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Recommended Citation
Nathaniel Browand, 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 (2004), http://lawdigitalcommons.bc.edu/ealr/vol31/iss3/7

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SHIFTING THE BOUNDARY BETWEEN THE
SECTIONs 402 AND 404 PERMITTING
PROGRAMS BY EXPANDING THE
DEFINITION OF FILL MATERIAL

NATHANIEL BROWAND*

Abstract: The section 404 permitting program has endured a history of
divergent interpretations from both the agencies that operate the pro-
gram and the courts. In 2002, these agencies, the Army Corps of Engi-
eers and EPA, redefined fill material to include many activities under the
section 404 program that did not appear to be included under the
previous definition. One of these activities is the disposal of excess dirt
and bedrock in the Nation’s waters from strip mining operations. Efforts
to thwart this disposal activity have been met with increasing resistance by
the courts, while efforts to minimize the adverse environmental effects of
this type of disposal have forced the Army Corps to propose developing a
coordinated permit process with other involved agencies. This Note
argues that the new definition of fill material expands the scope of the
section 404 program to include activities that at one time were or could
have become subject to regulation under EPA’s more rigorous section 402
program.

INTRODUCTION

Section 404 of the Federal Water Pollution Control Act (Clean
Water Act or CWA) has been described as “one of the simplest statutes
to describe and one of the most painful to apply.”1 Others have found
that because of the loss of wetlands attributable to the program, Con-
gress should relieve the U.S. Army Corps of Engineers (Corps) of its
section 404 permitting responsibilities.2 Nevertheless, the section 404

* Managing Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2003-04.
I would like to thank my parents, Anna Nicole McGee, and the law review staff for their
help and support during the production of this Note.

1 Oliver A. Houck, Hard Choices: The Analysis of Alternatives Under Section 404 of the Clean
2 Michael C. Blumm & D. Bernard Zaleha, Federal Wetlands Protection Under the Clean
Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform, 60 U.
COLO. L. REV. 695, 698-99 (1989) (claiming that the section 404 permitting program has
been unable to prevent the loss of over 300,000 acres of wetlands annually).
program occupies a tenuous location between activities that are not subject to federal regulation and activities that are subject to a more rigorous federal regulation by the U.S. Environmental Protection Agency (EPA) under section 402 of the CWA.\(^3\)

The scope of the section 404 program, while subject to differing pressures from outside organizations, has varied considerably throughout its history.\(^4\) Generally, environmental advocacy groups have argued for coverage of activities under the section 404 program where the alternative would be no federal environmental regulation;\(^5\) they have argued in favor of section 402 regulation by EPA over the section 404 program for activities that could arguably be subject to either permitting program.\(^6\) Contrariwise, industries and landowners have sought to limit the section 404 program where the alternative is no federal environmental regulation,\(^7\) but they have sought to expand the coverage of the section 404 program where the alternative is regulation by EPA.\(^8\) In light of the 2002 regulation changes, variations in the scope of the section 404 program are likely to continue.

Because the section 404 program is jointly administered by the Corps and EPA—with the Corps having the most decisive power in the program—each agency has developed an approach towards the program that has not always been consistent with the other agency’s approach.\(^9\) Until recently EPA has sought to give the Corps broad authority, while the Corps has imposed more restrictive terms over its own authority.\(^10\) This avoidance dynamic between the two agencies has yielded to embracing an expansion of the program into regulating activities that may before have been under the purview of EPA.\(^11\) Accordingly, the Corps is regulating more activities than it has since the inception of the section 404 program.\(^12\)

This Note suggests that the Corps and EPA have adopted this industry and landowner perspective toward expanding the scope of the

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\(^3\) See discussion infra Part IV.
\(^4\) See Blumm & Zaleha, supra note 2, at 703–08.
\(^5\) See, e.g., Avoyelles Sportsmen’s League, Inc. v. Marsh, 715 F.2d 897, 901–02 (5th Cir. 1983).
\(^7\) See, e.g., Avoyelles Sportsmen’s League, 715 F.2d at 900.
\(^9\) See discussion infra Part II.
\(^10\) See discussion infra Part IIA.
\(^11\) See discussion infra Parts II.F, IV.
\(^12\) See discussion infra Parts II.F, IV.
section 404 permitting program to an extent not seen in the program's thirty years. Part I provides a historical development of the section 404 permitting program and an overview of how it operates. Part II traces the definition of fill material throughout the duration of the section 404 program by EPA and the Corps. Part III examines the issue of discharging excess material from mountaintop mining in valley streams, considers how courts have applied, or refused to apply, the section 404 program to these activities, and presents current challenges that regulatory agencies are facing in administering the program. Part IV challenges the recent new definition of fill material by EPA and the Corps, and concludes that this new definition expands the section 404 program into regulating activities that may have been susceptible to EPA regulation under section 402.

I. THE SECTION 404 PROGRAM AND ITS HISTORY

In 1972, Congress amended the Federal Water Pollution Control Act and created a national program to control water pollution in the waters of the United States. The stated purpose of the Act is "to restore and maintain the chemical, physical, and biological integrity of the nation's waters." The amendments that comprise what is now referred to as the Clean Water Act prohibit the discharge of pollutants into the waters of the United States without a permit. To accomplish this, the CWA established the National Pollutant Discharge Elimination System (NPDES) that gives EPA the authority to issue permits limiting discharges of specific concentrations of pollutants from point sources. These NPDES permits under section 402 of the CWA limit the concentrations of pollutants allowed in wastewater discharges by requiring the use of technology-based wastewater pollution control systems.

Even prior to the passage of the CWA, the Corps had authority under the Rivers and Harbors Appropriation Act (RHA) to regulate shipping channels. In light of the tension created between the broad authority granted to EPA to control pollutants under the NPDES pro-

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15 Id. § 1311.
16 Id. § 1342.
17 Id.
gram and the Corps's existing authority under the RHA, Congress passed section 404 as an exception to the NPDES program.\textsuperscript{19}

The initially proposed Senate bill, that became the section 404 program, consisted of a permitting program for only the discharge of dredged spoil not fill material and was to be incorporated as a part of the NPDES program.\textsuperscript{20} The House amendments established a separate permitting program, called section 404, for the discharge of dredged or fill material administered solely by the Corps.\textsuperscript{21} The final bill that passed more closely resembled the House amendment; however, provisions were added that, most notably, gave EPA authority to provide guidelines that the Corps must follow in reviewing section 404 applications.\textsuperscript{22}

Section 404 operates under authority of the Corps with substantial assistance by EPA,\textsuperscript{23} and extends beyond the coverage of the RHA to include the permitting for dredge and fill material in all waters of the United States, most notably wetlands.\textsuperscript{24} By contrast, section 10 of the RHA authorizes the Corps to regulate structures and dredging for ship traffic and navigation.\textsuperscript{25} And unlike the CWA, the scope of section 10 of the RHA is limited only to navigable waters, and the Corps traditionally limited its jurisdiction up to the mean high tide line.\textsuperscript{26} Section 13 of the RHA, referred to as the Refuse Act, prohibited the discharge of refuse into the navigable waters without a permit.\textsuperscript{27} Though initially successful, courts invalidated the use of this section as a vehicle against more general discharges of pollution; it did, however, provide a basis for the more inclusive CWA and was later explicitly replaced by the NPDES permitting program.\textsuperscript{28}

\textsuperscript{19} 33 U.S.C. § 1342(a)(1); 2 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 4.12 (1986); Michael Hollins, Addition by Removal? National Mining Limits Section 404 Control of Construction in Wetlands, 14 J. LAND USE & ENVTL. L. 341, 346 (1999). Initially the Corps viewed section 404 not as a program that was excepted from EPA, but as an exemption from EPA's NPDES program for its section 10 RHA regulatory program. See Blumm & Zaleha, supra note 2, at 704.
\textsuperscript{21} Id.
\textsuperscript{22} Id. at 3819; see discussion infra Part I.C.
\textsuperscript{24} Hollins, supra note 19, at 351.
\textsuperscript{25} Id.
\textsuperscript{26} 2 RODGERS, supra note 19, § 4.12.
\textsuperscript{28} Hollins, supra note 19, at 352–53.
A. An Expansion in Geographic Jurisdiction

The scope of EPA's authority under the CWA, though ostensibly limited by its language to "navigable waters," in fact extends to all of "the waters of the United States" permitted by the Commerce Clause. The exact extent of this authority is strongly debated and has been recently limited, but is generally thought to include wetlands adjacent to waters that may affect interstate commerce. Likewise, the 1975 district court decision Natural Resources Defense Council v. Callaway held that the Corps's self-imposed limitation on section 404 permitting to navigable waters was invalid, thereby extending the section 404 geographic jurisdiction to be coterminous with section 402.

