The State of Justice

In the face of governments on the federal and state level seemingly unable or unwilling to act on the major environmental issues affecting the welfare of our nation and state (instead, pass me the table gambling ballot, if you please) the fight over mountain top mining is quietly raging in the country's civil justice system, one technical skirmish at a time. As courts in West Virginia have seen some of the major action of the current decade, here's a summary of some of the lead cases, with appropriate citations, for those of you who want to more fully explore the terrain.

*Bragg v. Robertson, et al.*72 F.Supp.2d 642 (1999): A decision of the United States District Court for the Southern District of West Virginia, by Chief Judge Charles Haden, citing state and federal regulations, finding that the so-called "buffer zone rule," under the Surface Mining Control and Reclamation Act (SMCRA) required State DEP officials and the Army Corps of Engineers to make findings that "valley fills" within one hundred feet of an intermittent or perennial stream shall not adversely affect the normal flow or gradient of the stream, adversely affect fish migration or related environmental values or material damage the water quantity or water quality of the stream, and not contribute to violation of applicable state or federal water standards. In addition, Judge Haden found that the Federal Water Pollution Control Act Amendments of 1972, Section 404(b)(1) did permit placement of excess spoil [from surface mining operations] in waters of the United States for constructive purposes, but not if the primary purpose of the fill was for "waste disposal," and accordingly issued an injunction permanently enjoining any further permits for valley fills in connection with surface mining (including mountaintop removal) operations that would authorize placement of excess spoil in intermittent and perennial streams (valley-fills) for the primary purpose of waste disposal.

Bragg v. West Virginia Coal Association, et al. 248 F.3d 275 (2001) A three judge panel of the Fourth Circuit Court of Appeals, including Judges Niemeyer, Luttig, and Williams, vacated Judge Haden's injunctions in *Bragg*, ruling that the federal district court was barred by the doctrine of sovereign immunity and the Eleventh Amendment from enjoining state officials where the State of West Virginia had agreed under the "cooperative federalism" scheme of the Surface Mining Control and Reclamation Act to take "exclusive regulatory jurisdiction," over the enforcement of the SMCRA, and thus plaintiffs should have brought their claims in state court in that the federal court was not the proper forum to challenge state law enforcement efforts under the SMCRA.

*Kentuckians for the Commonwealth, Inc. v. Rivenburgh, et al.*206 F Supp. 2d 782 (2002): A decision of the United States District Court for the Southern District of West Virginia, again by Chief Judge Charles Haden, (this time in a case did not involve an issue of "cooperative federalism") that found that permits granted by the Army Corps of Engineers for valley fills in connection with mountain top removal mining strictly for waste disposal (as opposed to fills allowed by the law for constructive primary purposes) were *ultra vires,* and illegal under the Section 404 of the Clean Water Act (CWA).

Kentuckians for the Commonwealth, Incorporated, v. Rivenburgh, et al. 317 F.3d 425 (2003): The Fourth Circuit Court of Appeals, in a decision by Judges Niemeyer and Hamilton, with Luttig concurring in part and dissenting in part, again reversed Judge Haden, disagreeing with his interpretation of the law that valley fills could not be permitted for waste disposal only , and "granting deference" to the EPA and Army Corp of Engineers interpretation that such permitting was proper, and finding that Judge Haden's injunction was overbroad, in that it was broader that that "necessary to provide complete relief to the plaintiff" and did not carefully address the circumstances of the case.

Rapanos, et al. v United States, 126 S.Ct. 2208 (2006) In a case with potentially far reaching ramifications for mountain top removal litigation, the Supreme Court of the United States , in a plurality opinion, analyzed the Corps' interpretations of its rules as to what constituted "navigable waters," and "waters of the United States," and determined the Corp's expansive view not entitled to "deference," narrowing their definition under the CWA to include relatively permanent, standing or flowing bodies of water which form geographical features, which did not encompass "transitory puddles or ephemeral flows of water," adding that the terms do "not necessarily exclude" streams, rivers or lakes that might dry up in extraordinary circumstances,

...a summary of some of the lead mountain top mining cases in West Virginia.

such as drought, nor does the term necessarily exclude seasonal rivers, which contain continuous flow during some months , but no flow during dry months.

Ohio Valley Environmental Coalition, et al. v. United States Army Corps of Engineers, et al. Civil Action No. 3:05-0784 (S.D.WV, filed 6/13/07): Judge Robert C. Chambers for the Southern District of West Virginia, (in a case that involved a stream which was apparently not in dispute as a "water of the United States,") followed the *Rapanos'* court's analysis of determining first whether or not the Corp's interpretation of its own rules was entitled to deference (and finding it was not—just as found by the *Rapanos* Court), and then interpreting the provisions of the Clean Water Act to disallow use of of Section 404 of the Act (valley fill permits) to allow streams ("waters of the United States,") below valley fills (and before flow into sediment ponds) to be polluted by sediment from the valley fill unless in compliance with CWA Section 402, which requires a separate National Pollutant Discharge Elimination System