken steps to address the district court’s rulings in any newly-issued permits. Judge Chambers’ rulings relating to pre-impact assessment of stream functions, mitigation for headwater stream impacts, and cumulative impacts seem to have the most immediate impact on permitting. These issues are being grappled with every day by the Corps’ permit reviewers who must continue with permit reviews despite having no resolution of the pending circuit court appeal.

The Corps has initiated the development of a functional assessment protocol for West Virginia, although it will take years to complete. In the interim, the Corps developed its “Functional Assessment Approach for High Gradient Streams” in June 2007. The approach uses a rapid assessment system and a set of eleven indicators designed to reflect functional categories. The approach has limitations and is intended to be a temporary assessment tool pending completion of a West Virginia functional assessment protocol.

The Corps is also continuing to address issues the district court found deficient in its combined decision document (CDD) for permits. Further, it has approved permits that propose new approaches to the construction of treatment ponds for valley fills. Pending its appeal, the Corps is proceeding with permitting, but is necessarily delayed while taking steps to comply with the court’s decisions.


First, Section 404 permit applicants should expect significant delays for any coal mining project. With over a year passing since the March and June

95 In addition to the many legal challenges in West Virginia, and within the Huntington District’s boundaries, most coal mining permits receive extensive comments from anti-mining or environmental groups.
2007 rulings, the Huntington District is still behind in reviewing and acting on coal-related permits. Long periods with no permits being issued, along with the implementation of new permitting processes, such as new combined decision documents, the interim assessment tool and other functional protocols, new mitigation approaches, and new ponds designs will continue to delay the permit review process.\textsuperscript{96} Other Corps districts may be delayed as well, and other similar lawsuits have been filed to challenge Section 404 permits for coal mining operations.\textsuperscript{97}

Second, permit applicants will have to work with consultants on revising applications to address these issues. No agency guidance is available at this juncture for conducting a functional assessment other than the interim protocol. Efforts to address this part of the court’s ruling will be difficult, and will likely be more time-consuming for a permit writer to review. In the absence of a final West Virginia (or other state) functional protocol, consultants and applicants are not likely to have a uniform approach to addressing stream functions.

Further, legal challenges mirroring the Chambers case are likely to be filed in other Corps districts, causing the same types of delays to occur there.\textsuperscript{98} To avoid operational delays, applicants outside of the Huntington District may find themselves trying to address these issues of pre-impact assessment, mitigation, cumulative impacts, and in-stream pond design and placement based on the Chambers case, despite the possibility that other district courts in the face of similar legal challenges may rule differently than Judge Chambers. While these issues are new, until some resolution is obtained on the pending appeals, the difficulties will persist.

\textsuperscript{96} This delay has been compounded by the Corps’ implementation of new guidance on jurisdictional determinations for all projects, and will be further delayed due to the Corps’ initial implementation of the new mitigation rule.

\textsuperscript{97} See, e.g., Kentucky Waterways Alliance, Inc. v. Army Corps of Eng’rs, No. 07-677 (W.D. Ky. 2007)(challenging Louisville District permitting decisions).

\textsuperscript{98} See, e.g., Kentucky Waterways Alliance, Inc.
Permit applicants that have pending applications or intend to file applications in the near future will be faced with determining how and whether direct functional measures can or should be obtained as part of a pre-impact assessment. The plaintiffs’ expert’s assertion that such measures are easy and can be completed in a matter of weeks or months will be undoubtedly tested. Upon selecting a course of action on functional measures, applicants likely will be subject to inconsistent approaches among permit reviewers due to a current lack of agency guidance. Further, with the delays in permitting, applicants may be required to change course or conduct additional work to address functions if various Corps and EPA-driven protocol or assessment methods are completed prior to final action on their permit application.

In addition to assessment methods, applicants will need to review proposed mitigation approaches. Judge Chambers expressed concern with down-stream enhancement projects to mitigate for headwater stream impacts. In addition, the court expressed concern over the duration of mitigation for permanent impacts such as fills, and particularly expressed concern that some of the proposed mitigation projects may not be maintained or monitored for more than ten years. With no appeal resolution, and with similar lawsuits possible (or already pending) in other jurisdictions, these types of mitigation questions will need to be addressed by applicants. The Corps will also likely focus anew on its cumulative impacts reviews, and applicants will need to be aware of any new approaches to evaluating cumulative impacts.

Pursuant to the court’s June 2007 ruling prohibiting in-stream treatment ponds, applicants within the Huntington District will need to present solutions to the Corps that will avoid in-stream ponds while still complying with SMCRA obligations. Until resolution of the pending appeals, applicants in other jurisdictions may choose to do the same. And, should the Fourth Circuit uphold Judge Chambers’ rulings, the prohibition of in-stream treatment ponds will be a significant challenge for virtually all steep slope mining operations.

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99 See Chambers March Ruling.
Further, for those with pending applications or with mining permits already approved, a re-design to avoid in-stream treatment ponds, if possible, will require changes in mining permits and possibly state certifications as well.

As part of the ongoing Chambers case, the Huntington District Corps has recently agreed to give immediate notice to the plaintiffs of any new coal mining Section 404 permit issued. While the plaintiffs have clearly received notice of the permits challenged, the promise of immediate notice was sought by the plaintiffs to allow for immediate requests for TROs prior to any filling activities by new permittees. This may present a new situation when the next TRO is requested. To date, the plaintiffs have reached agreements with each mine to allow for continued operation, at least on a limited basis, pending litigation. Now, unless the plaintiffs delay, no filling activities are likely to have taken place prior to a TRO request, and unless the court declines to issue a TRO, all Section 404 activities would be shut down entirely pending the outcome of litigation.

