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Regulatory Violations in the Mining Industry: Mountaintop Removal Mine Valley Fills Violate the Federal Clean Water Act

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REGULATORY VIOLATIONS IN THE MINING INDUSTRY: MOUNTAINTOP REMOVAL MINE VALLEY FILLS VIOLATE THE FEDERAL CLEAN WATER ACT

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I. INTRODUCTION

Valley fills are causing a substantial impact upon miles of streams, rivers, and other waterways throughout the United States. West Virginia has been most severely impacted by valley fills because of the widespread practice of valley fills within its borders. Mountaintop removal mining operations create valley fills through a process of disposing of excess spoil into the valley nearest the mine.¹ The coal mining industry favors this practice because it is an easy and relatively inexpensive way to dispose of the earth covering valuable coal seams.²

In West Virginia, valley fills have recently become a controversial topic³ and have even received national attention.⁴ The controversy lies in whether the

¹ “Mountaintop removal” mining is defined as an operation that “completely removes the upper fraction of a mountain, ridge, or hill to extract the entire coal seam running through the mountain.” See Surface Mining Control and Reclamation Act (“SMCRA”), 30 U.S.C. § 1256(a) (1994).

² “Spoil” is a mining industry term referring to excess overburden, rock, and soil from mountaintop removal mining. WEST VIRGINIA DIVISION OF ENVIRONMENTAL PROTECTION, MITIGATION/COMPENSATION AND WEST VIRGINIA’S MINING INDUSTRY (1992).

³ “Valley fills” are defined as using the soil and rock removed from the top of the mountain “to fill the upper reaches of the valleys on the side of the mountain, creating a relatively level plateau in place of the original ridge-and-valley contour.” See id.

⁴ Otherwise, coal companies would have to dispose of the spoil by placing the spoil back atop the mountain in an effort to restore the mountain to its original contour. This process is known as reclamation. See generally SMCRA, 30 U.S.C. §§ 1201-1328 (1994).

³ The issue of valley fills has become a controversial topic in West Virginia because of the adverse impacts sustained by the environment. For example, the partial or total destruction of a stream located in the valley being filled is the ultimate result of a valley fill. The stream which is destroyed may be simply a wet weather stream or it may be a perennial stream. As a result, the alarming factor continues to be the frequency of the practice and the steadily increasing number of stream miles destroyed in West Virginia. Cindy Rank, Mining Association Is Right on the Mark!, THE HIGHLANDS VOICE, September 1996, at 4.

⁴ A recent article in a periodical exposed the nation to a heart-wrenching discussion and horrifying pictorials of the environmental destruction caused by valley fills. See Penny Loeb, Shear Madness, U.S. NEWS & WORLD REPORT, Aug. 11, 1997, at 28; see also Michael Janofsky, Fears That a Coal Machine Could Rip Up Lives, N.Y. TIMES, May 7, 1998, at A1. Furthermore, the article also detailed the impact upon people living near valley fills. See generally id. In addition, two recent flood deaths in southern West Virginia, which were arguably attributable to a nearby valley fill, were discussed in the article as well. See Loeb, supra, at 34.

Between 15% and 25% of the mountaintops in southern West Virginia are being removed during mountaintop removal mining. See id. at 28. As a result the valleys between the mountaintop removal mined areas are being filled with the excess spoil. Id. Around 512 square miles have been permitted by the state to be surface mined. Id.
practice of spoil disposal through valley fills is a violation of the Federal Water Pollution Control Act ("CWA"). Proponents of the mining industry and the use of valley fills argue that this practice does not violate the CWA because federal permits are obtained for spoil disposal in the stream. On the other hand, opponents to the practice of valley fill spoil disposal argue, inter alia, that such practice is a violation of the CWA because the vast environmental impacts are prohibited by the CWA. Unfortunately, however, as of the date this Note was completed, the controversy remains unresolved because the issue has not yet been challenged in court.

This Note serves four purposes. First, it will discuss the federal law governing the disposal of fill material into the waters of the United States. Under federal law, the placement of fill material into a stream is regulated by the CWA. In addition, regulations promulgated pursuant to the CWA also govern placing fill material into the waters of the United States. Consequently, both of these federal sources of law provide the specific prohibitions and exceptions applicable to placing fill material into water sources.

Second, this Note will discuss the applicable West Virginia law that accompanies the federal provisions pertaining to fill material and discharges of such into streams. West Virginia has extensive statutory and regulatory provisions that deal directly with discharging fill material into the waters of West Virginia.

The valley fills resulting from this type of surface mining leave the area vulnerable to severe flooding. See id. at 29. In fact, over 30 floods have occurred in the last two years in areas where valley fills have redesigned the watersheds, and several people have died from these floods. Id. Unfortunately, large mining operations may be surrounded by a dozen or more valley fills. Id. at 34. In fact, some of these fills are around 1000 feet wide, 500 feet deep, and over one mile long. Id.

In constructing valley fills, coal companies simply dump the excess spoil over the side of the mountain into the valley below. Id.

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The most relevant federal regulations, developed under the CWA, are the guidelines promulgated under § 404(b)(1). Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 40 C.F.R. § 230-230.80 (1996).

The most relevant regulatory provision is the West Virginia Anti-Degradation Policy, which establishes a prohibition against degrading the state’s water quality and provides circumstances in which exceptions are made. W. VA. CODE STATE R. tit. 46, § 1-4 (1996).
Furthermore, West Virginia has developed a policy for mitigating the impacts of valley fills that are permitted.9

Third, this Note carefully analyzes the practice of valley fills under the applicable federal and state law. Such analysis will reveal that the disposal of fill material into the streams of West Virginia is a clear violation of CWA § 401(a)(1) and § 404(b)(1). Finally, this Note urges the citizens of West Virginia to play an active role in compelling compliance with the CWA. By compelling compliance, the citizens of West Virginia can preserve the rustic beauty of West Virginia and protect a state industry that is arguably more vital to the economy than the mining industry.

II. THE FEDERAL CLEAN WATER ACT

The CWA is the primary federal legislation applicable to valley fills. In essence, the CWA states that before a stream is altered, a permit is required from the United States Army Corps of Engineers ("Corps").10 Section 404 authorizes the Secretary of the Army11 to issue permits for the discharge of dredged or fill material into the waters at specified disposal sites.12 Furthermore, § 401 of the CWA requires that the appropriate state agency must grant water-quality certification for

9 WEST VIRGINIA DIVISION OF ENVIRONMENTAL PROTECTION, COMPENSATION/Demonstration Guidelines (1992). This mitigation policy establishes guidelines to determine how the valley fill impacts can be avoided, or minimized, and the manner of compensating for the loss of a water resource. Id.


11 "Secretary" is defined as the Secretary of the Army, acting through the Chief of Engineers. Id. § 1344(d) [hereinafter Secretary].

12 Id. § 1344(a).
the proposed fill.\textsuperscript{13} Therefore, a Corps 404 permit and state water-quality certification must be obtained before any valley fill project can begin.

A. Section 404 of the Clean Water Act

A valley fill requires a 404 permit issued by the Corps.\textsuperscript{14} The fill must meet certain guidelines in order to obtain the proper permit.\textsuperscript{15} The purpose of the Guidelines is to implement the fundamental goal of the CWA: "to restore and maintain the chemical, physical, and biological integrity" of the nation's waters.\textsuperscript{16} An applicant may choose between two categories of 404 permits: either an individual 404 permit or a general 404 permit.\textsuperscript{17} Nevertheless, the applicant must be issued a 404 permit for any valley fill regardless of the type the applicant chooses to request.\textsuperscript{18}

Congress authorized the Administrator ("Administrator") of the Environmental Protection Agency ("EPA"), in conjunction with the Secretary, to develop guidelines for the specification of in-stream filling sites.\textsuperscript{19} The Guidelines establish criteria for evaluating proposed dredge and fill projects.\textsuperscript{20} In essence, the Guidelines provide a basic presumption against the discharge of dredge and fill

\textsuperscript{13} \textit{Id.} § 1341(a)(1).
\textsuperscript{14} \textit{Id.} § 1344.
\textsuperscript{15} 40 C.F.R. §§ 230.1-80 (1996). These guidelines are known as the Section 404(b)(1) Guidelines [hereinafter Guidelines].
\textsuperscript{16} \textit{Id.} § 230.1.
\textsuperscript{17} \textit{See} 33 U.S.C. § 1344 (1994). Individual 404 permits are for those fill projects that are site specific and are only valid for the specified site permitted and the specified activity permitted. \textit{See id.} § 1344(a). General permits are for any category of activities that are similar in nature, will cause only minimal adverse effects on the environment when performed separately, and will only have minimal adverse cumulative effects on the environment. \textit{See id.} § 1344(d).
\textsuperscript{18} \textit{See id.} § 1344.
\textsuperscript{19} \textit{Id.} § 1344(b)(1).
\textsuperscript{20} 40 C.F.R. §§ 230.1-.80.
material into the aquatic ecosystem, unless such discharge will not have unacceptable adverse impacts affecting the ecosystems at issue.\textsuperscript{21}

Specifically, the Guidelines expressly state that discharge of dredged or fill materials shall not be permitted (1) "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem,"\textsuperscript{22} (2) if the proposed discharge will cause or contribute to violations of any state water-quality standard,\textsuperscript{23} (3) if the proposed discharge will cause "significant degradation of the waters of the United States,"\textsuperscript{24} (4) "unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem."\textsuperscript{25}

The requirements set forth by the Guidelines must be followed for an applicant to receive a 404 Corps permit for the proposed fill. However, the Administrator "is authorized to prohibit the specification ... of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification."\textsuperscript{26}

In addition to specific ("individual") permits for valley fills, Congress has authorized the Secretary to issue a general permit on a state, regional, or national

\textsuperscript{21} Id. § 230.1(c). The discharge may not cause "unacceptable adverse impact[s] either individually or in combination with known and/or probable impacts of other activities affecting the ecosystem of concern." Id. The Guidelines define "aquatic ecosystem" as follows: "waters of the United States, including wetlands, that serve as habitat for interrelated and interacting communities and populations of plants and animals." Id. § 230.3(c).

\textsuperscript{22} Id. § 230.10(a) (1996). These practicable alternatives should be pursued "so long as the alternative does not have other significant adverse environmental consequences." Id. The Guidelines define "practicable alternatives" as follows: "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." Id. § 230.10(b)(1).

\textsuperscript{23} Id. § 230.10(b)(1). The discharge will also not be allowed if it "[v]iolates any applicable toxic effluent standard" or jeopardizes the continued existence of any federal or state listed threatened or endangered species. Id. § 230.10(c).

\textsuperscript{24} Id. § 230.10(c).

\textsuperscript{25} Id. § 230.10(d).

\textsuperscript{26} 33 U.S.C. § 1344(c) (1994). The Administrator is authorized to prohibit, deny or restrict a defined area for specification whenever the Administrator determines, "after notice and opportunity for public hearings, that the discharge of such [fill] materials ... will have an unacceptable adverse effect." Id.
basis. A general permit can be issued for any category of activities involving discharges of dredged or fill material so long as 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." Any general permit issued must also be based on the Guidelines and must "set forth the requirements and standards which shall apply to any activity authorized by such general permit." As a safeguard, however, general permits issued by the Secretary are valid for no more than five years and can be revoked or modified by the Secretary.

The Secretary has exercised the authority to issue general permits by issuing many Nationwide Permits. In fact, the Corps recently re-authorized several Nationwide Permits and the final rule for administering those Nationwide Permits. The purpose of Nationwide Permits is to provide a simplified and more expeditious means of project authorization.

