UNITED STATES COURT OF APPEALS
FOR FOURTH CIRCUIT

No. 99-2443(L)
CA-98-636-2

PATRICIA BRAGG; JAMES W. WEEKLEY;
SIBBY R. WEEKLEY; WEST VIRGINIA HIGHLANDS CONSERVANCY;
CARLOS GORE; LINDA GORE;
CHERYL PRICE; JERRY MATHENA,

Plaintiffs - Appellees,

v.

WEST VIRGINIA COAL ASSOCIATION;
WEST VIRGINIA MINING AND RECLAMATION ASSOCIATION,

Intervenors - Appellants,

and

TOMMY MOORE; VICTORIA MOORE

Plaintiffs,

v.

DANA ROBERTSON, Colonel, District Engineer,
U.S. Army Corps of Engineers, Huntington District;
JOE N. BALLARD, Lieutenant General, Chief of
Engineers and Commander of the U.S. Army
Corps of Engineers;
MICHAEL D. GHEEN, Chief of the Regulatory Branch,
Operations and Readiness Division, U.S. Army Corps of Engineers,
Huntington District; MICHAEL C. CASTLE, Director,
West Virginia Division of Environmental Protection

Defendants,

and

HOBET MINING, INCORPORATED;
CATENARY COAL COMPANY; MINGO-LOGAN
COAL COMPANY; WESTERN POCAHONTAS
PROPERTIES LIMITED PARTNERSHIP;
NATIONAL COUNCIL OF COAL LESSORS,

INCORPORATED; INTERNATIONAL UNION,
UNITED MINE WORKERS
OF AMERICA

Intervenor-Defendant.

**STATEMENT OF SUBJECT MATTER AND**
**APPELLATE JURISDICTION**

Appellant Michael C. Castle, the Director of the West Virginia Division of Environmental Protection ("WVDEP"), contests subject matter jurisdiction. Appellees, plaintiffs below, invoked jurisdiction under 30 U.S.C. § 1270(a)(2). The district court presumed it enjoyed federal question jurisdiction. 28 U.S.C. § 1331.

On October 20, 1999, the district court entered a final order granting summary judgment in the appellees' favor on all unsettled issues in the case, and granting their request for a permanent injunction. J.A. 2799-2847. WVDEP filed timely Notice of Appeal on October 25, 1999. J.A. 0055. The district court entered a final order approving the Consent Decree which approved the settlement of all other issues in the case on February 17, 2000. J.A. 2912-2913. This Court has appellate jurisdiction under 28 U.S.C. §§ 1291 and 1292.

## STATEMENT OF THE ISSUES

1. Did the district court err in construing the buffer zone rule to outlaw coal mine spoil valley fills which touch intermittent or perennial streams?

2. Did the district court properly exercise jurisdiction over this case?

## STATEMENT OF THE CASE

Plaintiffs sued the Director of WVDEP and officials of the U.S. Army Corps of Engineers ("Corps") challenging aspects of the regulation of mining and mine spoil placement. Plaintiffs sought a programmatic declaratory judgment; prospective, injunctive relief against the Director and the Corps officials; and also sought to enjoin further development of one large surface mine, Hobet Mining Inc.'s ("Hobet's") Spruce mine. J.A. 0066-0113.

Intervenors joined the lawsuit as defendants, including Hobet, coal industry associations, coal lessor interests, and the United Mine Workers of America. The district court rejected defendants' arguments that it lacked jurisdiction. J.A. 0144-0164. Plaintiffs later negotiated a settlement with the Corps, memorialized in an agreement dated December 23, 1998, and a Memorandum of Understanding ("MOU"), both subsequently approved

by the district court. J.A. 0285-0298, 1725-1777. The district court then held a preliminary injunction hearing, and enjoined any development of the Spruce mine. J.A. 0440-1510, 1577-1622.

After additional discovery, the WVDEP and the plaintiffs entered into a Consent Decree, which has been approved by the district court, settling every count of the complaint save two. J.A. 1843-1907, 2912-2931. These two counts involve the construction and application of one regulation, called the "buffer zone rule." In the Consent Decree, the parties agreed to submit to the Court the question of how, if at all, the buffer zone rule applies to the portion of a stream beneath a mine spoil fill; that is, in the footprint of the fill and ponds or other structures associated with it. J.A. 1853. After extensive briefing, the district court granted summary judgment for plaintiffs on both counts of the complaint involving the buffer zone rule. J.A. 2799-2847. This appeal seeks a reversal of that Order.

## STATEMENT OF FACTS

The essential facts are spelled out in Judge Haden's order. Surface mining of coal requires removal of massive amounts of rock and dirt – overburden or "spoil" – to expose the coal. The overburden, once removed, "swells" and displaces a greater

volume than it occupied prior to mining.[1] The surface mining laws require this overburden to be used to restore the "approximate original contour" (AOC) of the mountains. Because of the swell factor, the amount of spoil is greater than needed to restore AOC and the excess spoil is placed in a valley – a "valley fill." Those valleys contain streams. The valley fills and the portions of streams which they cover are the physical focus of this appeal.

Congress enacted the Surface Mining Control and Reclamation Act ("SMCRA") in 1977 to establish minimum nationwide environmental standards to govern coal mining operations. 30 U.S.C. § 1202. SMCRA is administered through the United States Department of the Interior by the Office of Surface Mining Reclamation and Enforcement ("OSM"). 30 U.S.C. § 1211. However, Congress recognized that "because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations … should rest with the states." 30 U.S.C. § 1201(f).

Any state "wishing to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation

---

[1] This also occurs in the "face up" of underground mines.

operations" on non-federal lands within its borders may submit a proposed program to OSM for approval. 30 U.S.C. § 1253(a). Once a state program is approved, state, not federal, law governs surface mining operations within the state's borders. See 30 U.S.C. § 1253(a). On January 21, 1981, OSM approved the West Virginia Surface Coal Mining And Reclamation Act (WVSCMRA), 30 C.F.R. § 948.10, giving West Virginia exclusive jurisdiction to regulate surface coal mining within its borders. OSM only retains a role of limited oversight of the state program. 30 U.S.C. § 1267(a). The state program is administered by WVDEP.

Since 1981, persons wishing to mine coal in West Virginia have been required to obtain a WVSCMRA permit from the WVDEP. They must also obtain three permits under the Clean Water Act: a permit from the Corps for surface mining activities like mine spoil placement (CWA § 404 permit); and two more permits from West Virginia: one allowing the discharge of pollutants from point sources into streams (CWA § 402) and a certification that any proposed discharge will meet applicable water quality standards (CWA § 401). W.Va. Code § 22-11-1, et seq.; 33 U.S.C. §§ 1341, 1342 & 1344.

This appeal centers on a single West Virginia surface mining regulation, the "buffer zone" rule. 38 C.S.R. § 2-5.2. The buffer zone rule prohibits disturbances by surface mining operations within 100 feet of intermittent or perennial streams,

but permits variances when the Director finds "that surface mining activities will not *adversely affect*[2] the normal flow or gradient of the stream, *adversely affect* fish migration or related environmental values, *materially damage* the water quantity or quality of the stream and will not cause or contribute to violations of applicable State or Federal water quality standards." 38 C.S.R. § 2-5.2.[3] Historically, WVDEP has not applied the buffer zone rule to the portion of a stream beneath a valley fill, because the preceding section of the state regulations, 38 C.S.R. § 2.5.1, (a section without a federal parallel) states that "[n]atural drainways in a permitted area shall be kept free of overburden *except where overburden placement has been approved* …" and because overburden placement approval comes from a CWA § 404 permit, "a permit to do away with a certain segment of a stream by filling or other uses." J.A. 572-577, 608-610, 1023, 2279-2280.

Multiple definitions of stream types exist in the applicable laws and regulations. Under the West Virginia surface mining regulations, "intermittent stream" is defined as "[a] stream or reach of a stream that drains a watershed of at least one square mile; or [a] stream or reach of a stream that is below the local water table for at least some part of the

[2] Emphasis is added throughout the brief, unless otherwise noted.

year, and obtains its flow from both surface runoff and ground water discharge." 38 C.S.R. § 2-2.69. "Perennial stream" means "a stream or portion of a stream that flows continuously." 38 C.S.R. § 2-2.86. In contrast to WVSCMRA's hydrogeologic definition of streams, West Virginia's water quality standards, enacted pursuant to the CWA, define streams based on the presence of certain biological life. Under those standards, "intermittent streams" are "[s]treams which have no flow during sustained periods of no precipitation and which do not support aquatic life whose history requires residence in flowing waters for a continuous period of at least six (6) months." 46 C.S.R. § 1-2.10. The "aquatic life" are bugs, like mayflies or mites. The portions of streams above intermittent streams are commonly called ephemeral streams. West Virginia law does not define "ephemeral." Federal regulations define an "ephemeral" stream as "a stream which flows 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." 30 C.F.R. § 701.5. None of these definitions turn on volume or size; a perennial stream can be the width of a pencil.

---

[3] West Virginia's buffer zone regulation is patterned after OSM's parallel federal regulation. See 30 C.F.R. § 816.57.

For more than twenty years, the State of West Virginia understood the surface mining statutes to mean that valley fills could exist in intermittent or perennial streams. The buffer zone rule was applied to the whole stream below the fill, but not to the fill itself. So buffer zone variance findings were not made for the area beneath fills. When the district court asked Larry Alt, a WVDEP permit supervisor, why he did not believe the buffer zone rule applied to valley fills, the answer reflected this common-sense reading of the regulations:

> MR. ALT: [S]ir, just by reading the regulations there is different sections of the regulations that talks about places, valley fills, durable rock fills, that it was indications in the law that in the regulations that down the road they knew that there was going to be excess spoil and it was going to have to be in … valley fills.
>
> COURT: Who is they, though?
>
> MR. ALT: I think the legislature and the congress realized that when they first wrote the SMCRA law.

