



8-1-2017

Ohio Valley Envtl. Coal, Inc. v. United States Army Corps of Engineers: Fine Tuning the Scope of the Corps' Jurisdiction

Mitchell J. Ream

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/elj>



Part of the [Environmental Law Commons](#)

Recommended Citation

Mitchell J. Ream, *Ohio Valley Envtl. Coal, Inc. v. United States Army Corps of Engineers: Fine Tuning the Scope of the Corps' Jurisdiction*, 28 Vill. Envtl. L.J. 259 (2017).

Available at: <https://digitalcommons.law.villanova.edu/elj/vol28/iss2/4>

This Casenote is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Environmental Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

2017]

*OHIO VALLEY ENVTL. COAL., INC. V. UNITED STATES ARMY
CORPS OF ENGINEERS: FINE TUNING THE SCOPE
OF THE CORPS' JURISDICTION*

I. INTRODUCTION

Surface coal mining, otherwise known as mountaintop removal, has been an increasingly popular choice for resource extraction among coal companies in the Appalachia region since the early 1970s.¹ While surface coal mining has increased in popularity, it has also become the most controversial form of coal mining.² The process involves “clear-cut[ting]” forested summits, “strip[ing] [them] of topsoil,” and “blast[ing] away [] [up] to [one thousand] vertical feet of rock[]” to reach underlying seams of coal.³ “The leftover rubble, . . . [or] overburden[,] is pushed into the surrounding valleys,” which typically contain ephemeral headwater streams.⁴ In some cases, the mining itself takes place through the headwater streams.⁵

In either case, the industrial coal mining activity in and around the jurisdictional waters of the United States, which occurs in most surface mining operations, invokes the jurisdiction of the Army Corps of Engineers (Corps), as well as that of federally-approved state regulatory agencies, such as the West Virginia Department of Environmental Protection (WVDEP).⁶ Part III of this Note discusses the statutory schemes that regulate coal mining activities and

1. See Allison Subacz, *Mountaintop Removal: Case Studies and Legislative Update of the Permitting Process*, 4 APPALACHIAN NAT. RESOURCES L.J. 49, 51 (2010) (describing background of surface coal mining generally).

2. See *id.* (citing U.S. Environmental Protection Agency, *Mid-Atlantic Mountaintop Mining*, <http://www.epa.gov/region03/mtntop/index.htm> (last updated Oct. 11, 2016)) (discussing controversial nature of surface coal mining).

3. See Emily Sangi, *Equating Stream Structure with Function: The Fourth Circuit's Misstep in Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, 37 ECOLOGY L.Q. 701, 701-02 (2010) (citing Earthjustice, *Earthjustice Seeks Supreme Court Review in Mountaintop Removal Mining Case* (Aug. 27, 2009), <http://earthjustice.org/news/press/2009/earthjustice-seeks-supreme-court-review-in-mountaintop-removal-mining-case>) (describing surface coal mining process).

4. See *id.* at 702 (citing *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 286 (S.D.W. Va. 1999)) (citing *Bragg v. Robertson*, 72 F. Supp. 2d 642, 661-62 (S.D.W. Va. 1999)) (describing surface coal mining process and overburden treatment).

5. See generally *Ohio Valley Env'tl. Coal., Inc. v. United States Army Corps of Eng'rs*, 828 F.3d 316, 323 (4th Cir. 2016) (deciding case where mining activities took place through streams).

6. See Sangi, *supra* note 3, at 702-03 (describing regulation of coal mining).

260 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVIII: p. 259

the interplay between state and federal regulatory agencies that perform oversight of coal mining activities.⁷ In addition, part III will provide a comprehensive overview of the key statutes and regulatory permits that govern the surface coal mining process and will give a glimpse into their various judicial interpretations.⁸ Parts II and IV of this Note will provide the facts and analysis of the Fourth Circuit's recent decision in *Ohio Valley Environmental Coalition, Inc. v. United States Army Corps of Engineers (OVEC, Inc.)*,⁹ where the Court interpreted the scope of the Corps' jurisdiction in relation to surface coal mining.¹⁰ The impact section of this Note will present possible theories of the effect that the Fourth Circuit's recent decision in *OVEC, Inc.* will have in the coal mining context, as well as in other areas in which the Corps' jurisdiction can be invoked.¹¹

II. FACTS

Raven Crest Contracting, LLC (Raven Crest) operated the Boone North No. 5 Surface Mine in West Virginia for the purpose of extracting “‘approximately 6.8 [million] tons of . . . bituminous coal’ from a 724-acre area.”¹² In order to carry out its planned operations, federal law required Raven Crest to obtain permits under “four federal regulatory provisions: the Surface Mining Control and Reclamation Act of 1977 ([]SMCRA[]) . . . and sections 401, 402, and 404 of the Clean Water Act[] [(CWA)].”¹³ West Virginia's state environmental regulatory agency, the WVDEP, was required to issue the SMCRA permit and the permits under sections 401 and 402 of the CWA under a “cooperative-federalism approach,” under which WVDEP complies with minimum federal requirements in its permitting process, while the Corps was required to issue the sec-

7. For a discussion of the statutory schemes regulating surface coal mining, see *infra* notes 27-57 and accompanying text.

8. For a discussion of the statutory schemes regulating coal mining and the corresponding historical judicial interpretations, see *infra* notes 27-91 and accompanying text.

9. 828 F.3d 316 (4th Cir. 2016).

10. *Ohio Valley Envtl. Coal., Inc. v. United States Army Corps of Engineers*, 828 F.3d 316, 318 (4th Cir. 2016) (reviewing scope of Corps' jurisdiction). For a discussion of *OVEC, Inc.*'s facts, see *infra* notes 12-26 and accompanying text. Additionally, for an analysis of the court's holding in *OVEC, Inc.*, see *infra* notes 108-166 and accompanying text.

11. For a discussion of the potential impact of *OVEC, Inc.*'s holding, see *infra* notes 167-183 and accompanying text.

12. *OVEC, Inc.*, 828 F.3d at 318 (alteration in original) (quoting J.A. 93) (explaining factual background of case).

13. See *id.* (citations omitted) (explaining background of case).

2017] FINE TUNING THE SCOPE OF THE CORPS' JURISDICTION 261

tion 404 permit under the CWA.¹⁴ Between 2009 and 2011, Raven Crest applied for, and WVDEP issued, the SMCRA and CWA sections 401 and 402 permits.¹⁵

“Because the Corps[,] [] a federal agency,” must issue the CWA section 404 permit, “[the Corps’] review of a [S]ection 404 permit application must also comply with [the National Environmental Policy Act (NEPA)],” requiring federal agencies to report certain environmental findings prior to taking any major federal action, such as issuing permits.¹⁶ NEPA “requires [federal] agencies to produce an environmental impact statement ([]EIS[]) before undertaking any ‘major Federal action[] significantly affecting the quality of the human environment.’”¹⁷ An EIS is not required, however, if the agency finds the action will have “no significant impact” after preparing an Environmental Assessment.¹⁸

Raven Crest submitted a Section 404 permit application to the Corps in 2009.¹⁹ The Ohio Valley Environmental Coalition, Inc. (OVEC), a consortium of environmental groups, submitted a letter during the public comment period, “express[ing] [] concern[s] that ‘[v]arious studies have shown that coal mining has significant impacts on the health of those living in the coal fields[.]’”²⁰ OVEC argued that “[t]hese impacts must be considered by the Corps during the permitting process.”²¹ In 2012, “the Corps issued [its] [p]ermit [e]valuation and [d]ecision [d]ocument[,] [] include[ing] . . . [its] [Environmental Assessment that NEPA required], and [concluded that] grant[ing] Raven Crest’s . . . permit

14. *See id.* at 319-20 (explaining state and federal permitting process for surface mines). The SMCRA grants each state that meets minimum regulatory requirements exclusive jurisdiction over the regulation of surface coal mining within the state’s borders. *Id.* at 318. The West Virginia Department of Environmental Protection (WVDEP) administers West Virginia’s regulation. *Id.* WVDEP also cooperates with the Environmental Protection Agency to ensure that any discharge from mines within the state will comply with all applicable water quality standards and requirements under the National Pollutant Discharge Elimination System. *Id.*

15. *Id.* at 319-20 (describing Raven Crest’s permitting procedure for Boone North No. 5 mine).

