King of the Hill: Ohio Valley Environmental Coalition v. Aracoma Coal Company and the Battle Raging between the Coal Industry and Environmentalists over Mountaintop Mining

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KING OF THE HILL: OHIO VALLEY ENVIRONMENTAL COALITION V. ARACONA COAL COMPANY AND THE BATTLE RAGING BETWEEN THE COAL INDUSTRY AND ENVIRONMENTALISTS OVER MOUNTAINTOP MINING

I. INTRODUCTION

Not long after being sworn into office, President Obama delivered remarks at the White House regarding what he called the single most fundamental issue concerning our nation’s future: energy.\(^1\) Obama spoke of the need for energy independence primarily because dependence on foreign oil may fuel threats to national security.\(^2\) The President stated that the purchase of foreign oil can bankroll dictators, pay for nuclear proliferation and fund terrorism.\(^3\) For decades, Obama said, presidents have warned about the costs of relying on foreign oil and have vowed to attain energy independence.\(^4\) Over the years, however, the United States has gone from importing about one-third of its oil from foreign countries to now importing nearly half.\(^5\)

The prevalence of coal-generated electricity in the U.S. should be an important consideration as part of the Obama Administra-

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\(^2\) See id. (suggesting that pumping money into foreign countries for oil benefits terrorist operations in Middle East region where much of the oil is located).

\(^3\) See id. (observing that dependence on foreign oil subjects Americans to fluctuating gas price due to unstable regions, and stifles competition and innovation).

\(^4\) See id. (discussing President Nixon’s promise to make United States energy independent by end of 1970s).

\(^5\) See id. (addressing increase in energy dependence since 1970s when Nixon promised independence). The President went on to proclaim that the policy of his new Administration will be to reverse the trend of dependence on foreign oil and no longer risk the peril that comes with dependence. See id. The President stated,

Now America has arrived at a crossroads embedded in American soil, in the wind and in the sun, we have the resources to change. Our scientists, businesses and workers have the capacity to move us forward. It falls on us... [a]nd for the sake of our security, our economy and our planet, we must have the courage and commitment to change.

Id.

(293)
tion's plan to become energy independent. In 2007, coal was responsible for generating nearly half of U.S. energy, with more than one-third of the country's coal coming from the Appalachian region. Specifically, West Virginia, produces the second most coal of any state, behind Wyoming. Not only is coal prevalent in the U.S., but it is also inexpensive compared to petroleum or natural gas. Coal can be extracted by underground mining or by surface mining; the latter has become a popular means by which to extract coal in recent decades and accounts for roughly two-thirds of the nation's coal production. Mountaintop mining, a form of surface mining particularly popular in Appalachia, is responsible for approximately ten percent of the country's coal and about forty percent of coal mined in West Virginia and Kentucky.

As the practice of mountaintop mining has increased in recent years, so too has opposition to the practice, with numerous environmental groups suing in an attempt to curb a practice that many view as overly destructive. An environmental group will often bring suit against the coal company operating the specific mining site at issue and the various agencies that are responsible for issuing permits to the companies that allow the mountaintop mining to


8. See id. (highlighting that 39.7% of U.S. coal was produced in Appalachia in 2007).


10. See National Mining Association, supra note 6 (describing coal as most affordable source of power fuel per million Btu, averaging less than one-quarter of price of petroleum and natural gas).

11. See id. (noting increase in use of surface mining technique versus underground mining).

12. See id. (displaying prevalence of mountaintop mining in Appalachia).

This Note addresses one such case—Ohio Valley Environmental Coalition v. Aracoma Coal Company (Aracoma Coal).15 Aracoma Coal involves four permits issued by the United States Army Corps of Engineers (the Corps), allowing for certain mountaintop mining processes at four mining sites in West Virginia.16 In February 2009, the Fourth Circuit, in a controversial decision, overturned a 2007 order to vacate the four permits by the U.S. District Court for the Southern District of West Virginia and held that the four permits issued by the Corps were valid.17

This Note analyzes the Fourth Circuit’s decision in Aracoma Coal. Part II of this Note provides the factual basis important for understanding the technique of mountaintop mining and introduces some of the key players in the dispute and describes their roles.18 Part III presents a brief overview of the statutory framework that relates to mining regulations and the environmental statutes that shape mining practices.19 Part IV describes the Fourth Circuit’s analysis in reaching its conclusion to validate the four permits issued by the Corps.20 Part V analyzes and ultimately supports the Fourth Circuit’s decision to grant the Corps deference in the issuance of the permits.21 Finally, Part VI discusses the possible ramifications of the Fourth Circuit’s decision on the future practice of mountaintop mining, and forecasts potential legislative action from Washington in response to Aracoma Coal and mountaintop mining in general.22

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15. 556 F.3d 177 (4th Cir. 2009).
16. See Aracoma Coal, 556 F.3d at 187-88 (describing permits issued by Corps for mountaintop mining process).
17. See id. at 217 (reversing and vacating district court’s decision to rescind four challenged permits at issue).
18. For further discussion of the facts of Aracoma Coal, see infra notes 23-51 and accompanying text.
19. For further discussion of the legal background of Aracoma Coal, see infra notes 52-108 and accompanying text.
20. For a narrative analysis of the Fourth Circuit’s decision in Aracoma Coal, see infra notes 109-51 and accompanying text.
21. For a critical analysis of the court’s decision in Aracoma Coal, see infra notes 152-88 and accompanying text.
22. For further discussion of the impact of the Fourth Circuit’s decision in Aracoma Coal, see infra notes 189-206 and accompanying text.
II. FACTS

As the nation struggles to achieve energy independence, mountaintop removal mining has become particularly widespread in Appalachia over the last twenty years. To reach coal deposits layerd horizontally within mountains, miners blast away soil and rock on a mountaintop to expose the coal. At a typical mountaintop site, a mining operation will clear miles of hardwood forest, then drill holes and pack them with explosives to blast away rock, reducing the elevation of the mountain by as much as 800 feet. The soil and rock, known as “spoil,” which were blasted from atop the mountain, are removed and placed in adjacent valleys. After the coal is excavated, the displaced spoil is repositioned back on top of the mountain in an effort to recreate the mountain’s original shape. Due to stability issues associated with placing the spoil back atop the mountain, the excess spoil, known as “overburden,” remains in the valleys, creating a “valley fill” that buries intermittent and perennial streams.

In Aracoma Coal, several environmental groups in the Appalachian region, namely the Ohio Valley Environmental Coalition, the Coal River Mountain Watch, and the West Virginia Highlands Conservancy (collectively, OVEC) asserted various claims against the Corps. Although the Corps has no direct authority over

24. See id. at 615 (describing process of mountaintop mining); see also Aracoma Coal, 556 F.3d at 186 (outlining process of mountaintop mining).
26. See Corps of Eng’rs, 479 F. Supp. 2d at 615 (describing valley fill process); see also Aracoma Coal, 556 F.3d at 186 (noting valley fill process).
27. See Corps of Eng’rs, 479 F. Supp. 2d at 615 (noting that mining operations attempt to replace overburden spoil when feasible).
28. See Aracoma Coal, 556 F.3d at 186 (explaining how valley fills are created in associated with mountaintop mining). Water that collects in these fills must be moved to ensure the fill’s stability. See id. This is done by creating stream segments which channel the water out of the fill and into a sediment pond where the sediment can settle out of the fill runoff, with the water eventually being discharged back into existing streams. See id. A great deal of the impact from valley fills is felt by headwater streams, large streams, or rivers. See id. at 186-87. The parties here disagree over the exact role that headwater streams play in the area’s overall ecology, but the parties do agree that headwater streams play an important role in the area’s ecology. See id.
29. See Corps of Eng’rs, 479 F. Supp. 2d at 615 (naming parties in suit); see also Aracoma Coal, 556 F.3d at 185 (listing parties in same suit, on appeal).
mountain top removal mining, it has authority over the valley filling process—a necessary component of the mountaintop mining process. Authority to control the valley fill process is vested in the Corps pursuant to Section 404 of the Clean Water Act (CWA). The CWA authorizes the Corps to issue permits for the disposal of "dredge material" into "waters of the United States." While OVEC's claims were brought against the Corps' actions in issuing the permits, a litany of interested parties—primarily coal companies and various industry interest groups in the region—joined as Intervenors in the case.

From July 2005 through August 2006, the Corps issued four separate CWA Section 404 permits to coal mining operations in West Virginia. The permits allowed mining operations to place overburden spoil in various streams near the mining sites. In the instant case, OVEC challenged the four permits at issue in the District Court for the Southern District of West Virginia. The permits allowed for the filling of streams in conjunction with surface area coal mining. In the aggregate, the four permits granted permission for the construction of twenty-three valley fills, twenty-three