B. The 1977 Amendments

In 1977, Congress again amended the CWA, including some changes to the section 404 program. The amendments endorsed the Callaway case expansion of the section 404 program to all waters of the United States, exempted some activities from coverage under the program, and provided for a general permit procedure covering some activities. Discharges of fill material from the following activities were exempted from being covered under section 404: normal farming, silviculture, ranching activities, emergency reconstruction of structures such as dikes and dams, the construction of farm ponds, the construction of irrigation ditches, and the construction of farm or logging roads. These exemptions were introduced to address concerns about whether particular activities may require permits and to

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29 2 Rodgers, supra note 19, § 4.12.
30 Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 174 (2001) (invalidating an interpretation of 33 C.F.R. § 328(a)(3) (1999) that allowed section 404 permitting jurisdiction over isolated wetlands because migratory birds may have used these wetlands as habitat).
31 United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 139 (1985) (holding that the Army Corps had section 404 jurisdiction over wetlands abutting navigable waters); see also 33 C.F.R. § 328.3(a)(7) (2002) (stating that the term "waters of the United States" includes wetlands adjacent to waters that may be susceptible to use in or could affect interstate commerce).
eliminate the use of the permitting program for certain types of discharges.\textsuperscript{36}

General permits may be issued on a state, regional, or nationwide basis for a period of five years after notice and opportunity for a public hearing for activities involving discharges of dredge or fill material that "will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment."\textsuperscript{37} Activities authorized under general permits are thereby exempted from the individual permit requirements.\textsuperscript{38} Because these activities covered by a nationwide permit are considered to have only minimal environmental effects, they are not subject to review under the National Environmental Policy Act (NEPA).\textsuperscript{39} General permits have been used so extensively for certain activities that individual permits are not used.\textsuperscript{40} Critics of the nationwide program contend that the application process is desirable to regulated industries.\textsuperscript{41} Proponents of the nationwide program note that EPA's procedural checks of the 404(b)(1) guidelines and the 404(c) veto authority, discussed \textit{infra}, apply to both nationwide and individual permit applications, while individual permit applications have more associated complexities and costs.\textsuperscript{42} Undoubtedly, the appropriate scope of the nationwide permitting program is an important and contentious issue within the section 404 program.\textsuperscript{43}

\textsuperscript{36} S. REP. NO. 95-370, at 74–75.
\textsuperscript{37} 33 U.S.C. § 1344(e).
\textsuperscript{38} Id.
\textsuperscript{39} See National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332 (2000) (stating that environmental impact statements are required for "major Federal actions significantly affecting the environment").
\textsuperscript{40} Paul A. Duffy, \textit{How Filled Was My Valley: Continuing the Debate on Disposal Impacts}, 17 NAT. RESOURCES & ENV'T 143, 145 (2003) (stating that 84.4% of section 404 applications between 1996 and 1999 were handled under general permit programs); see also \textit{Mountaintop Mining and U.S. EPA's Proposed Rule Change: A Giant Step Backward for the Clean Water Act}, 30 Envtl. L. Rep. (Envtl. L. Inst.) 11,175, 11,176 (Dec. 2000) ("Every valley fill in West Virginia has been approved pursuant to a NWP [nationwide permit], rather than an individual permit.") [hereinafter \textit{Mountaintop Mining}].
\textsuperscript{41} Duffy, \textit{supra} note 40, at 145 ("Nationwide permits allow for the fast approval of projects with little or no administrative delay, and . . . approval under nationwide permits is relatively quick and easy and thus such permits are much more desirable to coal companies.").
\textsuperscript{42} Blair M. Gardner, \textit{Reconciling Surface Mining and the CWA: Section 404(B)(1) and Mitigation}, 17 NAT. RESOURCES & ENV'T 146, 148 (2003).
\textsuperscript{43} See Blumm & Zaleha, \textit{supra} note 2, at 766 (stating that "general permits are a substantial contributing factor in the alarming annual rate of national wetlands loss"); Gardner, \textit{supra} note 42, at 148 (suggesting that the Corps has been timid in justifying its nationwide permit program).
C. The Operation of the Section 404 Program

The Corps administers the section 404 permitting program with the assistance of EPA.44 Section 404(a) states that the Secretary of the Army "may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specific disposal sites."45 Section 404(b)(1) directs the Corps to apply guidelines developed by EPA in considering applications for these permits.46 These section 404(b)(1) guidelines stress the consideration of practicable alternatives, the analysis of impacts of the fill material on the aquatic area, and the minimization of the adverse effects of the discharges.47 The guidelines, furthermore, establish a presumption against the issuance of a permit for activities involving the discharge of fill material unless alternatives are impracticable.48 Section 404(b)(2), however, gives the Corps the authority to issue a permit for a site where the guidelines would not allow the issuance of a permit, when the economic impact of the site on navigation warrants the issuing of a permit.49 In addition, EPA may veto the issuance of a permit by the Corps if the discharge of material at that site will have an "unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas."50 Thus, the relationship between the two agencies in administering the section 404 program has been called "a ping-pong veto practice."51

II. A History of Fill Material

The Corps and EPA have had different definitions of what constitutes fill material for most of the history of the section 404 program.52

44 Timothy J. Hagerty, Surface Mining and the Clean Water Act: The 402/404 Conflict and the Regulation of Valley Fills, in WETLANDS LAW AND REGULATION 174, 178 (A.L.I.-A.B.A. COURSE OF STUDY, May 29–31, 2002), available in Westlaw, SG096 ALI-ABA 174. The extent of EPA’s role in the section 404 permitting program is one of emphasis and attitude. Compare Duffy, supra note 40, at 145 (asserting that “EPA has only minimal oversight over the Corps’ Section 404 permits”), with Gardner, supra note 42, at 148 (“Contrary to the suggestion in Paul Duffy’s article, EPA has a pervasive presence in Section 404 permitting.”).
46 Id. § 1344(b)(1).
48 40 C.F.R. § 230.10(a).
50 Id. § 1344(c). This provision has been invoked by EPA only eleven times since 1972. See Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 204 F. Supp. 2d 927, 933 (S.D. W. Va. 2002), vacated by 317 F.3d 425 (4th Cir. 2003).
51 2 RODGERS, supra note 19, § 4.12.
52 Hagerty, supra note 44, at 178–79.
In 1974 the Corps expanded the definition of fill material to mean "any material deposited or discharged into navigable waters which may result in creating fastlands or other planned elevations of lands beneath navigable waters." 53 In response to *Natural Resources Defense Council v. Callaway*, which forced the Corps to redefine navigable waters, the Corps also proposed to redefine fill material. 54 The Corps proposed fill material to mean "any material discharged into navigable waters for a purpose other than disposal, including without limitation, the creating of fast land, or the production of intended elevation of land beneath the water, but excluding material discharged in navigable waters subject to section 402 . . . ." 55 Later in 1975, after the notice and comment period, the Corps defined fill material to mean "any pollutant used to create fill in the traditional sense of replacing an aquatic area with dry land or of changing the bottom elevation of a water body for any purpose." 56 In 1976, EPA adopted this definition. 57