J.A. 0609-0611.

No federal discomfort with WVDEP's construction existed. See, e.g., J.A. 1637 (OSM Draft Oversight documents and Annual Reviews and Summary Reports: "on the larger sites, [excess spoil disposal fills] may be several thousand feet in length"); J.A. 1640-1641 ("OSM determined that the footprint of valley fill areas is excluded from the stream buffer requirements"). But

little formal guidance existed for fitting the buffer zone rule into the process.

During this litigation, WVDEP, acting in conjunction with OSM, the Corps, and the U.S. Environmental Protection Agency ("EPA") entered into another Memorandum of Understanding ("MOU") in August 1999, to clarify the application of the buffer zone rule to valley fills. J.A. 2218-2222. This MOU concluded that the buffer zone rule did not preclude valley fills, explained the relationship between the buffer zone rule and the CWA and provided that the findings necessary for a CWA § 404 permit were the functional equivalent of the buffer zone findings.[4]

Evidence at the preliminary injunction hearing and affidavits in support of WVDEP's motion for a stay pending appeal showed that banning valley fills in intermittent and perennial streams would "end the practice of mountaintop mining"; that "practically 100 percent" of valley fills are placed in intermittent and perennial streams; and that all but 3 of the 62 mining permits (including underground mining) pending at WVDEP in October of 1999 on their face proposed placing mine spoil in intermittent or perennial streams. J.A. 1271-1273, 2848-2849.

---

[4] The federal parties to the MOU disavowed it in their appellate brief in this matter, leaving the future of the MOU uncertain. But Director Castle's interpretations of the buffer zone rule, and the MOU's variation on that theme, remain the best constructions of the regulation at issue; the present

The district court rejected WVDEP's historic view that the buffer zone rule does not apply to the footprint of valley fills, rejected the MOU's interpretation of the buffer zone rule, and concluded that the buffer zone rule bans filling activities in intermittent or perennial streams.

## SUMMARY OF ARGUMENT

Valley fills may be placed in intermittent or perennial streams without offending the buffer zone regulation. While the buffer zone rule applies to waters downstream of a fill's embankment, it does not apply to the footprint of the valley fill -- the area where a natural drainway is replaced with dirt and rock. WVDEP's historic recognition of this fact rests on a reasonable construction of SMCRA, WVSCMRA and the clean water laws. The district court's contrary holding lacks perspective in its obsessive reading of the buffer zone rule -- one single regulation in a complex, often overlapping scheme of federal and state surface mining and water pollution control laws. The district court's interpretation of the buffer zone rule is inconsistent with multiple portions of WVSCMRA and the CWA. More critically, the district court's position, if affirmed, not only will eliminate mountaintop mining, but also will

position of the federal agencies and the district court are the least sensible conclusions.

drastically reduce contour mining and restrict all types of mining by banning the valley fills and refuse structures "necessary to carry out mining operations," West Virginia Coal Ass'n v. Reilly, 728 F. Supp. 1276, 1278 (S.D. W.Va. 1989), *aff'd per curiam* 1991 U.S. App. LEXIS 9401 (4th Cir. May 13, 1991), a result never intended by Congress or the West Virginia legislature. This Court should reject the district court's deconstruction of the buffer zone rule, and instead, defer to WVDEP's historic, rational interpretation of the laws it is entrusted to administer -- an interpretation that properly gives effect to WVSCMRA, the Clean Water Act and SMCRA.

In the alternative, this Court can approve the similarly rational, harmonizing interpretation in the MOU executed by WVDEP and the federal agencies charged with administering SMCRA and the clean water laws. The MOU addressed how these overlapping statutes and regulations intersect to allow valley fills when certain environmental protections are met. Like WVDEP's historic view that the buffer zone rule does not apply to valley fills, the MOU is consistent with WVSCMRA, the CWA and SMCRA, and is based on reasonable agency interpretations of these statutes. The only unreasonable interpretation of these statutes is the district court's interpretation, which recently became the federal agencies' appellate litigation position.

The district court lacked jurisdiction to decide this case under SMCRA's citizen suit provision. WVDEP has the discretion to decide how it will perform the duties at issue, which vitiates jurisdiction. Because those duties are state law issues, no federal question jurisdiction exists. Plaintiffs also failed to exhaust their administrative remedies. Moreover, the district court decided water law issues that were beyond its jurisdiction within the context of a SMCRA-based citizen suit.

Finally, plaintiffs' citizen suit is barred by the Eleventh Amendment to the United States Constitution. Ex Parte Young's narrow exception to Eleventh Amendment immunity does not apply in this case, because the matters at issue are matters of state law, governed by a thorough state administrative program.

## ARGUMENT

### STANDARD OF REVIEW

This appeal presents only issues of law. The standard of review is *de novo*.

### I. VALLEY FILLS ARE ALLOWED IN INTERMITTENT AND PERENNIAL STREAMS.

#### A. THE BUFFER ZONE RULE DOES NOT APPLY TO THE FOOTPRINT OF VALLEY FILLS.

Historically, the state and federal agencies charged with administering SMCRA and the clean water laws have understood that valley fills may be located in intermittent and perennial

streams. J.A. 572-577, 608-610, 1023, 1637, 1640-1641, 2279-2280. WVDEP's treatment of valley fills has been based on a rational interpretation of WVSCMRA and its regulations that allow placement of valley fills in "natural drainways", as well as provisions of the Clean Water Act which allow filling activities in waters of the United States. See 38 C.S.R. § 2-5.1; 33 U.S.C. § 1344. For over twenty years, both state and federal agencies evaluated the footprint of valley fills according to the standards governing filling activities in CWA § 404, and applied the buffer zone rule where waters remained, downstream of the fill's embankment. WVDEP's view that the buffer zone rule does not apply to the footprint of a valley fill is a reasonable interpretation of the statutes and regulatory provisions it administers, and accordingly, is entitled to deference.

**1. WVDEP's Interpretation of the Buffer Zone Rule is Entitled to Deference.**

WVDEP's interpretation is entitled to substantial deference unless it is plainly erroneous or inconsistent with the regulations. See West Virginia Coal Association v. Reilly, supra, 728 F. Supp. at 1290 (citing Udall v. Tallman, 380 U.S. 1, 16-17 (1965)); United States v. Consumer Life Insurance Co., 430 U.S. 725, 752-53 (1977)(the interpretation of state law by state regulatory officials charged with its administration is

entitled to "great deference" by federal courts); Elk Run Coal Company v. Babbitt, 919 F. Supp. 225, 229 (S.D. W. Va. 1996)(Charles H. Haden, C.J.) (clarifying that Congress intended primacy states under SMCRA to be accorded the same due deference in administering their approved programs as executive agencies with primary responsibility for implementing federal laws). Thus, "the task for the Court of Appeals [is] not to interpret the statute as it [thinks] best but rather the narrower inquiry into whether the [agency's] construction [is] 'sufficiently reasonable' to be accepted by a reversing court." FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 39 (1981)

### 2. WVDEP's Interpretation of the Buffer Zone Rule is Consistent with SMCRA and WVSCMRA.

WVDEP's interpretation, that the buffer zone rule does not apply to the footprint of valley fills, recognizes that this single regulation cannot be interpreted to ban in-stream filling contemplated by other WVSMCRA provisions. The district court's contrary conclusion, that the buffer zone rule absolutely prohibits placing valley fills in intermittent or perennial streams, is inconsistent with WVSCMRA and SMCRA for many reasons.

First, SMCRA presumes that large valley fills are an integral part of surface mining. "The requirements of Section

515(b)(22) of the Act[5] are extensive and express a clear congressional concern to assure the long-term stability of large fills, especially in the steeper areas, such as the Appalachia coal fields." H. Rept. No. 95-218, 95th Cong., 1st Sess. 114, (1977). In fact, West Virginia's regulations specifically addressing valley fills allow placement of fills in "natural drainways" and "watercourses", without regard to whether the water bodies are intermittent or perennial streams. The unique first section of the West Virginia regulations entitled, "Drainage and Sediment Control Systems", 38 C.S.R. § 2-5.1, states that:

> Natural drainways in the permit area shall be kept free of overburden *except where overburden placement has been approved. Overburden placement and haulageways constructed across natural drainways shall not materially increase the sediment load, or materially affect stream quality*.

The regulations' definitions give "natural drainway" broad meaning: "any natural water course which may carry water to the tributaries and rivers of the watershed." 38 C.S.R. § 2-77. This definition encompasses intermittent and perennial streams. See Deposition of Charles H. Norris, Plaintiffs' Hydrogeologist, J.A. 2272-2273 (explaining that intermittent and perennial streams occupy natural drainways); Webster's New Universal

[5] The buffer zone regulation was enacted pursuant to Section 515 of SMCRA. 30 U.S.C. § 1265.

Unabridged Dictionary 2066 (2d Ed. 1979) (defining water course as " 1. a stream of water; a river or brook."). "Sediment load" describes the amount of sediment per given unit of water. The entire concept of sediment loading is nonsensical without an extant stream (intermittent or perennial) as a referent. "Stream quality" is a vague term, but likewise presumes a remaining stream below the overburden placement.

The district court acknowledged, but inexplicably disregarded, hydrogeological testimony, including Mr. Norris', that all streams are natural drainways. Bragg v. Robertson, 72 F. Supp.2d 642, 652 (S.D. W.Va. 1999). The district court further admitted that, in common parlance, streams are natural drainways. Nonetheless, the district court formulated its own definition of "natural drainway", imposing limitations that are not mentioned in the regulation, do not exist in common parlance, and are not used by any expert in this case.