Nationwide Permit 21 for Surface Coal Mining Activities and Nationwide Permit 26 for Headwaters and Isolated Waters Discharges are the two most applicable and most commonly used Nationwide Permits for valley fills in West Virginia. However, these Nationwide Permits are not valid until the appropriate state agency certifies that the discharge does not violate the state's water-quality standards. Nationwide Permits are activity specific and are designed to relieve

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27 Id. § 1344(e)(1).
28 Id.
29 Id.
30 33 U.S.C. § 1344(e)(2). The Secretary can revoke or modify such permit if the Secretary determines that the activities authorized under that particular general permit "have an adverse impact on the environment or such activities are more appropriately authorized by individual permits." Id.
32 Id.
33 Id.
34 Id.
35 Id.
some of the administrative burdens associated with permit processing for both the applicant and the federal government.36

The West Virginia Division of Environmental Protection ("DEP") is the state agency which issues the water-quality standards certification.37 The DEP issues state 401 certification for both individual permits and Nationwide Permits.38 Therefore, a mining company must obtain both the Nationwide Permit issued by the Corps and obtain state 401 certification to receive a valid 404 Corps Nationwide Permit; the Corps's approval for a Nationwide Permit alone is not sufficient.

In summary, a mining company must comply with § 404 of the CWA if it desires to construct a valley fill.39 In so doing, the company must apply for and receive either an individual 404 permit or a Nationwide Permit issued by the Corps40 and state 401 water-quality certification from the DEP.41 Therefore, a coal company must obtain both a 404 permit and state 401 certification before it can construct a valley fill.42 As a result, state 401 water-quality certification from the DEP is a vital CWA requirement in the valley fill permitting process.

B. Section 401 of the Clean Water Act

Each proposed valley fill must receive 401 water-quality certification from the state in which the fill will be located.43 Certification may only be granted if the

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36 See id.
37 This certification is known as state 401 certification and is discussed infra III.B.
38 See W. VA. CODE STATE R. tit. 47, § 5A-1 to -10 (1985). In fact, the DEP has denied, without prejudice, water-quality certification on all Nationwide Permits. See generally WEST VIRGINIA DIVISION OF ENVIRONMENTAL PROTECTION, STANDARD CONDITIONS FOR STATE 401 CERTIFICATION APPLICABLE TO NATIONWIDE PERMITS (1997). As a result, individual water-quality certification is required on each proposed Nationwide Permit in West Virginia. Id. This particular DEP policy is not codified in the West Virginia Code of State Regulations. However, a copy of the policy is on file with the author and a copy can also be obtained from the DEP Office of Mining Reclamation.
40 Id.
41 Id. § 1341(a)(1).
42 See id. §§ 1341(a)(1), 1344(a), and 1344(e).
43 Id. § 1341(a)(1).
proposed valley fill will comply with all applicable CWA requirements. The state must also certify that the proposed valley fill meets the applicable state provisions as well. Therefore, a 404 valley fill permit shall not be granted if the certifying state agency does not certify that the valley fill will comply with all applicable CWA provisions and all applicable state provisions. Furthermore, any permit that has been issued for a valley fill, which is subsequently determined to be in violation of any of the applicable provisions, can be revoked.

Any applicant for a Corps individual or general 404 permit must obtain water-quality certification from the appropriate state agency. The state in which the discharge originates must certify that such discharge will comply with the applicable provisions of the CWA. In addition, the state must establish procedures for public notice in the case of all applications for certification and, to the extent the state deems necessary, procedures for public hearings for specific applications. However, certification must come from the Administrator if the state agency does not have authority to give such a permit. Such is not the case in West Virginia because the DEP is the authorized 401 state certification agency. If the DEP does not act upon a request for certification within a reasonable time, the certification requirements are thereby waived with respect to that particular federal application. Consequently, no permit shall be granted until the required 401

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44 Id.
45 Id.
46 Id.
47 Id. § 1341(a)(5).
48 Id. § 1341(a)(1).
50 Id. This provision is one reason why coal companies prefer Nationwide Permits over individual permits. Individual permits require public hearings while Nationwide Permits require only public notice, with public hearings being only discretionary on the part of the state. Id. This point is discussed more thoroughly infra Part III.B.1-3.
52 W. VA. CODE § 22-1-6(d)(6) (1994).
53 33 U.S.C. § 1341(a)(1). The reasonable period of time cannot exceed one year. Id.
certification has been obtained or waived. Additionally, no permit shall be granted if the state denies certification.

Furthermore, the DEP must immediately notify the Administrator when it receives an application and grants 401 certification. In the event that the Administrator determines that such discharge may affect the waters of another state, that state must be notified and given an opportunity to file an objection and request a public hearing. This mechanism provides bordering states with an avenue of action if its waters will be affected by a fill in another state. Such mechanism reassures a state that fills in the waters of another state cannot affect the bordering waters without its approval and fulfillment of the objecting state’s conditions. For example, the permitting state must condition the permit in a manner to ensure compliance with applicable water-quality standards of the objecting state. Consequently, the permitting agency shall not issue the permit if the imposition of conditions cannot ensure such compliance. Most importantly, any federal permit that has been granted proper 401 certification may be suspended or revoked. The federal agency issuing the permit may take such action when it has entered a judgment under the CWA that the activity has been operated in violation of the applicable provisions. In effect, a permit for a valley fill may be revoked or suspended if it is determined to be in violation of any of the applicable provisions.

Section 401 does not limit the authority of any department or agency, pursuant to any other provisions of law, to require compliance with any applicable

\[54\] Id.  
\[55\] Id.  
\[56\] Id. § 1341(a)(2).  
\[57\] Id.  
\[58\] Id.  
\[59\] Id.  
\[60\] Id. § 1341(a)(5).  
\[62\] Id.
water-quality requirements. In fact, the Administrator must provide the relevant information when another federal agency, a state agency, or an applicant requests information on applicable effluent limitations or other water-quality criteria. Also, the Administrator, upon request, must comment on any methods to comply with the requirements in question.

Permits for dredged or fill material are dependent upon 401 in more ways than one. First, 401 requires the appropriate federal or state agency to issue certification before such permits are granted. Second, 401 directly authorizes the Secretary to permit the use of spoil disposal areas. Finally, 401 requires the setting of effluent limitations, other limitations, and monitoring requirements. These requirements are necessary to assure that an applicant for a federal permit "will comply with any applicable effluent limitations and other limitations." As a result, the applicable limitations and requirements must become a condition of any federal permit subject to 401.

In summary, a mining operation must obtain state 401 certification before it may begin disposing of excess spoil by means of a valley fill. Through this process, the state determines whether the proposed valley fill will comply with the

63 Id. § 1341(b). For example, 401 does not limit the DEP's authority to require an applicant to satisfy the state Water Quality Standards or state Anti-Degradation Policy. Id.

64 Id.

65 Id.

66 Id. § 1341(a).

67 Id. § 1341(c). The Secretary is also authorized to charge the permittee for such use. Id. The funds received from such charges are merely deposited in the United States Treasury as miscellaneous receipts. Id. There is no direct requirement that such fees be used for mitigation of the permitted area or for the clean up of other environmental hazards. Id.

68 Id. § 1341(d) (1994).

69 Id. The applicable effluent limitations fall "under section 1311 or 1312 of this title [§ 301 or 302], standard of performance under section 1316 of this title [§ 306], or prohibition, effluent standard, or pretreatment standard under section 1317 of this title [§ 307], and with any other appropriate requirement of State law set forth in such certification . . . ." Id.

70 Id.

71 Id. § 1341(a)(1).
applicable federal and state laws and regulations. Therefore, state certification must be denied — and the excess spoil cannot be disposed of in the valley — if there will be a violation of any of the applicable CWA provisions or applicable West Virginia statutes and regulations.

III. APPLICABLE WEST VIRGINIA STATUTES AND REGULATIONS

Although the CWA is the primary piece of legislation applicable to valley fill situations, the issue of the environmental impact from valley fills is not governed solely by the CWA. West Virginia has enacted legislation and implemented agency regulations and policies to cover this controversial issue as well. Several of the applicable federal permitting programs have been designated to the state as permitted by the CWA. State legislation and regulations, however, must require no less than what is required under the CWA. In essence, the applicable state legislation and regulations determine the state water-quality standards, effluent limitations, the state Anti-Degradation Policy, and the agency which is authorized to implement and enforce such regulations.

Pursuant to the West Virginia Water Pollution Control Act, the DEP is authorized to provide a comprehensive program for the conservation, protection,

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72 Id. § 1341(a)(1)-(2).
73 Id.
76 Id.
77 See W. VA. CODE STATE R. tit. 46, § 1-1 to -9 (1996).
78 Id.
79 Id. at 1-4.
80 See W. VA. CODE § 22-1-6 (1994).
development, enjoyment, and use of the water resources of West Virginia.\textsuperscript{82} DEP must abide by the state Requirements Governing Water Quality Standards ("Requirements") and the Regulations for State Certification ("Regulations"), when exercising its authority in regard to valley fill issues.\textsuperscript{83} Therefore, the Requirements and the Regulations, in conjunction with CWA, provide DEP with the substantive law to determine whether to allow a prospective valley fill.

A. \textit{West Virginia Anti-Degradation Policy}

The West Virginia Anti-Degradation Policy ("ADP") is, perhaps, the most vital provision within the Requirements.\textsuperscript{84} The ADP specifically mandates that the quality of the waters within West Virginia must be maintained and protected at their existing quality levels.\textsuperscript{85} In general, the quality of West Virginia waters must not be degraded from their current natural state.\textsuperscript{86} However, degradation may be permitted in certain circumstances so long as federal or state water-quality criteria are not violated.\textsuperscript{87} Thus, although the ADP generally prohibits any form of water-quality degradation,\textsuperscript{88} there are situations of degradation that are deemed as permissive.\textsuperscript{89} Therefore, when a valley fill is deemed as permissive degradation, the fill must not violate any applicable state or federal water-quality criteria.\textsuperscript{90}

The legislature authorized the Environmental Water Quality Board to promulgate\textsuperscript{91} the Requirements.\textsuperscript{92} The purpose of the Requirements is "to establish

\textsuperscript{82} \textit{Id.}

\textsuperscript{83} \textit{Id.}

\textsuperscript{84} \textit{W. VA. CODE STATE R. tit. 46, § 1-4 (1996).}

\textsuperscript{85} \textit{Id.} § 1-4.1(a).

\textsuperscript{86} \textit{Id.}

\textsuperscript{87} \textit{Id.} § 1-4.1(b).

\textsuperscript{88} \textit{Id.} § 1-4.1(a).

\textsuperscript{89} \textit{Id.} § 1-4.1(b).

\textsuperscript{90} \textit{Id.}

\textsuperscript{91} \textit{W. VA. CODE § 22B-3-4 (1994 & Supp. 1997).}

\textsuperscript{92} \textit{W. VA. CODE STATE R. tit. 46, § 1-1 to -9 (1996).}
requirements governing the discharge or deposit of sewage, industrial wastes and other wastes into the waters of the State standing or flowing over the surface of the State. In addition, the Requirements declare it to be the public policy of the state to

maintain reasonable standards of purity and quality of the water of the State consistent with (1) public health and public enjoyment thereof; (2) the propagation and protection of animal, bird, fish, and other aquatic and plant life; and (3) the expansion of employment opportunities, maintenance and expansion of agriculture and the provision of a permanent foundation for healthy industrial development.

The Requirements as a whole are extremely vital to the conservation and protection of the waters of West Virginia. In the case of valley fills, though, the ADP is one of the most pertinent portions of the Requirements. Under the ADP, the “existing water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.” Furthermore, the ADP requires that the “existing high quality waters of [West Virginia] ... be maintained at their existing high quality ...” Degradation can be allowed, however, in certain situations “after satisfaction of the intergovernmental coordination of the State’s continuing planning process,” and the public has had opportunity for comment and a hearing.

