

**Mercer Law School Virtual Guest Lecture**  
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**MOUNTAINTOP REMOVAL: ENVIRONMENTAL  
INJUSTICE IN THE APPALACHIAN COALFIELDS<sup>1</sup>**

**I. Introduction**

Travelers entering Williamson, the county seat of Mingo County, West Virginia, pass a faded road sign that reads: “Welcome to the Billion Dollar Coalfields.” The irony of the greeting is hard to escape. Driving into the town which lies in the heart of central Appalachia's coal-producing region, one sees boarded-up stores and vacant and dilapidated buildings. Discouraging economic data and high unemployment in Mingo and other coal counties of southern West Virginia confirm what the eye sees: The billions of dollars of coal reserves mined from the region have only marginally benefited local people. After a century of mining in the “billion dollar coalfields,” local communities lack funds to upgrade aging schools; tens of thousands live below the federal “poverty line”; and public services such as fire, police, sewage treatment, and libraries struggle to survive on “bare-bones” budgets.

While the economic stagnation of coalfield communities continues, highly efficient coal mines have revolutionized coal mining in Appalachia. Coal production largely from giant “mountaintop removal” [FN1] strip mines and highly mechanized underground “longwall” [FN2] mines approaches record levels. How does one account for the pervasive dismal economic condition in a region which could aptly be called the “Saudi Arabia of coal?”

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**A. Historical Overview of the Pre-SMCRA Period**

Prior to the enactment of SMCRA in 1977, unregulated surface and underground coal mining created enormous environmental harm throughout the Appalachian coalfields. [FN137] These externalities created disincentives for local economic development as well as other adverse social and economic consequences. Generally, local people experiencing these costs of mining also enjoyed the benefits of jobs created by mining. The adverse environmental impacts of mining received scant notice in the Appalachian struggle for survival during the first half of

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<sup>1</sup> (Edited and adapted from Patrick C. McGinley, *From Pick & Shovel to Mountaintop Removal: Environmental injustice in the Appalachian Coalfields*, 34 ENVIRONMENTAL LAW 21, Winter 2004). Footnotes in this edited version are omitted. The citations in this virtual lecture are to footnotes in the original unedited ENVIRONMENTAL LAW essay. The article and the original citations may be viewed here:

the twentieth century. [C]oal mining's adverse impacts were seen as part and parcel of the industrialization.

The most visible adverse impacts of coal strip mining were the scars gashed in Appalachian mountainsides. Surface mining strips away forest vegetation, causing erosion and attendant stream sedimentation and siltation, accompanied by negative impacts on aquatic life and drinking water supplies. [FN138] \*\*\*

From the beginning of efforts to regulate strip mining, the coal industry cooperated with local and state politicians to oppose meaningful state regulation. Instead of placing limits on the worst of strip mining abuses, legislators chose to protect their own domestic industry. . . State politicians recognized that the price of coal produced in a state forbearing regulation would be cheaper and thus more competitive in the market than coal produced in a state that imposed environmental regulatory costs on its operators. [FN147]

By the end of the 1960s, public concern over the adverse impacts of coal mining had grown to a crescendo of opposition. It was generally recognized that the states could not and would not impose meaningful regulation on coal companies operating within their own borders. . . . A federal law imposing uniform national regulatory standards would nullify the strongest argument raised against regulation--in-state coal operators' competitive position vis-à-vis operators in other states. Operators in every state would be required to play by the same federal rules. The race to the bottom pressures would be eliminated by instituting a uniformly applicable federal regulatory program.

Twice Congress passed legislation, and twice the coal industry and its state political allies succeeded in persuading President Gerald Ford to exercise his veto power. [FN149] But with the transition to the Carter Administration came cooperation from the executive branch, and Congress once again passed legislation regulating surface mining. [FN150] On August 3, 1977, President Jimmy Carter signed the Surface Mining Control and Reclamation Act of 1977.

## **B. SMCRA's Cooperative Federalism Approach to Regulation**

Paralleling other federal environmental regulatory laws, Congress designed SMCRA as a “cooperative federalism” statute. [FN152] [T]he conflict spawned by SMCRA far exceeded that experienced in the implementation and administration of other cooperative federalism statutes.

SMCRA's cooperative federalism scheme instituted an extensive and permanent federal regulatory presence to deal with problems previously within the sole domain of the states. Congress created a new Office of Surface Mining (OSM) to oversee implementation, administration, and enforcement of SMCRA. [FN154] Congress intended that states have the option to assume “exclusive jurisdiction” to administer and enforce SMCRA, subject to compliance with minimum statutory standards and compliance with OSM's implementing regulations. [FN155] Moreover, state assumption of “exclusive jurisdiction over the regulation of surface coal mining and reclamation operations” was made specifically subject to OSM's oversight and enforcement power. [FN156] If an OSM-approved state fails to implement,

enforce, or maintain its program in accordance with SMCRA, OSM must enforce part or all of such program or assume exclusive federal jurisdiction over all mining operations within the state. [FN157]

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### **C. Coal Industry and State Opposition to Implementation, Administration, and Enforcement of SMCRA**

Not surprisingly, resistance to SMCRA by the coal industry and many state political and regulatory interests carried over to OSM's efforts during the implementation phase of the Act. Continuing conflict occurred between those from whom the SMCRA demanded cooperation: the states and the federal government. [FN166] The strident opposition of coal industry and state forces present during Congressional consideration of proposed legislation continued as OSM attempted to administer and enforce SMCRA.

In the quarter century since enactment of SMCRA, the environmental degradation and attendant adverse social and economic impacts on coalfield communities continue, albeit not at the catastrophic levels that existed in the pre-SMCRA years when coal mining was essentially unregulated. One of the best examples of such continuing regulatory failure can be seen in the failures of state and federal enforcement of SMCRA's requirements pertaining to huge mountaintop removal strip mines that have proliferated in the southern West Virginia coalfields.

### **IV. “Almost Level, West Virginia”: [FN172] Mountaintop Removal Strip Mining**

A decade and a half after enactment of SMCRA, some believed the statute was reducing abuses of coalfield lands and people caused by conventional strip and underground mining. Notwithstanding a measure of success, some coalfield communities continued to feel the effects of inadequately regulated mining that had plagued them decades earlier. [FN173] Many of these post-SMCRA impacts were produced by new surface and deep mining techniques that had gained favor with the nation's biggest coal producers. \*\*\*

The coal industry's competition-driven movement to new mining methods in central Appalachia adversely impacted coalfield communities. [FN180] On both fronts, coal production and man-hour efficiency in Appalachian mines increased dramatically. [FN181] However, as mountain ridges were blasted apart and more miles of headwater streams were buried under huge valley fills, mine jobs continued to hemorrhage. Promises that mountaintop removal mining would spur job-creating commercial, industrial, and residential development went unfulfilled.

### **A. Description of Mountaintop Removal Mining Methods**

SMCRA regulations define mountaintop removal as:

“surface mining activities, where the mining operation removes an entire coal seam or seams running through the upper fraction of a mountain, ridge, or hill . . . by removing substantially all of the overburden off the bench and creating a level plateau or gently rolling contour, with no highwalls remaining.” [FN182]

As traditional contour and area mining rapidly declined during the 1980s and 1990s, growing numbers of mountaintop removal mines began clear-cutting the steep-sloped hardwood forests and chopping off mountaintops in eastern Kentucky and southern West Virginia. [FN183] The underlying coal seams there lie sandwiched in layers of rock and soil hundreds of feet thick. In mountaintop removal operations, each layer of the rock above a coal seam is blasted and removed, the coal is extracted, and then the next layer is removed until the removal of rock and coal layers is no longer cost-effective.

Operators put some of the removed rock back on the flattened mountaintop. Because rock blasted from its natural state “swells,” coal operators assert there is usually inadequate room available on the flattened mountaintop to place this “swell” or “excess spoil.” [FN184] The spoil is dumped in adjacent valleys, often creating huge “valley fills.” [FN185] A single valley fill may be 1,000 feet wide and extend several miles at the upper reaches of Appalachian headwater streams. [FN186]

Over the course of more than two decades, the West Virginia Department of Environmental Protection (DEP) and its predecessors authorized the coal companies to bury at least 1000 miles of West Virginia streams under valley fills. [FN187] Thousands of acres of hardwood forests have been leveled. [FN188] The United States Fish and Wildlife Service found that “the loss of these streams and their associated forests may have ecosystem-wide implications.” [FN189] Beginning in the late 1980s, the size and number of mountaintop removal mines and their associated valley fills increased, especially in southern West Virginia, which has enormous reserves of high-energy, low-sulfur coal coveted by electric utilities. [FN190]

## **B. SMCRA's Strict Limits on Mountaintop Removal Mining**

Ordinarily, when a state grants a permit to conduct strip mining operations, a coal operator is required to restore mined land to its approximate original contour (AOC). [FN191] When Congress was debating SMCRA, central Appalachian coal operators and coal-state congressional representatives sought an exemption from the AOC requirement for mountaintop removal mining. Mountaintop removal mining, they argued, could produce flat land for development--a commodity in very short supply in the mountainous coalfields of West Virginia, Kentucky, Virginia, and Tennessee. [FN192] Congress accommodated these requests, but placed severe limitations on those situations where mountaintop removal would be allowed under a variance from the generally applicable AOC reclamation requirement.

