

**REPLY BRIEF OF APPELLANT/CROSS-APPELLEE  
MICHAEL C. CASTLE, DIRECTOR OF WVDEP**

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Appellees' lengthy brief is reminiscent of a large Cubist painting. Each fragment looks familiar. But most of them are out of place, other pieces are missing, and the effect – while arresting and jarring to the eye – intentionally distorts reality. The United States' reply brief suffers from a similar distortion of perspective.

**I. COAL MINING IN WEST VIRGINIA REQUIRES VALLEY FILLS IN INTERMITTENT AND PERENNIAL STREAMS.**

Appellees acknowledge that excess spoil is an integral part of coal mining, and must be placed in valleys. But they simultaneously overstate the extent and environmental effect of valley filling, and understate the economic impact of Judge Haden's ruling on the mining of coal in West Virginia.

As early as page 2 of their brief, appellees claim that "DEP has authorized the burial of at least 786 miles of West Virginia streams with mine waste from valley fills," JA 1930, 2112-14. Yet that measurement, as appellees know and as the chart they cite specifically states, runs from the ridgeline to the toes of valley fills. The same report says "the reported lengths do not reflect lengths of stream filled." JA 1927 (emphasis in original). See also Politan testimony, JA 818.

More importantly, the length of stream is a misleading measure, since every little valley and hollow in the rugged terrain of West Virginia can contain a "stream." A better measure is flowing acres of water, "measured at the ordinary high water mark, which is the width .... And then the length is the furthest downstream disturbance ... multiply

[the widths and lengths] times the conversion factor will give you acreage. That's the flowing acre of water impact." Politan, JA 819. Since 1992, the total number of flowing acres affected by valley fills is only between 100 and 150 acres in watersheds of greater than 250 acres. JA 819, 831. Thus, while appellees' stream length measure sounds dramatic, and WVDEP does not contend it is insignificant, it vastly over-dramatizes the case.

Appellees indulge in similar hyperbole in the next sentence on page 2 of their brief, claiming that "tens of thousands of acres of hardwood forest have been leveled," citing a U.S. Fish and Wildlife Survey, JA 275, which actually says "thousand of acres," not tens of thousands. Mistakes in orders of magnitude may serve a rhetorical purpose, but should not be permitted to affect this Court's understanding of the facts of the case.

Other portions of that survey, which appellees fail to mention, demonstrate that coal mining in West Virginia requires valley fills to be placed in intermittent and perennial streams. The table at JA 281, "of stream miles filled or approved for filling by valley fills in the WVDEP Logan region," shows that less than one-quarter of the length of streams covered by valley fills is ephemeral streams; the remainder is in intermittent and a small portion in perennial streams. JA 281.

These numbers, however preliminary and inexact, from an independent and hardly coal-friendly federal agency, undercut appellees' repeated claim that WVDEP's evidence of the effects of the district court's order is "conclusory" or "without any supporting evidence or analysis" (Appellees' Brief ("App. Br.") at 14), or that the record lacks "credible evidence," App. Br. at 28-29, 33, 64. Appellees protest too much. Due to West Virginia's topography, small intermittent and perennial streams run almost to

the head of the watershed. JA 1271; 2275-2276. Valley fills cannot be limited to ephemeral streams because “there is simply not enough room between the end of an intermittent stream and the top of the ridge to provide any storage capacity.” JA 1271-1272; 2275-2276. There is nothing “conclusory” or somehow unreliable about affidavits stating that a ban on valley fills in intermittent or perennial streams would foreclose operations or prevent permit issuance. JA 2859, ¶ 13; JA 2862, ¶ 9. Nor is there anything “conclusory” about the affidavit of Robert Bays that all of his company’s “operations have valley fills which impact intermittent/perennial streams.” JA 2870-71, ¶ 4. See also Affidavit of Eugene Kitts at JA 2274-76 (“all fills involve intermittent and perennial streams”), and his testimony, JA 1268-1272.

Appellees’ own expert testified that the redesigned Spruce Mine originally envisioned fills of 150 million cubic yards, but would be limited to one-fifth of that original amount if only ephemeral streams could contain valley fills, App. Br. at 11, 20, showing how drastic the lower court’s ruling will be, if affirmed. Thus, this Court should accept as a fact – further buttressed by the amicus briefs filed by the IMCC (p. 3, fn. 1), the Commonwealth of Virginia (pp. 21-23), the National Mining Association (pp. 7-8), and AEI Resources (pp. 1-2), -- that limiting fills to ephemeral streams will have unintended and drastic consequences.