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93 Id. § 1-1.
94 Id.
95 The Anti-Degradation Policy of the State of West Virginia is codified at W. VA. CODE STATE R. tit. 46, § 1-4 (1996).
96 “Existing water uses” is defined as “those uses actually attained in a water body on or after November 28, 1975, whether or not they are included in the water quality standards.” W. VA. CODE STATE R. tit. 46, § 1-2.6 (1996).
97 Id. § 1-4.1(a).
98 “High quality waters” is defined as those waters whose quality is equal to or better than the minimum levels necessary to achieve the national water-quality goal uses. Id. § 1-2.8.
99 Id. § 1-4.1(b).
100 Id.
In order for this exception to apply, it must be necessary to lower the water quality "to accommodate important economic or social development in the area in which the waters are located." However, if such degradation is permitted, it must not "result in interference with existing stream water uses" and must not violate state or federal water-quality criteria.

In summary, the ADP has a general requirement that existing water uses and water quality must be maintained and protected. However, degradation of both the existing water quality and uses is permissible when intergovernmental evaluation determines that the degradation "is necessary to accommodate important economic or social development . . . ." Nevertheless, any permitted degradation must not interfere with existing stream uses and must not violate any state or federal water-quality criteria. Therefore, although valley fills may be determined to be necessary for important economic or social development, the fills must not interfere with existing stream uses and must not violate applicable water-quality standards. State 401 certification is the process that determines whether proposed valley fills meet such requirements.

B. Procedures for State 401 Certification

The DEP, as the state 401 certifying agency, must follow specific procedures and requirements in granting or denying certification of federal permits. The purpose of the Regulations is to carry out the duties placed upon the DEP.

101 Id.

102 Id. The state and federal water-quality criteria referred to are those that describe "the base levels necessary to sustain the national water-quality goal uses of protection and propagation of fish, shellfish and wildlife, and recreating in and on the water." Id. In addition, the ADP mandates that "[i]n all cases, waters which constitute an outstanding [natural] resource shall be maintained and protected and improved where necessary. See id. § 1-4.1(d). "Outstanding natural resource waters" is defined as including, but not limited to, "all streams and rivers within the boundaries of Wilderness Areas designated by the Wilderness Act (16 U.S.C. § 1131 et seq.)," in the state of West Virginia. Id.


104 Id. § 1-4.1(b).

105 Id.

106 Id.

107 The requirements the DEP must follow are found in the Regulations. See W. VA. CODE STATE R. tit. 47, § 5A-1 to -10 (1985).
state by section 401 of the CWA. Furthermore, the Regulations require that the proposed valley fill will comply with the applicable federal and state laws. In general, the Regulations provide procedures and requirements concerning (1) the application for 401 certification; (2) the DEP's time frame of response to the application; (3) the public notice of application for 401 certification; (4) the procedures for requesting a public hearing on the matter; (5) the enforcement of certification provisions; and (6) any appeal of the certification decision made by the DEP. Therefore, the Regulations provide the framework which the DEP must follow for state 401 certification of valley fill permits.

The West Virginia legislature authorized the DEP to be the certifying agency for state 401 certification. In order to carry out these duties, the DEP must apply the Regulations. The procedures by which DEP grants, denies, or waives state 401 certification of federal permits are found within these regulations. Specifically, these regulations apply to the Corps 404 individual and general permits.

An applicant seeking a federal permit to discharge dredged or fill material into the waters of the United States must present the federal authority with a certification from the appropriate state agency. Furthermore, in issuing state 401 certification, the DEP must establish public notice procedures for all applications,


109 W. VA. CODE STATE R. tit. 47, § 5A-3.1(a) (1985). Under the Regulations, the procedures and requirements are generally the same for both individual 404 permits and general 404 permits. However, there are some minor discrepancies. See infra Part III.B.1-2. for a discussion of the discrepancies between individual 404 permit certification procedures and general 404 permit certification procedures.


111 The West Virginia legislature has the authority to authorize a state agency to issue state 401 permits if the state has been delegated that particular program. See 33 U.S.C. § 1341(e) (1994).


114 Id. § 5A-1.1. Nationwide Permits are one of the types of general permits. See 33 U.S.C. § 1344(e) (1994).

The DEP must follow certain procedures for certification of an individual 404 permit application. First, the DEP must receive a completed application. The DEP must base its decision regarding certification on compliance with the CWA and on compliance with any other applicable requirement of state law. Finally, the DEP must distribute copies of the proposed certification decision to the applicant and to all persons who commented or attended the public hearing. However, if an application for a federal permit is dismissed, denied, or otherwise rendered void, then the certification is no longer needed and any state certification proceeding, or action, is rendered moot and unnecessary. If such is the case, the applicant must renew its application for certification and the process begins anew.

The DEP has two options for satisfying the requirement of public notice. Public notice may be issued either jointly with the Corps or directly by the DEP. The Regulations also offer an appeal process regarding the DEP’s certification decision. Through the appeal of certification process, any person whose property is directly affected by the DEP’s “proposed certification or certification denial . . . may request a hearing within fifteen (15) days after notification of such

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124 Id. § 5A-5.1. Upon receipt of the application, DEP must act upon the request for certification within one year or the certification may be deemed as being waived. Id.


126 Id.

127 Id. § 5A-5.3.

128 Id. § 5A-5.4.

129 Id. In fact, the DEP again has one full year, under W. VA. STATE CODE R. tit. 47, § 5A-5.1 (1985), to respond to the resubmitted certification application. W. VA. CODE STATE R. tit. 47, § 5A-5.4.

130 Id. § 5A-6.1. Consequently, the notice must “describe the activity, advise the public of the scope of certification, their rights to comment on the proposed activity and to request a public hearing,” and must also “inform the public to whom they should send their request and comments.” Id.

131 See id. § 5A-8.

132 “Property” is referred to as any “property, interest in property, or other constitutionally protected interests, under West Virginia State Constitution Article 3, Section 10 . . . .” See id. § 5A-8.1(a).
and procedures for public hearings regarding specific applications, where appropriate.\textsuperscript{116}

The Regulations also require that the prospective discharging activity "comply with [the] specified sections of [applicable] federal law and with any other appropriate [state law requirements]."\textsuperscript{117} Strangely, however, the Regulations state that DEP "may consider the proposed activity’s impact on water resources, fish and wildlife, recreation, critical habitats, wetlands, and other natural resources under the director's jurisdiction."\textsuperscript{118}

The DEP has the discretion to grant, grant with conditions, or deny any application for state 401 certification.\textsuperscript{119} As a result, "[c]ertification and any conditions required by the certification" thereby become conditions on any federal permit.\textsuperscript{120} On the other hand, the federal permit cannot be granted if the DEP denies state 401 certification.\textsuperscript{121}


DEP processes applications for state 401 certification of individual 404 Corps permits by following the regulations pertaining to individual 404 permits. For example, the application itself to the DEP for certification of an individual 404 permit constitutes public notice issued by the Corps.\textsuperscript{122} As a result, the applicant does not have to submit a copy of the public notice if DEP has received a copy of such notice from the Corps.\textsuperscript{123}

\textsuperscript{116} Id. The DEP must provide a public hearing for specific permit applications where the DEP deems it appropriate. Id. (emphasis added).

\textsuperscript{117} Id. § 5A-3.1(a).

\textsuperscript{118} Id. (emphasis added).

\textsuperscript{119} W. VA. CODE STATE R. tit. 47, § 5A-3.1(b) (1985).

\textsuperscript{120} Id. at § 5A-3.2.

\textsuperscript{121} Id.

\textsuperscript{122} Id. § 5A-4.2. In effect, this public notice describes the activity, notifies the general public of the application for a 404 permit and state certification, and notifies the public of its right to comment and request a hearing. Id.

\textsuperscript{123} W. VA. CODE STATE R. tit. 47, § 5A-4.2 (1985). The DEP may request further information from the applicant or Corps if it needs further information for project assessment. Id.
proposed certification decision.” Ultimately, the decision of whether to hold an appeal hearing is for the Director of the DEP (“Director”).

The parties to the appeal hearing are the aggrieved person(s) and the DEP. In conducting the appeal hearing, the Regulations state that “the director or his designated appointee acting as a hearing examiner, shall follow the procedures contained in the West Virginia Code section one, article five, chapter twenty-nine-a [29A-5-1] et seq. entitled ‘Contested Cases.’” In addition, the parties can seek discovery and can make various motions because the West Virginia Rules of Civil Procedure generally apply. Finally, after the hearing has been concluded, the Director must decide the issues presented and must notify the parties of the decision.

2. Certification of General 404 Permits

The Corps, in carrying out the 404 dredge or fill permitting program, may issue general permits on a state, regional, or nationwide basis. “Activities


134 See id. § 5A-8.1(c). If the Director does grant an appeal hearing, the Director, or a hearing examiner appointed by the Director, must hold the hearing within 60 days. W. VA. CODE STATE R. tit. 47, § 5A-8.2(a) (1985). Usually, the appeal hearings are held in Charleston at a place specified by the Director. Id. However, it is within the Director’s discretion to hold the appeal hearing at another location or time. Id.

135 Id. § 5A-8.2(b). The aggrieved person shall be known as the appellant. Id. The DEP will be known as the appellee to the proceeding. Id.

136 Id. § 5A-8.2(d).

137 See id. § 5A-8.2(e).

covered by such general permits do not require individual application to the [Corps] for a 404 permit."140 Logically, general permits also require state 401 certification.141 Accordingly, the DEP may certify general permits by applying the same scope and effect of certification regulations that apply to individual 404 permits.142

The Corps requests state 401 certification of a general permit whenever it proposes to issue or reissue that particular general permit.143 Certification of Corps general 404 permits also requires public notice.144 Public notice of the certification request and public notice of the Director's decision may be given in two ways: either issued jointly with the Corps or issued solely by the DEP.145

An applicant can proceed with conducting the authorized filling activity once it has received both a Corps 404 general permit and state 401 certification.146 The authorized coal company, however, must publish a legal advertisement in a newspaper located in the county where such activity will take place, prior to conducting any activity authorized by a Corps Nationwide Permit.147 In addition,

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140 W. VA. CODE STATE R. tit. 47, § 5A-9.1(a) (1985). These types of permits must be for "a category of activities which 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." Id.

141 Id. § 5A-9.1(b).


144 Id.

145 Id. The required content of such notice is that which is required under individual 404 permit certification. Id. "Such public notice will describe the category of activities included in the general permit, advise the public of the scope of certification, their rights to comment on the proposed certification decision and to request a public hearing. Such notice will also inform the public to whom they should send their request and comments." Id. § 5A-9.2(a).

146 See generally 33 U.S.C. § 1341 (1994). General permits can be issued on a state, regional, or nationwide basis. 33 U.S.C. § 1344(e). Therefore, because most coal companies applying for a general 404 permit apply for a particular nationwide permit such as the Nationwide Permit 21 or Nationwide Permit 26, the discussion regarding general permits will continue in relation to Nationwide Permits.

147 W. VA. CODE STATE R. tit. 47, § 5A-9.3(a) (1985). This publication must contain the same information as the previous public notices. See supra note 130 and accompanying text for a discussion of the information required for a legal advertisement publication.
the company "must forward a certificate of publication of this notice to the director prior to conducting any activity authorized by [a Corps Nationwide Permit]."\(^{148}\)

At this point, although the process has been completed, and both the 404 Nationwide Permit and 401 state certification have been issued, an aggrieved or adversely affected person is not without recourse. For example, such an individual might explore appeal of the state 401 certification.\(^{149}\) In effect, any person whose property is directly affected by DEP’s 401 certification decision "may request an appeal hearing within fifteen (15) days after publication of the notice . . . ."\(^{150}\) Upon receipt of a request for an appeal hearing, the Director must decide whether to hold the hearing, and if the Director decides in the affirmative, he or she must conduct the hearing in accordance with West Virginia Code of State Rules title 47, § 5A - 8.2(a)-(d). Finally, if an appeal hearing is granted, the Director must "examine the issues presented [at the hearing] and notify the parties of [the] decision to either uphold, modify or withdraw certification for the individual activity" adversely affecting the appealing party.\(^{152}\)

3. Public Hearings

The Regulations permit a public hearing regarding both the application for, or certification of, an individual 404 permit and a 404 general permit.\(^{153}\) "The purpose of the public hearing is to afford persons and organizations the opportunity to present comments and information which will assist the [DEP] in its decision-

\(^{148}\) Id.

