

## INTEREST OF AMICUS

Friends of the Earth (“FOE”) is a national, nonprofit conservation organization with members residing throughout the United States, including West Virginia and other Appalachian states. FOE is dedicated to protecting and enhancing this country’s natural resources, including air, water, and land. Its environmental activities include advocacy for full and effective implementation of the nation’s environmental laws. FOE's members are greatly concerned about rivers, streams, and riparian areas, and FOE has a long history of involvement in activities to protect aquatic ecosystems.

FOE members use and enjoy streams, mountains, and valleys of West Virginia for recreation and aesthetic enjoyment – activities that are severely impacted or threatened by the valley fill practices at issue in this case. The U.S. Fish and Wildlife Service makes a “highly conservative” estimate that stream impacts from valley filling authorized by the state of West Virginia exceed 469.3 miles in just three of the affected watersheds. See Bragg v. Robertson, 72 F. Supp.2d 642, 663 n.41 (S.D.W.Va. 1999). The volume of a single stream fill can be as much as 250,000,000 cubic yards, with stream burials more than two miles long. As the trial court found, these fills literally wipe out all aquatic life in the affected stream segments. Such fills therefore completely destroy the environmental values that FOE is dedicated to protecting, and eliminate the ability of FOE members to use

and enjoy the affected streams and riparian areas.

FOE is filing this amicus brief to rebut erroneous arguments by appellants and other amici that, if accepted by this Court, would severely undermine protection of rivers, streams, wetlands, and riparian areas, not only in West Virginia but in other states as well. Specifically, this brief rebuts the argument by appellants and other amici that valley fills are subject to permitting under § 404 of the Clean Water Act (“CWA” or “the Act”) and therefore effectively exempt from regulation under the Surface Mining Control and Reclamation Act (“SMCRA”). No participant in this litigation has thoroughly responded to these arguments, which comprise a substantial portion of the briefs for appellants and other amici. In this brief, FOE also refutes appellants’ sweeping and extreme claim that the complete burial of an entire stretch of stream can somehow be deemed to comply with water quality standards.

### **SUMMARY OF ARGUMENT**

The trial court correctly held that valley fills constitute waste disposal activity that cannot be authorized by CWA § 404 permits issued by the Army Corps of Engineers (“Corps”). A longstanding Corps rule expressly excludes waste disposal from regulation under CWA § 404, and instead requires that such activity be regulated by the Environmental Protection Agency (“EPA”) under CWA § 402. An August 1999 Memorandum of Understanding (“MOU”) suggesting a contrary

view is entitled to no deference because it conflicts with the plain language of the Corps' regulation, and because the federal parties to the MOU have since abandoned it. The Corps' rule excluding waste disposal from § 404 permitting also controls over an inconsistent EPA rule because the Act grants the Corps – not EPA – the authority to issue § 404 permits, and does not authorize EPA to expand the Corps' jurisdiction. Finally, valley fills are properly subject to regulation under CWA § 402, which – contrary to claims by amicus AEI – plainly covers the discharge of waste rock regardless of whether it has the effect of filling or displacing receiving waters.

The trial court also correctly ruled that the obliteration of entire stream segments by valley fills violates state and federal water quality standards. Such standards prohibit the adoption of waste transport or waste assimilation as a designated use for a stream; prohibit the presence of materials in concentrations that are harmful or hazardous to aquatic life in a stream; and require the protection of designated uses of a stream. Valley fills violate these requirements by burying the stream and its aquatic life under millions of cubic yards of rock. There is no merit to claims by West Virginia and amici that the trial court's reasoning would lead to a ban on all fill activities. Although activities of the nature and magnitude of valley fills certainly violate standards, not all fills involve the disposal of waste, or the complete burial of an entire stream segment and total annihilation of all

aquatic life therein.

## **ARGUMENT**

### **I. THE TRIAL COURT CORRECTLY HELD THAT VALLEY FILLS CONSTITUTE WASTE DISPOSAL ACTIVITY THAT CANNOT BE AUTHORIZED UNDER SECTION 404 OF THE CLEAN WATER ACT.**

The state of West Virginia (“State”), Coal Associations, Coal Lessors, Permittee Intervenors, AEI Resources, and the American Mining Association all argue that the trial court erred in concluding that the Corps lacks authority to permit valley fills under § 404 of the CWA. They contend, among other things, that the Corps can and does authorize valley fills under § 404, and that reading the SMCRA buffer zone rule to prohibit valley fills creates an impermissible conflict between SMCRA and the CWA. They further assert that the buffer zone standards are not, and cannot lawfully be, more stringent than the guidelines set forth under § 404(b)(1) of the CWA, meaning that the authorization of valley fills under § 404 of the CWA obviates the need for buffer zone variances under SMCRA.