In order to qualify for a variance from the AOC requirement, SMCRA requires that a mountaintop removal permit applicant propose a postmining land use that falls in one of five specific categories:

- industrial, commercial, agricultural, residential,
- or public facility (which includes recreational facilities). [FN193]

In addition, the permit applicant must also prove that the proposed postmining use constitutes an

equal or better economic or public use of the affected land as compared to the premining land use. [FN194] An applicant seeking an AOC variance must also provide specific plans for its proposed postmining land use and accompanying assurances. [FN195]

Finally, SMCRA requires that the applicant demonstrate that the proposed use would be consistent with adjacent land uses, existing state and local land-use plans and programs, and that all other requirements of SMCRA will be met. [FN196] In granting a mountaintop removal permit with an AOC variance, a state must impose certain specific public safety and environmental protection requirements on the permittee. [FN197]

### **C. Media Exposé of Mountaintop Removal Impacts**

In a 1997 interview, longtime West Virginia coal industry lobbyist Ben Greene told *Business Week*, “With mountaintop removal, you get 100% mineral recovery, you can't mine again, and you get better land use than you ever had in its natural state.” [FN198] If by “better land” Greene meant “flatter” land then his statement was true. Mountaintop removal had created tens of thousands of acres of flat land. Greene's claims echoed the arguments that persuaded Congress to allow the practice only if the resulting flattened mountaintop was to be used as part of a coal operator proposed development that would create jobs for coalfield communities and promote local economies.

Ben Greene was not alone in trumpeting the value of flat land. As they have from SMCRA's inception, coal industry and government officials continue to tout flattening mountain ridges as a panacea for economic development. There was, and is, one problem with the scenario--mountaintop removal has played a significant role in the precipitous decline in coal mine employment, and has flattened and deforested mountaintops that now lay barren, generating weeds rather than jobs. As explained below, a quarter century after enactment, SMCRA's promise to coalfield communities of shopping centers, industrial plants, and new affordable housing--all located on flattened mountaintops--has been broken.

In August 1997, Penny Loeb, a Senior Editor at *U.S. News & World Report*, broke the story of mountaintop removal's adverse impacts on coalfield residents. [FN199] Her article, “Shear Madness,” exposed to a national audience the social and environmental injustice attendant the large-scale expansion of mountaintop removal in the coalfields. [FN200] Loeb wrote:

[C]oal companies and some state officials note that strip mining provides high-paying jobs--weekly pay averages \$922. And some contend that West Virginians are better off with their mountains flattened--several dozen buildings, including four schools and three jails, have been built on them so far.

. . . But the costs are indisputable, and the damage to the landscape is startling to those who have never seen a mountain destroyed. Topographic and landscaping changes leave some regions more vulnerable to floods. . . . And state employment records suggest the jobs argument is not very compelling. Mountaintop removal accounts for only 4,317 workers in the state--less than 1 percent of its job force. Overall, mining employment in the state has fallen from 130,000 in the 1940s and 1950s to just 22,000 last year. [FN201] Loeb catalogued multiple impacts on coalfield

communities caused by the proliferation of mountaintop removal mines:

Thirty floods have occurred in the past two years in areas where watersheds were bared and redesigned, and several people have lost their lives in such floods. Whatever the role of mining in the state's overall economy, its impact on nearby communities is devastating. Dynamite blasts needed to splinter rock strata are so strong they crack the foundations and walls of houses: Homeowners filed 287 blasting complaints with the state in the past year. Trucks full of coal rumble past some people's front porches at the rate of 20 an hour, 24 hours a day. Mining dries up an average of 100 wells a year and contaminates water in others. [FN202]

Loeb's report was followed by a comprehensive, fact-packed series of newspaper articles in the Charleston Gazette, beginning in 1998, which examined mountaintop removal mining and its impacts on the economy and people of the coalfields. [FN203] The series, "Mining the Mountains," . . . exposed the myth promoted by two decades of coal industry propaganda. The claims of industry lobbyists, politicians, and regulators that mountaintop removal would bring economic development and prosperity to coalfield communities were shown to be false.

### **1. State Mountaintop Removal Permitting Receives Scrutiny**

The first article in the series described a DEP hearing on the application for the largest strip mine ever proposed in West Virginia. [FN204] The hearing was held in the gymnasium of an aging Logan County elementary school; more than 125 people jammed the narrow bleachers. [FN205] Ward described the scene as follows:

Just over the ridge from the school, Arch Coal Inc. had stripped 2,500 acres of the Logan County hills around Blair Mountain. The company has applied for a permit to mine 3,200 more. If state regulators approve the new permit, giant shovels and bulldozers will eventually lop off the mountaintops of an area as big as 4,500 football fields. Residents of the tiny communities along W.Va. 17 complained Arch Coal's existing mine already makes their lives miserable. Why, they asked regulators at the hearing, should the company get a permit to mine more?

Melvin Cook of Blair was the first to walk across the gym floor to a microphone and speak up. He complained about the blasting. "You can't bear it," Cook said. "It has torn my house all to pieces." [FN206] Residents of nearby communities were not the only people who attended the public hearing. A solid block of the gym's bleachers was filled with miners and their families who said that "they wanted jobs at the new mine. But they agreed the company should make sure mining doesn't disturb area residents." [FN207]

The Gazette series told of giant machines that "towered over old-time shovels and bulldozers" used in earlier coal stripping. [FN208] Those monster machines "can literally move mountains," the newspaper related; only a few skilled equipment operators stood at the controls. [FN209] Gazette readers also learned that in twenty years nearly 500 square miles of the state had been strip mined; from 1994 to 1998 the average size of the new mines had doubled each year. In 1997, DEP had issued new permits totaling 31 square miles, an area larger than

Charleston, West Virginia. [FN210]

## **2. State Mountaintop Removal Permitting Decisions Questioned by Environmental Protection Agency**

The Gazette also closely examined specific mountaintop removal permitting decisions by state and federal agencies. The series noted that Arch Coal, Inc.'s subsidiaries had been seeking agency approval to permit larger and larger mines which would bury long segments of mountain headwater streams. [FN211]

Arch Coal's Hobet 21 mountaintop removal operation had finished stripping almost 10,000 acres of Boone County mountains by the end of 1995. [FN212] In 1997, the company proposed a new 2,000 acre mountaintop removal mine in neighboring Lincoln County, which would produce more than 30 million tons of coal over a decade. [FN213] Arch Coal's subsidiary, Hobet Mining, Inc., planned to dispose of “excess spoil” by burying two miles of Connelly Branch, a mountain headwater stream. [FN214] The United States Environmental Protection Agency (EPA) was the only regulatory agency charged with monitoring surface mining that raised questions about the enlarged scope of mountaintop removal permits being issued in West Virginia.

In September 1996, an EPA Region III official wrote to DEP, observing that ““Connelly Branch is the longest stream in West Virginia that has ever been proposed to be covered by a valley fill to our knowledge”” and its loss ““could possibly affect aquatic life in the Mud River, particularly in combination with other existing and proposed valley fills in the watershed.”” [FN215] EPA told DEP that it would object to issuance of the permit unless Hobet Mining considered alternatives to burying the stream. [FN216] However, within a few months, EPA retreated from this stance. [FN217] EPA responded in a similar fashion when huge mountaintop removal mines were proposed in Southern West Virginia.

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## **3. Coal Industry's Initial Response to Media Investigations of Mountaintop Removal**

At the beginning of the “Mining The Mountains” series, Ken Ward Jr. explained the initial response of coal industry officials and state and federal regulators: “Coal operators say all of this attention is unwarranted. Some have hauled out standard jobs-vs.-the-environment arguments. Others insisted the fight over stopping strip mining ended decades ago--and that they won.” [FN228]

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## **D. Lawlessness: Regulators Ignore SMCRA's “Approximate Original Contours” Mandate**

SMCRA requires most strip mines to be reclaimed to their approximate original contours (AOC). [FN232] SMCRA, however, allows the AOC requirement to be waived for mountaintop removal mining operations in certain narrowly circumscribed situations. [FN233] In order to qualify for an AOC waiver, a permit applicant is required by SMCRA to propose commercial, industrial, residential, agricultural, and/or public uses for the land after it has been stripped,

leveled, and reclaimed. [FN234] The obvious goal of waiving the AOC restoration mandate was economic development that would bring new jobs and prime the pump for coalfield community economies.

The Charleston Gazette investigation raised serious questions about state and federal agency oversight of state decisions to waive AOC restoration requirements for mountaintop removal mines.

Approximate original contour, or AOC, is the heart of the federal strip mining law. But among many West Virginia regulators, it became a joke. [FN235] The Gazette reported that the AOC waiver rules were “routinely skirted by dozens of huge mountaintop-removal strip mines.” [FN236] After coal companies blasted and ripped apart mountain ridge tops to reach multiple coal seams, state regulators allowed them to avoid the expense of restoring the land to AOC. Instead, DEP permitted coal operators to take the cheapest path: shoving and dumping the remains of mountains-- millions of cubic yards of rock and dirt--on top of headwater streams in nearby valleys. [FN237]

Information contained in DEP's own files revealed a systemic failure on the part of state regulators to apply SMCRA's AOC requirements to mountaintop removal mines. [FN238] The Gazette's investigation found that in 1997 alone, DEP had authorized twenty permits for mountaintop removal mines to level twenty square miles. [FN239] However, the newspaper's study showed that the companies obtaining these permits, “including [national coal production leaders] Arch Coal Inc., A.T. Massey Coal and Pittston Coal, rarely ask for or received approximate original contour exemptions for mountaintop removal.” [FN240] A West Virginia Freedom of Information Act request revealed that only one-quarter of active mountaintop removal mines had obtained the AOC exemption. [FN241] Thus, 75% of active mountaintop removal mines in West Virginia were being operated in violation of state and federal law.