The district court concluded that natural drainways and streams are mutually exclusive entities: "[b]ecause [natural drainways] carry water to the tributaries, natural drainways are not the tributary streams themselves." Id. Nothing in the definitional section of the regulations, 38 C.S.R. § 2-2, supports the view that streams cannot receive water from smaller water bodies, while at the same time carrying water to larger water bodies, thus acting as "natural drainways" themselves.

The district court’s analysis ignores the core of the definition of a natural drainway -- the term “natural water course” which means any stream or river. This strained reading of the regulation substituted the district court's definition for a rational reading used by the agency.[6] That alone warrants reversal. See Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984).

Thus, West Virginia’s laws and regulations addressing valley fills contemplate fills in “natural water courses,” which include intermittent and perennial streams, as long as those fills do not materially 1) increase sediment load or 2) affect stream quality downstream of the fill. These statutes and regulations, in plain language, negate the district court’s constricted reading of the buffer zone regulation.

Second, SMCRA and WVSCMRA unequivocally allow disturbances in intermittent or perennial streams that are comparable to valley fills. For example, West Virginia Code § 22-3-13(b)(22) authorizes the disposal of excess spoil material in areas containing “springs, natural water courses or wet weather seeps” so long as certain drains are constructed. Accord, 30 U.S.C. § 1265(b)(22)(d). "Springs" can be intermittent or perennial streams of any size. So can "watercourses." The district

[6] See Alt testimony, J.A. 0612 (“From what I see, intermittent or perennial streams are just types of water courses … all of them are drainways, natural drainways.”)

court's ruling thus ignores plain statutory words to the contrary.

Third, state and federal regulations expressly provide that sediment ponds may be placed in perennial streams with the approval of the regulatory authority. 38 C.S.R. § 2-5.4(b)(2) and 30 C.F.R. § 816.46(c)(ii). Sediment ponds, like valley fills, bury portions of stream channels with fill to create impoundments within the stream. Following the district court's theory, however, such sediment ponds would be illegal under the buffer zone rule because stream flow, gradient, fish migration, water quality and quantity are affected in the stream segment filled.

Fourth, state and federal regulations actually allow streams of any sort to be moved or diverted, as long as the diversions meet certain criteria, and are constructed so as to avoid additional contributions of suspended solids to streams. 38 C.S.R. § 2-5.3; 30 C.F.R. § 816.43. Fifth, federal surface mining regulations exclude the use of rock-core chimney drains in fill areas with intermittent or perennial streams, thus acknowledging the permissibility of excess-spoil fills with other types of underdrains in those same areas. 30 C.F.R. § 816.72(b). Several different types of excess spoil fills are recognized in the regulations, including side hill fills, conventional valley fills with chimney core drains and durable

rock fills with natural underdrains. 38 C.S.R. § 2-14.14; 30 C.F.R. §§ 816.72 & .73. Most fills in West Virginia are "durable rock" fills, which do not have rock-core chimney drains, and are allowed in areas with streams.

Sixth, the district court's holding ignores the reality that both the West Virginia Legislature and Congress knew how to prohibit mining activities in specific locations. Both WVSCMRA and SMCRA contain sections expressly prohibiting <u>all</u> surface mining activities in or near at least nine different types of locations, including public roads, occupied dwellings, and cemeteries. <u>See</u> W.Va. Code § 22-3-22(d) and 30 U.S.C. § 1272(e). If the West Virginia Legislature or Congress meant to prohibit valley fills in intermittent or perennial streams, they would have said so expressly in these provisions. But they did not.

All these state and federal regulations specifically contemplate or implicitly assume that portions of intermittent or perennial streams will be covered by fills or otherwise disturbed. These regulations implement the general requirements of Sections 22-3-13(b)(10) & (24) of WVSCMRA and Sections 1265(b)(10) & (24) of SMCRA, which mandate the minimization, not the outright prohibition, of disturbances to the prevailing hydrologic balance of the mine site, offsite areas, and to the quality and quantity of water both during and after surface coal

mining activities. They protect streams as a whole and the environment, but cannot be construed, as the district court did, to prevent any valley fills in intermittent or perennial stream segments. Accordingly, the district court's holding is inconsistent with WVSCMRA and SMCRA and must be reversed.

### 3. **WVDEP's Interpretation of the Buffer Zone Rule is Consistent with the CWA.**

If valley fills comply with CWA § 404, which expressly allows filling operations, and meet CWA § 401's protection of water quality standards, WVDEP permits them without requiring buffer zone variance findings. The district court's holding improperly construes the buffer zone regulation to effectively eviscerate CWA § 404.

#### a. **Valley Fills Do Not Necessarily Violate Water Quality Standards.**

The district court's holding, that valley fills in intermittent and perennial streams always violate water quality standards in the segment of the stream that is buried, is a category mistake. It ignores the fact that water quality standards were never designed to prohibit all filling activities which have the effect of displacing segments of water bodies altogether. Rather, water quality standards were adopted to regulate point source discharges of pollutants into water bodies that continue to exist in those areas where the standards are applied. The district court concluded that, because fills are

composed of waste, they must be regulated by EPA under CWA § 402, in the same manner as discharges of pollutants into existing water bodies. An overview of § 402 illustrates the impossibility of this conclusion.

The CWA requires states to adopt water quality standards and requires that EPA approve them after determining that they are consistent with the CWA. 33 U.S.C. § 1313(a)-(c); 40 C.F.R. § 131.5. Water quality standards must consist of "designated uses" for water bodies (such as fishing and swimming) and "water quality criteria" designed to protect those uses. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.6 & 131.10. EPA is required to develop and publish guidance on the "criteria" necessary to protect various water uses. 33 U.S.C. § 1314(a)(1)-(8).

To these ends, EPA has issued federal water quality standards against which to assess the adequacy of states' standards. <u>See</u> 40 C.F.R. §§ 131.1 & 131.11(b). Included in these standards are: (1) numeric criteria, which establish allowable in-stream pollutant concentrations for differing water uses; (2) narrative criteria, which prohibit odors and unsightly conditions, such as "debris" and "scum"; and (3) an antidegradation policy designed to maintain both existing stream uses and water quality which is better than necessary to sustain those uses. West Virginia's own numeric and narrative criteria, as well as its antidegradation policy, are nearly identical to

those developed by EPA. Compare *EPA Quality Criteria for Water 1986* and 40 C.F.R. § 131.12 with 46 C.S.R. § 1-3.1, 4.1 and 8. J.A. 2306-2313. See also J.A. 2319-2320.

Water quality standards are protected primarily through the NPDES permit process under § 402 of the CWA. The NPDES permit process imposes "effluent limits" on "point source" discharges of non-fill pollutants. See 33 U.S.C. § 1342(a). NPDES permits require that dischargers meet "technology-based effluent limits" at the "point of discharge." 33 U.S.C. §§ 1342(a)(1) & 1311(b)(1)(A) & (2). If a discharge that meets the so-called "technology-based effluent limits" will nonetheless cause the in-stream concentration of pollutants to rise above the concentration allowed by a numeric water quality standard (such as 1.5 milligrams per liter of iron), then the NPDES permit must establish a more stringent "water quality-based effluent limit" to avoid exceeding the in-stream standard. 33 U.S.C. § 1312(a). Accordingly, the CWA and the NPDES program require the permitting agencies to assess the pollution "loading" or "assimilation" capacity of streams in which allowable pollutant concentrations are exceeded and devise plans for allocating the load so as to achieve the water quality standards. See 33 U.S.C. § 1313(d).

Water quality standards, and the NPDES program designed to protect them, thus focus primarily on the allowable

concentrations of pollutants in a water body. They presume that the water body remains intact both at and downstream of the point of the pollutant discharge. Fills, which replace a water body, can never satisfy the standards enumerated in § 402 because no water quality can be measured. Filling necessarily eliminates existing water uses because it eliminates the water at that location. Applying § 402's water quality criteria to valley fills is trying to make a square peg fit into a round hole.[7]

By contrast, the filling program established under CWA § 404 approaches environmental protection differently, and is premised on the concept that a fill will eliminate portions of a water body. That is why water quality standards (and the buffer zone rule) traditionally have been applied only to waters downstream of the fill, and the filled portion of the water body is assessed by different standards. As the EPA explained:

> [T]he Agency disagreed with the suggestion that all solid waste (for example, garbage, trash, and sludge) be regulated under § 402. There are several reasons EPA believes that all discharges with the effect of fill should be handled under the 404 program instead of the 402 program. The 404 program is better suited to preventing the unnecessary destruction of valuable wetland ecosystems. For example, the section 404(b)(1) guidelines require consideration of alternative sites; the NPDES program does not provide for a comparable analysis. In addition, the section

[7] Section 402 is applied, of course, by WVDEP to water which flows into streams from the ponds below valley fills.

> 404(b)(1) guidelines look at the ecological impact of the discharge; the NPDES program uses technology-based effluent limitations.

45 Fed. Reg. 33290, 33299 (May 19, 1980). Thus, the § 404 program focuses not on the concentration of pollutants in an individual stream segment, but instead on an evaluation of alternatives, minimization of impacts and mitigation of unavoidable damage as a means of ensuring minimal adverse overall consequences of a fill.