The federal appellants, on the other hand, argue that the Court need not even address this issue because the United States now takes the position that valley fills in perennial and intermittent streams require SMCRA buffer zone variances regardless of whether such fills are subject to § 404 permitting. For essentially the same reason, the federal appellants also contend that the trial court’s ruling on the applicability of § 404 to valley fills was dictum.

FOE agrees with the federal appellants that valley fills in perennial and intermittent streams require SMCRA buffer zone variances regardless of whether such fills also require § 404 permits. FOE further agrees that, if the Court adopts the federal appellants' position on this issue, the Court need not rule on the applicability of § 404 to valley fills. Nevertheless, briefing on the issue of § 404's applicability is warranted in the event that the Court disagrees with the United States or otherwise decides to reach the question of whether valley fills can be authorized under § 404. FOE demonstrates in this brief, therefore, that the essential premise of the arguments raised by appellants and amici – that the Corps can authorize valley fills in perennial and intermittent streams pursuant to § 404 of the Clean Water Act – is fundamentally flawed. Accordingly, should the Court reach this issue, the Court should uphold the trial court's ruling rejecting the August 1999 MOU on this ground.

**A. Valley Fills Are Not Subject To Corps Authorization Under Section 404 Because Such Activities Involve The Discharge of Waste, Not “Fill Material,” Within The Meaning Of The Corps’ Regulations.**

The trial court rejected the position of appellants and amici that § 404 authorizes the Corps to issue permits for valley fills, ruling that “overburden or excess spoil, being a pollutant and waste material, is not ‘fill material’ subject to Corps’ authority under Section 404 of the CWA when it is discharged into waters of the United States for the primary purpose of waste disposal.” Bragg, 72 F.

Supp.2d at 657. The court concluded that “[t]he Corps’ § 404 authority to permit fills in the waters of the United States does not include authority to permit valley fills for coal mining waste disposal,” and that such fills instead “are regulated by the EPA under CWA § 402.” Id. On this basis, the court held that no conflict exists between the SMCRA buffer zone rule and the CWA, and that the August 1999 MOU purporting to supplant the buffer zone variance findings with the § 404(b)(1) guidelines was inconsistent with the CWA and therefore invalid. The trial court was clearly correct.

1. The Corps Cannot Regulate The Disposal Of Waste Under Section 404.

In order to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” 33 U.S.C. § 1251(a), the CWA prohibits the discharge of any pollutant into navigable waters except in accordance with a permit authorized under the Act, see id. §§ 1311(a), 1342, 1344. Section 404(a) of the Act establishes one such “exception,” authorizing the Corps to issue permits “for the discharge of dredged or fill material into the navigable waters at specified disposal sites.” Id. § 1344(a).

Because the mining spoil that comprises valley fills is indisputably not “dredged material,” the Corps’ § 404 jurisdiction over valley fills hinges on the meaning of the term “fill material.” Although the Act does not define this term, the Corps has, since 1977, defined 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. **The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the Clean Water Act.**

33 C.F.R. § 323.2(e) (emphasis added). Under the plain language of this regulation, therefore, the Corps cannot issue § 404 permits for the disposal of waste – i.e., the Corps cannot authorize valley fills if such activity constitutes waste disposal.

The Corps' contemporaneous construction of the above-quoted language further supports this view. In justifying the promulgation of what was then a new definition of "fill material," the Corps explained that, during its two years of experience administering the § 404 program, it had become aware of certain types of solid waste materials that technically fit within the then-existing definition of fill material, but were intended to be regulated by EPA under the § 402 National Pollutant Discharge Elimination System ("NPDES") program. See 42 Fed. Reg. 37,122, 37,130 (July 19, 1977). The Corps stated:

These include the disposal of waste materials such as sludge, garbage, trash, and debris in water. ...