\*\*\* By definition a mountaintop removal mine is one that removes entire coal seams running beneath a mountaintop. Many of the mines permitted without AOC variances reduced the elevation of mountain ridges by hundreds of feet. A mountaintop removal mine that reclaims mined land to its approximate original contours is obviously an oxymoron--but an oxymoron that regulators were willing to embrace so that coal operators could avoid SMCRA's strict economic development requirements applicable to mountaintop removal mining. The most egregious impact of DEP's failure to enforce the AOC requirement was the denial of jobs and permanent economic development that should have accompanied mountaintop removal mining operations.

### **1. The Response of Industry and Regulators to the Revelation that AOC Requirements Had Been Ignored for Two Decades**

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An A.T. Massey public relations officer asserted, “Massey Coal companies have complied with the reclamation regulations [...] . . . On any permit that does not include an AOC variance, the plans for reclaiming the mine site meet state guidelines for AOC standards.” [FN245] David Todd, an Arch Coal executive asserted, “We have been applying for mining permits and they have been reviewed by and granted by DEP, with oversight by OSM [...] . . . That's got to be

pretty fair evidence that [mountaintop removal mines] are being approved and operated according to and in compliance with the law.” [FN246]

Roger Calhoun, supervisor of the OSM Charleston field office . . . maintained that DEP was not issuing mountaintop removal permits without AOC variances. [FN248]

## **2. A Promise Broken: Systemic Waiver of Mountaintop Removal Requirements Negate SMCRA's Economic Development Goal**

### **a. Newspaper Investigation Discloses Agency Mifeasance**

The Gazette continued its investigation during the summer of 1998. [FN251] It examined the long-standing claims of coal industry advocates, government regulators, and politicians who had championed mountaintop removal as an economic development engine. In early August, the Gazette published a devastating article documenting how SMCRA's promise of economic development had been perverted by the West Virginia coal industry with the acquiescence of state and federal regulators. [FN252]

The Gazette found that for more than two decades, SMCRA's mountaintop removal requirements had been consistently ignored by regulators and coal operators. [FN253] Coal companies had been allowed to flatten mountains and dump hundreds of millions of cubic yards of “excess spoil” in valleys obliterating hundreds of miles of headwater streams. Reporting from a ridge above the Kanawha River near Charleston, West Virginia, Ken Ward Jr. wrote:

Bullpush Mountain isn't a mountain anymore. It's a flat, grassy meadow that stands out among the wooded hills along the Fayette-Kanawha County line. More than 25 years ago, Cannelton Industries Inc. chopped the top off Bullpush to get at the coal underneath. The operation, started in 1970, was the first mountaintop removal mine in West Virginia. Cannelton officials promised that if they flattened out the land, they could more easily develop it. The company drew up plans to turn Bullpush into a brand-new town, complete with churches, schools, shops and a hospital.

None of that ever happened. No schools. No churches or shopping centers. Cattle don't graze anymore on the pasture where Bullpush Mountain used to be. Hay isn't grown there, either. Bullpush Mountain isn't alone. Across the Southern West Virginia coalfields, mountaintop removal mining is turning tens of thousands of acres of rugged hills and hollows--nobody knows how many--into flat pastures and rolling hayfields. [FN254]

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The Gazette investigation examined far more than the false claims made about development potential of the flattened Bullpush Mountain. Its study found that over two decades, DEP had permitted more than fifty square miles for mountaintop removal mines; the plans for “economic development” at those mines were limited exclusively to pastures, hayfields, forests, or range lands. [FN265] In the thirty years since Bullpush Mountain had been “removed,” not one West Virginia mountaintop removal permit had included plans for a manufacturing or industrial plant. [FN266] On the contrary, the Gazette's investigation showed that the most popular land use

proposed for mountaintop removal sites was “fish and wildlife habitat.” [FN267] Incredibly, while “fish and wildlife habitat” was not a postmining land use recognized by SMCRA, it accounted for almost one third of the total mountaintop removal acreage permitted by DEP. [FN268]

### **b. The Response of Industry and Regulators to the Lack of Economic Development**

\*\*\* The President of the West Virginia Mining and Reclamation Association told the Gazette that SMCRA's requirements were outdated and “too stringent for today's large mountaintop removal mines.” [FN271] An official with DEP's Office of Mining and Reclamation said that all the involved parties needed to look at postmining uses: “There's not a lot of pre-planning done in terms of development [. . .]. There is a need for some long-term land use planning considerations. It's hard for us to say what's going to be out there and who is going to develop what and what the future holds.” [FN272]

### **E. Judicial Review: Coalfield Residents Turn to the Courts**

Contemporaneously with the media exposé of DEP's bogus permitting of mountaintop removal mines, eight coalfield residents living near valley fills and a statewide environmental organization filed a SMCRA citizen suit against DEP seeking declaratory and injunctive relief. [FN273] In *Bragg v. Robertson* (Bragg), [FN274] the plaintiffs alleged, inter alia, that the Director of DEP was violating his nondiscretionary duties under SMCRA in issuing permits for mountaintop removal mines. [FN275] More particularly, they alleged that the Director consistently issued permits to mining operations without making requisite findings that assured the restoration of original mountain contours or, alternatively, economic development on flattened mountain tops. [FN276] They asserted the Director violated his federal- and state-law duties to “withhold approval of permit applications that are not complete and accurate and in compliance with all requirements of the state and federal program.” [FN277]

In the course of a hearing on the plaintiffs' motion for preliminary injunctive relief, the United States District Court Judge, Charles H. Haden, II, accepted the coal company intervenors' invitation to visit mountaintop removal mines to see for himself how well mountaintop removal mines had been reclaimed. The judge visited and flew over most of the mountaintop removal sites in southern West Virginia, observing in a subsequent opinion:

The Court's helicopter flyover of all mountaintop removal sites in southern West Virginia revealed the extent and permanence of environmental degradation this type of mining produces. On February 26, the ground was covered with light snow, and mined sites were visible from miles away.

The sites stood out among the natural wooded ridges as huge white plateaus, and the valley fills appeared as massive, artificially landscaped stair steps. Some mine sites were twenty years old, yet tree growth was stunted or non-existent. Compared to the thick hardwoods of surrounding undisturbed hills, the mine sites appeared stark and barren and enormously different from the original topography. [FN278]

In a later opinion in the same case, the court discussed the impacts of mountaintop removal valley fills on the streams they bury:

When valley fills are permitted in intermittent and perennial streams, they destroy those stream segments. The normal flow and gradient of the stream is now buried under millions of cubic yards of excess spoil waste material, an extremely adverse effect. If there are fish, they cannot migrate. If there is any life form that cannot acclimate to life deep in a rubble pile, it is eliminated. No effect on related environmental values is more adverse than obliteration. Under a valley fill, the water quantity of the stream becomes zero. Because there is no stream, there is no water quality. [FN279]

Ultimately, the district court granted the plaintiffs' motion for a permanent injunction. [FN280]

In the spring of 2001, the Fourth Circuit reversed the District Court, holding that the Eleventh Amendment to the United States Constitution barred the suit against the state. [FN291]

Notwithstanding the Fourth Circuit's reversal, evidence uncovered in Bragg added to the accumulation of facts showing that coal industry lobbyists, politicians, and government regulators had perverted SMCRA to avoid meeting the economic development requirements attendant mountaintop removal mining. Often working in concert, these forces deprived coalfield communities of the economic development opportunities promised by SMCRA, even as they continued to spew propaganda about the need for flat land as a panacea that promised a new era of coalfield economic prosperity.

## **V. Coalfield Environmental Injustice Takes a New Form**

The inability or unwillingness of federal and state regulators to interpret and enforce SMCRA to effectuate the Act's promise to protect coalfield citizens and their property is not surprising. Indeed, as noted above, Congress expected regulatory failure to occur when it emphasized the historic tendencies of state governments to give short shrift to the interests of coalfield citizens while protecting local coal industry interests. [FN293] In light of this history, SMCRA contained two major components intended to neutralize states' natural tendency to favor coal companies over environmental protection and the rights of coalfield communities: 1) federal oversight of state mining regulatory programs, and 2) citizen rights to participate in the administration and enforcement of the Act. As discussed above, OSM has proved to be woefully ineffective in policing state regulatory programs, siding with the coal industry on many major issues.

The combined impacts of state and regulatory malfeasance and misfeasance and coal industry chutzpah has left coalfield citizens alone to fend off the incursions of property rights and environmental harm caused by modern, high-extraction mining techniques such as mountaintop removal. Thus, throughout the coalfields, citizens have organized at the grassroots level in an effort to protect their own interests. [FN294] Such organization would appear to be essential if the coal industry juggernaut, aided by politicians and regulators, is to be restrained

from literally wiping out whole coalfield communities.