16. *OVEC, Inc.*, 828 F.3d at 320 (describing requirements for section 404 permit application review).

17. *Id.* (alteration in original) (quoting 42 U.S.C.A. § 4332(C) (1975)) (describing federal law requirements on Corps review of section 404 permits).

18. *Id.* (describing federal law requirements surrounding issuance of EIS under CWA).

19. *Id.* (describing factual background of Raven Crest’s permitting procedure).

20. *Id.* (alteration in original) (quoting J.A. 204) (explaining OVEC’s environmental concerns with Raven Crest’s proposal).

21. *OVEC, Inc.*, 828 F.3d at 320 (alteration in original) (quoting J.A. 204) (discussing Raven Crest’s section 404 application).

262 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVIII: p. 259

. . . . would ‘not have a significant impact on the quality of the human environment[;]’ and [] therefore[,] the Corps did not need to prepare an EIS.”²² Because the Corps concluded that “the issues . . . raised regarding the relationship between surface coal mining and public health ‘are not within the purview of the Corp’s regulatory authority, but are considered by WVDEP during the SM-CRA permitting process[,]’” the Corps did not consider OVEC’s study in granting Raven Crest’s section 404 permit.²³

OVEC brought suit under the Administrative Procedure Act (APA), seeking to either “suspen[d] or revo[ke] [] Raven Crest’s section 404 permit, claiming that the Corps’ decision not to consider those studies violated both NEPA and section 404 [of the CWA].”²⁴ The District Court for the Southern District of West Virginia granted summary judgment in favor of Raven Crest and the Corps, and OVEC subsequently appealed.²⁵ Upon review, the Court of Appeals for the Fourth Circuit affirmed the district court’s holding, finding that the Corps neither violated NEPA nor the CWA, and that the relevant provisions of NEPA and the CWA did not “create an obligation for the Corps to study the effects of activities beyond the proposed [mining activities]” for which the applicant sought a permit.²⁶

III. BACKGROUND

A. Surface Mine Permitting Requirements

Surface coal mining, the practice of removing mountaintop overburden to expose and extract the underlying coal seam, requires four environmental permits.²⁷ Both state and federal environmental agencies must analyze the surface mining operations to ensure that the operations will not have a significant impact on human health and water quality.²⁸ The United States Environmental Protection Agency (EPA), or an EPA-approved state agency, is

22. *Id.* (quoting J.A. 582-83) (discussing Corps’ grant of Raven Crest’s section 404 permit).

23. *Id.* at 321 (alteration in original) (quoting J.A. 642) (discussing Raven Crest’s section 404 application).

24. *Id.* (footnote omitted) (discussing OVEC’s complaint).

25. *Id.* (discussing district court’s ruling and OVEC’s appeal).

26. *OVEC, Inc.*, 828 F.3d at 323-24 (finding in favor of Raven Crest and Corps).

27. Sangi, *supra* note 3, at 701-03 (discussing permit requirements for surface coal mine operations).

28. *See generally id.* at 702-03 (outlining surface mine permitting process); *see also OVEC, Inc.*, 828 F.3d at 318-21 (discussing surface mine permitting process and cooperation between state and federal regulatory agencies).

tasked with analyzing both the proposed mining activities generally and their potential effect on water quality before issuing any permits and certifications.²⁹ The Corps is tasked with analyzing the surface mine's proposed use of "valley[-]fill" techniques, which temporarily dispose of excess overburden from the mining operation in the neighboring valleys.³⁰

1. SMCRA Permit

In order to engage in surface mining, an applicant must obtain a surface coal mining permit that an EPA-approved state regulatory agency issued under the SMCRA.³¹ The state regulatory agency, specifically, WVDEP in West Virginia, requires the applicant to "provide detailed information about possible environmental consequences of the proposed operations, as well as assurances that damage to the site will be prevented or minimized during mining and substantially repaired after mining has come to an end."³² In most states, an EPA-approved state department of environmental protection has exclusive jurisdiction to authorize surface coal mining under the SMCRA.³³

2. CWA Section 401 Certification

An applicant must also obtain a section 401 certification that the EPA, or EPA-approved state regulatory agency, issues, representing that the applicant's proposed activities, including any discharge from the mine site, will not cause a violation of the state's water quality standards.³⁴ The CWA requires that the state water quality standards be "sufficiently stringent to protect public

29. See generally *OVEC, Inc.*, 828 F.3d at 318 (elaborating on surface mine permitting process).

30. See *id.* at 319-21 (discussing CWA section 404 permit and Corps' jurisdiction); see also Sam Evans, *Voices from the Desecrated Places: A Journey to End Mountaintop Removal Mining*, 34 HARV. ENVTL. L. REV. 521, 539-40 (2010) (analyzing Corps' jurisdiction over section 404 permits for discharge of dredged or fill material).

31. *OVEC, Inc.*, 828 F.3d at 318-20 (citing *Ohio Valley Env'tl. Coal. v. Aracoma Coal Co.*, 556 F.3d 117, 189 (4th Cir. 2009)) (describing SMCRA permit application).

32. *Id.* at 318-19 (internal quotation marks omitted) (quoting *Ohio Valley Env'tl. Coal. v. Aracoma Coal Co.*, 556 F.3d 117, 196 (4th Cir. 2009)) (discussing permitting process); see also 30 U.S.C. §§ 1256-57, 1265 (1977) (providing state and federal statutory scheme for coal mining regulations).

33. *OVEC, Inc.*, 828 F.3d at 322-23 (discussing WVDEP's exclusive jurisdiction under SMCRA).

34. *Id.* at 319 (quoting *Ohio Valley Env'tl. Coal. v. Aracoma Coal Co.*, 556 F.3d 117, 190 (4th Cir. 2009)) (noting CWA section 401 certification must comply with minimum EPA water quality standards).

264 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVIII: p. 259

health[]” as the EPA designates.³⁵ A section 401 certification is a prerequisite for the valid obtainment of any “other ‘Federal license or permit to conduct any activity . . . which may result in any discharge’ into waters of the United States[.]”³⁶

3. CWA Sections 402 and 404 Permits

An applicant seeking to operate a surface coal mine, which will involve massive earth-moving activities and undoubtedly lead to the discharge of pollutants into U.S. waters, must obtain a National Pollutant Discharge Elimination System (NPDES) permit through the EPA or the state’s EPA-approved regulatory agency that has administered its own NPDES permitting program.³⁷ One of Congress’ primary goals in requiring an NPDES permit was to prevent “[t]he use of any river, lake, stream or ocean as a waste treatment system” and to “eliminat[e] ‘the discharge of pollutants’ into federally regulated waters[.]”³⁸ Under a section 402 NPDES permit, the applicant’s proposed discharge must not violate state water quality standards.³⁹ Some pollutants that are prohibited from discharge into U.S. waters that may be of interest to the prospective surface coal mine operator include, among others, dredged spoil, rock, and sand.⁴⁰

Most surface coal mining operations involve mine-through and backfill activities in and around stream channels, which involve discharging rock, sand, and other fill materials into U.S. waters in violation of the water quality standards that the CWA sets forth.⁴¹ Not all discharges, however, are included in the CWA’s prohibitions on pollutant discharges into the federally regulated U.S. waters.⁴² An

35. *OVEC, Inc.*, 828 F.3d at 319 (citing 33 U.S.C. § 1313(c) (2000)) (describing cooperative-federalism between state agencies and EPA for water quality regulation).

36. *Id.* (quoting 33 U.S.C. § 1341(a) (1977)) (noting importance of CWA section 401 certification).

37. *Id.* (citing 33 U.S.C. § 1342 (2014)) (outlining CWA section 402 permit); see also Evans, *supra* note 30, at 539 (discussing EPA’s jurisdiction over CWA section 402 NPDES permits).

38. See Evans, *supra* note 30, at 544 (alteration in original) (quoting 33 U.S.C. § 1251(a)(1) (2006)) (quoting S. REP. NO. 92-414, at 7 (1971)) (discussing CWA drafter’s intent and stated goals).

39. See *id.* at 546 (discussing CWA section 402 NPDES permit requirements in context of storm water discharges associated with construction activities).