The Corps and [EPA] feel that the initial decision relating to this type of discharge should be through the NPDES program. We have, therefore, modified our definition of fill material to exclude those pollutants that are discharged into water primarily to dispose of waste. We will process Section 404 permits for these types of activities to the extent that a levee or other type of containment structure must be placed in the water as part of the overall disposal plan. We will not, however, take any final action on the

Section 404 permit application until a decision on the NPDES permit has been made.

Id. Thus, the Corps determined more than twenty years ago that waste disposal should be regulated under § 402, not § 404, and the Corps has not changed its regulation since.<sup>1</sup>

2. Valley Fills Constitute Waste, Not “Fill Material,” Under The Corps’ Regulation.

The valley fills at issue in this case consist of mining spoil, or overburden, produced through the practice of mountaintop removal coal mining. This material is comprised of rock, dirt, or sand that has been excavated to expose coal seams within mountains. Such spoil is deposited in valleys in order to dispose of excess material that cannot be returned to the mine site. In other words, it is waste. As this Court has observed, such discharges are “expressly for the purpose of disposing of waste or spoil from the mining operations.” West Virginia Coal Ass’n v. Reilly, 1991 WL 75217 (4th Cir. 1991) (unpublished disposition), aff’g,

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<sup>1</sup> Although the Corps and EPA jointly proposed a new definition of “fill material” in April 2000, see 65 Fed. Reg. 21,292 (April 20, 2000), the agencies are still considering public comment on this proposed regulation, and it may not be finalized for a long time, if ever. In the meantime, the Corps’ existing regulation remains valid and binding law on the scope of the Corps’ § 404 authority over valley fills. See Part I.B.1, infra. Furthermore, the fact that the Corps has felt it necessary to propose a new rule in order to establish its regulatory authority over valley fills reflects the agency’s own recognition that its existing rule does not provide such authority.

728 F. Supp. 1276 (S.D. W.Va. 1989).<sup>2</sup>

Other decisions also support the conclusion that the dumping of mining spoil is waste disposal activity that does not fall within the Corps' § 404 permitting authority. For instance, in an opinion that was affirmed by this Court, the trial court in Reilly concluded that, **precisely because it is waste**, “the [Corps] never intended to regulate the disposal of waste or spoil in valley fills.” West Virginia Coal Ass'n v. Reilly, 728 F. Supp. 1276, 1287 (S.D.W.Va. 1989), aff'd without opinion, 932 F.2d 964 (4th Cir. 1991) (table). Likewise, in Friends of Santa Fe County v. LAC Minerals, Inc., 892 F. Supp. 1333 (D.N.M. 1995), the court, citing Reilly, held that gold mining overburden does not fall within the definition of “fill,” and hence, is not subject to a § 404 permit. See id. at 1342-43; see also Resource Investments, Inc. v. United States Army Corps of Engineers, 151 F.3d 1162, 1168-69 (9<sup>th</sup> Cir. 1998) (holding that discharges of municipal solid waste into a wetland did not constitute fill under the Corps' definition and were thus beyond the scope of the Corps' § 404 regulatory authority).

In sum, because the Corps' definition of fill material explicitly excludes waste disposal from the coverage of § 404, and because mining spoil is unquestionably

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<sup>2</sup> FOE cites West Virginia Coal Ass'n v. Reilly, 1991 WL 75217 (4th Cir. 1991), pursuant to Local Rule 36(c), which permits citation of an unpublished disposition of this Court where that disposition “has precedential value in relation to a material issue in a case and ... there is no published opinion that would serve as well ... .” In accordance with Local Rules 28(b) and 36(c), a copy of the unpublished disposition is attached as an addendum to this brief.

waste for these purposes, the Corps lacks authority to issue § 404 permits for the discharge of mining spoil associated with valley fills.

**B. This Court Owes No Deference To An Interpretation Of The Corps’ Section 404 Authority That Conflicts With The Plain Language Of The Corps’ Regulation.**

1. The August 1999 Memorandum Of Understanding Is Not Entitled To Deference By This Court.

In August 1999, during the course of this litigation, the Corps, EPA, the Office of Surface Mining (“OSM”), and the State entered into a MOU purporting to “clarify” the SMCRA buffer zone regulations as they pertain to surface mining impacts on perennial and intermittent streams. The MOU announced, without support, that § 404 of the CWA authorizes the Corps to permit the discharge of excess mining spoil into waters of the United States. On that basis, the MOU provided that: (1) valley fills may be permitted in perennial and intermittent streams; and (2) the findings required for a buffer zone variance may be satisfied through compliance with the § 404(b)(1) guidelines for dredge and fill activities.