At first blush, the specter of wholesale destruction of entire communities might appear to some to be a gross exaggeration. It is not. The very existence of some former coal camps presents an obstacle to corporate plans to maximize the recovery of coal reserves and profits derived therefrom. Such communities are quite literally “targeted” for elimination. The evidence of such corporate plans and agency acquiescence is well documented.

Equally well documented is the approach of many coal companies to communities where elimination is not achievable--they simply carry on mining-related activities as if their coalfield neighbors do not exist. Thus, the corporate expectation, or at least the hope, is that communities will suffer in silence the infringements of private property rights that would never be tolerated in the upscale suburbs where most politicians, regulators, and coal company managers live. Among the tools available to coalfield communities for use in resisting the new wave of coal mining externalities are statutory citizen suits and time-tested common law remedies.

#### **A. Paradox in the Coalfields: Coal Production Booms While New Mining Technology Alters the Environment and the Economy Stagnates**

Newspaper editor Dan Radmacher, observed that coal-producing counties in West Virginia, Kentucky, and Virginia are much poorer than coal-producing counties in western states. [FN296] Radmacher noted that in Mingo County, the heart of the so-called “Billion Dollar Coalfields,” the median household income is \$12,000 less than the national average. [FN297] “Those left in McDowell County [, West Virginia,]” Radmacher reported, “are surrounded by empty houses and businesses, which has to be a psychological burden as well as a barrier to economic development.” [FN298] \*\*\*

While billions of dollars of coal have been extracted from West Virginia's mountains, the coal industry's power has enabled it to funnel much of the wealth generated by mining to out-of-state interests, leaving little for the people whose labors produced that wealth. Historian John Alexander Williams finds the paradox to be a theme of West Virginia history. [FN303] “In its repetitive cycle of boom and bust, its savage exploitation of men and nature, in its seemingly endless series of disasters, the coal industry has brought grief and hardship to all but a small proportion of the people whose lives it has touched.”[FN304]

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Politicians, the local elites, and the coal industry continue to give short shrift to considerations of local needs. Environmental, economic, and social justice in the coalfields remain goals yet to be achieved.

#### **B. Targeting Coalfield Communities for Destruction**

As mentioned above, some coal companies targeted for destruction communities located near their mountaintop removal mines. The facts are irrefutable, such corporate plans are not

apocryphal--they exist and have already been successful in eliminating some communities. Such plans find their origin in a century of time-honored disdain many coal industry managers have exhibited for miners, their families, and coalfield communities.

Of course such plans are not publicized and are camouflaged by corporate public relations specialists. The industry “PR” spin always seems to revolve around the threat of job losses if a company is held to account for operations which create nuisance conditions no middle-class community would long endure. Nonetheless, evidence of such plans and tactics is not difficult to find.

Julia Bonds and nine generations of her family had lived in Marfork Hollow fifty miles from Charleston. [FN314] Bond's family was the last to sell its Marfork home to Massey Energy. [FN315] No one else remains but Massey and its mining operation. Bonds related her experience with Massey:

Massey Coal [Company] moved in there around 1994. Now, I'm used to coal mining--I'm from a coal mining family--but I was not prepared for what Massey brought down on our heads in Marfork. The reserves they're mining now are not the clean reserves they were mining in the '40s, '50s, and '60s. These reserves create more waste than coal. The air pollution, the coal dust, is unbearable in that little community. My grandson now has asthma, and my home and my neighbors homes were damaged by coal dust. [FN316]

Bonds also told of the fish kills caused by Massey's mining in the stream near the hollow: “My family, for generations, has enjoyed that stream, but we never went back in the river again. We also witnessed several black water spills [of coal waste]. Those are so thick they're like pea soup, with big chunks in it.” [FN317] Summarizing her feelings, Bonds told an interviewer, “That was my home. Living in a hollow in West Virginia is unique. You feel so protected, it's so peaceful and quiet--until a mining company moves in, of course. They were completely indifferent to the people that lived there.” [FN318] Finally, after every other family in Marfork had moved, Bonds retained a lawyer and negotiated the sale of her home to Massey. [FN319]

In a January 11, 1998 letter to the editor of The Logan Banner, Jane Dalrymple . . . wrote emotionally of the impact of being forced from her home and community:

These communities hold so many memories for us. Now [when] you drive up Yolyn, you cannot even see where our homes had once been. [T]hese homes were torn down as soon as we moved out. [S]ome were torn down before we got all our personal belongings out. The saddest part is that Dehue Church, Slagle Church, and our Bethel Chapel are gone or will be destroyed. The only things left in this community are a few lonely trailers waiting for a place to go. [FN333]

\*\*\* Jane Dalrymple's letter to the editor reflects community peer pressures grounded in the ever present fear of losing existing jobs. Like most coalfield residents adversely impacted by coal company decisions, Dalrymple took pains to make clear that she was a friend of coal; but, she concluded, “My opinion of coal mining is changing.” [FN335] \*\*\*

Surely, the uninitiated might say, modern coal company managers will respect the rights of citizens who still live in those communities. Arch Coal, is one of the nation's top coal producers, operating several huge dragline mountaintop removal operations in the “billion dollar coalfields” of southern West Virginia. [FN341] When allegations were made that Arch's mining operations had devastated former coal camp communities near one of its largest mountaintop removal operations in Logan County, West Virginia the company flatly denied the charges.

Arch spokesman David Todd assured a Washington Post reporter that Arch was “committed to protecting the environment and respecting West Virginia's mountain heritage.” [FN342] Interviewed on the nationally televised ABC News Nightline program, Todd told viewers that Arch Coal “continue[s] to try to work with that community and to find ways to minimize our temporary presence there.” [FN343] However, Todd's statements were demonstrably at odds with reality. The following discussion reviews the history of the conflict between the coal companies operating a huge mountaintop removal complex near Blair Mountain in Logan County, West Virginia and home owners residing in former coal camps located in the midst of Arch's Dal-Tex operations.

### **C. Mountaintop Removal at Blair Mountain: A Case Study of Environmental Injustice in the Coalfields [FN344]**

#### **1. The Dal-Tex Mountaintop Removal Complex and Neighboring Communities**

In the mid-1980s and early 1990s, vast, strippable coal reserves were purchased in the heart of the billion dollar coalfields of southern West Virginia, and strip mining of these coal seams began in earnest. . . . As coal production began to rise to record levels, mining jobs continued to be lost to a new era of mechanization in underground and strip mining.

Communities located near these new, highly mechanized mines experienced increased adverse impacts from larger and larger mines that invaded the peace and solitude that they had begun to enjoy. Coal camp residents struggled to maintain some semblance of normality as small communities were engulfed in blasting vibrations, dust, noise, and flooding emanating from mine operations. [FN345]

In 1992, Ashland Coal, Inc. purchased Dal-Tex Coal Corp. and 22,000 acres of property near historic Blair Mountain, the site of the last battle of the mine wars. [FN346] Ashland Coal and Arch Mineral Corp. merged in July 1997, forming Arch Coal, Inc., one of the nation's biggest coal producers. [FN348]

At the time of its 1992 purchase, Ashland Coal executives had big plans for the Dal-Tex complex. Using high explosives and enormous equipment, including giant, twenty-story-high crane-like draglines, huge rock trucks, and gigantic bulldozers, these mines would apply state-of-the-art mountaintop removal mining techniques to turn the huge tract into what would be one of the largest contiguous mountaintop removal mines in Appalachian history.

First, as many as twenty coal seams underlying high mountain ridges would be peeled off. Preceding the extraction of each seam, miners would drill into underlying rock layers and insert explosives and then blast this “overburden” apart. [FN349] The fractured rock overburden, or “spoil,” would then be scraped off by the dragline bucket and dumped into the narrow valleys running out from the main ridges. This process would be repeated as the overburden of each coal seam was blasted apart, coal extracted, and spoil dumped into valleys containing headwater streams.