40. See *id.* at 545 (quoting 33 U.S.C. § 1362(6) (2014)) (discussing relevant pollutants as defined under CWA).

41. See *OVEC, Inc.*, 828 F.3d at 319 (discussing surface coal mines’ operations and needs for section 404 dredge and fill permit).

42. See Evans, *supra* note 30, at 544-45 (discussing “fill” exception to CWA’s general prohibition on discharges).

2017] FINE TUNING THE SCOPE OF THE CORPS' JURISDICTION 265

applicant may be excused from the CWA's stringent water quality standards and permitted to discharge "dredged [and] fill material into [U.S.] waters[.]" subject to guidelines of minimization and mitigation required under a section 404 permit.⁴³

B. Historical Background of the CWA and Section 404

Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁴⁴ The CWA's overall goal was to eliminate the use of the nation's waters as a means for waste treatment.⁴⁵ Congress recognized the need, however, for construction, development, and industrial activities in and around U.S. waters; consequently, it included a permitting process under section 404 to allow for the discharge of dredged and fill material related to those activities in order to avoid "stifl[ing] [these] beneficial activities" under the stringent water quality requirements.⁴⁶ While the Rivers and Harbors Appropriation Act of 1899 (RHA), the predecessor of the CWA, made a clear distinction between dredging and filling materials and "refuse" or waste materials, the CWA makes no such distinction, nor does it explicitly define what is included as "fill" under the section 404 permit.⁴⁷ It is clear that valley-fill type surface mining operations would violate the water quality standards of the NPDES permit; thus, surface coal mine operators have sought relief under the section 404 exception to carry out their operations.⁴⁸ "[T]he Corps may issue a permit [under section 404], notwithstanding the fact that it may cause a violation of water quality standards, if the permittee agrees to avoid and minimize stream impacts to the extent practicable[,] []taking into account the cost of alternatives that would satisfy the project's purpose[][,]" and to mitigate the damage.⁴⁹

43. *OVEC, Inc.*, 828 F.3d at 319 (discussing need for CWA section 404 dredge and fill permit); *see also* Evans, *supra* note 30, at 544 (discussing "discharge and fill" material permit exception to CWA section 402 permit).

44. Evans, *supra* note 30, at 544 (quoting 33 U.S.C. § 1251(a) (2006)) (stating purpose of CWA).

45. *See id.* (discussing CWA history and section 404 dredge and fill permit).

46. *See id.* (explaining CWA permitting history and significance of statutory language).

47. *See id.* at 543-45 (discussing fill as defined under RHA and CWA).

48. *See id.* at 540 (noting that surface coal mining operations currently permitted under section 404 would be prohibited under section 402); *see also* Browand, *infra* note 50, at 633-37 (analyzing coal companies' right to be regulated under section 404 instead of section 402).

49. Evans, *supra* note 30, at 539 (citing 33 C.F.R. §§ 332.1(c)(2), 332.3(a) (2008)) (describing section 404 permit requirements).

266 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVIII: p. 259

C. Defining “Fill” Under the CWA

Both the EPA and the Corps initially defined the term “fill” under the CWA expansively to include “any pollutant used to create fill in the traditional sense of . . . changing the bottom elevation of a water body for any purpose.”⁵⁰ In 1977, in an attempt to more clearly define the boundaries between section 402 waste regulation and section 404 fill regulation, the Corps changed its definition of fill material to reflect a “primary purpose” test.⁵¹ The Corps’ new primary purpose test redefined fill material “to mean ‘any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody.’”⁵² The Corps excluded “any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under Section 402 [of the CWA].”⁵³

In 1999, in *Bragg v. Robertson*,⁵⁴ “the District Court for the Southern District of West Virginia . . . held . . . that coal mining waste was not ‘fill’ under the Corps’ purpose-based [definition],” which removed coal mining activities from the protection of the Corps’ permit.⁵⁵ In response, the EPA and the Corps abandoned the purpose-based test for defining fill materials, and instead, implemented an effects-based test.⁵⁶ The new rule specifically includes “overburden from mining or other excavation activities[]” in its definition of fill material that is subject to a section 404 permit exception under the CWA.⁵⁷

D. Judicial Interpretations of Agency Rules

Various environmental groups have challenged the Corps’ practice of issuing section 404 “dredge and fill” permits to construc-

50. Nathaniel Browand, Note, *Shifting the Boundary Between the Sections 402 and 404 Permitting Programs by Expanding the Definition of Fill Material*, 31 B.C. ENVTL. AFF. L. REV. 617, 624 (2004) (internal quotation marks omitted) (quoting 33 C.F.R. § 209.120(d)(6) (1976)) (discussing historical agency interpretations of CWA).

51. *See id.* at 625 (explaining Corps rule changes under CWA).

52. *Id.* (quoting 33 C.F.R. § 323.2(e) (2001)) (explaining Corps’ new primary purpose test for fill material).

53. *Id.* (quoting 33 C.F.R. § 323.2(e) (2001)) (stating Corps new definition of fill material under 1977 rule changes to CWA).

54. 72 F. Supp. 2d 624 (S.D.W. Va. 1999).

55. *See Evans, supra* note 30, at 541-42 (citing *Bragg v. Robertson*, 72 F. Supp. 2d 624, 656-57, 663 (S.D. W. Va. 1999)) (discussing West Virginia district court opinion that found mining waste was not “fill”).

56. *See id.* (noting EPA and Corps rule change in response to *Bragg* decision).

57. *Id.* at 542 (quoting 33 C.F.R. § 323.2(e) (2009)) (highlighting new regulation’s inclusion of mining overburden in fill materials that fall under section 404 permit).

2017] FINE TUNING THE SCOPE OF THE CORPS' JURISDICTION 267

tion and mining operations prior to, during, and after the Corps adopted the effects-based test for determining what constitutes fill material.⁵⁸ Prior to the rule change, environmental groups attacked the validity of section 404 permits based on the Corps' definition of fill materials.⁵⁹ Courts typically found that the fill materials from mining operations were waste materials and, therefore, did not fall under a section 404 permit.⁶⁰ After the rule change, however, the more recent trend has shown courts interpreting cases favorably in response to coal companies' needs for an exception to the stringent water quality requirements of section 402.⁶¹

Environmental groups cut their losses under the "fill material" approach after appellate courts showed adherence to the Corps' new regulations.⁶² The only option left for environmental activists was to attack the sufficiency of the Corps' review of the section 404 application, as NEPA and the CWA required.⁶³ Environmental

58. See generally *OVEC, Inc.*, 828 F.3d 316 (4th Cir. 2016); *Kentuckians for Commw. v. United States Army Corps of Eng'rs*, 746 F.3d 698 (6th Cir. 2014); *Friends of Back Bay v. United States Army Corps of Eng'rs*, 681 F.3d 581 (4th Cir. 2012); *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009); *Bragg v. Robertson*, 7 F. Supp. 2d 624 (S.D.W. Va. 1999) (hearing challenges to Corps' issuance of section 404 permits in various contexts).

59. See Browand, *supra* note 50, at 633-35 (analyzing cases challenging section 404 permits on definition of "fill material").

60. See *id.* (discussing district court's view that mining overburden and spoil not considered "fill material" for purposes of section 404 permit). In a 1989 decision, the District Court for the Southern District of West Virginia concluded that the EPA had the authority to prohibit coal mining fill activities because the activities would involve discharging waste into federally regulated U.S. waters in violation of section 402 under the CWA. See *W. Va. Coal Ass'n v. Reilly*, 728 F.Supp. 1276, 1293 (S.D.W. Va. 1989) (concluding EPA had jurisdiction to prohibit dredge and fill activities as coal mine waste). Citing to *Reilly* for support, the District Court for the District of New Mexico similarly held that the EPA had jurisdiction to prohibit the dumping of gold-mine overburden because such overburden constituted waste. See *Friends of Santa Fe Cty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1342-43 (D.N.M. 1995) (holding EPA had jurisdiction to prohibit gold-mine overburden as waste).

61. Browand, *supra* note 50, at 635 (discussing recent cases illustrating presumption in favor of Corps' jurisdiction over valley-fill permitting).

