

**American Rivers • Clean Water Action • Defenders of Wildlife  
Earthjustice • Earthworks • Friends of the Earth • National Audubon Society  
National Environmental Trust • National Parks Conservation Association  
National Wildlife Federation • Natural Resources Defense Council  
Sierra Club • The Wilderness Society • World Wildlife Fund  
Union of Concerned Scientists • U.S. Public Interest Research Group**

April 7, 2004

Gale Norton, Secretary  
United States Department of the Interior  
1849 C Street, N.W.  
Washington, D.C. 20240

Jeffrey Jarrett, Director  
Office of Surface Mining  
1951 Constitution Avenue, N.W.  
Washington, D.C. 20240

Via U.S. Mail and Electronic Mail: [osmrules@osmre.gov](mailto:osmrules@osmre.gov)

Re: Comments on the Proposed Revision to the Stream Buffer Zone rule,  
69 Fed. Reg. 1036 (January 7, 2004)

Dear Secretary Norton and Director Jarrett:

These comments are submitted by the National Wildlife Federation, Earthjustice, Natural Resources Defense Council, Friends of the Earth, Union of Concerned Scientists, The Wilderness Society, Sierra Club, World Wildlife Fund, Defenders of Wildlife, National Audubon Society, National Environmental Trust, National Parks Conservation Association, American Rivers, Clean Water Action, Earthworks and U.S. Public Interest Research Group in opposition to the Department of the Interior's Office of Surface Mining's (OSM) proposal to rewrite key portions of the Surface Coal Mining regulations, most notably the Stream Buffer Zone rule. We hereby incorporate by reference all documents cited in these comments.

This rulemaking proposes to eliminate the Stream Buffer Zone rule, an explicit and long-standing legal prohibition against coal mining operations that occur within 100 feet of perennial and intermittent streams that would have any adverse effect on water quality or quantity. The proposed rule would replace the existing Stream Buffer Zone rule with a much less environmentally protective and much less clear regulation that would allow mining disturbances – including dumping or “placement” of coal mining wastes – directly into, on top of, and around streams without any buffer at all, as long as the adverse effects are “minimized” by the coal companies “to the extent possible.” In short, the new rulemaking would eliminate the “buffer” in the Stream Buffer Zone rule. Our organizations strongly oppose this illegal and unwarranted proposal. We urge the Department of the Interior and its Office of Surface Mining to withdraw this rulemaking from any further consideration.

For the last 20 years, the legal requirement that state and federal coal mining permits maintain a 100-foot safety zone around valuable water resources to protect them from degradation and destruction has been routinely ignored. Failure to enforce this law has led to widespread

environmental damage in Appalachia, as recently established by the scientific and technical studies that accompanied the May 2003 draft Environmental Impact Statement (DEIS) on mountaintop removal coal mining and valley fills.

Now the chronic failure of the Department of the Interior and its Office of Surface Mining to discharge its duty to enforce existing law is being used by the agency as one of several excuses to repeal the Stream Buffer Zone rule altogether. This is contrary to the exhaustive evidence supplied in the DEIS studies that make an overwhelming case for enforcing the existing Stream Buffer Zone rule, and for strengthening it and other environmental limits on mountaintop removal coal mining and valley fills.

The DEIS's scientific and technical studies documented in thousands of pages (and millions of federal taxpayer dollars) the enormous damage to Appalachia's natural resources already caused by mountaintop removal mining and valley fills over the last two decades, including the pollution and destruction of over 1200 miles of streams.<sup>1</sup> The DEIS studies also confirmed that, without the adoption of additional environmental restrictions on this extreme form of strip mining, over 1000 miles of streams will be added to this toll in the next decade, destroying what experts believe is one of the most diverse temperate headwater freshwater regions in the world.<sup>2</sup> According to the DEIS's Cumulative Impact Study, without more stringent environmental protections, mountaintop removal coal mining and valley fills will not "only" destroy over 1000 additional miles of streams in Appalachia, but in the process 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.

It is difficult, at best, to fathom how the Department of the Interior and its Office of Surface Mining could respond to these and other findings in the DEIS studies about the truly alarming extent of the extreme, largely irreversible damage being caused by mountaintop removal coal mining by proposing to gut the surface mining law's most important stream protection rule.

As discussed below, your proposal to repeal the Stream Buffer Zone rule is arbitrary and inconsistent with the language and purpose of the federal Surface Mining Control and Reclamation Act and violates not only that law but also the Clean Water Act and National Environmental Policy Act. The proposal misrepresents its true purpose and unavoidable consequences in a cynical, dishonest public relations ploy that characterizes the new rule as "clarifying" existing law and "minimizing" environmental harm when the opposite is true – the proposal would replace clear standards with vague language that is difficult to enforce, and this much weaker standard would accelerate, not diminish, damage to irreplaceable natural resources

---

<sup>1</sup> Additional relevant information about the extensive environmental and social damage caused by mountaintop removal mining and the burial of streams under valley fills, and comments on the failure of the DEIS to consider or propose any legally or substantively acceptable alternative means for limiting that damage, can be found in the January 6, 2004 comments of twelve national and regional environmental groups on the DEIS (attached).

<sup>2</sup> For example, scientists at World Wildlife Fund determined that the headwaters of the rivers and streams of the Tennessee/Cumberland Basin region (an area where mountaintop removal mining takes place) are arguably the most diverse temperate headwater freshwater ecoregions in the world and rival places like the Amazon Basin and the Mekong Delta in their aquatic diversity. Abell, R., D.M. Olson, E. Dinerstein, P. Hurley, J.T. Diggs, W. Eichbaum, S. Walters, W. Wettengel, T. Allnutt, C. Loucks, and P. Hedao, "Freshwater Ecoregions of North America: A Conservation Assessment," Island Press, Washington, DC, USA, 2000.

as well as the human and wildlife populations that depend on these resources for their survival. Further, the OSM misstates the plain language and original purpose of the Stream Buffer Zone rule and ignores its own and other federal agencies' past interpretations of that law in order to further obscure the truth.

The Department of the Interior and Office of Surface Mining should withdraw this rulemaking proposal and, instead of weakening the law, start enforcing the existing Stream Buffer Zone rule.<sup>3</sup>

### **I. The Federal Strip Mining Law Was Enacted By Congress to Reduce the Environmental Impacts of Coal Mining on the Environment, Including Protection of Streams and Other Natural Watercourses**

The proposed rulemaking to replace and effectively repeal the existing Stream Buffer Zone rule would completely overturn the balance struck between coal mining and environmental protection when the federal strip mining law was passed in 1977. When it adopted the Surface Mining Control and Reclamation Act (SMCRA), Congress clearly directed the federal agencies to strictly limit and, in some cases, eliminate environmental damage to natural watercourses and other natural resources caused by strip mining and other coal mining practices, including mountaintop removal coal mining and valley fills.

