

**American Rivers • Dakota Resource Council • Defenders of Wildlife
Earthjustice • Earthworks • Environment America • Friends of the Earth
National Audubon Society • National Wildlife Federation
Natural Resources Defense Council • The Wilderness Society
Western Organization of Resource Councils**

Via Federal Express and Electronic Submission to www.regulations.gov

Office of Surface Mining Reclamation and Enforcement
Administrative Record
Attn: RIN 1029-AC04
Room 252 SIB
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Washington, D.C. 20240

David Hartos
Office of Surface Mining Reclamation and Enforcement
Appalachian Region
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Pittsburgh, PA 15220

November 21, 2007

Re: Comments on Proposed Rule Regarding Excess Spoil, Coal Mine Waste, and Buffers for Waters of the United States and Draft Environmental Impact Statement on Proposed Rule– RIN 1029-AC04, Docket Nos. OSM-2007-0007 and OSM-2007-0008 (72 Fed. Reg. 48678, 48890)

Dear Mr. Hartos:

The Natural Resources Defense Council, Inc., American Rivers, Dakota Resource Council, Defenders of Wildlife, Earthjustice, Earthworks, Environment America, Friends of the Earth, National Audubon Society, National Wildlife Federation, The Wilderness Society, and the Western Organization of Resource Councils submit these comments on the Office of Surface Mining's ("OSM's") proposed rule amending its Stream Buffer Zone rule and OSM's draft Environmental Impact Statement ("DEIS") on the proposed rule.¹ *See* Excess Spoil, Coal Mine Waste, and Buffers for Waters of the United States, 72 Fed. Reg. 48890 (proposed Aug. 24, 2007) (to be codified at 30 C.F.R. pts 780, 784, 816, and 817); Notice of availability of a draft environmental impact statement, 72 Fed.

¹ We attach and incorporate by reference the comments filed by some of these groups on April 7, 2004, regarding OSM's January 7, 2004 proposed revisions to the Stream Buffer Zone rule (attached as Appendix I); on January 6, 2004 regarding OSM's Draft Programmatic Environmental Impact Statement on mountaintop removal coal mining and associated valley fills in Appalachia (attached as Appendix II); on September 1, 2005, regarding scoping for the Stream Buffer Zone Environmental Impact Statement (attached as Appendix III); and on October 9, 2001 regarding the United States Army Corps of Engineers' proposal to reissue and modify nationwide permits for activities involving discharge of dredged or fill material under Section 404 of the Clean Water Act (attached as Appendix IV).

Reg. 48678 (Aug. 24, 2007). We appreciate the opportunity to comment on OSM's proposed changes to the Stream Buffer Zone rule and its assessment of the environmental impacts of those changes. For the reasons discussed below, we believe that the proposed rule is unwise, inconsistent with the objectives of the Surface Mining Control and Reclamation Act ("SMCRA"), inadequate to achieve even OSM's stated objectives, inconsistent with the requirements of the Clean Water Act ("CWA"), and accompanied by a facially inadequate DEIS. We request that OSM withdraw its proposed rule and instead retain and enforce the existing requirements regarding the protection of mountain streams. Our detailed analysis and comments on the proposed rule and DEIS follow.

I. INTRODUCTION

On August 24, 2007, OSM, an agency within the U.S. Department of Interior, published a notice of its proposed rule, entitled "Excess Spoil, Coal Mine Waste, and Buffers for Waters of the United States," in the *Federal Register*. See 72 Fed. Reg. 48890. In its notice, OSM proposes several dramatic changes to its existing Stream Buffer Zone rule (codified at 30 C.F.R. § 816.57) that will strip away the existing protections afforded perennial and intermittent streams in connection with the most destructive and irresponsible forms of surface mining activities.

Mountaintop removal coal mining involves some of the most destructive practices the mining industry has to offer. In particular, in order to get at narrow seams of coal buried deep underground in mountainous regions of Appalachia; mining companies obliterate entire mountain tops and dump the leftover rubble (or "spoil") into mountain valleys and streams, creating so-called "valley fills." In addition to spoil, this mining process generates massive quantities of coal slurry wastes that are typically disposed of in "impoundments" (a euphemism for huge, stagnant settling ponds of contaminated water). OSM's proposed rule would categorically exclude the creation of valley fills and waste impoundments from the activities covered under the Stream Buffer Zone rule, which otherwise requires maintenance of a 100 foot buffer zone around all perennial and intermittent streams within which mining activities may not occur without a variance (and even then only upon the making of certain findings).² As a result, this proposed rule would expand and accelerate the creation of valley fills and coal waste impoundments and, in turn, the destruction of mountains, forests, and streams throughout Appalachia.

² The Stream Buffer Zone rule currently provides that "No land within 100 feet of a perennial stream or an intermittent stream shall be disturbed by surface mining activities, unless the regulatory authority specifically authorizes surface mining activities closer to, or through, such a stream." 30 C.F.R. § 816.57 (1983). In order to grant a variance, the rule provides that the regulatory authority must find that both "(1) Surface mining activities will not cause or contribute to the violation of applicable State or Federal water quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream; and (2) If there will be a temporary or permanent stream-channel diversion, it will comply with § 816.43 [which, in turn, provides that the regulatory authority may approve diversion of perennial and intermittent streams within the permit area 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]." *Id.*

In fact, it is clear that the *primary purpose* of OSM’s proposed rule is to remove existing regulatory barriers to the practice of mountaintop removal coal mining by authorizing valley fills and placement of coal waste impoundments in intermittent and perennial streams, including waters of the United States. While OSM does not clearly identify this as its core objective, this intent is clear from the regulatory history of the Stream Buffer Zone rule, associated caselaw, and the substance of OSM’s proposed changes. Nonetheless, OSM disingenuously summarizes the rule in its *Federal Register* notice, as follows:

Among other things, this proposed rule would require that surface coal mining operations be designed to minimize the creation of excess spoil and the adverse environmental impacts of fills constructed to dispose of excess spoil and coal mine waste. . . . It also would specify requirements to protect aquatic and other resources when an activity is conducted under either a variance or an exception.

72 Fed. Reg. 48890. Despite this statement, the proposed rule does nothing of the sort.

The fact of the matter is that OSM’s proposed changes to the Stream Buffer Zone rule would eliminate *clear regulatory language* that provides for meaningful and appropriate protection of mountain streams and associated aquatic and terrestrial ecosystems, and replace these provisions with a standing authorization to completely destroy these valuable natural resources coupled only with vague, redundant, under-protective, and largely unverifiable and unenforceable provisions for demonstrating that environmental harms have been minimized “to the extent possible.” *See* 72 Fed. Reg. 48890, 48919 (proposed 30 C.F.R. §780.35(a)(1)). Indeed, the most salient feature of the proposed rule, one OSM fails to even mention in its *Federal Register* summary, is its “*categorical exception*” from the 100 foot buffer zone requirement for certain activities – including valley fills and coal waste impoundments. *See* 72 Fed. Reg. 48890, 48914 (describing the proposal as containing “categorical exceptions for certain activities”).

In addition, OSM proposes to effectively repeal the buffer zone requirements for all other mining activities as well. Specifically, by eliminating the mandatory language requiring buffer zones, and replacing it with a discretionary standard that allows permitting authorities to specify requirements other than buffer zones, OSM’s proposal would in one fell swoop transform the entire Stream Buffer Zone rule into a technical hand-waving exercise with chance of providing real environmental protection.³

Disturbingly, this proposal appears to reflect the continuation of a trend by this administration aimed at subordinating protections for the nation’s waters and ecosystems to the interests of big coal, clearing the way for expansion of some of the most intrusive and destructive of all mining practices. Appalachia has been the unfortunate target of many of these activities. For example, in 2002 the U.S. Army Corps of Engineers (“the Corps”) repealed a 25-year-old prohibition on dumping waste material in streams. *See* Final Revisions to the Clean Water Act Regulatory Definitions of “Fill Material” and

³ *See* 72 Fed. Reg. at 48906 (discussing proposed 30 C.F.R. § 816.43(b)).

“Discharge of a Fill Material,” 67 Fed. Reg. 31129 (May 9, 2002). This action was followed in 2005 by OSM’s weakening of its oversight of state mining programs, see Revisions to the State Program Amendment Process, 70 Fed. Reg. 61194 (Oct. 20, 2005) (making federal takeovers of state mining programs upon state violations of federal law discretionary rather than automatic), and also in 2005 by the Corps’ issuance of a final Programmatic Environmental Impact Statement on Mountaintop Mining/Valley Fills in Appalachia (“PEIS”), *see* Final Programmatic Environmental Impact Statement for Mountaintop Mining and Valley Fills, 70 Fed. Reg. 62102 (Oct. 28, 2005) (proposing no meaningful reforms or restrictions on valley fills).

In light of this history, OSM’s proposal to eviscerate the Stream Buffer Zone rule – OSM’s single most important remaining safeguard for mountain streams – is sadly not very surprising. Given what is at stake, however – thousands of miles of mountain streams and hundreds of thousands of acres of pristine forest – the only responsible course of action is for OSM to withdraw its proposal and abandon its plans to sell off Appalachia a ton of coal at a time.

