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SURFACE MINING AFTER THE *BRAGG* DECISION

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I. INTRODUCTION

West Virginia has a long history of coal production.[1] The state at one time led the nation in total coal production, while at the same time coal from West Virginia constituted one quarter of total U.S. coal production.[2] In more recent years, however, West Virginia's level of coal production has been reduced in comparison to that of other states due to the high relative cost of producing coal in the state.[3] Another blow to the producers of coal in West Virginia is the action known as *Bragg v. Robertson*.[4]

In 1998 various individual plaintiffs, as well as a conservation group known as the West Virginia Highlands Conservancy, filed a civil action under a provision of the Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, §522, 91 Stat. 445 (codified at 30 U.S.C. §§1201-1328) ("SMCRA" or the "Act") that allows declaratory and injunctive relief against state and federal officials for non-compliance with the Act.[5] The plaintiffs generally claimed that the Director of the West Virginia Department of Environmental Protection ("WVDEP") had exhibited a pattern of violating mandatory non-discretionary duties under SMCRA and the West Virginia state regulatory program.[6] These non-discretionary duties involved many areas of regulation, including water quality standards, disturbance of wetlands, hydrologic reclamation plans, Approximate Original Contour ("AOC") requirements and AOC variances, post-mining land uses, contemporaneous reclamation, and as explained later, the "buffer zone rule."[7]

In addition to these claims against WVDEP, the plaintiffs also alleged that certain individual members of the Army Corps of Engineers (the "Corps") had failed to carry out statutory duties under the Clean Water Act (the "CWA") and the National Environmental Policy Act ("NEPA").[8] Generally, the complaint stated that the Corps did not have statutory authority under the CWA to regulate valley fills created for the purpose of the disposal of waste material, i.e., the overburden associated with mountain top mining.[9] Alternatively, the plaintiffs claimed that even if the Corps could regulate valley fills, the Corps violated NEPA by issuing nationwide permits without required analysis. Finally, the plaintiffs asserted that the issuance of a nationwide permit for surface mining valley fills is unlawful.[10]

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[1] *See generally* MARY LEGG STEVENSON, COAL TOWNS OF WEST VIRGINIA : A PICTORIAL RECOLLECTION (1998); THE ENCYCLOPEDIA OF WEST VIRGINIA (1999).
[2] *See* T.L. Healy, *Analyst Says Mining Restrictions Could Have Devastating Effect on State's Budget*, STATE JOURNAL, Feb. 14, 2000, at 1, available in 2000 WL 10507796.
[3] *See id.*
[4] There are seven readily available district court opinions regarding this action. This paper, however, generally deals with the following four opinions: *Bragg v. Robertson*, 83 F. Supp. 2d 713 (S.D. W. Va. 2000)[hereinafter Consent Decree]; *Bragg v. Robertson*, 190 F.R.D. 194 (S.D. W. Va. 1999)[hereinafter Stay Order]; *Bragg v. Robertson*, 72 F. Supp. 2d 642 (S.D. W. Va. 1999)[hereinafter Summary Judgment]; *Bragg v. Robertson*, 54 F. Supp. 2d 653 (S.D. W. Va. 1999)[hereinafter Settlement Agreement].
[5] *See* Bragg v. Robertson, Civil Action No. 2:98-0636, 1998 U.S. Dist. LEXIS 22077, at *4, *6-9 (S.D. W. Va. 1998).
[6] *See* Bragg v. Robertson, 54 F. Supp. 2d 635, 638 (S.D. W. Va. 1999).
[7] *See* Consent Decree, 83 F. Supp. 2d at 718.
[8] *See* Bragg v. Robertson, Civil Action No. 2:98-0636, 1998 U.S. Dist. LEXIS 22077, at *4 (S.D. W. Va. 1998).
[9] *See id.*
[10] *See id.* The claims involved with notes 9 and 10 were eventually reduced by the Settlement Agreement to a complaint regarding a specific mine in general, Hobet Mining, Inc.'s Spruce Mine No. 1. *See* Settlement Agreement, 54 F. Supp. 2d at 671-73.