Appellees know this to be true. They also know, as their own expert testified, that there is no practical way to determine where “ephemeral” streams end and “intermittent” streams begin. “[T]he precise determination of the start of intermittent flow under the SMCRA definition for each stream is not practicable.” Appellees’ expert Norris, JA 2285. Determining the beginning of intermittency in a stream is “a

philosophical discussion. It depends on the geographic site, it depends on the season of the year, it depends on days within the season of the year. So it's a moving target at best." JA 2431, (WVDEP's hydrologist Tom Galya). "I think we are trying to put a pinpoint definition on something that isn't a pinpoint." JA 2597 (WVDEP's expert witness Ron Mullenex). Thus, appellees are disingenuous, at best, when they argue that WVDEP should somehow have tried to determine where ephemeral streams end to assess the impact of fills limited to ephemeral streams. All the evidence shows that coal mining, in West Virginia and the other Appalachian states, will be impossible if valley fills are prohibited in intermittent and perennial stream portions, wherever they begin. There is no evidence to the contrary.

More overstatement abounds in appellees' rendition of the facts. They cite Judge Haden's dramatic description of valley fills as "massive, artificially landscaped stair steps." But this is how valley fills are required to be constructed, to improve the safety and stability of such fills as compared to their pre-SMCRA condition. See, e.g., 38 C.S.R. § 2-14.14.e.3. Appellees' repeated complaints about blasting are not an issue in this case. Blasting is regulated by separate sections of the West Virginia statutes and regulations. See generally 38 C.S.R. §§ 2-6.1, et seq.

Nor is it true, as appellees contend, that WVDEP does not dispute their claims about adverse effects of valley fills on aquatic life. App. Br. at 20-21. A trial on the downstream environmental effects of valley fills would have produced hotly-contested issues. For example, evidence at the preliminary injunction hearing shows that valley fills can act like sponges, and often turn intermittent streams into perennial ones. JA 952-953, 1268. Whether this sort of change constitutes environmental improvement or

damage was explored in depositions, and would have been a major factual dispute. Moreover, appellees' own expert admitted that there is no scientific evidence that valley fills harm the environment downstream. JA 2381-2393. But the issue is not before this Court, because all claims involving downstream effects were settled in the Consent Decree. The inquiry before this Court is limited to the footprint of valley fills and related impoundments.

## **II. WEST VIRGINIA'S APPROVED PROGRAM PERMITS PROPERLY-CONSTRUCTED VALLEY FILLS IN INTERMITTENT AND PERENNIAL STREAMS.**

Congress, when it passed SMCRA, meant to balance the need for energy production with the protection of the environment, and specifically intended for the states to take the lead:

Because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this chapter should rest with the states.

30 U.S.C. § 1201 (f)(emphasis added.)

The next section, 30 U.S.C. § 1202, notes multiple purposes in addition to environmental protection, including to “assure that the coal supply essential to the nation’s energy requirements, and to its economic and social well-being is provided and strike a balance between the protection of the environment and agricultural productivity and the nation’s need for coal as an essential source of energy.” 30 U.S.C. § 1202(f).

The need to strike a local balance is forcefully stated in West Virginia Code § 22-3-13(b), (parallel to 30 U.S.C. § 1265(b)). Appellees fail to cite the very first section of that statute, W.Va. Code § 22-3-13(b)(1), which requires operators to:

Conduct surface coal mining operations so as to maximize the utilization and conservation of the solid fuel resource being recovered so that re-affecting the land in the future through surface coal mining can be minimized.

Director Castle has to strike this balance between maximizing the efficient utilization and recovery of coal and minimizing long-term or multiple environmental impacts. Appellees' view of the buffer zone rule ignores this statutory mandate to maximize the efficient utilization of the reserves at issue.

Efficient recovery of coal in West Virginia's terrain has always required valley fills in intermittent or perennial streams. Even appellees acknowledge that overburden and excess spoil are inescapable components of surface coal mining. So West Virginia proposed, and the federal government approved, a coherent series of regulations dealing with overburden and excess spoil. Overburden is defined at 38 C.S.R. § 2-2.86. Spoil means "overburden that has been removed during surface mining operations." 38 C.S.R. § 2-2.116.

West Virginia's statutes require surface mining operations to use the overburden, first, to restore the land to its approximate original contour. W.Va. Code § 22-3-13(b)(3). When excess spoil exists – spoil greater than the volume needed to restore the approximate original contour – the operator must "backfill, grade and compact ... the excess overburden and other spoil and waste materials to obtain the lowest grade, but not more than the angle of repose ..." among other requirements. *Id.* The regulations have an entire section devoted to disposal of excess spoil. They mandate that "spoil

not required to achieve the approximate original contour shall be transported to and placed on designated disposal sites within the permit area.” 38 C.S.R. § 2-14.14.a.1. (emphasis added.) The extensive regulations which follow describe how this excess spoil is to be placed, including valley fills. 38 C.S.R. § 2-14.14, et seq.