Mountaintop removal mining, and the practice of creating valley fills, has already led to the destruction of more than 1,200 miles of Appalachia’s streams and 387,000 acres of its forests, and this path of destruction will only widen if OSM finalizes this proposed rule. In addition to the destruction of entire mountaintops, the burying of miles of mountain streams, the stripping of vast areas of forest, and the impairment of critical habitat, this practice terrorizes neighboring communities (forcing people from their homes by blasting, flooding, and environmental destruction) and threatens the very survival of a socially, historically, environmentally and economically important region of the country.

As we discuss below, OSM’s proposed rule not only reflects bad policy and appalling environmental stewardship, but is inconsistent with the underlying mandates of SMCRA and the provisions of the CWA; fails to achieve even the minimal objectives it sets for itself; and it is supported by an inadequate environmental impact analysis.

II. BACKGROUND

Mining activities are regulated under federal law by, among other things, the Surface Mining Control and Reclamation Act of 1977 or “SMCRA,” which is administered by OSM and forms the statutory basis for the Stream Buffer Zone rule. SMCRA was an outgrowth of decades of concerns about the environmental effects of strip mining practices, and was intended to provide new and significant protections for the environment and affected local communities. In the legislation, Congress found that:

[M]any surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife

habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources.⁴

While recognizing the role played by coal in addressing the nation's energy needs, Congress also found that it was "urgent" in 1977 to establish federal standards to "minimize damage to the environment."⁵ The very first stated purpose in the law is to "establish a nationwide program to *protect society and the environment* from the adverse effects of surface coal mining operations."⁶ The law that Congress passed was not perfect; some at the time believed the final law was too great a compromise, especially after Congress failed to pass earlier legislation to outlaw strip mining altogether. Nonetheless, SMCRA does place some meaningful restrictions on surface mining operations and require that certain natural resources, including streams and other "watercourses," be protected.⁷

SMCRA contemplates significant and meaningful protections, and OSM's recognition of this congressional intent forms the basis of the current Stream Buffer Zone rule. Recognizing several important environmental objectives, the Act provides that surface mining operations may be authorized *only* if the permitting authority finds (1) that the mining operations will "minimize disturbances and adverse impacts . . . on fish, wildlife, and related environmental values"; (2) that "no damage will be done to natural watercourses"; (3) 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 (4) that the disposal "is compatible with the natural drainage patterns and surroundings."⁸ Moreover, SMCRA mandates that mining operations must "minimize the disturbance to the prevailing hydrologic balance *at the mine site and in associated offsite areas.*"⁹

OSM first promulgated the Stream Buffer Zone rule in 1977 in an interim form. The interim rule established the 100 foot buffer-zone as well as the variance provision, although the 1977 rule did not specify under what conditions a permitting authority may grant a variance. In 1979, OSM adopted a permanent Stream Buffer Zone rule that restricted mining activities within 100 feet of any stream "with a biological community," and that included variance criteria.¹⁰ The criteria included in the 1979 rule required that before a permitting authority could authorize mining activity within the buffer zone, it

⁴ 30 U.S.C. §1201(b).

⁵ 30 U.S.C. §1201(c) (emphasis added).

⁶ 30 U.S.C. §1202(a) (emphasis added).

⁷ See, e.g., 30 U.S.C. §1265(c)(3)(D).

⁸ 30 U.S.C. §§ 1265(b)(10), (22), (24); § 1265(c)(4)(D).

⁹ 30 U.S.C. § 1365(b)(10). This provision clearly demonstrates an intent to protect environmental values both within the footprint of the mine site (including at spoil sites and impoundments) and at downstream locations.

¹⁰ 30 C.F.R. § 816.57(a) (1979). The regulation also included specific provisions for identifying the presence of a biological community. 30 C.F.R. § 816.57(c) (1979).

must find “that the original stream channel will be restored” and that “during and after the mining, the water quantity and quality from the stream section within 100 feet of the surface mining activities shall not be adversely affected.”¹¹ OSM explained in the preamble to the 1979 rule that the provisions of the rule were “required to protect streams from the adverse effects of sedimentation and from gross disturbance of stream channels.”¹²

In 1983, OSM adopted the current version of the Stream Buffer Zone rule. In so doing, OSM eliminated the reference that was in the 1979 rule to streams with “a biological community” and removed the provision requiring restoration of the original stream channel. Instead, the 1983 OSM rule identified all perennial and intermittent streams as worthy of protection under the rule, and added a requirement that any mining activities authorized within the 100 foot buffer zone may not cause or contribute to a violation of an applicable water quality standard and may not “adversely affect the environmental resources of the stream.”¹³ Significantly, this rule retained the core buffer zone requirement, an acknowledgment of the earlier finding this restriction was needed to meaningfully protect streams from the adverse effects of surface mining.

Consistent with the language and intent of SMCRA, the current Stream Buffer Zone rule provides real protection for the important water resources most likely to be affected by destructive mining practices like mountaintop removal coal mining. The rule states:

- (a) No land within 100 feet of a perennial stream or an intermittent stream shall be disturbed by surface mining activities, unless the regulatory authority specifically authorizes surface mining activities closer to, or through, such a stream. The regulatory authority may authorize such activities only upon finding that—
 - (1) Surface mining activities will not cause or contribute to the violation of applicable State or Federal water quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream; and
 - (2) If there will be a temporary or permanent stream-channel diversion, it will comply with § 816.43.
- (b) The area not to be disturbed shall be designated as a buffer zone, and the operator shall mark it as specified in § 816.11.¹⁴

¹¹ *Id.*

¹² The two types of impacts noted by OSM in its 1979 rule recognized the affects of both the activities within the footprint of the mine site (e.g., valley fills) and downstream adverse affects, respectively “gross disturbances” and “sedimentation.”

¹³ 30 C.F.R. § 816.57(a) (1983).

¹⁴ 30 C.F.R. § 816.57 (1983). In adopting the 1983 Stream Buffer Zone rule, OSM again recognized the importance of protecting mountain streams. For example, OSM explained that “intermittent and perennial streams generally have environmental resources values worthy of protection under section 515(b)(24),” and “surface coal mining operations will be permissible as long as environmental protection will be afforded to those streams with more significant environmental values” (i.e. intermittent and perennial streams). 43 Fed. Reg. at 30313 (June 30, 1983). Thus, the 1983 rule was clear both by the language of the regulation

The requirements of the current Stream Buffer Zone rule are crystal clear on their face, and have been interpreted by the courts in a manner that is consistent with and obvious from their plain language. For example, in 1999 Judge Haden, Chief Judge of the District Court for the Southern District of West Virginia, ruled 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.”¹⁵ Judge Haden further observed that “[v]alley fills are waste disposal projects so enormous that, rather than the stream assimilating the waste, the waste assimilates the stream,” and went on to note that “[w]hen valley fills are permitted in intermittent and perennial streams, they destroy those stream segments.”¹⁶ Not surprisingly, Judge Haden ruled that “placement of valley fills in intermittent and perennial streams violates federal and state water quality standards” and are impermissible under the Stream Buffer Zone rule.¹⁷ While the case was overturned on jurisdictional grounds, Judge Haden’s substantive observations, which the Court of Appeals did not address, are valid and compelling.¹⁸

Despite the existence of the Stream Buffer Zone rule – or rather, as a result of a failure to enforce the rule – mountaintop removal coal mining has destroyed forests, streams, communities, and lives in Appalachia at an alarming rate, in direct conflict with the SMCRA provisions Congress enacted to curb this type of extreme environmental abuse. According to one estimate, mountaintop removal mines involved forty-four permits covering 9,800 acres throughout the 1980s, yet in a nine-month period in 2002 alone, federal and state agencies issued permits for mountaintop removal mines to flatten and destroy an area covering 12,540 acres.¹⁹ Mountaintop removal and other large scale surface mining operations already have been authorized by permitting authorities to destroy nearly 2,000 miles of Appalachian streams and more than 1,000 square miles of forested mountain terrain. Indeed, according to the DEIS issued with OSM’s proposed rule, without *more stringent* environmental protections, over 1000 miles of streams will be added to this toll by 2012, and valley fills will turn a huge area of this country – over 2200 square miles of a unique, biologically diverse, forested, stream filled, mountainous region – into a barren wasteland for the foreseeable future.

itself and the accompanying preamble statement that intermittent and perennial streams needed to be protected, and that mining activities (including valley fills and coal waste impoundments) within 100 feet of such streams were appropriate *only* to the extent that they would not adversely affect stream function, water quality, water quantity, or other environmental values.

¹⁵ *Bragg v. Robertson*, 72 F. Supp.2d 642, 651 (S.D.W.Va. 1999), *vacated on other grounds*, *Bragg v. West Virginia Coal Ass’n*, 248 F.3d 275 (4th Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002).

¹⁶ *Id.* at 661-62.

¹⁷ *Id.* at 662.

¹⁸ *See Bragg v. West Virginia Coal Ass’n*, 248 F.3d 275 (4th Cir. 2001). Indeed, in the context of briefing this case on appeal, OSM, EPA and the U.S Army Corps of Engineers expressed agreement with the substance of Judge Haden’s opinion on the Stream Buffer Zone rule.

¹⁹ Burns, Shirley Stewart (2005), “[Bringing Down the Mountains: the Impact of Mountaintop Removal Surface Coal Mining on Southern West Virginia Communities, 1970-2004](#),” Ph.D. dissertation, West Virginia University, available at: http://kitkat.wvu.edu:8080/files/4047/Stewart_Burns_Shirley_dissertation.pdf (last accessed Nov. 19, 2007).