\(^{149}\) Id. § 5A-9.3(b).

\(^{150}\) Id. § 5A-9.3(b)(1). "Property" is referred to as "property, interest in property or other constitutionally protected interest under the West Virginia State Constitution Article 3, Section 10 . . . ." Id. § 5A-9.3(b)(2).

\(^{151}\) Id. § 5A-9.3(b)(3). The procedures for conducting a hearing under W. VA. CODE STATE R. tit. 47, § 5A-8.2(a)-(d) are discussed infra Part III.B.3.

\(^{152}\) Id. § 5A-9.3(b)(4).

\(^{153}\) See id. §§ 5A-4.2, 5A-6.1, and 5A-9.2.
The decision, however, to hold a public hearing lies within the discretion of the Director of the DEP. When the Director does call a public hearing, the Director must “send a written notice to all parties receiving the public notice and [must] publish a . . . legal advertisement in a newspaper in the county where the activity is located or proposed.” “The public hearing will be conducted in an orderly fashion” through which “[a]nyone having comments and information may present them to the hearing officer subject to reasonable time limitations.”


The fill activity may begin after the DEP has issued 401 certification of the proposed activity and the entire certification process is finalized. At this point, however, the coal company is still not free from agency involvement. As stated earlier, the CWA requires that every certification condition become a condition or term of the federal permit itself. Therefore, certification conditions “are subject to the enforcement mechanisms available for enforcing the terms or conditions of...
the federal license or permit to which they attach.\textsuperscript{159} In addition, the West Virginia Code may be a source of other available enforcement mechanisms as well.\textsuperscript{160}

5. Standard Conditions for State 401 Certification of Nationwide Permits

a. Standard Conditions Applicable to All Nationwide Permits

As discussed above, the DEP is the certifying agency for 401 certification of federal permits in West Virginia.\textsuperscript{161} Pursuant to this authority, the DEP reviewed the Nationwide Permits that the Corps recently submitted for re-authorization.\textsuperscript{162} As a result, the DEP issued standard conditions that must be met to obtain state 401 certification of the Corps Nationwide Permits.\textsuperscript{163} In fact, these standard conditions must be implemented into any activity authorized by a Corps Nationwide Permit.\textsuperscript{164} The standard conditions contain general requirements that apply to all Nationwide Permits issued by the Corps.\textsuperscript{165} A permittee is required to investigate for water supply intakes or other activities immediately downstream.\textsuperscript{166} Prior to beginning the work, the applicant must notify the operators of the affected water supply intakes and any such other water-quality dependent activities, if such activity downstream

\textsuperscript{159} W. VA. CODE STATE R. tit. 47, § 5A-10.1 (1985).

\textsuperscript{160} Id. For example, W. VA. CODE § 20-1-7(30) (1994), and W. VA. CODE § 20-7-5 (1994) may be applicable for enforcing the conditions of the permit and certification. W. VA. CODE STATE R. tit 47, § 5A-10.1 (1985).

\textsuperscript{161} W. VA. CODE § 22-1-6(6) (1994).

\textsuperscript{162} The Corps submitted these Nationwide Permits for re-authorization because each Nationwide Permit is only valid for a five-year period and the period had expired. See 33 U.S.C. § 1344(e)(2) (1994).

\textsuperscript{163} See WEST VIRGINIA DIVISION OF ENVIRONMENTAL PROTECTION, STANDARD CONDITIONS FOR STATE 401 CERTIFICATION APPLICABLE TO NATIONWIDE PERMITS (1997). See also supra note 38 and accompanying text.

\textsuperscript{164} Id. However, the DEP declared that its certification of these Nationwide Permit activities does not replace the need for the applicant proposing an activity under the Nationwide Permit Program from obtaining other applicable permits from the DEP and/or DNR. Id.

\textsuperscript{165} See id. However, only those conditions applicable to valley fills will be discussed herein.

\textsuperscript{166} See id.
may be affected by the permittee’s work in the watercourse. Furthermore, “filling in the watercourse [is permitted] only to the extent necessary to achieve the project’s purpose.” Additionally, upon completion of the operation, all fills in the watercourse, or onshore, must be “properly stabilized to prevent soil erosion.” Also, the permittee must comply with the West Virginia water-quality standards.

Finally, the DEP also placed standard conditions on mitigation related to Nationwide Permits. The standard conditions state that “[i]n all instances, mitigation for all impacts incurred through use of these Nationwide Permits must first be directed to elimination of the impacts, then minimization of the impacts, and lastly through replacement of in kind within the watershed in which the impact occurs.” However, the DEP states that it does not restrict the use of mitigation

167 WEST VIRGINIA DIVISION OF ENVIRONMENTAL PROTECTION, STANDARD CONDITIONS FOR STATE 401 CERTIFICATION APPLICABLE TO NATIONWIDE PERMITS (1997). This notification must give the operators of the affected activities “sufficient time to allow preparation for change in water quality.” Id.

168 Id. “In fact, spoil materials from the watercourse or onshore operations” cannot be dumped where the deposit may adversely affect the surface or ground waters of the state. Id. Also, “[t]he permittee will employ measures to prevent or control spills from fuels, lubricants or any other materials used in connection with construction and restrict them from entering the watercourse.” Id.

169 WEST VIRGINIA DIVISION OF ENVIRONMENTAL PROTECTION, STANDARD CONDITIONS FOR STATE 401 CERTIFICATION APPLICABLE TO NATIONWIDE PERMITS (1997). Consequently, the DEP has required that any such discharge “from retention/detention ponds must comply with permit requirements of the National Pollutant Discharge Elimination System permit program,” W. VA. CODE STATE R. tit 47, § 30-1 to -15 (1985), of the DEP. WEST VIRGINIA DIVISION OF ENVIRONMENTAL PROTECTION, STANDARD CONDITIONS FOR STATE 401 CERTIFICATION APPLICABLE TO NATIONWIDE PERMITS (1997).

170 WEST VIRGINIA DIVISION OF ENVIRONMENTAL PROTECTION, STANDARD CONDITIONS FOR STATE 401 CERTIFICATION APPLICABLE TO NATIONWIDE PERMITS (1997). The West Virginia water-quality standards are contained in the W. VA. CODE STATE R. tit 46, § 1 to -9 (1996). In addition to the 15 conditions that apply generally to all Nationwide Permits, the DEP also issued a sixteenth condition that applied only to specific Nationwide Permits. WEST VIRGINIA DIVISION OF ENVIRONMENTAL PROTECTION, STANDARD CONDITIONS FOR STATE 401 CERTIFICATION APPLICABLE TO NATIONWIDE PERMITS (1997). Those specific Nationwide Permits are 5, 6, 7, 12, 13, 14, 18, 21 and 26. Id. This standard condition “limits state certification for the listed Nationwide Permits on those rivers/streams classified as follows, except as may be provided for in the individual nationwide permit:” (A) Waters of Special Concern; (B) Outstanding National Resource Waters; and (C) waters protected under the West Virginia Natural Stream Preservation Act. Id.

171 WEST VIRGINIA DIVISION OF ENVIRONMENTAL PROTECTION, STANDARD CONDITIONS FOR STATE 401 CERTIFICATION APPLICABLE TO NATIONWIDE PERMITS (1997).
banks\textsuperscript{172} to the watershed in which the impact has occurred until there are mitigation banks developed in each major watershed.\textsuperscript{173}

b. Standard Conditions Applicable to Particular Nationwide Permits

Standard conditions issued by the DEP for specific Nationwide Permits accompany the general standard conditions for all Nationwide Permits.\textsuperscript{174} Coal companies commonly use two Nationwide Permits to dispose of their excess spoil into the nearby valley: the Nationwide Permit 21 for Surface Coal Mining Activities and the Nationwide Permit 26 for Headwaters and Isolated Waters Discharges.\textsuperscript{175}

The DEP subjected Nationwide Permit 21 to several conditions.\textsuperscript{176} For example, the DEP fully authorized fills in waters "other than wetlands, where the combined watershed of the proposed fill plus the watershed upstream of the proposed activity is two hundred and fifty (250) acres or less and/or the fill does not exceed \( \frac{1}{2} \) acre of headwater stream . . . ."\textsuperscript{177} In effect, fills of this size or less are authorized regardless of their environmental impacts, individually or cumulatively,

\textsuperscript{172} "Mitigation banks" are simply credit given for compensation in excess of the required payment or required compensation ratio. See generally West Virginia Division of Environmental Protection, Compensation/Demonstration Guidelines (1992).

\textsuperscript{173} West Virginia Division of Environmental Protection, Standard Conditions for State 401 Certification Applicable to Nationwide Permits (1997).

\textsuperscript{174} See id.


\textsuperscript{176} West Virginia Division of Environmental Protection, Standard Conditions for State 401 Certification Applicable to Nationwide Permits (1997).

\textsuperscript{177} See id.

Stream measurements are to be made using conditions that existed prior to the proposed disturbance. Area calculations are to be computed by measuring the length of the stream, in feet, from the point of the stream's origin to the furthest downstream point of disturbance and multiplying by the average stream width, in feet, at the ordinary high water mark. The result of the foregoing calculation is to be divided by 43,560 square feet/acre.

\textit{Id.}
simply because they are smaller in size than the typical valley fill. As a result, no mitigation or compensation whatsoever is required for fills of this size.\textsuperscript{178}

On the other hand, the mitigation ratio shall be one and one-half acres created for each acre impacted, where the combined watershed of the proposed fill plus the watershed upstream of the proposed fill is equal to or greater than 250 acres, or where stream impacts are greater than one-half acre.\textsuperscript{179} Consequently, only those fills affecting 250 acres or more of watershed require mitigation and compensation for the loss of a valuable water resource.\textsuperscript{180}

Finally, the DEP conditioned certification of Nationwide Permit 26 upon several requirements. Again, however, under Nationwide Permit 26, the DEP has fully authorized, without condition, stream fills of 200 feet or less.\textsuperscript{181} Evidently, the DEP has no concern for the individual or cumulative environmental impacts of valley fills of this size. Simply because this size of valley fill is relatively small compared to the typical fill does not eliminate the impact upon the environment both individually and cumulatively.\textsuperscript{182} Furthermore, stream fills of 200 feet or less require no mitigation or compensation whatsoever, despite the destruction of valuable water resources.\textsuperscript{183}

In addition, under Nationwide Permit 26, the DEP has fully authorized any mining related valley fills "where stream impacts are less than one-half (\(\frac{1}{2}\)) acre or where the combined watershed of the proposed fill plus the watershed upstream of the proposed activity is two hundred and fifty (250) acres or less . . . ."\textsuperscript{184} Again,

\textsuperscript{178} \textit{Id.}

\textsuperscript{179} \textit{See West Virginia Division of Environmental Protection, Standard Conditions for State 401 Certification Applicable to Nationwide Permits} (1997).

\textsuperscript{180} \textit{See id.} Additionally, however, valley fills in any one or more of the streams listed as Waters of Special Concern, Outstanding National Resource Waters, or protected by the West Virginia Natural Stream Preservation Act are prohibited by the DEP. \textit{Id.}

\textsuperscript{181} \textit{Id.}

\textsuperscript{182} Telephone Interview with Dan Ramsey, Environmental Contaminants Specialist, United States Fish and Wildlife Service (Jan. 22, 1998). \textit{See also} Dr. Sue A. Perry \& Michael Golden, \textit{West Virginia Division of Forestry, The Importance of Headwater Streams to Downstream Areas and a Comparison of Stream and Pond Productivity} (on file with author).