The trial court invalidated the August 1999 MOU, rejecting its premise that the Corps can authorize valley fills under § 404, and concluding, in any event, that the buffer zone requirements cannot be fulfilled through compliance with the less stringent § 404(b)(1) guidelines. See Bragg, 72 F. Supp.2d at 656-60. Appellants and amici argue, however, that the CWA is ambiguous as to which agency – the Corps or EPA – has jurisdiction over waste disposal activities. On this basis, they

urge the Court to defer to various administrative agreements – in particular, the August 1999 MOU – purporting to allocate authority over valley fills between the two agencies. They contend that, because the CWA does not prohibit such an agreement between the Corps and EPA, the agencies were entitled to rely on “longstanding practice” to determine that the Corps has § 404 jurisdiction over valley fills. They further contend that this Court’s decision in Reilly, which relied on a 1986 Memorandum of Agreement (“MOA”) to resolve a similar question of jurisdictional ambiguity, compels deference to the agencies’ more recent interpretation of their respective authority over valley fills.

These arguments are without merit. For one thing, the United States – including the Corps and EPA – has since disavowed the August 1999 MOU, determining instead that the buffer zone findings represent a prerequisite to valley fills in perennial and intermittent streams that is independent of the § 404(b)(1) guidelines for a dredge and fill permit. Thus, there is simply no “interpretation” to which the Court can now defer.<sup>3</sup>

Moreover, even assuming that the Corps currently interprets its § 404 authority to encompass valley fills associated with surface coal mining operations, that interpretation warrants no deference because it is flatly inconsistent with the

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<sup>3</sup> In any event, as the trial court’s analysis amply demonstrates, the interpretation advanced by appellants and amici, that the § 404(b)(1) guidelines can substitute for the buffer zone variance findings, would not survive under even the most lenient standard of deference.

Corps' own regulation, as well as the contemporaneous explanation of that regulation in the preamble to the 1977 rule. See Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (courts do not owe deference where “an alternative reading is compelled by the regulation’s plain language or by other indications of the [agency’s] intent at the time of the regulation’s promulgation”) (internal quotations omitted); see also Clean Ocean Action v. York, 57 F.3d 328, 333 (3d Cir. 1995) (“[a]n agency guideline or directive that conflicts with the plain meaning of a regulation is invalid”).

Indeed, no appellant or amicus disputes that valley fills constitute waste disposal within the meaning of the Corps’ definition of “fill material.” Rather, they simply advance various arguments as to why this Court should not give effect to the Corps’ regulation explicitly excluding such activities from its § 404 jurisdiction. They point, for instance, to the Corps’ alleged “longstanding practice” of authorizing such activities under various nationwide permits, and to the August 1999 MOU purporting to confer jurisdiction over such activities on the Corps.

Yet these arguments ignore the fact that the Corps’ regulation remains on the books at 33 C.F.R. § 323.2, and is valid and binding law until replaced through proper rulemaking procedures. See United States v. Nixon, 418 U.S. 683, 695-96 (1974) (an agency is bound by the express terms of its regulations until it amends

or revokes them); Mogavero v. McLucas, 543 F.2d 1081, 1085 (4th Cir. 1976) (an agency is free to amend its regulations “to reflect its past practice and its notions of salutary administrative procedure,” but the existing regulations “must be followed until amended or withdrawn”). Although courts owe “substantial deference” to an agency’s interpretation of its own regulation, see Thomas Jefferson Univ., 512 U.S. at 512, this principle does not entitle the Corps or this Court to ignore the terms of the regulation itself. In this case, the plain language of 33 C.F.R. § 323.2(e) clearly controls over any contrary interpretation. Because valley fills indisputably constitute waste disposal, the Corps does not have authority to issue § 404 permits for such activities.