Indeed, the very first stated purpose of SMCRA is “to protect society and the environment from the adverse effects of surface coal mining operations.”<sup>4</sup> As the House Report on the 1977 bill explained:

A basic tenet underlying this legislation is the principle that environmental protection and reclamation, at a minimum meeting the standards in this act, are a coequal objective with that of producing coal. The continued selection of mining techniques by engineers whose primary objectives are the most efficient removal of the overburden and transport of the coal is not sufficient to be fully responsive to the purposes and intent of the act.<sup>5</sup>

It is clear from the law that environmental concerns were no longer to take a “back seat” to coal production, even when mining goals such as efficiency might be affected. The purpose of the law was not to maintain the *status quo*, but to change it in recognition of the widespread damage being caused by coal mining. When it enacted SMCRA, Congress found that surface coal mining operations “result in disturbances of surface areas . . . by polluting the water, destroying

---

<sup>3</sup> In addition to its content, the timing of this new rulemaking proposal to repeal the existing Stream Buffer Zone rule is disturbing and perplexing. The proposal came just one day after the public comment period was to have closed on the government’s DEIS on mountaintop removal mining and valley fills. We have been told by the OSM that the overwhelming majority of the over 80,000 members of the public who commented on the DEIS by January 6, 2004 favored increased environmental safeguards for mountaintop removal mining and opposed suggestions that environmental regulations – such as the Stream Buffer Zone – be modified or weakened. Interior and OSM could not have even possibly considered these public comments when advancing this rule change, as it had already been filed at the Federal Register office on the day that the public review period on the DEIS officially closed.

<sup>4</sup> 30 U.S.C. § 1202(a).

<sup>5</sup> H. Rep. No. 218, p. 96 (emphasis added).

fish and wildlife habitats, by impairing natural beauty, . . . and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources.”<sup>6</sup>

In recognition of these environmental abuses caused by coal mining – and clearly with the purpose of preventing future damage – the environmental standards in SMCRA require that mining operations must “minimize the disturbances to the prevailing hydrologic balance at the mine-site” and “minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values.”<sup>7</sup> To meet these goals, Congress specified that, among other provisions, any disposal of coal mining waste must be “compatible with the natural drainage patterns and surroundings” of the environment.<sup>8</sup> Section 515(c)(4) of SMCRA provides that, in granting any surface mining permit that contains a mountaintop removal variance, “the regulatory authority shall require that . . . (D) no damage will be done to natural watercourses.”<sup>9</sup>

A. The Stream Buffer Zone Rule Was Adopted to Implement Congressional Intent to Strike a Balance Between Environmental Protection and Mining By Protecting Intermittent and Perennial Streams From Disturbance by Mining Activities

Consistent with SMCRA’s requirement that a balance be struck “between protection of the environment and . . . the Nation’s need for coal as an essential source of energy,”<sup>10</sup> the Stream Buffer Zone rule was adopted shortly after the passage of the statute to prevent the destruction of intermittent and perennial streams by mining activities, while allowing such activities to affect ephemeral streams and similar water bodies not protected within the buffer zone (although the water resources outside the buffer zone are subject to other environmental standards).<sup>11</sup> The history of the existing regulation amply demonstrates that OSM intended to create a clear rule defining which waters would be protected from mining activities within the buffer:

The final rule will require buffer zones within 100 feet of any intermittent or perennial stream regardless of the existence of a biological community, unless the regulatory authority grants the operator an exemption. . . . [T]he purposes of Section 515(b) of [SMCRA] will best be achieved by providing a buffer zone for those streams with more significant environmental-resource values. . . . It is impossible to conduct surface mining without disturbing a number of minor natural streams, including some of which contain biota. For this reason, surface coal mining operations will be permissible as long as environmental protection will be afforded to those streams with more significant environmental-resource value.<sup>12</sup>

---

<sup>6</sup> 30 U.S.C. § 1201(c).

<sup>7</sup> Id. at § 1265(b)(10), (24) (emphasis added).

<sup>8</sup> Id. at § 1265(b).

<sup>9</sup> Id. at § 1265(c)(4)(D) (emphasis added.) The Federal Register notice on the proposed rule states: “SMCRA in most cases requires the mining operation to minimize, rather than completely prevent, adverse environmental impacts.” 69 Fed. Reg. at 1043 (emphasis added). OSM’s proposed rule merely echoes the word “minimize” while ignoring and undercutting the substance of its meaning explicitly detailed in provisions such as the one that mandates a standard of no damage to streams and other natural watercourses.

<sup>10</sup> 30 U.S.C. § 1202(f).

<sup>11</sup> See 48 Fed. Reg. 30312 (June 30, 1983) at 30316.

<sup>12</sup> Id. at 30313 (emphasis added).

The rationale behind the final Stream Buffer Zone rule is also described in the Federal Register notice in 1982 when the current Stream Buffer Zone rule was proposed. The previous regulation had stated that the 100 foot buffer applied to any stream with a “biological community” that could be disturbed. In order to make the final regulation clearer to follow, the agency stated that:

This regulation has proven to be confusing to apply, and could be excessive, because many insignificant water sources in the East contain anthropods that are longer than 2 millimeters at some stage . . . . For this reason § 816.57(a) is proposed to be revised to require buffer zones for all intermittent streams, rather than streams with a specified biological community.<sup>13</sup>

The language describing the 1982 proposed rule and the final Stream Buffer Zone rule adopted in 1983 very effectively explain the reach of the buffer zone – and made clear that the buffer was to be an actual safety zone around the protected streams. That 1983 final rule – in effect today – recognized that surface coal mining was disturbing some water bodies, thus the rule sought to “balance” these concerns by drawing a bright line of protection around intermittent and perennial streams and, in order to avoid being “excessive,” allowed some mining disturbances to occur in certain ephemeral waters.<sup>14</sup> A 100 foot buffer zone where mining activities cannot occur unless the strict conditions for an exception are met – no adverse effect on the water – was (and still is) a logical device for protecting intermittent and perennial streams.<sup>15</sup>

B. The Stream Buffer Zone Rule Is Clearly Intended to Prohibit Activities That Will Adversely Affect the Stream or Violate Water Quality Standards.

---

<sup>13</sup> 47 Fed. Reg. 13466 (March 30, 1982) at 13466.

<sup>14</sup> It should be noted that the OSM, EPA and the Corps argued in the *Bragg* case that, “Recognizing that surface mining activities would disturb some streams, OSM chose to protect intermittent and perennial streams and stream segments because those streams and stream segments were recognized to be especially significant in establishing the hydrologic balance.” See Brief for the Federal Appellants, 4th Cir. No. 99-2683, April 17, 2000 at p. 16.

