

**COAL RIVER MOUNTAIN WATCH + KENTUCKY WATERWAYS ALLIANCE  
OHIO VALLEY ENVIRONMENTAL COALITION + SIERRA CLUB  
WATERKEEPER ALLIANCE + WEST VIRGINIA HIGHLANDS CONSERVANCY  
APPALACHIAN CENTER FOR THE ECONOMY & THE ENVIRONMENT  
EARTHJUSTICE + PUBLIC JUSTICE**

November 3, 2008

**Via Federal Express and U.S. Mail**

Administrator Stephen Johnson  
U.S. EPA Headquarters  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Mail Code: 6102T  
Washington, DC 20460

**Re: Request for Comment Regarding EPA's Concurrence Determination Regarding Proposed Rule on Excess Spoil, Coal Mine Waste, and Buffers for Waters of the United States, 72 Fed. Reg. 48,890-48,926 (Aug. 24, 2007), and Related Final Environmental Impact Statement, OSM-EIS-34 (Oct. 17, 2008)**

Dear Administrator Johnson:

On behalf of the Coal River Mountain Watch, Kentucky Waterways Alliance, Ohio Valley Environmental Coalition, Sierra Club, Waterkeeper Alliance, and West Virginia Highlands Conservancy, we are writing to express our grave concern about the above-referenced rule change proposed by the Office of Surface Mining ("OSM"), and the related Final Environmental Impact Statement, and to request that EPA take all necessary steps before issuing any decision regarding this rule.

We believe that the proposed rule is flatly inconsistent with numerous federal laws that shape EPA's mission and constrain its action. Congress charged EPA with administering the Clean Water Act, the aim of which is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a), (d). According to the agency's website, "EPA leads the nation's environmental science, research, education and assessment efforts. The mission of the Environmental Protection Agency is to protect human health and the environment."

Under § 501 of the Surface Mining Control and Regulatory Act ("SMCRA"), OSM shall not promulgate regulations for surface coal mining and reclamation operations until it has obtained the written concurrence of the Administrator of the EPA with respect to potential conflicts with air or water quality standards promulgated under the Clean Water Act or Clean Air Act. 30 U.S.C. § 1251(b). EPA has consistently stated that the current stream buffer rule is necessary to protect water quality and prevent further violation of water quality standards. Given that the proposed rule will sanction and allow such violations to continue and increase, EPA cannot lawfully concur in the proposed rule or the Final EIS.

Thus far EPA’s proposed concurrence determination regarding OSM’s proposed rule has not been submitted for public comment. So that interested members of the public may have an opportunity to comment in regard to EPA’s proposed binding concurrence decision regarding this rule, EPA must disclose the standard the agency intends to apply to guide its concurrence determination, its proposed basis for any such concurrence, and its proposed conclusion, and provide an adequate comment period. *See* 40 C.F.R. § 25.2(a)(8); 5 U.S.C. § 553; 33 U.S.C. § 1251(e); 42 U.S.C. § 7609(a); *see also, e.g.*, 40 C.F.R. § 131.5 (governing EPA review of state-proposed water quality standards).

In addition, EPA has responsibility to review the adequacy of OSM’s Final EIS. Under the Clean Air Act (“CAA”) EPA is required to review and comment in writing on the environmental impact of any matter relating to duties and responsibilities granted to EPA that are contained in “proposed regulations published by any department or agency of the Federal Government.” 42 U.S.C. § 7609(a). “In the event the Administrator determines that any such ... action ... or regulation is unsatisfactory from the standpoint of public health or welfare or environmental quality, the matter shall be referred to the Council on Environmental Quality.” *Id.* § 7609(b).

Given the serious environmental impacts that have already been shown to result from valley fills and the complete failure of the Final EIS to analyze these harms, review cumulative impacts, or study any reasonable alternatives to limit valley fills and other waste impoundments – most notably, the enforcement of the existing law as written – EPA must find that the proposed rule change will harm public health and welfare and environmental quality and, pursuant to its duty under CAA § 7609(a), refer the matter to CEQ.

**A. The Proposed Changes to the Stream Buffer Rule Eviscerate Stream Existing Protections.**

Presently, OSM regulations prohibit disturbance of land by surface mining activities within 100 feet of a perennial stream or an intermittent stream unless the regulatory authority makes a finding that no such activities will cause or contribute to violation of water quality standards, water quantity and quality, or other environmental resources of the stream. 30 C.F.R. § 816.57(a)(1).