These new challenges for permit applicants will continue at least until the Fourth Circuit issues a decision, and perhaps will continue as a result of such a decision. As with many regulatory processes, though, it is possible that even if the court of appeals overturns some or all of the appealed rulings, the Corps’ new processes may remain in place. New combined decision documents, for instance, may never revert to the format of the CDDs for the four appealed permits. New functional assessment protocols are now in the works and will likely be completed regardless of the outcome of OVEC’s lawsuit and the defendants’ appeals.

The Corps’ interim assessment tool is currently being required and is likely to be required until the final assessment protocols are completed – again regardless of the outcome of a legal case. The Corps’ permitting process for coal mining activities has become increasingly stringent over the past several years, and as a general rule regulatory changes resulting in more stringent requirements are more common and more likely to remain in place than changes that result in less stringent requirements.
[2] — What Will Applicants Need to Address?

As discussed in § 8.05(1) above, applicants will need to address stream functions, mitigation, cumulative impacts, and pond placement and design immediately if they need a Section 404 permit from the Huntington District Corps (or possibly other Corps districts) in the near term. Other legal issues, such as “significant degradation” of fills under the Clean Water Act, scope of analysis, and the appropriateness of an Environmental Assessment are very important and also need attention in applications. They are more likely to be addressed using narrative information. The assessment, mitigation, and treatment pond issues, however, may require a wholesale shift in approach by the applicant, including new engineering design and field work.

More specifically, with regard to stream “functions,” the March 2007 decision by Judge Chambers addresses stream functions and values, stream assessments to measure functions, mitigation to replace lost aquatic resources, mitigation monitoring, and mitigation project duration (e.g., how long a stream enhancement project will last). The decision seems to address both impacts to the filled stream segment and the potential impact to the downstream reaches. The decision, unless overturned on appeal, will require the Corps to focus specifically on whether stream functions are assessed in advance of proposed impacts, and whether those stream functions are replaced through mitigation.

The lists below are “functions” that the court focuses on in its March 2007 decision. The Corps will likely be required to address – and applicants to assess through assessment – the following functions or elements, using direct or indirect measures, or where appropriate an analysis that concludes the function is not meaningful, not relevant, or not measurable in a given circumstance. Judge Chambers states that the Corps must consider the following elements:

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100 Citing 40 C.F.R. § 230.11(a) – (e), (g) – (h); see also Chambers March Ruling at 624.
• Short-term and long-term effects to the physical, chemical and biological components of the stream\textsuperscript{101}

• Physical substrate of disposal site (a)

• Water circulation, salinity, and fluctuation (b)

• Suspended particulate/turbidity in vicinity of disposal site (c)

• Introduction, relocation or addition of contaminants to aquatic environment (d)

• Structure and function of the aquatic ecosystem and organisms (e)

• Cumulative impacts of the discharge (g)
  - Secondary effects associated with the discharge but not directly resulting from it (such as surface runoff, fluctuating water levels, septic tank leaching)(h)
  - The 404(b)(1) guidelines, at 40 C.F.R. § 230.11(e), list the following functions in making a determination of the effects on aquatic ecosystems and organisms:\textsuperscript{102}

• Changes in substrate and elevation

• Nutrients

• Water chemistry or substrate chemistry

• Water circulation

• Water fluctuation

\textsuperscript{101} Citing 40 C.F.R. § 230.11.
\textsuperscript{102} See Chambers March Ruling at 624.
• Water currents
• Water salinity
• Changes that impact recolonization and existence of indigenous aquatic organisms / communities
• Loss of environmental values
• Discharge can affect populations of fish, food web organisms releasing contaminants
• Discharge may smother sedentary organisms or impact them through contaminants, exposure to suspended particulates, altered substrate, reduced food supply
• Discharge may reduce detrital feeding species or other representatives of lower trophic levels, impairing flow of energy from primary consumers to higher trophic levels
• Reduction/elimination of food chain organism populations decreases the overall productivity and nutrient export ability of ecosystem

Due to the complexity of this issue, the West Virginia Coal Association (WVCA), an intervening defendant in the case, actually developed its own guidance document with the help of local biologists to assist companies with the problem of addressing stream functions consistent with the court’s ruling, in the absence of guidance from the Corps. The WVCA guidance uses a Corps document that helps define river and stream functions, and is designed to help applicants address functions on the above lists that may

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103 Citing 40 C.F.R. § 230.31(b).
104 See “Stream Functions Assessment Guidance Applying the 404(b)(1) Guidelines, West Virginia Coal Association, Guidance for Members, September 2007.”
not be addressed using the Corps’ interim assessment tool alone. This document was not considered by the court during the October 2006 trial and is not mentioned in the court’s March 2007 decision.

§ 8.06. Conclusion.

The Corps’ permitting process for coal mining activities has become increasingly stringent over the past several years and this trend seems likely to continue. Indeed, the OVEC decisions of 2007, especially with respect to steep slope terrain, have rendered Section 404 permits even more difficult to obtain and added even more uncertainty in the application process. The Fourth Circuit will hear oral arguments on the OVEC decisions on September 23, 2008, and a decision may bring a degree of stability to a process that presently confronts applicants, as well as the Corps, with too many unknowns. Perhaps the one certainty that does remain in the process is that the regulatory path to coal mining permits continues to become more complex every day.

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