\textsuperscript{183} \textit{See Perry} \& \textit{Golden, supra} note 182.

\textsuperscript{184} \textit{See West Virginia Division of Environmental Protection, Standard Conditions for State 401 Certification Applicable to Nationwide Permits} (1997). "Stream measurements are to be made using conditions that existed prior to the proposed disturbance." \textit{Id.}
the DEP requires no mitigation or compensation, regardless of the foreseeable or unforeseeable environmental impacts, for valley fills of this particular size.\textsuperscript{185}

In summary, the Regulations provide specific procedures which must be followed during DEP 401 certification.\textsuperscript{186} These procedures cover the 401 certification process from the initial application to appeal of the DEP's certification decision.\textsuperscript{187} Furthermore, the Regulations are designed to inform the public of a coal company's application for certification and the certification decision, and provide the public a mechanism for comment, public hearing, and appeal.\textsuperscript{188} Therefore, the Regulations control the steps for state 401 certification of 404 valley fill permits and provide an opportunity for public involvement in the decision-making process. Before certification of a valley fill is finalized, however, the DEP and the coal company must reach an agreement on mitigation and compensation for the proposed valley fill's effects.

\section*{C. Mitigation and Compensation for Valley Fills}

Obviously, filling valleys and streams with enormous amounts of overburden, soil, and refuse has highly significant environmental impacts. The DEP developed a mitigation and compensation policy as an attempt to reduce the environmental effects of valley fills.\textsuperscript{189} The purpose of the policy is to avoid or minimize the impacts of valley fills and to provide compensation for their effects.\textsuperscript{190} In general, the policy consists of a three step process: (1) avoid or minimize

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} On the other hand, the DEP has prohibited any filling activity for one or more streams listed as Waters of Special Concern, Outstanding National Resource Waters, or waters protected by the West Virginia Natural Stream Preservation Act, under Nationwide Permit 26. \textit{Id.}
\item \textit{See generally} \textsc{W. VA. CODE STATE R. tit. 47, § 5A-1 to -10 (1985)}.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{See} \textsc{West Virginia Division of Environmental Protection, Compensation/Demonstration Guidelines (1992)}. \textit{See supra} note 9 and accompanying text.
\end{enumerate}
\end{footnotesize}
impacts; (2) determine acreage of water resource lost and/or impacted; and (3) select compensation method. The DEP determines, by applying the Compensation Policy, the amount of impacted stream, whether the impacts have been reduced as much as possible, and the amount of monetary or in-kind compensation the coal company must provide. Therefore, the Compensation Policy contains the specific manner in which water resources impacted will be measured and the specific manner in which the coal company must compensate for such loss.

Unfortunately, it is unlikely that this policy adequately avoids or minimizes the overwhelming amount of devastation valley fills cause to the environment. However, an explanation of the Compensation Policy is still in order because mitigation and compensation are required with every issuance of state 401 certification. In fact, approval of a mitigation and compensation agreement is a prerequisite to 401 state certification from the DEP.

1. Avoid or Minimize Impacts

According to the DEP, "[i]n many cases, changes in design and/or engineering can minimize and even eliminate any substantial loss of aquatic habitat, and loss of productivity in water resources of the State." Under this theory, an applicant must demonstrate that no practical alternatives to the location and operation of the proposed activity exist. At a minimum, the demonstration must address the following: (1) the "activity will impact on no more of the natural

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191 Id. However, there are a few discrepancies between mitigation and compensation for permanent stream loss, and mitigation and compensation for temporary stream loss. These discrepancies are discussed infra Part III.C.3

192 Id.

193 Id.


195 WEST VIRGINIA DIVISION OF ENVIRONMENTAL PROTECTION, COMPENSATION/Demonstration Guidelines (1992). A mitigation and compensation agreement is like a contractual agreement between the coal company and the DEP as a condition of state 401 certification. The terms of such agreement are reached by applying the Compensation Policy.

196 See id.

197 Id.
watercourse or water resources than is necessary to accommodate its proper construction and operation;” (2) “treatment facilities will be located as close as practicable to the source(s) with which it is associated, and” (3) “there is no practical alternative to the location of such activity or treatment facility in a natural watercourse.” In addition, the applicant must submit a biological survey of the watercourse.

2. Determine Acreage of Water Resource Lost and/or Impacted

After the coal company has demonstrated there are no practicable alternatives, it must next calculate exactly how many acres of water resource will be destroyed or impacted. The length of the affected water resource must be multiplied by the width at the ordinary high water mark to calculate the acreage lost or impacted.

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198 See id.

199 WEST VIRGINIA DIVISION OF ENVIRONMENTAL PROTECTION, COMPENSATION/DEMONSTRATION GUIDELINES (1992). A biological survey must consist of three stations established in the watercourse. Id. The first station must be “above the proposed activity,” the second station must be “at the proposed activity,” and the third station must be “downstream of the proposed activity.” Id. However, “[t]he [biological] survey requirement can be waived with DEP concurrence.” Id.

200 Id.

201 “Length” means “the length (in feet) of the stream from the uppermost point of impact or loss to the furthest downstream point of impact or loss.” See WEST VIRGINIA DIVISION OF ENVIRONMENTAL PROTECTION, COMPENSATION/DEMONSTRATION GUIDELINES (1992).

202 “Width” means the “average stream width (in feet) at the ordinary high water mark.” See id.

203 Id.

[The] ordinary high water mark . . . is that line on the stream bank established by the fluctuation of water levels and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in soil characteristics, destruction or limits of terrestrial vegetation, and the presence of litter and debris. See id. (citing 33 C.F.R. § 329.11 (1996)).
3. Select Compensation Method

The final stage of the valley fill mitigation process is selecting a compensation method. After determining the acreage of water resource destroyed or impacted, the coal company has several options to compensate for the losses or impacts. First, "companies can select an option to best fit their needs and available resources." The specifics of the type of compensation chosen depend upon whether the valley fill creates a permanent destruction of the stream or a temporary alteration of the stream. Then, the option must be approved by the DEP.

a. Permanent Destruction of a Watercourse

There are three options for compensating for the permanent destruction of a watercourse: (1) lake development; (2) stream habitat improvement; or (3) monetary or in-kind payment. Option one, lake development, must be approved by the Wildlife Resource Section of the DNR before it can be approved by the DEP. Through this option, the applicant must "construct a lake four (4) times larger than the acreage of water resource lost or impacted." In fact, the applicant can choose to construct a lake larger than the four to one ratio if it has a suitable surface area.
location to do so. As a result, the coal company will be credited for any acreage exceeding the four to one ratio for future compensation needs.

The Wildlife Resource Section must first “approve the stream selected by the applicant for compensation work . . . in order for an applicant to compensate through option two, stream habitat improvement.” The minimum compensation ratio for this option is two to one, and “[t]he length of stream where habitat improvement is conducted must be at least twice as long as the length of the headwater stream impacted.”

Finally, the DEP will accept monetary payment if an applicant does not want to construct a lake or improve a stream. The DEP sets the minimum monetary payment at $200,000 per acre of water resource destroyed. This “payment will be deposited in a DEP fund designated for stream restoration or other environmental enhancement projects.” On the other hand, “applicants can make in-kind donations of land that would be suitable for lake development or water resources” development in lieu of a monetary payment. In these situations, the Wildlife Resource Section must approve the site for DEP consideration.

See id. To obtain Wildlife Resource Section approval, “[t]he stream must already have a viable sport fishery or be of sufficient size and length to support a put-and-take trout fishery.” Also, the Wildlife Resource Section must determine the “stream . . . would likely benefit from habitat improvements, i.e. boulder placement, subchannel construction, wing dam and log levee installation, etc.”

The DEP will accept a payment plan over three years. Recently, however, the mining industry has attempted to reduce the minimum monetary payment to $10,000 per acre of water destroyed. See Dan Radmacher, Reclamation Don’t Slash Coal Fees, CHARLESTON GAZETTE, Nov. 21, 1996, at 4A.


“The dollar value of the proposed site will be assessed at current market rates.”
b. Temporary Displacements of a Watercourse

In essence, the compensation choices for temporary displacements of water resources are the same as those for permanent destruction. However, there are substantial differences between the two in regard to their respective construction ratios, improvement ratios, and monetary pay scale per acre. As a result, the ratios and pay scale per acre are significantly lower for temporary displacements.

First, an applicant can choose compensation through lake development. This option requires the applicant to construct a lake two (2) times larger than the acreage of water resource lost or impacted. If the applicant has a suitable location, it can choose to construct a lake larger than the required two to one ratio and the acreage in excess of that ratio can be credited by the company for future compensation needs.

Option two involves stream habitat improvement. The Wildlife Resource Section "must approve the stream selected by the applicant" before this option can be approved by the DEP. Also, the Wildlife Resource Section must determine that the stream "would likely benefit from habitat improvement."

An applicant can choose the third option, monetary payment, if it does not want to construct a lake or provide stream improvement. The DEP will deposit any monetary payment for compensation in a "fund designated for stream

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221 See generally id.

222 Id.

223 See id.

224 Id. The Wildlife Resource Section of the DNR must approve the applicant’s proposal before this option can be considered by the DEP. Id.

225 Id. Furthermore, the lake must be a minimum of five surface acres for the lake “to qualify as acceptable compensation.” Id. In addition to constructing the lake, the coal company must also either deed or lease the lake, and any associated property, to the DNR. Id.

226 Id.

227 Id.

228 Id. “Habitat improvement” includes “boulder replacement, subchannel construction, wing dam and log levee installation, etc.” Id.

229 Id.
restoration or other environmental enhancement projects.\textsuperscript{230} The DEP developed a table to determine the minimum monetary payment required for this option.\textsuperscript{231}

The DEP, in a sense, also offers a fourth option of compensation that applies to both temporary and permanent fills.\textsuperscript{232} This option is simply a combination of any of the other three possible compensation options available for that particular type of fill, permanent or temporary.\textsuperscript{233} "Applicants may combine parts of any compensation option to best fit their resources and abilities."\textsuperscript{234} Consequently, the "DEP will review any such [proposed] compensation package to determine if it fulfills the compensation requirements."\textsuperscript{235}

In summary, the Compensation Policy sets forth the requirements which coal companies must follow in measuring stream acreage loss, determining the appropriate type of compensation, and measuring the amount of compensation to be obtained from the coal company.\textsuperscript{236} First, the coal company must show there are no practical alternatives to the valley fill method of disposal and the fill will impact no more of the stream than is necessary.\textsuperscript{237} In addition, the policy sets forth the requirements for conducting a biological survey of the stream to be impacted.\textsuperscript{238} Next, the Compensation Policy describes the method by which the acreage of

\begin{itemize}
\item $Id.$ The DEP will accept a payment plan over three years. $Id.$
\item $Id.$ For example, the table determines the amount of payment per acre by applying three categories of displacement lengths. See id.
\item First, a temporary displacement fill of less than two hundred feet of culvert is merely "certified with conditions." $Id.$ "Culvert lengths will be considered on a cumulative basis per project." $Id.$ Next, a temporary fill between 201 feet and 400 feet of culvert for zero to five years is also simply "certified with conditions." $Id.$ "Years" is defined as "the years, in 5 year increments, that the culvert remains in place." $Id.$ Third, a temporary fill of the same length for six to ten years is "certified with conditions" and the applicant must pay $20,000 per acre per a five year term. $Id.$ Finally, a temporary fill of greater than 400 feet of culvert for zero to five years is certified with conditions and $20,000 per acre per a five year term must be paid. $Id.$
\end{itemize}

\textsuperscript{230} See id.
\textsuperscript{231} See id.
\textsuperscript{232} See id.
\textsuperscript{233} See id.
\textsuperscript{234} See id.
\textsuperscript{235} See id.
\textsuperscript{236} See id.
\textsuperscript{237} See id.
\textsuperscript{238} Id.
destroyed stream is to be determined. 239 Finally, the Compensation Policy sets forth specific forms and ratios of compensation for the impacted stream. 240 The form of compensation ranges from construction of lakes or waterways to monetary payment per acre destroyed or impacted. 241 Therefore, the Compensation Policy is designed to calculate the amount of stream lost and to attempt to replace the destroyed stream through one of the forms of compensation. Although this policy may be a good-faith effort to remedy some of the effects of valley fills, it does not eliminate the fact that the issuance of state certification to construct a valley fill is a clear violation of the CWA and the state ADP.

