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IN THE COURT OF KING COAL: MOUNTAINTOP MINING IN APPALACHIA

I. INTRODUCTION

Driving along the Blue Ridge Parkway, through Virginia, heading westward, you can't help but pause and scan your eyes over the expanse of the mountain ridge that parallels the road. They are called the Appalachian Mountains and, at some parts, possess an almost inexplicable cerulean appearance as a mist makes them look almost celestial. These mountains hold stories recanted in old bluegrass tunes and poems that describe the hardships and loneliness that lies in the peaks, valleys and hollows. Such images of grandeur have proved to be a test for pioneers, frontiersman, and Native Americans for several centuries. These struggles exist even today, but of a different kind. A battle wages on for the preservation of the mountains and the dignity of the people that live amongst them. The battle that exists today is the most important fight these mountains will ever know.

The Appalachian Mountain chain is located in the eastern United States and in it lays the Appalachia region. Specifically, this region consists of parts of central New York, Pennsylvania, Kentucky, Tennessee, Virginia, Maryland, all of West Virginia, North Carolina, northern Georgia and western South Carolina.[1]

This general area, called "Appalachia" has consistently experienced poverty levels below the national average. According to the Appalachian Regional Commission, the 1990 Census

[1] *See generally* Map of Appalachia, http://www.arc.gov/misc/arc_map.jsp (last visited Oct. 2, 2009).

data showed that the national poverty rate was of 13.1 percent.[2] In rural areas of northern and southern Appalachia, the poverty rate was 16 percent.[3] In central rural Appalachia the poverty rate was nearly 27 percent.[4] Things aren't much different in Appalachia these days. The United States Census Bureau indicated that 17.1% of West Virginia's (which has the greatest portion of it's populous within Appalachia) population was below the poverty line while the United States poverty rate was 13.0%.[5]

A large source of the economic stagnation in Appalachia can be attributed to the coal mining industries that have, since the dawning of the Industrial Revolution, been public enemy number one of the Appalachians. From the oppressive and often brutal working conditions of early coal camps to environmentally harmful mining practices that to this day ravage the mountain valleys and persons residing therein, the coal companies have not, by in large, been a friend to the region. The large coal companies or "King Coal", along with flawed legislation have marginalized the Appalachian people and have caused irreversible scarring of the mountains by cheaper and vastly more destructive mining practices.

Most of the recent problems in Appalachia stem from the implementation of a relatively new and mechanized method of mining, harmlessly called "mountaintop mining" (MTM). This type of mining has negatively affected the natural resources and the economy of Appalachia which have directly affected the valleys, their streams, and the inhabitants below. This type of mining, regulated by flawed legislation without any substantive enforcement, has made MTM a

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[2] Appalachian Regional Commission, *Online Resource Center,* http://www.arc.gov/index.do?nodeId=2919 (last visited Oct. 2, 2009) [hereinafter ARC].

[3] ARC, http://www.arc.gov/index.do?nodeId=26.

[4] *Id.*

[5] United States Census Bureau, http://quickfacts.census.gov/qfd/states/54000.html (last visited Oct. 2, 2009).

formidable adversary to Appalachia. However, the winds of change are blowing through the mountains with incredible vigor as the Appalachians have reached a boiling point and are fighting back.

Section II will recount, in come detail, the dark and ominous history of coal mining within the region and it's fostering of oppression. This will help introduce Section III that will illustrate the modern and double-edged sword that is mountain top mining. In Section IV will analyze how this mining practice was attempted to be regulated, flaws and all, as well as how the courts interpreted the rule of law. Throughout the essay, and culminating in Section V, I will address the harmful effects of MTM, past and present, and what the future may hold for the region in terms of general solutions. Opposition to MTM is still strong and, as a result of advocate groups using the courts, Washington and the state capitals are starting to take notice. How quickly they will act is unknown.

II. THE GRIM TALE OF MINING IN APPALACHIA

Who would ever think that a region that possesses an abundant and seemingly limitless trove of wealth would be the source of so much pain and suffering? The early to middle stages of mining were dark and unpredictable. The perils and pitfalls of the mine worker were many as he, armed with a pick axe and headlamp, trudged through the small rock shafts, sometimes so small that he had to lie on his back and crawl as the wall of shaft brushed up against his face. At anytime tons of rock, slate, coal, or earth may entomb him. Even the heavy levels of methane gas or coal particles could build up and cause a fiery blast. If the bleak conditions within the tomb were bad, what was waiting for the miner when he got outside almost seemed one of the same.

The early part of the 20th century was noted to be one of the most tumultuous times in Appalachian mining as miners clashed with the coal companies that refused to protect the environment and the living conditions of the miners. The coal companies controlled everything.[6] Miners worked in coal camps with company tools and equipment which they were forced to lease.[7] The miners rented the company owned houses within the camp and were forced to buy items from the camp store that charged exorbitant amounts since there was no other competition within the hills.[8] The hand of the coal companies extended to every facet of life within the camp: the company doctor, the mines, the churches, the schools - everything.[9] The coal companies preferred to envelop miners in a total environment in order to have total control over their behavior.