30. See Corps of Eng'rs, 479 F. Supp. 2d at 615 (establishing Corps' indirect role in mountaintop mining by highlighting Corps' control over process of permitting valley fills used in mountaintop mining).
31. See id. (describing basis of Corps' authority to issue permits for valley fills).
32. See 33 U.S.C. § 1251 (vesting authority in Corps to issue § 404 permits for disposal of certain material such as debris from mountaintop mining activities).
33. See, e.g., Aracoma Coal, 556 F.3d at 177 (listing Intervenors in suit from coal industry). The case's namesake, Aracoma Coal Company, operated Camp Branch Mine, the first of the four mining sites to which the Corps issued a challenged § 404 permit. See id. at 187. The three subsequent mine operators and sites were as follows: Elk Run Coal Company's Black Castle Mine, Alex Energy's Republic No. 2 Mine, and Independence Coal Company's Laxare East Mine. Id. Each of the affected mining companies intervened as defendants in the suit, along with the West Virginia Coal Association.
34. See Corps of Eng'rs, 479 F. Supp. 2d at 615 (describing timing of § 404 permits issued by Corps to various mining operations); see also Aracoma Coal, 556 F.3d at 187-88 (outlining timeline of permits issued by Corps and challenges to permits brought by OVEC).
35. See Aracoma Coal, 556 F.3d at 187 (discussing fill activities authorized by permits at issue).
36. See id. at 187-89 (noting procedural posture of suit). OVEC's challenges began in September 2005 when it challenged the first of four permits issued by the Corps in July 2005. See id. at 187. OVEC then amended its complaint with each subsequent permit issued by the Corps to individual mining operations, culminating in August of 2006 with challenges to four individual § 404 permits issued to four separate coal mining operations during the thirteen month period. See id.
37. See id. at 186-87 (explaining activity that § 404 permits allow).
sediment ponds, and impacted 68,841 linear feet of intermittent and ephemeral streams, spanning over thirteen miles.\textsuperscript{38} OVEC's claims against the Corps arose under the CWA and National Environmental Policy Act (NEPA).\textsuperscript{39} OVEC claimed that the Corps' issuance of the four Section 404 permits violated the CWA and NEPA, and were "arbitrary and capricious, and an abuse of discretion" under the Administrative Procedure Act (APA).\textsuperscript{40} Given the adverse environmental effects that the proposed projects would have, OVEC asserted that the Corps was required under NEPA to prepare an Environmental Impact Statement (EIS) for each of the four projects prior to issuing a permit.\textsuperscript{41} OVEC further claimed that the Corps did not properly determine the individual and cumulative adverse impacts on the affected aquatic ecosystems in accordance with the CWA and the Corps' own guidelines.\textsuperscript{42} Conversely, the Corps contended that it was entitled to deference in its determinations regarding its various actions, including the scope of its NEPA analysis and interpretation of its own guidelines.\textsuperscript{43} The Corps further stated that its findings related to the individual and

\textsuperscript{38} Id. at 187 (describing cumulative results that four permits at issue would authorize). For a description of valley fills and sediment ponds, see supra note 28 and accompanying text. The Camp Branch mine included four valley fills impacting 15,059 linear feet of streams (both intermittent and ephemeral), along with four sediment ponds that would temporarily impound another 455 linear feet of streams. Aracoma Coal, 556 F.3d at 187. Black Castle included nine valley fills, impacting 13,401 linear feet of streams, also with six sediment ponds, temporarily impounding an additional 879 feet of streams. Id. Republic No. 2 called for three valley fills, affecting 9,918 linear feet of streams, with three sediment ponds temporarily impacting 690 linear feet of streams. Id. Finally, Laxare East involved seven valley fills, impacting 24,860 linear feet of streams, along with ten sediment ponds, temporarily affecting 3,099 linear feet of streams. Id.

\textsuperscript{39} See Corps of Eng'rs, 479 F. Supp. 2d at 616 (listing statutes under which OVEC's challenge was brought); see also Aracoma Coal, 556 F.3d at 188-89 (noting various statutes under which claims were brought).

\textsuperscript{40} Aracoma Coal, 556 F.3d at 187-88.

\textsuperscript{41} See id. at 187-88 (discussion OVEC's claims against Corps). OVEC's claim suggested that the proposed projects would affect water quality, aquatic and terrestrial ecosystems and habitats, species survival and diversity, crucial stream functions, forests, and the aesthetic value of the destroyed mountains. See id.

\textsuperscript{42} See id. at 188 (noting OVEC's CWA claims). For further discussion of Corps' guidelines in association with the CWA, see infra note 63 and accompanying text.

\textsuperscript{43} See id. at 188-89 (noting Corps' argument on appeal that scope of its analysis was proper and that its various findings regarding impacts of activity and plans to mitigate level of impacts below level of significance were not arbitrary or capricious and thus were entitled to deference).
cumulative impacts and its mitigation plans were not arbitrary or capricious.\textsuperscript{44}

In March 2007, the district court found in favor of OVEC and held that the Corps failed to comply with the CWA and NEPA when it issued the four permits.\textsuperscript{45} The court further noted that a CWA Section 404 permit may not be issued if the Corps fails to comply with its own guidelines and with NEPA when making a finding of no significant impact (FONSI) or performing an EIS.\textsuperscript{46} The court remanded the permits to the Corps for further consideration in light of its findings.\textsuperscript{47} The court also rescinded the four permits, enjoining the Corps and Intervenors from taking any action under the challenged permits.\textsuperscript{48}

On appeal, the Fourth Circuit reversed the district court's order and held that the Corps did not violate the CWA or NEPA in its

\textsuperscript{44} See id. at 188-89 (establishing Corps' claims on appeal). Intervenors raised the same challenges as the Corps in order to partake in the litigation. See id. at 189.

\textsuperscript{45} See Corps of Eng'rs, 479 F. Supp. 2d at 662 (holding in favor of OVEC). The district court found that the likely impacts of the valley fills would be significant and adverse; the mitigation plans for each permit were not sufficient to compensate for the impacts; the Corps should have considered broader impact of entire valley fill project, instead of limiting its NEPA scope to the impact on jurisdictional waters; and the Corps' evaluation of the cumulative impacts of the projects was insufficient. See id. at 663.

\textsuperscript{46} See id. at 662-63 (observing that Corps did not adequately review certain environmental impact issues as required by CWA and NEPA, and Corps' failure to conduct proper reviews and make FONSI was incorrect, meaning a full EIS may have been required).

\textsuperscript{47} See id. at 663 (discussing potential remedies; court opted to remand permits to Corps instead of directing Corps to prepare full EISs for each permit application).

\textsuperscript{48} See Aracoma Coal, 556 F.3d at 188 (noting that district court later granted Intervenor's request for limited stay on injunctions for some fills, "provided that Intervenors complied with all conditions, including mitigation requirements of the permits"). In a separate ruling, in June 2007, the district court granted summary judgment to OVEC on its claim seeking a declaratory judgment that the stream segments created to channel runoff from the valley fills to the sediment ponds were "waters of the United States," and thus the Corps did not have authority to permit the discharge of pollutants into the stream segments with a CWA § 404 permit. See id. at 188. The district court granted OVEC's request for declaratory judgment, finding that the stream segments were "waters of the United States," meaning that mining operators needed a CWA § 402 permit, and that the Corps lacked authority to permit such discharge. See id. The Fourth Circuit reversed and granted the Corps declaratory relief on this issue in Aracoma Coal. See id. at 186. Although this is an important issue relating to valley fill permits and mountaintop removal mining, this Note does not address the issue relating to the court's determination of what is considered "waters of the United States." For further discussion of the issue, see id. at 209-16.
issuance of the four valley fill permits.\textsuperscript{49} The Fourth Circuit overturned the lower court’s ruling, holding that the Corps did not act arbitrarily or capriciously in conducting its various impact analyses for the permits and proposed plans associated with the permits.\textsuperscript{50} The Fourth Circuit concluded that the Corps’ issuance of the Section 404 permits to the four mining operations was within the Corps’ authority under the CWA and NEPA.\textsuperscript{51}

### III. Background

This case is one in a long line involving the mountaintop mining process.\textsuperscript{52} Typically, an environmentalist group will bring suit against the coal company operating a mining site and the various government agencies that regulate the activities necessary for mountaintop mining.\textsuperscript{53} As with many suits implicating questions of

\textsuperscript{49} See id. at 186 (finding that district court did not grant proper deference to Corps’ actions and that in consideration of proper level of deference, Corps did not violate CWA or NEPA when issuing challenged permits).

\textsuperscript{50} See id. (overruling district court and holding that Corps acted within its discretion in granting permits at issue). The proposed plans associated with the permitted fill activities primarily included mitigating measures adopted to reduce the level of adverse impact below a level of significance, thus justifying a finding of no significant impact (FONSI), after considering mitigation. See id. at 207.

\textsuperscript{51} See id. at 186 (reversing district court orders; vacating district court’s injunction on four mining operations; reversing and remanding district court’s grant of declaratory relief on issue of stream segments being categorized as “waters of the United States”).


The normal flow and gradient of the stream is now buried under millions of cubic yards of excess spoil waste material, an extremely adverse effect. If there are fish, they cannot migrate. If there is any life form that cannot acclimate to life deep in a rubble pile, it is eliminated. No effect on related environmental values is more adverse than obliteration. Under a valley fill, the water quality of the stream becomes zero. Because there is no stream there is no water equality.


\textsuperscript{53} See Corps of Eng’rs, 479 F. Supp. 2d at 615 (discussing Corps’ involvement in mountaintop mining process that makes suits against Agency possible). Although the Corps does not have direct regulatory authority over the mountaintop removal process, it plays an indirect, yet crucial, role with its control over a necessary byproduct of the mountaintop removal process: valley fills. See id. Section 404 of the CWA allows the Corps to control this aspect of the mining process by issuing
environmental law, challenges brought against mining operations and agencies require courts to address a complex web of statutes and regulations.\textsuperscript{54} As Judge Gregory keenly observed before delving into his fifty-page majority opinion, "A complex statutory framework undergirds the regulation of valley fills and associated sediment ponds . . . ."\textsuperscript{55}

A. The Statutory Framework of Challenges to the Corps' Agency Actions

Four statutes contribute to the scope of the Corps' authority to issue valley fill permits: the Surface Mining Control and Reclamation Act of 1977 (SMCRA),\textsuperscript{56} the APA, the CWA, and NEPA.\textsuperscript{57} Specifically, a court reviewing a Corps-issued valley fill permit must consider whether the permit was issued in accordance with the CWA and NEPA, with the APA serving as a tool for judicial review

\textsuperscript{54} See, e.g., Braverman: King of the Hill: Ohio Valley Environmental Coalition v. Aracoma Coal, 556 F.3d at 189 (establishing statutory framework that provides foundation for court's opinion); see also Corps of Eng'r, 479 F. Supp. 2d at 625-26 (addressing statutory background of CWA and NEPA); see also Hurst, 604 F. Supp. 2d at 869-72 (explaining statutory considerations of CWA and NEPA required by court).

