

**PETITION FOR SUBSTITUTION OF FEDERAL ENFORCEMENT OF THE
STREAM BUFFER ZONE RULE OF THE SURFACE MINING REGULATIONS
OF THE STATE OF WEST VIRGINIA**

The Appalachian Center for the Economy and the Environment, Sierra Club, Coal River Mountain Watch, Ohio Valley Environmental Coalition, and West Virginia Highlands Conservancy hereby petition the Director of the Office of Surface Mining Reclamation and Enforcement to evaluate the West Virginia State surface mining program as required by 30 C.F.R. § 733.12. Because we believe that West Virginia has not demonstrated its capability and intent to adequately administer its program, we further request the Director to recommend to the Secretary that he withdraw approval of West Virginia's program and substitute federal enforcement either in whole or in part.¹ See 30 C.F.R. § 733(e)-(g).

SUMMARY

Under a plain reading of the West Virginia stream buffer zone regulation, mining operations that affect intermittent or perennial streams or the surrounding buffer zone must satisfy four requirements to be allowed: 1) water quantity may not be adversely affected; 2) water quality may not be adversely affected; 3) other environmental resources of the stream may not be adversely affected; and 4) state and federal water quality standards may not be violated. See 38 C.S.R. § 2-5.2(a). A federal district judge held, and the United States government in 2000 agreed, that this regulation applies to the

¹ We intend to submit several petitions in the near future demonstrating West Virginia's failure to properly implement its surface mining program. This first petition seeks federal enforcement of West Virginia's stream buffer zone regulation, which has been wholly ignored by the state. Ultimately, however, we believe that overwhelming deficiencies pervading West Virginia's surface mining program merit a federal takeover of all such activities in the state.

footprint of the fill itself, not just to downstream segments. Because it is impossible for the West Virginia Department of Environmental Protection (“WVDEP”) to make any of the four necessary findings for stream segments buried underneath a valley fill, the stream buffer zone regulation must be enforced to prohibit valley fills in intermittent or perennial streams. Furthermore, because other significant disturbances (such as removing large portions of streams) cannot comply with these four conditions, they are also prohibited in intermittent or perennial streams.

West Virginia has long refused to enforce the buffer zone rule, and it still refuses to do so. The State's systematic failure to apply the rule to those activities that are most harmful to the streams the rule was intended to protect defies logic. Indeed, the WVDEP's decision to exempt valley fills and huge stream elimination projects from the scope of the rule's protections renders the regulation meaningless. In fact, we believe that the State has never denied a request for a variance from the buffer zone rule. The WVDEP's failure to apply the rule to the very activities that cannot satisfy its requirements, while only subjecting more trivial disturbances to the rule's restrictions, shows that the State remains intent on satisfying the coal industry's voracious appetite for the State's waters; rather than requiring the coal industry to conform its activities to the law, the State has adopted the policy of conforming its enforcement of the law to the coal industry's mining practices. Our streams are being lost forever in the process.

BACKGROUND

West Virginia’s failure to enforce its surface mining program has led to massive environmental destruction on a scale not contemplated by the mandates of the Surface Mining Control and Reclamation Act (SMCRA). 30 U.S.C. §§ 1201 et seq. One of the

most egregious violations has been the consistent flouting of West Virginia's stream buffer zone regulation. See 38 C.S.R. § 2-5.2(a). The West Virginia regulations state:

5.2.a. Intermittent or Perennial Stream.

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 Secretary. The Secretary will authorize such operations only upon finding that surface mining activities will not adversely affect the water quantity and quality or other environmental resources of the stream and will not cause or contribute to violations of applicable State or Federal water quality standards.

Id. West Virginia is in violation of a plain reading of the regulation. The WVDEP has never suggested that stream segments buried beneath a valley fill are not adversely affected or even that they continue to exist. The scale on which streams in central Appalachia have been impacted is unprecedented. According to the Office of Surface Mining Reclamation and Enforcement ("OSM"), coal mining permits issued between October 1, 2001 and June 30, 2005

will directly affect about 535 miles of streams nationwide, of which 324 miles (60.6 percent) are in the central Appalachian coalfields. Based on data from the West Virginia permits, we estimate that approximately two-thirds of the 324 miles will be permanently covered by excess spoil fills and coal mine waste disposal facilities.