In 1979, EPA concurred in OSM’s determination that a 100-foot buffer to guard streams from nearby surface mining and reclamation activities was “required to protect streams from the adverse effects of sedimentation and from gross disturbance of stream channels.” OSM Permanent Program Final Preamble – Final Rule, 44 Fed. Reg. 14,902, 14,908, 15,176 (Mar. 13, 1979) (emphasis added). Accordingly, OSM adopted the current stream buffer rule that prohibits mining and reclamation activities within 100 feet of streams if such activities will cause or contribute to the violation of applicable State or Federal water quality standards, or have an adverse effect on water quality, water quantity, or other environmental resources of the stream. 30 C.F.R. § 816.57(a)(1).

In 1983, OSM revised the buffer zone rule to state that it would be applied only to perennial and intermittent streams, thereby allowing mining activities that might affect small water resources such as springs, seeps, and ephemeral streams. 48 Fed. Reg. 30,312 (June 30, 1983). At the same time, OSM “recognize[d] that intermittent and perennial streams generally have environmental-resource values worthy of protection under” SMCRA’s environmental protection performance standards, 30 U.S.C. § 1265(b). *Id.* at 30,313. Never did the agencies suggest that there were or would be any other exceptions to the 100-foot buffer restriction, particularly one that would swallow the rule.

Now OSM proposes to eviscerate the long-standing protection against mining activities within the 100-foot stream buffer zone by exempting most mountaintop removal and other surface mining activities that fill streams from its scope. The proposed rule does so by erasing two key prerequisites for conducting such activities within the buffer zone – the adverse effects test and water quality-based limits against mining within the buffer – and instead proposes to ask that coal mine operators merely endeavor to “minimize” harm to the extent possible.

**B. EPA is Responsible Under SMCRA for Minimizing Any Risk of Conflict Between OSM Rules and the Clean Water Act.**

The text of SMCRA makes plain that OSM cannot proceed with a rule unless the EPA provides its concurrence. Section 501 of SMCRA states: Regulations covering a permanent regulatory procedure for surface coal mining and reclamation operations “shall not be promulgated and published by the Secretary until he has ... obtained the written concurrence of the Administrator of the Environmental Protection Agency with respect to those regulations promulgated under [SMCRA] which relate to air or water quality standards promulgated under the authority of the Federal Water Pollution Control Act, as amended [33 U.S.C. 1251 *et seq.*]; and the Clean Air Act, as amended [42 U.S.C. 7401 *et seq.*].” 30 U.S.C. §§ 1251(a)(B) & 1251(b).

Congress enacted the EPA concurrence requirement in SMCRA precisely because it was concerned that OSM might attempt to promulgate SMCRA regulations that conflicted with air or water quality standards, and Congress believed that the EPA concurrence requirement was necessary to prevent environmental harm due to such a conflict. The 1977 House Report contains a section entitled “Relation of H.R. 2 to Other Laws” that states, in relevant part:

The committee felt that the requirement for the Secretary of the Interior to obtain the concurrence of the Administrator of the Environmental Protection Agency is necessary to insure that any environmental requirement of this act is consistent with the environmental programs and authorities of EPA and, in particular, those programs authorized under the Clean Air Act, as amended, and the Federal Water Pollution Control Act, as amended. Specifically, the Secretary must obtain the Administrator’s concurrence in the coal surface mining regulations and requirements under the environmental protection and State program approval provisions of the bill, as well as the final approval of any State program. The EPA has been directed by the Congress to insure the environmental well-being of the country. EPA has established water quality standards, air quality standards, and implementation and compliance requirements for the coal mining and processing

industry, and issues permits to the industry to insure appropriate pollution abatement and environmental protection. The committee concluded that because of the likeness of EPA's abatement programs and the procedures, standards, and other requirements of this bill, it is imperative that maximum coordination be required and that any risk of duplication or conflict be minimized.

H. R. REP. NO. 218, 95th Cong., 1st Sess. 142 (1977). Thus, EPA cannot concur with the proposed rule if it is inconsistent with or presents "any risk" of conflict with Clean Water Act requirements.