\textsuperscript{55} See Aracoma Coal, 556 F.3d at 189 (prefacing opinion with explanation of statutory framework behind challenges to mountaintop mining operations).

\textsuperscript{56} Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1201 (2006). Congress passed the SMCRA with dual, yet competing, goals in mind: to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations," while also recognizing the need to "strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy." See 30 U.S.C. § 1202(a), (f) (2006). A SMCRA permit requires excess spoil to be disposed of in a "controlled manner" to ensure stability. See 30 U.S.C. 1265(b)(22)(A) (2006). A SMCRA permit alone, however, is insufficient to allow mining operations to construct valley fills during mountaintop removals. See Aracoma Coal, 556 F.3d at 190. Mining operations must also obtain a CWA permit in order to construct a valley fill. See id. Specifically, a CWA § 404 permit is required for valley fills to allow the discharging of spoil into local waters. See id. (citing 33 U.S.C. § 1344(a) (2006)). The Corps then becomes involved in the process as the agency with the authority to issue § 404 permits. See id. at 190-91. The Corps uses § 404 permits to authorize the construction of valley fills and sediment ponds and follows guidelines promulgated by the EPA pursuant to 33 U.S.C § 1344(b)(1) (2006) which has been adopted into the Corps' own guidelines under 40 C.F.R. pt. 230 (2008). See id. at 191. NEPA comes into play when the Corps reviews the permits for CWA compliance. See id.

\textsuperscript{57} See Aracoma Coal, 556 F.3d at 189 (explaining role CWA and NEPA play in this litigation).
when assessing claims against agency actions. The APA mandates that a reviewing court must set aside an agency action if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Giving consideration to the APA standard of review, a court must determine whether a permit was issued in accordance with the CWA and NEPA.

B. The Clean Water Act (CWA)

In 1972, Congress enacted the Federal Water Pollution Control Amendments, more commonly known as the Clean Water Act (CWA), in an attempt to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." The CWA prohibits the discharge of any pollutants into navigable waters of the United States unless otherwise authorized by a permit. The Corps has the authority to grant permits allowing for discharge into various waters. The Corps must issue the permits, known as Section 404 permits, in accordance with the guidelines promulgated by the Environmental Protection Agency (EPA), which were incorporated into the Corps' own regulations for the permitting process.

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58. See id. at 190-93 (noting statutory review required by court).
60. See Aracoma Coal, 556 F.3d at 189 (describing interplay between APA, CWA, and NEPA).
62. See id. at 623-24 (explaining that CWA defines "pollutants" as including dredged spoil, rock, and dirt).
63. See Corps of Eng'rs, 479 F. Supp. 2d at 624 (describing Corps' authority to issue permits). The Corps may grant either individual or general permits for a specific disposal site. See id. At issue in this case are only individual permits. See id. General permits are used for activities determined to be similar in nature and that result in minimal adverse incremental or cumulative impacts to waters of the U.S. and have been the subject of extensive litigation. See generally Ohio Valley Envtl. Coal. v. Bulen, 429 F.3d 493 (4th Cir. 2005); see also Hurst, 604 F. Supp. 2d 860 (S.D. W. Va. 2009). For further discussion of the statutory framework, see supra note 56.
64. See Corps of Eng'rs, 479 F. Supp.2d at 624 (discussing origin of Corps' authority to permit valley fills). The district court in Corps of Eng'rs noted that the underlying intent behind the guidelines for administering § 404 permits is that dredged material should not be discharged if it will cause unacceptable adverse impacts on the aquatic ecosystem. See id. (citing 40 C.F.R. pt. 230.1(c)). The guidelines require the Corps, in considering potential adverse impacts of a discharge, to determine the short- and long-term effect that the discharge will have on: 1) the physical substrate of the proposed disposal site; 2) water circulation, fluctuation, and salinity; 3) suspended particulate/turbidity in the vicinity of the disposal site; 4) the introduction, relocation or addition of contaminants in the aquatic environment; and 5) the structure and function of the aquatic ecosystem and organisms. See id. (citing 40 C.F.R. pt. 230.11(a)-(e)). For further discussion of the statutory framework, see supra note 56.
According to these EPA guidelines, the Corps may not issue a Section 404 permit if the proposed discharge would cause a significant degradation to U.S. waters. A permit may, however, still be issued if the potential adverse impacts are minimized through "appropriate" and "practicable" steps. The Section 404 permit-issuing process undertaken by the Corps involves extensive review by the Agency, along with several state and federal agencies, as well as consideration of the public's interest.

C. The National Environmental Policy Act (NEPA)

NEPA, enacted in 1969, serves as the country's "basic national charter for protection of the environment." NEPA aims to "promote efforts which will prevent or eliminate damage to the environment . . . and stimulate the health and welfare of man." NEPA requires a federal agency to take a "hard look" at the environmental consequences of a proposed action. NEPA further calls for public dissemination of relevant environmental information. One commentator noted that NEPA possesses "appealing policy notes—good science, public participation, government reform, and protection of the environment."

If an agency finds that the proposed action would "significantly affect[ ] the quality of the human environment" after taking the

65. See 40 C.F.R. pt. 230.10 (listing instances in which Corps may not grant § 404 permit).
66. See id. (explaining that adverse impacts may be minimized by requiring mitigation as a condition of permit). Mitigation may be used to minimize adverse impacts but it must relate directly to the impacts of the proposal and be designed to avoid, reduce, or compensate for the resource losses that are likely to occur from the discharge. See 40 C.F.R. pt. 230.4(r)-(1)-(2) (2008).
67. See Aracoma Coal, 556 F.3d at 191 (discussing permit review process).
68. See Corps of Eng'rs, 479 F. Supp. 2d at 625 (quoting 40 C.F.R. pt. 1500.1(a) (2008)).
70. See Corps of Eng'rs, 479 F. Supp. 2d at 625 (citing U.S. Supreme Court interpretation of NEPA). NEPA is a procedure-based, as opposed to a result-based, act that only requires adverse effects of a proposed project to be identified and evaluated. See id. The Act does not require a proposed action to have substantive environmentally friendly results. Id. NEPA prohibits uninformed rather than unwise agency action. See Wyo. Outdoor Council v. U.S. Army Corps of Eng'rs, 351 F. Supp. 2d 1232, 1240 (D. Wyo. 2005).
71. See Corps of Eng'rs, 479 F. Supp. 2d at 625 (describing procedures for agency actions required under NEPA). NEPA's purpose for supplying public information is to allow for public comment and participation in the decision making process of the agency action. See id.
requisite "hard look," NEPA requires the preparation of an EIS.\(^\text{73}\) When it is unclear whether a proposed action would "significantly" affect the environment, an agency can prepare an environmental assessment (EA), a document less detailed than an EIS.\(^\text{74}\) An EA, however, may not serve as a substitute for an EIS if the proposed action could significantly affect the environment.\(^\text{75}\) If an agency concludes that the permitted action will have no significant impact on the environment, the agency must then issue a FONSI.\(^\text{76}\)

An agency can avoid the preparation of an EIS even if the proposed action would cause significant impact by requiring the applicant to include mitigation measures in the proposed plan that will reduce the impact below a level of significance.\(^\text{77}\) Courts have repeatedly stated, however, that an agency must show why the proposed mitigation will reduce the action's cumulative effects below a

\(^\text{73}\) See Corps of Eng'rs, 479 F. Supp. 2d at 625 (discussing NEPA review process); see also Wyo. Outdoor, 351 F. Supp. 2d at 1240 (discussing NEPA review process); Aracoma Coal, 556 F.3d at 191 (noting that Act requires EIS for only major federal actions that significantly impact environment). An EIS should discuss the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided, and alternatives to the proposed action. See Wyo. Outdoor, 351 F. Supp. 2d at 1240 (citing 42 U.S.C. § 4332). Congress provides assistance to federal agencies in the process by establishing the Council on Environmental Quality (CEQ). See Corps of Eng'rs, 479 F. Supp. 2d at 625. The CEQ oversees the implementation of assessment process and requires agencies to consider both the "context" and the "intensity" of a proposed action in deciding whether the action's effect on the environment reaches the level of "significance" to require an EIS. See id. (citing and discussing CEQ Regulations, 40 C.F.R. pt. 1508.27). When considering the "context," the agency's analysis focuses on the affected geographic region and interests, while the "intensity" consideration focuses on the severity of the environmental impact on the region and interests. See 40 C.F.R. pt. 1508.27(a), (b) (2008).

\(^\text{74}\) See Wyo. Outdoor, 351 F. Supp. 2d at 1240 (noting differences between EIS and EA); see also Corps of Eng'rs, 479 F. Supp. 2d at 625-26 (observing that EA simply determines whether there will be significant impact, while EIS weighs any significant impacts against positive goals of proposed project); see also 40 C.F.R. pt. 1501.4(b) (2008) (defining EA as document that briefly provides evidence and analysis for whether EIS is necessary or whether agency can issue FONSI); see also 33 C.F.R. pt. 230.10-230.11 (2008) (explaining Corps' requirements for issuing EA). An EA should be a brief documentation that provides sufficient evidence and analysis for determining whether an EIS should be prepared. See Wyo. Outdoor, 351 F. Supp. 2d at 1240.

\(^\text{75}\) See Corps of Eng'rs, 479 F. Supp. 2d at 626 (drawing distinction between EIS and EA).

\(^\text{76}\) See id. at 626 (citing 40 C.F.R. pt. 1508.13 (2008)). Even if an action would result in significant environmental effects, an agency can avoid preparing an EIS with a mitigated FONSI. See id. (citing Wetlands Action Network v. U.S. Army Corps of Eng'rs, 222 F.3d 1105, 1121 (9th Cir. 2000)).