72 Fed. Reg. 48,890, 48,891 (Aug. 24, 2007) (citation omitted). In the headwaters of Spruce Fork, for instance, permits for surface mining operations and valley fills cover 35.5% of total stream length and an alarming 44% of first order stream length. FEIS, Spruce Mine No. 1, p. 2-180 (September 2006) (available online at http://www.lrh.usace.army.mil/_permits/ (current as of July 22, 2009)). The total stream impacts for many watersheds exceeds 10%, and for some exceeds 50%, as shown in the following table:

Mine	Watershed	Cumulative Stream Miles Filled	% Stream Miles Filled	Decision Document page
Callisto	Pond Fork, WV	42.0	16.7%	27
Laxare East	Laurel Creek, WV	13.9	11.2%	53
Camp Branch	Dingess Run, WV	5.8	8.7%	28
Republic No. 2	Upper Cabin Creek, WV	11.7	14.0%	23-26
Fola Ike Fork	Lilly Fork, WV	46.5	66.8%	H13
Loadout Nellis	Fork Creek, WV	8.6	14.7%	66
Spruce No. 1	Spruce Headwaters	41.0	35.55%	C6
	Spruce Fork, WV	60.0	21.1%	
	Coal River, WV	256.3	11.5%	
Twilight	Upper Pond Fork, WV	52.9	24.3%	110

The total past, present, and future impacts from watershed disturbance for many permits are equally alarming, as shown in the following table:

Mine	Watershed	Watershed Size in Acres	Cumulative % Disturbance	Decision Document page
Callisto	Pond Fork, WV	65,876	13.9%	30
Falcon	Pond Fork, WV	88,230	17%	21
Laxare East	Laurel Creek, WV	31,159	30.2%	44, 54
Black Castle	Laurel Creek, WV	31,159	30.2%	43, 51
Camp Branch	Dingess Run, WV	20,208	45.4%	24, 28-29
Republic No. 2	Upper Cabin Creek, WV	22,518	25%	23-26
Fola Ike Fork	Lilly Fork, WV	18,438	66.8%	84, 107
Loadout Nellis	Fork Creek, WV	8,861	17.2%	66

Spruce No. 1	Spruce Headwaters	32,594	40.6%	C6-7, C14
	Spruce Fork, WV	80,719	26.25%	
	Coal River, WV	570,726	12.8%	
Twilight	West Fork of Pond Fork, WV	27,389	24.4%	100, 105
Tyler Morgan	Fourmile Fork, WV	2,734	56.7%	51
	Paint Creek, WV	78,580	19.3%	
Alex Energy South	Whitman Creek, WV	8,040	51%	72
Phoenix No. 5	Island Creek, WV	67,342	21.9%	37
	Pigeon Creek, WV	91,037	19.0%	
ICG Thunder Ridge	Lower Bad Creek KY	3,233	58.4%	35-36
	Greasy Creek, KY	47,385	12.3%	

(See U.S. Army Corps of Engineers Permit Decisions, attached as Exhibit 1). This massive environmental impact is in violation of the West Virginia regulations and demonstrates the failure of the WVDEP to adequately enforce its surface mining program.

LEGAL ISSUES

I. The Stream Buffer Zone Rule Must Be Read to Prohibit Valley Fills in Intermittent and Perennial Streams

The 1983 federal stream buffer zone (“SBZ”) regulation must be read to prohibit valley fills in intermittent and perennial streams for several reasons. As Chief Judge Haden of the District Court of the Southern District of West Virginia explained in his ruling in Bragg v. Robertson, 72 F. Supp. 2d 642 (S.D. W. Va. 1999), rev’d sub nom. Bragg v. W. Va. Coal Ass’n, 248 F.3d 275 (4th Cir. 2001), the SBZ regulation applies to the footprint of the fill, not just to downstream segments. The Fourth Circuit vacated the judgment on Eleventh Amendment grounds but never overturned the substantive ruling.

Indeed, Judge Haden's ruling was supported by the U.S. government itself, representing OSM, EPA, and the Army Corps of Engineers, during the appeal in the Bragg litigation. Furthermore, the Preambles to the adoption of the Federal buffer zone regulation demonstrate OSM's original belief that buffers were required to protect streams from the adverse affects of surface mining. See, e.g., 44 Fed. Reg. 14,902, 15,176-78 (Mar. 13, 1979). OSM's recent reversal of its position and its subsequent modification of the stream buffer zone rule reveal that the type of valley fills currently being authorized by the WVDEP are inconsistent with the original regulation. Because the current West Virginia regulation was promulgated after the Bragg litigation and modeled on the federal rule, it must be interpreted under the same analysis as that which was applied to the regulation by Judge Haden, OSM, and the U.S. government.

