

9-1-2002

Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 206 F. Supp. 2d 782 (S.D. W. Va. 2002)

Kate Osborn

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>

Custom Citation

Kate Osborn, Court Report, *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 206 F. Supp. 2d 782 (S.D. W. Va. 2002), 6 U. Denv. Water L. Rev. 199 (2002).

This Court Report is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 206 F. Supp. 2d 782 (S.D. W. Va. 2002) (granting mining company and Army Corps of Engineers' motion for clarification of an injunctive order enjoining the issuance of fill permits for waste disposal, denying mining company and Corps' motion for a stay pending appeal, denying citizen group's motion to dismiss for failure to join a necessary party, and denying citizen group's motion for further injunctive relief).

In early 2002, the citizen group Kentuckians for the Commonwealth ("Commonwealth") brought an action against Colonel John Rivenburgh, Robert Flowers, and Michael Green ("Engineers") of the Army Corps of Engineers ("Corps"). Commonwealth alleged the Engineers violated the Clean Water Act ("CWA"), the National Environmental Policy Act ("NEPA"), and the Administrative Procedure Act ("APA") by issuing permits authorizing the filling of waters of the United States with waste from surface coal mining. The parties filed cross-motions for summary judgment. The United States District Court for the Southern District of West Virginia concluded issuance of section 404 permits for the purpose of waste disposal was contrary to the spirit and letter of the CWA and *ultra vires*. On May 8, 2002, the district court enjoined the Engineers from issuing permits under section 404 of the CWA that have no primary use other than the disposal of waste, and specifically enjoined the Engineers from issuing mountaintop removal overburden valley fill permits solely for waste disposal.

In the present case, Kentucky Coal Association, Pocahontas Development Company, and AEI Resources ("Mining Companies") were joined as intervener-defendants. The Engineers and the Mining Companies requested clarification of the May 8, 2002 injunction and moved for a stay pending appeal. Commonwealth moved to dismiss for failure of the Engineers to join Beech Fork Processing ("Beech Fork") as a party and also moved for further injunctive relief against the Engineers.

The district court granted the Engineers and Mining Companies' request for clarification of its May 8, 2002 injunctive order. The court explained the scope of the injunction was not nationwide, it applied only to the Engineers and enjoined them from issuing section 404 permits from the Huntington District business office. The district court also stated the injunction enjoined the issuance of section 404 permits for all activities with no primary purpose other than the disposal of waste, including mountaintop removal overburden disposal in valley fills resulting from coal mining, but not including dredging and dredged spoil disposal. The court explained that permanent injunctive relief was necessary for three reasons: (1) Commonwealth showed at trial it did not have an adequate legal remedy; (2) irreparable environmental harm would result absent an injunction; and (3) section 706(2) of the APA requires courts to hold unlawful

and set aside agency action found to be contrary to law or outside the agency's statutory authority. At trial, the court determined the Corps and the Environmental Protection Agency ("EPA") acted contrary to the spirit and letter of the CWA and *ultra vires* through their rulemaking authority. The Corps and the EPA created a rule defining "fill material" that allowed the dumping of waste into streams as long as the disposal resulted in filling the waters of the United States. The court found this practice unlawful in light of the CWA and halted the practice, as required by the APA. The court then denied the Engineers and Mining Companies' motion for a stay pending appeal, finding the Engineers and the Mining Companies failed to make a strong showing they would prevail on appeal on the merits of the case. The Engineers and the Mining Companies submitted six arguments in support of their position, not one of which persuaded the court.

The court held the Engineers and Mining Companies failed to demonstrate irreparable harm would have occurred absent a stay. The Engineers and Mining Companies argued coal mining depended on the disposal of waste in section 404 fills. However, the court determined waste disposal fills were not necessary for coal mining, but rather were a cheaper alternative to reconfiguring the permits to avoid the placement of waste in waters of the United States. The court also determined irreparable harm to the environment could result if it granted the stay; and a stay could cause harm to the public since it would substantially harm the environment. Thus, the court denied the Engineers and the Mining Companies a stay pending appeal because they failed to substantially show they would prevail on appeal or suffer irreparable harm absent a stay. The court denied Commonwealth's motion to dismiss for the Engineers' failure to join Beech Fork as a necessary party. The court held a necessary party is one who has a legally protected interest in the litigation, not merely a financial interest or an interest of convenience. Beech Fork had only financial and convenience interests in the adjudication. The court therefore held Beech Fork was not a necessary party, and that dismissal of the action was improper.

The court also denied Commonwealth's motion for further injunctive relief requiring the Engineers to revoke authorization to Beech Fork to dispose of waste rock and dirt in waters of the United States. The court found the permanent injunction as previously ordered could not be extended to individual permit holders.

Kate Osborn