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These claims against WVDEP and the Corps were eventually determined by the U. S. District Court for the Southern District of West Virginia (also the "District Court" or the "Court") in three separate opinions which are the focus of this presentation: the Consent Decree, the Settlement Agreement, and the Court's Summary Judgment disposition of the buffer zone issue.[11]

The District Court's conclusions, especially those related to buffer zones, if not overturned on appeal, will further negatively impact West Virginia's ability to produce coal. Developments subsequent to the District Court's determination may have severe implications including changing allowable methods of mining. The decision may also impact litigation techniques of environmentally minded plaintiffs. It is essential, however, to first understand the impacts directly caused by the *Bragg* action before examining its indirect impacts.

II. THE CONSENT DECREE

The Consent Decree entered into between the plaintiffs and WVDEP resolved many of the claims against WVDEP with the exception of the claims involving buffer zones.[12] The Consent Decree discussed four general areas of dispute: (1) WVDEP enforcement of the buffer zone rule; (2) WVDEP treatment of AOC requirements and AOC variances, including post-mining land use and AOC bonding requirements; (3) hydrological reclamation; and (4) the creation of a five member quality control advisory committee to evaluate and improve quality control in mine permitting.[13] The Consent Decree also provided that WVDEP would enforce regulatory provisions involving variances from contemporaneous reclamation and sediment pond placement. Finally, the Consent Decree required both parties to develop a plan to meet AOC guidelines and to optimize soil placement for surface mining valley fills.[14]

The exact effect of the Consent Decree is difficult to determine due to its general language regarding many of the enumerated subjects (e.g., "The parties to this Decree shall work together to draft language, to be submitted to the Legislature as regulation...."[15]). There has, however, been activity on this front. A proposed amendment to the West Virginia regulatory program has been passed by West Virginia's legislature and signed by the state's Governor,[16]bstat_intro.html>. and has recently completed the necessary public comment period for regulatory amendments under SMCRA.[17] The final rule has not been announced yet, and therefore impacts on the coal industry are difficult to predict.

III. THE SETTLEMENT AGREEMENT

Prior to exploring the details of the Settlement Agreement, one must examine the prior permitting process. In addition to obtaining a permit from a SMCRA regulatory authority, the CWA also requires a permit for valley fills associated with mountaintop removal mining.[18] The CWA permitting process generally allows for three types of permits in mining: (1) the National Pollutant Discharge Elimination System ("NPDES") permit issued by the U. S. EPA; (2) a general section 404 permit, or nationwide permit ("NWP") issued by the Corps; and (3) where an operation does not qualify for a NWP, an individual 404 permit.[19] As stated earlier, the plaintiffs claimed that the Corps did not have authority to issue the proper permit for a valley fill, implying that a NPDES permit was required for valley fills.[20] The Plaintiffs also alleged that if the Corps did have authority to issue permits for valley fill activity under the CWA, it had violated the law by improperly issuing NWPs without proper analysis, and that NWPs could not lawfully be issued for valley fills in West Virginia.[21]

These claims against the Corps were dealt with by the Settlement Agreement.[22] The Settlement Agreement has two general provisions for dealing with the CWA permitting process; the interim provision and the long-term approach.[23] The long term approach involves the preparation of an Environmental Impact Statement ("EIS") by the U. S. EPA, the Corps, the Federal Office of Surface Mining Reclamation and Enforcement ("OSM"), the U.S. Fish and Wildlife Service ("FWS") and WVDEP on a proposal to develop agency policies and coordinated agency decision-making processes to minimize the adverse environmental effects of mountaintop mining operations, specifically the size and location of valley fills.[24] Under the Settlement

[11] *See supra* note 4 for citations of the referenced opinions and the rationale regarding the nontraditional nomenclature.
[12] *See* Consent Decree, 83 F. Supp. 2d at 718, 722.
[13] *See* Proposed Consent Decree, (visited Aug. 8, 2000) <http://www.fedcourtwvsd.com/decree.pdf>.
[14] *See id. at ¶*14; Consent Decree, 83 F. Supp. 2d at 718.
[15] *See* Proposed Consent Decree, *supra* note 13, at ¶17.