A. As interpreted under Bragg, the stream buffer zone rule prohibits valley fills

In his 1999 decision interpreting the stream buffer zone regulation, Judge Haden, Chief Judge of the District Court for the Southern District of West Virginia, ruled on the interpretation of both the existing state regulation and the federal regulation (the current state regulation now mirrors the federal regulation on which Judge Haden's ruling was based, see 30 C.F.R. § 816.57). He held that "[n]othing in the statute, the federal or state buffer zone regulations, or the agency language promulgating the federal regulations suggests that portions of existing streams may be destroyed so long as [some other portion of] the stream is saved. " Bragg v. Robertson, 72 F. Supp. 2d at 651. Such an interpretation would necessarily lead to "the reductio ad absurdum that miles of streams could be filled and deeply covered with rock and dirt [so long as] some stretch of water downstream of the fill remain[ed] undiminished and unsullied." Id. The Judge was thus

unequivocal in his ruling: “The Court finds and concludes the buffer zone rule protects entire intermittent and perennial streams, not just portions thereof.” Id.

Judge Haden’s interpretation of the stream buffer zone regulation does not stand in isolation. In the brief of the U.S. government on appeal in Bragg, OSM, EPA, and the Corps agreed that the SBZ rule protected stream segments underneath the footprint of the fill, not just downstream segments:

[V]alley fills in intermittent or perennial streams may be authorized under the buffer zone rule only if the permitting agency finds that they will not adversely affect the environmental resources of the filled stream segments. WVDEP has acknowledged that it has routinely approved valley fills in intermittent and perennial streams without making the findings called for by the buffer zone rule for the stream segment filled. The district court correctly rejected the arguments that WVDEP was not required to make the buffer zone findings, holding that the findings required by the buffer zone rule must be made for the filled stream segments and not at some point downstream from the valley fills.

Brief for the Federal Appellants at 24-25, Bragg v. W. Va. Coal Ass’n, No. 99-2683 (4th Cir. 2001) (emphasis added) (hereinafter U.S. Brief) (attached as Exhibit 2). The Acting Director of OSM, Katherine Henry, supported the position taken by the government in a May 22, 2000 letter to the Director of the WVDEP (attached as Exhibit 3). She stated that “the stream buffer zone waiver findings must be made not only for segments downstream of the fill, but also for each segment of an intermittent or perennial stream in which excess spoil is placed.”

In order for the WVDEP Director to permit a mining operation to affect an intermittent or perennial stream, he or she must make four findings: 1) water quantity is not adversely affected; 2) water quality is not adversely affected; 3) other environmental resources of the stream are not adversely affected; and 4) state and federal water quality standards are not violated. See 38 C.S.R. § 2-5.2(a). It would be impossible, however,

for any of these findings to be made for a buried stream segment. The water quantity of the stream necessarily becomes zero and it is nonsensical to describe the water quality of a stream that no longer exists. Any other environmental resources of the stream are destroyed as life forms are eliminated in the buried stream. Judge Haden recognized these three observations when he contemplated the effects of a valley fill:

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.

Bragg v. Robertson, 72 F. Supp. 2d at 661-62.

Furthermore, state and federal water quality standards cannot be met for the buried stream segments. The federal water quality standards, delineated in the Clean Water Act, have contained an anti-degradation policy since 1972. 33 U.S.C. § 1313(d)(4)(B); PUD No. 1 v. Washington Dept. of Ecology, 511 U.S. 700, 718 (1994). Under this policy, “existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.” Id., quoting 40 C.F.R. § 131.12(a)(1). EPA has explained that this policy means that “no activity is allowable . . . which could partially or completely eliminate any existing use.” Id. at 718-19, quoting EPA, Questions and Answers on Antidegradation 3 (Aug. 1985). West Virginia water quality standards contain an anti-degradation policy that mirrors the language in the federal rule. 46 C.S.R. § 1-4.1. Under those standards, the “existing use” of the intermittent and perennial streams of the State is, at a minimum, the “propagation and maintenance of fish and other aquatic life.” 46 C.S.R. §§ 1-2.5, 1-2.6, 1-6.1. Consequently, the partial or complete elimination of fish and aquatic life in a stream

violates the anti-degradation policy.