<sup>15</sup> Judge Haden also discussed the history of the Stream Buffer Zone rule and OSM’s original concern that broad protection was needed to comply with SMCRA:

When OSM promulgated the buffer zone rule in 1979, it considered comments on the buffer zone, intermittent and perennial stream definitions, and coal production:

Surface mining is impossible without destruction of a number of minor natural drainages, including some ephemeral streams as defined in section 701.5. The Office, therefore, believes it is permissible to surface mine coal so long as a reasonable level of environmental protection is afforded.

[ ] Several other commenters felt only perennial streams should require buffer zones. This would reduce operator cost and increase coal production from deposits underlying nonperennial streams. The Office believes that this alternative is illegal; however, because there are significant fish and wildlife resources in streams other than perennial streams that need protection under section 515(b)(24) of [SMCRA].

44 Fed. Reg. 15177 (1979). Thus, coal production and surface mining were considered when the regulations were promulgated. The regulator OSM nevertheless concluded that destruction of streams below natural drainways was illegal.

*Bragg v. Robertson*, 72 F. Supp.2d 642, 663-664 (S.D.W.Va. 1999), *reversed on other grounds*, 248 F.3d 275 (4<sup>th</sup> Cir. 2001).

OSM's contention that the Stream Buffer Zone rule is not intended as a prohibition of mining activity with the buffer zone is baseless and flies in the face of the plain language of the rule. To the extent that the stated exceptions do not apply (i.e. the "no adverse effects" requirements), the Stream Buffer Zone rule can be read in no other manner than as a prohibition of mining activities within the buffer area.

Not only is the language of the rule clear and unambiguous, the history of the rule plainly explains the intent of both the rule and the exception:

[O]perators will be required to protect the prevailing hydrologic balance and comply with all applicable non-Act requirements for water-quality protection. To eliminate confusion, OSM has modified the phrase "as determined by State and Federal water quality standards" ... to require mining activities not to cause or contribute to the violation of applicable State or Federal water quality standards and not to adversely affect water quantity and quality or other environmental resources of the stream. In determining whether an operator should be granted an exemption from the buffer-zone requirement, the final rule requires the regulatory authority to consider whether there will be an adverse effect on water quality and whether mining will inhibit the attainment of applicable water quality standards.<sup>16</sup>

The rule's intent cannot be doubted. Activities are not permitted to occur within the buffer zone unless the activities will not adversely affect the stream's water quality and quantity or cause and contribute to water quality violations.

Further, this obvious and correct reading of both the intent and plain meaning of the Stream Buffer Zone rule is entirely consistent with SMCRA and the Clean Water Act, laws that must protect both environmental resources and water quality.

### C. The Proposed Change to the Stream Buffer Zone Rule Violates the Savings Clause of SMCRA and the Clean Water Act

In addition to other provisions of SMCRA emphasizing the mandate to protect water resources, Congress further emphasized its mandate that coal mining activities regulated by SMCRA not destroy streams or other waters by stating that coal mining activities must comply with other environmental laws, specifically the Clean Water Act. SMCRA's savings clause states that nothing in the 1977 statute "shall be construed as superseding, amending, modifying, or repealing" the Clean Water Act or "any rule or regulation promulgated thereunder."<sup>17</sup>

This administration's proposed change to the Stream Buffer Zone rule is flatly inconsistent with the 1972 Clean Water Act because it is intended to allow – and expressly attempts to allow – the degradation and destruction of streams in violation of water quality standards. Mountaintop removal valley fills that bury waters of the United States with millions of tons of coal mining waste cannot achieve water quality standards either in the filled segments or downstream.

---

<sup>16</sup> 48 Fed. Reg. at 30315 and 30316 (emphasis added).

<sup>17</sup> 30 U.S.C. 1292.

The Clean Water Act states in its very first sentence that “[t]he objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>18</sup> To carry out this statutory requirement, the law generally prohibits the discharge of pollutants into the waters of the United States.<sup>19</sup> One of the exceptions to this general rule is the permitting of dredge and fill material into waters of the U.S. under section 404 of the Act, but this exception must comply with environmental limitations, including that such discharges of pollutants comply with water quality standards. The statute itself makes clear that, not later than July 1, 1977, EPA was required to adopt “any more stringent limitation, including those necessary to meet water quality standards . . . established pursuant to any State law or regulations . . . or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act.”<sup>20</sup>

EPA’s regulations on water quality standards have provided since 1983 that “[i]n no case shall a State adopt waste transport or assimilation as a designated use for any waters of the United States.”<sup>21</sup> In addition, EPA’s § 404(b)(1) Guidelines expressly require § 404 discharges to comply with water quality standards. The Guidelines state that “No discharge of dredged or fill material shall be permitted if it: (1) causes or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard.”<sup>22</sup> Thus, the Guidelines constitute a “federal regulation” that must be “achieved” under the Act.

The proposed changes to the Stream Buffer Zone rule plainly cannot meet water quality standards. As Judge Haden graphically described in his decision in the *Bragg* case:

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.<sup>23</sup>

The current Stream Buffer Zone rule fulfills the requirements of both SMCRA and the Clean Water Act, but the proposed rule change does not. The Federal Register notice proposing the 1983 Stream Buffer Zone rule also makes it clear that compliance with the Clean Water Act was an intent of the SMCRA rule:

The proposed paragraph (a)(2) would allow the exemption where the water quality and quantity would not be harmed as determined by State and Federal water quality standards. The reference to State and Federal water quality standards would ensure that

---

<sup>18</sup> 33 U.S.C. § 1251.

<sup>19</sup> Id. § 1311

<sup>20</sup> Id. § 1311(b)(1)(C).

<sup>21</sup> 40 C.F.R. § 131.10(a) (emphasis added).

<sup>22</sup> 40 C.F.R. § 230.10(b)(1).

<sup>23</sup> *Bragg*, 72 F. Supp.2d at 661-662 (S.D.W.Va. 1999) (emphasis added).

the physical and chemical as well as biological integrity of the stream will be maintained in accordance with the standards of the Clean Water Act[.]<sup>24</sup>

It is now well established that valley fills destroy the physical and chemical as well as biological integrity of the stream by burying and destroying the stream segments. In addition, valley fills cause downstream violations of water quality that will be exacerbated by weakening the Stream Buffer Zone rule. For example, available evidence shows that valley fills cause significantly elevated levels of selenium, a highly toxic bioaccumulant, downstream from the waste disposal sites. DEIS studies found elevated selenium levels – namely, 66 violations of stream water quality criteria – below valley fills and none found at test sites without valley fills upstream.<sup>25</sup> In addition, the DEIS studies found that numerous other indirect impacts to streams, including the reduced ability of headwater streams to maintain their nutrient cycling function, increased sedimentation, reduced floodwater attenuation potential, and temperature changes, are of great concern. These effects also are likely to violate water quality standards, including anti-degradation provisions, as well as harming existing and designated uses of these waters.