The most striking conflict from this period is that the Corps and EPA developed very different attitudes toward the section 404 program. 58 On the one hand, the Corps hesitantly expanded its jurisdiction in response to the *Callaway* case. 59 On the other hand, EPA saw a robust section 404 program as the means to protect the waters of the United States. 60 These differing philosophies toward the section 404 program led to the divergent definitions adopted by the two agencies. 61

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53 33 C.F.R. § 209.120(d)(4) (1975).
55 Id. at 19,770.
59 See Permits for Activities in Navigable Waters, 40 Fed. Reg. at 31,320 ("[The Corps] recognize[s] that this program . . . will extend Federal regulation over discharges of dredged or fill material to many areas that have never before been subject to Federal permits or to this form of water quality protection.").
60 Permits for Activities in Navigable Waters, 40 Fed. Reg. at 19,794 ("EPA believes that a broad implementation of the section 404 program is necessary to protect the Nation's water resources.").
61 Compare Regulatory Programs of the Corps, 42 Fed. Reg. 37,122, 37,130 (July 19, 1977) (defining fill material as "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody" and stating that "activities such as plowing, cultivating, seeding, and harvesting, cultivating . . . cannot be included in the program") (emphasis added), with 40 C.F.R. pt. 230, app. A (defining fill material as "any pollutant used to . . . replace[e] an aquatic area with dry land or . . . chang[e] the bottom elevation of a waterbody for any purpose") (emphasis added).
A. The Corps Adopts a Primary Purpose Test

The Corps in 1977 redefined fill material through informal rulemaking 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. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under Section 402."\(^6\) Pollutants include "solid waste, . . . wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural wastes discharged into water."\(^7\) The implication of this definition is that any waste disposal of a pollutant would not be subject to section 404, while material not qualifying as a waste disposal of a pollutant would be subject to this primary purpose test to determine whether it is fill material.\(^8\)

As the reason for the 1977 rule change, the Corps noted that some municipal discharges of solid waste material technically met the definition of fill material, but decided it should be regulated by section 402 going forward.\(^9\) The Corps stated that the final result of disposing "waste materials such as sludge, garbage, trash, and debris in water . . . may be a landfill even though the primary purpose of the discharge is waste disposal."\(^10\) In order to ensure that these activities that should be governed by section 402 do not become discharges of fill material under section 404, the Corps concluded that the initial determination of whether a permit should be granted for these types of discharges should be made by EPA under section 402. Furthermore, the Corps decided that action on a section 404 application in this area would not be taken until EPA reached a section 402 permit decision.\(^11\) This definition, which was unchanged for twenty-five

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7. 40 C.F.R. § 122.2.
8. See 33 C.F.R. § 323.2(e).
9. Regulatory Programs of the Corps, 42 Fed. Reg. at 37,130. The traditional subject of section 404 permitting is using material "to fill in a wetland to build a vacation home, or . . . as the bedrock material for a bridge or pier or other activity on or over the navigable waters." Robert W. Adler, Water Quality Protection, 15 J. ENERGY NAT. RESOURCES & ENVTL. L. 311, 314 (1995).
11. See id.
years,\(^{68}\) was also consistent with the Corps's philosophy of hesitantly expanding its regulatory authority.\(^{69}\)

**B. EPA Rejects the Primary Purpose Definition**

Meanwhile, EPA, while never adopting this primary purpose test, did look to the purpose of the disposal activity by defining fill material as "any pollutant used to create fill in the traditional sense of replacing an aquatic area with dry land or of changing the bottom elevation of a water body for any *purpose*."\(^{70}\) In 1980, however, EPA—under informal rulemaking—changed its definition of fill material to an effects-based test after proposing a primary purpose test at the beginning of the rulemaking.\(^{71}\) Under this change, EPA defined fill material as "any 'pollutant' which replaces portions of the 'waters of the United States' with dry land or which changes the bottom elevation of a water body for any purpose."\(^{72}\)

The agency found the 404 program to be better suited than the 402 program in preventing the destruction of wetlands because: (1) the section 404(b)(1) guidelines require the consideration of practicable alternatives, while the 402 program does not; (2) the guidelines consider the ecological impact of the discharge while the 402 program uses technology based limitations; and (3) 404 permits are for specific sites while 402 permits are issued for point sources.\(^{73}\) EPA concluded "that all discharges with the effect of fill should be handled under the 404 program instead of the 402 program."\(^{74}\) Because an effects-based test will likely include more activities than a primary

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\(^{69}\) See Permits for Activities in Navigable Waters, 40 Fed. Reg. 31,320, 31,320 (July 25, 1975) ("[The Corps] recognize[s] that this program ... will extend Federal regulation over discharges of dredged or fill material to many areas that have never before been subject to Federal permits or to this form of water quality protection.").


\(^{71}\) Consolidated Permit Regulations: CWA Section 404 Dredge or Fill Programs, 45 Fed. Reg. at 33,421. The agencies describe this definition as "focus[ing] on the effect of the material, rather than allowing the purpose of the discharge to affect whether it would be regulated by section 404 or section 402." Revisions to the Regulatory Definitions of "Fill Material," 65 Fed. Reg. 21,292, 21,294 (proposed Apr. 20, 2000).

\(^{72}\) Id. at 33,421. The agencies describe this definition as "focus[ing] on the effect of the material, rather than allowing the purpose of the discharge to affect whether it would be regulated by section 404 or section 402." Revisions to the Regulatory Definitions of "Fill Material," 65 Fed. Reg. 21,292, 21,294 (proposed Apr. 20, 2000).

\(^{73}\) Consolidated Permit Regulations: CWA Section 404 Dredge or Fill Programs, 45 Fed. Reg. at 33,299.

\(^{74}\) Id.
purpose test, EPA has continued to believe that a broad implementation of the section 404 program best protects the nation's water.75

This change adopted by EPA, however, was not immediately codified in EPA's regulations.76 Rather, the 1981 regulations retained EPA's and the Corps's 1976 definition before the Corps adopted its primary purpose test in 1977.77 The 1982 regulations drop these appended definitions and do not appear to define fill material.78 Finally, the 1983 regulations, in the context of state issued section 404 permits, define fill material as "any 'pollutant' which replaces portions of the 'waters of the United States' with dry land or which changes the bottom elevation of a water body for any purpose."79 EPA maintained this definition until the recent 2002 change.80

In 1984, the Corps signed a settlement agreement to a suit brought by environmental groups that, among other things, required the Corps to: (1) deny section 404 permit applications that do not comply with EPA's section 404(b)(1) guidelines; (2) demand that general permitees obtain individual permits for activities that cause the loss or substantial modification of ten or more acres of water; and (3) promulgate, in cooperation with EPA, a revised, joint definition of fill material.81 The Corps and EPA spent two years working toward a resolution regarding the definition of fill material, but instead of adopting a joint definition, they arrived at an interim agreement that allowed the agencies to consistently regulate discharges and coordinate practices between the two permitting programs.82

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77 40 C.F.R. pt. 230, app. A (1981) (defining fill material as "any pollutant used to create fill in the traditional sense of replacing an aquatic area with dry land or of changing the bottom elevation of a water body for any purpose").
80 See Revisions to the Regulatory Definitions of "Fill Material," 65 Fed. Reg. 21,292, 21,294 (proposed Apr. 20, 2000); see also discussion infra Part II.F.
C. 1986 Memorandum Reconciles the Agencies’ Understanding

In 1986, the Corps and EPA entered into a memorandum of agreement to reconcile the sections 402 and 404 practice that developed from these different definitions of fill material, especially with respect to discharges of solid wastes. The agreement established four criteria that attempted to divide homogeneous wastes—presumably waste materials of a substantially identical nature—regulated by section 402 from heterogeneous wastes, regulated by section 404. Specifically, a discharge was to be treated as fill material under section 404 in light of the following factors: (1) the primary or principle purpose of the discharge is “to replace a portion of the waters of the United States with dry land or to raise the bottom elevation”; (2) “the discharge results from road construction or other . . . construction-type activities”; (3) “a principal effect of the discharge is physical loss or physical modification of waters of the United States”; and (4) “the discharge is heterogeneous in nature and of the type normally associated with sanitary landfill discharges.” Thus these indicia determine whether particular activities involving solid wastes are subject to section 404 regulation.