State and federal water quality standards also mandate the designation by States of appropriate water uses to be achieved and protected. See 40 C.F.R. § 130.6(c)(4)(i). Though these uses may vary, “[i]n no case shall a State adopt waste transport or waste assimilation as a designated use for any waters of the United States.” 40 C.F.R. § 131.10(a). As Judge Haden held, “the reality [is] that valley fills are waste disposal projects so enormous that, rather than the stream assimilating the waste, the waste assimilates the stream.” Bragg v. Robertson, 72 F. Supp. 2d at 662. The Judge concluded that “[e]xisting stream uses are not protected, but destroyed. These effects are inconsistent with State and federal water quality standards.” Id. at 663.

The governmental agencies recognized all of these observations when they held that

[Judge Haden] correctly found that SMCRA’s stream buffer zone rule . . . prohibits the burial of substantial portions of intermittent and perennial streams beneath excess mining spoil. The elimination of substantial intermittent or perennial stream segment [sic] necessarily causes adverse environmental effects, as it eliminates all aquatic life that inhabits those stream segments. As the district court rightly concluded, the elimination of entire stream segments and all the life they contain plainly causes environmental harm. Accordingly, the district court correctly granted summary judgment on plaintiffs’ buffer zone claims.

U.S. Brief at 2. Given the government’s recognition that the SBZ regulation applies to the footprint of fills, it logically follows that the regulation must be read to prohibit valley fills that would cover intermittent or perennial stream segments.

B. The preamble to the original promulgation of the SBZ regulation stresses the importance of protecting intermittent and perennial streams

The original SBZ rule was first promulgated by OSM in 1979 at 30 C.F.R. § 816.57. At that time, OSM emphasized the crucial role that streams play biologically and stressed that section 816.57 was needed to protect certain types of streams from “gross disturbance.” See 44 Fed. Reg. 14,902, 15,176-78 (Mar. 13, 1979). OSM recognized that “[s]urface mining is impossible without destruction of a number of minor natural drainages, including some ephemeral streams The Office, therefore, believes it is permissible to surface mine coal so long as a reasonable level of environmental protection is afforded.” 44 Fed. Reg. at 15,177. Thus, OSM was cognizant that some surface mining operations necessarily involve the destruction of small waterways. Nevertheless, OSM chose to designate certain types of streams as requiring protection: “Because of the significance of streams as features on the mine landscape, the Office believes that rules on how streams are to be treated and protected should be spelled out. Section 816.57 establishes the kinds of streams that have the level of biological significance that triggers direct protective measures.” *Id.* (emphasis added). Nowhere does the preamble to the final rule imply that the SBZ rule is anything but categorical. In fact, in the preamble to the minor amendments modifying the rule in 1983, OSM specifically mentions “springs, seeps, ponding areas, and ephemeral streams” as being types of watercourses that do not require the buffer zone protection. 48 Fed. Reg. 30,312, 30,313 (June 30, 1983). Even these types of watercourses are protected under SMCRA, however, as requiring lateral drains underneath the spoil pile. 30 U.S.C. § 1265(b)(22)(D). Therefore, it is no wonder that OSM correctly singled out intermittent

and perennial streams as worthy of even stricter protection. The West Virginia regulations make a similar distinction between “natural drainways,” where any placement of overburden must be approved, and “intermittent or perennial streams,” where such placement is prohibited. Compare 38 C.S.R. § 2-5.1 with id., 2-5.2.

In the 1983 preamble, OSM responded to a commenter who worried about the scope of the SBZ rule and believed that stream protections were already adequately addressed by other regulations. The commenter

contended that Congress would have addressed the issue of buffer zones directly in the Act if it had intended to impose such a drastic requirement on operators. This commenter also claimed that the requirement of buffer zones was an onerous and unnecessary burden that could have serious adverse effects on many operations and preclude the mining of significant reserves.

