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## Ohio Valley Envtl. Coalition v. Bulen, 315 F. Supp. 2d 821 (S.D.W.Va. 2004)

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EPA approved the new standard. The WVRC claimed the approval of the new standard was arbitrary and capricious, because the new standard allowed the state discretion in determining when to compel additional studies before changing a site-specific water quality rule. Since the new standard incorporated all of the EPA's recommendations, the court ruled that the approval was not arbitrary and capricious.

The last WQS challenged by the WVRC relate to measurement techniques used when pollutant concentrations drop below the Practical Quantification Level ("PQL"), defined as the lowest level detectable by current monitoring methods. West Virginia initially submitted procedures to extrapolate pollutant levels below the PQL. One of the methods used the measurement of pollutant levels in fish. The EPA rejected this standard fearing that the alternate measurement standard using pollutant levels in fish may be a separate standard. Subsequently, the EPA approved a revised proposal by West Virginia, which did not include measurements of pollutants in fish. The court allowed the approval of the revised standard, because indirect measurements are the only method to detect pollutant levels below the PQL.

The court refused to issue a declaratory judgment ordering the EPA to institute WQSs for manganese and iron. The EPA initially rejected West Virginia's proposed WQSs, and the State failed to propose revised WQSs, as required by the Clean Water Act. The court found the issue moot given that the EPA approved the West Virginia standards after this action commenced, no reasonable likelihood existed that the harm would recur, and a declaratory judgment would not make the WVRC whole. Finally, the court granted the WVRC's request to file for attorney's fees because the CWA specifically provides for such actions.

In conclusion, the court granted summary judgment on the WVRC's claim that the EPA's actions were arbitrary and capricious when it failed to consider the effect of 3-methyl-4-chlorophenol on humans and fish when approving a WQS. However, the court ruled the EPA was not arbitrary and capricious when relying on reasoned scientific opinions when approving the other WQSs. Also, the court dismissed claims requesting a declaratory judgment to force the EPA to enact statutorily mandated WQSs enacted after filing of the suit but before the final decision.

*David B. Oakley*

**Ohio Valley Env'tl. Coalition v. Bulen, 315 F. Supp. 2d 821 (S.D.W.Va. 2004)** (holding illegal segmentation occurred when a coal company submitted plans for a smaller waste disposal project that operated only to facilitate approval of a larger disposal project).

Ohio Valley Environmental Coalition ("OVEC") sought a preliminary injunction against the United States Army Corps of Engineers

("Corps") in the United States District Court for the Southern District of West Virginia claiming that the Corps approved an illegally segmented disposal project. OVEC alleged that the Corps failed to comply with Section 404(a) of the Clean Water Act ("Act") when it granted a permit to Green Valley Coal Company ("Green Valley") to place fill materials into a stream because Green Valley submitted the same mitigation plan for both that project and a larger project. Green Valley contended that even though both mitigation plans were the same, the smaller project had independent utility and it therefore was not an illegal segmentation. The court rejected Green Valley's argument and granted the preliminary injunction.

Green Valley submitted a proposal known as Incidental Boundary Revision ("IBR") to the Corps requesting permission to dispose of coal refuse into Hominy Creek under Section 404(a) of the Act. While awaiting approval of the IBR, Green Valley sought approval for a smaller project, known as Revision 5, to place fill material into 431 linear feet of an unnamed tributary of Hominy Creek. The area of land of Revision 5 existed entirely within the proposed boundaries of the IBR. As part of its application for Revision 5, and pursuant to statutory requirements, Green Valley planned to divert 8,000 feet of Hominy Creek to "mitigate" the destruction of the unnamed tributary. OVEC requested a preliminary injunction, arguing that Revision 5 equated to nothing more than a segmentation of the IBR. OVEC further argued that the diversion of 8,000 feet of water meant to "mitigate" the effects of Revision 5 acted to unduly influence the Corp's decision to grant the IBR as Green Valley, in obtaining approval of Revision 5, overcame the most significant obstacle in obtaining approval of the IBR, establishing the existence of the diversion.

The court considered four factors in determining whether to grant the preliminary injunction: (1) the likelihood of irreparable harm to Green Valley if the preliminary injunction was denied; (2) the likelihood of harm to OVEC if the requested relief was granted; (3) the likelihood that Green Valley would succeed on the merits; and (4) the public interest. The court held that OVEC would likely suffer greater harm, since once the tributary was filled, it would be gone forever and resulting in the diversion of a significant portion of Hominy Creek from its course. The court further held that Green Valley would likely succeed in proving that Revision 5 constituted an illegal segmentation of the proposed IBR. The court noted the administrative record showed that the original IBR mitigation plan was identical to the newly proposed Revision 5 plan. In fact, Green Valley's application for Revision 5 relied exclusively on documents originally prepared in connection with the IBR. The court found that the plan to mitigate the destruction of 431 feet of a stream's small tributary by diverting 8,000 cubic feet of the stream itself was, therefore, proposed simply to clear the way for the approval of the IBR. Finally, the court found that the

public had interests in the integrity of the waters of the United States and in requiring that administrative agencies abide by their own regulations. Thus, the court ruled that the Corps approval of Revision 5 contradicted the law and granted OVEC's motion for preliminary injunction.

*Tonn Petersen*

**Ohio Valley Env'tl. Coalition v. Bulen, 2004 U.S. Dist. LEXIS 16078 (S.D.W.Va. Aug. 13, 2004)** (supplementing the initial order suspending all existing Nationwide Permit 21 authorizations for valley fills and surface impoundments for projects not already under construction as of July 8, 2004).

The United States Army Corps of Engineers ("Corps") issued a number of authorizations to Green Valley Coal Company ("Green Valley") under Nationwide Permit ("NWP") 21 dating back to March, 2002. On October 23, 2003, the Ohio Valley Environmental Coalition ("Coalition") brought suit against the Corps, alleging the NWP 21 authorizations did not comply with section 404 of the Clean Water Act ("CWA") and asking for a preliminary injunction. The United States District Court for the Southern District of West Virginia enjoined the Corps from authorizing Green Valley to proceed with Green Valley's projects. One projects included a plan called Revision 5, which potentially affected only 431 feet of an unnamed tributary of Blue Branch. However, the mitigation plan required the diversion of 8000 feet of Blue Branch.

On July 8, 2004, the court granted summary judgment in favor of the Coalition and prohibited new or expanded fills at the challenged mining operations where construction had not begun as of the date of the decision. In the present case, the Coalition asked the court's permission to file a supplemental complaint enumerating the six additional NWP 21 authorizations and requested that the court clarify the Corps' permanent injunction of Revision 5 under NWP 21.

Even though the Coalition lacked justification for failing to bring all NWP 21 authorizations in the initial challenge, the court amended the original order to include the suspension of all existing NWP 21 authorizations for valley fills and surface impoundments where construction had not begun prior to July 8, 2004. The court noted that although it could have required the Coalition to file another suit, two factors dissuaded the court from making that ruling. First, the court found requiring the Coalition to go through the needless formality and expense of instituting a new lawsuit, when events occurring after the original filing indicated the Coalition had a right to relief, went against the philosophy of the federal rules. Second, the court was not inclined to allow discharges into waters of the United States pursuant to unlawful permits simply because they were brought to the court's