On the other hand, a pollutant was to be treated under section 402 if “it is a discharge in liquid, semi-liquid, or suspended form or if it is a discharge of solid material of a homogeneous nature normally associated with single industry wastes, and from a fixed conveyance, or if trucked, from a single site and set of known processes.” Furthermore, the agencies specified that “placer mining wastes, phosphate mining wastes, titanium mining wastes, sand and gravel wastes, fly ash, and drilling muds” were to be subject to the section 402 program. Finally, the agencies agreed that they would identify additional materials to be subject to section 402 as necessary.

These factors and examples of activities served as useful guideposts, but did not remove ambiguities in specific applications of the definition of fill material and interface between the section 402 and

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83 Id.
84 Id.
85 Id. at 8872. See also Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 204 F. Supp. 2d 927, 940 (S.D. W. Va. 2002), vacated by 317 F.3d 425 (4th Cir. 2003) (stating that it is unclear whether these factors are to be considered disjunctive or conjunctive).
86 See Memorandum of Agreement on Solid Waste, 51 Fed. Reg. at 8872.
87 Id.
88 Id.
89 Id.
section 404 regulatory programs to activities such as strip mining.90 The first factor appears to be nothing more than a diluted primary purpose test and the third factor seems to be an effects-based test with some additional bite.91 Therefore, these indicia are ambiguous because it is unclear how much weight each factor should be accorded and how many factors must be satisfied to conclude that a particular discharge is a discharge of fill material.92

D. The Courts Develop Two Perspectives

Over time, courts developed two perspectives towards the Corps's primary purpose test of fill material.93 For example, in 1983 the Fifth Circuit considered a case involving private landowners who wanted to convert 20,000 acres of forested bayou into agricultural land.94 Because of the undulating topography of the land, the landowners had the harvested trees and vegetation tilled into the ground to create a more suitable contour.95 The court found that burying this material had the effect of leveling a tract of land, which was sufficient to be included in the Corps's primary purpose test, because the activity was intended to replace water with dry land.96 The court in essence was willing to find the primary purpose required by the Corps definition by considering the effect that the activity of burying material had on the land and concluding that such an effect can inform the primary purpose of the activity.97 This connection between purpose and effects became conflated and led to the conclusion that if the effect of material discharged is fill, then the material should be treated as fill material under the Corps's primary purpose test.98

By contrast, in 1998, the Ninth Circuit considered whether the Corps had the authority to handle the permitting for the construction of a municipal solid waste landfill under section 404.99 Twenty-one acres of wetland would need to be filled to construct the proposed

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90 See discussion infra Part IV.
91 See discussion infra Part IV.
92 See discussion infra Part IV.
93 See Res. Invs., Inc. v. U.S. Army Corps of Eng'rs, 151 F.3d 1162 (9th Cir. 1998); Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983).
94 Avoyelles Sportsmen's League, 715 F.2d at 901.
95 Id.
96 Id. at 924-25.
97 See id.
99 Res. Invs., Inc. v. U.S. Army Corps of Eng'rs, 151 F.3d 1162, 1163 (9th Cir. 1998).
168-acre landfill. The court held that the discharge of solid waste in a proposed solid waste landfill, though having the effect of fill, does not satisfy the Corps's primary purpose test and therefore cannot be regulated by the section 404 program. The court reasoned that a disposal of solid waste does not fit the primary purpose test because the purpose of such a disposal is neither to replace a waterbody with dry land nor to change the bottom elevation of a waterbody.

In 1999, an Illinois district court considered a suit brought by the Corps alleging violations of a section 404 permit granted to developers of a residential subdivision. The Corps contended that the erosion controls implemented as required by the permit were so inadequate that six inches of sediment from the development site had been deposited into adjacent wetlands. The court granted the developers' motion for lack of subject matter jurisdiction because the sediment deposited in the wetlands did not constitute fill material under the Corps's definition, and therefore the Corps could not allege that the sediment deposited was under the jurisdiction of the section 404 permit granted. Following the Ninth Circuit's understanding of the primary purpose test as requiring more than simply the deposition of material having the effect of fill, the court stated that "[r]ocks and dirt carried away by stormwater . . . do not automatically become 'dredged or fill material' just because they end up at the bottom of a creek." The court concluded that this sediment was more likely waste and therefore specifically excluded from the section 404 program because waste is within the jurisdiction of EPA under the NPDES program.

The Ninth Circuit decision drove the Corps and EPA to propose abandoning the primary purpose test out of a concern that most

fill serves some purpose other than just creating dry land or changing a water body's bottom elevation[; and] . . . taken to

100 Id. at 1164.
101 Id. at 1168. The court emphasized the consistency of the decision with the other solid waste responsibilities of EPA, such as the Resource Conservation and Recovery Act, and the traditional military and navigational missions of the Corps. Id. at 1169.
102 Id. Furthermore, the court also noted that the Corps's regulations explicitly excluded waste from being fill material because it is regulated under section 402. Id.
104 Id.
105 Id. at *3.
106 Id.
107 Id. at *3–4.
its extreme conclusion, the unreasonable end result could be that almost any traditional fill material proposed to be placed in the waters of the U.S. does not need a section 404 permit.\textsuperscript{108}

Accordingly, the agencies advocated an effects-based test over a test that considers the purpose of the discharge.\textsuperscript{109}

E. \textit{The Corps and EPA Propose an Effects-Based Test}

These split circuit decisions eventually resulted in a change to Corps and EPA rules.\textsuperscript{110} In 2000, the Corps and EPA jointly proposed a new single definition of fill material for both agencies that resembled EPA's effects test.\textsuperscript{111} The purpose of the change was to clarify existing practice by the agencies and to determine more clearly whether a particular discharge of a pollutant would be subject to section 402 or section 404.\textsuperscript{112} Specifically, the agencies proposed fill material to mean "material (including but not limited to rock, sand, and earth) that has the effect of: (i) replacing any portion of water of the United States with dry land; or (ii) changing the bottom elevation of any portion of a water of the United States."\textsuperscript{113} Fill material would not include "discharges covered by an NPDES permit issued under section 402 of the Clean Water Act."\textsuperscript{114}

Accordingly, the agencies proposed an effects-based test for the definition of fill material that applies to material that is not a pollutant subject to section 402.\textsuperscript{115} Thus, the proposed definition moves to a broader effects test while it avoids encroaching on the already expansive jurisdiction of pollutant under section 402 that was recognized in the 1986 memorandum of agreement on solid waste between the two agencies.\textsuperscript{116}

In addition, the Corps considered a provision that would prohibit the agency from handling a section 404 permit application when the regional engineer determines that a proposed discharge would be a

\textsuperscript{109} Id. at 21,293.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} Revisions to the Regulatory Definitions of "Fill Material," 65 Fed. Reg. at 21,300.
\textsuperscript{115} Id.
\textsuperscript{116} Id. at 21,292.
discharge of unsuitable fill material which includes trash, debris, and car bodies.\textsuperscript{117} Finally, the rule proposed the addition of strip mining overburden as an activity to be included within the definition of a discharge of fill material.\textsuperscript{118}

\textbf{F. The Corps and EPA Adopt a Different Effects-Based Test}

In 2002, after a change in presidential administrations and over 17,000 comments on the proposed rule, the two agencies adopted a different effects-based definition of fill material that specifically excludes only trash or garbage.\textsuperscript{119} The Corps and EPA both currently define fill material as "material placed in waters of the United States . . . [that] has the effect of (i) replacing any portion of a water of the United States with dry land; or (ii) changing the bottom elevation of any portion of a water of the United States."\textsuperscript{120} For both agencies the term specifically includes "rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation material, and materials used to create any structure or infrastructure in the waters in the United States" and specifically excludes trash or garbage.\textsuperscript{121} Thus, the agencies abandoned the specific exclusion of wastes in favor of a more limited exclusion of trash and garbage.\textsuperscript{122}

