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## Ohio Valley Env'tl. Coalition v. Bulen, 2004 U.S. Dist. LEXIS 16078 (S.D.W.Va. Aug. 13, 2004)

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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

attention after the filing. To preserve the mining industry's ability to operate while applying for individual permits pursuant to the CWA, the court enjoined only those projects not already under construction.

In addition, the court stated that any attempt to revise the Revision 5 mitigation plan amounted to an application for authorization pursuant to NWP 21 and since the court enjoined all NWP 21 authorizations, the Corps could not authorize Revision 5.

Thus, the court supplemented the initial order enjoining all permits for projects that had not commenced as of July 8, 2004 to include permits not initially identified and granted the Coalition's motion to clarify the permanent injunction on Revision 5 and denied as moot the Coalition's motion to amend its complaint.

*Story Washburn*

**United States v. Thorson, 2004 U.S. Dist. LEXIS 5927 (W.D. Wis. Apr. 6, 2004)** (holding: (1) wetlands hydrologically adjacent to navigable waters of the United States fall within the purview of the Clean Water Act; and (2) the Clean Water Act does not exceed congressional authority to regulate channels of interstate commerce under the Commerce Clause).

Peter Thorson, president of both Managed Investments, Inc. ("Managed Investments") and Construction Management, Inc. ("Construction Management"), purchased and pursued development of a 5.8-acre tract of land in Tomah, Wisconsin. The site was adjacent to a drainage ditch that flowed into Deer Creek, a watercourse that flowed to the Lemonweir River. The Lemonweir River is a tributary to the Mississippi River, a navigable watercourse of the United States. Upon purchase of the land, Thorson and Managed Investments submitted water quality certification applications describing plans to develop the site to both the United States Army Corps of Engineers ("Corps") and the Wisconsin Department of Natural Resources ("DNR"). Pursuant to water quality concerns raised by both the Corps and the DNR, Thorson and Managed Investments revised the site plan, retained a consultant to assist with the permit application, and provided additional environmental information. The DNR subsequently denied the water quality certification and the Corps denied the permit application. However, despite lacking a permit, Thorson directed Gerke Excavating, Inc. ("Gerke") to place fill material in the wetlands site. Gerke proceeded to fill and grade the site with stumps, roots, and other spoil material using a bulldozer and trucks. The Corps issued a cease and desist order to prevent Thorson, Managed Investments, Construction Management, and Gerke (collectively "Thorson") from completely filling the site. The United States sought injunctive and monetary relief against Thorson for violations of the Clean Water Act ("CWA"). The Corps contended that Thorson discharged a pollutant from a point