Moreover, nothing in this Court’s decision in Reilly undermines this conclusion. Reilly centered on a challenge to **EPA’s** authority to regulate the placement of fill material in streams to dispose of waste associated with surface coal mining operations. Because EPA, unlike the Corps, defines “fill material” as material “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**,” 40 C.F.R. § 232.2 (emphasis added), it appeared to the Court “that neither the EPA nor the [Corps] ha[d] jurisdiction over the disputed fill material ... ,” Reilly, 1991 WL 75217, at \*\*4: Under EPA’s definition, the Corps had jurisdiction, while under the Corps’ definition, EPA had jurisdiction. Certain appellants and amici now

place great weight on the fact that the Reilly Court turned to the agencies' 1986 MOA in resolving this "apparent confusion," id., contending that this Court must likewise resort to the August 1999 MOU to determine which agency has authority over valley fills.

Reilly compels no such deference, however, for the Court in that case was not faced with the question of the **Corps'** jurisdiction to regulate valley fills. See Reilly, 728 F. Supp. at 1285 ("the question before the court is not whether or to what extent the [Corps] holds companion authority over ... disposal of waste or spoil material"). The Reilly Court thus had no occasion to evaluate the Corps' adherence to its fill regulation in interpreting its § 404 permitting authority. In fact, if anything, Reilly lends support to FOE's position that the Corps cannot issue § 404 permits for valley fills, as the Court there concluded that, even under the 1986 MOA, EPA (and not the Corps) had authority over the disputed discharges. See 1991 WL 75217, at \*\*4.

2. EPA's Definition Of "Fill Material" Is Not Entitled To Deference Over The Corps' Definition Of That Term.

Nor is there merit to amicus AEI's argument that EPA's definition of "fill material," should prevail over the Corps' definition in the event of any conflict. Under EPA's definition, mining spoil would constitute fill subject to the Corps' § 404 permitting authority. Referring to EPA's "oversight role" in the CWA regulatory program, AEI contends that the Court should defer to this definition and

essentially ignore the Corps' own definition, which explicitly excludes mining spoil discharged for waste disposal purposes from the Corps' regulatory authority.

Although EPA plays an important role in the § 404 permitting program – for instance, EPA is charged with promulgating guidelines for the specification of disposal sites, see 33 U.S.C. § 1344(b), and with approving the delegation of § 404 permitting authority to qualifying states, see id. § 1344(h) – the Corps has primary responsibility for regulating the discharge of dredged and fill material under § 404. See id. § 1344(a) (granting the **Corps** authority to issue permits for the discharge of dredged and fill material into navigable waters); Resource Investments, 151 F.3d at 1166 (“Congress gave the Corps the responsibility of regulating the discharge of dredged or fill material into navigable waters in recognition of the Corps’ historical role ... as the permitting agency for dredge and fill activities in the nation’s navigable waters.”); id. (noting that “primary responsibility for regulating the discharge of dredged and fill material into navigable waters lies with the Corps”). Thus, the Resource Investments court relied on the Corps’ definition of “fill material” in determining that the Corps lacks authority under § 404 to regulate discharges of municipal solid waste into a wetland. See id. at 1166, 1168; see also Friends of Santa Fe County, 892 F. Supp. at 1342. Likewise, in a decision upheld by this Court, the trial court in Reilly recognized that the Corps’ definition of fill material defines the scope of its jurisdiction, apparently concluding that if

the Corps (like EPA) defined fill material to include material deposited for any purpose – whether or not such material constituted waste – then the Corps, rather than EPA, would have jurisdiction to regulate valley fills. See 728 F. Supp. at 1286-87.

As the trial court found in this case, EPA’s regulations do not define the scope of – and thus cannot enlarge or exceed – the Corps’ permitting authority under §404. See Bragg, 72 F. Supp.2d at 658. Accordingly, EPA’s definition of fill material cannot supplant the Corps’ definition for the purpose of delineating the Corps’ § 404 jurisdiction.<sup>4</sup>

**C. The Section 402 NPDES Permit Program Extends To Pollutants That Fill Or Displace Receiving Waters.**

In holding that valley fills are not subject to permitting under CWA § 404, the trial court found that such activity was instead subject to regulation under CWA § 402 (the "NPDES" permit program). In so finding, the trial court relied on express language in the Corps' rule, which states that "fill" material for purposes of § 404