West Virginia’s unique natural drainways section, 38 C.S.R. § 2-5.1, discusses the same permit area, and indicates that “natural drainways in the permit area shall be kept free of overburden except where overburden placement has been approved.” Thus, the “designated disposal sites within the permit area” are the same as the areas “where overburden placement has been approved.”

Most importantly, West Virginia’s natural drainways regulation allows placing overburden in intermittent and perennial streams. Under West Virginia law, a “natural watercourse consists of a bed, bank and water, and a stream in which the water usually flows in a certain direction and by a regular channel with banks or sides is a natural watercourse.” Syl. Pt. 1, McCausland v. Jarrell, 68 S.E.2d 729 (W.Va. 1951). The “natural watercourse” in McCausland was a stream two-to-three feet deep, Id. 733, with substantial regular flow, not mere ephemeral flows from a “freshet, from rain or snow.” Id., 736-737. Because overburden can be placed in a natural drainway, 38 C.S.R. § 2-5.1, which means “any natural watercourse ...,” 38 C.S.R. § 2-2.80, McCausland establishes that overburden can be placed in intermittent or perennial streams. The district court, appellees, and the federal appellants are all simply wrong when they ignore common sense, testimony and law to equate “natural drainway” with ephemeral streams, and to exclude intermittent and perennial streams from its definition.

Appellees also complain that the regulations contain no limits on the size of such fills. The simple answer to that concern is that the Legislature declined to adopt any. But that argument also ignores physical and regulatory reality. No matter how large the mine, only so much overburden exists. That overburden must first be used to restore the mine site's approximate original contour. Excess spoil must be placed in conformance with the regulations, and if that excess spoil must be placed in valley fills, valley fill regulations apply. Fills must also, of course, stay within permit areas. All these regulations limit the size of fills in a manner proportional to the size of the mining operation.

The Consent Decree approved by the District Court imposes new approximate original contour definitions and requires a permittee to "optimize spoil placement." JA 1855-1860. These definitions further restrict the size of valley fills and limit the impact on streams. After those fills are permitted, then the buffer zone protects the intermittent and perennial streams below the fill. That is the proper and consistent reading of these interlocking regulations.

Further protection for the environment is achieved by the overlapping Corps of Engineers § 404 permit process. See JA 808, 1189. Using the natural drainways section and the § 404 permit to control valley fills, and applying the buffer zone regulation downstream, was "the interpretation that had been in place for years." Ailes testimony, JA 2106. WVDEP's environmental analysis also includes a specific inquiry for endangered species. JA 826-827. In addition, the Corps of Engineers' Nationwide Permit 21 which allows surface coal mining activities, JA 2246, incorporates the § 401 Water Quality Certification Special conditions, including mitigation requirements for fills

in watersheds of greater than 250 acres and where stream impacts exceed one-half acre. Appellees blithely ignore the salutary effects of these mitigation requirements.

Thus, the “extreme result” prophesied by appellees, foreseeing “hundreds of miles of streams to be filled with billions of cubic yards of mining waste,” is an exaggeration. App. Br. at 58. Inherent limitations are imposed on mining operations by interlocking regulations, which protect the environment by governing the placement of overburden and excess spoil and by requiring mitigation for valley fills.

Moreover, appellees willfully ignore the fact that SMCRA’s valley fill regulations were themselves meant to address environmental concerns such as safety, stability and flooding. When SMCRA was enacted, valley fills were not considered an evil, but rather, an improvement over the conditions that existed before. The Court should disregard appellees’ attempts to characterize all other permissible stream disturbances -- like sediment ponds and stream diversions -- as good, and valley fills as malevolent. WVDEP’s construction of its federally-approved program is the only rational, and therefore proper, manner of painting a realistic picture with these separate palettes of law.

### **III. WEST VIRGINIA’S CONSTRUCTION OF ITS REGULATIONS IS ENTITLED TO DEFERENCE AND THE FEDERAL GOVERNMENT’S MOST RECENT VIEW IS NOT.**

Remarkably, appellees argue that WVDEP is entitled to no deference in its interpretation and application of West Virginia’s surface mining laws. But the principle case they rely upon, In Re Permanent Surface Mining Regulation Litigation, 653 F.2d 514 (D.C. Cir. 1981), does not support this view.

The In Re PSMR court considered a narrow question shortly after Congress enacted SMCRA and before federal regulations were adopted -- whether OSM had the authority to enact federal regulations other than those enumerated in the text of SMCRA itself. The court held that OSM, not various state regulatory authorities, was entitled to deference in the interpretation of OSM's own rulemaking powers and duties under SMCRA. 653 F.2d at 522-523. In Re PSMR, which predated state regulatory programs, does not hold that state regulatory authorities are entitled to no deference in the construction of their own states' surface mining laws.