The savings clause included in SMCRA provides that where it conflicts with the CWA the CWA governs, stating that:

Nothing in this chapter shall be construed as superseding, amending, modifying, or repealing ... the National Environmental Policy Act of 1969 ..., or any of the following Acts or with any rule or regulation promulgated thereunder, including, but not limited to – ... (3) the Federal Water Pollution Control Act (79 Stat. 903), as amended ..., the State laws enacted pursuant thereto, or other Federal laws relating to preservation of water quality....

30 U.S.C. § 1292(a). Therefore, as OSM recognized in promulgating its 1979 regulations, even where technology-based requirements apply under SMCRA, the Clean Water Act might require further protection against violations of water quality standards adopted under that Act. 44 Fed. Reg. at 14,927. In enacting SMCRA, Congress determined that EPA's concurrence is needed to ensure that clean water protections are met in addition to SMCRA requirements because the CWA remains supreme over SMCRA and its goals. Senator Muskie aptly described the need for EPA's concurrence procedure to address potential gaps between the two statutes:

[Under SMCRA] the best technology available ought to be used to control pollution. My only point in discussing this measure is that it should not be viewed as the final possible requirement. It is entirely possible, under the Federal Water Pollution Control Act, that even with the use of the best available technology, the discharge from the mining activity might be such that the mining activity could not be done in compliance with that Act. In that case, even the best available technology would not be sufficient to allow the mining to go forward.

H.R. REP. NO. 218, at 142 (quoting 121 CONG. REC. 6201 (Mar. 12, 1975)).

We are concerned by a recent news report that EPA intends to issue a concurrence based on some suggestion that it could stop the regulation from causing environmental harm later through review of the application of the rule on a case-by-case basis. *See* INSIDE EPA, Vol. 29 No. 42. Although a news report can in no way substitute for an agency's submission of its proposed decision for notice and comment and we remain in the dark as to what EPA proposes to do, any such approach would be unlawful and would not provide the requisite review of and determination regarding the rule at this stage in OSM's promulgation process. It is not clear how EPA could police OSM at a later stage, after its regulation would have taken legal effect. In

addition to the legal flaws of this approach, it is not clear that EPA has the staff or resources to monitor and review every SMCRA permit in a timely manner, and EPA has not proposed a procedure for doing so.

Moreover, as stated above, Congress' intention in enacting the EPA concurrence requirement was to avoid inconsistency and minimize any risk of conflict. EPA cannot carry out this responsibility after the rule has taken effect. Neither SMCRA nor the CWA allows for EPA to delay its responsibility to issue a determination now regarding OSM's proposed regulation. To issue a concurrence without directly addressing conflicts with the Clean Water Act would constitute an unlawful derogation of EPA's concurrence responsibility.

**C. EPA's Concurrence Determination is Governed by its Responsibility to Administer the Clean Water Act.**

**1. The CWA defines the extent of EPA's authority to issue a concurrence.**

The EPA has the duty to administer the CWA so as to achieve the objectives of the Act, which include: restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters; eliminating the discharge of pollutants into the navigable waters; establishing water quality standards in order to protect the propagation of fish, shellfish, and wildlife and providing for recreation in and on the waters; and developing and implementing technology necessary to control pollution and eliminate the discharge of pollutants into waters. *See* 33 U.S.C. § 1251(a), (d); *see also, e.g.*, 40 C.F.R. § 131.5 (governing EPA review of state-proposed water quality standards). Constrained by the statutory and regulatory framework of the CWA from which it receives its authority to act, EPA has no discretion to approve a SMCRA regulation that would create permanent, irreparable harm to streams regardless of OSM's policy reasons for proposing the regulation.

**2. Factors EPA must consider in assessing OSM's request for concurrence**

The proposed rule change directly clashes with the water quality protections that have been adopted pursuant to the Clean Water Act, and that include no room for a company to violate them because it determines it is more economical or practical to do so than to comply. It would allow continued and increased use of valley fills in sensitive headwater streams, which cause and contribute to violations of water quality standards (both at individual valley fills and cumulatively with other such fills in the affected watersheds), and allow total destruction of existing stream uses underneath buried streams. These and other factors that guide EPA's statutory and regulatory authority, *see, e.g.*, 33 U.S.C. § 1251, would need to be discussed, considered, and applied before EPA could issue a final concurrence approving OSM's proposed regulation. A brief, but not comprehensive review of two of these factors shows that EPA has no legal basis for concurring and that public review is needed to air EPA's proposed decision before it makes a substantial legal error resulting in significant environmental harm.