Amid the joyless economic environment, the surrounding landscape was affected by the lack of adequate control of coal particles and dust getting into the air and streams. Historian Janet Green notes:

> In some of the coal camps, however, homes were as crowded as urban areas, resulting in public health problems such as polluted water and unhealthy sewerage. Coal dust from coke ovens, steam engines, and coal cars settled everywhere. Houses were crowded beside railroad tracks and around tipples. Burning slag smoldered beside some of the homes. In the early twentieth century, some women recalled that the creeks were still clear, but after the mid-1920s the ground was black with coal dust. Children were covered with it; it sifted onto wet wash hanging on the lines to dry; at times it seemed to block the sun.[10]

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[6] David Alan Corbin, The West Virginia Mine Wars: An Anthology 1 (David Alan Corbin ed., Appalachian Editions 1st ed 1990) [hereinafter W. Va. Mine Wars].

[7] West Virginia State Archives, *West Virginia's Mine Wars*, http://www.wvculture.org/hiStory/minewars.html (last visited Oct. 11, 2009) [hereinafter W. Va. State Archives].

[8] *Id.*

[9] *Id.*

[10] Janet W. Greene, *Strategies for Survival: Women's Work in the Southern West Virginia Coal Camps*, http://www.wvculture.org/history/journal_wvh/wvh49-4.html (last visited Oct. 11, 2009). *See also* Geoffrey L.

The early 1900's was still a time when the United States was still reeling from the Industrial Revolution of the latter part of the 19th century so by in large there was no environmental laws or regulations that attempted to protect the environment.[11] Pollution, either in the form of smoke coming out of factory stacks or from soot landing in streams and air, were all evidence of progress.[12] Any harm to the surroundings was an unfortunate but inevitable consequence of accumulating wealth and income mobility.[13]

It is certainly understandable that the coal companies, and similar cogs of industry, gave little concern for the environmental impact of their operations since they simply did not have to. The United States was at a junction in time that the days of sweat and toil could be alleviated with new machinery and conveyor belts. However the lack of any established health or environmental laws should not have sufficed as a valid excuse for not creating, at the very least, appropriate working conditions for the very employees and their families that put their lives and blood into the mines.

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[11] Geoffrey L. Buckley, *The Environmental Transformation of an Appalachian Valley, 1850-1906*, 88 The Geographical Review, April 1998, at 187-88. [hereinafter Transform. of App.] "...by the second half of the nineteenth century, George's Creek, [in western Maryland] was little more than a receptacle for industrial and domestic waste. No fish survived in it; no vegetation withstood its acidic water. Its main purposes were patently to carry away that effluent from coal mines and to serve as 'a public sewer' for the valley's inhabitants." "Today acid mine drainage continues to pose one of the greatest and most expensive problems facing former mining areas in Appalachia." *Id.* at 188.

[12] J.T. Morgan, *The Mythical Erosion of Mens Rea*, Natural Resources and Environment, Winter 2009, at 30.

[13] *Id. See also Transform. of App.* at 186-87 (Coal companies, admittedly, did not stand alone as the only offender of environmental negligence. Timber was increasingly being harvested as it had been for the better part of the 19th century to help set up coal camps and their mines, to make telephone and telegraph lines, and to lie down railroad cross ties for the impending arrival of the locomotive. Officials in Allegheny County, located in western Maryland, were hesitant, despite a growing state and national awareness of over-deforestation, to slower the production of timber.[13] It was generally believed that no person could possibly convince a landowner, in the spirit of conservation to simply halt his timber or coal operation and lose his business and succumb to his competition).

In order to combat the working conditions and relatively low wages, the miners began to organize. The decade of 1912 to 1922 was marred by what were called "The Mine Wars".[14] These skirmishes, throughout most of Appalachia, consisted of hired guns of the coal operators battling hundreds (at various towns) of armed miners who were not yet unionized.[15] Common sense dictates the coal companies were, and rightfully so, afraid of any unionizing because surely they knew that the unions would mandate better living conditions and fairer wages. When these rebellions occurred, the coal camps, which had much influence in the local and state level governments, had unlimited resources for brute force through the state militias and the federal army.[16] If the miners were caught, they faced a trial by military tribunal.[17]

By the early 1900s, most of the Appalachian miners were unionized throughout the region through the United Mine Workers of America (UMWA), however some coal companies strictly refused the UMWA to intervene.[18] The most famous incident occurred at the coal camps of Paint and Cabin Creeks located in Kanawha County, WV.[19] After being refused the opportunity for union membership, the Paint Creek miners walked off the job and Cabin Creek coal mine soon followed.[20] The two camps demanded, other than the right to organize, simple fundamental rights such as free speech and assembly, as well as alternatives to a company store, an end to the practice of using the hired guns, and the use of an advocate to ensure the companies were not cheating the miners.[21] These were refused.