48 Fed. Reg. at 30,312 (emphasis added). OSM did not negate this concern in its response. Instead, OSM chose to emphasize the importance of the protection provided by the rule:

OSM rejects the position that there is no need for a section dealing with stream buffer zones. Final § 816.57 implements Sections 515(b)(10) and 515(b)(24) of the Act and is also authorized by Sections 102, 201, 501, 503, 504, 506, 507, 508, 510, and 517 of the Act. Streams are crucial conduits of sediment pollution from mine areas and are often valuable fish and biological habitats. Because of the significance of streams, OSM will specify how streams are to be treated and protected. Section 816.57 establishes the kinds of streams that will trigger direct protection measures.

Id. Again, it is the kind of stream that triggers direct protective measures, not its location or whether or not it is located within the permitted area. Any intermittent or perennial stream triggers the strict requirements of the SBZ rule.

C. OSM’s recent interpretation of the SBZ rule confirms that the original language of the rule applies to valley fills in intermittent or perennial streams

OSM revised the SBZ rule on December 12, 2008. In the preamble to the final revised rule, OSM asserted that “[h]istorically, we and the State regulatory authorities have applied the 1983 stream buffer zone rule in a manner that allowed the placement of excess spoil fills . . . in intermittent and perennial streams.” 73 Fed. Reg. 75,814, 75,817 (Dec. 12, 2008). While this analysis may be correct, the fact that in 2008 OSM attempted to amend its rule demonstrates that its application of that rule has not accorded with the rule’s legal meaning. If OSM had believed in 2008 that the 1983 rule truly excluded from its purview intermittent or perennial streams that would be buried by valley fills, there would have been no reason for the attempted rule change. OSM was attempting to conform its regulations to its behavior, not the other way around. The attempted rule change confirms that the 1983 rule required the interpretation given to it by the U.S. government in its brief in the Bragg litigation. In light of the recent steps taken by the U.S. government to vacate the 2008 amendment to the SBZ rule (see infra, section III), it is highly likely that the 1983 rule will be reinstated.

II. The SBZ Rule Also Prohibits Mining Activities That Adversely Affect the Environmental Resources of an Intermittent or Perennial Stream

For the reasons discussed above, any mining operations within 100 feet of an intermittent or perennial stream must be prohibited if they cannot preserve the water quality, quantity or environmental resources of the stream, or if they violate federal or state water quality standards. Mining operations that eliminate significant portions of intermittent and perennial streams cannot satisfy any of those four conditions. Although smaller disturbances associated with mining through and reestablishing limited portions

of intermittent and perennial streams may be permissible, larger disturbances cannot satisfy the buffer zone rule. SMCRA and the regulations implemented by OSM allow for limited disturbances within the buffer zone, but only provided that the regulatory authority is able to make the four findings discussed above:

Diversion of perennial and intermittent streams within the permit area may be approved by the regulatory authority after making the finding relating to stream buffer zones that the diversion will not adversely affect the water quantity and quality and related environmental resources of the stream.

30 C.F.R. § 816.43(b)(1). Remarkably, just as West Virginia does not apply the buffer zone rule to the footprints of fills, neither does it consider the buffer zone rule in regard to permanently eliminating intermittent and perennial stream segments. The State's failure to apply the SBZ regulation to these huge disturbances is absurd on its face and without legal or factual foundation.

III. The Amended SBZ Rule Violates Congressional Intentions to Protect the Nation's Environment and Streams

The SBZ rule promulgated by OSM in 2008 conflicts with the environmental goals of SMCRA and it is unlikely that OSM will retain this regulation given that the U.S. government has filed a motion for voluntary remand and vacatur of the rule in a case pending before the D.C. District Court. See Nat. Parks Conservation Ass'n v. Salazar, Case No. 1:09-cv-00115HHK (Apr. 24, 2009); see also Coal River Mountain Watch v. Salazar, Case No. 1:08-cv-02212. Provided that this motion is granted, "[v]acatur of the SBZ rule would achieve the result of allowing the prior, valid rule that was in effect on December 11, 2008, to be reinstated." Nat. Parks Conservation Ass'n v. Salazar, at ¶ 5. At any rate, West Virginia has not obtained approval for a revised version of its SBZ regulation; therefore, OSM must look to the existing West Virginia rule (which is

identical to the prior federal rule) in evaluating the State's compliance, regardless of the form the current federal rule takes.