**Destruction of Beneficial Uses.** The proposed rule would allow mine operators to conduct mining operations and dump mine waste within the stream buffer zone as long as the operator claims that it will minimize harm to the stream. However, the stream and all its existing

and potential uses are entirely destroyed underneath the footprint of every valley fill. This clearly creates a conflict with water quality standards required by the Act to protect designated and existing stream uses. *See* 33 U.S.C. § 1313; 40 C.F.R. Part 131. Most waters of the U.S. are designated for numerous uses, some of the most sensitive of which include protecting aquatic life, supporting fish, shellfish, insects, and other wildlife. Human uses such as drinking water sources are also adversely affected.

In his 1999 ruling interpreting the existing stream buffer rule, Judge Haden, Chief Judge of the District Court for the Southern District of West Virginia, stated:

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

*Bragg v. Robertson*, 72 F. Supp. 2d 642, 661-62 (S.D. W. Va. 1999).

EPA, OSM, and the U.S. Army Corps of Engineers acknowledged the adverse impacts of filling intermittent and perennial streams during 2000-01 in litigation concerning the existing stream buffer rule. *See Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001).<sup>1</sup> In their brief in that appeal, EPA, OSM and the Corps agreed that “SMCRA’s stream buffer zone rule ... prohibits the burial of substantial portions of intermittent and perennial streams beneath excess mining spoil.” Brief for the Federal Appellants at 2, *Bragg v. W. Va. Coal Ass’n*, 248 F.3d 275 (4th Cir. 2001) (No. 99-2683). EPA and its fellow agencies went on to say that the “elimination of substantial intermittent or perennial stream segment [sic] necessarily causes adverse environmental effects, as it eliminates all aquatic life that inhabits those stream segments.” *Id.* Accordingly, EPA, OSM and the Corps agreed that “valley fills in intermittent or perennial streams may be authorized under the buffer zone rule only if the permitting agency finds that they will not adversely affect the environmental resources in the filled stream segments.” *Id.* (emphasis added).

The extent to which streams in Appalachia have already been buried by valley fills is astounding. In *OVEC v. U.S. Army Corps of Engineers*, Civil No. 3:05-0784 (S.D. W. Va.), expert analysis of GIS data showed that present and pending permits for surface mining operations and valley fills conservatively cover the following percentages of streams in these watersheds:

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<sup>1</sup> The district court’s ruling was overturned on jurisdictional grounds, but the substance of the ruling was not addressed by the court of appeals.

Watershed/Subwatershed	% total streams covered	% first order streams covered
Upper Guyandotte	7.4	9.5
Dingess Run	19.9	19.5
Coal River	12.0	14.5
Laurel Creek	28.0	37.3
Upper Kanawha	7.9	10.2
Cabin Creek–Headwaters	22.9	32.1

Expert Report of Douglas P. Pflugh, May 16, 2006, Summary p. 2, attached hereto as Ex. 1. In the headwaters of Spruce Fork in West Virginia, permits for surface mining operations and valley fills cover 35.5% of total stream length and an alarming 44% of first order stream length. FEIS, Spruce Mine No. 1, p. 2-180 (September 2006).<sup>2</sup>

**Violations of Downstream Water Quality Standards.** OSM’s past and ongoing failure to enforce the existing stream buffer rule has already resulted in substantial harm to aquatic values, including violations of water quality standards. Mountaintop removal mines and other large-scale surface mines in West Virginia provide a stark illustration of this. Presently, many of the streams located downstream of mined areas and associated valley fills are listed by the State of West Virginia on its Clean Water Act § 303(d) list of waters needing total maximum daily loads (TMDLs).<sup>3</sup> An in-depth monitoring study by EPA staff clearly shows that coal mining operations in these southern West Virginia watersheds are “strongly related to downstream biological impairment,” including diminished biodiversity that otherwise characterizes unmined Appalachian streams and pronounced adverse effects on stream chemistry. Gregory J. Pond *et al.*, *Downstream Effects of Mountaintop Coal Mining: Comparing Biological Conditions Using Family- and Genus-Level Macroinvertebrate Bioassessment Tools*, 27 J. N. AM. BENTHOL. SOC’Y, 717-37 (July 8, 2008). The study demonstrated that the following adverse aquatic impacts result from coal mining operations:

- Surface coal mines and associated valley fills eliminate certain sensitive macroinvertebrates at some sites. In particular, the authors found that “nearly all Ephemeroptera were eliminated from most medium- and high-disturbance sites.” *Id.* at 723 (emphasis added). The authors stated that this finding was of particular concern because:

Ephemeroptera are a major component of the macroinvertebrate assemblage and often account for 25 to 50% of total macroinvertebrate abundance in least-disturbed Central Appalachian streams sampled in the spring. Therefore, Ephemeroptera richness and composition metrics are appropriate indicators for bioassessments in this region. Our finding that entire orders of benthic organisms (e.g., Ephemeroptera) were nearly

<sup>2</sup> Available online at <http://www.lrh.usace.army.mil/permits/> (current as of Oct. 23, 2008).

<sup>3</sup> W. Va. Dep’t of Env’tl Prot., WV Section 303(d) List and Supplements, available at <http://www.epa.gov/reg3wapd/tmdl/303list.html#WV> (current as of Oct. 23, 2008).

eliminated in [mountaintop mining] streams is a cause for concern and is evidence that the aquatic life use is being impaired.

*Id.* at 724.

- Streams below surface coal mines exhibit shifts in macroinvertebrate community structure from “greater abundance of more sensitive genera present in unmined sites” to greater abundance of more pollution-tolerant genera at mined sites. *Id.* at 722, 728.

Coal mining valley fills have profound effects on stream chemistry. In particular,

- “The water quality downstream of the [coal mining valley fills] can have elevated levels of SO<sub>4</sub>, Ca, Mg, hardness, Fe, Mn, Se, alkalinity, K, acidity, and NO<sub>3</sub>/NO<sub>2</sub>.” *Id.* at 718 (citing Bryant *et al.*, 2002).
- Shifts in abundance of certain macroinvertebrates were linked to elevated selenium (related to EPT and Ephemeroptera generic richness) and dissolved iron (related to % Chironomidae). *Id.* at 723.
- “[M]ined sites averaged nearly 700 mg/L SO<sub>4</sub>, whereas unmined sites averaged only 16 mg/L.” *Id.* at 725.

The study noted that at sites observed over time, the above effects were not alleviated by reclamation.

- “3 revisits to sites downstream of reclaimed [mountaintop mine / valley fills] revealed little sign of biological recovery ... after 6 to 7 [years] whereas communities within the 3 unmined catchments remained relatively stable.” *Id.* at 730-31.

The authors concluded that “[t]he severity of the impairment rises to the level of violation of water quality standards (WQS) when states use biological data to interpret narrative standards.” *Id.* at 724 (emphasis added).<sup>4</sup> Given the adverse effects that valley fills clearly inflict upon existing uses and water quality standards protected under the Clean Water Act, EPA cannot lawfully concur in the proposed rule.

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<sup>4</sup> See, e.g. W. VA. CODE R. 47-2-3.2i (2008) (“no significant adverse impact to the chemical, physical, hydrologic, or biological components of aquatic ecosystems shall be allowed”); 401 KY. ADMIN. REGS. 5:031 §§ 2(1)(d), 4(1)(f) (2008) (“Surface waters shall not be aesthetically or otherwise degraded by substances that: ... [i]njure, are chronically or acutely toxic to or produce adverse physiological or behavioral responses in humans, animals, fish and other aquatic life...” and “[t]otal dissolved solids or specific conductance shall not be changed to the extent that the indigenous aquatic community is adversely affected.”); TENN. COMP. R. & REGS. 1200-4-3-.003(3)(g) (2008) (“The waters shall not contain substances or a combination of substances ... which, by way of either direct exposure or indirect exposure through food chains, may cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction), physical deformations, or restrict or impair growth in fish or aquatic life or their offspring.”).

#### **D. EPA's Responsibilities under CAA to Review the Environmental Impact of the Proposed Rule**

EPA is required to “review and comment in writing on the environmental impact of any matter relating to duties and responsibilities granted pursuant to [the Clean Air Act] or other provisions of the authority of the Administrator, contained in ... proposed regulations published by any department or agency of the Federal Government. Such written comment shall be made public at the conclusion of any such review.” 42 U.S.C. § 7609(a). Additionally, “[i]n the event the Administrator determines that any such ... action ... or regulation is unsatisfactory from the standpoint of public health or welfare or environmental quality, he shall publish his determination and the matter shall be referred to the Council on Environmental Quality.” *Id.* § 7609(b).