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[14] W. Va. State Archives *supra.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*

After months of miner intimidation, the situation at Paint Creek reached a critical mass. And as a result, then Governor William Glasscock, declared martial law and dispatched state and national militia on at least three occasions.[22] When Glasscock would remove the national guards, the uprisings would start again.[23] When the pinnacle of the fighting had past, at least twenty to fifty men had been killed, mostly miners.[24]

III. MOUNTAINTOP MINING: The Cost of Expediency

For the next half a century, the working conditions certainly improved and the life of the miner was by in large, better that that at the early part of the 20th century. However, the coal companies in Appalachia continued their onslaught on the hills and valleys of Appalachia through a more expedient, cheaper, and destructive coal extraction method called- mountaintop mining (MTM).

The method of mountain-top mining, used primarily in West Virginia, Kentucky, Virginia, and Tennessee began in the late 1960s and involved using large amounts of explosives to blast off the tops of the mountains (sometimes removing 500 feet from the summit), exposing

[22] John Alexander Williams, *West Virginia: a History* 132 (W.W. Norton & Co., Inc. 1976) (1984). [hereinafter W. Va. History] ("cribbing" explained, "Workers were paid based on tons of coal mined. Each car brought from the mines supposedly held a specific amount of coal, such as 2,000 pounds. However, cars were altered to hold more coal than the specified amount, so miners would be paid for 2,000 pounds when they actually had brought in 2,500. In addition, workers were docked pay for slate and rock mixed in with the coal. Since docking was a judgment on the part of the checkweighman, miners were frequently cheated).

[23] *Id.*

[24] *Id.* Glasscock's successor, Governor Hatfield initially seemed sympathetic to the miners. He demanded an end to the strike and proposed a settlement on April 14, 1913 through the "Hatfield Contract" in which he gave the miners and coal companies a 36-hour deadline to accept. Coal operators quickly agreed to Hatfield's terms, but the miners weren't so easily persuaded. The proposal didn't guarantee the right to organize and it didn't eliminate the mine guard system, the two most important issues. Hatfield gave the miners an ultimatum: accept the terms or face deportation from the state. UMWA delegates approved the contract as did the miners along Paint Creek. However, Cabin Creek strikers held out for several more months before reluctantly signing. *Id.* at 186-87.

the large seams of coal.[25] In the early days of MTM, when the earth, called "overburden", was blown off it was simply dumped in the neighboring valley which would sometimes result in the burial of valley streams.[26] The obvious ecological implications of MTM as well as the dangers to people began to surface in the 1970s due to a lack of state and federal oversight. [27]

The adverse human effects of MTM were and currently are a problem. A recent Eastern Kentucky University study found that children in Letcher County, Ky., "suffer from an alarmingly high rate of nausea, diarrhea, vomiting, and shortness of breath -- symptoms of something called blue baby syndrome -- that can all be traced back to sedimentation and dissolved minerals that have drained from mine sites into nearby streams. Long-term effects may include liver, kidney, and spleen failure, bone damage, and cancers of the digestive tract."[28] At least in conventional mining, the health effects of coal mining were limited, generally, to the actual miners in the mines. Now, the blasting is sending dirt and fine particles in the air at a much greater radius.

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[25] United States Environmental Protection Agency-Mid Atlantic, http://www.epa.gov/Region3/mtntop/#what.

[26] *Id.*

[27] *see generally* Kai T. Erickson, *Everything in its Path: Destruction of Community in the Buffalo Creek Flood* (Simon & Schuster 1978) (1976). When coal companies conducted surface mining on top of the mountains, they would create several dams down the mountain to protect the valley below from the overburden and "coal slurry" (a mix of water, coal dust, clay and toxic chemicals such as arsenic mercury, lead, copper, and chromium.) that would descend the mountain. However, after being labeled as satisfactory by a federal inspector, these dams gave way. As a result, 132 million gallons of black waste water, cresting over 30ft high, charged upon the residents of 16 coal mining hamlets in Buffalo Creek Hollow. Out of a population of 5,000 people, 125 were killed, 1,121 were injured, and over 4,000 were left homeless. 507 houses were destroyed, in addition to forty-four mobile homes and 30 businesses. its legal filings, Pittston Coal referred to the accident as "an Act of God." *See also* W. Va. Governor's Ad Hoc Commission of Inquiry, *The Buffalo Creek Flood and Disaster* 111-21 (1972) (reporting that there were not federal or state laws that could regulate this catastrophe).

[28] Erik Reece, *Moving Mountains: The battle for justice comes to the coal fields of Appalachia*, Orion Magazine, Jan/Feb 2006, at 55.

While MTM impacts the surroundings, it is also costing jobs.[29] In Kentucky, for instance, coal-related employment has dropped 60 percent in the last 15 years.[30] MTM takes very few people, with the explosives doing the work to get to the seams before the giant machines do most of the clear-cutting, excavating, loading, and bulldozing of overburden. [31] The loss of jobs in an industry seeking to cut costs has not bided well for the economy of Appalachia.