\(^\text{77}\) See Corps of Eng'rs, 479 F. Supp. 2d at 626 (noting that mitigated FONSI can allow agency to forego EIS process); see also Wyo. Outdoor, 351 F. Supp. 2d at 1240 (describing agency's decision to issue FONSI and not prepare EIS is factual determination which implicates agency expertise).
level of significance. In *O'Reilly v. United States Army Corps of Engineers* (*O'Reilly*), the Fifth Circuit required the Corps to explain why it concluded that proposed mitigation plans would reduce the impact level below significance.

Numerous federal courts have dealt with challenges to the Corps' issuance of FONSI's for CWA permitting purposes under the NEPA regime. In *Ohio Valley Environmental Coalition v. Hurst* (*Hurst*), for example, decided only a few weeks after the Fourth Circuit handed down its order in *Aracoma Coal*, the Southern District Court of West Virginia was again faced with a challenge under the CWA and NEPA to a Corps-issued fill permit in relation to mountaintop mining. In *Hurst*, the district court analyzed the claims against the Corps to determine whether the Agency considered the relevant factors and whether the Corps committed a clear error of judgment when the Corps issued the permit under the CWA and NEPA. The court ultimately vacated the Corps' decision, the court stated that the Corps'
CWA and NEPA cumulative impact determinations relied too heavily on mitigation plans intended to minimize the cumulative impact below a level of significance without providing a rational explanation for this reliance. The court also noted that while an agency may consider mitigation plans when determining the level of environmental impact under a NEPA review, reliance on such plans to make a FONSI must be justified.

The court explained that it would find the Corps' reliance on mitigation justified if the mitigating proposal satisfied two factors. The first factor requires that the proposed mitigation leading to the FONSI "must be more than a possibility" in that the plan is "so integrated into the . . . proposal that it is impossible to define the proposal without mitigation." The second factor requires a level of assurance that the mitigating measures will "constitute an adequate buffer against the negative impacts that result from the authorized activity to render such impacts so minor as to not warrant an EIS." The Hurst court found that the Corps' permitting decision met the first factor because the permit contained mandatory conditions for mitigation integrated into the permit. The court concluded, however, that the second factor was not met because the Corps did not produce sufficient evidence that the mitigation measures would be

86. See id. (noting that Corps did not provide rational explanation for its reliance on mitigation measures, and therefore Corps' unsupported decision to grant permit was arbitrary and capricious).

87. See Hurst, 604 F. Supp. 2d at 888 (citing O'Reilly v. U. S. Army Corps of Eng'rs, 477 F.3d 225, 231 (5th Cir. 2007) for proposition that agencies may consider ameliorative effects of mitigation in determining impacts of activity). The district court cited a number of federal cases to support an agency's ability to consider mitigation plans in assessing impact, but noted that the reliance on the mitigation plans must be justified by substantial evidence. See id. (relying on Sierra Club v. U.S. Army Corps of Eng'rs, 464 F. Supp. 2d 1171, 1224 (M.D. Fla. 2006) and Wyo. Outdoor Council v. U.S. Army Corps of Eng'rs, 351 F. Supp. 2d 1231, 1250 (D. Wyo. 2005)).

88. See id. at 888 (enumerating two-factor test applied by various federal courts).

89. See id. (quoting Sierra Club, 464 F. Supp. 2d at 1225).

90. See id. at 888-89 (discussing second factor of test). The district court noted that the Corps must produce sufficient evidence that the mitigation measures will be successful. See id. at 888. Sufficient evidence can be achieved by displaying studies conducted by the agency, or requirements for adequate monitoring of the mitigation to ensure success. See id. The court in Hurst went on to say that although a precise and completely developed mitigation plan is not required to support a FONSI, the Corps "must provide some explanation of how or why . . . mitigation will reduce the cumulative adverse impacts . . . to insignificance." Id. at 889.

91. See id. at 890 (discussing permit's proposed mitigation plans and finding plans integral to permit).
successful, and therefore held that the Corps’ FONSI and permitting decision were not justified.\(^9\)

In Sierra Club v. United States Army Corps of Engineers (Sierra Club),\(^9\) a case involving the Corps’ issuance of a permit authorizing wetland fills in connection with property development,\(^4\) the court utilized the two-factor test employed in Hurst.\(^5\) Satisfied that the Corps met both factors of the Sierra Club test, the court found in favor of the Corps.\(^6\) Similar to the Hurst court, the Sierra Club court found the first factor satisfied because the permit contained mandatory conditions for mitigation.\(^7\) The two courts differed, however; while the Hurst court sought an adequate monitoring system to satisfy the second factor,\(^8\) the Sierra Club court relied on satisfactory scientific evidence to conclude that the Corps’ mitigation plans carried assurances for success.\(^9\)

In Wyoming Outdoor Council v. United States Army Corps of Engineers (Wyoming Outdoor),\(^1\) the United States District Court of Wyoming employed the same two-factor test from Hurst and Sierra Club.\(^2\) The Wyoming Outdoor court found that the Corps’ permit for a wetland fill must fail, reasoning that although the mitigation was mandatory, the Corps’ reliance on mitigation was not supported by a single scientific study and set forth no specific monitoring plan.\(^3\) In Wetlands Action Network v. United States Army Corps of

\(^9\) See Hurst, 604 F. Supp. 2d at 890-92 (finding Corps’ mitigation plans lacked assurance of success). The court observed that the Corps could have satisfied the second factor even though it did not produce any scientific evidence to prove the likely success of mitigation. See id. at 891-92. The court stated that if the Corps could have instead shown that the mitigation plans would be adequately policed by a program to monitor and ensure the measures’ effectiveness. See id.

\(^9\) 464 F. Supp. 2d 1171 (M.D. Fla. 2006), aff’d, 508 F.3d 1332 (11th Cir. 2007).

\(^9\) See id. at 1177 (describing property development project that requires certain wetlands filled, thus calling for CWA permit from Corps). The challenge brought by the plaintiff environmentalist group required the court to assess the Corps’ permitting decision under the CWA and NEPA. See id.

\(^9\) See id. at 1225 (applying two-factor test used in Hurst).

\(^9\) See id. (finding that mitigating measures proposed in Corps’ permit were mandatory condition of permit, scientifically supported, and enforceable through special conditions in permit).

\(^9\) See id. (satisfying first factor of test to justify Corps’ FONSI based on proposed mitigation).

\(^9\) See Hurst, 604 F. Supp. 2d at 891-92 (concluding second factor was satisfied).

\(^9\) See Sierra Club, 464 F. Supp. 2d at 1225 (allowing Corps’ scientific evidence to satisfy second factor).


\(^9\) See id. at 1250 (applying two-factor test used in Hurst and Sierra Club).

\(^9\) See id. at 1250-52 (concluding that Corps’ FONSI was unsupported by reliance on mitigation measures). The court found that the first factor of the test
Engineers (Wetlands),\textsuperscript{103} the Ninth Circuit focused on the second factor of the test when reviewing a Corps decision to forego the issuance of an EIS in light of mitigation plans.\textsuperscript{104} The court in Wetlands held that where the Corps’ mitigation measures were developed to a reasonable degree, reviewed by various federal agencies, and included special conditions that were “extremely detailed,” the Corps’ issuance of a FONSI was justified.\textsuperscript{105} Accordingly, the court held that the Corps did not act arbitrarily or capriciously in avoiding the EIS.\textsuperscript{106}

When reviewing an agency’s decision to grant a CWA permit, a number of federal courts will require strict adherence to NEPA’s “hard look” requirement on the part of the agency.\textsuperscript{107} NEPA’s requisite “hard look” focuses the agency’s attention on the cumulative impacts of the proposed action.\textsuperscript{108} Courts that strictly enforce this “hard look” approach appear to seek and thoroughly analyze the reasoned justification for an agency’s decision to issue a CWA permit under the NEPA scheme.\textsuperscript{109}

was met because the Corps’ permit included mandatory mitigation. See id. at 1250. The Corps’ permitting decision failed, however, because the Corps did not supply any scientific evidence or an adequate monitoring program to ensure the effectiveness of mitigation. See id. at 1252. The court noted that there was a monitoring program mentioned in the proposed permit, but the plan lacked specifics, and that the permit called for only “annual monitoring,” that “may be required” to track the mitigation results. See id. The court concluded that the monitoring plan was not the kind of adequate policing that would make a mandatory mitigation measure sufficient to support a FONSI. See id.

103. 222 F.3d 1105 (9th Cir. 2000).

104. See id. at 1121 (seeking to determine whether Corps’ mitigating measures constituted sufficient buffer against negative impacts to render impacts so minor as to not require EIS).

105. See id. at 1121-22 (reviewing record and concluding that Corps reliance on mitigation justified FONSI).

106. See id. (ruling in favor of Corps’ decision to issue FONSI in lieu of performing EIS).


109. See, e.g., Hurst, 604 F. Supp. 2d at 888 (performing NEPA analysis of Corps’ action with two-factor test); see also Sierra Club, 464 F. Supp. 2d at 1225 (applying two-factor test); Wyo. Outdoor, 351 F. Supp. 2d at 1250 (utilizing two-factor test); Wetlands Action Network, 222 F.3d at 1121 (focusing on second factor of test, requiring mitigation measures to constitute adequate buffer against negative impacts from authorized activity).
IV. NARRATIVE ANALYSIS

In Aracoma Coal, the Fourth Circuit's review of the district court's decision focused primarily on the Corps' interpretation of the CWA and NEPA, which the Corps had adopted as its own guidelines for issuing valley fill permits. After laying out the complex statutory landscape upon which the claims were based, the Fourth Circuit began by addressing OVEC's claims arising under NEPA.