As is typical in such large corporate acquisitions, before inking the Dal-Tex acquisition, Ashland performed a “due diligence” evaluation to determine potential risks and costs attendant the property to be acquired. Like the astute businessmen they were, Ashland executives had done their homework. They knew that Dal-Tex's enlarged stripping operations had not been well received by the residents of nearby former coal camps like Monclo. Some families in Monclo had even filed lawsuits alleging that mining operations had disrupted their lives. [FN350]

In 1991, Monclo residents had protested “choking” dust blowing from the Dal-Tex mine complex into nearby communities. [FN351] “Blasting, heavy equipment operation and coal trucks leave a film of dust on the area that reappears after every cleaning. Cases of asthma, allergies and bronchitis are reported,” said a newspaper article. [FN352] At the time, Dal-Tex's mine manager attempted to minimize residents' complaints, asserting that ““At any facility such as this one, dust and coal traffic are going to be issues[.] . . . We work around the clock to try to alleviate any of the problems that come up concerning dust or trucks or any other community complaints.”” [FN353]

After their purchase, Ashland Coal . . . spent millions on bigger earth-moving equipment. [FN355] [T]he company began round the clock operations every day of the year at the Dal-Tex complex. [FN356]

## **2. Mountaintop Removal Mining Impacts Stir Community Resistance**

People who lived near Dal-Tex felt the full impact of the transformation of their quiet rural communities into the epicenter of a major industrial complex. [FN357] Blair resident Tommy Moore described the dust as ““a constant haze all the time.”” [FN358] In a sworn statement, Moore said, ““I've seen times where vehicles driving down the road would have to turn on headlights during the day.”” [FN359] Brenda Rollins told a state administrative board that:

Every day it's blast and its blast it's blast and its dust and its dust. . . . I'm a nurse. I see people with . . . asthma. [Victoria Moore's] son has allergies. I see people come in with these. And I know by looking in the community that this dust is affecting everybody in the community. . . . The elderly, we have lots of elderly people that live in our community, and it is affecting them drastically. [FN360]

Those affected by the blasting and dust did not find speedy help from either the state or the coal company. [FN361] Five Block resident Victoria Moore explained the “runaround” she received from State regulators on a day when she sought to report heavy dust coming off the mine:

I called the air quality people and they put me in touch with Jeff Hancock. And he couldn't tell me nothing, so he told me to call abandoned mines and reclamation. Well, I couldn't get nothing done there, so I called back at four-forty-five and they told me to talk to James Robertson. And he took my complaint and they said that they would get in touch with the DEP in Logan and, you know, find out more about it. I've never heard nothing from the air control people. And what [DEP officials] told me is . . . there is no law about how much [dust] can come down into a community from blasting from a mine. [FN362] DEP officials bemoaned the fact that agency inspectors could never seem to be able to get to the Blair area in time to observe the dust coming off the mine. Without actually seeing the dust blowing from the mine, DEP claimed an inability to take enforcement action. [FN363] For its part, the company repeatedly pointed to steps it was taking to protect Blair residents from mine blasting. [FN364] \*\*\*

Finally responding to unrelenting pressure from local residents, state inspectors issued four notices of violation (NOVs) to the company for its fugitive dust emissions. [FN367] The company appealed the NOVs to the state's Surface Mine Board (SMB). [FN368] The coal company's defense was that "DEP inspectors could not prove that Dal-Tex violated any legal dust limits." [FN369] But before SMB could reach the merits, the company and DEP secretly negotiated a consent settlement agreement. [FN370] The settlement required the coal company to pay a \$2,000 fine every time company-installed dust monitors detected dust in excess of specified limits. [FN371]

A hearing was held for purposes of submitting the agreement to SMB for its approval. Appearing without counsel in front of SMB, citizen intervenors picked apart the agreement, raising numerous questions about the limits it placed on dust emissions and how its terms would be implemented by DEP. [FN372] The citizens zeroed in on the provision of the agreement that seemed to tie DEP's hands and prevent it from taking alternate enforcement action in the event the company failed to achieve abatement. [FN373]

One SMB member echoed the citizens' concerns, asking, "Why does the State agree that [the company] can willfully exceed the dust emission limits?" [FN374] After receiving unsatisfactory responses from DEP and company representatives, he expressed the concern that the company might conduct a cost-benefit analysis and conclude that the benefits of unchecked blasting might outweigh the costs of any future fines. [FN375] \*\*\*

### **3. National Attention Is Drawn to Mountaintop Removal Mining at Blair Mountain**

While residents of Blair were fighting DEP and the operator of the Dal-Tex complex in SMB proceedings in 1996 and 1997, the operators of the Dal-Tex complex were carrying out a surreptitious plan. Throughout the period from 1992 to 1997, Ashland and its successor were buying the homes of Blair residents.

Sales of Blair homes to the Dal-Tex operators drew significant national media attention. [FN389] In a September 1997 article in U.S. News and World Report, journalist Penny Loeb

wrote, “The mining operation has bombarded the houses below with dust, noise, and occasional rocks.” [FN390] Loeb reported that “rather than fight constant complaints from homeowners, Arch Coal Inc., the mine's owner, had bought more than half of the 231 houses in Blair.” [FN391] The houses were “[v]acated and quickly stripped” and more than 24 homes were burned. [FN392]

Loeb's article was critical of both coal operators and the regulatory agencies. Arch Coal and industry lobbyists responded quickly and furiously. Arch Coal President and CEO Steven F. Leer wrote to Loeb's editors asserting that Loeb had:

“strung together a handful of isolated incidents and portrayed them as a pattern of abuse. . . . The reality is this: Coal mining is carried out in close proximity to hundreds of communities in Central Appalachia. . . . With few exceptions this mining is conducted in a careful, safe and responsible manner, and with the full support of the communities in which it is carried out.” [FN393]

National Mining Association President Richard Lawson joined a chorus of industry criticism of Loeb's reporting, declaring it “an insult to the mining industry and the hundreds of dedicated federal and state mine inspectors.” [FN394] Lawson continued, “By drawing upon a handful of isolated incidents, you reach several very general and incorrect conclusions. . . . After mining, the law requires land restoration to either premining or better uses, which the industry and its highly skilled workforce have accomplished with the reclamation of millions of acres.” [FN395]

#### **4. Facts Emerge About the Coal Company's Plan for “Working with the Community to Minimize Its Temporary Presence There” When Citizens Seek Relief in Court**

Victoria and Tommy Moore and their two young children, aged four and nine, lived in a mobile home located next to West Virginia Route 17 in Five Block, a small former coal camp close to Blair and the center of Arch Coal's Dal-Tex complex in Monclo. [FN396] In 1994, they began to feel the impacts of the enlarged mountaintop removal mining operation at the nearby Dal-Tex complex. In 1996, Arch Coal's twenty-story-tall dragline appeared on a nearby ridgeline towering above their small home. The mining operations \*93 moved down the ridge blasting it apart. For several years the Moore's home was constantly inundated with thick layers of dust blown down from the Dal-Tex complex.

The Moores were outraged by the nearby blasts that rattled their windows and rocked their home. [FN397] The Moores' nine-year-old son, Justin, suffered from asthma and was being treated by a respiratory specialist. They saw their son's asthma grow worse in the pervasive dust. [FN398] In a deposition in 1998, Victoria Moore said, “If you were inside, it interrupted your life. If you were outside, it interrupted your life.” [FN399] “I couldn't sit on my porch without getting dust on me. . . . I couldn't even walk in my grass. I couldn't get in my car. I couldn't even let my kids go out and play without the dust.” [FN400]

All around their home and up and down West Virginia Route 17 there were vacant houses of neighbors, most of whom had sold their property to the coal company. Investigative journalist

Ken Ward Jr. researched the county real estate records in Logan County and discovered that in the five-year period between 1993 and 1998, affiliates of the operator of the Dal-Tex mine had purchased more than 200 properties in that county. [FN401] In the Blair area alone, Ward discovered that the coal operator had spent at least \$6 million to acquire properties. [FN402]

As Penny Loeb reported, many of the homes near the Moores had been purchased by the company and had mysteriously been burned to the ground. [FN403] Many who remained in the community suspected that Arch had arranged to have their own buildings torched. Arch Coal blamed arsonists for torching the homes, disclaiming any knowledge of the responsible parties. [FN404] Whether or not the coal company was behind the burnings, it did little to clean up the charred remains. The communities located along Route 17 and up the hollows radiating from the main highway were littered with dozens of the burned hulks of what once were part of former thriving coal camp communities. It was not until Loeb's article appeared that Arch made any real effort to begin removing the mess left in the community by the fires. [FN405]

In April 1998, ABC News's Nightline prominently displayed the burned rubble of what remained of the homes Arch had purchased in the communities near Dal-Tex. [FN406] David Todd, Arch Coal's Vice President for external relations, assured the Nightline audience that his company knew nothing of the cause of the fires and was “work[ing] with [that] community . . . to minimize [its] temporary presence” at its Dal Tex complex. [FN407]

Arch Coal land agents offered what the Moores believed was an inadequate amount to purchase their property. They viewed Arch's offer as little short of extortion. Unwilling to accept Arch's offer, the Moores filed suit against the mine operator, disputing its claims of community cooperation. [FN408] . . . In the course of four short months of discovery in the case, Arch Coal's public relations veneer was peeled away and a quite different picture emerged from the mouths of Arch's own executives and employees.