[16] *See The West Virginia Legislature's Bill Status on the Web* (visited Aug. 8, 2000) <http://129.71.161.247/Bill_Status/
[17] *See* 65 Fed. Reg. 24158 (April 25, 2000).
[18] *See* Settlement Agreement, 54 F. Supp. 2d at 653, 657-58 n. 6 (S.D. W. Va. 1998).
[19] *See id.*; Summary Judgment, 72 F. Supp. 2d at 655-56 (S.D. W. Va. 1999).
[20] *See* Bragg v. Robertson, Civil Action No. 2:98-0636, 1998 U.S. LEXIS 22077, at *4 (S.D. W. Va. 1998)
[21] *See id.*
[22] *See* Settlement Agreement, 54 F. Supp. 2d at 657 (S.D. W. Va. 1999); Settlement Agreement ¶2 (visited Aug. 8, 2000) <http://www.emlf.org/archive/charleston.htm>.
[23] *See* Settlement Agreement, 54 F. Supp. 2d at 657-58.
[24] *See id.* at 658.

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Agreement, prior to the completion of an EIS, applications for mountain top mining operations in West Virginia that would result in more than minimal adverse effects to the waters of the United States will require an individual 404 permit, rather than the more easily obtained NWP for fill material placed in the waters of the United States.[25] An application is deemed, under the Settlement Agreement, to result in more than minimal adverse effects if it proposes to discharge fill material in waters draining a watershed of two hundred fifty (250) acres or more.[26] In addition, a permit that encompass less than two hundred fifty (250) acres may also be found by the Corps to fail the minimal adverse effects test.[27]

In addition to the interim and long-term aspects, the Settlement Agreement also calls for an inter-agency coordination process involving the above named agencies.[28] The process was to be governed by a Memorandum of Understanding ("MOU") entered into by the agencies, until it was amended or rescinded.[29] The process set forth in the MOU was to result in the issuance or denial of a 404 permit by the Corps, appropriate buffer zone findings, and the issuance or denial of SMCRA permits by WVDEP.[30] The MOU was indeed entered into by the enumerated agencies in August of 1999.[31] A great portion of the MOU, however, was later found by the District Court to be inconsistent with the CWA and SMCRA, making it invalid as an interpretive rule.[32]

The District Court's action in regard to the MOU along with the Court's findings in the Summary Judgment decision, have serious repercussions for coal mining in the state of West Virginia as well as in other states east of the Mississippi. However, even if the MOU had not been deemed invalid, there would have been negative effects from the Settlement Agreement. This can be seen in the more onerous application process for an individual 404 permit, which could cause a two year delay in permit applications, along with the associated loss of jobs and revenue due to the performance of an EIS.[33] This two year loss of production could also have a chilling effect on investment, which would in turn negatively impact the West Virginia economy for three to five years.[34]

[25]*See id.*
[26]*See id.*
[27]*See id.* at 658-59.
[28]*See id.* at 659.
[29]*See id.*
[30]*See id.*
[31]*See* Summary Judgment, 72 F. Supp. 2d 642, 653 (S.D. W.Va. 1999).
[32]*See id.* at 655, 657, 660.
[33]*See* Settlement Agreement, 54 F. Supp. 2d at 666.
[34]*See* Headley, *supra* note 2, at 1.

IV. THE BUFFER ZONE PROVISION

The plaintiffs also claimed that WVDEP engaged in a practice of approving buffer zone variances without making required findings.[35] They also alleged that WVDEP could not permit valley fills that bury substantial portions of intermittent and perennial streams as the required findings could not be made as to the activity.[36] The District Court granted Summary Judgment to the plaintiffs on both counts, thereby voiding significant portions of the August 1999 MOU.[37]

The buffer zone requirements bar WVDEP from allowing land within one hundred feet of an intermittent or perennial stream[38] to be disturbed by surface mining operations.[39] Any variance from this rule requires WVDEP to make findings that the proposed disturbance will not: (1) adversely affect the normal flow of the stream; (2) adversely affect the gradient of the stream; (3) adversely affect fish migration; (4) adversely affect related environmental values; (5) materially damage water quality; (6) materially damage the quantity of the stream; or (7) cause or contribute to violations of State or Federal water quality standards.[40] In further interpreting the rule, the U.S. District Court found, through analysis of the definitions of the affected streams, that the rule applied to stream segments and was not limited to the effect of a proposed fill on the *entire* stream.[41]