A. NEPA Claims

The Fourth Circuit noted that NEPA requires federal agencies to take a "hard look" at the environmental consequences of their actions, but that the statute does not specify how an agency should determine the scope of its NEPA analysis. While the court did not find guidance in the language of NEPA itself, it instead looked to the Corps' implementing regulations. The court observed that the appropriate scope of analysis for NEPA review, as specified by the Corps' own guidelines, is "to address the impacts of the specific activity requiring a . . . [Department of the Army] permit and those portions of the entire project over which the [Corps'] district engineer has sufficient control and responsibility to warrant Federal review." The court noted that OVEC's challenge to the scope of the Corps' NEPA review relied primarily on OVEC's misinterpretation of what constitutes a "specific activity" requiring a permit. The court further observed that the "specific activity" permitted by the Corps under a Section 404 permit is merely "the filling of jurisdictional waters for the purpose of creating an underdrain system for the larger valley fill."

110. See Aracoma Coal, 556 F.3d at 189 (noting all agency actions must be set aside if found to be arbitrary or capricious).
111. See id. at 194 (discussing NEPA analysis required based on OVEC's claims under the Act).
112. See id. (suggesting ambiguity in certain NEPA requirements).
113. See id. (examining Corps' own regulations).
115. See id. (discussing OVEC's challenge to Corps' NEPA analysis). OVEC's claim was that the Corps' § 404 permit is a permit for the entire valley fill, "down to the last shovel full of dirt at the edge of the valley." Id. The Fourth Circuit corrects OVEC's interpretation, noting that a § 404 permit in which the Corps is authorized to permit under the CWA: "... permits, after notice and opportunity for public hearing for the discharge of dredged or fill material into the navigable waters at specified disposal sites." Id. (quoting 33 U.S.C. § 1344(a) (2000)).
116. See Aracoma Coal, 556 F.3d at 194 (observing that Corps has no legal authority to prevent placement of fill material in areas outside waters of United States, and that such fill activity is regulated by West Virginia Department of Environmental Protection).
The court found support for its reasoning by calling on the aforementioned statutory scheme for guidance; although the Corps' Section 404 permit is central to the success of the valley-filling process, the Corps did not retain control and responsibility over the entire fill.\textsuperscript{117} Citing SMCRA, the court noted that

\begin{quote}
[1]o say the Corps has a level of control and responsibility over the entire valley fill project such that 'the environmental consequences of the larger project are essentially products of the Corps permit action,' is to effectively read out of the equation the . . . congressionally mandated schema for the permitting of surface mining operations prescribed by SMCRA.\textsuperscript{118}
\end{quote}

The court described the congressional intent behind the SMCRA as "clearly contemplating" the regulation of the disposal of excess spoil and the creation of valley fills to fall under the authority of SMCRA.\textsuperscript{119} The court further noted that by issuing a Section 404 permit, the Corps would turn a valley fill project into a "federal action," and the state agency's regulation of the process prescribed under the SMCRA would be rendered "at best duplicative, and, at worst, meaningless . . . [and] NEPA plainly is not intended to require duplication of work by [the West Virginia Department of Environmental Protection (WVDEP)] and [the Corps]."\textsuperscript{120} The court ultimately discharged OVEC's first claim regarding the Corps' allegedly improper scope of NEPA review, ruling that because the statutory scheme provides that the state agency, the WVDEP, and not the Corps, has "control and responsibility" over all aspects of the valley fill projects, the Corps was not solely responsible.\textsuperscript{121}

\footnotesize
\begin{itemize}
\item \textsuperscript{117} See id. at 194-95 (relying on interaction between related statutory authority of SMCRA and NEPA).
\item \textsuperscript{118} See id. at 195 (quoting 33 C.F.R. pt. 325, App. B. § 7 (b) (2) (2008)).
\item \textsuperscript{119} See id. (observing that state of West Virginia has exclusive jurisdiction over regulation of surface coal mining projects, and citing 30 U.S.C. § 1265(b)(22)(D) (2006) which requires the construction of lateral drains where a spoil disposal area contains "springs, natural water courses or wet weather seeps"); see also Kentuckians for the Commw., Inc. v. Rivenburgh, 317 F.3d 425, 443 (4th Cir. 2003) (noting that "it is beyond dispute that SMCRA recognizes the possibility of placing excess spoil material in waters of the United States").
\item \textsuperscript{120} See Aracoma Coal, 556 F.3d at 196 (suggesting that Corps' action was not "federal action"). The court supports its supposition by citing numerous federal regulations mentioning the desire for cooperation between federal, state and local agencies and nonduplicative practices. See id. (explaining reasoning).
\item \textsuperscript{121} See id. at 197 (describing involvement of other agencies in permit review process to show that Corps was not sole decision maker and that limiting scope of its analysis was not incorrect).
\end{itemize}

Corps, therefore, properly limited its scope of analysis to the filling of jurisdictional waters. 122

1. The Corps’ Finding of No Significant Impact

The Fourth Circuit next addressed the district court’s finding that the Corps failed to adequately support both its FONSI under NEPA and its findings of no significant degradation to waters of the United States under the CWA. 123 On appeal, the Fourth Circuit ruled in favor of the Corps and held that the district court’s conclusions were incorrect. 124 In particular, the Fourth Circuit agreed with the Corps’ CWA analysis of the fills’ impact on the structure and function of affected streams, the sufficiency of the planned mitigating measures so as to comply with the CWA and NEPA, and the adequacy of the Corps’ CWA and NEPA assessments regarding the cumulative impacts of the proposed fills. 125 The Fourth Circuit also noted that the district court failed to apply an arbitrary and capricious standard to the Corps’ decisions and, in doing so, erred by substituting its judgment for that of the Agency. 126

The Corps’ CWA Guidelines (Guidelines) require it to “[d]etermine the nature and degree of effect that the proposed discharge will have, both individually and cumulatively, on the structure and function of the aquatic ecosystem . . . .” 127 Because the Guidelines do not specifically define “function of the aquatic ecosystem,” the Fourth Circuit noted that the Corps is entitled to rely on its “best professional judgment” when assessing aquatic impact, in addition to possible mitigating measures. 128 The Fourth Circuit and the district court agreed that the Guidelines neither define “function,” nor do they provide any way to evaluate function, and therefore, the courts deferred to the Corps’ interpretation. 129

122. See id. (pointing to each permit at issue, and noting that Corps was correct to limit NEPA analysis scope to jurisdictional waters, and extending analysis beyond there to include review of environmental effects on other areas would encroach on regulatory authority of WVDEP, which administers state’s SMCRA program).

123. See id. at 197-98 (addressing Corps’ FONSI).

124. See id. (reversing lower court’s decision and finding in favor of Corps).

125. See Aracoma Coal, 556 F. 3d at 197-98 (ruling that Corps did not violate CWA or NEPA in review of permits).

126. See id. at 198 (overturning lower court decision).


128. See id. (allowing Corps to rely on its best professional judgment when guidelines are silent on certain issues).

129. See id. at 199 (explaining discrepancy between district court and Fourth Circuit’s analysis of Corps’ decision-making process). The district court and
The courts differed, however, in that the district court found that the Corps failed to fully assess all ecological functions, or take the requisite hard look, and provide a reasoned basis for its conclusions.130 Conversely, the Fourth Circuit found that the Corps’ assessment of the stream functions in the permit process was not arbitrary and capricious, and was therefore entitled to deference.131

The Fourth Circuit was particularly aware of its reviewing capacities, noting that any “attempt to define stream function beyond [the Guidelines] would certainly be inappropriate judicial intrusion into the Corps’. . . sphere of authority.”132 The court was also quick to state that an agency’s actions are reviewed under an abuse of discretion standard and, because no specific guidance existed to assist the Corps in assessing stream function, it would be “difficult to understand” how the Corps could have abused its discretion.133 The court concluded that the Corps was not required to engage in full functional assessment, emphasizing that it is not a court’s place to dictate to the Corps how it should assess stream functions.134 The court further observed that the reports the Corps issued with each permit included substantial analysis and explanation regarding impact findings, based on the Corps’ “best professional judgment,” and, as such, the court could not say that the Corps acted arbitrarily or capriciously.135

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130. *Aracoma Coal*, 556 F.3d at 199 (noting district court’s holding).
131. See id. (disagreeing with lower court’s holding).
132. Id. at 201 (describing dissent’s approach as inappropriate judicial intrusion).
133. Id. (finding no abuse of discretion on part of Corps).
135. *Aracoma Coal*, 556 F.3d at 201 (concluding that Corps did not act arbitrarily or capriciously).
B. Proposed Mitigating Measures

Next, the Fourth Circuit addressed the Corps’ mitigation plans for the valley fill permits. The court sought to determine whether the plans were sufficient to justify the Corps’ issuing of a FONSI in lieu of a full EIS, as required by NEPA. Citing the CWA Guidelines, the court observed that a Section 404 permit cannot be issued absent “appropriate and practicable steps . . . which will minimize potential adverse impacts of the discharge [of fill material] on the aquatic ecosystem.” The court focused its discussion of the Corps’ mitigation plans on the potential impact on headwater streams. Initially, the district court held that the Corps had “failed to explain how a valley fill’s destruction of headwater streams could be compensated for by . . . the [Corps’ mitigation measures].” The Fourth Circuit, however, found that the Corps was not required by the CWA Guidelines to differentiate between headwater and other stream types when forming its mitigation plans.