Ignoring the distinction between the NPDES program and the fill program, the district court held that valley fills necessarily violate state and federal water quality standards in two ways. First, the district court found that valley fills offend the antidegradation component of federal and state water quality standards requiring the protection of existing water uses because they necessarily kill aquatic life and destroy existing stream uses in the portion of the stream that is buried. Bragg, 72 F. Supp.2d at 662 (citing 40 C.F.R. § 131.10(a) & 46 C.S.R. § 1-6.1(a)). Second, the district court concluded that valley fills violate state and federal regulations prohibiting any state from adopting waste transport or waste assimilation as a designated use for any waters of the United States. Id. at 662-63 (citing 40 C.F.R. § 131.12(a)(1) & 46 C.S.R. § 1-4.1(a)). On both scores, the district court erred.

**(1) Valley fills do not violate anti-degradation requirements.**

EPA has rejected the district court's interpretation of the antidegradation requirements because it would effectively eviscerate CWA § 404, which expressly authorizes fills. In holding that the proposed valley fill at Hobet's Spruce Fork mine was unlawful, the district court stated that antidegradation policy requires that "the existing high quality waters of the State must be maintained at their existing high quality." 72 F. Supp.2d at 662. However, EPA's exemption of filling operations from the reach of the antidegradation requirements applies regardless of whether the filling occurs in high quality waters, or lesser quality waters.[8] In its *Questions and Answers on Antidegradation*, EPA addresses the relationship between existing uses and fills as follows:

> [Question]: Fill operations in wetlands automatically eliminate any existing use in the filled area. How is the antidegradation policy applied in that situation?
>
> [Answer]: *Since a literal interpretation of the antidegradation policy could result in preventing the issuance of any wetland fill permit under Section 404 of the Clean Water Act,* and it is logical to assume that Congress intended some such permits to be granted within the framework of the Act, EPA interprets § 131.12(a)(1) of the antidegradation policy to be satisfied with regard to fills in wetlands if the discharge

[8] Both EPA and West Virginia Antidegradation policies contain three tiers of protection. Each successive tier receives greater levels of protection. 40 C.F.R. § 131.12(a)(1)-(3) and 46 C.S.R. § 1-4.1.a-e.

> did not result in "significant degradation" to the aquatic ecosystem as defined under Section 230.10(c) of the Section 404(b)(1) guidelines. *If any wetlands are found to have better water quality than "fishable/ swimmable", [i.e. high quality waters] the State would be allowed to lower water quality to the no significant degradation level as long as the requirements of Section 131.12(a)(2) were followed.*

J.A. 1948-1950. See also, letter from EPA to West Virginia Office of Water Quality, J.A. 2505.

Recognizing that fills automatically eliminate any existing use in the filled area, EPA's guidance states that filling may occur, even in high quality waters, so long as there is no "significant degradation" in accordance with the § 404(b)(1) guidelines and if the procedures of § 131.12(a)(2) are followed. Thus, EPA's water quality standards, on which West Virginia's standards are modeled, unequivocally allow filling in high-quality waters such as fishable, swimmable streams.

**(2) Valley fills do not violate prohibitions on waste assimilation.**

The district court held that valley fills in intermittent or perennial streams violate state and federal water quality standards "by eliminating the buried stream segments for the primary purpose of waste assimilation." 72 F. Supp.2d at 662. In reaching this conclusion, the district court relied on federal and state water quality standards prohibiting a State from adopting "waste transport or waste assimilation" as a

designated use for any waters of the United States. 40 C.F.R. § 131.10(a); 46 C.S.R. § 1-6.1(a). Permitting spoil fills where the requirements of CWA § 404 can be met is hardly equivalent to adopting "waste transport or waste assimilation" as a protected water use.

Waste transport and assimilation standards are inapplicable to valley fills. Valley fills are not designed to be "assimilated" or "transported" by a stream, but are designed to stay in one place. The district court rejected this common sense view, declaring "waste disposal projects are so enormous that, rather than the stream assimilating the waste, the waste assimilates the stream." 72 F. Supp.2d at 662. Thus, the district court faults valley fills precisely because of their "fill" character.

This view directly contravenes the EPA's admonition that fills must be assessed differently to avoid erasing CWA § 404 from the United States Code. Instead of recognizing that traditional water quality standards like antidegradation and waste assimilation cannot, and were never meant to, apply to fills, the district court adopted a Ptolemaic view that put the buffer zone rule at the center of the environmental universe and construed every other statute and regulation to prohibit filling activities expressly authorized under CWA § 404. The district court simply erred.

**b. Waste Fills Are Not Illegal.**

For twenty years, valley fills have been permitted under § 404 of the CWA. Indeed, the district court itself accepted a Settlement Agreement between plaintiffs/appellees and the Corps, pursuant to which the Corps was to administer valley fill permits under CWA § 404. Bragg v. Robertson, 54 F. Supp.2d 635 (S.D. W.Va. 1999). Shockingly, the district court later reversed its position, sua sponte, with respect to the Settlement Agreement, holding that it is unenforceable because it is illegal. In so doing, the district court concluded that overburden or excess spoil from mining operations is not a "fill" material subject to the Corps' authority. 72 F. Supp.2d at 657. This does not mean, however, that valley fills and similar waste fills are not properly authorized under the CWA.

Permits issued under CWA § 404 authorize the placement of fill materials into waters of the United States. The Corps' regulations define "fill" material according to its purpose: "any material used for the primary purpose of replacing an aquatic area with dry land or changing the bottom elevation of an [sic] waterbody." 33 C.F.R. § 323.2(e). The district court found that valley fills do not satisfy this "primary purpose" test of "fill" material because they are not used primarily for constructive purposes, but rather for waste disposal. But valley fills are composed of dirt and rock that is

indistinguishable from the dirt and rock used in construction projects. It makes no sense for the law to allow fills of dirt and rock for construction projects, but not fills composed of the exact same materials at mining projects.

Indeed, the law does not draw such a distinction. The district court's findings regarding the Corps and waste are not based on environmental concerns, but rather on jurisdictional ones. As noted in West Virginia Coal Ass'n v. Reilly, supra, there has long been confusion over who has the permitting authority over mine spoil disposal in streams: the Corps or the EPA. This is so because the two agencies define "fill" material inconsistently. The Corps' purpose test excludes from "fill" any material discharged into water for the primary purpose of disposal of waste, 33 C.F.R. § 323.2(e), while EPA regulations provide that the Corps has authority over fill material discharged into water for "any purpose." 40 C.F.R. § 232.2. Understandably, these inconsistent regulations have generated confusion over which agency controls the discharge of mine spoil.[9]

To remedy this confusion, the Corps and EPA entered into a Memorandum of Agreement ("MOA") in 1986 which did not outlaw mine spoil discharges, but instead specified who had authority

[9] The federal appellants disagreed with the district court's resolution of this issue, and have proposed regulatory changes reversing the district court. See Addendum at 365.

over them. J.A. 2344-2350. See Reilly, 728 F. Supp. 1287, supra. The MOA demonstrates that the issue regarding the Corps and mine spoil has always been one of who regulates these fills, and not one of whether spoil fills are permitted at all.

Nothing about the composition of valley fills or West Virginia's water quality standards, which are modeled after EPA's standards, mandates outlawing valley fills in water. Valley fills are composed of dirt and rock -- far less odious materials than the sanitary waste from septic tanks, or old appliances or all the other detritus of modern life that occupies municipal solid waste landfills in wetlands across the country. Accordingly, if EPA and other states allow waste fills in conformity with the CWA and their own water quality standards, then West Virginia may also. See New Hanover Township v. U.S. Army Corps of Engineers, 96 F. Supp. 180 (E.D. Pa. 1992), *vacated on other grounds*, 990 F.2d 470 (3rd Cir. 1993); Orange Environmental, Inc. v. County of Orange, 817 F. Supp. 1051 (S.D. N.Y. 1993); Resource Investments, Inc. v. U.S. Army Corps of Engineers, 151 F.3d 1162, 1167-68 (9th Cir. 1998).

### B. IN THE ALTERNATIVE, BUFFER ZONE VARIANCE FINDINGS MAY BE MADE BY COMPLYING WITH CWA §§ 401 AND 404(b)(1).

WVDEP stands by its long-established interpretation that the buffer zone rule does not apply to the footprint of valley fills. However, if this Court disagrees with that view, and finds that the buffer zone rule does apply to the footprint of fills, the Court should defer to WVDEP's conclusion that the buffer zone variance findings are satisfied if the criteria found in the § 404(b)(1) Guidelines are satisfied. This reasoning was articulated in the MOU.

In August, 1999, during this litigation, WVDEP and the federal agencies responsible for administering SMCRA and the clean water laws executed the MOU to explain how the buffer zone rule could apply to valley fills. Under the MOU, these agencies with overlapping responsibility for regulating fills determined that the findings under CWA §§ 404 and 401 to authorize fills are equivalent to the buffer zone variance standards. This approach allows filling to occur, as envisioned by SMCRA and CWA § 404, but limits impacts to the "no significant degradation" level downstream:

> As reflected in the April 7, 1999 MOU, we are seeking to enhance effective coordination and timeliness in the evaluation of proposals to discharge excess spoil fills in waters of the U.S., while ensuring effective protection of the State's human health and environment. In view of the comparable requirements discussed above under the SMCRA and Section 404 regulatory programs, OSM and WVDEP believe that, where

> a proposed fill is consistent with the requirements of the Section 404(b)(1) Guidelines and applicable requirements of § 401 certification of compliance with water quality standards, the fill would also satisfy the criteria for granting a stream buffer zone variance under SMCRA and WVDEP regulations.

J.A. 2220.