In finding that WVDEP engaged in a practice of approving buffer zone variances without making required findings, the Court rejected three arguments made by the Defendants: (1) since other SMCRA provisions implicitly recognize valley fills in streams and as courts must interpret statutes as consistent as possible, the buffer zone rule must be read to only apply to the stream as a whole;[42] (2) Section 404 of the CWA permits fills and thus authorizes valley fills as provided in the August 1999 MOU[43]; and (3) where sufficient findings are made under 404(b)(1) of the CWA, these may be substituted for the variance findings under the buffer zone rule.[44]

[35]*See* Summary Judgment, 72 F.Supp. 2d at 647.
[36]*See id.*
[37]*See id. at 660, 661, 663.*
[38]Intermittent stream is a stream or a part thereof that (2) drains a watershed of at least one square mile; or (2) is below the local water table for at least some part of the year, and obtains its flow from both surface runoff and ground water discharge. A perennial stream is a stream or part thereof that flows continuously during all of the calendar year as a result of ground water discharge or surface runoff. *See* 30 C.F. R §701.5.
[39] *See* Summary Judgement, 72 F. Supp. 2d at 650.
[40]*See id.* (citing W.Va. Code St. R. 38 §2-5.2).
[41]*See id.* 651-652.
[42]*See id.* at 652.
[43]*See id.* at 653-54.
[44]*See id. at 654.*

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The first of the Defendant's arguments was based on a provision in SMCRA which stated that "natural drainways" in a permit should be kept free of overburden except where overburden placement had been approved.[45] This argument, of course, was dependent on whether the affected streams were "natural drainways," which were defined by state regulations as "any natural water course which may carry water to the tributaries and rivers of the watershed."[46] The U. S. District Court found that intermittent and perennial streams were not natural drainways, as they were the "tributaries and rivers of the watershed" to be fed by natural drainways, and thus could not be natural drainways themselves.[47] The U.S. District Court stated that this finding was justified by the difference in regulatory treatment of the two types of waterways, and seemed a logical progression.[48] The Court also rejected another regulation which applied "as long as the fill is not located in an area containing intermittent or perennial streams."[49] The Court distinguished the regulation's language of "...area containing intermittent or perennial streams" from a regulation that would permit fills "in intermittent or perennial streams" concluding that the former did not equal the latter.[50]

The second argument presented by WVDEP focused on a provision of SMCRA that provided that nothing within the Act "shall be construed as superseding, amending, modifying, or repealing the ...Clean Water Act."[51] WVDEP argued that the CWA allowed valley fills in intermittent and perennial streams, and pointed to the August 1999 MOU which codified as an interpretive rule the longstanding practice under §404 of the CWA allowing the Corps to permit valley fills when §404(b)(1) findings have been made.[52] This, coupled with the SMCRA provision, meant that the buffer zone rule could not be interpreted to disallow valley fills in the affected streams.

While the District Court accepted the MOU as an interpretive rule, it also pointed out that an administrative interpretation may only be treated as controlling if it is not inconsistent with the underlying regulation or statute.[53] The Court then examined the MOU under the inconsistency standard and found it wanting.[54] Specifically, the Court restated that §404, the section from which the Corps draws its authority to issue permits, governs only the issuance of permits for "discharges of dredged or fill material."[55] The Court then discussed the definitions of dredged and fill material and found that the spoil used in valley fills did not fit either category within the authority of the Corps.[56]

This determination turned on the Corps' definition of fill material, which includes "material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a water body [and] does not include any pollutant discharged into the water primarily to dispose of waste."[57] The Court concluded that valley fills, while having the incidental effect of replacing an aquatic area with dry land, have their primary purpose in the disposal of industrial waste and cannot be subject to the Corps' §404 authority.[58] Rather, the Court found that such discharges should be permitted by the EPA under §402 of the CWA.[59] The Court concluded that the MOU, which stated that valley fills should be permitted under §404 by the Corps, was inconsistent with the underlying regulations of the CWA.[60] This freed the Court from any conflict which may have arose under the non-supersession clause of SMCRA, had the MOU been deemed valid.[61]

The final argument proposed by WVDEP to counter allegations of a pattern of approving buffer zone variances without making required findings was that the Corps findings necessary to the issuance of §404 permits were a sufficient substitute for findings under SMCRA.[62] The Court also rejected this argument pointing out that the standard of consideration under the §404(b)(1) finding is "significant degradation of the waters of the United States," while the standard for a buffer zone variance is "will not adversely affect...related environmental values."[63] According to the Court, the two standards differ in two ways. First, the degree of harm allowed is different being that the CWA section is modified by "significant", while no such modifier is associated with the SMCRA regulation.[64] Second, the regulation's scope of protection differs in that the CWA provision looks only to the degradation of the waters of the United States while the SMCRA section deals with adverse effects to environmental values.[65] The Court concluded these differences