IV. CONTINUAL VIOLATIONS OF THE CLEAN WATER ACT

Permits issued for the construction of valley fills must only be issued if the fill will comply with applicable CWA provisions. 242 For example, the CWA requires that valley fills comply with both the Guidelines promulgated under § 404(b)(1) and with the state ADP. 243 Thus, any discharge of fill material into the waters of the United States that does not fully comply with the Guidelines, the state ADP, or any other applicable provisions is violating the CWA. 244 Valley fills violate both the Guidelines and the West Virginia ADP. Therefore, the DEP violates the CWA every time it certifies a 404 permit for a valley fill.

A. Violations of the Guidelines

Certification of permits for discharging fill materials into the waters of the United States requires full compliance with the CWA as a whole. The Guidelines promulgated under 404(b)(1) allow only those fills that will not have unacceptable

239 Id.
240 Id.
241 Id.
244 Id.
adverse impacts affecting the aquatic ecosystems. Furthermore, the Guidelines specifically state that a fill should not be permitted (1) "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem;" (2) if the proposed discharge will cause or contribute to violations of any state water-quality standard; (3) if the proposed discharge "will cause ... significant degradation of waters of the U. S.;" (4) "unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of discharge on the aquatic ecosystem." Therefore, valley fills violate the Guidelines because there are practicable alternatives available and there is significant degradation of the waters respective to each valley fill. As a result, valley fills should not survive the permit stage, much less reach full construction.

1. Practicable Alternatives

The mining industry argues there are no practicable alternatives to disposal of mountaintop removal mining spoil through valley fills. This argument is simply not true. Although there may not be any cheaper alternatives than valley fill disposal, there are several available and practicable alternatives. The mining industry simply disregards these alternatives as impracticable because they reduce the margin of profit the industry enjoys from the lower costs of valley fill disposal.

One very practicable alternative to valley fills is to allow coal companies to dispose of excess spoil in abandoned mines during land reclamation, which would have much less adverse environmental impacts. Each year West Virginia spends millions of dollars in efforts to restore land at abandoned mines to its

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245 40 C.F.R. § 230.1 (1996). The discharge cannot cause unacceptable adverse impacts individually or cumulatively. Id. See supra note 21 and accompanying text for the definition of "aquatic ecosystems."

246 See 40 C.F.R. § 230.10(a) (1996). See supra note 22 and accompanying text for the definition of "practicable alternatives."


250 Telephone Interview with Dan Sweeney, Environmental Engineer for the Office of Watersheds, United States Environmental Protection Agency (Sept. 23, 1997).
original contours and uses. That cost would be decreased significantly by requiring coal companies to dispose of excess spoil in abandoned mines. However, mining companies prefer to dispose of the spoil by means of a valley fill because it is a much cheaper form of disposal.

A second alternative to filling valleys with excess spoil is simply to employ comprehensive reclamation. Spoil can be restored upon the mining site thereby virtually rebuilding the hill or mountain through comprehensive reclamation. Again, mining companies argue this is an impracticable alternative because of its higher cost than valley fill practices. However, this is a practicable alternative despite its higher price. The same development in technology that has allowed coal companies to remove the earth lying above a coal seam so quickly and economically also permits coal companies to restore the earth to its original contour. In fact, a few mining companies have proven it to be a practicable alternative by substantially reconstructing the mined mountaintop to its pre-mining contour. As a result, the recent explosion in technological advancements has

251 Telephone Interview with Brian Farkas, Public Information Officer, West Virginia Division of Environmental Protection, (Jan. 22, 1998). Mr. Farkas stated that during the fiscal year of July 1, 1996 to June 30, 1997 the State of West Virginia spent $27,600,000 from the Abandoned Mine Lands Program on the reclamation of mines abandoned prior to the enactment of SMCRA. Id.

252 Loeb, supra note 4, at 34.

253 In fact, this activity is required by the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. §§ 1201-1328 (1994), and is often waived. Loeb, supra note 4, at 35. According to this article, "[h]ardly any mining firm's reclamation projects abide by regulations requiring that the land be returned to its premining use, usually hardwood forests on steep hillsides." See id.; Ken Ward, Jr., Flattened: Most Mountaintop Mines Left as Pasture Land in State, SUNDAY GAZETTE-MAIL, Aug. 9, 1998, IA. SMCRA requires that the mined land be returned to its pre-mining mountain contour unless exceptional circumstances prove to make this requirement virtually impossible. See generally 30 U.S.C. §§ 1201-1328 (1994).

254 See Loeb, supra note 4, at 35. Mountaintop removal surface mining companies use a large machine called a “dragline” to remove the earth lying above the coal seam. These machines can stand as tall as twenty stories, are made out of enough steel to make 2,700 cars, and can use up to $50,000 worth of electricity every month. Each dragline, which costs around $100 million, removes 110 cubic yards of earth with each scoop of the bucket. This bucket is large enough to hold 26 Ford Escorts. With this technology, the top one-third of an 840-foot-high mountain peak can be scooped away within three years. Id.

255 See id. Arch Coal’s Samples mine near Cabin Creek, West Virginia has utilized comprehensive reclamation to restore the mined area to its original contour by placing the spoil, after mining is complete, back atop the mined mountain, planting trees, and creating ponds for wildlife. Id.
proven it possible, practicable, and evidently economical.\footnote{See id.} Therefore, yet another proven, practicable alternative to valley fills exists.

The practicable alternatives available to coal mining operations are numerous and certainly are not limited to those described above. The point is that there clearly are practicable alternatives to valley fills which indisputably cause far less adverse impacts to the environment and aquatic ecosystem. However, these practicable alternatives are not being employed in clear violation of the Guidelines. The task at hand is to enforce compliance with the CWA, which requires companies to employ these various available alternatives. After all, valley fills are supposed to be a last resort, not a cheaper means of disposal.\footnote{40 C.F.R. § 230.10(a) (1996). See supra note 22 and accompanying text for the definition of "practicable alternatives."}

2. Significant Degradation

Valley fills are also not to be permitted if the proposed fill will cause or contribute to significant degradation of the waters of the United States.\footnote{See 40 C.F.R. § 230.10(c) (1996).} The regulations state that effects contributing to significant degradation, considered individually or cumulatively, include:

(1) Significantly adverse effects of the discharge of pollutants on human health or welfare . . . ;\footnote{See 40 C.F.R. § 230.10(c)(1) (1996). These effects include but are "not limited to effects on municipal water supplies, plankton, fish, shellfish, wildlife, and special aquatic sites." Id.} (2) Significantly adverse effects of the discharge of pollutants on life stages of aquatic life and other wildlife dependent on aquatic ecosystems . . . ;\footnote{See 40 C.F.R. § 230.10(c)(2) (1996). These effects include "the transfer, concentration and spread of pollutants or their byproducts outside of the disposal site through biological, physical, and chemical processes . . . ." Id.} (3) Significantly adverse effects of the discharge of pollutants on aquatic ecosystem . . . .
diversity, productivity, and stability . . . 261 (4) Significantly adverse effects of the discharge of pollutants on recreational, aesthetic, and economic values.262

The amount of significantly adverse effects caused by the DEP’s permitting a coal company to create a valley fill is uncertain because neither the DEP nor the EPA have conducted a cumulative impact study.263 However, these fills, both individually and collectively, certainly do result in prohibited adverse environmental impacts. The only uncertainty is the degree of adverse environmental impacts.

Of the four types of significant impacts described above, only one must exist to justify denial of the valley fill 404 permit or, if the permit has already been granted, show evidence of noncompliance with the CWA.264 Valley fills create at least two of the four categories of adverse impacts prohibited by the Guidelines. First, a valley fill results in significantly adverse effects upon aquatic ecosystem diversity, productivity, and stability because the destruction of a stream, in whole or in part, causes loss of fish and wildlife habitat.265

Research shows that headwater streams perform many functions which “are extremely important to downstream biological production.”266 However, these crucial functions a stream provides are totally depleted from the entire river system when that stream is completely filled.267 Furthermore, research also indicates that mountaintop removal mining clearly increases sedimentation in these headwater

261 See 40 C.F.R. § 230.10(c)(3) (1996). “Such effects may include, but are not limited to, loss of fish and wildlife habitat or loss of the capacity of a wetland to assimilate nutrients, purify water, or reduce wave energy . . . .” Id.


263 See Rank, supra, note 3, at 4.

264 See generally 40 C.F.R. § 230.10(a)-(d).

265 Telephone Interview with Dan Ramsey, Environmental Contaminants Specialist, United States Fish and Wildlife Service (January 22, 1998). Mr. Ramsey, a biologist, stated that valley fills clearly cause significantly adverse impacts upon aquatic ecosystem diversity, productivity, and stability. Id. Furthermore, Mr. Ramsey explained by stating that loss of headwater streams results in a loss of energy for the whole stream system, which ultimately translates into energy loss and adverse effects for the entire West Virginia river system. Id. See also PERRY & GOLDEN, supra note 182.

266 See PERRY & GOLDEN, supra note 182.

267 Id.
streams. An increase in stream sedimentation has direct negative impacts on fish and other aquatic wildlife downstream by significantly decreasing reproductive success, species diversity, productivity, and abundance. Furthermore, sedimentation significantly reduces the amount of critical habitat area for aquatic wildlife in ways such as decreasing the stream length and the depth of pools. Additionally, studies show that mining sedimentation and stream fills decrease biological efficiency because of energy loss downstream. Consequently, negative impacts from mining and valley fills upstream cause cumulative impacts downstream and on the entire river system because stream and river systems “are a connected network.” Therefore, valley fills clearly result in significantly adverse effects on aquatic ecosystem diversity, productivity, and stability.

According to the DEP mitigation files, over sixty-seven miles of stream water had been destroyed or impacted by valley fills between 1992 and 1995.

268 Id. Research has shown that deforestation, from preparing the landscape for mining, combined with the wide-spread soil disturbance from the mountaintop removal mine itself injects huge amounts of sediment into the stream ecosystems. Id.

269 Id. Sediment has direct effects on fish such as “clogging gills and opercular cavities,” which causes mortality. See id. Furthermore, “[s]edimentation also causes sublethal detrimental effects on fish populations, including distributional changes as an avoidance behavior, reduced feeding and growth, respiratory impairment, and general physiological stress that can lead to a reduced tolerance to diseases and toxicants.” Id.

For example, brook trout declined, as did their principal invertebrate food source, in streams affected by mining sedimentation. Id. Therefore, sedimentation also indirectly impacts fish and aquatic wildlife by adversely impacting their food sources. Id.

270 Id.

271 See id.

272 Id. Headwater streams supply a nutrient and energy base downstream and this is where their value is priceless to the overall “network.” Id.