The DEIS Cumulative Impact Study explicitly found that mountaintop removal valley fills degrade and destroy water quality. That study concluded that “[f]or both direct and indirect impacts to ecological processes resulting from alterations in hydrologic patterns, [mountaintop removal and valley fills] would appear to be the major impact producing activity in the study area.”<sup>26</sup>

As required by SMCRA, the existing Stream Buffer Zone rule protects water quality in perennial and intermittent streams – and its language plainly meets that mandate. In contrast, the administration’s proposed rule would directly violate the Clean Water Act and SMCRA by weakening the requirement in the existing regulation that water quality be a paramount concern in decisions about allowing mining activities to occur near streams and protecting streams from pollution.

#### D. EPA Must – But Has Not – Concurred That the Proposed Change to the Stream Buffer Zone Rule Does Not Violate the Clean Water Act

SMCRA states explicitly that any regulation promulgated under the statute that affects water quality requires the concurrence of the U.S. Environmental Protection Agency (EPA). Specifically, the statute says that any environmental protection regulations “which relate to . . . water quality standards promulgated under” the Clean Water Act cannot be approved by OSM unless it has “obtained the written concurrence” of EPA.<sup>27</sup>

---

<sup>24</sup> 47 Fed. Reg. 13466 (March 30, 1982) at 13467 (emphasis added).

<sup>25</sup> EPA’s stream chemistry study found that “The selenium data clearly show ‘hot spots’ with higher concentrations of selenium in each of the five watersheds [that were studied] and located downstream of ‘Filled’ sites ONLY. There are 66 violations of the stream water quality criteria identified and each is at a filled site. No other category of site had violations of selenium!” Email from Gary Bryant (EPA WV) to William Hoffman (EPA Region 3), March 27, 2002 (capitalization and exclamation point in original).

<sup>26</sup> DEIS App. I at 75.

<sup>27</sup> See 30 U.S.C. § 1251(b).

This provision of law was written by Congress to “insure that any environmental requirement of this act is consistent with the environmental programs and authorities of EPA.”<sup>28</sup> To our knowledge, the Department of the Interior and Office of Surface Mining have neither sought nor received any such concurrence from EPA regarding the proposal to repeal the existing Stream Buffer Zone rule.

Attempting to ignore or evade the requirement of SMCRA to obtain the written concurrence of EPA with the proposed rule is perhaps not surprising since OSM is intent on changing the rule and there is no way the EPA could legally concur with the proposal to repeal the Stream Buffer Zone rule as it flatly violates numerous mandates of the Clean Water Act – the very outcome the savings clause and EPA concurrence requirements of SMCRA were adopted to prevent.<sup>29</sup>

#### E. OSM Is Incorrect in Contending That the Stream Buffer Zone Rule Was Not Meant to Apply to Watercourses in Small Watersheds

The Stream Buffer Zone rule explicitly applies to “intermittent” and “perennial” streams. In the current Federal Register Notice, OSM attempts to confuse this point by focusing on language in the 1983 EIS concerning the Stream Buffer Zone rule, which states that:

OSM could redefine “intermittent stream”... This definition is not being revised under the preferred alternative. A broader definition of intermittent stream consistent with that of the Army Corps of Engineers’ definition would allow regulatory authorities to protect smaller streams (those draining less than one square mile) with buffer zones where necessary.<sup>30</sup>

In the Federal Register notice on the proposed rule, the OSM cites this passage from the 1983 EIS to support its contention that, “we did not anticipate regulatory authorities to apply the SBZ to watercourses in small watersheds (less than 1 square mile).”<sup>31</sup>

This assertion completely ignores the existing regulation’s actual definition of “intermittent stream” which clearly states that certain watercourses draining less than one square mile can be “intermittent streams” to which the Stream Buffer Zone rule is clearly intended to comply. SMCRA regulations define an “intermittent stream” as: “(a) [a] stream or reach of a stream that drains a watershed of at least one square mile, or (b) [a] stream or reach of a stream that is below

---

<sup>28</sup> H. Rep. No. 218, 95th Cong., 1st Sess. 142 (1977).

<sup>29</sup> In the proposed rule, the OSM takes the position that “it is appropriate to limit SBZ restrictions on placement of fill in streams when those fills are also expressly regulated and authorized by section 404 of the CWA.” 69 Fed. Reg. at 1044. This position contains numerous flaws. First, as stated above, filling streams with mining waste violates the purpose of the Clean Water Act and the express terms of the 404(b)(1) guidelines. Second, since 1975 the § 404 regulations defining “fill material” expressly prohibited waste material from being used to fill waters until the waste exclusion was repealed by this administration. Third, the Corps of Engineers routinely violates the Clean Water Act by permitting valley fills in streams under a nationwide general permit, which does not contain protections for streams comparable to the buffer zone. Finally, the argument that SMCRA’s savings clause stating that the mining law does not supercede, amend or repeal the Clean Water Act makes it “inappropriate” for OSM to enforce more protective amendments was already rejected by the position of the United States in the Fourth Circuit in the *Bragg* litigation. See Brief for the Federal Appellants, at p. 45-49.

<sup>30</sup> 69 Fed. Reg. at 1042 (citations omitted).

<sup>31</sup> *Id.*

the local water table for at least some part of the year, and obtains its flow from both surface runoff and ground water discharge.”<sup>32</sup>

OSM’s assertion that the Stream Buffer Zone rule was not intended to apply to watersheds of less than one mile is based on an 1983 EIS rather than the clear language of the actual regulation. The OSM is now trying to reinterpret the rule language to say that intermittent streams must both drain a watershed of at least one square mile **and** run below the local water table for at least some part of the year plus obtain their flow from both surface runoff and ground water discharge in order to be protected by the buffer. However, the use of the word “or” in the actual definition clearly indicates that the definition of “intermittent stream” is intended to include certain streams with groundwater flow for some or part of the year that meet either of these requirements. OSM’s assertion that small watersheds that contain intermittent streams were not intended to be protected by a buffer zone is contrary to the plain language of its own regulations.

## **II. The Proposed Rule Neither Minimizes Harm Nor Clarifies the Existing Rule**

In the January 7, 2004 Federal Register notice on the proposed rule change, OSM states that the proposal to amend the Stream Buffer Zone regulation is intended to accomplish two basic goals: 1) clarifying the circumstances in which mining activities, such as the construction of excess spoil fills, may be allowed within the stream buffer zone . . . within 100 feet of a perennial or intermittent stream, and 2) minimizing the adverse environmental effects stemming from the construction of excess spoil fills.<sup>33</sup>

If that is a true statement of OSM’s intent, then the proposal is a complete failure, since neither of these goals is met by the proposed rule. The existing rule is quite clear – much clearer than the proposed rule – and the existing rule, if enforced, would result in much less environmental harm than the proposal. OSM’s professed intent to “clarify” and “minimize” flies in the face of reality and current law. Rather, under the twin guises of “clarification” and “minimization,” the OSM is trying to reverse the meaning of the current Stream Buffer Zone rule in an attempt to legally authorize mountaintop removal valley fills that adversely affect and even destroy streams while attempting to mislead the public about the true significance of the rule change.