While the federal agencies disavowed the MOU in their April 17 brief to this Court and a contemporaneous letter to Director Castle, WVDEP executed and relied upon the MOU in good faith. As Director Castle's response indicates, the federal about-face leaves the fate of the MOU in question, and undermines the progress made since August 1999, in developing a coordinated permitting process. See Addendum at 382. Federal vacillation aside, WVDEP's reasoning in the MOU is based on a permissible construction of the applicable statutes and regulations, and also is entitled to deference to the extent the Court finds the buffer zone rule applicable to fills. Under either theory, the district court's ruling should be reversed.

#### 1. **What the MOU Does.**

Under CWA § 404, the Corps issues fill permits for mine spoil consistent with EPA-developed guidelines. 33 U.S.C. § 1344(b)(1). The Corps uses these environmental standards -- known as the 404(b)(1) Guidelines -- to review CWA § 404 permit applications. 40 C.F.R. § 230.1. The Guidelines require applicants to demonstrate that: (1) "no practicable

alternative" exists to locating the fill within waters of the United States; (2) the fill will comply with state water quality standards; (3) the project will not result in "significant degradation" of the aquatic ecosystem;[10] and (4) the project includes practicable and appropriate measures to minimize potential harm to the aquatic ecosystem. Id.

In addition to satisfying the criteria in the § 404(b)(1) Guidelines, applicants for CWA § 404 permits must also demonstrate that their projects will meet applicable State water quality standards by obtaining State certification pursuant to CWA § 401. 33 U.S.C. § 1341(a)(1).

The agencies signatory to the MOU determined that the findings under CWA §§ 404 and 401 to authorize fills are equivalent to the buffer zone variance standards.

**2. The MOU is Consistent With the Relevant Statutes.**

In contrast to the district court's holding (and the federal appellants' new position in their brief), the MOU harmonizes CWA § 404 with water quality standards and SMCRA-based regulations, and appropriately gives effect to all provisions of the law. United States v. Fisher, 58 F.3d 96, 99 (4th Cir. 1995) ("rules of statutory construction require that we

---

[10] EPA elaborated on the effects contributing to "significant degradation" in its 404(b)(1) Guidelines. 40 C.F.R. § 230.10(c).

give meaning to all statutory provisions and seek an interpretation that permits us to read them with consistency”).

**3. The MOU Is Consistent With Established EPA Policy Approved By The District Court.**

Likewise, the MOU is consistent with a former CWA policy already approved by the district court. The manner in which the MOU harmonizes water quality standards with filling activities is not appreciably different from EPA’s 1988 “In-Stream … Filling Policy” that the district court approved as consistent with the Clean Water Act a decade ago in West Virginia Coal Ass’n v. Reilly. J.A. 2524-2527. That 1988 EPA Policy expressly relied on the CWA § 404(b)(1) Guidelines as establishing the criteria for permitting valley fills under the CWA and providing detailed protection for fishable waters, 728 F. Supp. at 1280 n.2 (setting out the conditions under which EPA would allow valley fills), and should not have been rejected by the district court.

**4. The § 404(b)(1) Guidelines Offer the Same, or More, Protection Than The Buffer Zone Rule.**

The district court rejected the MOU’s interpretation of the § 404(b)(1) Guidelines as equivalent to the buffer zone variance criteria, concluding that the Guidelines are less protective of streams than the buffer zone regulation. However, the § 404(b)(1) Guidelines and associated § 401 certification provide the same measure of environmental protection -- if not more --

than does the buffer zone regulation. It was outside the power of the district court to conclude that it was irrational for EPA, OSM, WVDEP and the Corps to agree that "adverse effect" and "material damage" (from the buffer zone rule) mean the same thing as "significant degradation" (from CWA § 404).

The buffer zone regulation itself invokes two imprecise standards. It requires consideration of "*adverse*" effects on stream-flow, gradient, fish migration and other related environmental values, and "*material damage*" to water quantity and quality in the stream. 38 C.S.R. § 2-5.2. Contrary to the district court's holding, the buffer zone rule was never meant to prohibit any de minimis adverse effect. Likewise, the § 404(b)(1) Guidelines consider a wide range of impacts on "fish and other related environmental values" pursuant to the "significant degradation analysis." See 40 C.F.R. § 230.10(c) (considering "significantly adverse effects of the discharge of pollutants on life stages of aquatic and other wildlife dependent on aquatic ecosystems" and on "aquatic ecosystem diversity, productivity, and stability").

The significant degradation analysis is to be made by considering impacts not only on water quality, but also on water quantity, flow and gradient. See e.g., 40 C.F.R. § 230.11(b) (requiring consideration of "potential diversion or obstruction of flow, alterations of bottom contours, or other significant

changes in the hydrologic regime”). The § 401 certification ensures that water quality standards are met. Thus, the CWA § 404 and § 401 standards have been reasonably construed by the responsible agencies to be equivalent to the buffer zone variance “adverse effects” and “material damage” criteria and the district court should have agreed.

### 5. WVDEP’s Application of the MOU is Entitled to Deference.

The MOU was a collaborative effort on the part of every agency involved in administering SMCRA and the CWA. It took months of deliberation. WVDEP relied upon it in good faith. It strikes a reasonable balance that harmonizes the surface mining laws with all sections of the CWA. It is a permissible construction of these statutes and regulations by the agencies responsible for their administration. As such, this construction, too, is entitled to deference. See West Virginia Coal Association v. Reilly, supra, 728 F. Supp. at 1290; West Virginia Mining and Reclamation Association v. Babbitt, 970 F. Supp. 506 (S.D. W.Va. 1997) (affirming OSM’s construction of bond release provisions as striking a reasonable balance in the face of Congressional ambiguity).

### C. THE APPROACH TAKEN BY THE DISTRICT COURT AND THE FEDERAL DEFENDANTS IS UNREASONABLE AND PLAINLY ERRONEOUS.

The district court's opinion is based on a too-narrow reading of the buffer zone rule -- one single regulation out of a complex, often overlapping scheme of federal and state surface mining and water pollution control laws. The interpretation fashioned by the district court (and subsequently embraced in this appeal by the federal appellants) is wholly inconsistent with numerous portions of WVSCMRA, federal SMCRA and the CWA. The district court's position not only bans valley fills essential for surface and underground mining in West Virginia, but actually prohibits *all* fills authorized under the CWA. This construction creates an impermissible conflict between SMCRA and the CWA, and if affirmed, will have a devastating effect on West Virginia's mining industry.

The litigation position belatedly assumed by the federal appellants in this election year is no more sensible than the district court's construction of the governing statutes and regulations. It represents OSM's third interpretation of the buffer zone rule during this lawsuit.[11] Inexplicably, the federal appellants abandoned their historic approach to valley fills and embraced the district court's conclusion that valley

[11] The federal about-face also appears to violate the MOU, and could be rejected by this Court for that reason. See Addendum at 382.

fills can *never* comply with the buffer zone regulation, but in the same brief declared without apparent irony that this rule should only apply to "substantial" fills, and not "minor spoil disposal activities" in streams. The district court's interpretation, and the federal appellants' slant on that interpretation, must be rejected because they are not based on a reasonable construction of the governing law.

### 1. **The District Court's Holding Effectively Bans All Fills.**

If this Court affirms the district court's conclusion that antidegradation and waste assimilation standards apply to the segment of streams that are buried in valley fills, then all fills will be outlawed. Compliance with antidegradation and waste assimilation requirements under the CWA is not limited to those streams defined as "intermittent" or "perennial" under the surface mining laws. Rather, West Virginia's water quality standards apply to all "waters of the state" as defined under the West Virginia Water Pollution Control Act. West Virginia Code § 22-11-1, et seq. The "waters of the state" are defined broadly to encompass "any and all water on or beneath the surface of the ground, whether percolating, standing, diffused or flowing, wholly or partially within this state and within its jurisdiction, and includes … natural or artificial lakes, rivers, streams, creeks, branches, brooks, ponds … impounding

reservoirs, springs, wells, watercourses and wetlands." W.Va. Code § 22-11-3(23).

Thus, the district court's application of antidegradation and waste assimilation standards to all stream segments in valley fills has the effect of eliminating all types of fills authorized under the CWA. This result illustrates the district court's error in applying water quality standards to the filled portion of the stream.

### 2. **The District Court's Holding Creates An Impermissible Conflict Between SMCRA and the CWA.**

Mine spoil fills, like other waste fills, are permitted under the CWA. If West Virginia or OSM's buffer zone regulations prohibit these same valley fills, they effectively supercede the CWA. This is expressly prohibited by Section 702(a)(3) of SMCRA: "[n]othing in this Act shall be construed as superceding … [t]he Federal Water Pollution Control Act … the State laws enacted pursuant thereto, or the Federal laws relating to preservation of water quality." 30 U.S.C. § 1292(a)(3). See also In Re Surface Mining Regulation Litigation, 627 F.2d 1346, 1366-69 (D.C. Cir. 1980)(OSM cannot issue SMCRA regulations which interfere with CWA standards and exemptions imposed by EPA). Thus, the district court's interpretation of the buffer zone rule as a per se ban on

otherwise permissible fills creates an unacceptable conflict between SMCRA and the CWA.

### 3. **The District Court's Approach To Valley Fills Will Crush West Virginia's Mining Industry.**

The district court's holding, if affirmed, would crush mining in West Virginia, contrary to WVSCMRA's stated purpose "to strike a careful balance between the protection of the environment and the economical mining of coal … " W.Va. Code § 22-3-2(a). In West Virginia Coal Association v. Reilly, supra, the district court found that valley fills "are necessary to carry out mining operations." 728 F. Supp. at 1278. Valley fills are necessary in all types of coal mining. J.A. 2274-2276. So are fill-type structures known as "coal refuse disposal facilities." These facilities, located in valleys, are used to store the "refuse" generated when raw coal is cleaned of its impurities. J.A. 2275. The hollows where valley fills and coal refuse disposal structures are placed contain streams. J.A. 2276.