136. See id. at 201-03 (examining proposed mitigation measures in Corps’ permits to determine if it complies with CWA).
137. See id. at 201-02 (determining whether Corps’ FONSI was proper or whether Corps should have performed full EIS).
138. See id. at 202 (quoting 40 C.F.R. pt. 230.10(d) (2008)). In a 1990 Memorandum of Agreement between the EPA and Corps, the two agencies agreed that mitigation had three components: avoidance, minimization and compensatory mitigation. See Memorandum of Agreement, Clean Water Act § 404(b) (1) Guidelines, Correction, 55 Fed. Reg. 9210-01 (Mar. 12, 1990). Avoidance was defined as “the least environmentally damaging practical alternative.” Id. Minimization can be accomplished through practicable project modifications and permit conditions that minimize adverse impacts. Id. Lastly, it was agreed that compensatory mitigation may be used where appropriate to compensate for unavoidable adverse impacts after all avoidance and minimization steps have been taken. Id. Compensatory mitigation can include the restoration of existing wetlands or the creation of new wetlands, and it is to be done as close to the discharge site as possible. Id. The Agreement noted that the functional values lost should be carefully considered when determining compensatory mitigation, and that generally, “in-kind” mitigation should be used. Id. The Memorandum of Agreement noted the uncertainty of wetland creation measures, instructing that restoration options be considered prior to creation options. Id. In the instant case, the mitigation measures proposed in the four challenged permits included stream enhancement, stream restoration and stream creation. Aracoma Coal, 556 F.3d at 203.

139. See Aracoma Coal, 556 F.3d at 205 (noting that role of headwater streams in downstream ecology is of some debate both scientifically and in present litigation).
140. Id. (discussing district court’s conclusions). The district court found that, because the Corps did not properly access stream function, “ignore[ing] a number of crucial headwater stream values in its evaluation of adverse impact,” the mitigation plan could not adequately offset adverse impacts. Id.
141. Id. (reviewing guidelines and concluding that regardless of role headwater streams play in overall watershed ecology, Corps is not required to differentiate).
The court based its conclusion on the direction offered to the Corps in Regulatory Guidance Letter 02-02 (RGL 02-02). RGL 02-02 requires that where a full functional assessment is infeasible, the only compensatory mitigation the Corps must require in a permitting decision is stream replacement on a one-to-one basis. Because nothing in the Corps’ CWA guidelines mandates only in-kind, on-site mitigation, the court noted that the Corps’ permits actually exceeded the minimal requirements with plans for stream replacement at a ratio greater than one-to-one.

In his dissent, Judge Michael took issue with the majority’s reliance on the language of the Regulatory Guidance Letter issued by the Corps. He noted that when analyzing the sufficiency of the Corps’ mitigation plans, the court “must begin with the provisions that are truly mandatory: those in the regulations.” Judge Michael went on to extract language from the Guidance Letter that addressed situations in which “a full functional assessment is not feasible,” permitting only compensatory measures on a one-to-one basis. Judge Michael argued that a situation should not arise where “a full functional assessment is not feasible” because the Corps’ CWA Guidelines always require the Corps to conduct such an assessment. He also opined that the majority’s conclusion, that the Corps’ surrogate for assessing stream function was sufficient as part of the Corps’ CWA guidelines analysis, is wholly para-

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142. See id. at 203-04 (citing Corps’ Regulatory Guidance Letter for support). In 2002, the Corps used RGL 02-02 requiring a district “when possible” to “use functional assessments by qualified professionals to determine impacts and compensatory mitigation requirements.” Id. at 198 (explaining RGL 02-02 scheme). The court noted that although RGL 02-02 was superseded by a 2008 amendment to the Guidelines that altered the Corps’ compensatory mitigation policy, RGL 02-02 was in place at the time the Corps made its permitting decisions here and must be considered by the court in addressing the Corps’ actions. Id. at 198 n.14.

143. Id. at 204 (interpreting Corps’ Regulation Guidance Letter 02-02 and its guidelines).

144. See Aracoma Coal, 556 F.3d at 204 (noting one of four sites granted challenged permit involved direct impact to 15,514 linear feet and required mitigation of 45,306 feet).

145. See id. at 223-24 (Michael, J., concurring in part and dissenting in part) (observing inconsistencies between Regulatory Guidance Letter, which was issued by Corps to its district officers, and 40 C.F.R. pt. 230.11(e)).

146. Id. (Michael, J., concurring in part and dissenting in part) (indicating that compliance with 40 C.F.R. pt. 230.11(e) is not discretionary for Corps when issuing § 404 permits).

147. See id. at 224 (Michael, J., concurring in part and dissenting in part) (addressing shortcomings of Corps’ RGL 02-02 and majority’s interpretation).

148. Id. (Michael, J., concurring in part and dissenting in part) (citing Corps’ CWA Guidelines 40 C.F.R. pt. 230.11(e) to argue that Corps cannot rely on “illegal” provision in its RGL as justification for failure to mitigate for lost stream functions).
doxical and unsupportable when contrasted with the majority's
decision to allow the Corps to mitigate lost stream function because
"a full functional assessment is not feasible." 149

C. The Corps' Cumulative Impact Analysis

Lastly, the Fourth Circuit determined that the Corps did not act
arbitrarily or capriciously in conducting its required cumulative
impact analysis. 150 The court held that because the Corps satisfac-
torily articulated its conclusion, that cumulative impacts would not be
significantly adverse after the planned mitigation, the requirements
under the CWA and those required to justify the issuance of a
FONSI under NEPA were satisfied. 151 While the district court
found that the Corps' cumulative impact analysis failed because it
relied improperly on mitigation to negate the projects' adverse
impacts, the Fourth Circuit dismissed this finding, noting that the
Corps' decision did not rest wholly on its own mitigation plans and
that it sufficiently explained its conclusion, thus justifying its FONSI
to avoid issuing a full EIS. 152

149. See Aracoma Coal, 556 F.3d at 224 (Michael, J., concurring in part
and dissenting in part) (suggesting sufficiently assessing stream function should mean
same thing under Corps' CWA Guidelines as it does in Corps' Regulatory Gui-
dance Letter). The majority countered that the dissent's conclusion is based on
the faulty assumption that 40 C.F.R. pt. 230.11(e) (the Corps' CWA Guidelines)
requires a functional assessment. See id. at 204 n.25. The majority reminded the
dissent that the statute provides no guidance for assessing "function," beyond sev-
eral factors that the Corps should and did consider. See id. Judge Michael's pri-
mary argument, however, was that the majority's position is logically unjustifiable
because it accepted the Corps' argument that stream function had been ade-
quately assessed while permitting the Corps' to adopt mitigating measures which,
under the Corps' RGL, are to be applied only when a functional assessment is not
feasible. See id. at 224 (Michael, J., concurring in part and dissenting in part).

150. See id. at 209 (concluding Corps' cumulative impact determinations were
not arbitrary or capricious).

151. See id. at 207 (drawing comparison with O'Reilly to determine that Corps'
mitigation measures allowed it to declare FONSI and avoid EIS). Under both the
CWA and NEPA, the Corps must consider the cumulative impacts of a proposed
project. See id. The CWA Guidelines require the Corps to reject an application for
a § 404 permit if it cannot be shown that there will be no adverse impact either
individually or in combination with known or probable impacts of other activities.
See id. Under NEPA, the Corps must determine whether the proposed project is
"related to other actions with individually insignificant but cumulatively significant
impacts." Id.

152. See id. at 207-09 (holding that Corps was justified in making FONSI and
not issuing EIS). The Fourth Circuit had to reconcile the instant case with O'Reilly,
a case used to support the district court's position, where the Fifth Circuit held
that "mitigated to insignificance" is insufficient to demonstrate a lack of cumula-
tively significant impacts. See id. at 207. Accordingly, the Fourth Circuit indicated
that the Corps in O'Reilly leaned too heavily on mitigation and that was why the
Fifth Circuit found the Corps' permit there to be inadequate. See id. at 208. The
court here observed that not only did the Corps in Aracoma Coal not lean as heavily
V. CRITICAL ANALYSIS

The Fourth Circuit’s analysis of the CWA and NEPA seems to have buckled under the weight of scientific information that the court did not wish to handle.\textsuperscript{153} Although the court ultimately reached the proper conclusion, particularly regarding its NEPA analysis, it could have provided a more thorough and articulated basis for reaching its conclusion.\textsuperscript{154}

A. Fourth Circuit’s Review of Corps’ Mitigating Measures

The decision in \textit{Aracoma Coal} hinged on the Fourth Circuit’s desire to offer a great deal of deference to the Corps’ agency action.\textsuperscript{155} The court warned, however, that the high level of deference agency actions ought to be granted by reviewing courts should not equate to a judicial “rubber stamp.”\textsuperscript{156} The court would have been wise to heed its own warning and complete a more thorough analysis of the Corps’ actions, particularly regarding the mitigation measures adopted by the Corps.\textsuperscript{157} Though the court ultimately arrived at the proper conclusion, that the Corps’ mitigation plans justified judicial deference toward its FONSI, other courts faced with

\footnotesize{on mitigation to reach a determination of insignificant adverse impact, but the Corps also relied on the West Virginia Department of Environmental Protection’s (WVDEP) CWA § 401 certification and the SMCRA permitting process. \textit{See id.} Under CWA § 401, the WVDEP is required to certify that the proposed mining activity will not cause or contribute to a violation of state water quality standards. \textit{See id.} The court noted that the Corps sees this certification as satisfying the water quality portion of a cumulative impact analysis. \textit{See id.} The SMCRA permitting process involves the WVDEP’s assessment that probable cumulative impacts of past, present (including the project under review), and future mining will not damage the hydrologic balance outside the permitted area. \textit{See id.}\

\textsuperscript{153} \textit{See generally} Rodgers, Jr., \textit{supra} note 72, at 10622 (noting that NEPA promotes good science and Fourth Circuit’s NEPA analysis in particular, and observing that while district court provided brilliant, creative and instructive analysis of NEPA, Fourth Circuit produced thud in its analysis); \textit{see also} \textit{Aracoma Coal} 556 F.3d at 201 (pointing out importance of reviewing court deferring to agency choice). The Fourth Circuit provided that when reviewing matters “involving complex predictions based on special expertise, a . . . court must generally be at its most deferential.” \textit{Id.}\

\textsuperscript{154} For a further discussion of the court’s holding and its need for further explanation, see \textit{infra} notes 175-87 and accompanying text.\

\textsuperscript{155} \textit{See Aracoma Coal}, 556 F.3d at 199 (reiterating that agency’s interpretation of own regulation is due significant deference).\

\textsuperscript{156} \textit{See id.} at 192 (asserting that court must engage in careful inquiry of record despite narrow standard of review).\

similar issues have provided a more articulated and well reasoned analysis in reaching their conclusions.  