The federal appellants admit that, until the district court's adverse ruling, OSM never read its buffer zone regulation or West Virginia's to ban valley fills in streams. OSM's original proposed buffer zone rule conditioned variances on a finding that "[d]uring and after the mining, the water quantity and quality from the stream section within 100 feet of the surface mining activities shall not be adversely affected." 44 Fed. Reg. 15403 (March 13, 1979)(subsection 816.57(a) of the proposed buffer zone regulation)(emphasis added). OSM deleted this "stream section" language when it enacted the final rule:

Under the existing § 816.57(a)(1) an operator need not use buffer zones where the regulatory authority finds that ... the water quality and quantity in the stream section within 100 feet of the mine will not be harmed .... The requirement [in the proposed rule] to prevent harm to the stream within 100 feet of the mining would be deleted. OSM anticipates that rules applicable to evaluating compliance with water quality standards will be sufficient to ensure adequate stream protection.

47 Fed. Reg. 13466 (March 30, 1982). OSM's deletion of the provision prohibiting adverse effects in the "stream section within 100 feet of the mine" indicates that OSM

felt that the aquatic ecosystem could be adequately protected by applying water quality standards to streams as a whole, instead of discrete stream sections.

The federal appellants wrongly accuse WVDEP of that of which they alone are guilty -- inconsistency. The fact that for two decades, multiple federal agencies concurred in West Virginia's conclusion that its buffer zone rule does not apply to the footprint of fills, and then later, wrote and urged WVDEP to sign an MOU which achieves the same result by a different route, shows that the federal agencies have historically agreed that valley fills are permissible in intermittent and perennial streams. The federal agencies' litigation-driven decision to renege in one brief and one letter, without advance notice, public comment or review, is perhaps the best evidence that WVDEP's interpretation is the only established view, and is the only view that is entitled to deference by this Court.

Examples from other states also show that the federal government has always officially approved of valley fills in intermittent and perennial streams, particularly in Appalachian terrains, consistent with the purposes of SMCRA. The best example is Kentucky, where the federally-approved buffer zone rule, 405 KAR 16-060 Section 11, does not apply "to any reach of a stream that is upstream of an impounding structure located within the permit area and within the stream channel." Since valley fills are always upstream of impoundments like sedimentation ponds, this regulation -- approved in 1983 by OSM -- achieves exactly the same purpose as West Virginia's natural

drainways regulation.<sup>1</sup> The buffer zone rule only applies below approved fills and ponds in streams.

A similar result is found in the very Tennessee program appellees cite for the proposition that CWA § 404 allows states to impose restrictions more stringent than federal law. App. Br. at 52. They fail to note that the same regulation, Tenn. Comp. Rules & Regulations R. § 0400-3-7-.03(1)(d), (in a state where OSM administers the program) expressly excludes head of hollow fills in streams from the buffer zone rule:

Protection of Streams. ***No mining, placement of spoil, or associated activity will be permitted within one hundred (100) feet horizontal distance of any stream, except*** that roads may be constructed within one hundred (100) feet of a stream where such roads are part of the approved mining and reclamation plan and in special circumstances, such as ***where head-of-hollow fill plans have been approved by the Commissioner.***

(emphasis supplied). While Tennessee's buffer zone regulation protects streams of all types, it also expressly excludes some fills.

Thus, the United States has historically and deliberately approved express exclusions of valley fills from certain states' buffer zone rules, consistent with SMCRA's broad goal of state and geography-specific environmental protection. The federal government's peremptory retreat in the year 2000 from that interpretation in West Virginia and its breach of the MOU it drafted and asked WVDEP to sign, should be entitled to no deference now.

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<sup>1</sup> See also OSM's response to Kentucky's 1986 program amendments: "***The Director recognizes that it sometimes may be appropriate to construct a waste disposal structure or excess spoil fill in an intermittent or perennial stream*** .... However, no such structures may be built where the stream's environmental resources would be adversely affected." 51 Fed. Reg. 30488 (August 27, 1986) (emphasis supplied).

#### **IV. THE MOU ALSO SHOWS FEDERAL APPROVAL OF VALLEY FILLS IN INTERMITTENT AND PERENNIAL STREAMS**

Despite the federal agencies' abrupt repudiation of their MOU, the 404(b)(1) Guidelines also are an appropriate standard to apply in granting a buffer zone variance for filling activities. As WVDEP explained in its opening brief at 34-36, the Guidelines provide the same level of protection in a different way because, unlike the buffer zone rule, they are tailored specifically to filling activities. The difference is one of semantics and interpretation, which should be left to WVDEP as the regulatory authority.<sup>2</sup>