## **5. A Plan for “Working with the Community” Is Developed at the Beginning**

Before its 1992 acquisition of the Dal-Tex complex and its vast coal reserves, Arch Coal predecessor Ashland Coal ordered its land agents to study the mine and the residential communities upon which it would have an impact. [FN410] In his deposition, Terrence Irons, a land agent for an Arch Coal subsidiary, said, ““When we look at a corporation, we look at their mining operations, we look to see how many properties we think we may need in our mining operation, and also homes that could be impacted by those mining operations.”” [FN411]

Ashland managers knew that Dal-Tex had already turned nearby Monclo into a huge industrial mining, trucking, and railroad complex. In the process, Dal-Tex had created conditions so bad that most Monclo families had left-- voluntarily or involuntarily. [FN412] When Ashland bought Dal-Tex in 1992, the little village was well on its way to extinction. By the time of the merger of Ashland Coal and Arch Mineral several years later, Monclo ceased to exist; most of the homes had been burned and bulldozed. The few homes left standing had been purchased by and were being used by Dal-Tex or its employees. [FN413]

Ashland Coal executives developed a plan to deal with the former coal camp communities and those who lived there: “buy out nearby residents so there would be no one left to complain about blasting, dust and flyrock.” [FN414] Company land agent Irons stated in his deposition, ““When we were purchasing Dal-Tex, there was some concern expressed that there were homes that would be close to the mining and that there was potential for dust problems and there probably would be blasting complaints.”” [FN415] Because under both SMCRA and the corresponding state law, coal companies are prohibited from mining within 300 feet of an occupied dwelling without a waiver, [FN416] Ashland decided to buy all of the homes within 300 feet of any active or future mining site. [FN417]

In his deposition, Irons stated that the company was concerned about homes located beyond the 300 foot limit. [FN418] Thus, on September 18, 1992, company officials sat down with a topographical map they titled “Target Acquisition Areas” and drew circles around homes the company needed to purchase to make way for mining. [FN419] Irons described these homes as belonging to ““people living within proximity of the mining area who might not like living close to a mining operation.”” [FN420]

Company executives, after reading Irons’ report, directed land agents to buyout the residents. [FN421] But what was odd about the company's plan was that land agents were not sent out into the nearby communities with offers to buy homes and land (except to those within the 300 foot limit). Instead, the company ratcheted up the intensity of its strip mining operations. Typically, at Dal-Tex no offer was made to buy residents whose lives and property had been adversely impacted by mining activities. Company managers preferred to wait until residents came to the company indicating that they could not endure the conditions and would like to leave.

## **6. Option to Purchase Agreements**

When homeowners like the Moores got fed up with the conditions created by mining operations, some would approach the company asking to be bought out. [FN422] Such visits set the stage for the company to execute the next step in its target acquisition plan. Company land agents would respond, telling the anxious home owners that the company would pay them the “fair market value” of their property based on an appraisal. The promise of a buyout at fair market value was, however, illusory because the conditions created by the mining were inimical to residential living--there was no market for the homes except to sell to the company. [FN423] In most cases, neither the price nor the terms of such deals were negotiable.

Company land agent James Stephens testified in his deposition that the company required sellers to sign a five-page “Option to Purchase” agreement. [FN424] The terms of that agreement clearly reveal the “end game” of the company's target acquisition plan. In return for the sale of a home and surrounding property, families were required to promise to leave their homes--former coal camps in hollows that had been home to some for generations. [FN425]

The agreement identified eleven communities and eleven hollows from the crest of Blair Mountain to the boundary between Boone and Logan Counties at Clothier that would be off-limits to the sellers for the rest of their lives. [FN426] According to the proffered agreement, they

could neither live in nor purchase property anywhere within the designated area that bordered the company's vast 22,000 acre coal reserve. [FN427] In his deposition, company land agent Ron Vermillion said, "If we buy somebody in Blair, obviously we don't want them moving back to Blair[.] . . . We wouldn't buy them in the first place if they were going to move right back to Blair." [FN428] His colleague, James Stephens, testified, "The problem is you relocate one person and he moves right back in . . . eventually you end up buying them twice." [FN429]

The lifetime ban on living near the mine was not the only nonnegotiable condition the company placed on the purchase of a resident's home. Sellers also had to agree to give up their right to speak out against strip mining and take back prior protests. [FN430] The Option to Purchase agreement stated that the seller "will withdraw any permit protests or citizen complaints which they may have filed related to the mining permits or applications for such permits of Dal-Tex Coal Corporation . . . and that they will not file any further permit protests or citizen complaints in the future." [FN431]

To effectuate this goal, Stephens and other company land agents provided the sellers with a form letter to send to DEP. [FN432] The letter put DEP on notice that the person whose signature appeared at the bottom desired to drop all complaints he or she had filed. [FN433] In his deposition, land agent Terrence Irons explained that the relocation ban and the protest-revocation requirement worked hand in hand: "That's the primary reason that we don't want anybody back in there, is because citizens have the right to protest mining permits. Some citizens protest whether they are impacted or not." [FN434]

Interviews with numerous residents who signed the Option to Purchase agreements revealed that they felt honor-bound by its terms, which they naively believed were legally enforceable. Those knowledgeable about real estate and the law know better. In July 1998, the Moores' attorneys deposed Donald Mueller. [FN435] Mueller had been hired by Arch Coal to testify as a company expert witness on the value of the Moores' land and home. [FN436] When asked if he had ever seen a contract for the sale of a single family residence similar to the coal company's Option to Purchase agreement, he testified that he had not and he did not believe it would be enforceable in a court of law. [FN437] Moreover, he admitted that as a licensed professional real estate broker, "he would have ethical problems asking anyone to sign such an agreement." [FN438]

Finally, as he sat staring at the agreement--which the company's lawyers apparently had not revealed to him prior to the deposition--Mueller blurted out:

I have seen some funky deed provisions at times, but never something in a contract like that[.] . . . I don't think it does prohibit anyone from purchasing property in that area. I don't think you can take that right away from someone. It's like putting in a deed restriction that if you are black, you can't live in this property, or whatever. [FN439]

In addition to proof that Arch Coal and related companies had drawn up secret plans designed to cause the wholesale exodus of families from the communities located near the Dal-Tex complex, discovery in the Moores' case revealed another equally surprising set of facts. These revelations draw into question statements Arch Coal CEO Steven Leer made: ". . . We

are constantly seeking new ways to lessen any adverse impacts our operations might have on surrounding communities.” [FN440]

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On the basis of what had been uncovered in discovery, the Moores filed a motion seeking to amend their complaint . . . to add as defendants the two companies employing the land agents and to add new causes of action for civil conspiracy and civil fraud. [FN448] The amended complaint also sought punitive damages. [FN449] The Circuit Court of Logan County never had an opportunity to rule on the plaintiffs' motion to amend their complaint. [FN450] Within days of Mueller's deposition and the filing of the amended complaint, the defendant offered to settle the case and the Moores agreed. [FN451] The settlement amount was \$225,000, far more than any offer the company's land agents had made to the Moores prior to the lawsuit. [FN452]

Not surprisingly, Arch Coal's Vice President David Todd told the national audience of ABC's Nightline, “We continue to try to work with the community and to find ways to minimize our temporary presence nearby,” [FN457] and later told a Washington Post reporter, “‘We're committed to protecting the environment and respecting West Virginia's mountain heritage.’” [FN458]

[T]he record is clear, Arch Coal and its predecessors at Dal-Tex did not protect mountain heritage, respect their neighbors, or work with the communities to lessen the impacts of mining. Rather, they formulated a specific plan with a target goal of eliminating as many families as possible. As David Todd told the Gazette, “‘Our philosophy is not to impact people[.] . . . And if there are no people to impact, that is consistent with our philosophy.’” [FN459]

## VI. Conclusion

The counties of southern West Virginia's so-called “billion dollar coalfields” contain enormously valuable coal reserves. Coal production from huge, highly efficient mountaintop removal and longwall mines has reached record levels, a fact that belies the dismal economic reality of the coalfield communities where coal production is greatest. [FN460] This Essay was intended to provide insight as one attempts to answer the obvious question: How is it that so many communities in the “billion dollar coalfields” are still mired in poverty and stagnant local economies continue to record some of the highest unemployment rates in the United States?  
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In addition to the destruction of coalfield communities, conflicts between union and nonunion mine operators, poverty, high unemployment, underfunded schools, lack of community infrastructure, and the fear and intimidation generated by industry threats to close mines and layoff workers persist in the region. Federal and state regulatory agencies often show more concern for those whom they are supposed to regulate than for the coalfield communities and their environment. As tens of thousands of coal miners' jobs have evaporated, bundles of campaign contributions maintain King Coal's grip on state politicians.

But the future of coalfield communities is not as bleak as it may seem. Modern communication technology, including the internet, allows people and organizations in remote and isolated coalfield venues to share information and work together toward the common goal of

economic, environmental, and social justice. Across the coalfields people are coming together in grassroots organizations. In West Virginia, the West Virginia Organizing Project and Coal River Mountain Watch have made strides in drawing attention to conflicts between coalfield citizens and coal mining operations. These and other established and new grass roots organizations throughout Appalachia continue to seek justice in the coalfields.

Moreover, public interest and plaintiffs' lawyers representing coalfield families and communities have, for the first time, garnered a considerable measure of success. [FN462] No longer do coal companies go to court with the expectation of favorable treatment by judges and juries. [FN463] The fact that citizen plaintiffs are achieving success as they challenge the excesses of the coal industry should encourage a second look by plaintiffs' lawyers whom in the past have shown little interest in taking on such clients. [FN464]

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## APPENDIX

### Selected Mountaintop Removal & Related Cases

The following selected federal court cases provide insight into the complexity of the issues of federal and state environmental regulatory program administration and enforcement of NNEPA, the CWA and SMCRA in the context of coal mining in Appalachia. Each case involves issues that have a bearing on environmental protection afforded water resources and attendant public and private rights under these federal environmental regulatory regimes.

*1. Bragg v. West Virginia Coal Ass'n.*, 248 F.3d 275, (4th Cir. 2001), *cert denied*, *Bragg v. West Virginia Coal Ass'n.*, 534 U.S. 1113, 122 S.Ct. 920 (2002), *reversing Bragg v. Robertson*, 72 F.Supp.2d 642 (S.D.W.Va. 2001) (Haden, C.J.).