The most visual indication of the destruction of this mining method is the scars along the many mountains in the regions. Where mountains once stood tall, there are piles of displaced dirt and earth that cannot be set back to their normal stature.[32] MTM also eradicates forest vegetation which allows heavy amounts of sediment to fall into the valley streams below which of course destroys not only the scenic beauty of the rivers, but also adversely affects the aquatic life and drinking water supplies.[33] When the land is void of vegetation the overburden freely runs down the mountain and clogs creeks and rivers with sediment and debris, which causes floods in areas where none have previously occurred.[34] Often flooding leads to the permanent displacement of residents, especially in counties where coal companies own most of the land.[35]

IV. 1970s ENVIRO-LEGISLATION: BOWING DOWN TO THE KING

Early on, in an attempt to balance the interests of the coal companies and the environment, laws were enacted on the federal level that would at the very least, show the country that something was being to be done to mitigate the adverse environmental effects of MTM. Any new laws regulating the coal industry had to come from Washington since the

[29] Ohio Environmental Council, *Mountaintop Removal Mining*, http://www.theoec.org/LandMining.htm (last visited Oct. 19, 2009).
[30] *Id.*
[31] *Id.*
[32] *Encyclopedia of Appalachia,* http://utpress.org/Appalachia/EntryDisplay.php?EntryID=007.
[33] *Id.*
[34] *Id.*
[35] *Id.*

Appalachian states, with their local economies in mind, wished to make coal mining as profitable as possible without restrictions. The country needed oversight to curb the wanton expansion of MTM and the federal government had to be the one to do it. Unfortunately, as we have seen, the effects of MTM haven't changed considerably since the years prior to 1970. The legislation set forth, as we will see, has made very little difference.

A. The Surface Mining Control and Reclamation Act (SMCRA)

The federal government, due to growing national concern for the environmental damages caused by the mining companies, enacted the Surface Mining Control and Reclamation Act (SMCRA) which was signed into law by President Jimmy Carter in 1977.[36] The SMCRA was created in direct response to the overwhelming need for regulation of coal extraction and its implications to the environment.[37] The Act prescribed that the states would have formal power to enforce the tenants of the law since "the terrain, landscape, economy, and needs of each state varied greatly.[38] The SMRCA was unique in the sense that it stressed the importance of "assur[ing] that appropriate procedures are provided for the public participation in the development, revision, and enforcement of regulations, standards, reclamation plans, or programs established by the Secretary or any State under this Act;".[39] This appeared to be exactly what the region needed.

Among others, the SMCRA required that the operator of the mine must restore the land back to its "approximate original contour" (AOC) by putting back the excess spoil from where

[36] 30 U.S.C §1201 (2000).

[37] 30 U.S.C §1202 (2000).

[38] *Id.*

[39] *Id.*

they removed it.[40] Appalachian coal operators and coal-state congressional representatives lobbied for the availability of an exemption from the AOC requirement.[41] They argued that mining could provide flat land, which in turn would lead to greater economic development and provide much needed land for schools, airports, and hospitals.[42] In response, although it imposed stringent regulations, Congress provided an AOC exemption for certain mountaintop-removal-mining operations.[43]

In order for a mining operation to receive an AOC expemption, it must show the relevant agencies, in this case the Office of Surface Mining (OSM) and the Division of Environmental Protection (DEP), that the variance will be used for at least one of five specific uses: industrial, commercial, agricultural, residential, or public facility.[44] Additionally, the applicant must prove that the proposed post-mining use constitutes an "equal or better economic or public use of the affected land, as compared with the pre-mining use."[45] Furthermore, the applicant must assure the agencies that the company has sufficiently planned a post-mining land use and meets certain objective criteria.[46] Of course, if the variance is granted, and the land flattened, the land has to go somewhere, and often it is dumped into the valley. If the exception or variance is not granted, then the companies must put the mountain back where they got it.

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[40] 30 U.S.C. § 1265(b)(3) (2000).

[41] *McGinley,* supra note 3, at 58.

[42] *Id.* at 58 & n.192.

[43] *See* 30 U.S.C. § 1265(c)(2)-(3) (enumerating requirements for proposed post-mining land uses).

[44] *Id.* § 1265(c)(3).

[45] Id. § 1265(c)(3)(A).

[46] Id. § 1265(c)(3)(B).

Skepticism is bred from ambiguity. Everyone in the mountains appears to be baffled, even to this day, what the term "AOC" specifically means. This issue came to the forefront in May 1998 when the Charleston Gazette exposed the OSM's lack of enforcement of the AOC requirement as MTM mining was expanding and had already blasted nearly 500 square miles in West Virginia alone.[47] The DEP stated in the article that in 1995, four of the six new MTM sites did not receive exemptions.[48] In 1997, fifteen of the active MTM mines, or seventy-five percent did not receive exemptions.[49] Thus this large percentage of mines would be required to rebuild the mountain to its approximate height.