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<sup>4</sup> Certain appellants also contend that, because the trial court previously approved a 1998 settlement agreement that assumed the Corps' authority to grant § 404 permits for valley fills, see Bragg v. Robertson, 54 F. Supp.2d 653 (S.D.W.Va. 1999), the court was not empowered to “re-decide” that issue. In approving the settlement, however, the trial court did not actually rule on the issue of the Corps’ jurisdiction over valley fills, but simply stated, reciting the relevant legal standard, that the settlement “accords with the law and is fair, reasonable and faithful to the objectives of SMCRA and CWA.” Id. at 665. Approval of a settlement is hardly a statement on the merits of the parties’ claims. See, e.g., United States v. City of Jackson, 519 F.2d 1147, 1152 (5th Cir. 1975).

jurisdiction "does not include any pollutant discharged into the water primarily to dispose of waste, **as that activity is regulated under section 402 of the Clean Water Act.**" 33 C.F.R. § 323.2(e) (emphasis added).

Despite the clear language of the regulation, amicus AEI asserts that the §402 NPDES permit program does not cover any discharges that fill or displace receiving waters. Such a restriction on the scope of the NPDES program, however, appears nowhere in the CWA or implementing regulations. To the contrary, the § 402 permit program covers the discharge of "any pollutant, or combination of pollutants." 33 U.S.C. § 1342(a)(1); see also 40 C.F.R. § 122.1(b)(1) ("NPDES program requires permits for the discharge of 'pollutants' from any 'point source' into 'waters of the United States'"). The Act and EPA's NPDES rules define "pollutant" to include such items as solid waste, garbage, munitions, wrecked or discarded equipment, rock, and sand. See 33 U.S.C. § 1362(6); 40 C.F.R. § 122.2. The definition does not exclude materials that happen to fill or displace receiving waters when discharged, and several items statutorily defined as "pollutants" – e.g., munitions, discarded equipment, and rock – can obviously have such an effect. Courts have specifically applied the NPDES permit requirement to discharges of these kinds of "solid" pollutants. See, e.g., Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) (discharge of ordinance into U.S. waters from ships and planes); Driscoll v. Adams, 181 F.3d 1285, 1291 (11th Cir. 1999) (sand and silt discharged

into a pond); Texas Oil & Gas Ass'n v. EPA, 161 F.3d 923 (5th Cir. 1998) (produced sand from oil drilling); Sierra Club v. Abston Construction Co., 620 F.2d 41 (5th Cir. 1980) (sediment from mining operation); Long Island Soundkeeper Fund v. New York Athletic Club, 1996 WL 131863 (S.D.N.Y. 1996) (target debris and spent shot from trap shooting range).<sup>5</sup>

AEI also asserts that the NPDES program addresses only pollutants that can be regulated via end-of-pipe concentration limits (e.g., "2 milligrams per liter"). Again, there is no support in the statute or rules for such a restriction on the NPDES program. As noted above, munitions, equipment, and rock are all "pollutants" subject to the NPDES program, even though concentration limits on such materials would ordinarily be impracticable. Further, EPA regulations do not require concentration limits in all NPDES permits. Non-continuous discharges, for example, can be limited based on total mass or frequency of discharge. See 40 C.F.R. § 122.45(e). Where numeric discharge limits are infeasible, EPA rules also allow NPDES permits to require "best management practices" ("BMPs") in lieu of numeric limits. BMPs are defined as:

schedules of activities, prohibitions of practices, maintenance procedures,

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<sup>5</sup> Of course, pollutants that meet the Corps' definition of dredged or fill material are regulated under CWA § 404 rather than § 402. That definition, however, plainly does not encompass **all** pollutants that happen to fill or displace receiving waters, and expressly excludes waste disposal. See 33 C.F.R. § 323.2(e).

and other management practices to prevent or reduce the pollution of "waters of the United States." BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

40 C.F.R. § 122.2. These kinds of requirements can plainly be applied to the discharge of solid materials, such as rock and mining overburden.

For all the foregoing reasons, AEI is completely off base in asserting that the NPDES program was not intended to cover activities such as valley fills. The Act and EPA rules broadly apply the NPDES permit requirement to discharges of "pollutants," a term that specifically includes rock and other solids of the type found in valley fills.