Citizen suit was brought under Surface Mining Control and Reclamation Act (SMCRA), alleging that the West Virginia Division of Environmental Protection (“WVDEP”) had violated its non-discretionary duties under SMCRA, and the state SMCRA primacy regulatory program, in connection with issuance of surface coal mining permits.

Plaintiffs alleged three counts against the Army Corps of Engineers under the CWA and NEPA and ten counts against Defendant WVDEP. In Counts One through Ten, WVDEP was alleged to have engaged in a pattern and practice of violations of mandatory non-discretionary duties under SMCRA and the OSM approved West Virginia state regulatory program.

In *Counts* Eleven through Thirteen, the federal Defendant was alleged to have engaged in a pattern and practice of failure to carry out their statutory duties under the National Environmental Policy Act (“NEPA”), [42 U.S.C. §§ 4321 et seq.](#), Clean Water Act, [33 U.S.C. §§ 1344 et seq.](#), and the Administrative Procedure Act (“APA”), [5 U.S.C. §§ 553, 706\(2\)\(A\)](#). The Plaintiffs alleged it was unlawful for the Corps to issue CWA § 404 (nationwide or “NWP”) permits for surface mining valley fills in West Virginia; that the Corps violated NEPA by issuing NWPs without the required analysis; and the Corps was issuing permits in a manner that allows illegal segmentation of intended mine operations.

Subsequently, counts relating to the Federal defendant and most pattern and practice counts relating to the WVDEP permitting process for surface mines were settled.<sup>2</sup> The District Court

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<sup>2</sup> The settlement resolved allegations in the complaint relating to WVDEP’s pattern and practice of issuing permits for mountaintop removal (“MTR”) coal stripping operations, including, *inter alia*:

Approving permits without required reclamation plans; approving MTR mining operations that propose impermissible post-mining land uses such as “fish and wildlife habitat,” “recreation lands,” “rangelands,” and “grasslands,” when the only post-mining land uses permissible under the SMCRA MTR variance provisions and the WV approved state regulatory program are commercial, residential, industrial, recreational and agricultural uses.

granted summary judgment. Only the Plaintiffs counts alleging the following were not resolved by settlement agreement:(1) regulations requiring state authorization for surface mining activities that would disturb land within 100 feet intermittent or perennial streams where applicable for entire length of streams; and (2) placement of valley fill from surface coal mine in buffer zone of intermittent and perennial streams necessarily “adversely affected” streams.

The District Court (Haden C.J), granted summary judgment to plaintiffs and issued injunction, 72 F.Supp.2d 642, (S.D.W.Va.,1999) with injunction stayed pending appeal, 190 F.R.D. 194, and entered consent decree approving settlement, 83 F.Supp.2d 713. Appeals were taken.

The Court of Appeals for the Fourth Circuit, (Niemeyer, J.) held that: (1) suit seeking to enjoin West Virginia Department of Environmental Protection Director from continuing to grant permits pursuant to the grant of “exclusive jurisdiction” under SMCRA’s cooperative federalism scheme was barred by Eleventh Amendment; and (2) West Virginia did not waive Eleventh Amendment immunity by participating in SMCRA scheme; but (3) court had subject matter jurisdiction to enter consent decree. Affirmed in part, vacated in part.

**2. West Virginia Highlands Conservancy v. Norton**, 161 F.Supp.2d 676, (S.D.W.Va. 2001) Civil Action No. 2:00-1062 (S.D. W.Va.). (Haden, C.J.), , *continuing as, sub nom, West Virginia Highlands Conservancy v. Kempthorne, Secretary, United States Department of the Interior*, (Copenhaver, J.).

Environmental organization brought citizen suit under Surface Mining Control and Reclamation Act (SMCRA) against Secretary of the Department of the Interior and Acting Director of the Office of Surface Mining (OSM), alleging unreasonable delay of mandatory enforcement action against state of West Virginia for inadequacy of that state's alternative program for surface mine reclamation bonds. Plaintiffs alleged that thousands of acres of mined land had not been reclaimed and hundreds of miles of streams had been polluted as a result of the failure of the West Virginia SMCRA primacy program to adequately fund an OSM approved “alternative bonding program under § 509 of the SMCRA, 30 U.S.C. § 1259. Organization moved for partial summary judgment and permanent injunction against the federal OSM with the ultimate goal of forcing the OSM to replace WVDEP as the regulatory authority responsible for reclamation bonding of all surface and deep mines in West Virginia.

The District Court held, inter alia, that: ten year delay between finding of inadequacy and initiation of administrative proceedings to withdraw program's approval was unreasonable, violating both the SMCRA and the Administrative Procedure Act (APA). Plaintiff's motion granted in part and denied in part.

Noteworthy was the District Court’s harsh characterization of the failures of both the OSM and the WVDEP to live up to their cooperative federalism responsibilities under SMCRA:

Clearly, Congress intended federal law to provide minimum national requirements for surface mining. States may regulate their own programs so long as they are consistent with federal law. But where a state program is inconsistent, it may not

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See Counts 6, 8, 14, and 15 of Second Amended Complaint. 1999 WL 33933888 (S.D.W.Va.)

be approved, and the statutory timelines for both the State and the Secretary to achieve State compliance are short: 60 days apiece.

Under the third factor, the direct consequences of the agency's decade-long delay have been examined here before: thousands of acres of unreclaimed strip-mined land, untreated polluted water, and millions (potentially billions) of dollars of State liabilities. The indirect results, however, may be more damaging: *a climate of lawlessness*, which creates a pervasive impression that continued disregard for federal law and statutory requirements goes unpunished, or possibly unnoticed. Agency warnings have no more effect than a wink and a nod, a deadline is just an arbitrary date on the calendar and, once passed, not to be mentioned again. Financial benefits accrue to the owners and operators who were not required to incur the statutory burden and costs attendant to surface mining; political benefits accrue to the state executive and legislators who escape accountability while the mining industry gets a free pass. Why should the state actors do otherwise when the federal regulatory enforcers' findings, requirements, and warnings remain toothless and without effect?

161 F. Supp. 2d 676, at 683-684.

**3. *Kentuckians For the Commonwealth, Inc. v. Rivenburgh***, and 206 F.Supp.2d 782 and 204 F.Supp.2d 927, 54 ERC 1434, 32 Env'tl. L. Rep. 20,588 (S.D.W.Va., 2002) (Haden, C. J.), rev'd, ***Kentuckians for Commonwealth Inc. v. Rivenburgh***, 317 F.3d 425, 55 (4<sup>th</sup> Cir. , 2003).

Citizen group brought action alleging that Army Corps of Engineers violated Clean Water Act (CWA), National Environmental Policy Act (NEPA), and Administrative Procedure Act (APA) by authorizing mining company, pursuant to nationwide general permit (NWP), to fill over streams with waste rock and dirt from surface coal mining activities. Coal industry association and owner and lessor of surface and mineral rights at issue intervened.

The District Court, granted summary judgment, holding that: (1) prior settlement agreement explicitly left undecided issues of Corps' and Environmental Protection Agency's authority under CWA to issue nationwide permits (NWP) for valley fills; (2) EPA's regulation defining fill material authorized discharges for purpose of bringing an area into new use; and (3) purported rule making by Corps and EPA which revised definition of "fill material" was *ultra vires*. An appeal to the 4<sup>th</sup> Circuit followed.

The Court of Appeals (Niemeyer, J.) held in relevant part that: the CWA was permissibly interpreted by the Corps as authorizing the Corps to issue permits for the creation of valley fills in connection with coal mining activities, even when the valley fills serve no purpose other than to dispose of excess overburden from the mining activity; the Corps' 1977 regulation defining "fill material" was a permissible reading of the CWA, and the Corps' interpretation of its own regulation was not plainly erroneous; and the Corps' issuance of the permit in this case was not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. Reversed, vacated, and remanded. (Luttig, J., filed opinion *concurring* in the judgment in part and *dissenting* in part).

4. *Ohio Valley Environmental Coalition v. Bulen*, 410 F.Supp.2d 450 (S.D.W.Va., 2004), rev'd, *Ohio Valley Environmental Coalition v. Bulen*, 429 F.3d 493, 61 ERC 1513, 35 Env'tl. L. Rep. 20,242 (4th Cir., 2005).

Environmental groups brought action challenging Army Corps of Engineers' issuance of nationwide permit (NWP) authorizing discharges of dredged or fill material into waters of the United States associated with surface coal mining and reclamation operations.

Environmental groups filed motion for a preliminary injunction and/or summary judgment on all of their claims. Intervening mining associations' motion to dismiss and cross-motion for summary judgment, and the United States filed motion for judgment on the pleadings and cross-motion for summary judgment. The District Court, (Goodwin, J.), held that NWP did not comply with Clean Water Act; Plaintiffs' motion granted; defendant's and intervenors' motions denied.

The Court of Appeals for the Fourth Circuit (Luttig, J.), held that: general permit authorized "category of activities"; use of procedural, in addition to substantive, parameters by Corps was not prohibited under CWA; Corps did make minimal-impact determinations required by CWA; Corps could make pre-issuance minimal impact determinations under CWA by relying in part on its post-issuance procedures; Corps' post-issuance, case-by-case policing of activities authorized by general permits under CWA was reasonable; notice and hearing were not required before Corps authorized individual project under general permit; and district court did not abuse its discretion in refusing to join entities as necessary parties that held permits for discharge.