The existing Stream Buffer Zone rule states 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. 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

---

<sup>32</sup> 30 C.F.R. § 701.5. A perennial stream is defined as a “stream or part of a stream that flows continuously during all of the calendar year as a result of ground-water discharge or surface runoff. The term does not include intermittent stream or ephemeral streams.” Ephemeral streams are streams “which flow[] only in direct response to precipitation in the immediate watershed or in response to the melting of a cover of snow and ice, and which has a channel bottom that is always above the local water table.

<sup>33</sup> 69 Fed. Reg. at 1036.

standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream.<sup>34</sup>

This rule contains objective, measurable, readily understandable standards (e.g. “within 100 feet of a perennial stream or an intermittent stream” and “will not adversely affect the water quantity and quality or other environmental resources of the stream”). In contrast, not only is the proposed rule much more subjective (e.g. “minimize” harm to streams “to the extent possible”), the effect of the proposed rule is the exact opposite of the existing rule.

The existing rule forbids the disposal of coal mining waste in streams – an activity that assuredly does adversely affect the water quantity and quality or other environmental resources of streams – and the proposed rule would allow this and other destructive activities to occur not just within the 100 foot buffer but actually right in streams.

Contrary to assertions in the January 2004 Federal Register notice that the proposed rule constitutes nothing but a “clarification” of the existing regulations, it is clear on its face that OSM is trying to repeal the existing Stream Buffer Zone rule and replace it with much weaker conditions that would allow intermittent and perennial streams to be polluted and even obliterated.<sup>35</sup>

The proposed rule requires a much, much weaker finding that stream effects have been “minimized . . . to the extent possible.”<sup>36</sup> Because the new rule would allow waste dumping in streams, the effect on watercourses would clearly not be “minimized,” as the OSM’s discussion of the proposal suggests – to the contrary, the damage to streams will be increased.

The proposed minimization requirement is clearly weaker than the existing Stream Buffer Zone prohibition that can be waived only when there are “no adverse effects” on the protected watercourse.<sup>37</sup> It is undeniable that mountaintop removal coal mining waste that is “placed” or dumped into streams permanently destroys those stream segments. The DEIS studies unequivocally found that “[h]eadwater streams are destroyed by filling”<sup>38</sup> and [w]hen streams are filled or mined all biota living in the footprint of the fill or in the mined area are lost.”<sup>39</sup>

There can be no credible dispute over whether burying streams and surrounding land under a rubble pile hundreds of feet deep is worse for the streams than maintaining a 100 foot buffer between a stream and massive mining operations like mountaintop removal valley fills. The

---

<sup>34</sup> 30 C.F.R. § 816.57 (emphasis added).

<sup>35</sup> While the OSM’s description in the preamble to the January 2004 rulemaking shows how it is trying to “spin” its current interpretation of the existing rule, the agency’s discussion has no bearing on what the language in the rule actually says or means. See *NWF v. EPA*, 286 F.3d 554, 569 (D.C. Cir. 2002) (“The preamble to a rule is not more binding than a preamble to a statute. ‘A preamble no doubt contributes to a general understanding of a statute, but it is not an operative part of the statute and it does not enlarge or confer powers on administrative agencies or officers’”).

<sup>36</sup> See 69 Fed. Reg. at 1043.

<sup>37</sup> In addition, the proposed “minimization” standard and other purported environmental benefits of the proposed rule are duplicative of standards in existing regulations and therefore provide no additional protections. See, e.g. 30 C.F.R. § 816.45(a); § 30 C.F.R. 816.97(a); and the Clean Water Act 404(b)(1) Guidelines.

<sup>38</sup> DEIS, App. I, p. 70. .

<sup>39</sup> DEIS, p. III.D-2.

administration is deliberately mischaracterizing its proposal in an attempt to hide its effects.

It is the existing Stream Buffer Zone rule, if enforced, that would ensure stream impacts are truly “minimized” by keeping valley fills and other coal mining disturbances 100 feet away from streams unless there is no adverse effect on the water quality or quantity. There is no more “minimal” effect than avoidance of harm, which the current rule requires.

### **III. OSM’s Reasoning in Support of Changing the Stream Buffer Zone Rule Conflicts With the Plain Meaning of the Existing Regulation and It Is Inconsistent with Previous Interpretations of the Law**

To further justify the proposed rule change, the OSM asserts that “we did not intend the Stream Buffer Zone rule as an absolute prohibition of mining in the buffer zone.”<sup>40</sup> This is simply incorrect. As described already in these comments, the Stream Buffer Zone rule is absolutely unambiguous. There is no uncertainty in its effect or intent. The rule plainly prohibits mining and the dumping of waste in the buffer zone area unless there is finding that the activities will not adversely affect the stream or cause or contribute to the violation of applicable State or Federal water quality standards.<sup>41</sup>

#### **A. Prior Agency Interpretation of the Law Supports the Plain Meaning of the Stream Buffer Zone Rule**

In their Brief to the Fourth Circuit in the *Bragg* case, the OSM, EPA and the Corps correctly took the position that:

By its plain terms, the buffer zone rule protects particular stream segments and does not allow mining activities, such as valley fills, in intermittent or perennial streams unless there is a finding that the activity will cause no adverse environmental effect in the affected stream segment.<sup>42</sup>

Yet, OSM is now arguing that the buffer zone rule somehow does not do what it says it does.

OSM attempts to support its subterfuge of the plain language of the Stream Buffer Zone rule by selectively citing from Federal Register references to incarnations of rules that existed prior to the current 1983 Stream Buffer Zone rule and from the 1983 EIS performed for the Stream Buffer Zone rule.<sup>43</sup> In addition, OSM simply ignores certain unambiguous language in the

---

<sup>40</sup> 69 Fed. Reg. at 1042.

<sup>41</sup> 30 C.F.R. § 816.57.

<sup>42</sup> Brief for Federal Appellants, at 44.