Federal appellants continue to sit firmly on both sides of the fence. They argue, on the one hand, that no significance requirement may be read into the buffer zone rule, and thus, the rule prohibits any "adverse effect" on a stream. Yet they contend, on the other hand, that the buffer zone rule was not meant to prohibit "de minimis" adverse effects and complain that the district court's injunction is too broad. U.S. Br. at 49-51. Both the plaintiff-appellees and the federal appellants miss the point. OSM declined to put a significance threshold in the buffer zone rule because it intended to give regulatory authorities like WVDEP broad discretion to determine whether a proposed mining activity can be conducted in an environmentally sound manner within the buffer zone. 48 Fed. Reg. 30312, 30313 (June 30, 1983)(explaining that by omitting any "significance" criteria from the federal buffer zone rule, "[t]he final rule provides the regulatory authority the flexibility to allow surface mining activities to take place within

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<sup>2</sup> Appellees' most specious argument is that the 404(b)(1) Guidelines have "a narrower jurisdictional and geographic scope" than the buffer zone rule. The buffer zone rule protects intermittent and perennial streams, not the land surrounding those streams. Any protection the buffer zone rule affords to land is purely incidental.

the 100-foot buffer zone if such activities are conducted in an environmentally acceptable manner.”). The federal appellants themselves admit that the § 404(b)(1) Guidelines and the buffer zone rule “require similar analyses regarding environmental effects of fills”, and that the Guidelines are relevant in determining whether to approve mining activities in the buffer zone. U.S. Br. at 50-51. This analysis has been done, by WVDEP, in construing its regulations to permit proper valley fills, and applying the buffer zone rule downstream. For these reasons, the district court’s order and injunction should be reversed, not sent back for more judicial rule-making.

#### **V. SMCRA CANNOT OVERRIDE THE CWA.**

The district court’s interpretation of the buffer zone rule effectively repeals § 404 of the CWA, and thus, violates SMCRA § 1292(a). In an effort to dodge this impermissible conflict between SMCRA and the CWA, appellees characterize WVDEP’s appeal on this issue as a time-barred, indirect challenge to OSM’s rulemaking. WVDEP does not contest the validity of either the federal or state buffer zone regulations themselves. Rather, WVDEP challenges the illogical interpretation of these rules offered by appellees and adopted by the district court.

Appellees and the federal government ignore the plain directive of § 1292(a), which states, without qualification, that nothing in SMCRA “shall be construed as superceding, amending, modifying, or repealing” the CWA “or any rule or regulation promulgated thereunder.” § 1292(a). As the federal appellants acknowledge, the district court’s reading of the buffer zone rule prohibits all filling activities in streams, which would be otherwise permitted under § 404 of the CWA. This effectively erases

§ 404 from the United States Code regarding mine sites.<sup>3</sup> It is difficult to imagine a more drastic amendment or modification.

Appellees' reliance on the case law cited by the federal appellants is similarly misplaced. In Freightliner Corp. v. Myrick, 514 U.S. 280 (1995), the Court held that plaintiff's state common law claims against a tractor trailer manufacturer were not impliedly pre-empted by the National Traffic and Motor Vehicle Safety Act of 1966. Unlike SMCRA in this case, there was no express statutory language suggesting that Congress intended for one body of law to take precedence over the other in the area under consideration. The Myrick Court's holding is simply inapposite.

Similarly, the cases the federal appellants rely upon do nothing to modify the District of Columbia Circuit's holding that OSM cannot issue regulations that interfere with CWA standards and exemptions imposed by the EPA. In Re PSMR, 627 F.2d at 1366-1369. In Chemical Manufacturers Assn. v. EPA, 673 F.2d 507 (D.C. Cir. 1982), the court was asked to determine whether SMCRA, which dealt more specifically with the matter at issue than RCRA, took precedence over RCRA. The court was not asked to consider the effect of SMCRA § 1292(a). The court found it was not necessary to determine whether the more specific statute took precedence over the more general statute because, under the particular circumstances of the case, there was no contradiction between the SMCRA and RCRA provisions. Id. at 512. Likewise, in West Virginia Mining and Reclamation Ass'n v. Babbitt, 970 F. Supp. 506 (S.D. W.Va. 1997), the court found no conflict between the CWA on the one hand, and bond release

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<sup>3</sup> Indeed, if appellees and the district court were correct in their assertion that traditional water quality standards must be satisfied in the filled portion of a water body, all fills would be illegal, not just fills affected by SMCRA.

conditions under SMCRA on the other, because the WVDEP Director's conditions for bond release did nothing to alter any CWA standards, or to prohibit any otherwise lawful activity under the CWA. See Id. at 521.

In short, OSM's historic interpretation of the buffer zone rule, identical to WVDEP's, recognizes that some stream segments may be filled as long as the environmental resources of the stream as a whole are protected. This approach appropriately harmonizes the buffer zone rule with the CWA and regulations allowing valley fills in intermittent and perennial streams.