62. See generally *Friends of Back Bay*, 681 F.3d at 583; *Aracoma*, 556 F.3d at 187-88 (analyzing plaintiffs attack on Corps environmental review of section 404 permit applications in various contexts). Appellate courts began to reject district courts' treatment of coal mining overburden as waste and, instead, decided that overburden was properly categorized as fill material and therefore subject to the Corps' section 404 permitting process. See *Aracoma*, 556 F.3d at 187-88; *Friends of Back Bay*, 681 F.3d at 583 (overturning district court decisions regarding categorization of fill material and discussing Corps' section 404 jurisdiction in construction context).

63. See generally *Kentuckians*, 746 F.3d at 701; *Friends of Back Bay*, 681 F.3d at 583; *Aracoma*, 556 F.3d at 187-88; (analyzing plaintiff's attack on Corps environmental review of section 404 permit applications in various contexts).

268 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVIII: p. 259

groups asserted, in various construction and mining contexts, that the Corps' review of the environmental impacts of the proposed projects was insufficient to meet the requirements NEPA and the CWA set out.⁶⁴

E. Attacks on the Corps' Environmental Review Process

In *Ohio Valley Entl. Coal. v. Aracoma Coal Co. (Aracoma)*,⁶⁵ the plaintiff, a consortium of environmental organizations, brought an action against the Corps, challenging the validity of four section 404 permits issued by the Corps to various coal companies.⁶⁶ “[The] permits authorize[d] the creation of [twenty-three] valley fills and [] sediment ponds[]” impacting just over thirteen miles of intermittent and ephemeral streams.⁶⁷ For each of the four permits, the Corps conducted Environmental Assessments, concluding “that the permitted activity would not result in significant environmental impacts given planned mitigation measures.”⁶⁸ The environmental groups claimed that the Corps “violated [] substantive and procedural provisions of [] [NEPA] and the [CWA]” because it failed to prepare an EIS.⁶⁹ The groups claimed that an EIS was required “given the significant individual and cumulative adverse effects the projects would have on water quality, aquatic and terrestrial ecosystems and habitats, species survival and diversity, crucial stream functions, forests, and the aesthetic value of the destroyed mountains.”⁷⁰

64. See generally *Friends of Back Bay*, 681 F.3d at 583; *Aracoma*, 556 F.3d at 187-88 (outlining plaintiff's attack on Corps environmental review of section 404 permit applications in various contexts). In *Aracoma*, the Fourth Circuit overturned the District Court for the Southern District of West Virginia's decision to treat coal mining overburden as waste and concluded that the overburden was properly categorized as fill and subject to the Corps' section 404 permitting process. See *Aracoma*, 556 F.3d at 187-88 (overturning district court decision). Although *Friends of Back Bay* focused on the sufficiency of the Corps' environmental review, the case illustrates a different example in which the Corps' authority under section 404 relating to dredge and fill activities can arise. See *Friends of Back Bay*, 681 F.3d at 583 (discussing applicability of section 404 permit in boating and mooring-facility construction project).

65. *Aracoma*, 556 F.3d at 187-88 (stating plaintiff's claim against Corps under APA).

66. *Id.* (explaining plaintiff's challenges to permit validity on appeal).

67. *Id.* at 187 (stating scope of valley-fill project).

68. *Id.* (describing Corps' findings and grant of permits).

69. *Id.* at 187-88 (describing OVEC's claims against Corps for violation of NEPA and CWA).

70. *Aracoma*, 556 F.3d at 187-88 (describing plaintiff's argument that NEPA required EIS). The district court found “that the probable impacts of the valley fills would be significant and adverse under both the CWA and NEPA[,] that the [proposed] mitigation plans . . . were [] [in]sufficient[,] . . . that [] . . . the Corps

The District Court for the Southern District of West Virginia found that the Corps violated NEPA and the CWA by limiting the scope of its environmental review to only the projects' impacts on U.S. waters, rather than limiting the scope of its environmental review to the projects' impact of the entire valley fill project.⁷¹ The Corps appealed the district court's ruling and argued that it was "entitled to deference on its determination" of the required scope of review and on its findings on "individual and cumulative impacts and mitigation[.]"⁷² In response, the environmental groups argued that the Corps' NEPA analysis must consider all environmental impacts caused by the fill project as a whole.⁷³ The Corps' counter-argument on appeal was that its interpretation of its own regulations on the limited scope of review was reasonable and entitled to deference.⁷⁴

"NEPA requires federal agencies to take a 'hard look' at the environmental consequences of their actions," but it does not provide guidance on how the scope of environmental review should be determined.⁷⁵ The Corps' regulations, however, state that "the proper scope of analysis for NEPA review is 'to address the impacts of the *specific activity* requiring a . . . permit and those portions of the entire project over which the [Corps] district engineer has sufficient control and responsibility to warrant Federal review.'"⁷⁶

The Court of Appeals for the Fourth Circuit focused its decision on the "specific activity" language found in the Corps' regulations.⁷⁷ The Court of Appeals for the Fourth Circuit also pointed to section 404 of the CWA itself, which authorizes the Corps to issue permits "for the discharge of dredged or fill material into the navi-

[is required] . . . under NEPA to look [] at the [broader] impact . . . of the entire valley fill project[,] and[] . . . that the Corps inadequately evaluated the cumulative impacts of the projects." *Id.* at 188.

71. *Id.* at 188 (discussing district court findings of Corps' violations).

72. *Id.* (stating Corps' deference arguments on appeal).

73. *Id.* at 193 (stating plaintiff's arguments on appeal).

74. *Id.* at 188-89 (stating Corps' counter-arguments on appeal). The Corps has also argued that it is entitled to deference in interpreting section 404 based on the *Chevron* doctrine in other contexts. See Bradford C. Mank, *American Mining Congress v. Army Corps of Engineers: Ignoring Chevron and the Clean Water Act's Broad Purposes*, 25 N. Ky. L. Rev. 51, 57-58 (1997) (explaining Corp's *Chevron* arguments).

75. *Aracoma*, 556 F.3d at 194 (quoting *Wetlands Action Network v. United States Army Corps of Eng'rs*, 222 F.3d 1105, 1115 (9th Cir. 2000)) (providing NEPA requirements on Corps' scope of environmental review).

76. *Id.* at 194 (alteration in original) (emphasis added) (quoting 33 C.F.R. pt. 325, App. B, § 7(b)(1) (2008)) (noting Corps' regulations on scope of NEPA review).

77. See *id.* (discussing court's reasoning for evaluating scope of activity).

270 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVIII: p. 259

gable waters[.]”⁷⁸ The court found that the “specific activity[.]” for which the Corps issued a section 404 permit in these instances, was “nothing more than the filling of jurisdictional waters for the purpose of creating an underdrain system for the larger valley fill.”⁷⁹ The Corps did not have jurisdiction to prevent the larger valley-fill project because such fill placement was outside of U.S. waters, and, according to the court, was subject to the exclusive jurisdiction of WVDEP as provided for under the SMCRA.⁸⁰

The Court of Appeals for the Fourth Circuit then addressed the possibility that the Corps had jurisdiction over the entire valley-fill project because it was a larger project that encompassed the specific activity over which the Corps has “sufficient control and responsibility to warrant Federal review.”⁸¹ The Corps’ regulations state that these are cases “where the environmental consequences of the larger project are essentially products of the Corps[‘] permit action.”⁸² The environmental group contended that the overall valley-fill project must have been within the scope of the Corps’ NEPA jurisdiction and review because the project would not be possible without the section 404 permit for the underdrain system.⁸³ The court found that the environmental groups’ arguments warranted consideration because their arguments had intuitive appeal.⁸⁴ The court, however, ultimately concluded that requiring the Corps to review the entire project would create duplicative agency action, given that WVDEP already had jurisdiction to review the environmental impacts of the proposed mining operations as a whole.⁸⁵

Under the SMCRA, “the WVDEP surface mine permitting process examines ‘[e]very detail of the manner in which a coal mining operation is to be conducted . . . includ[ing] the plan for the dispo-

78. *Id.* (emphasis in original removed) (internal quotation marks omitted) (quoting 33 U.S.C. § 1344(a) (2000)) (providing arguments in favor of limited scope of review).

79. *See id.* (upholding Corps’ limited scope of review).

80. *See Aracoma*, 556 F.3d at 194 (justifying holding for limited scope of review).