Of course, they were not. The DEP claimed that there was no detailed federal or state rule that defined or explained the parameters of AOC.[50] For many years the DEP was guessing and created a de facto policy of requiring the mountains to be rebuilt within a dismal fifty feet of their original height.[51] The Gazette reported that a memo was sent out of the OSM office in Morgantown, WV in which it stated:

"For mountaintop removal mining there is not minimum or maximum elevation requirement to which the final contour must be restored after mining…There could be as much as 200 or 300 feet difference between the pre-mining and post-mining elevations."[52]

This lack of enforcement essentially gave the coal companies a license to freely expand their mining areas, as they continued to dump the overburden into the valleys. The article

[47] Ken Ward, Jr., *'As high as God did': Law to Rebuild Mountains Falls by the Wayside*, Charleston (W. Va.) Gazette, May 3, 1998, *available at* http://www.wvgazette.com/News/MiningtheMountains/200803100595.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

reported that several mines, operated by Pen Coal Corp. and Costain Coal, had blown off ninety feet off the top of various mountains to reach coal seams.[53] The company, when the mining had ceased, then dumped the leftover rock and earth into nearby valleys.[54] These mines didn't get mountaintop-removal variances and as a result, could dump the overburden in the valleys and not be required to develop the land. The coal companies thus saved thousands, if not millions of dollars.

The seminal case regarding AOC compliance is undoubtedly, *Bragg v. Robertson*.[55] The plaintiffs, who were eight coalfield residents living near valley fills, alleged that DEP was violating their non-discretionary duties under SMCRA in issuing MTM permits to Arch Coal Company.[56] They alleged that the DEP consistently issued permits without making the requisite findings that assured the restoration of AOC and, in the alternative, economic development on flattened lands.[57] The presiding judge, Charles Haden II, upon urging of the coal companies, took a helicopter ride over the MTMs to see how the companies were treating the newly flat land. This backfired.

Haden was impressed and awestruck by the extent of ecological devastation.[58] He wrote in his opinion that the flyover "revealed the extent and permanence of environmental degradation

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[53] *Id.*

[54] *Id.*

[55] *Bragg v. Robertson*, 54 F. Supp. 2d 635 (S.D.W. Va. 1999). (This case included many other provisions of federal statutes in addition to SMCRA).

[56] *Id*. at 638. The Arch Coal mine that the permit pertained to, was at that time the largest mine within W. Va.

[57] *Id*. at 639.

[58] *Id*. at 646.

this type of mining procures"[59] and "compared to the thick hardwoods of surrounding undisturbed hill, the mine sites appeared stark and barren and enormously different from the original topography."[60] The judge's eyes were opened. He realized for presumably the first time that once these mountains were gone, along with the streams and valleys that were buried, the landscape would never be the same.

As a result, Judge Haden granted first a preliminary injunction to stop the mining and eventually granted a permanent injunction.[61] Not only was the Arch Coal mine shut down, but the DEP was ordered to enforce AOC requirement, which Haden stated correctly was a non-discretionary power of the DEP. Haden also mandated that the AOC requirement must be met to avoid placing excess spoil in the valley streams for the purpose of waste disposal, which essentially abolished the AOC exemption.[62] This injunction had no impact on permits that had already been issued.[63] Of course, this reminder to the DEP to adhere to the rule of law pertained to all future mining permits, not just those of Arch Coal. This was a large victory indeed, but the celebration was short lived.

[59] *Id.*

[60] *Id.*

[61] *Id.* at 663.

[62] *Bragg v. Robertson*, 72 F. Supp. 2d 642, 663 (S.D.W. Va. 1999), *rev'd sub nom. Bragg v. W. Va. Coal Ass'n*, 248 F.3d 274 (4th Cir. 2001). It abolished the exception since allowing flat land after the mine would require the overburden to be placed somewhere which inevitably was the valley.

[63] *Id.*

The Fourth Circuit, on appeal, reversed the Haden's decision, holding that the Eleventh Amendment to the United States Constitution barred the suit against the state.[64] The Fourth Circuit, as we will see, will come to be the biggest obstacle to anti-MTM activists.

B. The Stream Buffer Zone Rule

The DEP, while not enforcing the AOC requirement, was not enforcing another component of SMCRA which is known as the Stream Buffer Zone rule (SBZ).[65] This section has in the past seven years been a hotly contested issue and for good reason. Initially when this rule was added, it simply stated that no land within 100 feet of a perennial stream or an intermittent stream shall be disturbed by surface mining activities, unless the regulatory authority determined that it will not affect state and federally mandated water quality.[66] Additionally, any construct that is made to divert the water away from contaminant should also apply to regulatory standards.[67]

However the Bush Administration drafted a new rule to replace the in 2002 which eventually was signed into law in December 2008, just before Bush left office. This was presumably an attempt to aid the coal companies during nationwide economic hardships and indirectly legalizing the DEP's and OSM's ineptitude. [68] The new rule removed the 100 foot requirement and instead allowed excess fill to be placed in intermediate or perennial streams so long as the company minimized the creation of excess spoil to the maximum extent practicable

[64] Bragg v. Robertson, 248 F.3d 275, 286 (4th. Cir. 2001).

[65] 30 C.F.R §816.57 (1983).

[66] Id. at (a)(1).

[67] Id. at (a)(2).