## **VI. NO FEDERAL QUESTION JURISDICTION EXISTS.**

Although appellees nominally allege violations of federal SMCRA to invoke federal court jurisdiction, and federal appellants doggedly cite federal statutes and regulations, appellees seek relief for alleged violations of West Virginia's program. The sole issue before this court is WVDEP's alleged disregard of the State's buffer zone regulation. This is a matter of state law that is not subject to federal court jurisdiction under SMCRA's citizen suit provision.

SMCRA's citizen suit provision, on its face, is clearly limited to enforcement of the federal SMCRA. 30 U.S.C. § 1270. Section 1270(a), on which appellees rely for jurisdiction, is entitled, "Civil action to compel compliance with **30 U.S.C. §§ 1201 et seq.**" Id. (emphasis supplied). Section 1270(a)(2), the specific subsection on which appellees rely, provides for civil actions to compel compliance with "**this Act** ... where there is alleged a failure of the Secretary or the appropriate State regulatory authority to

perform any act or duty under **this Act** ....” § 1270(a)(2) (emphasis supplied). “This Act” means federal SMCRA, not WVSCMRA.

From its inception, SMCRA contemplated state-by-state regulation, not one universal federal formula. Section 1253 provides that each state seeking exclusive jurisdiction over surface coal mining within its borders must submit to the Secretary a “State program” which includes a “**State law**” for regulating, sanctioning and effectively implementing the requirements of SMCRA. § 1253(a)(1), (2) & (4) (emphasis supplied). Congress provided that “[a]ction of the State regulatory authority pursuant to an approved State program shall be subject to judicial review by a court of competent jurisdiction in accordance with **State law** ... ” § 1276(e)(emphasis supplied).

Further, § 1255(a) explains that “[n]o **State law** or regulation in effect on the date of enactment of [SMCRA], or which may become effective thereafter, shall be superseded by any provision of [SMCRA] or any regulation issued pursuant thereto, except insofar as such **State law or regulation** is inconsistent with the provisions of [SMCRA].” Additionally, § 1254(b) authorizes the Secretary to federally enforce any part of a state program that is not being enforced properly by the state itself. Notably, in all the years since approval of West Virginia’s program, the Secretary has never exercised its enforcement power under § 1254(b) due to any improper application of West Virginia’s buffer zone rule by WVDEP.

These provisions clearly demonstrate that Congress intended for separate and different state laws to effectuate SMCRA’s purposes, and did not expect state legislators to enact federal law “pursuant to” SMCRA. Undaunted, appellees argue that WVSCMRA is somehow federal law because it is “codified” in the Code of Federal

Regulations. App. Br. at 88. But one searches, in vain, for such codification. The Code of Federal Regulations merely lists the West Virginia statutes and regulations approved by OSM. See 30 C.F.R. §§ 948.1 through 948.30. The C.F.R. nowhere provides the complete text of these West Virginia statutes and regulations. Instead, it advises the reader that copies of West Virginia's program may be obtained at the WVDEP office in Nitro, West Virginia, or the OSM Field Office in Charleston, West Virginia. 30 C.F.R. § 948.10. It is difficult to imagine that Congress intended for West Virginia's surface mining program to be federal law if it failed to include the text of WVSCMRA and its regulations in the United States Code or the Code of Federal Regulations. The message is clear.

As the PMSR court explained, "the state regulatory authority decides who will mine in what areas, how long they will conduct mining operations, and under what conditions the operations will take place", and "it is with an approved state law and with state regulations consistent with the Secretary's that surface mine operators must comply." 653 F.2d at 519. The court contrasted the independence of a state administering an approved state program under SMCRA with the continuing role of the EPA after a state has assumed responsibility for pollution discharge permits under the Clean Water Act. Id. at 519 n.7.

In fact, the United States Supreme Court rejected a constitutional challenge to SMCRA based on the Tenth Amendment precisely because SMCRA does not compel states to enforce federal law. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981). The Court found that SMCRA passes constitutional muster because it gives states a choice -- they can enact and administer their own approved

surface mining programs, or they can opt for the Federal Government to regulate surface mining activities in the state through SMCRA. 452 U.S. at 288, 289.

Telecommunications cases do not support appellees' notion that state surface mining administrators are simply "deputized federal regulators." App. Br. at 81-82. Unlike SMCRA, the Telecommunications Act of 1996 did not give states the option to enact their own regulatory programs. See MCI Telecommunications Corp v. Illinois Bell Telephone Company, 2000 U.S. App. LEXIS 17739 (7<sup>th</sup> Cir. July 24, 2000); Michigan Bell Telephone Company v. Climax Telephone Company, 202 F.3d 862 (6<sup>th</sup> Cir. 2000). These cases do not discuss whether a state-specific regulatory program conforming to federal minimum standards is considered state law or federal law. Indeed, this Court recently held that the Telecommunications Act violates the Tenth Amendment insofar as it coerces the states into enforcing federal law. Petersburg Cellular Partnership v. Board of Supervisors of Nottoway County, 205 F.3d 688 (4<sup>th</sup> Cir. 2000). Thus, the telecommunications cases have no application to this SMCRA suit.