Only a month after the Fourth Circuit's decision in Aracoma Coal, the District Court for the Southern District of West Virginia heard Hurst, and was again faced with a case requiring the court to perform a CWA, NEPA and APA analysis for a fill permit granted by the Corps. The Hurst court, while fully aware of its scope for reviewing agency actions, subjected the Corps’ permitting decisions to a thorough review and provided a reasoned analysis for its conclusion, ensuring that the court was more than a mere rubber stamp for agency actions.

In accepting the Corps’ determination that its mitigation plans in the CWA permit were sufficient to justify its issuance of a FONSI for purposes of NEPA, the Fourth Circuit in Aracoma Coal properly looked to the Fifth Circuit’s 2007 decision in O’Reilly. In O’Reilly, the Fifth Circuit noted the oft-acknowledged proposition that mitigation measures may reduce a project’s impacts below the level of significance, thereby justifying a FONSI in lieu of an EIS. The Fourth Circuit correctly distinguished Aracoma Coal from O’Reilly on the basis that while the Corps in O’Reilly relied almost exclusively on mitigation plans to eliminate adverse impacts, the Corps in Aracoma Coal not only cited mitigation plans, but also relied on other agen-


159. See Hurst, 604 F. Supp. 2d at 868 (reviewing Corps’ actions under CWA, NEPA and APA). Hurst is another in the long line of mountaintop removal cases, differing from Aracoma Coal only in that the court was reviewing a general (or nationwide) permit granted by the Corps. See id. at 883. The court in Hurst explained that while the permit in that case was general rather than the individual permits at issue in Aracoma Coal, the challenge in both cases involves the same permitted activity, scope of analysis, and Corps regulations. See id. Individual permits are required for discharges that will cause greater than a minimum adverse impact on the aquatic environment, and typically take 144 days to process. See Ahrens et al., supra note 13, at 44 (discussing difference between individual and general permits). General permits, on the other hand, are used for projects that will cause only minimal adverse effects, and typically take just twenty-seven days to process). Id.

160. See Hurst, 604 F. Supp. 2d at 888-92 (specifying NEPA requirements for court to find that Corps’ mitigating measures justified its decision to make FONSI instead of issuing EIS).

161. See Aracoma Coal, 556 F.3d at 206 (distinguishing FONSI issued in Aracoma Coal from FONSI issued in O’Reilly based on mitigation measures planned by Corps).

162. See O’Reilly v. U.S. Army Corps of Eng’rs, 477 F.3d 225, 231 (5th Cir. 2007) (noting when mitigation plans may justify a FONSI).
cies' determinations that adverse impacts would be less than significant.\textsuperscript{165} Once the Fourth Circuit established that the Corps' decision to issue a FONSI based partially on mitigation plans was sufficiently distinct from the Corps decision to do so in \textit{O'Reilly},
which the Fifth Circuit rejected as inadequate, the Fourth Circuit essentially cut its analysis short and yielded to the Corps' decision.\textsuperscript{164} While there is no definitive test that the Fourth Circuit failed to perform, a number of federal courts reviewing Corps-issued FONSI have articulated a clear set of factors that provide a thorough review of the agency action before granting deference to the agency.\textsuperscript{165}

B. Judicial Review of Agency Actions: Not Just a Rubber Stamp?

An agency's reliance on mitigation when issuing a FONSI must be justified by substantial evidence that supports two important factors.\textsuperscript{166} Although the Fourth Circuit in \textit{Aracoma Coal} seemed to touch on these factors, it would have been well served to explain its reasoning and display how the Corps' mitigation plans actually fit within the two factors adapted and applied by other federal courts.\textsuperscript{167} When reviewing a Corps-issued CWA permit, many courts perform this two-factor test to ensure that the Corps has taken the NEPA-required "hard look" at the cumulative impacts of the proposed action before issuing a FONSI and CWA permit.\textsuperscript{168} The first factor requires the proposed mitigation plan associated with the FONSI to be more than a possibility, in that it is imposed by statute or a regulation, or that the plan is "so integrated into the initial proposal that it is impossible to define the proposal without

\textsuperscript{165} See \textit{Aracoma Coal}, 556 F.3d at 208 (discussing Corps' reliance on not only mitigation measures in issuing FONSI but also reliance on WVDEP's CWA § 401 certification and SMCRA permitting process).


\textsuperscript{167} See \textit{Hurst}, 604 F. Supp. 2d at 888-90 (noting two-factor test used by various circuits in reviewing agency decision to issue FONSI based on mitigation plans); see also \textit{Sierra Club}, 464 F. Supp. 2d at 1224-25 (utilizing two-factor test to evaluate mitigation measures).

\textsuperscript{168} See \textit{Sierra Club}, 464 F. Supp. 2d at 1224 (explaining support needed to justify Corps' issuance of FONSI); see also \textit{Hurst}, 604 F. Supp. 2d at 888 (analyzing Corps' FONSI).

\textsuperscript{167} See \textit{Aracoma Coal}, 556 F.3d at 205-08 (finding Corps' mitigation plans sufficient to justifying FONSI).

\textsuperscript{168} See, e.g., \textit{Hurst}, 604 F. Supp. 2d at 888 (discussing two-part test when reviewing Corps-issued FONSI in relation to CWA permit).
mitigation."\textsuperscript{169} The second factor requires some assurances that the proposed mitigating measures "constitute an adequate buffer against the negative impacts that result from the authorized activity to render such impacts so minor as to not warrant an EIS."\textsuperscript{170} Essentially, what courts look for under the second factor is an assurance that the mitigation plans will be successful.\textsuperscript{171}

In addressing the first factor, the Fourth Circuit should have analyzed and explained how the Corps’ mitigation plans were so integral to the permit process that the process would be impossible to define absent the mitigation plans.\textsuperscript{172} The court pointed to each of the four permits and noted the proposed mitigation plans,\textsuperscript{173} but it did not explicitly state that the mitigation plans were essentially mandatory conditions integrated into the proposed permits, and therefore could serve to satisfy the first factor and entitle the Corps to rely on the plans.\textsuperscript{174} Although the court’s analysis in this regard lacked thoroughness, it did reach the right conclusion; given the court’s description of the four permits’ respective mitigation plans, the first factor of the test favored by various federal courts would have been satisfied.\textsuperscript{175}

To lend rationalized support to its conclusion, the Fourth Circuit would have been well served to analyze the Corps’ mitigation plans using the second factor from \textit{Hurst} and adopted by various

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\item[169] Id. (providing first requirement that proposed mitigation must satisfy). Moreover, the court stated, "In some instances, where the proposal itself so integrates mitigation from the beginning that it is impossible to define the proposal without including the mitigation, the agency may then rely on the mitigation measures in determining that the overall effect would not be significant . . . \ldots" Id. (quoting Council for Environmental Quality, Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 Fed. Reg. 18026, 18038 (1981)).
\item[170] See Wetlands Action Network v. U.S. Army Corps of Eng’rs, F.3d 1105, 1121 (9th Cir. 2000) (seeking assurances that mitigation plans will be successful); see also \textit{Hurst}, 604 F. Supp. 2d at 888 (compiling cases that cite second factor considered).
\item[171] See \textit{Hurst}, 604 F. Supp. 2d at 888 (summarizing second factor of test that court used).
\item[172] See id. (compiling cases and discussing first factor).
\item[173] See \textit{Aracoma Coal}, 556 F.3d at 202 (describing each of four permits at issue and mitigation plans proposed for each site in permit issued by Corps).
\item[174] See \textit{Hurst}, 604 F. Supp. 2d at 890 (applying first factor of test). The court in \textit{Hurst} found that certain mandatory conditions that the Corps required in its permit could be considered integral to the project and that the Corps was justified in relying upon it in making its FONSI. \textit{See id.}
\item[175] See \textit{Aracoma Coal}, 556 F.3d at 202 (discussing mitigation plan for all four sites receiving CWA permit). The mitigation measures specific for each of the four projects include stream restoration, stream creation and stream enhancement, which may take the form of planting native species of trees and plants, stabilizing stream banks, and cleaning the stream beds to improve the habitat and water quality. \textit{Id.}
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other federal courts.176 This criterion requires sufficient assurance that the proposed mitigation plans will lead to actual mitigation.177 Courts have found that proposed mitigation measures can be considered sufficient if the Corps provides studies showing that the plans could lead to actual mitigation, or that the mitigation measures call for policing to ensure the efficacy of such measures.178 In concluding that the Corps’ mitigation plans were sufficient to justify its FONSI, the Fourth Circuit properly noted certain studies and policing measures provided by the Corps, but again failed to thoroughly articulate why the studies and policing plans sufficiently assured the court that the Corps’ mitigation plans would lead to actual mitigation.179 Had the Fourth Circuit conformed its review of the Corps’ mitigation plan to the test applied in Hurst and cases the district court cited therein,180 it could have avoided the tightrope act it endured in attempting to justify the Corps’ claim that its proposed mitigation measures had potential for success.181

The Corps did not provide the Fourth Circuit with a very sturdy basis for finding assurance in the success of the mitigation plans.182 The court should have instead considered the second factor of the test utilized by other courts and concluded that even if the Corps’ evidence that the mitigation measures would actually mitigate the adverse impacts was weak or lacking, the absence of similar successful measures could be overcome with an adequate monitoring system to ensure the plan’s effectiveness.183 The court

176. See, e.g., Hurst, 604 F. Supp. 2d at 890 (describing second criterion to find justification for Corps’ FONSI); see also Wyo. Outdoor, 351 F. Supp. 2d at 1250 (outlining mitigation standards for evaluation); Wetlands Action Network, 222 F.3d at 1121 (stating mitigating factors can justify Corps’ FONSI).