## **II. VALLEY FILLS VIOLATE WATER QUALITY STANDARDS.**

The trial court found that valley fills do not qualify for SMCRA buffer zone variances because such fills violate state and federal water quality standards. See Bragg, 72 F. Supp.2d at 662-63. Specifically, the court found that valley fills violate water quality standards that: (1) prohibit the adoption of waste transport or waste assimilation as a designated use for any waters of the United States; (2) prohibit the presence of materials in concentrations that are harmful, hazardous, or toxic to animal or aquatic life; and (3) require the protection of existing uses, and designated uses such as fish habitat and water contact recreation. See id. The court based this ruling on its finding, undisputed by any party, that valley fills destroy all existing animal and aquatic life in stream segments up to two miles

long. The trial court's ruling was clearly correct.

**A. Valley Fills Violate The Bar On Waste Assimilation As A Designated Use.**

EPA rules specifically prohibit states from adopting waste transport or assimilation as a designated use for any waters of the United States. See 40 C.F.R. § 131.6(c)(4)(i). The trial court found that valley fills violate this prohibition by eliminating the buried stream segments for the primary purpose of waste assimilation. See Bragg, 72 F. Supp.2d at 662. The State and AEI object, asserting that valley fills are not intended to be assimilated into the receiving stream; rather, they are intended to replace the stream with dry land. Such a position defies common sense. Under appellants' view, it is permissible to completely obliterate all stream life by burying it in waste, but not permissible to cause far less stream impairment by dumping waste that floats or dissolves in the water. Manifestly, the EPA rule is designed to prevent waste assimilation from becoming an end use in and of itself. It is impossible to conceive of a more dramatic violation of the rule than here, where waste assimilation becomes not simply a recognized end use, but the only use.<sup>6</sup>

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<sup>6</sup> AEI also asserts that the purpose of the waste assimilation rule was to prevent rivers from being used as open sewers, citing a sentence from the preamble to the rule. Although prevention of open sewers was undoubtedly one purpose of the rule, that was not the only purpose. The language of the rule itself broadly prohibits "waste assimilation" – not just "sewage assimilation." See United States v. Harvey, 814 F.2d 905, 916 (4th Cir. 1987) (limits on literal sweep of statute cannot be inferred merely because of history citing narrower concern); Jurgensen v. Fairfax County, 745 F.2d 868, 885 (4th Cir. 1984) (preamble is not controlling over

**B. Valley Fills Violate State Narrative Water Quality Criteria.**

West Virginia has adopted narrative water quality criteria applicable to all waters of the State. Among other things, these criteria provide as follows:

3.2 No sewage, industrial wastes or other wastes present in any of the waters of the State shall cause therein or materially contribute to any of the following conditions thereof:

- 3.2a. Distinctly visible floating or settleable solids . . .
- 3.2b. Deposits or sludge banks on the bottom;
- . . . . .
- 3.2e. Materials in concentrations which are harmful, hazardous or toxic to man, animal or aquatic life; . . .

W.Va. C.S.R. § 46-1-3. Valley fills unavoidably violate each of the above standards. Such waste disposal causes the presence of settleable solids and deposits on the bottom. It also causes the presence of materials in concentrations that are palpably harmful to animal and aquatic life. As the trial court found, and no one disputes, the concentration of industrial waste in a valley fill “is mortal to animal or aquatic life in the stream segment buried.” Bragg, 72 F. Supp.2d at 663.

**C. Water Quality Standards Apply To Valley Fills, and Such Fills Illegally Destroy Designated Uses.**

The State and AEI assert that water quality standards do not apply to valley fills. To conclude otherwise, they assert, would mean that no type of fill activity

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the language of statute itself); cf. Moskal v. United States, 498 U.S. 103, 111 (1990) ("This Court has never required that every permissible application of a statute be expressly referred to in its legislative history.").

could be allowed, because fills "unavoidably" result in the loss of the existing uses of the specific stream segment or wetland filled. They also argue that water quality standards apply primarily to discharges regulated under the NPDES permit program, not to discharges of fill material, and that such standards are meant to limit only the concentration of contaminants in the waters of a flowing stream.

In large measure, these claims are simply variations of appellants' arguments that valley fills are subject to permitting under the § 404 dredge and fill permit program rather than under the § 402 NPDES permit program. Those arguments were refuted in Part I above. As noted in that discussion, valley fills are waste disposal practices that are not covered by the § 404 permit program. Waste rock is a pollutant, the discharge of which requires a NPDES permit. Such permits must ensure that the discharge does not cause or contribute to a violation of water quality standards – including standards that require protection of designated uses of the receiving waters. See 33 U.S.C. § 1311(b)(1)(C).