Appellees also take Indiana Coal Council v. Lujan, 774 F. Supp. 1385 (D. D.C. 1991) out of context. They fail to explain that the case merely holds that surface mine permitting decisions satisfy the specific definition of a "federal undertaking" found in the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470 et seq. The court in Indiana Coal Council did not say that state surface mining programs are federal law. To the contrary, the court noted that despite OSM's oversight role, "states with approved programs have exclusive authority to issue mining permits and those decisions are reviewable only under state law". Id. at 1401.

In this case West Virginia passed its own statutes. It adopted its own regulations, using terms like “natural drainways” with West Virginia definitions. The federal government approved the program as consistent with SMCRA and handed surface mine regulation over to West Virginia. No federal question exists.

## **VII. THE ELEVENTH AMENDMENT BARS THIS ACTION.**

Appellees also argue that West Virginia’s surface mining act is federal law, not state law, in an effort to evade Pennhurst. This contention is not supported by SMCRA’s statutory scheme, or by cases explaining the role of state regulators administering their own approved programs.

The Tenth Circuit’s decision in Powder River Basin Resource Council v. Babbitt, 54 F.3d 1477 (10<sup>th</sup> Cir. 1995) does not support appellees’ argument that Ex Parte Young lifts the Eleventh Amendment bar. The plaintiff in Powder River alleged that the attorneys’ fees provision of Wyoming’s surface mining program failed to meet SMCRA’s minimum standards. Unlike appellees in this case, plaintiff in Powder River did not challenge the state official’s application of the law. On appeal, the circuit court merely rejected the district court’s conclusion that Ex Parte Young was unavailable because the relief sought was retroactive, instead of prospective. Id. at 1483. The court did not address whether Wyoming’s regulatory program is federal or state law.

Similarly, the Court’s decision in Molinary v. Powell Mountain Coal Co., Inc., 125 F.3d 231 (4<sup>th</sup> Cir. 1997) did not address whether state surface mining programs are federal law within the purview of Ex Parte Young. The only court to decide this very issue held that SMCRA oversight does not transform state surface mining law into

federal law so as to outweigh the state's sovereignty interests. Pennsylvania Federation of Sportsman's Clubs, Inc. v. Seif, No. 1: CV-99-1791 (M.D. Pa., July 6, 2000)(copy attached hereto). The Seif court expressly rejected the district court's holding in this case that duties owed under a state program are federal law themselves for purposes of Ex Parte Young. Slip op. at 15-17.

Seif dispelled the notion that Molinary and Arkansas v. Oklahoma, 503 U.S. 91 (1992) are dispositive of the issue. The court found Arkansas to be inapposite to SMCRA cases, because Arkansas was specific to the Clean Water Act, which has a long history of interstate water pollution being controlled by federal law. Slip op. at 15 n. 5. The court also distinguished both Arkansas and Molinary because neither case addressed the issue of whether state surface mining regulations are "federal law", as required by Pennhurst State Hospital v. Halderman, 465 U.S. 89 (1984), to meet the Ex Parte Young exception to immunity. Id. at 15. The court expressly rejected Judge Haden's opinion in this case due to his heavy reliance on Arkansas and Molinary -- two cases that did not address Eleventh Amendment issues -- to defeat WVDEP's sovereign immunity. Id. WVDEP urges this court to adopt the Seif court's reasoning.

#### **VIII. NO WAIVER OCCURRED.**

Remarkably, appellees raise a new argument, pretermitted below, that the State impliedly consented to suit in federal court by assuming responsibility for the regulation of surface mining activities in West Virginia. However, the United States Supreme Court abolished the constructive waiver doctrine in College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666 (1999).

This Court has made clear that, after College Savings, a court may not find a waiver of sovereign immunity “absent an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment.” Litman v. George Mason University, 186 F.3d 544, 550 (4<sup>th</sup> Cir. 1999)(quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 238 n.1 (1985)). Accordingly, “a State cannot be deemed to have waived its Eleventh Amendment immunity constructively even by engaging in activities after Congress has made clear that such activity would subject [the State] to suit [in federal court].” Id. at 551. (citing College Savings).

Again, the telecommunications cases appellees cite are inapposite. The language of the Telecommunications Act is markedly different from SMCRA’s language. The Telecommunications Act vests federal district courts with exclusive jurisdiction to review actions of state regulatory authorities, and expressly deprives state courts of jurisdiction. 47 U.S.C. § 252. SMCRA contains no such language. Indeed, the only court in this Circuit to decide this issue held that, in light of College Savings, states do not constructively waive their Eleventh Amendment immunity by participating in the regulatory process under the Telecommunications Act. Bell Atlantic-Maryland, Inc. v. MFS Intelenet of Maryland, Inc., No. S 99-2061, 1999 U.S. Dist. LEXIS 16477 (D. Md. October 20, 1999).