Appalachia is widely recognized as one of the most biologically diverse temperate headwater freshwater regions in the world, and the environmental and ecological harm to these resources from mountaintop removal coal mining is grave indeed. Studies associated with the Corps' 2005 PEIS on mountaintop removal coal mining observes that mountaintop removal causes "fundamental changes to the terrestrial environment" and "significantly affect[s] the landscape mosaic," with post-mining conditions "drastically different" from pre-mining conditions. Further, mining impacts on the nutrient cycling function of headwaters streams "are of great concern" and impacts to habitat of interior forest birds could have "extreme ecological significance." The PEIS also notes that mining could impact 244 terrestrial species, including, for example, 1.2 billion individual salamanders, and that the loss of the genetic diversity of these affected species "would have a disproportionately large impact on the total aquatic genetic diversity of the nation." Finally, the PEIS observes that valley fills are strongly associated with violations of water quality standards for selenium, a toxic metal that bioaccumulates in aquatic life.

Amazingly, against this backdrop, OSM does not seek to strengthen its rules, or to demand appropriate enforcement of existing requirements. Rather, in spite of the dire and devastating consequences of mountaintop removal coal mining, and the statutory mandate to protect society and the environment from the adverse effects of surface coal mining operations, OSM now offers up this proposal – with the primary intent and function of exempting the nation's most destructive surface mining practices from the very regulatory provisions best suited to achieve the objectives of SMCRA.²⁰ OSM's proposal is ill-advised and, not surprisingly, illegal.

III. THE PROPOSED RULE, IF ADOPTED, WOULD VIOLATE SMCRA AND THE CLEAN WATER ACT

A. OSM's Proposed Rule Would Violate SMCRA

As discussed above, Congress intended SMCRA to protect society and the environment from the adverse effects of surface coal mining operations. Despite this fact, and OSM's protestations that its rule is intended to strike an appropriate "balance" between interests of protecting the environment and allowing industry exploitation of natural resources, the rule utterly fails to achieve SMCRA's clear objectives. Indeed, the

²⁰ OSM first proposed repealing the Stream Buffer Zone rule in January 2004. At that time, many national and regional groups (including some of the groups represented in these comments) filed comments objecting to the proposal. *See supra* n. 1 and Attachment I. In addition to asking that the proposal be withdrawn, these comments stated that the agency was required by law to prepare an Environmental Impact Statement (EIS) before proposing to change a major federal rule. *See* Attachment I at 14-18. Somewhat surprisingly, OSM agreed and the following summer, in 2005, took public comment on what it needed to study. One point made loudly and consistently by many who submitted comments at that time was that the OSM must consider, as one alternative, *enforcing the Stream Buffer Zone as written* – as a "buffer" around intermittent and perennial streams, protecting them from damage from coal mining activities, including waste disposal. As discussed later in these comments, OSM has nonetheless failed to include such an alternative in its DEIS for this proposed rule. *See infra* Part IV.

proposed rule is sufficiently at odds with SMCRA’s intent and objectives that it is unlawful.

1. The Proposed Rule Would Violate SMCRA By Allowing Mining Interests to Trump Environmental Protection

While OSM asserts that its proposed rule is a clarification of the 1983 Stream Buffer Zone rule, in fact it is just the opposite. OSM has taken clear language prohibiting *all* surface coal mining activity within a specific distance – 100 feet – of certain streams in the absence of a variance based on specified objective criteria, and replaced it new proposal that would allow virtually *any* surface coal mining activity to go directly into streams. This is nothing short of an effective repeal of the current buffer.

The proposed rule creates four new categories of “exceptions” to the proposed buffer; this includes a standardless provision that would permit the creation of valley fill and coal waste impoundments *in every single instance*, contingent only on a vague and qualified requirement to minimize environmental impacts “to the extent possible.” The exemption from the protective stream buffer zone for valley fills and coal waste impoundments is the most extreme and illegal proposal contained in the rule. These mountaintop removal-related activities are the most destructive of stream resources; as noted above, the OSM itself has admitted that hundreds and hundreds of miles of streams in Appalachia have already been obliterated by these features. It is preposterous to assert that a statute like SMCRA that is concerned with streams protections, including protecting streams from excess sedimentation, could nonetheless be interpreted to allow the dumping on 250,000,000 cubic yards of “sediment” in a single stream at just one valley fill site.

This new category of exemption and the related minimization “requirement” is notable in several other respects. First, *in no instance whatsoever* would the requirement preclude the construction of a valley fill or coal waste impoundment, *no matter how severe or widespread the harm or how profound the damage to the local aquatic or riparian environment* – so long as the mining company completes the hoop-jumping exercise outlined in the proposed rule by “demonstrating” that the proposed mining activity would minimize adverse impacts “to the extent possible.” That is, absolutely no type, degree, or scope of harm would be off-limits under OSM’s proposed rule. Instead, environmental protection would *ALWAYS* give way to the interests of coal mining, contingent only on the permit applicant’s showing, “to the satisfaction of the permitting authority” that it had satisfied the proposed rule’s vaguely defined “to the extent possible” requirement.²¹

²¹ See proposed 30 C.F.R. § 780.35, allowing valley fills without limitation if the permit applicant provides:
A demonstration, prepared to the satisfaction of the regulatory authority that the operation has been designed to minimize, to the extent possible, the volume of excess spoil that the operation will generate . . .
A demonstration that the designed maximum cumulative volume of all proposed excess spoil fills within the permit area is no larger than the capacity needed to accommodate the anticipated cumulative volume of excess spoil that the operation will generate . . .

OSM's proposed rule is ostensibly intended to ensure that all steps are being taken to limit environmental harm, to the extent possible. However, even assuming that the proposed rule's "extent possible" requirement could be meaningfully applied, in *no situation* contemplated by the proposed rule would the remaining environmental harm, *however severe*, actually preclude the permitting of the mining activities now exempt from the buffer zone setback.. In effect, then, the proposed rule provides no objective, identifiable threshold of protection that must *ever* be met before a valley fill or coal waste impoundment may be authorized. At most, the proposed rule embodies the proposition that, while the destruction of any mountain stream is ultimately permissible, a mining company may not select the most stream-destroying of its design options simply because it is the cheapest.²² In the end, however, the "permitting authority" is identified as the arbiter of whether an alternative is "possible,"²³ and ultimately what constitutes a "satisfactory" demonstration – therefore, given the lack of any objective measures of adequate environmental protection and the track record of the relevant permitting authorities, even this minimal level of assurance is likely to be illusory.

In short, OSM's proposed rule contains an inherent bias that assures the rule, no matter how stringently it is enforced, will favor resource extraction over environmental protection in every case. For this and the other reasons noted in these comments, the proposed rule is therefore unlawful under SMCRA.

2. The Proposed Rule Fails to Achieve Even OSM's Stated Objectives Under SMCRA

OSM claims that the proposal is intended to ensure that valley fills and coal waste impoundments in waters of the United States are, consistent with SMCRA's mandates, allowed only when they are designed to minimize impacts to the environment.²⁴

A description of all alternatives considered for disposal of the [identified] amount of excess spoil. . . and an analysis of the environmental impacts of those alternative [although the rule would allow an analysis of alternatives under 40 CFR 230.10 to substitute in full for the analysis of alternatives required by this rule] . . . [and] to the extent possible, [selection of] the alternative with the least overall adverse environmental impact; [and]

A description of the steps that [an applicant] will take to avoid the adverse environmental impacts that may result from the construction of fills or, if avoidance is not possible, the steps that [an applicant] will take to minimize those impacts.

²² In this regard, the closest thing to a back-stop anywhere in the regulation is the watered down and qualified statement in proposed 30 C.F.R § 780.35(a)(3)(iii) that "This provision does not authorize selection of the least costly alternative at the expense of environmental protection solely on the basis of cost. If another alternative considered under paragraph (a)(3)(i) of this section would be more environmentally protective than the alternative you selected, you must demonstrate, to the satisfaction of the regulatory authority, that implementation of the more environmentally protective alternative is not possible."

²³ The qualification "to the extent possible" is by no mean innocuous. The rule defines this phrase as follows: "An alternative is possible if it is capable of being done *after consideration of cost, logistics, and available technology.*" 30 C.F.R § 780.35(a)(3)(iii). Thus, whether or not any particular measure need be adopted (or perhaps even considered) will be contingent on a second level of ambiguous analysis regarding cost, logistics, and technology.

²⁴ As discussed above, OSM's construction of this mandate is fundamentally flawed and illegal.

However, even if the proposed rule were implemented in strict adherence to its language, it fails to establish standards that will truly ensure minimal impacts.

First, the proposed rule establishes no hard and fast thresholds for the environmental impacts associated with mountaintop removal mining. For example, OSM could have identified some concrete and objective limits on surface coal mining and waste disposal activities, such as a restriction on the size or number of valley fills at any one mine. Such a requirement, although inadequate in itself to satisfy SMCRA's environmental protection mandates, would at least provide some absolute indication of what "minimizing impacts" means, as opposed to the purely relative set of requirements in OSM's proposed rule. OSM has failed to provide even this basic level of protection, and opted instead for a proposal that would allow the generation of any amount of excess spoil necessary to extract the coal at a given mine site.²⁵

Additionally, even the purely relativistic approach to "minimizing impacts" that the proposed rule adopts will not ensure in each instance that environmental effects are as limited as possible.²⁶ For example, OSM's proposed rule would require a description of all alternatives "considered" for dealing with excess spoil, but would provide no objectively meaningful or enforceable set of requirements for how comprehensive and searching such an alternatives analysis must be or what specific alternatives must be considered. The rule also would not establish any minimum set of requirements (of any kind) that identify what alternative will be minimally acceptable under different circumstances. Instead, OSM has left the identification of acceptable alternatives entirely open-ended, subject to a case-by-case application of the hopelessly vague provisions of the proposed rule.²⁷

²⁵ The rule establishes a laughable "standard" restricting the volume of excess spoil that may be disposed of in valley fills to that "need to accommodate the anticipated cumulative volume of excess spoil that the operation will generate." See 72 Fed. Reg. 48890, 48903. So, in effect, OSM's restriction is no restriction at all – except perhaps a restriction on importing material for valley fills or generating additional excess spoil that is not necessary in connection with the mining operation.