Affirmed in part, vacated in part, and remanded.

5. *Ohio Valley Environmental Coalition v. U.S. Army Corps of Engineers*, 479 F.Supp.2d 607, 65 ERC 1234 (S.D.W.Va., 2007).

Environmental advocacy organizations, alleging that Corps of Engineers violated the CWA and NEPA by issuing four permits to fill headwater streams with material from mountaintop removal coal mining, requested injunctive relief and judicial review.

The District Court (Chambers, J.), held, in relevant part that Corps of Engineers failed to take required hard look at whether the impacts of fills on headwater streams and their aquatic ecosystems were significant; (3) Corps acted arbitrarily and capriciously in relying on mitigation plans to support its Finding of No Significant Impact (FONSI); (4) mitigation measures relied upon by Corps failed to provide an adequate buffer against adverse impacts resulting from the authorized activity; (5) Corps acted arbitrarily and contrary to its own regulations by limiting its scope of analysis to only the jurisdictional waters and aquatic impacts of the projects, without assessing the environmental consequences of filling the valleys; and (6) Corps failed to properly assess projects' cumulative effects.

Rev'd, *sub nom*, *Ohio Valley Environmental Coalition v. Aracoma Coal Company*, 556 F.3d 177 (4<sup>th</sup> Cir. 2009). *Rehearing and rehearing en banc denied*, *Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, 567 F.3d 130 (4th Cir. May 29, 2009); *Petition for Certiorari Filed*, 78 USLW 3099 (Aug 26, 2009)(NO. 09-247); *Petition for Certiorari can be found at* [http://www.earthjustice.org/library/legal\\_docs/final\\_mtr\\_cert\\_petition\\_08-2009.pdf](http://www.earthjustice.org/library/legal_docs/final_mtr_cert_petition_08-2009.pdf)

Citing the “alarming cumulative stream loss” to mountaintop removal mine valley fills, the District Court ruled in March 2007 that the Army Corps of Engineers failed to conduct proper environmental reviews before issuing Clean Water Act permits for valley fills. In February 2009, the 4th Circuit ruled that the trial court did not defer to the Corps’ own judgment on those environmental reviews. The Court of Appeals held that Corps was not required to consider environmental impacts of entire valley fill; Corps was not required to undertake functional assessment of effects; Corps was not required to differentiate between headwater and other stream types in determination of mitigating measures; proposed mitigation plans were sufficient; Corps did not act arbitrarily or capriciously in conducting cumulative impact analysis; and interpretation of CWA to conclude that streams were not waters of the United States was reasonable. The opinion upholding Corps decisions was based primarily upon *Chevron* deference.

Judge Michael’s concurring and dissenting opinion stated:

Today's decision will have far-reaching consequences for the environment of Appalachia. It is not disputed that the impact of filling valleys and headwater streams is irreversible or that headwater streams provide crucial ecosystem functions. Further, the cumulative effects of the permitted fill activities on local streams and watersheds are considerable. By failing to require the Corps to undertake a meaningful assessment of the functions of the aquatic resources being destroyed and by allowing the Corps to proceed instead with a one-to-one mitigation that takes no account of lost stream function, this court risks significant harm to the affected watersheds and water resources. We should rescind the four permits at issue in this case until the Corps complies with the clear mandates of the regulations. First, the Corps must adequately determine the effect that the valley fills will have on the function of the aquatic ecosystem. Second, based on this determination, the Corps must certify that the fills, after mitigation is taken into account, will result in no significant degradation of waters of the United States and no significant adverse impact to the human environment.

Michael, J., *concurring and dissenting*, 556 F.3<sup>rd</sup> 177, 226 (4<sup>th</sup> Cir. 2009).

**6. *West Virginia Highlands Conservancy, Inc. v. Huffman*, 651 F.Supp.2d 512 (S.D.W.Va., 2009) (Keely, J.); *West Virginia Highlands Conservancy, Inc. v. Huffman*, 651 F.Supp.2d 512 ( S.D. W.Va., 2009) (Copenhaver, J.).**

These two suits both alleged that the West Virginia Department of Environmental Protection (DEP) has violated, and continues to violate, the federal Clean Water Act (the Act) by failing to obtain a West Virginia National Pollution Discharge Elimination System (WVNPDES) permit when the Division of Land Reclamation is reclaiming and treating water at bond forfeited sites as directed by state law. These cases represent a continuation of *West Virginia Highlands Conservancy v. Norton*, see *supra*, 161 F.Supp.2d 676, 53 ERC 1597 (S.D.W.Va., 2001). Both District Courts held that the State of West Virginia must obtain a NPDES permit that requires compliance with both Clean water Act effluent limitations and water quality standards when it forfeits a SMCRA reclamation bond and takes responsibility for discharge of pollutants from an

unreclaimed mine. Appeals are pending in the United States Court of appeals for the Fourth Circuit.

**7. *Ohio River Valley Environmental Coalition, Inc. v. Kempthorne*, 473 F.3d 94 (4<sup>th</sup> Cir. 2006).**

Environmental groups brought action against the Secretary of the Interior, alleging that Secretary's approval of amendments to state's regulatory program for surface coal mining violated the Administrative Procedure Act (APA) and the Surface Mining Control and Reclamation Act (SMCRA). The United States District Court for the Southern District of West Virginia, Robert C. Chambers, J., 2005 WL 2428159, granted summary judgment in favor of environmental groups. The Secretary appealed.

The Court of Appeals, Williams, Circuit Judge, held that:

- (1) SMCRA requirement that the Secretary provide written notice to the state if and only if any of its proposed mining program was denied did not preempt the APA's enabling provision;
- (2) approval of state surface coal mining program amendments constituted “rulemaking” under the APA; and
- (3) approval of the program's amendments was arbitrary and capricious.

Affirmed.

***The Buffer Zone Rule***

In *Bragg v. Robertson* (see above), 72 F.Supp. 2d 642 (S.D.W.Va.1999), the District Court held that the West Virginia Department of Environmental Protection had systematically allowed issuance of permits to mountaintop removal and other coal mines without requiring compliance with a “buffer zone” rule promulgated in 1983 by the Department of the Interior’s Office of Surface Mining. The West Virginia “buffer zone rule,” based on a SMCRA rule (30 C.F.R. § 816.57) at the time summary judgment was granted in *Bragg* in October, 1999, provided:

No land within one hundred feet (100') of an intermittent or perennial stream shall be disturbed by surface mining operations including roads unless specifically authorized by the Director. The Director will authorize such operations only upon finding that surface mining activities will:

- 1) not adversely affect the normal flow or
- 2) gradient of the stream,
- 3) adversely affect fish migration or
- 4) related environmental values,
- 5) materially damage the water quantity or

6) quality of the stream and

7) will not cause or contribute to violations of applicable State or Federal water quality standards.

The District Court's decision was reversed by the Court of Appeals for the Fourth Circuit on Eleventh Amendment grounds, *Bragg v. West Virginia Coal Ass'n*, 248 F.3d 275 (4<sup>th</sup> Cir. 2001).

The West Virginia "buffer zone" rule was based upon a similar federal rule promulgated by the Department of Interior Office of Surface Mining ("OSM"), 30 C.F.R. § 816.57. OSM proposed amending the federal buffer zone rule, 69 Federal Register 1036 (January 7, 2004).

Compare the two rules: [http://virginia.sierraclub.org/FOJ/pdf/bz\\_side\\_by\\_side.pdf](http://virginia.sierraclub.org/FOJ/pdf/bz_side_by_side.pdf) . The amendment was promulgated as a final rule by the OSM. 73 Fed. Reg., at 75814 (Friday, December 12, 2008) <http://www.smartpdf.com/register/2008/dec/12/E8-29150.pdf>. The rule change is the subject of a petition for review in the United States District Court for the District of Columbia Circuit. *National Parks Conservation Ass'n v. Salazar* (No. 1:09-cv-00115HHK) (D.C.D. C. 2009).

*Kentuckians for Commonwealth Inc. v. Rivenburgh*, 317 F.3d 425, 55 (4<sup>th</sup> Cir., 2003).

The U.S. Army Corps of Engineers fill rule relating to coal wastes placed in valley fills in connection with coal mining activities in effect at the time *Kentuckians for Commonwealth Inc. v. Rivenburgh* was decided:

. . . 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)(2001)(emphasis added).

This rule had been in effect since 1977. On May 3, 2002, the Corps and the EPA signed a final joint rule, clarifying the definition of "fill material" to make it both uniform and consistent with their prior practices. The "New Rule," 33 C.F.R. § 323.2 (2002), used an "effects-based" test, defining "fill material" in § 404 of the Act as any material placed in the waters of the United States that has "the effect of ... [r]eplacing any portion of a water of the United States with dry land or [c]hanging the bottom elevation." *Id.* § 323.2(e)(1). The New Rule also provide that examples of such fill subject to regulation by the Corps included "overburden from mining or other excavation activities," but it also stated that "trash or garbage" was not "fill material." *Id.* § 323.2(e)(2), (3).