Given the serious environmental impacts that have already been shown to result from valley fills as discussed in the previous section, EPA must find that the proposed rule change will harm public health and welfare and environmental quality and refer the matter to CEQ.

On October 17, 2008, OSM released a Final Environmental Impact Statement (“Final EIS”) on the proposed rule change. The EIS starts with the pretext that the proposed rule change is needed to ensure that mine operations are “designed to minimize, to the extent possible, the volume of excess spoil that the operation will generate.” Final EIS at S-1. Then, OSM reinterprets the existing stream buffer rule as allowing fills in intermittent and perennial streams, thereby failing to assess the environmental benefits of actually enforcing the existing rule as OSM interpreted it in 2000. The Final EIS reaches the dubious conclusion that the weak requirement to minimize harm to the extent possible will have “slightly positive” environmental effects. Final EIS at IV-141 to 159. No evidence or studies are offered to support this claim, and any EPA decision to concur with that claim would require such evidence. On the contrary, because OSM is proposing to exempt the bulk of mountaintop removal and surface mining activities that fill streams from the stream buffer zone rule, this rule is likely to increase harm.

OSM acknowledges that the existing buffer rule “manifest[s] an assumption that maintenance of an undisturbed 100-foot buffer around perennial and intermittent streams is” the best control technology available (BCTA). 72 Fed. Reg. at 48,902. OSM’s 180-degree reversal of that assumption is not founded on fact or science, but on the unsupported claim that buffer zones are impractical or impossible for the mountaintop and surface mining industries in a specific region. *See, e.g.*, Final EIS at II-17. Given that Congress expressly contemplated that not all mining can go forward in compliance with the Clean Water Act, this is not a valid justification for the rule change.

##### **1. Inadequate consideration of alternatives**

OSM considered only five alternatives in detail, each of which allows mining and the disposal of mining waste in the stream buffer zone. *Id.* at II-18 to 23. In assessing the “no action alternative” which would retain the existing rules and take no action to further minimize harm from coal mining activities, OSM acknowledges that under the existing rules “[t]he regulatory authority can authorize activities within a stream buffer zone only upon finding that those

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.” *Id.* at II-18. However, the EIS candidly acknowledges that OSM does not enforce the existing stream buffer rule, stating:

[N]either OSM nor the State SMCRA regulatory authorities have applied or interpreted the stream buffer zone rule as an absolute prohibition on the construction of excess spoil fills, refuse piles, slurry impoundments, stream crossing structures, or sedimentation ponds in streams when those activities inherently must be conducted in the stream, as is the case in many situations involving coal operations in steep slope terrain.

*Id.* at II-19. Thus, OSM substitutes its current unlawful practice of ignoring the stream buffer rule as the “no action” alternative, reversing its 2000 interpretation of the same rule in federal court litigation. The only reasonable “no action” alternative would interpret the rule as applying to the footprint of valley fills, as OSM determined was legally required in 2000, and assume a *status quo* in which the appropriate agencies are actually enforcing it, and prohibiting fills that will cause or contribute to violation of water quality standards, water quantity and quality, or other environmental resources of the stream. 30 C.F.R. § 816.57(a)(1).

OSM also failed to seriously consider the full range of alternatives as required by 40 C.F.R. § 1502.14. Critically, the Final EIS considers no alternatives that address cumulative impacts, such as alternatives that impose stronger restrictions on the placement of mining overburden in the stream buffer zone. We submitted detailed comments to OSM regarding its failure to consider alternatives in the Draft EIS. Those comments are attached hereto as Ex. 2 and Ex. 3, and incorporated by reference in their entirety.

## **2. Failure to address cumulative impacts**

The cumulative impacts section of the EIS is little more than a disjointed listing of activities and regulations by OSM, other agencies, and private parties. It lists numerous impacts that affect the environment at large, then fails to synthesize these impacts or, for some, explain why they are relevant to the proposed rule. Moreover, because it begins with the false assumption that the proposed rule creates “slightly positive” environmental impacts, the entire analysis is skewed. *See* Final EIS at IV-170 to 178.