More importantly, the specific language of WVSCMRA’s citizen suit provision shows that no specific or implied waiver occurred. While actions against operators may be brought “in any court of competent jurisdiction”, W.Va. Code § 22-3-25(f), West Virginia’s Legislature limited actions against the WVDEP Director to “the circuit court of

the county to which the surface mining operation is located.” W.Va. Code § 22-3-25(a). Likewise, the Director is only permitted to intervene in actions “brought in any appropriate circuit court.” W.Va. Code § 22-3-25(c). Because West Virginia specifically declined to permit the Director to be sued or intervene in federal courts, appellees’ waiver argument is wholly without merit. Director Castle could have, and should have, been sued in state court.

#### **IX. NO JURISDICTION EXISTS OVER WATER LAW ISSUES.**

This Court should reject appellees’ attempt to invoke SMCRA’s citizen suit provision to challenge the issuance of NPDES permits for valley fills. If a party’s real complaint pertains to the substance of an NPDES permitting decision, as opposed to a simple failure to require an NPDES permit for surface mining at all, the issue must be decided under the water laws, not the surface mining laws. See WVDEP’s opening brief at 49-51. This point, made by the West Virginia Supreme Court of Appeals in Tennant v. Callaghan, 490 S.E.2d 845 (W.Va. 1997), comports with the district court’s observation in West Virginia Coal Ass’n v. Reilly, 728 F. Supp. 1276, 1285 (S.D. W.Va. 1989) that “Congress intended that the regulation of the quality of water, including water connected with mining operations, be carried out by EPA.” A plaintiff is obligated to seek his or her remedy under the right body of law, whether administrative remedies are exhausted prior to judicial review, or a citizen suit is brought in the first instance.

Appellees misconstrue Dubois v. United States Dept. of Agriculture, 102 F.3d 1273 (1<sup>st</sup> Cir. 1996). Dubois does not stand for the proposition that a state’s compliance with its water quality standards may be reviewed in the context of *any* suit in federal

court, so long as the suit is not brought under the National Environmental Policy Act. The plaintiff alleged that the Forest Service violated the CWA by approving the special use permit when the permitted activities would lead to violations of state water quality standards. Id. However, the court declined to address this issue because the Forest Service itself has no authority to make NPDES permitting decisions in the first instance, or to second-guess those decisions once a permit is issued. Id. at 1300-1301.

When read correctly, Dubois illustrates that water law issues incidental to other permitting activities must be regulated by the EPA, and reviewed under the CWA. SMCRA's citizen suit provision does not authorize a review of incidental water pollution issues that Congress clearly intended to be regulated by the EPA under the water laws.

#### **X. WVDEP'S APPLICATION OF THE BUFFER ZONE RULE IS A DISCRETIONARY ACT.**

Distilled to its essence, appellees' complaint is a criticism of how WVDEP makes variance findings for valley fills under West Virginia's buffer zone rule. These factual findings are not subject to review under SMCRA's citizen suit provision. The plain language of the buffer zone rule itself and the natural drainways regulation which precedes it demonstrates that these matters are within WVDEP's discretion. The regulations authorize overburden placement and incursions into the buffer zone only upon approvals or findings made by the Director. See 38 C.S.R. § 2-5.1, 2.

The term "non-discretionary" in environmental citizen suit provisions has been construed narrowly to compel administrators to perform "purely ministerial acts". Monongahela Power Company v. Reilly, 980 F.2d 272, 277 n.3 (4<sup>th</sup> Cir. 1992). As Kennecott Copper Corp. v. Costle, 572 F.2d 1349 (9<sup>th</sup> Cir. 1978) makes clear, while an

agency has a non-discretionary duty to make determinations in the area that it regulates, and to act consistently with those determinations once made, the substance of those determinations is left to the agency's discretion. See 572 F.2d at 1354-1355. The fact that an agency's discretionary determinations cannot be attacked in an environmental citizen suit does not leave aggrieved persons without a remedy -- these determinations are subject to proper judicial review once administrative appeal procedures have been exhausted. See 572 F.2d at 1355.

WVDEP's decisions about where and how to apply the buffer zone rule are not the sort of determinations that are precise, exact and beyond dispute. Rather, the laws require WVDEP to use its special skills, and exercise its discretion, to protect the environment without crippling the coal industry. It has done so in deciding to regulate valley fills and apply the buffer zone rule downstream of the footprint of valley fills. The manner in which WVDEP has lawfully exercised this discretion is simply not the sort of ministerial act that is reviewable in a SMCRA citizen suit.

### **CONCLUSION**

For all the foregoing reasons, the district court's Order should be reversed.

Respectfully submitted,

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