²⁶ In fact, it is likely that, at best, the impact "minimization" element of OSM's rule is entirely worthless and redundant, even if its problems weren't compounded by being vague and subjective. As noted below in the discussion of the Clean Water Act, the requirement to consider alternatives to discharging pollutants (including "fill"), and to minimize what cannot be avoided, is *already* a requirement of Clean Water Act permits relevant to valley fills and waste impoundments. 40 C.F.R. § 230.10(a). Further, the OSM notes in the preamble that since 1999 it has worked with the states of Kentucky, Virginia and West Virginia and the federal OSM regulators in Tennessee to develop enhanced guidance to address the problems of "excess spoil generation" and alternatives to placing spoil into streams." 72 Fed. Reg. at 48897. Even by the OSM's own rosey descriptions, these new "requirements" in the proposed rule serve only to "reinforce the basis for those policies" already adopted and apply them nationwide, *id.*, another almost meaningful "improvement" when the vast majority of the harm is occurring in those four states.

²⁷ In this regard, the proposed rule would require only that an applicant "consider impacts to both terrestrial and aquatic ecosystems," consider alternatives that "vary with respect to the number, size, location, and configuration of proposed fills," and take into consideration "the quality of the receiving waters." 72 Fed. Reg. 48890, 48893. Nothing about this requirement will ensure that a full or complete range of alternatives is considered, or, more importantly, that the alternative that would have the *least possible environmental impact* is even among the alternatives on the table. Nor does OSM call out specific types of alternatives that must be a part of this analysis. Once alternatives have been identified, OSM specifies several types of impacts that must be evaluated, and then requires that to the "extent possible" the applicant select the alternative that would have the "least overall adverse environmental impact." *Id.*

Nothing about the proposed rule ensures that the most protective types of alternatives are actually considered, let alone prioritized to ensure that they are adopted wherever feasible. For example, while OSM's proposed requires, with some caveats, that an applicant "must locate fills on the most moderately sloping and naturally stable areas available," the proposed rule does not require that *all options* for managing excess spoil that would not involve the discharge of such material into intermittent or perennial streams must be exercised before any such material may be placed in a valley fill containing such waters. Similarly, and with respect to every type of potential impact, the proposed rule fails to establish any hard requirements for avoiding environmental harm.²⁸

Finally, to add insult to injury, OSM's proposed rule would water down the 100 foot buffer zone requirement in even those instances where it would still (ostensibly) apply – to surface coal mining activities other than those in the four categories completely exempted. Specifically, OSM proposes to allow the regulatory authority to approve "a lesser buffer, or the use of a technique that does not involve the maintenance of any buffer," upon a showing by the permit applicant that an alternative technique would "constitute best technology currently available." 72 Fed. Reg. at 48902. Although OSM suggests that such alternatives would only be approved where the alternative technique is "no less effective in meeting the requirement of the regulatory program" than a buffer zone, in light of regulatory authorities' poor record of enforcing the current Stream Buffer Zone rule, this "flexibility" is very likely to result in a *de facto* across the board repeal of the 100 foot buffer zone requirement. *Id.* OSM does not explain or discuss precisely what it means by "no less effective" (for example, whether this means that an alternative approach may not have *any* adverse effect that would not be experienced with a 100 foot buffer zone); does not explain or discuss what standard of proof or what type of technical assessment is required to show that an alternative measure is "no less effective"; and does not explain or discuss what ongoing implementation and enforcement measures are required to ensure that an alternative measure continues to perform at a level that is "no less effective" than the maintenance of a buffer zone.

In addition, OSM proposes to eliminate the requirement that stream diversions may be authorized only where they will not adversely affect water quantity and quality, or other environmental values, and proposes to water down the requirement that a diversion may be approved only where the stream will be reclaimed.²⁹ Appallingly, this across the board knee-capping of the Stream Buffer Zone rule is premised on a cynical fiction that OSM is attempting to make the rules more consistent with the Act – nothing could be further from the truth. In fact, even assuming *arguendo* that OSM's relativistic approach to "minimizing impacts" was permissible, nothing about OSM's proposal would require an applicant to even determine what the minimum possible impacts

However, this requirement loses what little meaning it has if the least-impact alternative is not even among the alternatives identified for consideration.

²⁸ For example, OSM recognizes that the volume of excess spoil generated "varies considerably depending upon the nature of the . . . mining method;" however, OSM's rule does not specifically identify and require the use of mining methods that produce lower volumes of excess spoil. See 73 Fed. Reg. 48890, 48891.

²⁹ See 72 Fed. Reg. at 48905-06.

really are. For example, the rule would not require a full alternatives analysis in connection with either the approval of mining activities within 100 feet of a perennial or intermittent stream or for the diversion of a stream.

Tellingly, OSM does not even suggest that a permit applicant must consider (let alone adopt) a buffer zone of more than 100 feet, or a buffer zone *plus* some additional measure(s), where such an approach is available and would be *more* protective. Were OSM's desire to minimize impacts genuine (even according to the biased framework OSM has chosen), it would necessarily require a full analysis of alternatives in connection with any mining activities in sufficient proximity to a stream to have *any* affect on that stream (including, of course, any stream diversion), and demand the selection of the comparatively *most protective* option, even if it were *more protective* than the current requirements. In fact, the starting point for any such alternatives analysis (even under OSM's warped rationale) would need to be the option of *avoiding all impacts* on streams; it then would require consideration of all other available options in descending order according to their level of protectiveness.³⁰ The fact that OSM does not even acknowledge the possibility of this outcome is a clear indication of OSM's true intent – to erode existing protections to the benefit of the mining industry and to the detriment of the environment. Indeed, what OSM attempts to do is establish a sliding scale that slides in only one direction – to make environmental protection *less* stringent.

Finally, given permitting authorities' appalling level of disregard of the existing stream buffer zone regulations, entrusting those authorities with additional "discretion to determine the best technology currently available," is a recipe for environmental disaster; especially in light of the irrational approach that OSM has proposed (that would not even ensure consideration of a full range of alternatives) and the failure to identify precise parameters for the exercise of that discretion.

To make matters worse, the proposed rule would eliminate the current requirement that activities subject to the Stream Buffer Zone rule cannot qualify for a waiver or variance unless it can be shown that the activities in question will not cause or contribute to the violation of applicable State or Federal water quality standards and that such activities will not adversely affect the water quantity or quality. *See* 72 Fed. Reg. 48890, 48902.³¹ Thus, OSM proposes to remove *every trace* of objectively identifiable standard or absolute requirement from buffer zone rule – transforming the permitting

³⁰ We do not endorse this approach, but merely observe that accepting *arguendo* OSM's erroneous construction of the Act, its chosen approach does not even meet its own test, and therefore is unlawful.

³¹ OSM claims that the "absolute nature of the 'will not adversely affect' language of existing 30 C.F.R. 816.57(a)(1) and 817.57(a)(1) is inconsistent with [section 515(b)(10 and (24) of SMCRA]." 72 Fed. Reg. at 48902. This assertion is simply not supportable; the fact that SMCRA uses the phrase "to the extent possible" and refers to "best technology currently available" does not foreclose OSM discretion to establish environmental backstops to prevent destructive and unsustainable mining practices where such practices involve unacceptably adverse environmental consequences. That is, OSM may establish (and has in the past) a threshold for "minimizing" environmental impacts that represents an objectively identifiable level of minimally acceptable protection reflecting best technology. Nothing in SMCRA suggests that OSM lacks authority to do this. Nor does anything in SMCRA indicate that a permitting authority may not deny approval of a mining project because, despite efforts to mitigate adverse impacts, the project would have unacceptably severe environmental impacts.

process into a formless and standardless paper shuffling exercise that has virtually no chance of meeting even the lackluster goals that OSM has identified.

In the final analysis, OSM's proposed rule is not only fundamentally at odds with SMCRA and incapable of minimizing the environmental impacts of surface mining, but is also too vague, too riddled with caveats, and too internally inconsistent to be meaningfully or effectively implemented or enforced. The proposed rule identifies no objective or minimum standards of any kind; and no generalizable set of criteria for approval of valley fills and coal waste impoundment emerge from its hodgepodge of provisions. In fact, the proposed rule appears fated, if not designed, to make objective implementation and enforcement impossible for *all* surface coal mining activities – those categorically exempted from the buffer, such as valley fills, and those that can be given variances under a case-by-case review. Considered alongside the other flaws in OSM's proposal, and the established tendency among SMCRA permitting authorities to require less than stringent adherence to applicable regulatory requirements, the proposed rule would virtually guarantee that Appalachia's forests, streams, aquatic ecosystems, wildlife habitat, and communities continue to be sacrificed at the altar of big coal. This is not what Congress had in mind when it adopted SMCRA, and it does not constitute a permissible implementation of the statutory directives therein.