[68] *Id.* at (b).

and designed the fill to avoid or minimize adverse impacts to perennial and intermediate streams.[69]

Though this new rule required the companies to ensure that there would be a minimal adverse effect (which essentially is an arbitrary term) it replaced the older rule that made a sweeping prohibition of valley fills from even coming close to streams. To determine what a "minimal" effect is cannot be so easily determined considering that even a small amount of fill entering into the stream may have multiple "minimal" effects in areas down stream for miles upon miles.

In April 2009, the Secretary of the Interior announced that the Department of the Interior would attempt to vacate the new buffer zone rule in response to pending litigation challenging the rule.[70] Though happy with the possible change, groups like Earthjustice stress that if and when the rule is vacated and the old 1983 rule is re-instated, that the 1983 rule would actually be enforced.[71] Without the enforcement element, it does not matter which rule is law.

In June 2009, the Obama Administration created a new interagency plan to regulate MTM. The agreement, signed between the EPA, the Department of the Interior, and the Army Corps of Engineers (Corps).[72] The agreement ordered the termination of streamlined permitting processes, a better coordination by the EPA with the state governments to oversee the permitting

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[69] *Id.* at (b)(1).

[70] Press release, Dept. of the Interior, Interior Secretary Salazar Seeks to Vacate Bush's Stream Buffer Zone Rule (Apr. 27, 2009) *available at* http://www.southernenvironment.org/newsroom/press_releases/04_27_09_stream_buffer_zone_rule1/.

[71] *Id.*

[72] Environment News Service, *Obama Mountaintop Coal Mining Plan Disappoints Appalachian Advocates,* http://www.ens-newswire.com/ens/jun2009/2009-06-15-091.asp (last visited Oct. 21, 2009).

process (including oversight with the SBZ rule, as well improving stream mitigation plans).[73] A current lawsuit is pending brought by the Southern Environmental Law Center in U.S. District Court challenging the new SBZ rule that could further catalyze change.[74] Environmental groups are tentative in their joy as they know that the wheels of government and justice are slow and mistrust with federal legislation is surely still prevalent.

C. The Clean Water Act

The Federal Water Pollution Act of 1972 was the first major United States law to address water pollution.[75] The current statute is called the Clean Water Act (CWA).[76] This act monitors and regulates activities and practices that specifically involve fill for development, dams and levees, infrastructure development (highways and bridges), and mining projects.[77]

Specifically section 404 of the Act is of the most concern.[78] Section 404 requires a permit before any dredged or "fill material" may be discharged into water. One of two separate permits, found in section 404 must be obtained in order for any activity to exist that will have any type of environmental impacts: an individual permit[79] and a general permit[80]. These permits are reviewed by the Corps. and are issued only after there is notice given to the public along with

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[73] *Id.*

[74] *Id.*

[75] Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2000).

[76] *Id.*

[77] Environmental Protection Agency, *Wetland Regulatory Authority: Regulatory Requirements* 1 (2003), *available at* http://www.epa.gov/owow/wetlands/pdf/reg_authority_pr.pdf.

[78] 33 U.S.C. §§ 1344 (2000).

[79] *Id.* at (b)(1).

[80] *Id.* at (e)(1).

the an opportunity for public hearings.[81] The Corps' decision to issue a permit "should reflect the national concern for both protection and utilization of important resources."[82] Ultimately, the section 404 permitting process requires extensive review and coordination with numerous federal and state agencies, as well as significant consideration of the public interest.[83]

The individual permit is required for any individual activity that will degrade any waterway[84]. The guidelines to determine "degradation" can be found in section 403(c) of the Act that requires the following considerations: effects the pollutants will have on human health[85], marine life and any changes in ecological diversity or stability[86], the esthetic, recreation, or economic effects[87], the permanence of the effects[88], etc. There is a further guideline set forth by the EPA in which it requires that the Corps seek a mitigation plan or an alternative that would have "less adverse impact on the aquatic system."[89]

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[81] *Id.* at (a).

[82] 33 C.F.R. § 320.4(a)(1) (2008).

[83] Environmental Protection Agency, *Wetland Regulatory Authority: Regulatory Requirements* 1 (2003), *available at* http://www.epa.gov/owow/wetlands/pdf/reg_authority_pr.pdf.

[84] "Waters of the United States" include interstate waters and all waters used (or that could potentially be used) in interstate commerce, and "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams) [et al.] ... the use, degradation or destruction of which could affect interstate or foreign commerce...." 40 C.F.R. § 230.3(s) (2008).

[85] *Id.* at §1343 (c)(1)(A).

[86] *Id.* at (c)(1)(B)

[87] *Id.* at (c)(1)(C).

[88] *Id.* at (c)(1)(D).

[89] 40 C.F.R. § 230.10.