The EIS avoids addressing the likely impacts of the proposed rule on surface water flow by pointing to the minimization requirement. OSM acknowledges that the practices involved in surface coal mining cause changes in runoff and that these changes “may cause scouring and erosion of unprotected stream channels and can contribute to flooding.” *See id.* at IV-184. But OSM brushes off this concern, stating “[t]he SMCRA program requires a surface coal mining permit applicant to consider these changes and design the mine to minimize these impacts.” *Id.* It is not sufficient as matter of law that the proposed rule would require “minimization” of site-specific impacts, since that requirement applies only to individual projects and does not require minimization of the cumulative loss of headwater streams from numerous valley fills in a watershed. Moreover, OSM offers no evidence that that the minimization requirement is

adequate in practice to prevent significant cumulative impacts. For example, OSM provides no information about what standard of “minimization” operators would be required to meet.

The discussion of cumulative impacts on headwater streams is appallingly inadequate, and fails to comport with the NEPA regulations that guide analysis of cumulative impacts. *See* 40 C.F.R. §§ 1508.7; 1508.8; 1508.27(b)(7). OSM lists a number of relevant impacts, but then stops short of conducting a serious scientific analysis of their environmental consequences. OSM lists the following impacts:

- Of approximately 59,000 total stream miles within central Appalachian coal fields, about 367 miles are expected to be permanently impacted by permits issued between October 2001 and June 2005;
- 1,208 miles in that region were estimated to be directly impacted by mining from 1992 to 2002;
- 724 miles were directly impacted between 1985 and 2001;
- If continued at the current rate for 10 years, 4.1% of streams in Appalachia would be directly impacted, including an additional 724 miles of headwater stream buried by 2018.

*Id.* at III-133 to 136. However, OSM blithely sweeps these impacts aside without exploring them on a scale that is either analytically useful or scientifically defensible. In particular, the EIS does not even attempt to analyze the magnitude of headwater streams lost in relation to the individual watersheds where the most intensive mining and filling occurs. No attempt is made to offer evidence that such tremendous stream losses are insignificant.

Finally, the proposed rule and Final EIS fail to adequately consider potential harm to endangered or threatened species or habitat that may be allowed by OSM’s regulation. *See* Final EIS at IV-160 to 163 and Appx. C-88, 89, 109. Consequently, EPA must initiate formal consultation pursuant to § 7 of the Endangered Species Act, 16 U.S.C. § 1536(a)(2). Until EPA has undertaken such consultation, EPA cannot determine that the regulation is satisfactory from the standpoint of environmental quality.

## **Conclusion**

For all of these reasons, both the proposed rule and the Final EIS are deficient as a matter of law. We urge EPA to (1) deny concurrence with the proposed stream buffer zone rule change because it will allow continued and increased violations of water quality standards under the CWA; (2) issue a determination that the Final EIS is deficient in the foregoing respects and refer the matter to CEQ; (3) initiate formal consultation with the Secretary of Interior regarding potential harm to threatened or endangered species or habitat; and (4) provide the legally

required opportunity to review and comment on EPA's proposed decision regarding the OSM regulation and its basis for the decision under each statute set forth above.

Sincerely,

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Sierra Club, Ohio Valley Environmental Coalition,  
Waterkeeper Alliance, Coal River Mountain Watch,  
and Kentucky Waterways Alliance*

## **Attachments**

1. Expert Report of Douglas P. Pflugh in OVEC v. Bulen, May 16, 2006, excerpt, Summary of Findings.
2. Nov. 20, 2007 comments of WVHC, Sierra Club, Earthjustice, OVEC, CRMW, and Waterkeeper Alliance Comments on Comments on Proposed Rule and Draft EIS on Excess Spoil Minimization/Stream Buffer Zones, 72 Fed. Reg. 48678, 48890 (August 24, 2007), RIN 1029-AC04, Docket Nos. OSM-2007-0007 and OSM-2007-0008; OSM-EIS-34.
3. Nov. 21, 2007 comments of 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, and Western Organization of Resource Councils Proposed Rule and Draft EIS on Excess Spoil Minimization/Stream Buffer Zones, 72 Fed. Reg. 48678, 48890 (August 24, 2007), RIN 1029-AC04, Docket No. OSM-2007-0007.