In any event, there is no language anywhere in the CWA suggesting that water quality standards can be waived or relaxed where fill activities are involved. To the contrary, the CWA explicitly requires **all** discharges to comply with state and federal water quality standards. See 33 U.S.C. § 1311(b)(1)(C). Indeed, achievement of water quality standards is "one of the Act's central objectives." Arkansas v. Oklahoma, 503 U.S. 91, 106 (1992). No NPDES or § 404 permit can

be issued if the discharge will cause or contribute to a violation of water quality standards. See 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. §§ 122.4(d), 230.10(b)(1).

Further, all fill activities do not "unavoidably" violate water quality standards. Although activities of the magnitude of valley fills certainly violate standards, not all fills involve the complete obliteration of a stream for two miles or more, and the total annihilation of all aquatic life therein. Activities permitted under the § 404 program typically involve more limited incursions, such as the installation of docks or jetties, the filling of a portion of the stream channel to support bridges or other structures, the filling of adjacent wetlands, or the construction of dikes, levees or riprap along the edge of the river channel. E.g. 33 C.F.R. Part 322. Although the foregoing activities can in some cases cause violations of water quality standards (thereby precluding issuance of a permit), they do not unavoidably do so in all cases. The construction of a wharf or bridge is a far cry from wiping out an entire stretch of stream and all life therein.

Appellants are also simply incorrect in asserting that water quality standards are meant only to limit the concentration of contaminants within the water column of a flowing stream. The Act and EPA rules require state water quality standards to include three key components: (1) designated uses (e.g., swimming, boating, fish migration, fish spawning, fish harvesting) that must be protected; (2) water quality criteria to protect uses, which can include both numeric limits on pollutant

concentrations (e.g., no more than 1 milligram of copper per liter) and narrative criteria (e.g., requiring waters to be “free from materials that are harmful to human or animal life”); and (3) antidegradation policies. See 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. 131.6. Although there is some overlap, each of these components has independent significance. Numeric criteria (e.g., concentration limits) may be very helpful in protecting designated uses, but they do not always satisfy the requirement to fully protect such uses.

The Supreme Court explicitly so held in PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology, 511 U.S. 700 (1994). There, the Court held that adequate stream **flow** was an element of water quality standards compliance, because adequate flow was often essential to protect designated uses. See id. at 714-15. The Court rejected arguments that compliance with water quality standards should be determined solely on the basis of numeric water quality criteria, noting that the CWA required water quality standards to contain **both** uses and criteria. See id. Protection of designated uses, held the Court, often involves more than concentration limits:

In many cases, water quantity is closely related to water quality; **a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses**, be it for drinking water, recreation, navigation or, as here, as a fishery.

Id. at 719 (emphasis added). The Court noted that the CWA defines "pollution" in terms of the "physical" and "biological" as well as chemical alteration of water,

and recognizes that pollution may result from changes in water flows, as well as from chemical contamination. See id. at 719-20. The Court then upheld a decision by the state of Washington to require – as a condition of water quality standards compliance – that a hydroelectric project maintain adequate stream flows to protect fish habitat. See id. at 723.

The situation here is even more compelling. Valley fills do not simply reduce stream flow – they eliminate it entirely. The fact that such fills destroy all designated uses makes a violation of water quality standards not merely possible, but certain. All waters in West Virginia are designated (at a minimum) for the propagation and maintenance of fish life and for water contact recreation. See 46 C.S.R. § 1-6.1. Valley fills invariably eliminate those uses, thereby violating water quality standards.

For all of the foregoing reasons, valley fills unquestionably and inevitably violate water quality standards. The trial court therefore correctly ruled that such fills cannot qualify for SMCRA buffer zone variances.

## CONCLUSION

For all of the foregoing reasons, FOE supports affirmance of the trial court's decision.

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)**

The undersigned counsel for amicus curiae Friends of the Earth hereby certifies that the foregoing brief complies with the type-volume limits in Federal Rules of Appellate Procedure 29(d) and 32(a)(7) in that the brief contains 6,373 words.

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