Congress enacted SMCRA to “strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy.” 30 U.S.C. § 1202(f). In doing so, Congress declared an end to the assumption that “the permanent degrading of the local surroundings and the pollution of streams was the inevitable price which the community paid in return for jobs and tax revenue generated by the coal industry.” H.R. Rep. No. 218, 95th Cong., 1st Sess., reprinted in 1977 U.S.C.C.A.N. 593, 666. SMCRA thus “establishes a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.” 30 U.S.C. § 1202(a). As the House Report on the 1977 bill explained:

A basic tenet underlying this legislation is the principle that environmental protection and reclamation, at a minimum meeting the standards in this act, are a coequal objective with that of producing coal. The continued selection of mining techniques by engineers whose primary objectives are the most efficient removal of the overburden and transport of the coal is not sufficient to be fully responsive to the purposes and intent of the act.

H.R. Rep. No. 218, 95th Cong., 1st Sess., p. 96 (1977). Therefore, the impetus behind the Act was not that it was necessary to make coal production more efficient, but that it was necessary to make environmental protection at coal mining sites more stringent. Any ambiguity in interpretation of the statute must be resolved in favor of this fundamental purpose.

Congress recognized the environmental hazards posed by the valley fills associated with mountaintop removal mining: “Serious problems are presented . . . by operations using head-of-the-hollow or valley fill. For such operations, it is uncertain

whether spoil can be placed in an environmentally sound manner.” Id. at 157 (quoting Sec. of the Interior Cecil Andrus), reprinted in 1977 U.S.C.C.A.N. 593, 688. See also id. at 615 (“[S]ome mountaintop removal operations have caused serious environmental problems in the Appalachian area. The key cause of these problems has been the ‘valley’ fill or ‘head-of-the-hollow’ fill techniques utilized to dispose of excess spoil material.”). Congress concluded that valley fills “should be limited to the minimum and that strong spoil placement standards are needed to insure that there will be no offsite damages.” Id. at 688-689 (quoting Sec. of the Interior Andrus); see also Cong. Rec. 33,314 (Oct. 9, 1973) (statement of Sen. Jackson) (stating that the disposal of spoil from mountaintop removal mining may be authorized only if fills satisfy “very carefully determined conditions precedent”).

The text of SMCRA therefore establishes “strong spoil disposal standards” required for surface coal mining, including mountaintop/valley fill mining. Several environmental performance standards govern the conditions under which surface mining, including associated spoil disposal, may be authorized. Pursuant to those standards, surface mining operations may be authorized only if the permitting authority finds that the mining operations will “minimize disturbances and adverse impacts . . . on fish, wildlife, and related environmental values”; that the excess spoil will be placed in an area that “does not contain springs, natural water courses or wet weather seeps unless lateral drains are constructed from the wet areas to the main underdrains in such a manner that filtration of the water into the spoil will be prevented”; and, crucially, that “no damage will be done to natural watercourses.” 30 U.S.C. §§ 1265(b)(22), (24); § 1265(c)(4)(D).

The Department of Justice agreed that “SMCRA unequivocally expresses a congressional intent to protect aquatic resources at the site where mining activities occur.” U.S. Brief at 40. SMCRA mandates that mining operations must “minimize the disturbance to the prevailing hydrologic balance at the mine site and in associated offsite areas.” 30 U.S.C. § 1365(b)(10) (emphasis added). By specifying that mining disturbances such as valley fills should minimize environmental harm “at the mine site,” Congress expressed its intent to protect streams where the disturbances occur, i.e., in the footprint of proposed valley fills. By specifying that mining disturbances should minimize environmental harm “in associated offsite areas,” Congress sought to protect affected downstream areas.

The buffer zone rule must be applied to all intermittent and perennial streams to advance the purpose of the rule, which was enacted to “protect stream channels” (44 Fed. Reg. 15176), as well as to advance the general purpose of the standards established under SMCRA, which were promulgated “to ensure that all surface mining activities are conducted in a manner which preserves and enhances environmental and other values in accordance with the Act.” 30 C.F.R. § 816.2.

IV. The Original SBZ Rule Is Consistent with the Clean Water Act

Under the Clean Water Act (“CWA”), the Army Corps of Engineers may issue fill permits provided that “no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States.” 40 C.F.R. § 230.10(c); see also 33 U.S.C. § 1344(b)(1). The standard of “no adverse effects” under the original SBZ rule is even stricter than the standard of no “significant degradation” promulgated under section 404(b)(1) of the CWA. Thus, a fill permitted by

the CWA is not necessarily permitted by SMCRA. SMCRA's more demanding standard does not conflict with the CWA, however, as the U.S. government and EPA have determined. In the Bragg litigation, the government observed that

[t]he CWA and SMCRA establish independent obligations and standards with which mining companies must comply. . . . By the plain language of the buffer zone rule, the unmodified phrase "adverse effects" encompasses a larger set of effects than the 404(b)(1) guidelines' "significantly adverse effects" standard. As a result, the buffer zone language adopts a stricter standard than the 404(b)(1) guidelines.