B. The Proposed Rule Would Violate the Clean Water Act

OSM's proposed rule is also fundamentally at odds with the Clean Water Act ("CWA"), otherwise known as the Federal Water Pollution Control Act. SMCRA makes clear that the mining law is designed to preserve existing environmental protections applicable to mining sites, yet the proposed rule's re-interpretation of, and planned amendments to, the Stream Buffer Zone Rule seek to ratify practices that the CWA prohibits. Indeed, it is hard to believe that our nation's streams could, 35 years after the CWA's adoption, be used as repositories for the permanent disposal of mining waste.

SMCRA contains an express savings clause that states, "[n]othing in this chapter shall be construed as superseding, amending, modifying, or repealing . . . [t]he Federal Water Pollution Control Act . . . , the State laws enacted pursuant thereto, or other Federal laws relating to preservation of water quality," and also preserves "any rule or regulation promulgated thereunder. . . ." ³² Nevertheless, OSM's proposed rule would authorize the wholesale disposal of waste in streams, in the form of valley fills and impoundments, even though these activities are inconsistent with the rules implementing the CWA, which plainly applies to these surface mining activities, and with related State water pollution control requirements. The current dredge and fill guidelines, promulgated under Section 404 of the CWA, make clear that it would be impossible to reasonably permit valley fills and impoundments. ³³

³² 30 U.S.C.A. § 1292(a).

³³ We vigorously dispute the propriety of the Corps' 2002 decision to classify as "fill material" virtually any "material placed in waters of the United States where the material has the effect of . . . [r]eplacing any portion of a water of the United States with dry land; or . . . [c]hanging the bottom elevation of any portion of a water of the United States." 67 Fed. Reg. 31,129 (May 9, 2002); see *Southeast Alaska Conservation*

First, the Section 404 guidelines generally provide that “no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.”³⁴ OSM might argue that the present proposal is in harmony with that requirement, as it provides that the permit applicant must “[i]dentify a reasonable range of alternative disposal methods and alternative locations” and “[t]o the extent possible, select the alternative with the least overall adverse environmental impact. . . .”³⁵ However, it is hard to see this provision as likely to lead to a serious consideration by the agency of non-water disposal sites, given OSM’s claim that the disposal activities regulated by the proposed rule “inherently involve placement of fill material in waters of the United States.”³⁶ But an objective and fair reading of the 404 requirements, when compared to OSM’s interpretation of its rules regarding alternatives and adverse effects, demonstrates that the latter is inconsistent with the former.

Second, the section 404 guidelines ordinarily prohibit discharges which “cause or contribute to significant degradation of the waters of the United States,” which could include “[s]ignificantly adverse effects” on: “human health or welfare”; “life stages of aquatic life and other wildlife dependent on aquatic ecosystems”; “aquatic ecosystem diversity, productivity, and stability”; or “recreational, aesthetic, and economic values.”³⁷ It is hard to imagine an activity that more significantly degrades water bodies than the mining waste disposal practices OSM’s proposed rule would authorize. Indeed, as Judge Haden explained in his 1999 *Bragg v. Robertson* ruling:

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

Council v. U.S. Army Corps of Engineers, 486 F.3d 638, 651 n. 12 (9th Cir. 2007) (dicta) (“The *amici* brief of 14 members of Congress argues persuasively that the adoption of these regulations by the Corps and EPA violates the purposes and plain language of the Clean Water Act by allowing waste material to be dumped into lakes, rivers, and other waters of the United States.”).

³⁴ 40 C.F.R. § 230.10(a). The Corps’ regulations governing general permitting state that “consideration of alternatives in § 230.10(a) are not *directly* applicable to General permits,” 40 C.F.R. § 230.7(b)(1) (emphasis added), but that does not mean that these disposal operations can properly be permitted under general permits either without first examining non-water disposal options. For one, general permits are supposed to be reserved for activities that have minimal adverse effects on the environment, 33 U.S.C. § 1344(e)(1), a pre-condition that these enormous disposal projects cannot satisfy when conducted in waters of the United States. Moreover, even under the nationwide permit for surface mining activities, the district engineer must evaluate, when deciding whether an activity has more than minimal impacts and what mitigation may be needed, whether “[t]he activity [is] designed and constructed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable at the project site (i.e., on site).” 72 Fed. Reg. 11,092, 11,193 (Mar. 12, 2007) (General Condition 20).

³⁵ 72 Fed. Reg. at 48,918 (proposed 30 C.F.R. §§ 780.25(d)(1)(A) & (C)) (waste impoundments and refuse piles); *id.* at 48,919 (proposed 30 C.F.R. §§ 780.35(a)(3)(i) & (iii)) (similar requirements for excess spoil disposal).

³⁶ 72 Fed. Reg. at 48,892.

³⁷ 40 C.F.R. §§ 230.10(c)(1)-(4).

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.³⁸

Moreover, these effects are not ameliorated by mitigation projects that are required as part of the permitting of these mining disposal operations. As OSM acknowledges, “[a] natural stream channel is a complex system which is difficult to re-create,” so that “the state of the art in creating smaller headwater streams onsite has not reached the level of reproducible success. . . .”³⁹ Similarly, OSM admits that “[a]ttempts to reestablish the functions of the headwater streams on the groin ditches on the sides of fills have achieved little success to date.”⁴⁰ Therefore, OSM’s proposed rule that would permit hundreds of miles of irreplaceable streams to be destroyed cannot be consistent with the provisions of the Clean Water Act.

Third, section 404 permits must ensure compliance with state water quality standards, and there is significant evidence that the activities at issue in this proposal violate such standards. The guidelines prohibit any discharge which, among other things, “[c]auses or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard. . . .”⁴¹ Yet the present proposal would encourage the use of waters of the United States as mining waste dumps, notwithstanding the general prohibition on state water quality standards authorizing such activities.⁴² To take West Virginia as an example, state water quality standards reflect this prohibition. The state code provides that “[w]aste assimilation and transport are not recognized as designated uses.”⁴³ It also states that “[n]o . . . industrial wastes or other wastes present in any of the waters of the state shall cause therein or materially contribute to” various conditions, including “[d]istinctly visible . . . settleable solids”,⁴⁴ “[d]eposits or sludge banks on the bottom”,⁴⁵ “[m]aterials in concentrations which are harmful, hazardous or toxic to man, animal or aquatic life”,⁴⁶ and “[a]ny other condition . . . which adversely alters the integrity of the waters of the State,” which would include “significant adverse impact to the chemical, physical, hydrologic, or biological components of aquatic ecosystems. . . .”⁴⁷

³⁸ *Bragg v. Robertson*, 72 F.Supp.2d 642, 661-62 (S.D. W.Va. 1999), *vacated on other grounds*, 248 F.3d 275 (4th Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002) (emphasis added).

³⁹ OSM, Draft Environmental Impact Statement: Excess Spoil Minimization – Stream Buffer Zones Proposed Rule, OSM-EIS-34, at 111 (April 2007).

⁴⁰ *Id.* at 117.

⁴¹ 40 C.F.R. § 230.10(b)(1).

⁴² See 40 C.F.R. § 131.10(a) (“In no case shall a State adopt waste transport or waste assimilation as a designated use for any waters of the United States.”).

⁴³ W.Va. Code of State Rules § 47-2-6.1.a.

⁴⁴ *Id.* § 47-2-3.2.a.

⁴⁵ *Id.* § 47-2-3.2.b.

⁴⁶ *Id.* § 47-2-3.2.e.

⁴⁷ *Id.* § 47-2-3.2.i.

State water quality standards for selenium may also be violated by coal waste disposal activities. According to OSM’s DEIS, a 2002 EPA “report indicate[d] that excess spoil fills associated with coal mining increase concentrations of several chemical parameters in streams.”⁴⁸ In particular, “[s]elenium concentrations from the ‘filled’ category sites were found to exceed [ambient water quality criteria] for selenium at most (13 of 15) sites in this category. No other site categories had violations of the selenium limit.”⁴⁹ A closer look at the underlying study – performed in West Virginia at several sites downstream from mined and un-mined areas – is telling:

There are 66 violations of the stream criterion. All values above the stream criterion of 5 ug/L are at Filled sites and many of those are several times greater than the detection limit of 3 ug/L. The elevated values of selenium appear to be closely related to MTM/VF mining activity.⁵⁰

The direct relationship between the mining disposal activities at issue in the proposed rule and exceedances of applicable state water quality standards cannot be ignored.

C. The Proposed Rule’s Language Regarding “Waters of the United States” Will Cause Unnecessary Confusion

One of the most perplexing aspects of the proposed rule is OSM’s plan to change the bodies of water to which stream buffer zone provisions apply. If adopted, the rule would no longer apply to all perennial and intermittent streams, but instead would cover “waters of the United States.” Although this is touted as providing “increased environmental protection and consistency with the Clean Water Act,”⁵¹ less protection and more confusion seems inevitable if the proposal is adopted.

To begin with, this proposal appears to be a solution in search of a problem. OSM acknowledges: “we do not anticipate that this change in terminology will result in a significant expansion in the applicability of our rules because the vast majority of waters that may be affected by surface coal mining and reclamation operations are perennial and intermittent streams.”⁵² By itself, this fact is not a reason to reject the proposal; we agree with the idea that a wide range of water bodies ought to be protected from mining-related damage, as SMCRA contains provisions that seek to protect water bodies beyond streams.⁵³ However, in view of the other problems discussed below with linking the

⁴⁸ OSM DEIS at 118.