[45] *See id.* at 652.
[46] *Id.* (quoting W. Va. Code St. R. 38 §2-77).
[47] *Id.*
[48] *See id.*
[49] *Id.* at 653.
[50] *Id.*
[51] *Id.* (quoting SMCRA's "savings clause," 30 U.S. C. §1292(a)(3)).
[52] *See id.* at 653-55.
[53] *See id.* at 655.
[54] *See id.* at 656-58.
[55] *Id.* at 655.
[56] *See id.* at 655-57.
[57] *Id. at 656* (quoting 33 C. F. R. §323.2(e)).
[58] *See id.* at 656-57.
[59] *See id.* at 658.
[60] *See id.* at 658.
[61] *See id.*
[62] *See id.* at 653-54.
[63] *Id.* at 659.
[64] See *id.* at 659.
[65] *See id.* at 659-60.

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that establish that the §404(b)(1) determination is inconsistent with the required findings for a buffer zone variance due to the former's more lenient, less protective standard.[66]

Due to the failure of each of the above three arguments, the only way WVDEP could have avoided the finding of a pattern of approving buffer zone variances without making the required findings would have been to present evidence of its prior findings in variant cases. WVDEP acknowledged, however, that none of the required findings were made on previous buffer zone variance applications because of its belief of the validity of the above arguments.[67] This led the Court to grant Summary Judgment holding that WVDEP has a nondiscretionary duty to make the required findings under the buffer zone rule before granting permits for valley fills .[68]

All that remained was a decision on whether valley fills, as a general activity, could ever satisfy the seven criteria for a buffer zone variance.[69] The U. S. District Court determined that requirements one through six could not be made as valley fills in the affected streams destroy the "filled" section of the stream. The Court stated that this results in an:

> "...extremely adverse effect. If there are fish, they cannot migrate. If there is any life form that cannot acclimate to life deep in a rubble pile, it is eliminated...Under a valley fill, the water quantity of the stream becomes zero. Because there is no stream, there is no water quality. The [WVDEP] lawfully cannot make required findings one through six for buffer zone variances for valley fills. [70]"

The Court continued declaring that the seventh finding (that the valley fill will not cause or contribute to violations of water quality standards) also could not be made.[71] This was based on the Court's observation that industrial waste, as it determined spoil used in valley fills to be, is hazardous to animal and aquatic life in the buried stream segment of a valley fill.[72] This ran afoul, in the Court's interpretation, to both federal and state water quality standards.[73] With none of the required buffer findings satisfied, the Court granted Summary Judgment and granted the plaintiffs' motion to permanently enjoin WVDEP "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."[74]

There was an immediate reaction to the ruling in West Virginia. The Governor of West Virginia placed a hiring and spending freeze on state government anticipating a severe reduction in tax revenue due to the curtailment of mining.[75] The mining industry served six hundred (600) miners with Worker Adjustment and Retraining Notices of impending layoffs.[76] In addition, U.S. Senator Robert Byrd from West Virginia, unsuccessfully attempted to pass a "rider" to the year-end omnibus appropriations bill which would have provided that §404 permits were applicable to valley fills and that state water quality standards were sometimes inapplicable.[77] WVDEP study results released shortly after the ruling provided support for these measures, stating that 288 of West Virginia's 393 active mining permits would be affected and that 59 of 62 permits could not be issued due to the ruling.[78]

These frenzied reactions by those outside the suit caused Judge Hayden to stay the injunction pending outcome of its appeal just twelve days after the initial ruling.[79] The stay was issued in, as the Court characterized it, "the interests of justice" due to the Court's conclusion that the normal standard for granting a stay was not met.[80] The remainder of the Court's opinion seemed directed at parties outside the courtroom, stating that "it [is] preferable to attempt to defuse invective and diminish irrational fears so that reasonable decisions can be made...."[81]

IV. SUBSEQUENT EVENTS AND THE FUTURE

Rescinding the MOU and The Federal Appellants' Brief

With the stay of the injunction in place, actions involving valley fills continued under the August 1999 MOU, at least until April 17, 2000.[82] On that day, the Acting Director of OSM informed WVDEP