U.S. Brief at 43-44. A mining operation cannot satisfy its obligations under SMCRA simply by complying with the requirements of the CWA.

Adopting stricter standards than those under the CWA does not violate the SMCRA savings clause, which provides that

[n]othing in this Act shall be construed as superseding, amending, modifying, or repealing . . . any of the following Acts or with any rule or regulation promulgated thereunder, including, but not limited to –

. . .

(3) The Federal Water Pollution Control Act, as amended, the State laws enacted thereto, or other Federal laws relating to the preservation of water quality.

30 U.S.C. § 1292(a). This section does not prevent OSM from issuing regulations that would prohibit activities that may be allowed under other environmental statutes. As the Supreme Court has held, two statutes can be said to conflict only when it is impossible to comply with both. See Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995). "No such conflict arises if SMCRA is construed to prohibit some activities that would be authorized by the CWA, since it is possible to comply with both statutes by engaging in only those activities authorized by both statutes." U.S. Brief at 48. Furthermore, section 404(t) of the CWA provides that nothing in that section "shall preclude or deny the right of any State . . . agency to control the discharge of dredged or fill material in any portion

of the navigable waters within the jurisdiction of such State” 33 U.S.C. § 1344(t). Courts have interpreted this section to allow States to impose additional conditions. Friends of the Earth v. United States Navy, 841 F.2d 927, 936-37 (9th Cir. 1988); United States v. Marathon Development Corp., 867 F.2d 96, 100 (1st Cir. 1989). Thus, SMCRA does not conflict with the CWA by imposing additional requirements on mining activities. Indeed, mining operations may only be permitted if they comply with both the SBZ regulation and the CWA.

CONCLUSION

The unprecedented environmental degradation incurred by burying hundreds of miles of perennial and intermittent streams in West Virginia was not envisioned by Congress when it passed SMCRA in 1977. The scale of adverse impact caused by current mountaintop mining/valley fill operations was simply unimaginable at the time. As the Department of Justice recognized,

At the time of the passage of SMCRA, excess spoil from coal mining was generally placed in the extreme headwaters of streams affecting primarily ephemeral stream sections. While some larger fills existed, the volume of such fills was generally less than 250,000 cubic yards each. . . . Today, the volume of a single stream fill can be as much as 250 million cubic yards, with stream burials up to two miles long.

U.S. Brief at 7-8, citing J.A. at 275. The regulations developed by West Virginia and approved by OSM were developed to protect the environmental concerns that motivated Congress to regulate surface mining. The SBZ regulation allows for disturbances within 100 feet of an intermittent or perennial stream only if the Secretary finds that a disturbance “will not adversely affect the water quantity and quality or other environmental resources of the stream and will not cause or contribute to violations of applicable State or Federal water quality standards.” 38 C.S.R. § 2-5.2(a). These

findings are impossible to make where a valley fill covers an intermittent or perennial stream or where mining operations permanently eliminate stream segments. The water quantity, quality, and other environmental resources of the buried stream are all destroyed, and water quality standards are necessarily violated. Thus, the stream buffer zone regulation must be interpreted as a prohibition against the disposal of mining waste within 100 feet of or within intermittent or perennial streams, a prohibition that West Virginia has ignored. By consistently and knowingly permitting operations that cannot comply with this rule, West Virginia has demonstrated that it lacks the capability and intent to effectively administer its surface mining program.

Under section 733 of chapter 30 of the Code of Federal Regulations, the Director of OSM has a non-discretionary duty to verify the allegations made in this petition and to determine within 60 days whether or not an evaluation of West Virginia's surface mining program shall be made. 30 C.F.R. § 733.12(a)(2). Given West Virginia's refusal to enforce the law in the face of coal industry interests, we believe that the only remedy that will protect the State's essential environmental resources is for OSM to substitute federal enforcement, in whole or in part, of the state's surface mining program.

Respectfully submitted,

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