⁴⁹ *Id.*

⁵⁰ Gary Bryant & Scott McPhilliamy, USEPA Region III, and Hope Childers, Signal Corporation, Final Report, A Survey of the Water Quality of Streams in the Primary Region of Mountaintop/Valley Fill Coal Mining: October 1999 to January 2001, at 75 (Apr. 8, 2002). Consistent with these findings, as of 2004, West Virginia had identified 10 water bodies as impaired by selenium. *See* U.S. EPA, Total Maximum Daily Loads: List of Impaired Waters, available at http://iaspub.epa.gov/tmdl/waters_list.control?state=WV&impairment=SELENIUM&p_cycle=2004 (result of query for West Virginia and selenium). We incorporate these materials by reference here.

⁵¹ 72 Fed. Reg. at 48,900.

⁵² *Id.*

⁵³ *See, e.g.*, 30 U.S.C. § 1265(b)(10) (requiring operations to “minimize the disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water

Stream Buffer Zone rule to “waters of the United States” under the Clean Water Act, the likely incremental benefit of including other water bodies does not justify the change.

If there is one thing that conservation groups, the federal government, and the coal mining companies probably can agree on in this rulemaking, it is that it is not clear today what aquatic features qualify as “waters of the United States,” at least without further factual inquiry. As a result of two Supreme Court decisions and unhelpful “guidance” by EPA and the Army Corps of Engineers, some have come to the conclusion that even certain streams may not qualify as “waters of the United States” protected by the Clean Water Act’s core programs.

Most recently, in *Rapanos v. United States*,⁵⁴ the Supreme Court had no majority opinion but split 4-1-4 in its analysis of the Clean Water Act and the extent to which certain features could permissibly be called “waters of the United States.” Although the Court did not invalidate the agency’s existing rules, the various opinions suggested three different tests for determining whether waters remain under the scope of the Clean Water Act. The four-justice plurality would have significantly limited the law’s scope. Focusing on a 1954 dictionary definition of “waters” more than the language, purpose, or history of the Clean Water Act, the plurality concluded that:

[T]he phrase ‘the waters of the United States’ includes only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] ... oceans, rivers, [and] lakes.’ . . . The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.⁵⁵

The opinion also would require wetlands to have a “continuous surface connection” to such waters to be protected.⁵⁶

Justice Kennedy would require the agencies to show a physical, biological, or chemical linkage – a “significant nexus” – between a water body and an actually navigable one in order for it to be protected.⁵⁷ For tributaries, Justice Kennedy said that, applied consistently, existing rules “may well provide a reasonable measure of whether specific minor tributaries bear a significant nexus with other regulated waters to constitute ‘navigable waters’ under the Act.”⁵⁸ For wetlands adjacent to non-navigable

in surface and ground water systems both during and after surface coal mining operations and during reclamation”).

⁵⁴ 126 S.Ct. 2208 (2006).

⁵⁵ *Id.* at 2225 (plurality opinion).

⁵⁶ *Id.* at 2226. The opinion even seems to indicate that the plurality might believe that water bodies must be interstate (or connected to interstate waters) in order to be “waters of the United States.” *Id.* at 2220 n.3 (stating that the phrase “of the United States” traditionally “excludes intrastate waters, whether navigable or not” and suggesting that the CWA’s use of the phrase “retains some of its traditional meaning”).

⁵⁷ *Id.* at 2248 (Kennedy, J., concurring).

⁵⁸ *Id.* at 2249.

tributaries, Justice Kennedy suggested that a “significant nexus” could be shown in different ways, depending on the kind of water to which the wetland is adjacent.⁵⁹

In dissent, four justices wrote that the existing agency regulations reflect a reasonable interpretation of the statutory phrase “waters of the United States.”⁶⁰ While rejecting the rationale of both of the other opinions, these four justices stated that, since they would protect all of the waters that the plurality’s test would protect and all of the ones Justice Kennedy’s test would protect, the agencies should continue to protect water bodies if they qualify under either test.⁶¹

For the water bodies historically protected by the Stream Buffer Rule – namely, perennial and intermittent streams – the fallout from *Rapanos* could lead these water bodies to lose Clean Water Act protections. Although EPA and the Corps have taken the position that perennial streams that are tributaries to traditionally navigable waters are categorically protected by the Clean Water Act,⁶² as a result of adding the plurality opinion in *Rapanos* to the dissent, a federal appeals court recently held that non-navigable tributaries are not necessarily protected, but instead must be shown to have a “significant nexus” under Justice Kennedy’s opinion in *Rapanos*. The U.S. Court of Appeals for the Eleventh Circuit reversed a criminal conviction under the Clean Water Act, holding that the government did not put on evidence of a “significant nexus” at trial, and that a new trial was needed, notwithstanding the fact that the case involved the pollution of Avondale Creek, a continuously-flowing Alabama stream that is a tributary to the Black Warrior River.⁶³ Likewise, intermittent streams may lose protection unless a “significant nexus” to some traditionally navigable water body can be shown.⁶⁴

In light of the various interpretations that have followed *Rapanos*, there is the potential that individual perennial and intermittent streams may need to depend on case-by-case factual analysis to qualify as “waters of the United States” under the Clean Water

⁵⁹ *Id.* (“When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries.”).

⁶⁰ *Id.* at 2255 (Stevens, J., dissenting).

⁶¹ *Id.* at 2265 & n. 14.

⁶² U.S. EPA & Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States* & *Carabell v. United States*, at 1 (June 5, 2007) (hereinafter “*Rapanos* Guidance”), available at: <http://www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf>. We incorporate this document by reference here.

⁶³ *U.S. v. Robison*, 2007 WL 3087419 (11th Cir. Oct. 24, 2007).

⁶⁴ *Rapanos* Guidance at 1 (summarizing principles; stating that agencies “will decide jurisdiction over [three categories of] waters based on a fact-specific analysis to determine whether they have a significant nexus with a traditional navigable water,” including “[n]on-navigable tributaries that are not relatively permanent”). *But see United States v. Chevron Pipeline Co.*, 437 F.Supp.2d 605, 613-14 (N.D. Tex., 2006) (holding that “[b]ecause Justice Kennedy failed to elaborate on the ‘significant nexus’ required, this Court will look to the prior reasoning in this circuit,” and concluding that oil spill into unnamed tributary and Ennis Creek, an intermittent stream near Snyder, Texas (described as intermittent), did not reach a protected water).

Act.⁶⁵ Were the Stream Buffer Zone rule to be amended by the proposed rule to apply to “waters of the United States,” then, we have significant concern that it may be applied to only a subset of perennial and intermittent streams, whereas it historically has applied to all such streams. Effectively, implementing this change may lead to the proposed rule protecting fewer streams than the Stream Buffer Zone rule has in the past, exacerbating the other rollbacks detailed in these comments.

Finally, we do not believe that it is feasible, as OSM suggests, to resolve these jurisdictional issues by having “the SMCRA regulatory authority . . . consult and coordinate with the Corps of Engineers in situations in which there is a question as to whether waters within or adjacent to the proposed permit area are waters of the United States under the Clean Water Act.”⁶⁶ As the OSM may or not be aware, it is the EPA, not the Corps, that has the responsibility for determining which water bodies are “waters of the United States” for purposes of the 404 program and the entire Clean Water Act.⁶⁷ The EPA, working in conjunction with the Corps, is just beginning to make many jurisdictional and non-jurisdictional determinations using *Rapanos* as a guide, and the preliminary indications are that the process is very time-consuming and, more importantly, may be so arbitrary that it is leading to waters being declared unprotected when they in fact should remain jurisdictional. Here is what one commenter, a Corps employee, had to say about the agencies’ *Rapanos* guidance:

Rapanos guidance has more than quadrupled the time it takes to verify a delineation or make a jurisdictional call. Furthermore, many verifications are for streams that did not used to require a verification of jurisdiction. * * * Once the information is found and documented, the end result is now more of a guess than it was before. * * * But when considering whether the wetlands and waters themselves possess a significant nexus, no one knows. We might as well come into work, sleep for 8 hours, flip a coin, pick heads or tails, and base our significant nexus evaluation off of that. The time spent and results from both methods would likely be very similar.⁶⁸

⁶⁵ We wish to stress that we do not accept that this is the proper interpretation of *Rapanos*. As noted above, Justice Kennedy’s concerns about potential overbreadth of the Corps’ treatment of adjacent wetlands did not extend to its treatment of tributaries. On the contrary, Justice Kennedy indicated that the Corps could properly assert categorical jurisdiction over tributaries by applying its regulations consistently. 126 S. Ct. at 2249 (noting that the Corps asserted jurisdiction over tributaries having an “ordinary high water mark” under 33 C.F.R. § 328.3(e), Justice Kennedy concluded: “Assuming [this standard] is subject to reasonably consistent application, it may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute ‘navigable waters’ under the Act.”) (citation omitted). Indeed, both *Rapanos* and the predecessor *SWANCC* case involved water bodies in categories other than tributaries (“[w]etlands adjacent to waters” and “other waters,” respectively). Accordingly, we believe that tributaries should continue to be afforded categorical protection. However, that has not been how some have read *Rapanos*, and the practical impact of those interpretations is that some streams have been placed at risk.