Moreover, Corps regulations mandate that an individual permit requires a "case by case evaluation of a specific project" in accordance with certain procedures and a "determination that the proposed discharge is in the public interest."[90] The determination whether to issue a permit must be "based on the evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest."[91]

Generally speaking, the National Environmental Policy Act (NEPA) requires the Corps to conduct an environmental impact statement (EIS) before granting an individual permit that must include an analysis of direct and indirect environmental "effects" of the proposed action, including "cumulative" impacts and "cumulative actions". [92] But to determine if an EIS is needed, the Corps must prepare an "environment assessment" (EA) which should "include a brief discussion of the need for the proposed action, or appropriate alternatives if there are unresolved conflicts."[93] If after analyzing the environmental impacts in the EA, the Corps concludes that the activity will not have a significant effect on the human environment, it may issue a "Finding of No Significant Impact" (FONSI) and is not required to prepare an EIS.[94]

The problem lies within the alternative permit, which is the general permit. This permit, known as Nationwide Permit 21 (NWP 21) is codified in section 404(e) which states that that the

[90] 33 C.F.R § 323.2(g)

[91] Id. at §320.4.

[92] 40. C.F.R. §§ 1502.16, 15.08.8, 1508.25(a)(2). *See also* 42 USC § 4332 (a)(2)(C). This report must include (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. *Id.* at (a)(2)(c)(i-v).

[93] 40 C.F.R. §§ 1501.3-1501.4.

[94] Id. at §1501.4(e).

Corps can issue general permits on a "state, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material" so long as the categories of activities "are similar in nature, will cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative effects on the environment."[95] By granting these general permits, the Corps can avoid the detailed analysis and public participation required for individual permits. It can then, essentially, use NWPs to rubber-stamp the vast majority of stream-filling activities associated with coal mining projects.

Moreover when a court is reviewing the granting of these permits, the standard to determine the validity of the permit issued will be whether the Corps. issued the permit "arbitrarily or capriciously and with abuse of discretion" with much deference given to the issuing party.[96]

There has been considerable debate and litigation concerning the "minimally adverse effect" clause in Section 404. The text of the law is flawed. No coal company, that has an MTM, can be granted a NWP since destroying an entire mountain will certainly have a more than a minimal adverse effect on the mountain itself and on the community. This assertion is enhanced especially since the NWP covers multiple mining practices within the state, region, or nation that fit into the approved category. Logic dictates that despite a minimal adverse affect on specific area, if a permit is granted to a whole region, those individual operations will have a large cumulative affect.

The cumulative and irreversible effects are staggering. According to a fact sheet, derived from a Corps EIS and published by Earth Justice, approximately 1,200 mile of headwater

[95] 33 U.S.C. 1344(e)(1).

[96] 5 U.S.C. §706(a)(2)A).

streams were directly impacted by MTM and valley fills between 1992 and 2002.[97] An estimated 724 stream miles were covered by valley fills from 1985 to 2000.[98] The EIS conceded that they could not establish an "acceptable" amount of stream loss and could not conclude with any acceptable degree of certainty that the free flowing streams could be reconstructed, or that the hardwood forests surrounding the mines could be reclaimed to their previous state.[99] What was more shocking is that the Corps. concluded that the "large scale surface mining will result in the conversion of large portions of one of the most heavily forested areas of the country, also considered one of the most biologically diverse, to *grassland habitat.*"[100]

The widespread environmental effects are indicative of how damaging the overburden from the MTM is on the valleys below and their streams. Despite the glaring devastation, in the name of expediency, the Corps have issued the NWPs generously and have evaded the more stringent requirements associated with the individual permit.

1. Kentuckians for the Commonwealth v. Rivenburgh

On August 21, 2001 a complaint was filed by Kentuckians for the Commonwealth, in which the group challenged the placing of overburden into streams under the CWA and its regulations.[101] The Corps. were named as defendants. The complaint prayed for injunctive and declaratory relief regarding a mining permit issued by the Corps under NWP 21 allowing Martin

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[97] *Studies for the Draft Environmental Impact Statement Demonstrate that the Environmental Harm from Mountaintop Removal Coal Mining and Valley Fills is Substantial and Irreversible*, http://www.earthjustice.org/library/policy_factsheets/EIS_fact_sheet.pdf (last visited Nov. 2, 2009).

[98] Id. at 1

[99] Id.

[100] Id. at 2.

[101] *Kentuckians for the Commonwealth v. Rivenburgh*, 206 F. Supp. 2d 782 (S.D. W.Va. 2002).

Coal to build dozens of valley fills that would bury over 6 miles of streams in Martin County, KY with waste rock and dirt from their MTM mining activities.[102]

The Corps contended "that because the CWA does not define the term "fill material," the statute is ambiguous and…the Court must defer to the agencies' reasonable construction."[103] The plaintiffs contended that the valley fills were actually waste which the CWA could not have intended to allow especially if the "waste"[104] were to bury twenty-seven miles of valley and streams. The CWA's clear intent was "to restore and maintain the chemical, physical, and biological integrity of the nation's waters."[105]

At precisely the time the opinion of this case was written, on May 3, 2002, the Bush Administration altered the CWA to permit waste dumps in valley streams.[106] This new rule clarified that the valley fills dumped into streams was exactly that, "fill material"[107] On May 8th, the judge granted the injunction and found that the new Bush rule violated the CWA since there was no way Congress had intended this type of material, on this large of scale, to be dumped in the water and not be within the CWA protection.[108] This was a large victory for the mountains, but unfortunately was short-lived.