[66] *See id.* at 660.
[67] *See id.* at 661.
[68] *See id.*
[69] *See id.*
[70] *Id.* at 661-62.
[71] *See id.* at 662.
[72] *See id. at 662-63.*
[73] *See id. at 663.*

[74] *Id.*
[75] *See Miners Return to Work After Judge Stays Controversial Ruling*, STATE JOURNAL, Nov. 8, 1999, at 1, available in 1999 WL 11729568.
[76] *See id.*
[77] *See* Clean Water Act and Wetlands Developments: A Congressional Perspective, SE55 ALI-ABA 145, 151 (Feb. 9, 2000).
[78] *See Miners*, *supra* note 67, at 1.
[79] *See* Stay Order, 190 F.R.D. 194 (S.D. W. Va. 1999).
[80] *Id.* at 196.
[81] *Id.*
[82] *See* T.L. Headley, *Officials Accuse Federal Agencies of Flip-Flop in Mountaintop Case*, STATE JOURNAL, April 24, 2000, at 1, available in 2000 WL 10507835.

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of OSM's abandonment of its regulatory position taken in the MOU.[83] This sudden change in policy left WVDEP questioning exactly how it would be able to properly determine when spoil may be placed in intermittent and perennial streams.[84] Initially, OSM had no reply to questions as to what actions would be allowed in valley fills.[85] An answer, though a vague one, was not long in coming.

In a letter dated May 22, 2000, OSM informed WVDEP that it intended to develop "an interpretation addressing permitting issues raised in the *Bragg* litigation with respect to the placement of excess spoil in intermittent and perennial streams."[86] The interpretation is intended to be consistent with the District Court's decision in at least two aspects. First, it will state that CWA §404(b)(1) findings may not be substituted for buffer zone variance findings.[87] The interpretation will also provide that buffer zone findings must be made for both the segments downstream from a fill and for each stream segment of an affected stream in which spoil is proposed to be placed.[88] This interpretation is to be provided to "all regulatory authorities with similar permitting issues," ensuring that the turmoil caused by the *Bragg* decision will extend far beyond the boundary of West Virginia.[89]

In the interim, OSM recommends that pending permit applications that would affect intermittent or perennial streams be processed in a manner consistent with the United States' brief on file with the Fourth Circuit Court of Appeals as of April 17, 2000.[90] As foreshadowed in OSM's initial comments regarding future interpretation, OSM agrees with the District Court's decision on many issues as reflected in its brief.[91] In fact, the only issues that the brief disputes are (1) the District Court's finding that the Corps does not have authority to regulate fills under CWA §404; and (2) the breadth of the injunction.[92]

The brief's argument regarding the Corps' authority to regulate valley fills under §404 stems from three general arguments. First, the Federal Appellants point out that SMCRA and the CWA operate independently, and therefore the scope of the Corps' authority under the CWA has no bearing on West Virginia's SMCRA authority.[93] OSM also argued that the Corps' authority to issue permits under §404 was established and accepted by the Court in its acceptance of the Settlement Agreement, which had not been appealed by any party.[94] Finally, the brief points out that the difficulties associated with the differences in the EPA and CWA definitions of "fill material", which was a large part of the Court's analysis of the Corps' authority issue, is presently being addressed through rulemaking.[95] For these reasons, the Federal Appellants argue that the portion of the District Court's opinion dealing with the Corps' authority should be treated as dictum.[96]

The Federal Appellants also disagree with the breadth of the District Court's injunction.[97] The brief points out that while the Plaintiffs only addressed activities that buried substantial portions of intermittent and perennial streams, the issued injunction prevents WVDEP from authorizing proposed placement of any excess spoil into intermittent or perennial streams for the purpose of waste disposal.[98] It is argued that this fails to realize, small amounts of spoil placed in an intermittent or perennial stream may not cause adverse environmental effects, the standard by which proposed variances are to be determined.[99]

The Federal Appellants' areas of agreement with the District Court's opinion also reveals a bit about the future of this issue and how OSM wishes pending applications to be processed. The most interesting of these is the brief's treatment of certain portions of the Summary Judgment. The brief seems to alter the District Court's analysis a bit in this regard, implying that burial of substantial portions of intermittent and perennial streams, rather than mere burial, causes adverse environmental effects.[100] From this it would seem that the question of what