177. See Wyo. Outdoor, 351 F. Supp. 2d at 1250 (explaining second factor in test and suggesting means by which second factor may be satisfied).


179. See Aracoma Coal, 556 F.3d at 205 (noting that Corps’ permits included monitoring of mitigation at each site for as much as ten years and detailed performance standards to measure and ensure success of mitigation). The court also pointed to one similar mitigation measure taken in Kentucky, as well as an Ohio State University study associated with the mitigation technique planned. See id.

180. See Hurst, 604 F. Supp. 2d at 888-91 (citing various district and circuit court opinions that applied two-factor test).

181. See Aracoma Coal, 556 F.3d at 205 (validating Corps’ claim that its method of mitigation has potential to succeed based on dearth of support that Corps offered).

182. See id. (observing that Corps’ support for its claim that there was high likelihood of success was lacking).

183. See Wyo. Outdoor, 351 F. Supp. 2d at 1250 (suggesting that when Corps does not provide any evidence that its proposed mitigation would be successful, it must at least show that its mitigation process will be adequately policed). The
in *Aracoma Coal* erred by only briefly mentioning the monitoring plans that the Corps' permits required to track and ensure the success of its mitigating measures. A number of courts that have applied the test ignored by the Fourth Circuit have found that when evidence fails to sufficiently show mitigation's potential success, an adequate monitoring system can still salvage the Corps' issuance of a FONSI. An adequate monitoring system would allow the Corps to ensure that its mitigation measures will succeed and result in less than significant adverse impacts.

The Fourth Circuit would have been wise to note other courts' use of the two-factor test described in *Hurst*, as it would have supplied a much stronger rationale for the conclusion that the Corps' FONSI based on the proposed mitigation plans was justified, and thus the Corps did not issue the CWA permits arbitrarily or capriciously. Although the Fourth Circuit in *Aracoma Coal* ultimately reached the correct conclusion—that the Corps did not violate the CWA because the mitigation plan was sufficient to justify its FONSI in lieu of preparing an EIS—the court's analysis should have been more thorough. The court's decision would have been easier to accept had it performed the two-factor test that many other courts utilize for agency actions under NEPA.

VI. Impact

The greatest impact arising from the Fourth Circuit's decision in *Aracoma Coal* and other mountaintop mining cases is likely to be felt outside of the courtroom. The practice of mountaintop mining has raised the ire of many environmentalist groups and drawn district court in *Hurst* noted that mitigation plans are adequately policed when the plans include a program to monitor and ensure its effectiveness. See *Hurst*, 604 F. Supp. 2d at 891. In *Hurst*, the court's decision that the Corps' issuance of a FONSI was not justified hinged on the lack of specific monitoring called for in the Corps' mitigation plan when the Corps offered no studies to support its likelihood of success. See id.

184. See *Aracoma Coal*, 556 F.3d at 205 (describing Corps' monitoring plans in only a few sentences).
185. See *Hurst*, 604 F. Supp. 2d at 891 (compiling cases permitting adequate monitoring system).
186. See *Wyo. Outdoor*, 351 F. Supp. 2d at 1250 (explaining need for monitoring system installed by Corps to ensure mitigation is successful).
188. See, e.g., id. at 888-92 (providing thorough analysis through use of two-factor test).
189. See id. (applying two-factor test).
190. See generally Ahrens et al., supra note 13, at 44 (discussing Memorandum of Understanding between EPA, Department of Interior, and Corps that will limit use of general permits and increase scrutiny of individual permits).
increasing attention from federal agencies.\textsuperscript{191} Recently, in an unprecedented move, the EPA used its power to revoke a previously issued permit for a large mountaintop mining operation in West Virginia.\textsuperscript{192} Local politicians criticized this decision, saying it will hurt employees and businesses alike.\textsuperscript{193} Environmentalists, on the other hand, praised the EPA’s decision and looked to the future, saying that the move “underscores the need for the Obama Administration to develop new regulations to end mountaintop removal mining once and for all.”\textsuperscript{194}

In another move surely applauded by environmentalists, the EPA recently announced that it will hold up seventy-nine pending permits for surface coal mining operations to perform enhanced review to ensure CWA compliance.\textsuperscript{195} Allies of the coal industry claim that the EPA’s decision to delay the permits ignores America’s need for affordable energy and hurts workers in an economically poor region.\textsuperscript{196} Only a year into the Obama Administration, the EPA’s involvement in the permit review process has

\textsuperscript{191} See id. (noting EPA’s increased involvement in Corps’ issuance of permits). For further discussion on the involvement of environmentalist groups in mountaintop mining litigation, see supra note 13 and accompanying text.

\textsuperscript{192} See John Raby, EPA Plans to Veto Surface Mining Permit in West Virginia, ABC News, Oct. 16, 2009, http://abcnews.go.com/Business/wireStory?id=8849113 (last visited Feb. 13, 2010) (describing EPA’s plan to revoke permit for surface mining operation). According to the Acting EPA Regional Administrator, the Agency’s decision to revoke a permit for the first time since the CWA was enacted “reflects the magnitude and scale of anticipation direct, indirect, and cumulative adverse environmental impacts associated with this mountaintop removal mining operation.” Id. Officials from the mining company that sought the permit were “shocked” by the EPA’s revocation of its permit, saying that it was “the most carefully scrutinized and fully considered mine permit in West Virginia history,” taking almost ten years to complete. Id. The project was to be the largest authorized mountaintop mining operation in Appalachia. Id.

\textsuperscript{193} See id. (noting grievances with EPA’s revocation of mining operation’s permit). West Virginia Governor, Joe Manchin, a Democrat, described the EPA’s decision as a prime example of the federal government not working for the people. See id. Governor Manchin further said that the EPA is now telling employees and the business that made investments, “No, you cannot work.” Id.

\textsuperscript{194} See id. (quoting Sierra Club’s opinion of EPA’s move).


\textsuperscript{196} See id. (observing grievances aired by coal companies and interest groups).
changed dramatically from that under the Bush Administration.\textsuperscript{197} Notably, the EPA did not veto a single CWA permit under Bush.\textsuperscript{198}

Federal agencies and environmentalists are not the only ones taking notice of the controversies swirling around mountaintop mining; legislators have recently introduced two bills in Congress that seek to impose stricter limitations on CWA Section 404 permits for mining purposes.\textsuperscript{199} The Clean Water Protection Act (H.R. 1310)\textsuperscript{200} and the Appalachia Restoration Act (S. 696),\textsuperscript{201} two bills introduced in 2009, could preempt CWA Section 404 permits and in turn limit the operation of mountaintop mines requiring such a permit.\textsuperscript{202} Legislator have also taken a supply-side approach by proposing bills that prohibit public utilities within their states from using coal from mountaintop mines in their plants.\textsuperscript{203} Difficulties are mounting for companies that wish to continue with mountaintop mining; for example, Bank of America has determined that it will no longer extend funding to mountaintop mining operations.\textsuperscript{204}

The constant flow of challenges and appeals involving mountaintop mining has created a great deal of uncertainty in the practice with results felt industry-wide.\textsuperscript{205} The time from when a

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\item[197] See Ahrens et al., \textit{supra} note 13 (contrasting Obama Administration’s EPA with that of Bush Administration).
\item[198] See \textit{id}. \textit{supra} note 13 (noting marked difference in EPA involvement in permit review).
\item[199] See \textit{id}. \textit{supra} note 13 (discussing two bills introduced to Congress in March 2009).
\item[202] See Ahrens et al., \textit{supra} note 13 (contrasting Obama Administration’s EPA with that of Bush Administration).
\item[203] See, e.g., Progressive Democrats of North Carolina, \textit{Pricey Harrison’s Newsletter}, http://www.progressivedemocratsnc.org/blog/node/194 (last visited Mar. 21, 2010) (proposing bill that prohibits use of coal from mountaintop mining operations in North Carolina power plants). Although North Carolina has no mountaintop mining sites of its own, the proposal would still prohibit the use of coal mined using the mountaintop process. \textit{See id}.
\item[204] See \textit{id}. \textit{supra} note 13 (noting litigation’s impact on industry when courts prevent permits from being issued or when certain cases await resolution). Often in cases brought challenging the Corps’ issuance of a permit, district courts will side with the environmentalists, but the Fourth Circuit has consistently overturned in favor of the Corps. \textit{See id}. The impact on the industry results from the district court’s decision, which may prevent or dramatically slow the issuance of new permits until the case makes its way to an appellate court. \textit{See id}. In \textit{Aracoma...
challenge to a permit is initially brought to its final adjudication can span years. While a case is pending or on appeal, mining operations are often limited in the activities that they can perform, thus limiting their productivity. Although the proposed legislation against mountaintop mining would settle industry-wide uncertainty, the effect would be the elimination of an efficient and cheap way to mine coal and supply energy. As environmentalists call for President Obama to push for a permanent ban on mountaintop mining, the President would be wise to consider his goal of energy independence and the role that surface coal mining plays in supplying American-made energy before signing off on any legislation.

In the end, it looks as though the environmentalists and those who oppose mountaintop mining will be left standing as the “kings of the hill,” with the Administration and EPA seeking to ban the practice for good through legislation, not the courts.

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Coal, the time between the district courts ruling in favor of OVEC to the Fourth Circuits reversal in favor of the Corps was nearly two years. See id. Typically during the time between rulings, mining operations may be limited to activities that do not require a CWA permit which could significantly impact their production capabilities. See id.

206. See generally Aracoma Coal 556 F.3d 177 (reversing case initially heard in 2007).

207. See Ahrens et al., supra note 13 (discussing effect that stream on litigation and uncertainty has on mining industry).

208. For further discussion of cost efficiency of coal energy, see supra note 10 and accompanying text.

209. For further discussion of the United States’ coal energy production, see supra notes 6-12 and accompanying text.

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