81. *Id.* (internal quotation marks omitted) (quoting 33 C.F.R. pt. 325, App. B, § 7(b)(1) (2008)) (internal quotation marks omitted) (discussing possible scope of Corps’ jurisdiction).

82. *Id.* (emphasis in original removed) (internal quotation marks omitted) (quoting 33 C.F.R. pt. 325, App. B, § 7(b)(1) (2008)) (discussing standards and regulations for determining possible scope of Corps’ review).

83. *Id.* at 194-95 (discussing need for 404 permit for entire valley-fill project). The underdrain system is required for the safety and stability of the overall valley-fill project. *Id.* at 195.

84. *Id.* at 194-95 (discussing validity of plaintiff’s contentions).

85. *Aracoma*, 556 F.3d at 196 (holding that Corps’ jurisdiction is precluded by exclusive grant of jurisdiction to WVDEP).

2017] FINE TUNING THE SCOPE OF THE CORPS' JURISDICTION 271

sal of excess spoil[.]’⁸⁶ The Court of Appeals for the Fourth Circuit noted that the regulatory scheme the NEPA promulgated and the Corps echoed focused on a complimentary approach to the interplay between state and federal regulatory agencies and discouraged the duplication of state agency procedures.⁸⁷ The court ultimately concluded that the Corps properly and reasonably limited the scope of its review; in addition, the court determined that the Corps should be accorded deference in its findings on the environmental impact and mitigation of the operations.⁸⁸

Much like in the Fourth Circuit cases, the Sixth Circuit, in *Kentuckians for Commw. v. United States Army Corps of Eng'rs (Kentuckians)*⁸⁹, upheld the Corps' decision to limit its scope of review only to the specific dredge-and-fill activities for which the coal company requested a section 404 permit.⁹⁰ The Sixth Circuit focused its reasoning in *Kentuckians* on many of the same factors as that of the Fourth Circuit in *Aracoma*, including the Corps' own interpretation of its scope of review and congressional intent to limit duplicative regulation between the EPA and the Corps.⁹¹

F. Section 404 Permits and NEPA Analysis Outside of the Mining Context

Courts have analyzed the Corps' issuance of section 404 permits in a variety of contexts.⁹² In *Friends of Back Bay v. United States*

86. *Id.* at 195 (alterations in original) (quoting Br. for the W. Va. Dep't of Commerce and the W. Va. Dep't of Env'tl. Prot. as Amici Curiae Supporting Appellants at 13) (discussing extent of WVDEP's required environmental review).

87. *Id.* at 196 (discussing discouragement of duplicative agency review).

88. *Id.* at 197 (noting court's holding). The court found that the Corps impact findings were not arbitrary or capricious. *Id.* at 201. The court found that the Corps was "able to 'articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *Id.* at 207 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (internal quotation marks omitted). The court found that the Corps did not act arbitrarily or capriciously when it found that the project's cumulative impacts would not be significantly adverse. *Id.* at 209.

89. 746 F.3d 698 (6th Cir. 2014).

90. *Kentuckians for Commw. v. United States Army Corps of Eng'rs*, 746 F.3d 698, 698 (6th Cir. 2014) (upholding Corps' decision to limit scope of review to dredge-and-fill activities).

91. *Id.* at 708-11 (accepting Corps' arguments for limited scope of review).

92. See generally *Defenders of Wildlife v. N.C. Dep't of Transp.*, 762 F.3d 374, 380 (4th Cir. 2014); see also *Friends of Back Bay v. United States Army Corps of Eng'rs*, 681 F.3d 581, 583 (4th Cir. 2012) (analyzing Corps' jurisdiction in various construction contexts). These cases do not directly address the court's analysis of the Corps' decisions to issue section 404 permits; rather, the cases present situations outside of the coal mining context where such an analysis could potentially arise. *Id.*

272 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVIII: p. 259

Army Corps of Engineers (Friends of Back Bay),⁹³ the Fourth Circuit analyzed the sufficiency of the Corps' environmental review of a proposed boat mooring facility near a national wildlife refuge.⁹⁴ The Corps issued a section 404 permit to authorize "channel dredging, as well as the excavation and relocation . . . of silt and other material."⁹⁵ "[T]he permit [also authorized] [] the construction of bulkheads, piers, [and] mooring piles[.]"⁹⁶

An environmental group challenged the Corps' decision to issue the permit in *Friends of Back Bay*, arguing that the Corps improperly limited its scope of review.⁹⁷ The District Court for the District of Columbia deferred to the Corps' decision to limit its scope of review and not consider the potential harm to the refuge from the increase in boating activity resulting from the project.⁹⁸ The Fourth Circuit overturned the district court's ruling and forced the Corps to expand its scope of review to consider the possible negative effects of increased motor traffic near the refuge.⁹⁹ The Fourth Circuit made no mention of any competing regulatory agencies in its decision.¹⁰⁰ Rather, it focused its analysis on the Corps' required scope of review.¹⁰¹

Although the Corps' review was not called into question, environmental groups challenged the sufficiency of state regulatory agencies' review of proposed highway construction in at least one case.¹⁰² In *Defenders of Wildlife v. North Carolina Department of Transportation (Defenders of Wildlife)*,¹⁰³ environmental groups challenged the sufficiency of the state transportation agency's review of a proposed bridge construction.¹⁰⁴ In that case, the Fourth Circuit found that the District Court for the Eastern District of North Carolina improperly defined the scope of the project and the scope of

93. 681 F.3d 581 (4th Cir. 2012).

94. *Friends of Back Bay v. United States Army Corps of Engineers*, 681 F.3d 581, 583 (4th Cir. 2012) at 583 (presenting issue on appeal).

95. *Id.* (discussing scope of permit and construction activities in question).

96. *Id.* (describing construction activities authorized by permit).

97. *Id.* at 586 (describing plaintiff's complaint).

98. *Id.* (discussing district court's holding).

99. *Friends of Back Bay*, 681 F.3d at 589 (remanding case to district court for preparation of new EIS).

100. *See id.* (providing no mention of competing regulatory agencies).

101. *See id.* (focusing analysis on Corps' required scope of review).

102. *See Defenders of Wildlife v. N.C. Dep't of Transp.*, 762 F.3d 374, 381-82 (4th Cir. 2014) (discussing claims against N.C. Department of Transportation for insufficient review under NEPA).

103. 762 F.3d 374 (4th Cir. 2014).

104. *Id.* at 381 (discussing plaintiff's suit against state regulatory agency for violations of NEPA).

2017] FINE TUNING THE SCOPE OF THE CORPS' JURISDICTION 273

review.¹⁰⁵ Because the project dealt with the construction of a bridge, which provided access to coastal barrier islands, the project would likely invoke the Corps' jurisdiction as well.¹⁰⁶ Similar challenges, like those made to the Corps' issuance of section 404 permits in the coal mining context, could potentially be made in the context of the *Defenders of Wildlife* bridge construction case.¹⁰⁷

IV. THE FOURTH CIRCUIT'S REVIEW OF THE CORP'S JURISDICTION ON APPEAL

A. NEPA Violation

In *OVEC, Inc.*, the Fourth Circuit discussed and rejected the plaintiff's contention that the Corps violated NEPA by failing to consider the evidence that OVEC introduced during the public interest review period.¹⁰⁸ The court primarily relied on its holding in *Aracoma* and upheld the Corps' decision to grant Raven Crest's section 404 permit, despite evidence that OVEC submitted it.¹⁰⁹ The key factor to the court's decision was the "elaborate, congressionally mandated schema for the permitting of surface mining operations[.]"¹¹⁰ This statutory scheme places the "bulk of environmental effects associated with surface coal mining operations" under WVDEP's jurisdiction.¹¹¹

The court found that the critical facts of *OVEC, Inc.* were indistinguishable from those of the *Aracoma* case, where the Fourth Circuit upheld the Corps' decision to limit its scope of review to "only the effects of the discharge of fill material into 'the affected waters and adjacent riparian areas.'"¹¹² OVEC argued that its case was distinguishable from *Aracoma* because the activities in its case, which

105. *Id.* at 391 (stating that district court based its analysis on improperly defined scope of review). The court found that the district court's analysis was based on an "erroneously defined scope of the Project[.]" *Id.*

106. *See id.* at 381 (discussing scope and purpose of proposed bridge replacement project).