⁶⁶ 72 Fed. Reg. at 48,900.

⁶⁷ See, e.g. Administrative Authority of Construe § 404 of the Federal Water Pollution Control Act (“Civiletti Memorandum”), 43 Opp. Att’y. Gen. (1979).

⁶⁸ Matt R. Rabbe, Comment on Draft EPA/Army Guidance Regarding CWA Jurisdiction after *Rapanos*, Docket ID No. EPA-HQ-OW-2007-0282 (Nov. 9, 2007).

It is bad enough that EPA's and the Corps' applications of the Clean Water Act's programs have become caught up in this mess. It would be a serious mistake for OSM, by adopting its proposed rule, to import this uncertainty into the Stream Buffer Zone rule.

IV. IV. THE DEIS VIOLATES NEPA AND CANNOT SUPPORT ADOPTION OF OSM'S PROPOSED RULE

In its DEIS for the proposed rule, OSM considers only five alternatives in detail: a "no action" alternative, in which OSM would retain the current Stream Buffer Zone rule and continue to interpret it as allowing disposal of coal mining waste directly into streams and other mining activities within the Stream Buffer Zone; the proposed rule, which explicitly allows such activities; and three other alternatives that are nothing more than partial versions of the proposed rule.⁶⁹ Each alternative considered by OSM allows substantial disposal of coal mining wastes into streams. OSM does not consider any more environmentally protective alternatives, the most obvious of which is enforcement of the current Stream Buffer Zone rule as written. Moreover, in drawing comparisons only among a narrow range of alternatives, OSM fails to address the devastating environmental impacts that would be permitted if the proposed rule were adopted.

The National Environmental Policy Act ("NEPA")⁷⁰ requires that an EIS describe (1) the "environmental impact of the proposed action," (2) any "adverse environmental effects which cannot be avoided should the proposal be implemented," (3) any "alternatives to the proposed action," and (4) any "irreversible or irretrievable commitment of resources which would be involved in the proposed action should it be implemented."⁷¹ NEPA implementing regulations make clear that an EIS must "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision maker and the public," and "rigorously explore and objectively evaluate *all reasonable alternatives*."⁷²

The Council on Environmental Quality's NEPA implementing regulations explain that this alternatives analysis is "the heart of the environmental impact statement."⁷³ In order to conduct an adequate alternatives analysis, the agency must base it on a complete discussion of the effects of the proposed action and its alternatives, including "ecological

⁶⁹ OSM DEIS at 17-18.

⁷⁰ 42 U.S.C. § 4321 *et seq.* NOTE: This section addresses only a few of the many ways in which this DEIS violates NEPA statutory and regulatory requirements; it is not meant to be comprehensive. Further, to the extent that this DEIS relies on or incorporates by reference previous NEPA documents, such as the October 2005 Mountaintop Mining/Valley Fills in Appalachia Final Programmatic Environmental Impact Statement prepared by the U.S. Environmental Protection Agency, these comments do not attempt to address comprehensively all of the NEPA violations in those documents.

⁷¹ *Id.* § 4332(2)(C).

⁷² 40 C.F.R. § 1502.14 (emphasis added).

⁷³ *Id.*; *see also* NRDC v. Callaway, 524 F.2d 79, 92 (2d Cir. 1975) (describing the "detailed and careful analysis" of alternatives as "absolutely essential to the NEPA process" and "the linchpin of the entire impact statement").

(such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect or cumulative.”⁷⁴

In this case, OSM’s proposed replacement of the Stream Buffer Zone rule is accompanied by a reinterpretation of the current rule that conforms it to OSM’s failure to enforce the rule as written.⁷⁵ The plain language of the current Stream Buffer Zone rule, however, prevents OSM and state agencies from issuing permits for coal mining activities within 100 feet of streams, unless the permitting agency specifically confirms that the activities will not violate water quality standards and will not adversely affect water quantity, quality, or other stream resources.⁷⁶ OSM’s proposed rule, by comparison, would specifically allow the dumping of coal mining spoil directly into streams that ought to be protected by federal and state authorities under a correct interpretation of the current rule. But by reinterpreting the current rule as already allowing such dumping, OSM eliminates most of the difference between the two rules and reduces the DEIS’ “no action” alternative to a pale shadow of the proposed rule.

OSM concedes that retaining the current Stream Buffer Zone rule, and enforcing it in a manner consistent with its plain language, would be a more environmentally protective alternative.⁷⁷ Nevertheless, OSM refuses to analyze the environmental benefits of this alternative – along with other alternatives that would be more environmentally protective⁷⁸ – on the grounds that any such alternative is prohibited by SMCRA and is insufficiently supported by scientific evidence.

These arguments are meritless. First, as explained above, the current Stream Buffer Zone rule, correctly interpreted, not only is substantially more protective of the environment than the proposed rule, but it also appropriately balances mining interests and is therefore consistent with SMCRA. Disingenuously, OSM fails to discuss full enforcement of the current Stream Buffer Zone rule as a stand-alone alternative, which it

⁷⁴ *Id.* § 1508.8. Direct effects “are caused by the action and occur at the same time and place.” *Id.* § 1508.8(a). Indirect effects “are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” *Id.* § 1508.8(b). A cumulative effect is “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” *Id.* § 1508.7; *see also Grand Canyon Trust v. FAA*, 290 F.3d 399, 345 (D.C. Cir. 2002) (setting forth NEPA requirements for cumulative impact analysis).

⁷⁵ *See* 72 Fed. Reg. at 48895-96. This interpretation is in *direct* conflict with positions taken by OSM, EPA and the U.S. Army Corps of Engineer in other contexts, and with a plain language interpretation of the regulation by a federal court. *See supra* note 18 and accompanying text.

⁷⁶ 30 C.F.R. § 816.57.

⁷⁷ OSM DEIS at 20 (citing *Bragg v. Robertson*, 72 F. Supp. 2d 642 (S.D.W.Va. 1999), *vacated on other grounds*, 248 F.3d 275 (4th Cir. 2002)).

⁷⁸ *Id.* at 19-26. The other more environmentally protective alternatives that OSM identifies but refuses to consider include an “absolute” Stream Buffer Zone rule (Alternative 6), added prohibitions on excess spoil fills in certain kinds of streams or in all valleys (Alternatives 8-11), restrictions on excess spoil fills based on fill size, watershed size, percentage of streams that would be impacted, or length of stream that would be impacted (Alternatives 12-15), or expansion of the buffer zone in the current rule to some number greater than 100 feet (Alternative 16). *Id.*

should be – either as the true “no action alternative” or just as it is, along with other options. Rather, OSM conflates its discussion of this alternative with its discussion of Alternative 6, a so-called “absolute” rule.⁷⁹ In this way, OSM frames the issue in all-or-nothing terms, falsely suggesting that enforcement of the current rule according to its plain meaning (or with certain additional restrictions on spoil disposal, as in the other alternatives that OSM refuses to consider) would necessarily require the cessation of almost all current mining projects and thus be contrary to SMCRA.⁸⁰

Second, OSM’s refusal to consider more environmentally protective alternatives based on the agency’s judgment about their scientific merit is inconsistent with well-established NEPA principles. Although, in a NEPA analysis, an agency judgment that there is “inconclusive evidence may serve as justification for not *choosing* an alternative,” such an agency judgment “cannot serve as a justification for entirely failing to ‘rigorously explore and objectively evaluate *all* reasonable alternatives.’”⁸¹

Accordingly, OSM’s failure to consider *any* alternatives that are more environmentally protective than the status quo is a blatant violation of NEPA. The only alternatives that OSM considered all would allow valley fills to be dumped in any stream without any limitation on the amount of stream or the types of stream that could be buried and destroyed, just a vague, case-by-case determination that the overall fill be minimized, “to the extent practical.” To comply with NEPA, and to be responsive and fair to the people of Appalachia, OSM must consider some alternatives that restrict filling of streams, including at the very least the enforcement of the existing Stream Buffer Zone rule as written.⁸² The failure to consider an appropriate range of viable alternatives, including alternatives with materially lighter environmental impacts, renders a NEPA analysis inadequate.⁸³ Moreover, the greater the scope and expected impacts of the proposed action, the greater the range of alternatives that must be considered.⁸⁴

By asserting that the proposed rule would not worsen the environmental status quo and refusing to consider any more environmentally protective alternatives, OSM also

⁷⁹ *Id.* at 20.

⁸⁰ *See id.*

⁸¹ *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 110 (D.D.C. 2003) (quoting 40 C.F.R. § 1502.14).

⁸² *See, e.g., N.W. Env'tl. Defense Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1538 (9th Cir. 1997) (noting that NEPA requires agencies to set forth “alternatives necessary to permit a reasoned choice”) (internal quotation marks omitted). In an EIS, an agency must “[d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits,” 40 C.F.R. § 1502.14(b). An agency “will not be permitted to narrow the objective of its action artificially and thereby circumvent the requirement that relevant alternatives be considered.” *City of N.Y. v. U.S. Dep't of Transp.*, 715 F.2d 732, 743 (2d Cir. 1983) (citations omitted); *see also Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 666, 669 (7th Cir. 1997) (cautioning that an agency may not frustrate Congress’s will by restricting its analysis to alternatives that serve the particular goals of a project’s beneficiary).

