

Chapter 8**Section 404 Permits, Valley Fills
and In-Stream Ponds:
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§ 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,² 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).³ The lawsuit, filed by several anti-mining groups, challenged the issuance of five Section 404 permits authorizing the filling of “waters of the United

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.

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.