273 Id. The study states that mountaintop removal mining and valley fill practices disturb the landscape, remove vegetation, and change watershed drainage. Id. Disturbance of the watershed to this extent increases erosion and sedimentation, degrades stream water-quality, and decreases energy input, “all of which can reduce biological production.” Id. Furthermore, negative impacts from these types of disturbances upstream are also felt downstream because “water moves unidirectionally downstream.” Id. The study concludes by stating, “Therefore, the value of a stream, small or large, intermittent or perennial, cannot be ascertained solely from measures of biological production. Some measure of the streams impact and importance to downstream areas must be taken into account.” Id.
alone.\textsuperscript{274} In fact, an updated study of the files through 1996 reveals that the total number of stream miles destroyed or impacted between 1992 and 1996 is closer to 148 miles.\textsuperscript{275} Thus, it appears there was an increase of eighty-one miles of stream destroyed or impacted between 1995 and 1996 alone. Obviously, there must be significant adverse effects upon stability and productivity from the total miles of streams destroyed or impacted. It is also rather obvious that someone must soon take action to stop the DEP from continually permitting such activity, because the DEP obviously continues to fold to the mining industry’s whims.

Aesthetic and economic values are another area in which valley fills have resulted in prohibited adverse effects. Few, other than mining companies, would argue against the fact that a mountaintop removal mined area, with its accompanying valley fills and flattened topography, is enormously less aesthetic than the typical mountainous, tree-topped terrain perched above the valley and stream below. Mountains, valleys, and rivers, not mountaintop removal mines, are found in paintings and on postcards of West Virginia. The aesthetic value of our beautiful mountains, terrain, and streams is among West Virginia’s most complimented and most prided attributes. Countless travelers, residents, and former residents praise West Virginia’s beautiful mountains and topography. Very rarely will one hear the high praises of the beauty or aesthetic value of a recently constructed valley fill and mountaintop removal mined area. For example, John Denver’s hit song \textit{Country Roads} highly praises West Virginia’s mountains, valleys, and streams, not surface mines. Therefore, under the Guidelines, poor aesthetic value is another reason why the 404 permits for valley fills do not comply with the CWA.

Finally, there is the issue of economic value. The tourist industry is the third largest industry in the state and the largest non-extractive industry in West Virginia.\textsuperscript{276} West Virginia’s economy thrives from the tourist dollar for many of the

\textsuperscript{274} See Rank, \textit{supra} note 3, at 4. This number is actually quite larger than 67 miles because: (1) the DEP’s files concern only those fills since the DEP assumed the mitigation program in 1992, which does not account for miles of stream destruction that took place during the years in which the DNR administered the program; and (2) this figure also does not include those streams destroyed by valley fills of 250 acres or less because fills of that size are not in the mitigation records due to the fact that no mitigation is required for fills of such size. \textit{See id.}

\textsuperscript{275} See Cindy Rank, \textit{Mining Association Is Right on the Mark!}, December 1996, at 7. However, this figure also does not include the miles of streams impacted by fills of 250 acres or less. \textit{Id.}

\textsuperscript{276} Telephone Interview with Alisa Bailey, State Tourism Director, West Virginia Division of Tourism (Oct. 21, 1997). Ms. Bailey stated that the Division of Tourism notes the tourism industry as the third largest industry in West Virginia. The tourism industry generates four billion dollars a year in revenue and provides over 76,000 jobs throughout the state. Specifically, the tourism industry generated $4.029 billion for the state economy and provided 76,337 full-time equivalent jobs in 1996.
same reasons as stated above. Tourists travel to West Virginia to view amazing mountainous skylines and beautiful stream beds below. The continual destruction of these mountaintops, valleys, and streams is a continual reduction of a vital economic resource for the state. The equation is simple. Fewer and fewer majestic views of mountains, valleys and streams equals fewer and fewer tourists, which equals fewer tourist dollars. Tourists will not be attracted to West Virginia if it has significantly less beautiful scenery to view. Unfortunately, as a result of an undiversified economy, there is not much other than the scenery to attract tourists to West Virginia. Consequently, the economy will suffer.

Simply stated, West Virginia cannot afford to lose those tourist dollars. If valley fills are permitted to continue, however, this will likely be the result. Therefore, there has been a violation of the Guidelines’ prohibition of adverse effect on economic value. This, and any of the other violations of the Guidelines discussed above, constitutes a violation of the CWA.

In summary, valley fills clearly violate the Guidelines because there are practicable alternatives to dispose of the spoil and there is obvious significant degradation. There are alternatives, such as comprehensive reclamation or disposal of spoil in abandoned mines during reclamation, that are practicable, economical, and extremely less adverse to the environment. However, mining companies refuse to employ, and the DEP refuses to require, such alternatives despite the CWA mandate to do so.

Furthermore, valley fills result in significant degradation because there are adverse effects upon aquatic ecosystem diversity, productivity and stability, and upon aesthetic and economic values of the affected land. For example, valley fills

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277 See supra note 276 and accompanying text.

278 See 40 C.F.R. § 230.10(a) (1996). The Guidelines require the exhaustion of practicable alternatives which would have less adverse impacts on the environment. Id. Also, the Guidelines prohibit a fill that will result in significant degradation of the waters of the United States. See id. § 230.10(c).
create a flattened and virtually treeless topography. As a result, the tourist industry will suffer greatly because many tourists travel to West Virginia to see the mountains, valleys, streams, and colorful trees. Therefore, valley fills clearly do not comply with the CWA because each valley fill violates the Guidelines. In addition, valley fills also violate the West Virginia ADP, which also constitutes a violation of the CWA.

B. State Anti-Degradation Policy Violations

In general, the West Virginia ADP prohibits any degradation of the quality of West Virginia watercourses. For example, the ADP states that an activity cannot interfere with the existing water uses or water quality. Valley fills do, in fact, interfere with the existing water uses of the affected stream. Therefore, each valley fill constitutes a violation of the ADP.

Under Section 401 of the CWA, a state is required to certify that the proposed 404 permit complies with the CWA, the state water-quality standards, and the state Anti-Degradation Policy. Thus, any 404 permit certified by the state that does not comply with all of the above is in violation of the CWA. Furthermore, Section 401 does not limit any agency or department, “pursuant to any other provision of law, to require compliance with any applicable water quality requirements.” Therefore, the DEP strictly violates the CWA every time it issues state 401 certification of an individual 404 permit or Nationwide Permit.

The DEP expressly violates the state ADP when it issues 401 certification, which contains a mitigation agreement as part of the conditions of certification. The state ADP specifically states that the “[e]xisting water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.” Thus, the ADP has a general prohibition against degradation of any

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283 Id.


285 See W. VA. CODE STATE R., tit. 46 § 1-4.1(a).
Therefore, the DEP’s grant of 401 certification and the accompanying mitigation agreement are both in violation of the ADP because each permitted valley fill results in degradation of the stream’s existing uses. A stream’s existing use is not being maintained or protected whenever the stream is filled with untold thousands of tons of rock and earth. In many situations the stream is completely destroyed, which indisputably is not a maintenance or protection of existing uses. The stream no longer exists; thus the stream no longer has an existing use. As a result, it is difficult to argue that the destruction of a stream maintains or protects the existing uses of that stream. Consequently, every valley fill violates the ADP’s general prohibition against degradation because each fill destroys or alters the stream’s existing uses.

However, the ADP does provide that degradation can be permitted if it is necessary to lower the water quality to accommodate important economic or social development in the area in which the waters are located. No one disputes that the mining industry and a particular mining project are important economic developments in the area in which the fill will take place because jobs have been created or extended. However, the ADP states that degradation permitted for those reasons also must “not result in . . . interference with existing stream water uses” and must not violate state or federal water-quality criteria. Thus, a coal company may argue that the particular mountaintop removal mining operation meets the exception under the ADP because it is an important economic development. However, the company must still find a means of spoil disposal that does not interfere with existing stream uses. Consequently, valley fills cannot be the means of spoil disposal because, as illustrated above, valley fills interfere with, and often destroy, existing stream uses.

Therefore, despite arguably being necessary for important economic development, the DEP’s issuance of certification of valley fill 404 permits still constitutes a violation of the ADP because these fills do interfere with existing stream uses. Consequently, a violation of the ADP during the issuance of

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286 Id.
287 Id.
288 Id.
290 Id.
291 Id.
mitigation agreements and 401 certification constitutes a violation of the CWA.\textsuperscript{292} As a result, the presence of continual violations of the CWA mandates that action be taken immediately.

\textbf{V. CONCERTED ACTION MUST BE TAKEN IMMEDIATELY}

As illustrated above, the certification of 404 valley fill permits by the DEP violates the CWA because each valley fill violates both the Guidelines and the West Virginia ADP. Violations of the CWA create the opportunity for several avenues of recourse against valley fill spoil disposal. Three possible avenues of recourse are (1) wait for the EPA to take action against the DEP’s CWA violations;\textsuperscript{293} (2) popular appeal to the West Virginia legislature to compel the DEP to comply with the CWA; and (3) a citizen civil suit against the EPA and/or the DEP to compel

\begin{itemize}
\item \textsuperscript{292} Specifically, there is a violation of 33 U.S.C. § 1341(a)(1) and (b) (1994).
\item \textsuperscript{293} The EPA’s authority to intervene in violations of the CWA and, specifically, in dealing with the placement of fill material into the waters of the United States is found in several sources. For example, “[t]he Administrator is authorized to prohibit the specification . . . of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for [404] permit specification . . . .” See 33 U.S.C. § 1344(c) (1994). Furthermore, the Administrator is authorized to prohibit, deny, or restrict a defined area for 404 permit specification whenever the Administrator “determines, after notice and opportunity for public hearings, that the discharge of [fill] material . . . will have an unacceptable adverse effect.” Id.
\end{itemize}

Also, the EPA’s authority to intervene was solidified in 	extit{West Virginia Coal Association v. Reilly}, 728 F. Supp. 1276 (S.D.W. Va. 1989). In 	extit{Reilly}, the court was presented with the issue of whether the EPA

\begin{itemize}
\item has statutory authority under the Clean Water Act to adopt a policy which generally prohibits in-stream treatment ponds and fills and to object to draft National Pollutant Discharge Elimination System permits submitted to it by the West Virginia Department of Natural Resources on the basis that the draft permits authorize such ponds and fills.
\end{itemize}

\textit{Id.} at 1277.

The \textit{Reilly} court held that the EPA does in fact have the “authority to regulate the construction of the fills and ponds,” under § 402 of the CWA, because this material falls under the definition of “pollutant.” \textit{See id.} at 1288. Furthermore, the court held that the EPA had not acted beyond its authority in regulating the waters that flow into the treatment ponds at the foot of the valley fill. \textit{See id.} at 1290-91. The court’s reasoning was that the water flowing into the treatment ponds are within the definition of “waters of the United States,” thereby placing them under the authority of the EPA. \textit{See id.} For an excellent discussion of \textit{Reilly}, see Brian Peterson, Note, \textit{Confusion In Regulating Coal Mine Water Pollution: Regulatory Overlap In SMCRA and the CWA}, 99 W. VA. L. REV. 595, 613 (1997).

Also, another relevant source gives the EPA the authority to object to draft permits if it fails to ensure compliance with state water-quality standards. \textit{See} 40 C.F.R. § 123.44(b)(1) (1996). As discussed earlier, the West Virginia state water-quality standards include the West Virginia ADP. \textit{See} W. VA. CODE STATE R. tit. 46, § 1-4 (1996).
compliance with the CWA. The CWA violations are clear and extensive and obviously will continue until the mining industry is forced to comply. Therefore, some form of action must soon be taken to compel compliance with the CWA, to stop the construction of valley fills, and to save the environment of West Virginia from further destruction.

A. Waiting For The EPA To Compel Compliance

Waiting for the EPA to take action on its own volition is one possible remedy to the issue of valley fills failing to conform with the CWA. The EPA has authority to intervene in the issuance of permits for valley fills or state certification when there is a violation of the CWA. Although the EPA has expressed concern with particular valley fills, it has yet to intervene with the DEP's overall certification program. The EPA, though, recently stated that it has realized the growing total number of waters being destroyed or impacted by valley fills and is "becoming concerned with the probable cumulative effects." Despite the EPA's

See supra note 293 for a discussion of the EPA's authority to intervene.