⁸³ *See, e.g., Resources Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1307 (9th Cir. 2003); *State of California v. Block*, 690 F.2d 753, 767 (9th Cir. 1982) (holding that an inadequate range of alternatives was considered where the end result of all eight alternatives evaluated would be the development of a substantial portion of wilderness).

⁸⁴ *See, e.g., Alaska Wilderness Recreation and Tourism v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995).

ignores the NEPA requirement to take a “hard look” at the significant adverse impacts of the proposed rule change, including the cumulative impacts that would result from allowing the current coal mining spoil disposal practices to continue unimpeded.⁸⁵ By discussing environmental impacts only in the narrow, relative terms of its limited range of alternatives, OSM ignores the overwhelming evidence in the public record that current practices, and specifically valley fills associated with mountaintop removal mining, have devastating impacts on streams, forests, and their associated ecosystems, as well as wildlife and human communities.⁸⁶ The DEIS itself notes that mountaintop removal mining resulted in the destruction of over 700 miles of Appalachian streams between 1985 and 2001 and an additional 535 miles between 2001 and 2005.⁸⁷ If this rate of destruction continues, the proposed rule change would allow more than 1,000 miles of streams to be destroyed each decade into the future. Scientific evidence within the DEIS further confirms that these valley fills cause significant degradation to ecologically valuable headwater streams.⁸⁸ The DEIS’ analysis of the cumulative impacts of these practices is completely non-existent.⁸⁹

⁸⁵ See OSM DEIS at 121 (“OSM would not anticipate a major shift in on-the-ground consequences from any of the alternatives.”); *id.* at 124 (proposed rule “would cause no discernable changes” in direct impacts on streams); see also *id.* at 126-27, 128, 131, 133, 135, 142.

⁸⁶ The public record is far too extensive to attempt to summarize it here. We hereby incorporate by reference the following documents (and the materials cited therein) and request that they be considered part of the public record for this rulemaking: Comments submitted by Earthjustice, *et al.* on the Draft Programmatic Environmental Impact Statement on mountaintop removal coal mining and associated valley fills in Appalachia, published at 68 Fed. Reg. 32,487 (May 30, 2003) (comments submitted Jan. 6, 2004); Comments of West Virginia Highlands Conservancy and Ohio Valley Environmental Coalition on the Draft Programmatic Environmental Impact Statement on Mountaintop Removal Mining/Valley Fills in Appalachia (Jan. 5, 2004); Comments on behalf of the Natural Resources Defense Council, *et al.* on the proposal by the U.S. Army Corps of Engineers to reissue and modify nationwide permits for activities involving discharge of dredged or fill material under § 404 of the Clean Water Act 66 Fed. Reg. 42,070 (Aug. 9, 2001) (comments submitted Oct. 9, 2001).

⁸⁷ OSM DEIS at 117; see also Programmatic Environmental Impact Statement on Mountaintop Mining/Valley Fills in Appalachia (PEIS), 70 Fed. Reg. 62,102.

⁸⁸ Headwater streams “serve a number of important ecological functions including . . . improving water quality.” OSM DEIS at 109. When streams are buried by valley fills, “those segments no longer exist and all stream functions are lost.” *Id.* at 117. This degradation must be deemed significant, especially because there is no evidence showing that buried streams can be recreated successfully elsewhere on mined sites. The DEIS states that “the state of the art in creating smaller headwater streams has not reached the level of reproducible success,” *id.* at 111, and “[a]ttempts to reestablish the functions of headwater streams on the groin ditches on the sides of fills have achieved little success to date,” *id.* at 117. Consequently, these stream losses must be considered permanent and irreversible.

⁸⁹ See OSM DEIS at 145 (asserting that the proposed rule is only a “narrow revision” of existing regulations and failing to provide any meaningful analysis of cumulative impacts of current practices). Even more egregiously, OSM asserts that it need not analyze cumulative impacts in this DEIS because it previously analyzed cumulative impacts in programmatic EISes that were prepared in 1979 and 1983. *Id.* OSM provides no authority for this outrageous proposition that it may, consistent with NEPA, rely on cumulative impact analyses that are 28 and 24 years old, respectively. Indeed, this is contrary to NEPA guidance issued by the Council on Environmental Quality, which provides that an EIS should be supplemented if it is more than five years old. Council on Environmental Quality, NEPA’s Forty Most Asked Questions, No. 32, 46 Fed. Reg. 18,026 (Mar. 16, 1981). OSM further asserts, again without providing any supporting authority, that it need not analyze cumulative impacts in this DEIS because certain cumulative impacts are considered by SMCRA permitting authorities in reviewing individual permit applications. *Id.* Neither of these proffered excuses justifies OSM’s failure to conduct the NEPA-required cumulative impact analysis.

The analysis of environmental impacts and alternatives in the DEIS is based on the false premise that the proposed rule change is fully consistent with SMCRA and the CWA, and that OSM lacks the authority or justification to consider more environmentally protective alternatives. Hiding behind this falsehood, OSM has failed to conduct the straightforward, informed, and transparent review of the environmental impacts of its proposed action that NEPA requires.

V. OSM SHOULD PRESERVE AND ENFORCE THE EXISTING STREAM BUFFER ZONE RULE AND REJECT ITS PROPOSED RULE

A. The Current Stream Buffer Zone Rule is Consistent with SMCRA and the Clean Water Act

The current Stream Buffer Zone rule, finalized in 1983 by the Reagan administration, is one of the most important components of current SMCRA law – and the most important for protecting streams. Contrary to OSM’s assertions, the existing Stream Buffer Zone rule strikes an appropriate balance between the interests of resource extraction and environmental protection. As discussed above, OSM’s approach in the proposed rule would not strike a balance at all, but rather would give primacy to the interests of the mining industry at the expense of the environment, giving industry the trump card in every instance. Moreover, the existing Stream Buffer Zone rule gives actual meaning to the provisions of SMCRA that specifically demand substantive environmental protections, including the protection of water quantity and quality, the preservation of watercourses, and restrictions on the placement of spoil.

Moreover, the current Stream Buffer Zone rule is consistent with the Clean Water Act – indeed it specifically precludes activities that would cause or contribute to violations of the Clean Water Act. To the extent that OSM asserts that there is some tension between the existing Stream Buffer Zone rule and the Clean Water Act, because the rule would preclude activities that the Clean Water Act might permit, this difference is without significance. The Supreme Court has held that 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 inherent conflict exists in this instance, because it is possible to comply with both statutes by engaging in only those activities authorized by both statutes.⁹⁰

B. OSM Has Reversed Its Position on the Stream Buffer Zone rule Without Adequate Justification

In each of the previous rulemakings establishing permanent Stream Buffer Zone requirements (including the rulemaking for the 1983 rule that is currently in place), OSM has manifestly recognized the value of intermittent and perennial streams and the appropriateness of strong protections for these waterways. Indeed, the framework

⁹⁰ As discussed herein, OSM’s proposed rule, on the other hand, it significantly at odds with both the Clean Water Act and SMCRA.

currently in place, which restricts mining activities that would impair or destroy these important natural resources, reflects a responsible interpretation and implementation of SMCRA's mandate. Now, however, OSM has completely reversed its position and proposed a rule that would wholly exempt valley fills, waste impoundments and other stream incursions from the buffer zone requirements. 72 Fed. Reg. 48890, 48907; DEIS, p. S-2. When an agency reverses its position, its burden of justification increases. In such cases, "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). As detailed above, OSM has failed to rationally justify its complete about-face. It has failed to adequately demonstrate that its proposed reversal is consistent with its statutory authority; it has failed to show that the approach that it proposes will accomplish even the limited objectives that it identifies; and, in the context of completing its environmental assessment, it has failed to even consider the alternative of enforcing the current Stream Buffer Zone rule as written. Moreover, the proposed rule that OSM has put forward is at odds with important requirements of the Clean Water Act.

In light of these significant shortcomings, the only justification OSM offers for its proposed rule is that mountaintop removal coal mining, including valley fills and coal waste impoundments, in most cases cannot be accomplished without destroying mountain streams. Therefore, in OSM's view, the preservation of mountain streams and waterways must always give way in every instance to the interests of coal extraction. In order to ensure that environmental protection never stands in the way of mining interests, OSM reasons, the most destructive practices associated with surface coal mining must be exempted from the very requirements intended to protect important natural resources from the adverse impacts of surface mining activities. This incongruent justification simply cannot carry the burden of OSM's regulatory about-face.⁹¹ As a result, the rule cannot stand as proposed and should be withdrawn.

Instead of adopting its proposed rule, OSM should retain and enforce the existing Stream Buffer Zone rule, which recognizes and protects the environmental values of intermittent and perennial streams and strikes an appropriate balance between the interests of coal extraction and the interests of environmental protection.

⁹¹ Nor do OSM's professed desire to simplify the regulatory requirements, or its assertion that the proposed rule is more consistent with SMCRA's language, constitute compelling justifications for adoption of the proposed rule. The fact is, OSM has utterly failed to reconcile its prior rulemakings and subsequent interpretations of the existing Stream Buffer Zone rule with the substance of the current proposed rule, or to explain specifically the basis for the existing rules and why the justification is no longer appropriate.

VI. CONCLUSION

For the reasons above, OSM's proposal to effectively repeal the Stream Buffer Zone rule is inappropriate, unwise, and illegal. We urge OSM to withdraw the proposed rule and instead preserve and strictly enforce the existing Stream Buffer Zone rule.

Sincerely,

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