In determining which streams have the biological criteria to be classified as "intermittent" or "perennial", DEP establishes, as part of the permitting process, that certain forms of stream life, such as mayflies, exist in the streams. Id. This test typically results in the uppermost reaches of hollows being classified as intermittent or perennial. Id.

Indeed, nearly 100% of valley fills and refuse structures would encroach upon intermittent and perennial streams as defined under the clean water laws. Id. And 59 out of 62 mining permit applications pending at WVDEP on the day of the district court's order on their face proposed a fill in an intermittent or perennial stream. J.A. 2276.

If this Court affirms the district court's view of the buffer zone rule, then this Court will effectively outlaw the overwhelming majority of valley fills and refuse disposal structures. Simply put, if (1) valley fills necessarily violate water quality standards; and (2) nearly all valley fills and refuse disposal structures are placed in waters to which water quality standards apply; then (3) nearly all valley fills and refuse impoundments will violate water quality standards. Because valley fills and refuse disposal structures are needed in all types of mining, outlawing these structures would devastate mining in West Virginia. Certainly, neither the West Virginia Legislature nor OSM intended to secretly abolish coal mining by adopting the buffer zone regulation.

## II. THE DISTRICT COURT LACKS JURISDICTION OVER THIS CASE.

### A. THE DISTRICT COURT LACKED JURISDICTION TO REVIEW DEP'S DISCRETIONARY APPLICATION OF THE BUFFER ZONE RULE.

The District court found that it had jurisdiction under SMCRA's citizen suit provision to review the appellees' complaints. However, the appellees' criticisms of when, where and how DEP makes its buffer zone determinations are beyond the jurisdiction conferred by § 1270(a)(2).

Section 1270(a)(2) only permits suits against a state regulatory authority for an alleged failure to perform any act or duty under SMCRA which is not discretionary with the state regulatory authority. Courts construing similarly-phrased environmental citizens' suits recognize that the non-discretionary duty requirement is meant to limit the number of citizen suits that can be brought against a regulatory agency and to lessen the disruption of the Act's complex administrative process. Kennecott Copper Corp. v. Costle, 572 F.2d 1349, 1353 (9th Cir. 1978)(holding the same in the context of the similarly-phrased citizen suit provision under the Clean Air Amendments of 1970).

Accordingly, courts refuse to find jurisdiction under such citizen suit provisions where the claim goes to the manner in which the agency performed its duties, as opposed to the failure to perform those duties at all. Cascade Conservation League v.

M.A. Segale, Inc., 921 F. Supp. 692, 698 (W.D. Wash. 1996)(holding that the similarly-phrased CWA citizen suit provision does not confer jurisdiction over an allegation that the Corps performed its duties under the Act erroneously); Sun Enterprises, Ltd. v. Train, 532 F.2d 280, 288 (2d Cir. 1976) (explaining that complaints regarding how EPA performs its duties under the CWA must be considered in administrative permit review process, and not the citizen suit provision); Wisconsin Environmental Decade, Inc. v. Wisconsin Power and Light Company, 395 F. Supp. 313, 321 (W.D. Wis. 1975) (Clean Air Act's citizen suit provision "was intended to provide relief only in a narrowly-defined class of situations in which the Administrator failed to perform a mandatory function; it was not designed to permit review of the performance of those functions, nor to permit the court to direct the manner in which any discretion given the Administrator in the performance of those functions should be exercised.").

Non-discretionary duties must be explicitly set out in the law. Monongahela Power v. Reilly, 980 F.2d 272, 276 n.3 (4th Cir, 1992); Kennecott Copper Corp., supra, 572 F.2d at 1355 (9th Cir. 1978); Sierra Club v. Thomas, 828 F.2d 783, 791 (D.C. Cir. 1987); Nobles v. Duncil, 202 W. Va. 523, 535, 505 S.E.2d 442, 453 (1998). If the duty complained of grants the agency even a "limited element of discretion", courts have no jurisdiction to

review the agency's actions under SMCRA's citizen suit provision in the absence of a complete failure to perform. See National Wildlife Federation v. Burford, 677 F. Supp. 1445, 1468-69 (D. Mont. 1985).

Such is the case here. WVDEP has to use discretion in construing and applying its buffer zone rule in light of all the other related statutes. In adopting the federal buffer zone regulation, OSM expressly stated that "[t]he regulatory authority and the permittee can agree at the application stage where buffer zones need to be established … ." 44 Fed. Reg. 15177 (March 13, 1979) (referring specifically to intermittent streams and another example of a citation pretermitted by the district court). This task "requires the fusion of technical knowledge and skills with judgment which is the hallmark of duties which are discretionary." See Kennecott Copper Corp., supra, 572 F.2d at 1354 (citing Train v. Natural Resources Defense Council, 421 U.S. 60 (1975)). Threshold decisions about 1) how to permit overburden placement in "natural drainways", and 2) whether to apply the buffer zone rule to the footprint of fills permitted by CWA § 404, are exactly this sort of discretionary act. Appellees cannot raise their complaint about discretionary duties in a citizen suit's challenge to the performance of a non-discretionary duty.

### B. THE APPELLEES FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES.

How to apply the buffer zone rule is also the sort of decision best reviewed in an appropriate administrative forum. Yet the appellees did not avail themselves of the thorough administrative processes available under WVSCMRA for contesting permit issuance.

The United States Supreme Court has:

> long acknowledged the general rule that parties exhaust prescribed administrative remedies before seeking relief from the federal courts. Exhaustion is required because it serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency.

McCarthy v. Madigan, 503 U.S. 140, 144-145 (1992).

Consequently, courts normally require exhaustion of SMCRA's administrative remedies prior to any judicial review. Mullins Coal Company v. Clark, 759 F.2d 1142, 1143 (4th Cir. 1985)(requiring administrative review of a cessation order issued pursuant to 30 U.S.C. § 1271(a)(3) prior to judicial intervention); Shawnee Coal Co. v. Andrus, 661 F.2d 1083, 1093 (6th Cir. 1981) (same); Graham v. Office of Surface Mining Reclamation and Enforcement, 722 F.2d 1106, 1112 n.8 (3rd Cir. 1983) (same). Requiring exhaustion in this case would allow WVDEP to apply its expertise, and would create a reasonable division of labor between agency and court. See Mullins Coal Company v. Clark, 759 F.2d 1142, 1145 (4th Cir. 1985).

West Virginia Code §§ 22-3-20(a) & (b), 22-3-21, 22B-1-7, and 22B-1-9, set forth a detailed administrative procedure for contesting the issuance of a permit for surface mining or a significant revision to an existing permit. Any person having an interest which is or may be adversely affected by issuance of a permit may participate in the permitting process through public notice, written objections, informal conferences, formal hearings, de novo appeals to an expert Board, and judicial review in state court. No reasoned basis exists for the district court's holding that appellees did not have to comply with these procedures and attack specific permits.

While acknowledging that exhaustion of administrative remedies is generally required in SMCRA suits, the district court concluded that SMCRA's citizen suit provision carves out an exception to the normal exhaustion requirement. The district court did not cite any case law to support this view. Similarly, the district court's interpretation is not supported by SMCRA's language.

Both the federal SMCRA and WVSCMRA require any person challenging the permitting process to exhaust administrative appeal procedures before obtaining judicial review. Section 1264(f) is the key provision in the federal scheme:

> Any applicant or any person with an interest which is or may be adversely affected *who has participated in the administrative proceedings as*

> *an objector*, and who is aggrieved by the decision of the regulatory authority … shall have the right to appeal in accordance with section 526 [30 U.S.C. § 1276][SMCRA's judicial review provision].

§ 1264(f). WVSCMRA also conditions judicial review on participation in the administrative process. Under West Virginia Code §§ 22-3-21 and 22B-1-9, any person adversely affected by a permitting decision must appeal that decision to the West Virginia Surface Mine Board. The Surface Mine Board has authority to affirm, modify, vacate or stay permitting decisions, subject to judicial review. W.Va. Code § 22B-1-7.

Neither the federal SMCRA nor WVSCMRA provides an express exception to the exhaustion requirement for citizen suits. If the district court's interpretation of these statutes were correct, citizens could always circumvent the administrative procedures and time frames for challenging permits by clothing such challenges as citizen suits. SMCRA's legislative history illustrates that Congress intended no such result. In discussing SMCRA's citizen suit provision, Congress explained: "This section is not intended to override the specific provisions of this bill which provide more precise requirements for citizen participation in the permit application and performance bond release proceedings … " S.R. No. 95-128, 95th Cong. 1st Sess. (1977), at p. 88.

Indeed, this Court has refused to allow environmental citizen suits to circumvent the administrative processes for challenging permitting decisions. Palumbo v. Waste Technologies Industries, Inc., 989 F.2d 156 (4th Cir. 1993). In Waste Technologies, the Court held that the plaintiffs' claims concerning EPA's permitting process for a hazardous waste incinerator had to be raised on direct appeal, not in a suit under RCRA's citizen suit provision. 989 F.2d at 159-161. This Court stressed the dangers of allowing citizen suits to be used to mount collateral attacks on permitting decisions:

> Adding another layer of collateral review for agency decisions threatens to put at naught the administrative process established by Congress. Plaintiffs who sue collaterally in a federal district court would be able to avoid the deferential standard of review that circuit courts must apply under the Administrative Procedure Act when hearing a direct appeal from an agency decision. Plaintiffs would also be able to circumvent the limitations period during which they were required to post a direct appeal -- ninety days in the case of RCRA. And the district court, as plenary fact-finder, would not be limited to the evidentiary record that the agency has accumulated during the months of permit proceedings and public hearings held prior to the issuance of the permit. In short, for an uncertain length of time after the agency issues the permit, the permit-holder would face the very real threat that the inquiry into the validity of its permit might be reopened in an altogether different forum.