\textbf{III. An Illustration of the Moving Boundary: Strip Mining, Overburden, and Spoil}

Strip mining is a common method of surface mining in Appalachia for coal and in the western United States for precious metals such as gold.\textsuperscript{123} It is characterized by clearing an area, typically a mountaintop, of vegetation and removing the dirt and bedrock to expose seams of coal or precious metals for removal.\textsuperscript{124} The dirt and bedrock that must be removed to access a coal or mineral seam is re-

\textsuperscript{117} Id. at 21,296.
\textsuperscript{118} Id. at 21,297.
\textsuperscript{120} 33 C.F.R. § 323.2(e)(1) (2002); 40 C.F.R. § 232.2.
\textsuperscript{121} 33 C.F.R. § 323.2(e)(2)–(3); 40 C.F.R. § 232.2.
\textsuperscript{123} See Mountaintop Mining, supra note 40, at 11,175; see also Friends of Santa Fe County v. LAC Minerals, Inc., 892 F. Supp. 1333, 1337–38 (D.N.M. 1995) (involving the disposal of overburden from a gold mining operation).
\textsuperscript{124} See Mountaintop Mining, supra note 40, at 11,175.
ferred to as overburden. In accordance with the Surface Mining Control and Reclamation Act (SMCRA), mining operators must restore a mined mountain to its approximate, original shape upon finishing excavation. After removing the coal or mineral and restoring the mountain to its appropriate shape, mine operators are left with excess spoil that must be disposed of "because spoil takes up more space than did the original overburden."

A. Excess Spoil as Waste

A series of cases has arisen over the issue of whether the Corps has the authority to grant section 404 permits for filling valley streams with this excess spoil. For instance, in 1989, a coal mining association challenged an EPA policy prohibiting the disposal of spoil in valley streams and the use of wastewater treatment impoundment ponds by claiming that such activities are governed by the Corps's 404 permitting program, not EPA's 402 permitting program. The court reasoned that even though this activity is within EPA's broader definition of fill material, only the Corps can issue section 404 permits, and therefore EPA's broad control of "pollutants" under section 402 is not limited by its own definition of fill material, rather it is limited only by the Corps's definition of fill material. The court, relying on the difference between the Corps's and EPA's definitions of fill material, denied the coal mining association's motion for summary judgment because the Corps's primary purpose definition did not include the disposal of spoil and the creation of wastewater treatment impoundment ponds. The court found that the primary purpose of the activity "is to dispose of waste or spoil and treat sediment-laden water, not to create dry land ... as contemplated by the Army's definition" and that the disposal of waste is specifically excluded from

126 Id.
128 Rivenburgh, 317 F.3d at 431.
131 See id. at 1285–86.
132 Id. at 1287.
being fill material because the disposal of waste is regulated by EPA under section 402. The court noted that sediment runoff from valley fills satisfies the 1986 memorandum of agreement language for regulation under EPA's NPDES program.

On appeal, the Fourth Circuit affirmed in an unpublished opinion the reasoning that the primary purpose of these "fills and treatment ponds is to dispose of waste and treat sediment-laden water, not to create dry land or to change the bottom elevation of the water." Accordingly, the court found that the in-stream treatment procedures are not within the Corps's definition of fill material and should be subject to EPA’s authority under section 402. The court concluded that the purpose of the fills in this case is to dispose waste from mining operations and, even though some embankments of the treatment ponds may be within the Corps’s section 404 authority, this does not deprive EPA of its permitting authority over the discharge of pollutants under section 402. Furthermore, the court concurred with the district court that the activities of this case are subject to EPA’s NPDES program according to terms of the 1986 memorandum of agreement. In short, the court held the Corps to its primary purpose test and recognized the primacy of EPA’s section 402 permitting authority.

Following this case, in 1995 a New Mexico district court granted a defendant gold mine operator’s motion for partial summary judgment by dismissing an allegation that placing overburden from surface gold mining in an arroyo without a permit violated section 404 of the CWA. The court found that the overburden was not fill material because the primary purpose of the discharge was "not to replace

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133 Id.
134 Id. The court stated that sediment runoff from valley fills is a “discharge in liquid, semi-liquid, or suspended form.” Id. (quoting Memorandum of Agreement on Solid Waste, 51 Fed. Reg. 8871, 8872 (Mar. 14, 1986)).
136 Id.
137 Id.
138 Id.
139 See id. at *5; cf. Hagerty, supra note 44, at 180 (asserting that the 1986 memorandum of agreement addresses an “ambiguity” concerning fill material, but not mentioning that the court of appeals applies the definition from the 1986 memorandum to the disposal activities in the case to conclude that these activities are subject to EPA’s NPDES permitting authority).
[the area] with dry land or [to] chang[e] the bottom elevation' of the streambed."141 Again according to the Corps's definition of fill material, the court found wastes, such as overburden from surface gold mining, to be under the jurisdiction of EPA, not the Corps.142 More recent cases illustrate that the presumption of EPA regulation for valley fill permitting in earlier cases has shifted to a presumption in favor of regulation by the Corps.

B. The Bragg Case

In a citizen suit that challenged permits granted under the SMCRA, district court Judge Haden ruled that the Corps does not have the authority under section 404 to regulate the disposal of spoil in valley fills because the primary purpose for disposing spoil is to dispose waste, which is regulated by section 402.143 The court considered the section 404 program to employ the section 404(b) (1) guidelines as a substitute for the buffer zone rule under the SMCRA and held that the Director of the Corps has a duty to deny variances allowing the placement of valley fills.144 On appeal, the Fourth Circuit avoided the section 404 issue and vacated the district court's injunction by concluding that sovereign immunity bars a citizen-suit challenge against a state official in federal court under the SMCRA.145

More importantly, however, the Fourth Circuit upheld the settlement agreement between the parties that the district court approved.146 The settlement agreement required EPA, the Corps, the Office of Surface Mining (OSM), and other agencies to prepare a programmatic environmental impact statement (EIS) under the National Environmental Policy Act to analyze the environmental impacts of permitting valley fills associated with mountaintop strip mining.147 As a part of the settlement, the Corps agreed that proposed valley fills in West Virginia in watersheds of at least 250 acres must be permitted by individual, and not nationwide, permits.148 One commentator

141 Id. at 1342 (alterations in original) (quoting 33 C.F.R. § 323.2(e) (1994)).
142 Id.
144 Id. at 658.
146 Id.
147 Duffy, supra note 40, at 177.
148 See id.
claimed that the *Bragg* case has caused valley fill permitting in West Virginia to be conducted through the individual permit process. 149 A recent report by permitting agencies contradicts this proposition. 150

In 2002, when the Corps reissued nationwide permit (NWP) 21, the NWP associated with surface mining activities, it agreed to comply with the terms of the *Bragg* settlement agreement, but chose not to extend the 250-acre restriction to jurisdictions outside of West Virginia. 151 The reissued NWP 21 adopted the following two changes from the previous NWP 21: (1) the Corps must make a case-by-case determination that the adverse effects to the aquatic environment caused by the proposed activity are minimal both individually and cumulatively before any project can be authorized; and (2) the Corps requires a compensatory mitigation plan to ensure that losses to the aquatic environment are minimal. 152 The Corps provided a one-year grace period that expired February 11, 2003 for ongoing projects to comply with the reissued NWP 21. 153

After the expiration of this grace period, the Huntington District of the Corps sought section 404 compliance from mining operations. 154 EPA and the Corps have since expressed concern that ongoing coal mining operations have not met the conditions of the reissued NWP 21 and do not have a valid section 404 permit for their


151 Issuance of Nationwide Permits, 67 Fed. Reg. 2020, 2039 (Jan. 15, 2002) (stating that the "Corps believes there are many different types of coal mining operations in other parts of the country and . . . that the conditions of the settlement agreement may not be applicable to many of these other operations?").

