

Chapter 12

All Our Yesterdays: The Increasing Risk of Landowner Liability for Legacy Discharges

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§ 12.01. Introduction: Recent Litigation Trends, Suits Against Landowners Under the Clean Water Act (CWA).

[1] — Overview.

Beginning in 2012, environmental advocacy groups in the Central Appalachian region began a new litigation offensive for alleged legacy mining-related water discharges against a class of defendants previously left alone — landowners. The focus on landowners as liable parties under the CWA is relatively recent, and particularly novel to landowners in the Central Appalachian region. Prior legacy discharge suits in other regions have almost exclusively focused on the discharge creator, not the owner of the land solely (usually they are one in the same in these cases).

This trend has the potential to reach back virtually indefinitely into the past. Coupled with the EPA’s recent “Clean Water Rule” issuance,³ this trend creates an unprecedented, virtually endless, expansion of alleged CWA jurisdiction and potential liability.

³ See 80 Fed. Reg. 37054 (June 29, 2015).

The plaintiffs, a collection of environmental advocacy groups, are claiming that particular locations on either former mining permit sites that previously achieved bond release or pre-Surface Mining Control and Reclamation Act (SMCRA) sites disturbed before the enactment of the federal regulatory program in 1977⁴ contain unpermitted point source discharges under the Clean Water Act (CWA).⁵ The plaintiffs have brought their claims as statutory causes of action under the CWA's "citizen suit provisions."⁶ Typical plaintiffs include:

- Appalachian Voices
- Kentuckians for the Commonwealth
- Ohio Valley Environmental Coalition
- Sierra Club
- Southern Appalachian Mountain Stewards
- West Virginia Highlands Conservancy

These are the same environmental advocacy groups commonly seen as plaintiffs in the large, complex CWA citizen suit cases seen in Central Appalachia against primarily coal mining interests since the late 1990s.

[2] — Environmentalist's New Offensive.

[a] — Dual Strategies.

In general, environmental plaintiffs in the region have focused on two "types of situations in their efforts to impose residual liability under the federal CWA for passive landowners based upon alleged ongoing point source discharges associated with inactive mining operations: (1) former mining sites where the applicable SMCRA and National Pollutant Discharge Elimination System (NPDES) permits recently have been released by the permitting authority, and (2) historic, "pre-law" mining sites where mining activity took place prior to the enactment of SMCRA in 1977. However, under

⁴ 30 U.S.C. §§ 1201 *et seq.*

⁵ 33 U.S.C. §§ 1251 *et seq.*

⁶ 33 U.S.C. § 1365.