<sup>43</sup> This is particularly true, as discussed previously, for OSM’s assertion that streams that drain one square mile were not intended to be protected. It is also true, for instance, where OSM contends, citing the preamble to a previous 1979 rule, that, “Buffer zones are required to protect streams from adverse effects of sedimentation and from gross disturbances of stream channels,” 69 Fed. Reg. at 1041, citing 44 Fed. Reg. 15176 (March 13, 1979), and that, “[I]f operations can be conducted within 100 feet of a stream in an environmentally acceptable manner, they may be approved.” *Id.* These contentions are extremely misleading. First of all, they apply to the 1979 rule, not the current 1983 rule. Second, and perhaps most importantly, OSM implies that this is all the Stream Buffer Zone rule is meant to do. As is detailed herein, there is ample language from the federal register concerning the 1983 rule that makes

Federal Register, previously detailed in these comments, regarding the current rule, which plainly contradicts OSM's assertion that the intent of the rule is unclear.<sup>44</sup>

Ultimately, there is no basis for OSM's contention regarding the intent of the Stream Buffer Zone rule. As Judge Haden correctly pointed out:

Nothing 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 [under the Stream Buffer Zone rule]. The Court finds and concludes the buffer zone rule protects entire intermittent and perennial streams, not just portions thereof.<sup>45</sup>

Judge Haden went on to find that:

Valley fill waste disposal is a surface mining operation from which streams are protected. ... Accordingly, the buffer zone rule, which protects entire intermittent and perennial streams from incursions within the one hundred foot buffer zone, is harmonious with other state and federal regulations and must be accorded full force and effect.<sup>46</sup>

A close reading of SMRCA, the Clean Water Act, the 1983 Stream Buffer Zone rule and its history confirms the clear intent and purpose of the Stream Buffer Zone rule to prevent valley fills in perennial and intermittent streams and explains why the Department of Justice and the federal agencies it represented in *Bragg* took that position on appeal.

B. The Administration Is Manufacturing Ambiguity Regarding the Stream Buffer Zone Rule's Intent Due to Its Desire to Change the Rule's Effect

Unlike this administration, federal courts and previous administrations have not had any difficulty discerning the clear intent of the Stream Buffer Zone rule. For instance, in the *Bragg* case, Judge Haden had no trouble understanding either the intent or the meaning of this rule:

The Court ... holds the Director has a nondiscretionary duty under the buffer zone rule to deny variances for valley fills in intermittent and perennial streams because they necessarily adversely affect stream flow, stream gradient, fish migration, related environmental values, water quality and quantity, and violate state and federal water quality standards.<sup>47</sup>

Similarly, OSM, EPA and the Corps, in their brief submitted in the *Bragg* appeal, agreed with Judge Haden, finding the meaning and intent of this rule clear:

---

clear that the Stream Buffer Zone rule is intended to provide streams with much stronger protection than the language cited by OSM would lead one to believe.

<sup>44</sup> See 69 Fed. Reg at 1040-1041.

<sup>45</sup> *Bragg*, 72 F.Supp.2d at 651-52 (S.D.W.Va. 1999).

<sup>46</sup> Id. at 653.

<sup>47</sup> Id. at 661-662 and 663.

[T]he District Court correctly found that SMCRA’s Stream Buffer Zone rule ... prohibits the burial of substantial portions of intermittent or perennial streams beneath excess mining spoil. The elimination of substantial intermittent or perennial stream segment [sic] necessarily causes adverse environmental effects. ...<sup>48</sup>

Through their lawyers at the Department of Justice, OSM, EPA and the Corps went on to conclude, logically, that:

[V]alley fills that disturb intermittent or perennial streams may be approved only if there is a finding that the activity will not adversely affect the environmental resources of the filled stream segment. Because it is uncontested that WVDEP has had a practice of not making such findings, the district court correctly granted summary judgment on Count 2 [holding that the burial of substantial portions of intermittent or perennial streams in valley fills causes adverse environmental impact in the filled stream segment and therefore cannot be authorized consistent with the buffer zone rule].<sup>49</sup>

Thus, both a federal court and past agency interpretations have agreed that the intent and practical effect of the buffer zone rule is to prohibit destructive mining practices, such as valley fills, in intermittent and perennial streams.

Simply put, there is no credible way to cast doubt upon the intent and meaning of the existing Stream Buffer Zone rule. It explicitly created a 100 foot buffer where mining activities cannot disturb intermittent and perennial streams. The Stream Buffer Zone rule only allows exceptions for mining activities in the buffer zone if the activities will not adversely affect the stream or violate water quality standards. Again, as stated above, burying a segment or entirety of a stream necessarily violates water quality standards in the buried segment and downstream as well.

#### **IV. The Office Of Surface Mining Must Complete an Environmental Impact Statement Before Proposing Changes to the Stream Buffer Zone Rule**

The National Environmental Policy Act (NEPA) clearly requires OSM to complete an Environmental Impact Statement (EIS) prior to finalizing the proposed change to the Stream Buffer Zone rule.<sup>50</sup> Yet no EIS has been prepared to identify the adverse effects of this significant federal rulemaking action on the environment and communities of Appalachia and other coal mining regions.

NEPA was enacted to ensure federal policy makers take a “hard look” at the environmental impacts of a proposed action, and to fully consider less environmentally harmful alternatives to the proposal. Thus, an EIS is required for any proposed “major Federal actions significantly affecting the quality of the human environment.”<sup>51</sup> Major federal actions include “...new or revised agency rules, regulations, plans, policies, or procedures...”<sup>52</sup> OSM argues that its

---

<sup>48</sup> Brief of Federal Appellants, at 3-4.

<sup>49</sup> Id. at 44-45 (citations omitted) (emphasis in original).

<sup>50</sup> 42 U.S.C. § 4321 et. seq.

<sup>51</sup> NEPA §102(2)(C), 42 U.S.C. § 4332(2)(C).

<sup>52</sup> 40 C.F.R. §1508.18 (emphasis added).

proposed rule change does not need an EIS because it “will not significantly affect the quality of the human environment.”<sup>53</sup>

OSM has prepared a draft environmental assessment (EA) that makes the “tentative determination” that the proposed rule “will not significantly affect the quality of the human environment.” Further, OSM anticipates it will make a finding of no significant impact (FONSI) for the final rule.<sup>54</sup> As discussed below, the basis of OSM’s EA determination is both arbitrary and illegal and the agency’s anticipated FONSI would be fatally flawed for the same failures of law and reason.

#### A. Mountaintop Removal and Associated Valley Fills Significantly Alter The Human Environment

Over the past several years, an overwhelming public record of reports, studies, comments and correspondence has documented the significant environmental impacts, including cumulative impacts, of valley fills composed of mining waste.<sup>55</sup> The documents found in the appendices of the DEIS on impacts of valley fills illustrate the devastating impacts to streams, forests, wildlife habitat and human communities that has already occurred and that is projected to continue for the foreseeable future if existing limitations on mountaintop removal are not enforced and new restrictions on mountaintop removal mining are not implemented. This body of evidence makes any possible suggestion by Interior or OSM that mountaintop removal or valley fills do not cause significant environmental harm patently absurd.