152 Id. at 2038; see also U.S. ARMY CORPS OF ENG'RS, PRE-CONSTRUCTION NOTIFICATION REQUIREMENTS FOR NATIONWIDE PERMIT 21, SURFACE COAL MINING ACTIVITIES 3 (2003) ("Typically, compensatory mitigation consists of on-site [] or off-site stream/wetland restoration . . . . However, in some instances, it may be acceptable to allow the use of mitigation banks or an in-lieu fee arrangement . . . . A performance mitigation bond or other appropriate financial instruments may also be required . . . ."), available at http://www.orl.usace.army.mil/cof/notices/pcnwp21.pdf (last visited Apr. 26, 2004) [hereinafter PRE-CONSTRUCTION NOTIFICATION].


154 PRE-CONSTRUCTION NOTIFICATION, *supra* note 152, at 1 ("It is imperative that all mining operations that are currently discharging, or propose to discharge dredged or fill material into waters of the United States contact this office immediately to apply for a Section 404 permit.").
activities.\textsuperscript{155} In short, the Corps appears to be scrambling to keep coal mining operators in compliance with section 404 requirements.\textsuperscript{156}

\section*{C. Mountaintop Mining EIS}

In early 1999, the Corps, EPA, the OSM, and others published a Notice of Intent to prepare an EIS directed towards developing agency policies and decisionmaking processes “to minimize ... the adverse environmental effects to waters of the United States and to fish and wildlife resources affected by mountaintop mining operations, and to environmental resources that could be affected by the size and location of excess spoil disposal sites in valley fills.”\textsuperscript{157} On May 29, 2003, these agencies published a draft EIS on mountaintop mining and valley fill activities for public comment.\textsuperscript{158} The geographic area of the EIS comprises about 12 million acres of Eastern Kentucky, Eastern Tennessee, Western Virginia, and Southern West Virginia which contain 59,000 miles of streams.\textsuperscript{159} The draft EIS includes the results of over thirty scientific and technical studies conducted relating to the impacts of mountaintop mining and excess spoil disposed as valley fills.\textsuperscript{160} The EIS analyzes three alternatives, in addition to the no-action alternative, for improving agency decisionmaking in permitting mountaintop mining and valley fill operations.\textsuperscript{161}

The three alternatives offer different approaches for handling permit applications of mountaintop mining and valley fill operations.\textsuperscript{162} Alternative 1 provides that the Corps would determine

\textsuperscript{155} See Memorandum from U.S. EPA & U.S. Army Corps of Engineers, to U.S. Army Corps of Engineers District Commanders & U.S. EPA Regional Administrators 1 (May 19, 2003) (“In this regard, we are becoming increasingly aware of circumstances in Kentucky, West Virginia, and Ohio involving coal mining operations that may be discharging dredged or fill material in waters of the United States without current CWA authorization or a permit application to the Corps of Engineers.”) (on file with author).

\textsuperscript{156} See id. at 1-2 (“We believe it is necessary to provide information as soon as possible to the coal mining industry that reiterates CWA Section 404 permitting requirements and prompts those that may be discharging in waters to apply immediately to the Corps for a CWA Section 404 permit.”).

\textsuperscript{157} Notice of Intent to Prepare an Environmental Impact Statement, 64 Fed. Reg. 5778, 5778 (Feb. 5, 1999).

\textsuperscript{158} See MOUNTAINTOP MINING EIS, supra note 150, at ES-1.

\textsuperscript{159} Id. at ES-2. In 1998, 280 million tons of coal was extracted from the region, but over 28 billion tons of high-quality coal remains. Id.

\textsuperscript{160} Id. at ES-3. The studies noted that 1200 miles of headwater streams had been impacted by mountaintop mining and valley fills from 1992-2002 and that 724 miles of streams were covered by valley fills from 1985-2001. Id. at ES-3 to ES-4.

\textsuperscript{161} Id. at ES-4 to ES-5.

\textsuperscript{162} See id. at ES-9.
whether to permit the proposed activities and the size of the valley fills. The Corps would conduct this review under the section 404 individual permit procedure, although NWP 21 authorization may be available in selected circumstances. Other permitting agencies would rely on decisions made by the Corps. Under Alternative 3 the SMCRA authority would determine the size, number, and location of valley fills permitted. The SMCRA permitting review would be enhanced to include standards similar to the section 404(b)(1) guidelines, while the Corps would authorize most projects under NWP 21. The EIS concludes that these two alternatives would enhance environmental protection when compared with the no-action alternative, but it dismisses all three options.

The preferred alternative, Alternative 2, provides that the regulatory agencies would integrate features of the CWA and SMCRA “into a coordinated regulatory process to determine the size, number, and location of valley fills in waters of the U.S.” The Corps would make case-by-case determinations whether a proposed operation would be subject to NWP 21 or individual permit processing. This determination would be guided by a protocol that “provides a numerical score for stream segments based on physical, chemical, and macroinvertebrate data collection.”

A joint permit process would incorporate permitting by the Corps under section 404 and permitting by the SMCRA authority concurrently. As a part of the SMCRA review, the OSM would “adopt regulations to allow data collection, impact predictions, alternative analysis, fill minimization, and on-site mitigation considerations in consonance with the CWA Section 404(b)(1) Guidelines.” This review would include a policy, developed by the West Virginia Department of Environmental Protection, “requiring volumetric calculations and an engineering process to assure that excess spoil disposal resulted in the least stream impacts possible to conduct the proj-

163 Id. at ES-5.
164 MOUNTAINTOP MINING EIS, supra note 150, at II.B-3 tbl.II.B-1.
165 Id.
166 Id. at II.B-9.
167 Id. at II.B-9.
168 Id. at ES-5.
169 Id. at II.B-8.
170 MOUNTAINTOP MINING EIS, supra note 150, at II.B-5.
171 Id. at II.B-9.
172 Id. at II.B-8.
Apart from these calculations, other features of this new, proposed regulatory process are yet to be determined.  

D. The Kentuckians Case

Another group, Kentuckians for the Commonwealth (KFTC), challenged, as violations of the CWA and the Administrative Procedure Act (APA), the Corps’s issuance of a section 404 permit under NWP 21 allowing Martin County Coal Corporation (MCCC) to fill streams with spoil from coal strip mining. More specifically, the permit authorized twenty-seven valley fills that “would bury some 6.3 miles of streams at the heads of the valleys.” KFTC has noted that over the past twenty years, these activities have buried over 1500 miles of streams in Kentucky and West Virginia. In this case, Judge Haden sustained the challenge and enjoined the issuance of the permit in question and any future permits by the Huntington District office of the Corps that have no primary purpose except to allow the waste disposal of spoil removed from strip mining to be placed in valleys.

Challenges to a particular agency action under the arbitrary and capricious standard of review in the APA are subject to the two-part test established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council.* The first prong of the test requires the reviewing court to employ the tools of statutory construction and give effect to Congress’s intent, if a congressional intent can be discerned.

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173 Id. at II.B-6.

174 Id. at II.B-9 ("The regulatory framework and process for this alternative would be embodied in an interagency Memorandum of Agreement (MOA) among the regulatory agencies with authorities under the SMCRA or CWA and their respective implementing regulation.").


178 Rivenburgh, 204 F. Supp. 2d at 946. The court further declared the recently adopted new definition of fill material by the two agencies to be *ultra vires* just days before the rule was made final on May 9, 2002. Id. at 945.