107. *See Defenders of Wildlife*, 762 F.3d at 381-82 (discussing scope of proposed project that involves 2.4 miles of bridge and fifteen miles of highway traveling through federally owned and managed natural coastal areas).

108. *Ohio Valley Envtl. Coal, Inc. v. United States Army Corps of Eng'rs*, 828 F.3d 316, 318 (4th Cir. 2016) (addressing plaintiff's arguments on appeal).

109. *Id.* at 321-23 (relying on precedent to uphold Corps' decision).

110. *See id.* at 322-23 (internal quotation marks omitted) (quoting *Aracoma*, 556 F.3d at 195) (stating reasoning behind decision to uphold trial court decision).

111. *Id.* at 322-23 (arguing that requiring broader scope of review would be inappropriate).

112. *Id.* at 322 (quoting *Aracoma*, 556 F.3d at 193) (discussing reliance on precedent).

274 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVIII: p. 259

the Corps authorized, involved the “mine-through” of streams, as opposed to the overburden valley-fill activities in question in *Aracoma*.¹¹³ OVEC raised this distinction as an attempt to show that what the Corps was authorizing under its section 404 permit in the *OVEC, Inc.* case was more than the mere dumping of fill material into federally regulated U.S. waters.¹¹⁴ OVEC argued that the Corps was authorizing coal mining activities as a whole.¹¹⁵ OVEC reasoned that because the Corps was authorizing mining activities, it must review the human-health effects of the mining operation overall.¹¹⁶ The Fourth Circuit rejected OVEC’s attempt to distinguish *Aracoma* and held, in accordance with the Sixth Circuit, that the specific activity a section 404 permit authorized cannot be coal mining because WVDEP has exclusive authority to authorize coal mining activities.¹¹⁷

OVEC further attempted to distinguish *OVEC, Inc.* by asserting that the claims made in *Aracoma* “‘were limited to the Corps’ duty to consider water quality impacts of the authorized valley fills and related mining,’ whereas here[,] [in *OVEC, Inc.*,] [the claims] relate[d] to human health.”¹¹⁸ OVEC believed that such a distinction would require the Corps to expand its review.¹¹⁹ According to OVEC, while the statutory scheme provided for extensive review of water quality impacts, it did not require the review of the human-health impacts of the project as a whole.¹²⁰ OVEC argued that the Fourth Circuit should require the Corps to review the human-health consequences of the mining project because the statutory scheme did not require any other agency to do so.¹²¹

113. *Ohio Valley Envtl. Coal. Inc. v. United States Army Corps of Engineers*, 828 F.3d 316, 323 (4th Cir. 2016) (showing plaintiff’s attempt to distinguish current case from unfavorable precedent).

114. *See id.* (addressing plaintiff’s first argument that Corps was authorizing more than just coal mining).

115. *See id.* (raising and rejecting plaintiff’s attempt to distinguish facts and legal analysis).

116. *See id.* (discussing plaintiff’s second argument).

117. *Id.* (citing *Kentuckians for the Commw. v. United States Army Corps of Eng’rs*, 746 F.3d 698, 710 (6th Cir. 2014)) (noting court’s reliance on precedent and persuasive authority).

118. *OVEC, Inc.*, 828 F.3d at 323 (quoting Appellants’ Br. at 33) (discussing plaintiff’s attempts to distinguish unfavorable precedent).

119. *See id.* (inferring reasoning behind plaintiff’s arguments).

120. *See id.* (outlining conflicting regulations between CWA and SMCRA). OVEC argued that the unfavorable holding in *Aracoma* was a result of existing statutory requirements addressing water quality concerns. *Id.*

121. *See id.* at 324 (discussing plaintiff’s arguments).

The Fourth Circuit, however, rejected this distinction in *OVEC, Inc.*¹²² The court concluded that WVDEP was, in fact, required to consider human-health effects when it issued a section 401 permit under the CWA.¹²³ The court subsequently found that WVDEP's human-health considerations would not be required to justify the Corps' decision to limit the Corps' scope of review under section 404.¹²⁴ The Corps' scope of review is limited to only the specific dredge-and-fill activities detailed in *OVEC, Inc.*, regardless of the specific considerations other agencies required, because the SM-CRA gives "exclusive jurisdiction" to WVDEP to authorize coal mining activities.¹²⁵

B. CWA Section 404 Violation

In *OVEC, Inc.*, after the Fourth Circuit rejected OVEC's claims that the Corps violated NEPA, it turned to, and quickly rejected, OVEC's CWA claim.¹²⁶ OVEC argued that the Corps' own regulations required that it "consider the connection between surface coal mining and adverse public health effects" during its review of a section 404 permit application.¹²⁷ OVEC relied on these regulations, attempting to show that the Corps' failure to consider the reports on the adverse human-health impacts of coal mining generally constituted a violation of section 404 of the CWA.¹²⁸

OVEC addressed the Corps' regulations that require the Corps to reject permit applications for "discharges that will involve '[s]ignificantly adverse effects . . . on human health or welfare.'"¹²⁹ OVEC also highlighted the Corps' regulation that requires the Corps to weigh the benefits of the proposed activity against its "rea-

122. *Id.* at 323-24 (rejecting plaintiff's arguments attempting to distinguish unfavorable precedent).

123. *OVEC, Inc.*, 828 F.3d at 324 (providing reasoning for rejecting plaintiff's attempt to distinguish unfavorable precedent).

124. *Id.* (expanding on reasoning behind rejecting plaintiff's distinctions).

125. *Id.* (stating conclusion on validity of Corps' decision to limit scope of review under section 404 to only specific activities related to dredging and filling of jurisdictional waters).

126. *See id.* (raising and rejecting plaintiff's argument that Corps violated CWA section 404).

127. *Id.* (stating OVEC's argument that section 404 requires public health review).

128. *See OVEC, Inc.*, 828 F.3d at 323-24 (discussing plaintiff's arguments about violation).

129. *Id.* (alteration in original) (quoting 40 C.F.R. § 230.10(c) (2012)) (outlining plaintiff's argument); *see also* 40 C.F.R. § 230.10(c) (2012) (providing regulatory basis for plaintiff's argument).

276 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVIII: p. 259

sonably foreseeable detriments.”¹³⁰ The Fourth Circuit agreed that these regulations “require the Corps to take into account the public-health effects of a proposed discharge of fill material before granting a section 404 permit.”¹³¹ The court ultimately concluded, however, for the same reasons it employed in its NEPA analysis, that the Corps’ review of public-health effects was properly limited to the proposed discharge of fill material alone.¹³² The court refused to force the Corps to review impacts of coal mining generally because such a review is exclusively under WVDEP’s authority pursuant to the SMCRA.¹³³

V. AN ANALYSIS OF THE FOURTH CIRCUIT’S DECISION

A. Mining Through: What is the Corps Really Authorizing?

In *OVEC, Inc.*, the Fourth Circuit relied on binding and persuasive precedent in *Aracoma* and *Kentuckians* in order to uphold the Corps’ decision to limit the Corps’ scope of review.¹³⁴ In both of those cases, the proposed activity requiring a section 404 permit was the filling of streams with overburden from strip mining activities.¹³⁵ In *OVEC, Inc.*, however, the proposed activity involved the “mining through” of streams.¹³⁶ The plaintiffs did not challenge the Corps’ decision to regulate and review the “mining through” activity.¹³⁷ Rather, they challenged only the sufficiency and scope of the Corps’ environmental review of the activity.¹³⁸ Although the Fourth Circuit agreed that the Corps had authority to regulate the activity of mining-through the stream, it refused to require the

130. *OVEC, Inc.*, 828 F.3d at 323-24 (quoting 33 C.F.R. § 320.4(a)(1) (2011)) (outlining plaintiff’s argument); *see also* 33 C.F.R. § 320.4(a)(1) (2011) (providing regulatory basis for plaintiff’s argument).

131. *OVEC, Inc.*, 828 F.3d at 323-24 (discussing court’s concessions to plaintiff’s premises).

132. *Id.* at 324 (holding in favor of limited scope).

133. *See id.* (limiting Corps’ review).

134. For further discussion of the Fourth Circuit’s reliance on its reliance on precedent, *see supra* notes 108-133 and accompanying text.