Id. at 161-162.

The principle of permitting an agency to review, in the first instance, actions within the scope if its unique expertise

applies with special force to the highly technical determinations about natural drainways and buffer zones required by WVSCMRA. WVDEP is in the best position to make those initial permitting decisions and coordinate them with the Corps' § 404 decisions. The West Virginia Surface Mine Board is in the best position to monitor those decisions. If interested persons are dissatisfied with the Surface Mine Board's decision, they can then seek judicial review. This is what plaintiffs should have done in this case, with the Spruce mine permit or any other specific permit which offends them. The federal courts need not be involved.

**C. THE DISTRICT COURT LACKED JURISDICTION OVER APPELLEES' CLAIM THAT VALLEY FILLS VIOLATE WATER QUALITY STANDARDS.**

Distilled to its essence, appellees' complaint uses a SMCRA-based citizen's suit to bootstrap a challenge to the issuance of CWA permits for valley fills. The district court lacked jurisdiction in this case to decide this water law issue.

The surface mining laws regulate water quality "only incidentally." "Congress intended that the regulation of water, including water connected with mining operations, be carried out by EPA." West Virginia Coal Ass'n v. Reilly, supra, 728 F. Supp. at 1285. Accordingly, DEP's Office of Surface Mining and Reclamation relies on another agency -- the Office of Water Resources -- to ensure that water quality standards are met in

the context of surface mining operations and certify that the operations will comply with applicable water quality standards by issuing a CWA § 401 permit. Plaintiffs never noticed an intent to sue under the water laws.

SMCRA's incidental requirement in the buffer zone rule that water quality standards be met cannot give rise to a SMCRA-based action against the DEP for failure to enforce standards that are applied solely by other agencies acting under the clean water laws. See Tennant v. Callaghan, 490 S.E.2d 845 (W.Va. 1997) (where plaintiff's real complaint in with an NPDES permit, challenges must be made to that permit rather than SMCRA). The reasoning behind this legal principal was explained in Dubois v. U.S. Dept. of Agriculture, 102 F.3d 1273, 1300 (1st Cir. 1996). In Dubois, the court noted that plaintiffs could not use a NEPA suit against the U.S. Forestry Service to collaterally litigate issues relating to water quality. Explaining that the "Forestry Service possesses neither the congressional mandate nor the expertise to second-guess State water quality certification," the court found that the plaintiffs had to challenge EPA's actions under the CWA -- even though the Forestry Service had a duty under NEPA to ensure that the permittee complied with Clean Water Act requirements. Id. at 1300-1301.

The district court side-stepped this jurisdictional hurdle with the sophistic explanation that it was not enforcing the

CWA, but merely interpreting the MOU for consistency with both CWA and SMCRA. But the district court's sweeping conclusion metamorphosized the buffer zone regulation into a rule that valley fills necessarily violate federal and state water quality standards. Challenges to the issuance of mining-related water permits must be made under the water laws themselves, not SMCRA. Thus, the district court lacked jurisdiction to resolve appellee's CWA permit challenge in this SMCRA-based citizens' suit.

**D. FEDERAL QUESTION JURISDICTION IS LACKING.**

Despite appellees' characterization of this case as one involving issues of federal law, there is no federal question to support the district court's jurisdiction. Appellees base their complaint against Director Castle on an alleged "pattern and practice" of disregarding the requirements of West Virginia's regulatory program, including the West Virginia buffer zone rule. Relying on Molinary v. Powell Mountain Coal Company, 125 F.3d 231 (4th Cir. 1997), the district court held that these West Virginia regulations function as federal law for purposes of federal-question subject matter jurisdiction.

Yet Molinary's holding is not supported by a reasonable interpretation of SMCRA. When faced with the same issue, the Third Circuit held that alleged violations of state regulations connected to a state-approved program do not confer federal

question jurisdiction. Haydo v. Amerikohl Mining, Inc., 830 F.2d 494, 497-98 (3rd Cir. 1987). In Haydo, the plaintiffs urged the court of appeals to find that state-promulgated regulations are issued pursuant to federal SMCRA, and thus, that an action for their violation "arises under" federal law for purposes of federal subject matter jurisdiction. The court declined to do so.

The Haydo court noted that, while Congress intended for SMCRA to impose minimum nationwide standards, it also recognized that the individual states should assume responsibility for regulating surface mining in their borders pursuant to state programs enacted by them to meet their individual needs. 830 F.2d at 497-498. The court concluded that treating state regulations as federal law would render meaningless the Congressional offer in SMCRA of exclusive jurisdiction to states obtaining approval of a regulatory program. Id.

Other jurisdictions also recognize that, once OSM has approved a state's program, state law applies, and an aggrieved person's cause of action will be in state court. See Coteau Properties Company v. Department of Interior, 53 F.3d 1466, 1472-73 (8th Cir. 1995). See also, In Re Permanent Surface Mining Regulation Litig., 653 F.2d 514, 519 (D.C. Cir. 1981) ("It is with an approved state law and with state regulations consistent with the Secretary's that surface mine operators must

comply."); National Wildlife Federation v. Lujan, 928 F.2d 453 (D.C. Cir. 1991) (Wald, J., concurring)(SMCRA does not apply in states that have assumed exclusive jurisdiction over surface mining, and thus, aggrieved person's cause of action will be in state court under applicable state law program); Laurel Pipe Line Co. v. Bethlehem Mines Corp., 624 F. Supp. 538, 539-41 (W.D. Pa. 1986).

The Molinary court considered, and wrongly rejected, the reasoning in Haydo, concluding that the Third Circuit failed to recognize that SMCRA only offers exclusive regulatory authority to the states, not exclusive adjudicative authority. 125 F.3d at 236 n.5. While this distinction might make a difference in cases against permittees where diversity jurisdiction is invoked, it should not obtain against a state official where the only basis for jurisdiction is the existence of a federal question.

There is simply no reasonable basis for Molinary's characterization of state-promulgated regulations as federal law/state law hybrids. As Haydo correctly noted, SMCRA does not provide for concurrent jurisdiction in the states and federal government. When a state fails to implement an acceptable regulatory program, the federal government can sue to revoke the program and allow the Secretary to assume jurisdiction for the regulation of surface mining taking place within the state. 830

F.2d at 497. But when OSM approves a state's program, state law controls, and the state is vested with exclusive jurisdiction. Id. Either federal mining law or state mining law applies to regulate surface mining activities, but not both. 830 F.2d 497. Since West Virginia maintains an approved state program with its own natural drainways and buffer zone regulations, West Virginia law applies, and there is no federal question to support subject matter jurisdiction in the district court.

**E. THIS SUIT IS BARRED BY THE ELEVENTH AMENDMENT.**

The Eleventh Amendment protects an unconsenting state from suit in federal court by private parties. See Hans v. Louisiana, 134 U.S. 1, 10 (1890). A state's Eleventh Amendment immunity extends to state agencies, such as WVDEP, and state officials, such as Director Castle. See Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993).

While Eleventh Amendment immunity is not without exception, there are no circumstances to suggest that the Director is not immune from suit here. Plaintiffs chose not to rely on an argument that the State of West Virginia did anything to waive its Eleventh Amendment rights.[12] Nor did plaintiffs advance an argument that Congress validly abrogated the states' Eleventh

[12] The Consent Decree was submitted to the district court without waiving this argument for this appeal. J.A. 1852.

Amendment immunity when it enacted SMCRA. In any event, neither argument would have merit. Instead, plaintiffs and the district court relied on the only remaining avenue around the Eleventh Amendment, Ex Parte Young, which does not apply in this case.

The Ex Parte Young doctrine, a narrow exception to Eleventh Amendment immunity, allows private individuals to sue state officers in federal court for prospective, injunctive relief for continuing violations of federal law. Relying on the general language of SMCRA's citizen suit provision, as well as excerpts from the legislative record regarding the benefits of citizen participation in the regulatory process, the district court concluded that Congress "implicitly authorized citizens to bring suit under the Ex Parte Young exception." Bragg v. Robertson, No. 2:98-0636, 1998 U.S. Dist. LEXIS 22077 at *8-9 (S.D. W.Va. Oct. 9, 1998). The district court was wrong.

Far from authorizing citizens to bring suit under the Ex Parte Young exception, SMCRA's citizen suit provision expressly acknowledges the limitations placed on citizen suits by the Eleventh Amendment. Section 1270(a)(2) provides that citizen suits may be brought "against the Secretary or the appropriate State regulatory authority to the extent permitted by the eleventh amendment to the Constitution … ." Other courts considering such language have construed it as an express constitutional limitation on citizen suits, and not as an

implicit grant of authority in derogation of the Eleventh Amendment. Powder River Basin Resource Council v. Babbitt, 54 F.3d 1477, 1483 n.3 (10th Cir. 1995); Burnette v. Carothers, 192 F.3d 52, 57 (2nd Cir. 1999).

The mere inclusion of a citizen suit provision in SMCRA is not enough to eviscerate the Eleventh Amendment. Nor is it enough that plaintiffs' Complaint names Director Castle in his individual capacity, and requests prospective injunctive relief. As the United States Supreme Court explained: "To interpret Young to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle … that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction." Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 270 (1997). On close scrutiny, this action fails to satisfy the Ex Parte Young exception.