For example, the DEIS studies conclude that more than 1,200 miles of headwater streams in Appalachia have already been buried or destroyed, with another 1,000 miles projected for burial and destruction in the next ten years if limits are not placed on mountaintop removal operations.<sup>56</sup> The functions and values of those streams, as well as any wildlife unlucky enough to be present when the mountaintops were blown away and valleys buried, are lost forever. The

---

<sup>53</sup> 69 Fed. Reg. at 1046.

<sup>54</sup> Id.

<sup>55</sup> This record has been developed as a result of a variety of activities including several lawsuits challenging the practice of mountaintop removal mining valley fills, reissuance of Nationwide Permits under the Clean Water Act, and preparation of a DEIS concerning valley fills in Appalachia (itself the result of one of the earlier lawsuits). It is not possible to attach, or even adequately summarize, the full extent of that public record. However, we request that the following documents and public comments (and the references that they cite) be included as part of the public record to this rulemaking: Comments submitted by Earthjustice, the Natural Resources Defense Council, National Wildlife Federation, et.al., on the Draft Programmatic Environmental Impact Statement (“DEIS”) on mountaintop removal coal mining and associated valley fills in Appalachia, published at 68 Fed. Reg. 32487 (May 30, 2003) (comments submitted January 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 Fill Activities in Appalachia (January 5, 2004); Comments on behalf of the Natural Resources Defense Council, National Wildlife Federation, Earthjustice, 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. 42070 (August 9, 2001) (comments submitted October 9, 2001).

<sup>56</sup> It is important to note that many studies indicate that these reported stream impacts are likely to be a gross underestimation of the stream miles filled in the study area. The inventories used in the EIS rely heavily on topographical maps that often do not map smaller headwater streams, despite their ecological importance. See Testimony of J. Bruce Wallace, Professor, University of Georgia, before the US Senate Committee on Environment and Public Works, June 6, 2002.

studies found that no scientific basis could be established for arriving at an environmentally “acceptable” amount of stream loss and it is “difficult if not impossible to reconstruct free flowing streams on or adjacent to mined sites.”<sup>57</sup>

The studies accompanying the DEIS also documented the impacts of massive deforestation in the region that accompanies mountaintop removal mining. Those studies found that when adding past, present and future terrestrial disturbances, the estimated area that will be stripped and flattened encompasses 1,408,372 acres of forest resources – which roughly equates to 11.5% of the entire study area,<sup>58</sup> – an area larger than the entire state of Delaware. The destruction of these nearly 1.5 million acres of some of the most diverse temperate forest in the country has widespread environmental, economic and social consequences for the region and the nation. It is extremely unlikely that even a small portion of this forest will be restored, and the timeline for even that minute level of restoration is hundreds, if not thousands of years.<sup>59</sup>

As succinctly summarized in the DEIS Cumulative Impact Study:

Mountaintop mining and valley fill activities significantly affect the landscape mosaic. Landcover changes occur as forests are removed, the topography and hydrology is altered, and vegetation is eventually re-established. The result is an area drastically different from its pre-mining condition. Soil qualities are different, the vegetative community has a different structure and composition, and habitats are altered.<sup>60</sup>

The proposed rule change to weaken the Stream Buffer Zone rule will significantly add to the irreversible damage already being done to the environment by mountaintop removal coal mining. The proposed evisceration of the Stream Buffer Zone rule – rhetorical window-dressing about “protections” and “minimization” notwithstanding – will provide legal sanction and promote the expansion of valley fills into more intermittent and perennial streams. It will strip citizens of the ability to enforce the 100 foot buffer to limit harm to streams.

Because the permanent harm to the human environment caused by these excess spoil fills will increase if the Stream Buffer Zone rule is repealed as OSM proposes, an Environmental Impact Statement is required before OSM proceeds with this rulemaking.

#### B. OSM’s Explanation Why An EIS Is Not Needed Lacks Merit

OSM does not directly dispute the permanent environmental harm caused by mountaintop removal and valley fills. Instead, its argument that an EIS is not needed essentially contends that, because of its longstanding policy of looking the other way and allowing wholesale violation of the Stream Buffer Zone rule, there will be no new harm to the human environment caused by the proposed rulemaking. In other words, OSM is arguing that because it has never

---

<sup>57</sup> See MTM/VF EIS Steering Committee, “Problems Identified/Confirmed/Inferred by Technical Studies,” August 15, 2002 working draft.

<sup>58</sup> DEIS IV.C-1.

<sup>59</sup> Email from Cindy Tibbott, FWS, re: MTM/VF EIS cumulative impact assessment, June 26, 2001 (“even if hardwood forests can be re-established, it should be intuitively obvious that they’ll be a drastically different ecosystem from pre-mining forests for generations, if not thousands of years”).

<sup>60</sup> DEIS App. I, at 23 (emphasis added).

really followed or enforced its own rules, as is required by law – nor required State agencies with delegated programs to do so – that eliminating the Stream Buffer Zone rule from law will have no environmental impacts that necessitate completion of an EIS.

We have found no provision of the NEPA statute, its implementing regulations, nor any court decision that supports this novel interpretation of OSM’s obligations to prepare an EIS for this rule change. Not surprisingly, other than its assertion that “it is so,” OSM provides no legal support for its position that it is not required to prepare an EIS. It is arbitrary and capricious for the agency to base a determination of “no significant impact” on a violation of law – their own failure to enforce the law that they are now trying to change.

As discussed in detail above, the current Stream Buffer Zone rule prohibits disposal of mining waste within 100 feet of intermittent and perennial streams. That is, it is currently illegal to dispose of mining waste within the 100-foot buffer zone of those streams unless there is no adverse effect on the streams. The court in *Bragg* found such discharges to be illegal, and the Department of Justice concurred with that judgment in its appeals brief for the *Bragg* case.

The proposed rule attempts to lift the existing prohibition to legalize disposal of mining spoil in the exact areas where, but for the rule change, disposal would still be illegal. This change of policy in an attempt to legalize previously illegal disposal of mining waste, and its associated devastation of aquatic habitat, is precisely the kind of action for which NEPA intended an EIS.

Although historically the coal mining industry may have felt little restraint coming from OSM to curtail its pattern of illegal discharges, it is undeniable that the industry has felt pressure from other parties (namely, their neighbors and local citizen groups) to limit the number and scope of illegal valley fills that destroy streams.