The EPA has expressed great concern with the environmental effects of valley fills by frequently objecting to the issuance of the permits to construct them. For example, the EPA has recently objected to valley fill permits for Hobet Mining, Inc.'s Westridge Surface Mine (NPDES permit No. WV1016776) and Independence Coal Company, Inc.'s Twilight MTR Surface Mine (NPDES draft permit No. WV1016890). The substance of the EPA's objections include strong concerns about the valley fill length, other possible off-stream disposal alternatives, potential impacts on aquatic life downstream, destruction of aquatic life downstream, the possibility of available feasible options to reduce the fill length, and the lack of adequate mitigation to compensate for permanent stream loss.

Consequently, the effect of the EPA's objection to a valley fill permit is that the fill cannot be granted a permit until the conditions of the objection are fulfilled. However, the EPA usually withdraws its objection to the respective valley fill and the fill is permitted after all. The memoranda of EPA objections to the above-referenced valley fill permits are on file with the author and copies can be obtained from the West Virginia DEP Office of Mining Reclamation.

The EPA has the authority to revoke a delegated state 401 certification program if the program does not conform to the requirements established under the CWA. See generally 33 U.S.C. § 1341 (1994). The DEP valley fill files show no evidence whatsoever of an EPA warning of possible revocation of the state 401 certification program.

Sweeney, supra note 250. Mr. Sweeney indicated that the EPA is "becoming concerned" that the valley fills are "clustered in the same general watershed areas and may have cumulative effects." Id. Furthermore, Mr. Sweeney stated that the EPA is beginning to "reassess" the issue of valley fills and their cumulative impacts upon the environment because the valley fills are "growing larger and the coal industry's pressure for reducing mitigation is also getting stronger." Id. In addition, Mr. Sweeney indicated that the EPA's current policy, which allows valley fills, developed
objections to specific valley fills and its recent growing concern with cumulative
effects, the EPA will likely not take the appropriate comprehensive action in the
near future. The construction of valley fills and the resulting destruction of streams
have been continuing for over a decade, with no comprehensive EPA action to
date.\textsuperscript{298} Therefore, the EPA will likely not take aggressive, comprehensive action
against the DEP's CWA violations in the near future, if at all.\textsuperscript{299} Perhaps, however,
the EPA will take comprehensive action more quickly if it is persuaded to do so by
a concerted effort from the citizens of West Virginia. A concerted popular effort
will have a greater likelihood of success.

B. Aggressive Popular Appeal To State Officials

A strong popular appeal to the West Virginia legislature and administrative
agencies is one approach that may result in success. For example, the people of
West Virginia could bombard Charleston, West Virginia with petitions and letters
to all state representatives expressing their strong objection to the DEP's violations
of the CWA. Such an effort, if composed of a large enough percentage of voters,
could result in the legislature demanding the DEP's full compliance with the CWA,
thereby halting the practice of valley fill spoil disposal. However, popular appeal
often falls second in priority to campaign contributions. As the largest industry in
West Virginia, the coal industry also has the largest lobbying resources in the West
Virginia legislature.\textsuperscript{300} The coal industry accounts for an overwhelming percentage

\begin{footnotes}
\footnotetext[298]{Obviously, because valley fills were dealt with in both the 1988 EPA 404 permit policy,
\textsc{UNITED STATES ENVIRONMENTAL PROTECTION AGENCY}, \textsc{EPA DRAFT POLICY FOR INSTREAM
TREATMENT AND FILLING BY THE COAL MINING INDUSTRY} (1988), and in \textit{West Virginia Coal
Association v. Reilly}, 728 F. Supp. 1276 (S.D.W. Va. 1989), valley fills have been present in West
Virginia for at least ten years, maybe more. To date, the DEP files contain only EPA objections to
particular fills and no evidence of comprehensive action against the entire state 401 certification
program.}

\footnotetext[299]{For example, Dan Sweeney stated that the EPA was "becoming concerned" and would
"reassess" the issue of valley fills cumulative effects upon the environment. Sweeney, \textit{supra} note 250.
Choosing words such as "becoming concerned" and "reassess" demonstrates that the EPA does not
intend immediate action against the DEP for its violations of the CWA.}

\footnotetext[300]{\textsc{Steenstra}, \textit{supra} note 276. The coal industry contributed 24\%, or $710,854, of the total
political campaign contributions for the 1996 state elections. \textit{Id.} This figure is three times larger than
the amount contributed by the labor political interest groups and education political interest groups
combined. \textit{Id.} Furthermore, the coal industry's contributions were more than the entire chemical,
timber, oil, gas, and solid waste industries combined. \textit{Id.} The coal industry contributed $83,300,
eleven percent of the total contributions, to the seventeen state Senate races, which was second only

of state political campaign contributions.\textsuperscript{301} As a result, legislators often fold to industry pressure in fear of losing future campaign contributions. Consequently, legislators would likely ignore the popular appeal to compel the DEP's compliance with the CWA in fear of losing valuable campaign funds. Therefore, although a popular appeal to the legislature would be more successful than passively awaiting EPA intervention, it is not the most potent action available to the citizens of West Virginia. As a result, a more aggressive popular effort, that will result in a more definitive remedy, is the most promising approach to ending the practice of valley fill spoil disposal.

C. Citizen Suit Against The DEP and/or EPA

The most aggressive action, and the most likely to succeed, is a citizen civil suit to compel compliance with the CWA. A civil action against the DEP and/or the EPA will further expose, in a neutral legal forum, the extensive CWA violations caused by permitting valley fills. The federal district court will decide whether certification of valley fills is a violation of the CWA solely on the issue's legal merits.\textsuperscript{302}

The federal district court would find valley fills’ violations of the CWA to be clear and widespread throughout the industry. Furthermore, the court would understand that a ruling favorable to the mining industry would produce harsher environmental, social, and economic consequences for West Virginia than a ruling favoring the citizens would impose upon the mining industry. Therefore, the federal

to the health care industry. \textit{Id.} In fact, the legal establishment contributed only 10% of the total contributions to the state campaigns. \textit{Id.}

Additionally, the coal industry contributed $264,454 to Governor Underwood’s 1996 campaign, which was 20% of the total contributions Underwood received. \textit{Id.} This figure does not include the coal industry’s contribution of $253,850 to Governor Underwood’s inauguration party, which was the single highest contribution to the inauguration. \textit{Id.} \textit{See also} Loeb, \textit{supra} note 4, at 36.

Consequently, the mining industry’s contribution of 24% of the total contributions for the 1996 state elections is substantially larger than the 18% contributed by the labor, education, and legal political interest groups combined. Steenstra, \textit{supra} note 276.

See \textit{supra} note 300 and accompanying text for a discussion of mining industry campaign contributions.

A civil action by the citizens of West Virginia against the DEP and/or the EPA could be brought in federal district court because there is federal question jurisdiction. \textit{See} 28 U.S.C. § 1331 (1994).

Unlike state legislators, federal district court judges are not susceptible to political persuasion from campaign contributors because they are not elected officials. As a result, the federal court will decide the issue on its merits, uninfluenced by the coal industry’s political lobbying powers. Therefore, the issue of whether valley fills violate the CWA will be decided solely on its legal merits.
court would rule in favor of the citizens of West Virginia, granting injunctive relief against the certification of valley fills because the CWA violations are clear and the impacts are devastating.\textsuperscript{303}

The issue of valley fill spoil disposal is certainly not a rumor, a secret, or a farce. In fact, the environmental devastation resulting from mountaintop removal mining valley fills has recently received national attention.\textsuperscript{304} Furthermore, both environmentalist groups and the EPA have expressed great concern over the effects of valley fills.\textsuperscript{305} Unfortunately, despite the concern expressed by the EPA and environmentalists, the DEP continues to violate the CWA by granting certification of valley fill permits. As a result, valley fills continue to be the means of spoil disposal, and streams continue to be destroyed. The citizens of West Virginia must join the effort to halt the continuing destruction of West Virginia’s streams and beautiful landscape, otherwise the environmental and aesthetic devastation will continue.

VI. CONCLUSION

The coal industry has dominated the economy, the legislature, and the people of West Virginia for well over a century. The State of West Virginia and its people will continue to suffer from such domination until someone takes a legal stand against the industry’s wrongdoings. Eventually, the coal resources in West Virginia will dissipate, and the industry will move on. A suffering economy and a devastated environment will be left behind if action is not taken soon against the industry’s environmentally destructive practices.

The coal industry may be supreme in the West Virginia economy, but no one and no company is above the law. A comparative analysis clearly demonstrates that both the DEP’s 401 certification practices and the accompanying valley fill

\textsuperscript{303} The court would likely grant injunctive relief against the practice of valley fills until the defendants can show that valley fill practices have been modified to comply with all applicable provisions. Furthermore, the court could also grant monetary relief, or any other such relief it deems suitable.

\textsuperscript{304} See supra notes 3-4 and accompanying text. See also Nightline (ABC television broadcast, April 21, 1998).

\textsuperscript{305} Cindy Rank has vigorously led the West Virginia Highlands Conservancy in the battle to stop valley fills from causing more environmental destruction. Other environmental organizations involved in the movement against valley fills include: Citizens Action Group, Trout Unlimited, Citizens Coal Council, Clean Water Network, National Wildlife Federation, and West Virginia Rivers Coalition. See supra note 295 and accompanying text for a discussion of the EPA’s expressions of concern.
mitigation and compensation policy are in violation of the federal CWA. For example, the Guidelines promulgated by the Administrator are clearly being violated because of the damage to economic and aesthetic values, the significant adverse effects upon the aquatic ecosystem, and the unknown cumulative effects affecting human water supplies.

In addition, every valley fill results in degradation of the state’s water-quality standards, such as the Anti-Degradation Policy. The violation of the ADP is clear because valley fills clearly interfere with, and often eliminate, the stream’s existing uses.

Therefore, these clear violations of the CWA justify aggressive action to remedy the situation. The EPA has shown some concern with these stream destructions through the objections it has issued on several specific fill permits. However, the EPA has not taken the initiative to address the issue more closely. Perhaps a strong showing of concern from the citizens of the State of West Virginia will awaken the EPA’s interests. The proper public concern or a publicity-producing lawsuit may finally elicit EPA intervention. However, the EPA is not likely to intervene in the near future, if at all.

Consequently, the citizens of West Virginia must be responsible for taking action to compel compliance with the CWA. Appealing to state officials by means of petitions and letters could produce favorable results. However, the lobbying powers of the mining industry will likely defeat this particular option. Thus, the option most likely to compel compliance is a civil action brought in the federal district court, a forum which is free from industry influence, to obtain definitive results. Therefore, the citizens of West Virginia must file a civil action against the DEP and/or EPA in order to compel compliance with the CWA and prevent further valley fill destruction.

If the citizens of West Virginia do not soon file suit to compel compliance with the CWA, valley fills will eventually envelope the topography of West Virginia. In fact, environmentalists predict that within two decades, one-half of the peaks in southern West Virginia might vanish. As a result, the tourist industry and West Virginia’s economy will greatly suffer.

306 Specifically, the practices violate 33 U.S.C. §§ 1344(b)(1) and 1341(a) (1994).
308 See supra note 295 and accompanying text for a discussion of the EPA’s concern with certain valley fills.
309 See supra note 300 and accompanying text.
310 See Loeb, supra note 4, at 28.
Which West Virginia will likely amass more tourist dollars: (1) West Virginia, as it exists now, with beautiful mountains and terrain virtually from border to border? or (2) West Virginia as it soon will be, if valley fills continue to be permitted, with a flattened topography, virtually no valleys or streams, and with the only remaining natural beauty isolated in a few protected National Parks scattered about the state? The time is now for the citizens of West Virginia to make a difference and preserve the future of West Virginia, as well as the environment.

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