[83] *See id.*
[84] *See* T.L. Headley, *State Officials Seek Clarification From Federal Agencies on Mining Rules*, STATE JOURNAL, May 1, 2000, at 1, available in 2000 WL 10507847.
[85] *See id.*
[86] Letter from Katherine Henry, Acting Director, Office of Surface Mining, to Michael Castle, Director, West Virginia Division of Environmental Protection (May 22, 2000)(on file with author).
[87] *See id.*
[88] *See id.*
[89] *Id.*
[90] *See id.,* WVDEP, Industry Intervenors and the United States appealed the October 20, 1999 Summary Judgment to the United States Court of Appeals for the Fourth Circuit. Briefing is scheduled to be completed in the Fall of 2000. Oral arguments are scheduled for December 7, 2000.
[91] Brief for the Federal Appellants, (visited Aug. 8, 2000)<http://www.emlf.org/archive/bragg_brief.PDF>.
[92] *See id.* at 26-33, 51-52 (Page cites regarding this document will reflect pagination as given by the brief's table of contents, as page numbers are not reflected in the body of the brief as accessed).
[93] *See id.* at 27-29.
[94] *See id.* at 30-32.
[95] *See id.* at 32-33; 65 Fed. Reg. 21292 (April 20, 2000).
[96] *See* Brief for the Federal Appellants, at 33.
[97] *See id.*
[98] *See id.* at 51-52.
[99] *See id.*
[100] *See id*. at 49-51.

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constitutes substantial portions will be key not only in the future interpretation, but also in affected states' processing of permits "in accordance" with the position of the United States.[101]

Environmental Use of the Citizen's Suit Provision

Another effect of *Bragg* that will be felt throughout the nation is the power of citizen suit provisions. There are, at present, at least two citizen suit provision cases involving the coal industry.[102] One involves, among other things, Kentucky's alleged failure to apply the buffer zone rule to all portions of a stream as enunciated in *Bragg*.[103] The second suit involves the Ohio Valley Environmental Coalition's ("OVEC") claims that WVDEP fails to complete the requisite hydrological studies prior to issuing permits for valley fills.[104]

These suits seem to have two related effects. First, the suits are often used as a form of harassment as plaintiffs often settle after filing but retain the right to sue in relation to specific matters. These plaintiffs then refile their claims later in what some have painted as an attempt to "litigate [coal producers] out of business."[105] Second, since these citizen suit provisions are actions against state and federal officials for failure to carry out duties, the coal industry's role in the litigation is reduced to that of an intervenor, a position from which industry cannot forcefully assert its interests.[106] The plaintiffs may then exploit their position by enacting a settlement with the governmental entity that addresses the common interests of the plaintiffs and the government while either ignoring or acting adversely to the coal industry's interests.

V. CONCLUSION

As stated above, the history of West Virginia coal production, and mountain top removal mining itself, has been seriously impacted by *Bragg v. Robertson*. The damage is not only reflected in the immediate effects of the decision, and the present confusion in the permitting process, but also in the events subsequent to the decision. These events reveal that further repercussions also lie in wait. Many challenges, some yet unseen, await the coal industry as a result of *Bragg v. Robertson*.

[101] Letter from Katherine Henry, Acting Director, Office of Surface Mining, to Michael Castle, Director, West Virginia Division of Environmental Protection (May 22, 2000)(on file with author).

[102] *See* T.L. Headley, *Environmental Groups File New Lawsuit Aimed at Limiting Mining*, State Journal, at 1, available in 2000 WL 10507721; *Kentucky Mining Authority Receives Notice of Intent to Sue Under SMCRA* (visited Aug. 8, 2000)<http://www.emlf.org/Coal_Project.PDF>.

[103] *See Kentucky Mining Authority*, *supra* note 94, at 4.

[104] *See* Environmental Groups, *supra* note 94, at 1.

[105] *Id.*

[106] *See e.g.*, Consent Decree, 83 F. Supp. 2d 713 (S.D. W. Va. 2000); Settlement Agreement, 54 F. Supp. 2d 653 (S.D. W. Va. 1999); Bragg v. Robertson, 183 F.R.D. 494 (S.D.W. Va. 1998).

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