In addition, the current prohibition on fills in the buffer zone means that a range of potential penalties and other remedies apply to violators of the existing law, as Congress wisely provided neighbors and others harmed by violations of SMCRA and the Clean Water Act with legal recourse should federal and state agencies fail to enforce the law. Those legal restraints, penalties and remedies would disappear if the prohibition on destroying streams is lifted, with the more-than-likely result that the number of stream burials, and their consequent harm to the human environment will increase. Therefore, it is obvious that an EIS is required in advance of finalizing this proposal.<sup>61</sup>

### C. The EIS Must Be Completed Prior To Finalizing the Proposed Rule

Under the requirements of NEPA and applicable regulations, an EIS must be completed before the OSM takes final action pursuant to the January 7 proposal. Indeed, the OSM should have

---

<sup>61</sup> Furthermore, OSM cannot rely upon previous EIS’s completed in 1979 and 1983 in lieu of completing a new or supplemental EIS. As a “rule of thumb,” CEQ considers an EIS of more than five years old to have lost its shelf life, and, furthermore, a new or supplemental EIS is required if significant new circumstances or information arise. CEQ, Forty Most Asked Questions, 46 Fed. Reg. 18026 (1981); 40 CFR § 1502.9(c)(1)(ii). As noted elsewhere, there is an enormous volume of research on impacts of valley fills (and other excess spoil fills) that has been completed in the past 20 years, as well as a large increase the practice of valley fills. These changes in circumstances and vastly expanded sources of information necessitate a new or supplemental EIS.

conducted an EIS before proposing to change this long-standing Stream Buffer Zone rule. NEPA expressly requires preparation of an EIS in connection with any "proposal[]" for federal action with significant environmental effects. § 102(2)(C). To take final action before completing the EIS that must accompany proposed action violates the express terms of NEPA. The OSM's approach also violates NEPA regulations that provide that, where an agency proposal requires an EIS, no decision on the proposal can be made until thirty days after the EIS is finalized.<sup>62</sup>

In sum, OSM must draft and finalize an adequate EIS before finalizing any proposed changes to the Stream Buffer Zone rule.

## **Conclusion**

This administration's desire to eliminate the Stream Buffer Zone rule is transparent, despite the various justifications given to obscure the true motivations. The rule change has nothing to do with the rule's intent or lack of clarity; it has everything to do with the rule's effect – if and when it is ever enforced – as Appalachian citizens are now trying to do in order to protect themselves, their families, and their streams and environment from the ravages of mountaintop removal coal mining.

The existing Stream Buffer Zone rule was not promulgated solely to protect streams from "sedimentation" and "gross disturbances of the stream channel" as the OSM spuriously contends in its contorted history and reading of the rule. Instead, the rule was clearly promulgated to protect intermittent and perennial streams from mining activities' adverse effects and to protect the water quantity and quality of such streams from mining activities. The clearly intended objective of SMCRA and the original Stream Buffer Zone rule can only be accomplished by prohibiting activities, such as fill by excess spoil, that destroy intermittent and perennial streams.

This administration is attempting to disingenuously manufacture ambiguity regarding the history and meaning of the existing Stream Buffer Zone protections in order to justify allowing coal mining companies to do what the current rule clearly prevents – to fill and destroy intermittent and perennial streams.

While advancing the desires of the coal mining industry, the OSM and Department of the Interior, through this proposal, are perpetuating nothing short of the utter destruction of the

---

<sup>62</sup> See 40 C.F.R. § 1506.10(b)(2). Accord, id. §§ 1505.1 (requiring inter alia that agency decision-making procedures "[d]esignat[e] the major decision points for the agency's principal programs likely to have a significant effect on the human environment and assuring that the NEPA process corresponds with them;" "[r]equiring that relevant environmental documents, comments, and responses be part of the record in formal rulemaking or adjudicatory proceedings;" and "[r]equiring that relevant environmental documents, comments, and responses accompany the proposal through existing agency review processes so that agency officials use the statement in making decisions") (emphasis added); §1500.1(b) ("NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken") (emphasis added); § 1502.2(g) ("Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made"); §1508.23 ("[p]reparation of an environmental impact statement on a proposal should be timed...so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal").

natural resources and communities of Appalachia. As described above, the DEIS amply demonstrates that this is no overstatement. By weakening long-standing and basic federal environmental protections that are needed to ensure there is some balance between mining coal and protecting the natural resources and the communities of people that live in the coal mining regions, this proposed rule change guarantees that this unprecedented environmental destruction will continue unabated.

This is the second major repeal of long-standing environmental regulations pursued by the Bush administration to benefit mountaintop removal coal mining. In May 2002, the EPA and Army Corps of Engineers eliminated a 25 year-old ban on dumping industrial waste in streams in order to head off citizen lawsuits aimed at enforcing Clean Water Act limits on this form of mining's destruction of streams. Both of these rule changes – the rewrite of Clean Water Act rules and now the proposed repeal of the Stream Buffer Zone rule – are blatant give-aways of our nation's precious water resources to coal mining companies that practice Mountaintop Removal mining. These two water protections are being repealed by the Bush administration because the coal industry wants no interference with their unlimited destruction of streams, mountains, forests and communities in the coalfields of the eastern United States. Unfortunately, it seems that the coal industry's wish is the Bush administration's command.

In sum, this administration is engaged in a serial effort to thwart any attempt by the people of Appalachia to exercise their rights under national environmental laws to protect themselves and their communities from the widespread damage caused by mountaintop removal. Instead, this administration wants to wipe out any environmental safeguards that stand between the coal companies and the citizens who are trying to defend their natural heritage – the streams, mountains and communities of Appalachia.

For the above stated reasons, the Department of the Interior and Office of Surface Mining should withdraw this rulemaking proposal and enforce the existing Stream Buffer Zone rule.

Sincerely,

Jim Murphy  
Wetlands and Water Resources Counsel  
National Wildlife Federation

Joan Mulhern  
Senior Legislative Counsel  
Earthjustice

Daniel Rosenberg  
Attorney  
Natural Resources Defense Council

Bob Perciasepe  
Chief Operating Officer  
National Audubon Society

Sara Zdeb  
Legislative Director  
Friends of the Earth

William M. Eichbaum  
Vice President, Endangered Spaces  
World Wildlife Fund

Debbie Sease  
Legislative Director  
Sierra Club

David Alberswerth  
Bureau of Land Management Program Director  
The Wilderness Society

Craig D. Obey  
Vice President for Government Affairs  
Parks Conservation Association

Alan Noguee  
Director, Clean Energy Program  
Union of Concerned Scientists

Velma Smith  
Senior Policy Associate  
National Environmental Trust

Paul Schwartz  
National Policy Coordinator  
Clean Water Action

S. Elizabeth Birnbaum  
Director of Government Affairs National  
American Rivers

William J. Snape III  
Vice President for Law and Litigation  
Defenders of Wildlife

Richard Caplan  
Environmental Advocate  
U.S. Public Interest Research Group

Lexi Shultz  
Legislative Director  
Earthworks

CC: Office of Surface Mining Reclamation and Enforcement Administrative Record  
Room 101, 1951 Constitution Avenue, N.W. Washington, D.C. 20240