181 Id. at 842 (stating that "the question [is] whether Congress has directly spoken to the precise question at issue").
sional intent can be found, the second prong of the test requires a reviewing court to defer to any reasonable construction of the statute or regulation by the agency.182

Following step one of the Chevron test, the district court found the intention of Congress on the issue of section 404 permits for waste disposal to be clear in three ways.183 First, relying on section 404(f)(2), Judge Haden reasoned that section 404 permits require the discharge of fill to be undertaken with a purpose that relates to using the land that will be created by the fill.184 Second, he concluded since section 10 of the RHA, which regulated only improvements in the navigable waters, was the sole source of authority for section 404 while section 13 of the RHA, which regulated all waste disposal other than dredged material, was explicitly replaced by the section 402 program, section 404 permits must be limited to activities that are improvements and not disposals of waste.185 Lastly, Judge Haden decided that since the SMCRA requires coal mining operators to return removed overburden to the mining site unless the site can be put to a better economic use, and because the SMCRA is in harmony with the provisions of the CWA, the SMCRA does not authorize the disposal of spoil from mining activities in streams.186 Thus, the court concluded that there is a clear intention of Congress for the section 404 program not to include the disposal of waste, and that the discharge of spoil from strip mining in streams is waste disposal, and therefore the discharge of spoil into valley streams must be enjoined.187

On appeal, the Fourth Circuit vacated the injunction, reversed the district court requirement that fill material must be limited to material deposited for a beneficial purpose, and remanded the case, while effectively leaving the most relevant substantive issues as open

182 Id. at 843 (stating that “the question for the court is whether the agency’s [interpretation] is based on a permissible construction of the statute”).
183 Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425, 441 (4th Cir. 2003) (suggesting that the district court relied upon section 404(f)(2) of the CWA, the CWA relation to the RHA, and the CWA relation to SMCRA as indicia of congressional intent with regards to the definition of fill material).
184 Id. at 937. Section 404(f)(2) states that “any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject . . . shall be required to have a permit under this section.” 33 U.S.C. § 1344(f)(2) (2000).
186 Id. at 941–42.
187 See id. at 932–33, 946–47.
The court declared that the case is not about the new effects-based definition of fill material adopted by the two agencies in 2002, but rather whether the permit granted to the MCCC to deposit spoil in valleys violates section 404 and the Corps's 1977 primary purpose definition of fill material.\footnote{See Rivenburgh, 317 F.3d at 448.}

Under step one of Chevron the circuit court, disagreeing with the district court, found that there was no clear intent on the part of Congress to limit fill material to material deposited for some beneficial purpose and not waste material.\footnote{Id. at 438. This approach decisively rejects the argument that the new effects-based definition by the agencies "obviates the plaintiffs' claims." Contra Hagerty, supra note 44, at 181.} The court found that section 404(f)(2) provides an exception to the list of exceptions in 404(f)(1) and not a limit on the type of discharges available for a section 404 permit generally.\footnote{Id. at 441.} The court dismissed the district court's RHA analysis by noting that section 10 may prohibit the discharge of waste since waste would presumably alter the condition of navigable waters.\footnote{See id. at 442.} The court also stressed that section 10 has been used to prohibit the discharge of solid industrial waste into navigable rivers.\footnote{Id. (citing United States v. Republic Steel Corp., 362 U.S. 482 (1960)).}

Finally, the court found, contrary to the district court, that the SMCRA allows excess spoil to be deposited into the waters of the United States under certain conditions even if the material does not have a beneficial purpose.\footnote{Id. at 443.}

The circuit court then undertook the Chevron test's step two analysis, concluding that the Corps's primary purpose definition is a permissible reading of the CWA, and that the agency's practice was consistent with this definition.\footnote{Id. at 444–42.} The court relied on the preamble to the proposed rule change in 2000 and ten years of practice regarding the division of authority between the Corps and EPA in deciding that the Corps's interpretation of the 1977 definition of fill material is consistent with the text of that definition.\footnote{See id. at 442.} The majority asserted that the practice associated with the division of authority between the Corps for fills and EPA for effluents is decisive, and since the Corps's
“practice reflects its interpretation,” the waste exclusion in the Corps’s 1977 definition does not “defer to the EPA on all material deposited for disposal,” just material that is subject to EPA’s effluent limitations.

In partial dissent, Judge Luttig criticized the majority’s reliance on the statements made in the 2000 proposed revision by the agencies because these statements do not address the Corps’s interpretation of its 1977 regulations and they may in fact illustrate a need to reconcile a discrepancy between the language of the regulations and the agency’s practice. He further stressed that the majority should have simply vacated the injunction and remanded the case for the Corps to present its interpretation of its 1977 primary purpose test. Judge Luttig’s opinion, more so than the majority opinion, leaves the substantive issue of this case unresolved—namely, whether the granting of this permit to the MCCC violated the Corps’s 1977 primary purpose regulation of fill material.

On remand, KFTC’s effort to file a supplemental complaint was denied by Judge Haden because the NWP 21 permit authorization in question had expired, making the case moot. KFTC attempted to allege that the Corps had no authority to modify the NWP 21 authorization in question after the MCCC’s successor Beech Fork Processing, Inc. (Beech Fork) admitted in a letter to the Corps that it could mine coal under its permit without placing spoil in the waters of the United States. Judge Haden held that since the NWP 21 authorization expired February 21, 2003, Beech Fork currently had no permit authorization to fill streams with excess spoil. He further noted that Beech Fork has applied for authorization under the reissued NWP 21,

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197 Id. at 446 n.3.
198 Id. at 447.
199 Id. at 451 (Luttig, J., concurring in the judgment in part and dissenting in part) (emphasizing that the Army Corps does not state its interpretation of its 1977 regulation).
200 Id. at 451–52. (noting that it is not obvious how the disposal of spoil into streams has the primary purpose of making dry land or elevating the streambed).
201 Id. at 452. Judge Luttig’s opinion, in contrast to the majority’s opinion, offers support for the contention that he is “eager to be perceived as more moderate in anticipation of a Supreme Court opening.” See Deborah Sontag, The Power of the Fourth: How One Appellate Court Is Quietly Moving America Ever Rightward, N.Y. TIMES, Mar. 9, 2003, § 6 (Magazine), at 43.
203 Id. at 712.
204 Id. at 715 (“Under the permit, if approved, Beech Fork proposes to fill 9,220 feet of jurisdictional waters of the United States.”).
and if granted a challenge to any future authorization would not evade judicial review.\footnote{Id. at 716.}

IV. ANALYSIS: IMPLICATIONS OF THE NEW EFFECTS-BASED DEFINITION OF FILL MATERIAL

As a starting point, the agencies recognize that the definition of fill material provides the dividing line between the section 404 and section 402 programs.\footnote{Revisions to the Regulatory Definitions of "Fill Material," 65 Fed. Reg. 21,292, 21,293 (proposed Apr. 20, 2000) (stating that "the term 'fill material' under the CWA is important in determining whether a proposed discharge of a pollutant is subject to regulation under section 404 or section 402").} Thus, any change in the scope of what constitutes fill material would presumably change whether some activities would be subject to the section 404 program or the section 402 program.\footnote{See id.} Contrary to this intuition, in promulgating the new rule, the agencies stress that the new definition "is intended to maintain our existing approach to regulating pollutants under either section 402 or 404," even though the new definition eliminated the explicit exception for discharges covered by section 402 permits.\footnote{Revisions to the Regulatory Definition of "Fill Material," 67 Fed. Reg. 31,129, 31,135 (May 9, 2002) (to be codified at 33 C.F.R. pt. 323; 40 C.F.R. pt. 232). One has to doubt this conclusion when "[t]he comments of environmental groups and the various form letters were strongly opposed to the proposal [while] . . . comments from the regulated community generally supported the proposal." See id. at 31,131. The regulated community’s support for the final definition must be even stronger.} Theoretically, this means that the exception for discharges covered by section 402 still exists; however, "existing approach" most likely means current regulatory practice.\footnote{Id. at 31,135.}