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[102] *Id.* at 804.
[103] *Id.* at 794.

[104] *Id.* at 788.

[105] 33 U.S.C. § 1251(a) (2000)
[106] Proposed Revisions to the Clean Water Act Regulations Definitions of "Fill Material" and "Discharge of Fill Material," 65 Fed. Reg. 21,292, 21,295–96 (proposed Apr. 20, 2000) (to be codified at 33 C.F.R. 323.2(e) & 40 C.F.R. 232.2).
[107] *Id.*

[108] Kentuckians for the Commonwealth v. Rivenburgh (Kentuckians I), 204 F. Supp. 2d 927, 946 (S.D. W.Va. 2002).

It should come to no surprise what the Fourth Circuit did next. On January 29, 2003 the judgment was reversed.[109] The Fourth Circuit validated the permits and stated that the valley fills were not pollutant waste as is garbage, sewage, etc. and thus "fills" were outside the realm of the Congress's intention.[110] The Fourth Circuit also decided that the district court's ruling regarding the new rule promulgated by President Bush was out of the scope of the issue since none of the parties had sought a decision regarding such.[111]

The future of the NWP is in question. The Corps have been recently holding public hearings into the future of the NWP 21. The proposals, only affecting Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia are certainly a step in the right direction.[112] The first proposal is to simply prohibit NWP 21 from being issued in Appalachia and instead an individual permit, with its more stringent guidelines and expectations.[113] The second proposal is to suspend the permit while the Corps evaluates the comments received during the thirty day comment period. Any permits issued during the hiatus would have to be individual permits.[114] Town meetings conducted by the Corps are taking place currently day to give coal supporters and environmentalist a venue to voice their opinions.

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[109] 317 F.3d 425 (4th Cir. 2003).

[110] *Id.* at 448.

[111] *Id.* at 438.

[112] Press Release, United States Army Corps of Engineers, *Corps Solicits Public Comment on NWP-21 Proposals* (July 21, 2009), *available at* http://www.nao.usace.army.mil/News/20090715_PublicComment_NWP.asp.

[113] *Id.*

[114] *Id.*

IV. THE CLIMB AHEAD

How can a region possesing almost endless coal resources find themselves in such a heated conflict with the industry that should not be eradicating the world around them, but instead should be creating a thriving region full of jobs and opportunities? The truth is that the coal companies, taken within the historical context, have never been a true friend to the people in Appalachia and have simply profited off of them without giving much in return. There is no doubt that the great disadvantage the coal companies inflicted on the Appalachian mine workers a hundred years ago has created a system of disadvantage and acute poverty today that will be hard to reverse. Furthermore, the mechanization of coal mining allows this legacy to continue. The coal companies have been, and continue to be, the only game in town and they have not been paying.

There is enough blame to go around and the coal companies do not have to take all of it. The political system a century ago, and continuing to this day, perpetuates the economic stagnation of Appalachia through badly written pieces of legislation and overt failure to enforce them. The people simply want a rule of law that makes sense and which protects the region's natural resources but allows the region to be economically viable. They want the legislation to have enforcement requirements that are unambiguous and not susceptible for abuse or neglect.

The legislation must be changed or modified. In order to rid itself of the AOC dilemma, the SMCRA must be amended to give a tangible elevation height, within reason, and must abolish the AOC exemption. Is it feasible to build a mall in the middle of a forest or housing development on top of a flattened hill when there is no other road or infrastructure to support it? And is it fair for the coal company to foot the bill for this development? The AOC exemption

should be removed and enforcement of the AOC should be implemented alongside new, specific, modifications that are feasible.

Section 404 permits should be confined to the individual permits, exclusively. Judging by the strong opposition to NWP 21 along with the headway made in local court, it should be abolished altogether. The NWP allows too much leeway for discretion and has shown to be easily circumvented. The CWA should issue individual permits so long as the requisite data collection, as per the rule of law, is followed. There is too much is at stake to keep burying the streams and valleys.

Appalachians may be well served to bury their contempt for the coal companies and instead take aim at the practice of MTM exclusively. Perhaps with better AOC requirements and the implementation of individual permits, MTM will become too arduous and time consuming to be profitable. Then the coal company would have to adapt. No one is naïve enough to think that suddenly the country should stop using coal since it is still an important and viable energy source. The coal companies will survive with possibly the help of tax incentives and a better relationship with the communities in which they operate. Coal is not going anywhere anytime soon, so they need to be part of the solution.

MTM is just one form of coal mining. Ending it would force the coal industry to re-visit traditional mining techniques (such as shaft mining) which employ more workers and preserve the tops of the mountains for future generations. This in turn would breathe new life into the region, sustain local economies through better employment levels, and maintain the beauty that is only rivaled by the great Rocky Mountains.

Either the law has to change or MTM is to be abolished or even both. To continue down this path of destruction will only perpetuate the way Appalachian region and its inhabitants have

always existed– forgotten and abused. Once the mountains go, then so will be the people. And when that happens, the coal companies will no longer be the primary culprit. The entire nation will be.