135. *OVEC, Inc.*, 828 F.3d at 322-23 (distinguishing case from *Aracoma* and *Kentuckians* precedent).

136. *Id.* at 322 (internal quotation marks omitted) (addressing plaintiff’s arguments).

137. *Id.* (internal quotation marks omitted) (stating plaintiff’s argument that specific activity to be regulated is “mining-through” streams).

138. *Ohio Valley Envtl. Coal., Inc. v. United States Army Corps of Eng’rs*, No. 2:12-6689, 2014 WL 4102478, at *15 (S.D.W.V. Aug. 18, 2014) (clarifying scope of plaintiff’s complaint).

Corps to consider the cumulative adverse impacts of coal mining because coal mining is exclusively regulated by WVDEP.¹³⁹

In the absence of WVDEP regulation, the Corps' regulations provide that the Corps must consider the human-health effects of coal mining generally because such effects are "reasonably foreseeable[.]" indirect, and cumulative effects of the proposed mining-through activities.¹⁴⁰ The Corps' regulations, however, also provide guidance as to when "the Corps has control and responsibility beyond the specific regulated activity[.]"¹⁴¹ These regulations require that the Corps consider two categories of factors in assessing the scope of its jurisdiction.¹⁴² The first category encompasses two proximate cause factors concerning the link between the specific activity and the project as a whole.¹⁴³ The second category addresses two jurisdictional factors prompting the Corps to consider the breadth of its jurisdiction and "[t]he extent of cumulative [f]ederal control and responsibility."¹⁴⁴ In *OVEC, Inc.*, the Corps decided to limit its scope of review of Raven Crest's application to "the footprint of the regulated activity within the delineated water[]" because the entire project was not regulated within cumulative federal control.¹⁴⁵

The Corps' decision gives controlling weight to the jurisdictional factors for determining when the Corps has responsibility beyond the specifically regulated activity.¹⁴⁶ The Fourth Circuit in *OVEC, Inc.* justified the Corps' decision by relying on the reasoning

139. See *OVEC, Inc.*, 828 F.3d at 324 (limiting Corps' scope of review).

140. See *id.* at 320-22 (internal quotation marks omitted) (quoting *Ohio Valley Envtl. Coal v. Aracoma Coal Co.*, 556 F.3d 177, 191 (4th Cir. 2009)) (analyzing appropriate level of Corps' jurisdiction); see also 40 C.F.R. § 1508.8 (2011) (providing regulatory basis for jurisdictional analysis).

141. *Ohio Valley Envtl. Coal, Inc. v. United States Army Corps of Eng'rs*, No. 2:12-6689, 2014 WL 4102478, at *13 (S.D.W.V. Aug. 18, 2014) (laying out plaintiff's argument); see also 33 C.F.R. Pt. 325, App. B(7)(b) (1988) (providing regulations supporting plaintiff's argument).

142. *OVEC, Inc.*, 828 F.3d at 321-22 (discussing Corps' regulations).

143. *Ohio Valley Envtl. Coal, Inc.*, 2014 WL 4102478 at *14 (analyzing plaintiff's regulatory arguments); see also 33 C.F.R. Pt. 325, App. B(7)(b) (1988) (providing regulatory basis for plaintiff's argument).

144. *Ohio Valley Envtl. Coal, Inc.*, 2014 WL 4102478 at *14 (quoting 33 C.F.R. Pt. 325, App. B(7)(b) (1988)) (analyzing Corps' regulations).

145. *Id.* (internal quotation marks omitted) (quoting Department of the Army Permit Evaluation and Decision Doc. 8-9) (outlining structure of Corps' regulations).

146. See *id.* (noting Corps analyzed four factors considered in determining whether it has responsibility beyond specific regulated activity). "The Corps relied primarily on the [jurisdictional factors], as WVDEP was responsible for the overall permitting of coal operations pursuant to SMCRA[.]" *Id.*

278 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVIII: p. 259

the Fourth Circuit used in *Aracoma*.¹⁴⁷ In *Aracoma*, the court found that the specific activity was “nothing more than the filling of jurisdictional waters for the purpose of creating an underdrain system for the larger valley fill.”¹⁴⁸ The court upheld the Corps’ permit in *Aracoma* because, although it was an activity deemed to be a causal link and a necessary requirement for the rest of the coal mining project, the rest of the project “[fell] under the exclusive jurisdiction of [] WVDEP[.]”¹⁴⁹ The court upheld the Corps’ decision to give controlling weight to the jurisdictional factors.¹⁵⁰

The court in *Aracoma* was able to limit the Corps’ required scope of review based on a jurisdictional conflict with WVDEP because the question was whether the Corps must consider coal mining when the specific activity was only the underdrain system related to the coal mine.¹⁵¹ In *OVEC, Inc.*, however, the activity for which the Corps issued a section 404 permit was not for the mere filling of a stream for an underdrain system; rather, it was for the “mining through” of federally regulated U.S. waters.¹⁵² The Fourth Circuit’s reasoning in *Aracoma* for upholding the Corps’ decision does not transfer to the Fourth Circuit’s reasoning in *OVEC, Inc.* without distorting the definition of the “specific activity” in question.¹⁵³

The activity in this case, mining-through streams, is not merely a causal link to coal mining, but is coal mining itself.¹⁵⁴ If the “specific activity” was defined as the “mining-through” of streams, the Corps would likely be required to review the cumulative health effects of coal mining because coal mining is the specific activity for which the Corps had issued a permit.¹⁵⁵ The *OVEC, Inc.* court per-

147. See *OVEC, Inc.*, 828 F.3d at 321-24 (relying on *Aracoma* precedent).

148. *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 194 (4th Cir. 2009) (distinguishing precedent).

149. *Id.* (limiting Corps’ scope of review on jurisdictional grounds).

150. See *id.* (giving controlling weight to jurisdictional limitations in Corps’ regulations).

151. See *id.* at 187 (describing scope of requested permit). The *Aracoma* permits authorized the creation of valley fills and sediment ponds. *Id.*

152. See *OVEC, Inc.*, 828 F.3d at 322-23 (internal quotation marks omitted) (analyzing scope of Corps’ review). “[T]he Corps limited its NEPA review to the environmental impacts of the dredge-and-fill activities associated with ‘mining through’ the streams[.]” *Id.* at 322.

153. See generally *Aracoma*, 556 F.3d at 194; see also *OVEC, Inc.*, 828 F.3d at 323 (comparing reasoning to precedent).

154. See *Evans, supra* note 30, at 544 (describing activities Corps regulates).

155. See *Ohio Valley Envtl. Coal., Inc. v. United States Army Corps of Eng’rs*, No. 2:12-6689, 2014 WL 4102478, at *13-*15 (S.D.W.V. Aug. 18, 2014) (citing *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004)) (discussing environmental review required by NEPA).

2017] FINE TUNING THE SCOPE OF THE CORPS' JURISDICTION 279

mitted the Corps to further narrow its scope of review on jurisdictional grounds by even further limiting its definition of the “specific activity[.]”¹⁵⁶ The Fourth Circuit used the jurisdictional basis in *Aracoma* to limit the scope of review required for filling activities and used the same basis to limit the definition of the “specific activity” in question in *OVEC, Inc.*¹⁵⁷ The court in *OVEC, Inc.* refused to require the Corps to consider the negative human-health effects of coal mining when the Corps issued a permit to do the very same thing.¹⁵⁸

B. Filling the Gap between the Scope of the Corps' Authority and the Scope of Its Review

While there appears to be a gap in the *OVEC, Inc.* court's logic, the court found a compelling justification for limiting in the scope of the Corps' review in the statutory interplay between NEPA, the SMCRA, and the CWA.¹⁵⁹ The SMCRA grants exclusive jurisdiction over the regulation of coal mining to WVDEP.¹⁶⁰ WVDEP must review “[e]very detail” of coal mining operations under the SMCRA permitting process.¹⁶¹ The Fourth Circuit in *Aracoma* found that also requiring the Corps to review the cumulative impacts of coal mining would be “at best duplicative, and, at worst, meaningless.”¹⁶² This justification for the Corps' decision holds true whether the specific activity in question is simply the disposal of mining overburden or actually mining through streams.¹⁶³

The Corps' regulations in *OVEC, Inc.*, however, forced the court to manipulate the definition of “specific activity[.]”¹⁶⁴ There, the Fourth Circuit had no outlet for limiting the scope of review for

156. See *id.* at *14 (allowing Corps to narrow definition of “specific activity”).

157. See generally *Aracoma*, 556 F.3d at 194; *OVEC, Inc.*, 828 F.3d at 323 (providing justifications for limitation of scope of permit review).