### 1. **The Issues In This Case Pertain To State Law.**

Ex Parte Young does not apply because the issues in this case involve WVSCMRA, not federal law. Although appellees nominally allege violations of federal SMCRA to invoke federal court jurisdiction, they seek relief for Director Castle's alleged failure to comply with the approved West Virginia

surface mining program. The foundation of the Complaint is an alleged “pattern and practice” of disregarding West Virginia's buffer zone regulation.

In fact, as discussed above, once a state program is approved by OSM, state, not federal, regulations govern. Coteau Properties Company v. Department of Interior, supra. See also, In Re Permanent Surface Mining Regulation Litig., supra; National Wildlife Federation v. Lujan, supra; Haydo, supra. Since WVSCMRA is controlling, appellees cannot defeat Director Castle’s Eleventh Amendment immunity based on a continuing violation of federal law.

The district court relied on Molinary for the proposition that state-promulgated regulations are issued “pursuant to” federal SMCRA, turning disputes concerning state regulations into federal issues. However, Molinary does not address the application of Ex Parte Young to defeat sovereign immunity. The plaintiffs in Molinary brought a SMCRA citizen suit against a private surface mine operator under 30 U.S.C. § 1270(f), not a state official under 30 U.S.C. § 1270(a)(2). 125 F.3d 233. The Molinary court was never asked to disregard a state’s sovereign immunity. Rather, the Court was asked to decide whether it had federal-question subject matter jurisdiction over a dispute involving Virginia’s regulatory program. For these reasons, this Court should not extend its holding in Molinary to defeat a

state's Eleventh Amendment immunity from SMCRA suits in federal court.

Further, Molinary, if extended to encompass state actions, would be contrary to the United States Supreme Court's holding in Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984). In Pennhurst, the Court held that the Eleventh Amendment prohibits a federal court from ordering state officials to conform their conduct to state law. The Court explained that the purpose of Ex Parte Young is to harmonize Eleventh Amendment rights with the need to uphold the "supreme authority of the United States." Id. at 102. The "supreme authority" is not at risk in an action involving state law and regulations. The Court noted that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." Id. at 106.

Like the action in Pennhurst, this case involves state officials applying state law. The case could have, and should have, been brought in state court under state law. WVSCMRA specifically authorizes citizen suits – only in state courts – against the Director for failure to perform non-discretionary duties under the West Virginia program. W.Va. Code § 22-3-25(a)(2). Instead, appellants asked the federal district court to order Director Castle to comply with duties allegedly imposed

by one of West Virginia's surface mining regulations. Ex Parte Young should not apply.

**2. Adequate State Remedies And A Detailed Remedial Scheme Exist To Enforce SMCRA's Minimum Standards.**

In Seminole Tribe, the Supreme Court restricted the availability of suits against state officials under the Ex Parte Young doctrine where Congress has created a remedial scheme for the enforcement against a state of federal statutory rights. 517 U.S. at 52-56. The Seminole Tribe plaintiffs, suing for violations of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701, *et seq.*, satisfied the facial requirements of the Ex Parte Young exception to sovereign immunity. Nevertheless, the Court refused to lift the Eleventh Amendment bar, explaining that "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon Ex Parte Young." 517 U.S. at 53.

In this case, the district court abruptly concluded that SMCRA's oversight provisions are not "the type of detailed remedial scheme which suspends the Court's ability to hear the case." 1998 U.S. Dist. LEXIS 22077 at *9. But in failing to articulate its reasoning, the district court gave Seminole Tribe short shrift.

Congress provided a detailed, federal remedial scheme to enforce SMCRA's minimum standards against state agencies assuming exclusive jurisdiction over surface mining activities. Under 30 U.S.C. § 1267, the Secretary retains authority to make "such inspections of any surface coal mining and reclamation operations as are necessary to evaluate the administration of approved State programs." SMCRA's regulations contain procedures for making any amendments to the state programs that OSM determines are necessary. 30 C.F.R part 732. The regulations also prescribe a detailed process for discontinuing state programs that do not continue to meet SMCRA's minimum standards. 30 C.F.R. part 733. This detailed, remedial scheme protects SMCRA's minimum nationwide standards, while preserving the states' vital Eleventh Amendment rights. If appellees believe that WVSCMRA is being enforced illegally, their remedy is to ask, or sue, OSM to revoke West Virginia's program approval.

The existence of an adequate state forum also is a second sufficient bar to application of Ex Parte Young. In Coeur d'Alene Tribe of Idaho, supra, the United States Supreme Court clarified that the Ex Parte Young exception should not be applied where there is an adequate state forum in which to vindicate federal rights. 521 U.S. at 271-274. The Court explained that the holding in Ex Parte Young itself was premised

on the plaintiffs' inability to raise their constitutional objections to the state statute at issue in a state-court enforcement action, without risking severe penalties for its violation. Id. at 271.

Since Idaho's state courts provided an adequate judicial forum for resolution of the dispute in Coeur d'Alene Tribe, the Court refused to use Ex Parte Young to lift the Eleventh Amendment bar to a suit against state officials. The Court emphasized that, where there is an adequate judicial forum at the state level, the existence of a federal-law issue need not override Eleventh Amendment concerns:

> What is really at stake where a state forum is available is the desire of the litigant to choose a particular forum versus the desire of the State to have the dispute resolved in its own courts. The Eleventh Amendment's background principles of federalism and comity need not be ignored in resolving these conflicting preferences.

521 U.S. at 277.

Similarly, Eleventh Amendment principles need not be ignored in this case. Assuming federal issues exist, West Virginia's own courts can provide every remedy plaintiffs seek. WVSCMRA provides a detailed administrative procedure with judicial review, for contesting the issuance of a permit for surface mining or a significant revision to an existing permit. W.Va. Code §§ 22-3-20, 22-3-21, 22B-1-7 & 9. In addition, WVSCMRA specifically authorizes citizen suits exactly like this

one, involving non-discretionary duties, in state courts of general jurisdiction and only in state courts. W.Va. Code § 22-3-25(a)(2). There is simply no need to use Ex Parte Young to provide plaintiffs with an access to federal courts, where the full panoply of state court rights exists.

## III. OBSERVATIONS AND CONCLUSIONS.

The problems with perspective imbedded in the district court's ruling manifest themselves most dramatically in the "Observation," at the end of the order.

The "Observation" obliquely doubts Director Castle's view that application of the buffer zone rule would end all types of mining by eliminating valley fills, despite all the evidence to the contrary. The Court quotes two paragraphs from the 1979 Federal Register, ignoring subsequent paragraphs of the same comments which acknowledge the Director's discretion to allow fills in intermittent streams, and ignoring the statutory history which specifically contemplated large valley fills in streams. The district court observes that OSM "concluded that destruction of streams below natural drainways was illegal," but ignores the broad meaning of natural drainways and natural watercourses (which subsume ephemeral, intermittent and perennial streams). The "Observation" also ignores West Virginia's unique, and approved, regulation permitting

overburden placement in all natural drainways as long as sedimentation and water quality downstream – in the remaining stream – are protected.

Then the district court accuses the Director and "other agencies" of fostering misapprehension of the buffer zone rule. Respectfully, Director Castle submits that it is the district court, and now the Department of Justice, fostering misapprehensions of the buffer zone rule. From 1977 until this lawsuit, from the legislative history through regulatory actions, all the agencies responsible for the regulation of surface mining and water quality understood that mining required valley fills and other placement of dirt and rock into streams. Concomitantly, the buffer zone rule could not be construed to ban valley fills. While the court and the plaintiffs protest the volume and length of fills (see, e.g., Court's Opinion at n. 41), none of the statutes or regulations at issue limit fills by volume or length. Rather, WVSMCRA requires regulators to balance environmental protection with the need for coal mining and attendant filling activities.

Even the federal appellants, in a backhanded way, acknowledge the impossibility of the district court's conclusion when they argue (citing, as legal authority, Count III of the Complaint) that the buffer zone rule "allows minor incursions" into streams. Fed. App. Brief at 51-52. They admit that the

district court’s order prohibited WVDEP from authorizing the placement of even “a single rock or handful of dirt, in any intermittent or perennial stream.” Id. But they cite no standards, and have proposed none, which a regulator might use to reconcile the mining and water laws in drawing a line between the federally blessed handful of dirt and the allegedly impermissible burial of “substantial portions” of streams.

The district court’s order, at its heart, fails to recognize that the approved West Virginia program assigns the responsibility for line-drawing about valley fills and buffer zones to the executive branch’s regulators. They have the experience, training and time to consider each valley, each stream, and each proposed fill. The Congress and the Legislature have already spoken. It is the district court which has impermissibly tried to change the legislative mandates. If the plaintiffs, the federal appellants, or the district court want a ban on valley fills, or specific limits or new standards for the size of valley fills, they need to go to the legislative branches of government to have such standards added to the mining or water laws.

Until that happens, the laws say that these difficult and discretionary decisions must be made by Director Castle and his counterparts. They have done so, since 1977, in reasonable ways which are faithful to the spirit and letter of complex and

overlapping laws. The district court's substitution of its judgment for that of the Director's violates these laws, exceeds the court's jurisdiction, and should be rejected.

## **REQUEST FOR ORAL ARGUMENT**

Given the determinative effect the issues at stake will have on the coal mining industry in West Virginia, and by implication, the coal mining industry in all coal producing states, WVDEP respectfully requests oral argument.

Respectfully submitted,

_____________________________________

Benjamin L. Bailey
Brian A. Glasser
Jennifer S. Fahey
Special Assistant Attorneys General
Bailey & Glasser, LLP
Laidley Tower, Suite 202
500 Lee Street, East
Charleston, West Virginia 25301
(304) 345-6555
(304) 342-1110 *facsimile*