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Court Finds Reclaimed Valley Fills May Be Point Sources Under The Clean Water Act

The United States District Court for the Southern District of West Virginia addressed the issue of whether fully reclaimed, post-mining valley fills are point sources requiring National Pollutant Discharge Elimination System (NPDES) permits under the Clean Water Act (CWA). *OVEC v. Pocahontas Land Corp.*, No. 3:14-11333 (S.D. W. Va. May 7, 2015).

The landowner, Pocahontas Land Corporation (Landowner or Pocahontas), owns property containing valley fills constructed between 1980 and 1996 for surface mining activities. Post-mining, the valley fills were fully reclaimed, sediment ponds were removed and the state authorized full bond release under the Surface Mining Control and Reclamation Act (SMCRA), including a determination that there were no further discharges requiring a NPDES permit. In 2012, the Sierra Club found elevated conductivity, sulfates and total dissolved solids downstream of the two valley fills. Plaintiffs filed a CWA citizen suit alleging an unpermitted, continuing discharge from the toes of the valley fills. Pocahontas argued on its motion for summary judgment that (1) reclaimed valley fills are not producing "confined and discrete" discharges and are not point sources; (2) water flowing from the reclaimed valley fills is groundwater migration that is not subject to CWA Section 402 requirements; (3) any discharge was migration of fill material previously placed pursuant to a Section 404 permit; (4) Pocahontas, a passive landowner, was not "adding" pollutants; and (5) that the environmental groups were collaterally attacking the West Virginia Department of Environmental Protection's (WVDEP) bond release decision.

Based on conflicting expert testimony, the court found the issue of whether reclaimed valley fills amount to point sources under the CWA is a question of fact for a trial court. Further, the court relied on language in a preamble to a 2001 proposed rule that was later rejected by EPA to find that CWA jurisdiction can include discharges of pollutants to surface water via groundwater that has a direct hydrological connection to surface waters, and thus a permit may still be required for discharges to surface water through groundwater from the toe of valley fills. The court rejected the Landowner's argument that summary judgment was warranted because of the agencies' historic practice of not requiring post-reclamation valley fill to obtain NPDES permits and that Plaintiff's citizen suit was a collateral attack on WVDEP's bond release decision. The court reasoned that the historic practice of the agency did not trump the CWA's citizen suit authority, and the state's decision that a NPDES permit is not required post-bond release did not grant immunity from a court determination in a citizen suit that the agency has failed to issue a permit. Finally, the court rejected the Landowner's argument that a NPDES permit was not required because the valley fills were constructed and reclaimed in full compliance with the law and are not presently actively managed. The court reasoned that ongoing discharges of pollutants require permits even when not actively managed, and that the CWA has no causation requirement. The court denied summary judgment for Pocahontas, and granted, in part, the environmental groups' summary judgment motion.

Depending on whether Pocahontas is successful in the trial, this case could have implications for owners of land with post-reclamation valley fills — requiring them to maintain a NPDES permit long after mining and reclamation are complete. The decision also has implications for bond release. Under the existing regulatory regime, water quality for making bond release determinations is measured at the sediment

pond outfall. This interpretation would mean water quality would be measured at the toe of the valley fill structure. Additionally, it is another example in a growing trend of cases where CWA jurisdiction is asserted through indirect groundwater connections.

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