158. See *OVEC, Inc.*, 828 F.3d at 323-24 (upholding Corps decision to limit scope of review for dredge and fill activities relating to mine-through activities).

159. See generally *Aracoma*, 556 F.3d at 195-96 (discussing duplicative action justification for limiting Corps scope of review).

160. *Id.* at 195 (citing 30 U.S.C. § 1253 (2000)) (analyzing jurisdictional balance between Corps and WVDEP); see also 30 U.S.C. § 1253 (2000) (providing statutory support for contention).

161. See *Aracoma*, 556 F.3d at 195-96 (alteration in original) (quoting W. Va. Dep't of Commerce & W. Va. Dep't Env'tl. Prot. as Amici Curiae Supporting Appellants 13) (discussing scope of WVDEP's environmental review).

162. *Id.* at 196 (discussing reasoning used in prior case to limit Corps' scope of review).

163. See generally *OVEC, Inc.*, 828 F.3d at 316; *Aracoma*, 556 F.3d at 177 (providing background of Corps' jurisdictional analysis).

164. See *Ohio Valley Env'tl. Coal, Inc. v. United States Army Corps of Eng'rs*, No. 2:12-6689, 2014 WL 4102478, at *13 (S.D.W.V. Aug. 18, 2014) (internal quota-

280 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVIII: p. 259

specific activities that are regulated by other federal agencies, so the court was forced to limit its definition of “specific activity[]” under the Corps’ regulations.¹⁶⁵ This limited definition of “specific activity” forced the court to artificially separate the activity of “mine-through” streams into two otherwise inseparable activities: 1) the seemingly metaphysical act of coal mining generally, and 2) the act of dredging and filling the streams through which mining activities have taken place.¹⁶⁶

VI. IMPACT: THE CORPS’ NARROWED DEFINITION OF “SPECIFIC ACTIVITY”

A. The *OVEC, Inc.* Decision’s Impact on Coal Mining

The Corps was able to successfully narrow its scope of review to avoid jurisdictional overlap with WVDEP after the court’s most recent decision in *OVEC, Inc.*¹⁶⁷ This new, narrowed scope and definition of “specific activity” will allow the Corps to continue issuing permits to surface coal mine operators without needing to fully analyze the potential impacts that mining has on the environment or human health.¹⁶⁸ WVDEP and other similar federally-approved state regulatory agencies may consider such impacts in most instances.¹⁶⁹ Further investigation of potential inadequacies in WVDEP’s environmental review process, however, may be required to more fully understand any possible negative consequences of the *OVEC, Inc.* court’s decision to limit the scope of the Corps’ review.¹⁷⁰

At least one scholar has suggested that “state permitting authorities have ignored egregious violations of law.”¹⁷¹ There have been suggestions that some “state [regulatory] agencies have []

tion marks omitted) (quoting 33 C.F.R. Pt. 325, App. B(7)(b) (2013)) (justifying Corps’ interpretation of regulations).

165. *See id.* at *13-*14 (internal quotation marks omitted) (quoting 33 C.F.R. Pt. 325, App. B(7)(b) (2013)) (justifying narrow interpretation in light of Corps’ regulations).

166. *See OVEC, Inc.*, 828 F.3d at 322-23 (separating surface mining from fill activities associated with surface mining involving mine-through activities).

167. *See id.* at 323-24 (holding that Corps’ scope is limited due to WVDEP’s exclusive jurisdiction to authorize surface coal mining).

168. *See id.* (upholding WVDEP’s exclusive jurisdiction to authorize coal mining).

169. For a further discussion of cases involving the oversight of coal mining by state regulatory agencies, see *supra* notes 6565-91 and accompanying text.

170. *See Evans, supra* note 30, at 530 (discussing possible inadequacies in state regulation of coal mining).

171. *See id.* (footnote omitted) (discussing possible insufficient review by state regulatory agencies).

[actually] violated the CWA [themselves].”¹⁷² If, in fact, state regulatory agencies’ review of the overall mining process is insufficient, then the *OVEC, Inc.* court’s decision to limit the Corps’ scope of review may prolong the negative effects associated with an inadequate environmental review.¹⁷³ In theory, however, the court’s decision in *OVEC, Inc.* will serve to ensure an appropriate distribution of authority between state and federal regulatory agencies.¹⁷⁴ Requiring full and comprehensive review from federal and federally-approved state regulatory agencies for the same proposed activity would appear to be an unnecessary expenditure of national resources.¹⁷⁵ Such an approach also appears contrary to the intentions of the cooperative federalism approach of the statutory scheme.¹⁷⁶

B. The Decision’s Impact in Other Corps’ Regulated Areas

The Corps’ jurisdiction to permit earth-moving activity in and around U.S. waters is not limited to the coal mining context.¹⁷⁷ The CWA potentially requires the Corps to issue section 404 permits for a variety of proposed construction activities.¹⁷⁸ Thus, the Corps’ scope of review for its permitting process is relevant to anyone who may be undertaking earth-moving activities or construction projects in or around U.S. waters.¹⁷⁹

It is possible that this new, narrowed definition of “specific activity” will allow the Corps to limit its scope of review for other pro-

172. *See id.* (discussing instances of CWA violations by state agencies); *see also* Zoë Gamble, *Injustice in the Fourth Circuit: Bragg v. West Virginia Coal Association is Moving Mountains for Industry*, 30 VT. L. REV. 393, 398 (2006) (outlining political pressures leading to substandard state regulation of coal mining).

173. *See* Evans, *supra* note 30, at 530 (providing examples of state regulatory deficiencies). At least one scholar, however, suggests additional intervention from the EPA could help curb the negative effects of an uninvolved Corps. *See id.*

174. For a further discussion of the court’s desire to limit duplicative agency action, *see supra* notes 80-91 and accompanying text.

175. For a further discussion of the court’s desire to limit duplicative agency action in order to conserve resources, *see supra* notes 81-91 and accompanying text.

176. For a further discussion of the court’s desire to adhere to the statutory scheme promoting a cooperative federalism approach, *see supra* notes 87-88 and accompanying text.

177. For a further discussion of the potential areas of the Corps’ jurisdiction outside of the mining context, *see supra* notes 92-107 and accompanying text.

178. For a further discussion of examples of possible areas in which the Corps’ may have jurisdiction for various construction contexts, *see supra* notes 92-107 and accompanying text.

179. For a further discussion of the potential impact the court’s decision to limit the Corps’ scope of review may have generally, *see supra* notes 167-170 and accompanying text.

282 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXVIII: p. 259

posed projects, in which a federally-approved state regulatory agency's jurisdiction is also invoked.¹⁸⁰ The Corps' new scope of review could potentially allow it to skirt its responsibility of reviewing the environmental impacts of proposed construction activities for mooring and boating facilities, or even roadway and highway construction.¹⁸¹ It is most likely the case, however, that the Corps will only be permitted to limit its scope of review when there is a federally-approved state regulatory agency also directly responsible for permitting major aspects of the proposed activity.¹⁸² It is also possible that in the future, courts will limit the holding in *OVEC, Inc.* to the coal mining context and will refuse to expand the implications of the *OVEC, Inc.* holding into other areas that require a section 404 permit from the Corps.¹⁸³

*Mitchell J. Ream**

180. For a further discussion of the potential for the invocation of the Corps' review in non-mining contexts, see *supra* notes 92-107 and accompanying text.

181. For a further discussion of the potential consequences of the court's limitation of the Corp's scope of review, see *supra* notes 167-170 and accompanying text.

182. For a further discussion of the role that competing agency jurisdiction played in the court's decision to limit the Corps' scope of review, see *supra* notes 140-150 and accompanying text.

183. For a further discussion of the instances when the Fourth Circuit required a heightened scope of NEPA analysis outside of the coal mining context, see *supra* notes 92-107 and accompanying text.

* J.D. Candidate, 2018, Villanova University Charles Widger School of Law, B.S., 2015, West Virginia University.