One possibility regarding the result of the rule change is that the baseline has changed.\footnote{See id.} Previously, fill material and the section 404 program did not encroach upon pollutants that could potentially be covered by the NPDES program.\footnote{E.g., Regulatory Programs of the Corps, 42 Fed. Reg. 37,122, 37,130 (July 19, 1977).} Rather it constituted an exception; namely, section 404 reached some of the remaining material that was not within the reach of the NPDES program.\footnote{Id.} Moreover, the NPDES
program explicitly limited the scope of the section 404 permitting authority. 213

Now, however, fill material defines the extent of the NPDES program. 214 As recently stated, where material is already determined to constitute fill, only pollutants subject to effluent limitations are excluded from regulation as fill. 215 Furthermore, the new rule attempts to foreclose the possibility that a discharge activity, already satisfying the definition of fill material, may become subject to section 402 regulation—instead of section 404 regulation—as a result of EPA proposing a new effluent limitation for a pollutant that is a part of that discharge activity. 216 In other words, the NPDES program may no longer preempt section 404 permitting of a discharge activity that satisfies the agencies’ new definition of fill material. 217 This change is a significant departure from the original congressional perspective that the section 404 permitting program was to constitute an exception to EPA’s NPDES program. 218 Under the current definition of fill material and regulatory practice by the agencies regarding some activities, however, it appears that EPA cannot expand the NPDES program to regulate pollutants that are present in discharge activities regulated by the Corps’s section 404 program. 219

The discrepancy between the treatment of waste before and after the adoption of the regulation illustrates this change. 220 As noted above, the Corps’s previous regulation explicitly stated that the dis-

214 See Revisions to the Regulatory Definition of “Fill Material,” 67 Fed. Reg. at 31,134. The agencies state that the “rule does not affect the application of section 402 of the CWA to discharges of pollutants other than fill material that may be associated with such things as solid waste landfill structures and mine impoundments.” Id. (emphasis added). These examples are just the beginning, because the new definition of fill material is not limited to the inclusion of only landfill structures and mine impoundments; it includes anything that is not trash or garbage. See 33 C.F.R. § 323.2(e) (2)-(3) (2003); 40 C.F.R. § 232.2.
215 See Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425, 445 (4th Cir. 2003) (“[W]hen the Corps issued the permit . . . it was authorized to regulate discharges of fill, even for waste, unless the fill amounted to effluent that could be subjected to effluent limitations.”).
216 See supra text accompanying note 214.
217 See supra text accompanying note 214.
219 See supra text accompanying note 214.
posal of waste was subject to section 402. Now the agencies "believe that a categorical exclusion [from the 404 program] for waste would be over-broad. Instead, where a waste has the effect of fill, we believe that regulation under the section 404 program is appropriate." Accordingly, the logical conclusion is either that the scope of 404 program is broader than it previously was or that the Corps did not actually follow its previous definition, or both.

Proponents of the revision counter contentions that this rule is an attempt to frustrate environmental protection by arguing that "the rulemaking was initiated by the agencies under the prior, Democratic administration." Though the initial rulemaking change did propose to eliminate the distinction between waste and fill, the proposal recognized that the disposal of solid waste from certain mining activities, but not coal mining overburden, will continue to be regulated by EPA's section 402 program and moreover invited comment on whether these specified solid waste disposal activities "fully encompass[] the range of discharges properly subject to section 402." The final rule formally eliminates the distinction between waste and fill material.

A more nuanced difference between the proposed and final rule illustrates that the final rule attempts to circumscribe the jurisdiction of EPA's NPDES program in terms of the Corps's definition of fill material. Specifically, the proposed rule provided an exclusion from the definition of fill materials for discharge activities regulated by final or proposed effluent limitations standards or NPDES permits. The implication is that EPA, by publishing proposed effluent limitations for a pollutant, could shift the regulation of disposal activities

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221 33 C.F.R. § 323.2(e) (2001) ("[Fill material] does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under Section 402.").


223 See id. (stating that the two agencies disagree with comments that the expansion of section 404 jurisdiction is inappropriate).

224 Gardner, supra note 42, at 147.


227 See id. at 31,135.

228 Revisions to the Regulatory Definitions of "Fill Material," 65 Fed. Reg. at 21,295-96 ("Also, today's proposal recognizes that discharges from coal mining activities that are covered by a proposed or final EPA effluent guideline . . . are not fill material and would remain subject to regulation under CWA section 402").
involving that pollutant from section 404 to section 402. This interpretation is recognized and explicitly thwarted by the final rule. Rather, the final rule is an effort to preclude EPA from adopting effluent limitations for pollutants present in activities that satisfy the definition of fill material.

In short, the Corps has replaced a desire for a workable program in favor of a more objective approach for determining what activities are subject to the section 404 program. Nevertheless, review of certain activities subject to the section 404 program, like mountaintop mining and valley fills, requires a more coordinated analysis and framework than currently exists under the section 404 program alone. Thus, the emphasis has shifted from ensuring that the administrative state can manage and preserve the waters of the United States to ensuring consistent treatment of activities and providing certainty for the regulated community.

CONCLUSION

Since the creation of the section 404 permitting program over thirty years ago, the Corps and EPA have struggled to define fill material in a way that strikes a meaningful balance of including many activities and excluding activities that were beyond the scope of the program. During much of this period, each agency defined fill material differently because each agency had differing policy perspectives about the breadth of the section 404 program. This resulted in an inconsistency between the operation of the program by the Corps and

229 See id. ("We welcome comment on all aspects of today's proposal, and especially solicit comment on whether the proposal's reference to discharges covered by proposed or final effluent limitations guidelines and standards . . . covered by an NPDES permit fully encompasses the range of discharges properly subject to section 402 of the Act.").

230 See Revisions to the Regulatory Definition of "Fill Material," 67 Fed. Reg. at 31,135 ("[T]he language in the actual rule could raise questions as to whether the reference to effluent guidelines was meant to refer only to those in existence at the time today's rule was promulgated or whether the reference was prospective.").

231 See id. (claiming that "EPA has never sought to regulate fill material under effluent guidelines").

232 Id. at 31,133 (claiming that "it is important to use an objective, effects-based test"); Permits for Activities in Navigable Waters, 40 Fed. Reg. 31,320, 31,320 (July 25, 1975) (stating the comments received addressed "the dual purposes of the FWPCA [CWA]: First, the development of a workable program; and, second, the needs of water quality").

233 See supra Part III.C.

234 Revisions to the Regulatory Definition of "Fill Material," 67 Fed. Reg. at 31,133. The ability of this regulatory change to provide certainty to the regulated community in contexts such as mountaintop mining and valley fills may have been overestimated. See supra note 156 and accompanying text.
its regulations. In effect, the Corps over time adopted EPA’s broad implementation policy toward the section 404 program, rendering its primary purpose test moot. The change in treatment by the courts towards excess spoil in mountaintop mining cases illustrates this policy shift towards the section 404 program by the Corps. The inevitable outcome of this policy shift was to abandon the primary purpose test in favor of a more inclusive definition of fill material.

The result of the new definition, however, may be nothing more than to recreate the problems of the primary purpose test in reverse. If the primary purpose test became irrelevant because it made the hurdle for activities that qualify as fill material too high, the new effects-based definition may become irrelevant because it fails to exclude almost any activity from being considered fill material.

Before this occurs, however, the expansion of the section 404 permitting program may come at the expense of EPA’s NPDES program. The agencies have suggested that the NPDES program may not regulate activities that may be considered fill material. Thus, the NPDES program is now potentially cabined by this new definition of fill material. Furthermore, the cases involving excess spoil disposal from mountaintop mining suggest that EPA’s failure to define effluent limitations for activities that were presumed to be subject to NPDES allows those activities to instead be subject to section 404 under the new definition of fill material. In short, the new definition enables the Corps to permit activities under section 404 that may have been within the purview of the NPDES program. The upshot is that because the effluent limitation standards under the NPDES program are often more stringent than what is required to obtain a section 404 permit, the burden of this new definition of fill material will be borne by the Nation’s wetlands.