

No. 99-2683

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PATRICIA BRAGG, et al.,
Plaintiffs-Appellees,

v.

COLONEL DANA ROBERTSON, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

REPLY BRIEF FOR THE FEDERAL APPELLANTS

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The central question raised by this appeal is whether the Surface Mining Control and Reclamation Act (SMCRA) authorizes the West Virginia Department of Environmental Protection (WVDEP) to issue mining permits for valley fills that bury entire segments of intermittent or perennial streams. Because the claims against WVDEP allege the violation of nondiscretionary duties imposed by SMCRA, the claims were properly brought under SMCRA's citizen suit provision. Furthermore, because the administration of SMCRA is entrusted to the Secretary of the Interior, acting through the Office of Surface Mining (OSM), it is the Secretary's interpretation of SMCRA and its implementing regulations, not the Director of WVDEP's interpretation, that is entitled to deference.

The Secretary has reasonably concluded that SMCRA's buffer zone rule prohibits those mining activities, including valley fills, that adversely affect the environmental resources of the affected

intermittent or perennial stream segments. Accordingly, the district court's grant of summary judgment must be affirmed.

The district court's injunction, however, is overly broad because it not only prohibits valley fills that unquestionably cause adverse environmental effects in intermittent or perennial streams but also prohibits the disposal of any excess spoil in intermittent or perennial streams. The district court also erred by purporting to "hold" that the Army Corps of Engineers lacks authority to regulate valley fills under Clean Water Act (CWA) section 404, an issue not properly raised by the SMCRA claims against WVDEP.

I. THE DISTRICT COURT HAD JURISDICTION OVER THE BUFFER ZONE CLAIMS

WVDEP and the industry-intervenors argue that the district court lacked jurisdiction over the SMCRA buffer zone rule claims because (1) the claims allegedly do not involve nondiscretionary duties for which SMCRA's citizen suit provides jurisdiction, and (2) the claims allegedly do not arise under federal law. Both arguments must be rejected. First, SMCRA expressly provides that a state has no discretion to issue mining permits in the absence of affirmative demonstration and a written finding that all applicable state and federal requirements have been met. Second, because the buffer zone rule was adopted as part of West Virginia's program to implement SMCRA, plaintiffs' claims arise under federal law.

A. The Buffer Zone Rule Claims Allege Violations of Nondiscretionary Duties

In determining whether a statute imposes a nondiscretionary duty, a court must be guided by the statute's text. See Monongahela Power Co. v. Reilly, 980 F.2d 272, 278 & n.6 (4th Cir. 1993); Cascade Conservation League v. M.A. Segale, Inc., 921 F. Supp. 922, 928 (W.D. Wash. 1996). A statute plainly imposes a nondiscretionary duty where it establishes "clear-cut" or "purely ministerial" requirements. See Environmental Defense Fund v. Thomas, 870 F.2d 892, 899 (2d Cir. 1989); Sierra Club v. Thomas, 828 F.2d 783, 791 (D.C. Cir. 1987). On the other hand, a statute plainly provides an agency with discretion in making decisions that call for "the fusion of technical knowledge and skills with judgment." Kennecott Copper Corp. v. Costle, 572 F.2d 1349, 1354 (9th Cir. 1978).

Statutes may impose duties that involve both discretionary and nondiscretionary elements. For instance, as originally enacted, Clean Air Act (CAA) section 110(a) mandated that the Administrator of EPA "shall approve" revisions to a state air quality control plan if the Administrator determined that the revisions met certain substantive requirements. 42 U.S.C. 7410(a)(3), repealed by Pub. L. 101-549.^{1/} Construing that

¹ While the use of mandatory language such as "shall" or "shall not" may mean that the relevant person or entity is under a mandatory duty, Kennecott Copper makes clear that the use of mandatory language is not always dispositive of whether a decisionmaker has discretion in the manner that a duty is performed.

provision, the Ninth Circuit found that "[i]t is clear that the Administrator has a non-discretionary duty to make a decision regarding the state revision. The Administrator, however, retains a good deal of discretion as to the content of that decision." Kennecott Copper, 572 F.2d at 1354. Because the statute provided the Administrator discretion in assessing the substantive requirements for approving a revised state plan, that assessment could not form the basis for a citizen suit claim for the violation of a nondiscretionary duty. On the other hand, "[o]nce the Administrator * * * has determined that [a revised state plan] either does or does not meet all the requirements * * *, there is a nondiscretionary duty to act in accordance with his determination." Id. at 1355.

SMCRA section 510(b) imposes a duty on WVDEP comparable to that imposed by CAA section 110(a). SMCRA section 510(b) provides that "[n]o permit * * * shall be approved unless the application affirmatively demonstrates and the regulatory agency finds in writing * * * that all the requirements of this chapter and the State or Federal program have been complied with." 30 U.S.C. 1260(b). Like CAA section 110(a), SMCRA imposes a nondiscretionary duty on WVDEP - to withhold the issuance of a mining permit - unless it has found that the permit would comply with all the requirements established under SMCRA. Whether WVDEP has discretion in determining compliance with SMCRA's regulatory requirements depends on the nature of those requirements. But once a determination has been made that a SMCRA requirement is not

satisfied, "there is a nondiscretionary duty to act in accordance with [that] determination" and to deny the permit. Kennecott Copper, 572 F.2d at 1355.

These principles establish that the buffer zone rule claims allege the violation of nondiscretionary duties. The complaint alleges that WVDEP has a policy of issuing SMCRA permits that authorize valley fills in intermittent or perennial streams without making the findings required by SMCRA section 510(b), including the findings required by the buffer zone rule. JA 1784-1797. Although the buffer zone rule may provide WVDEP some discretion in determining whether a mining practice causes adverse environmental harm, it gives WVDEP no discretion to issue permits without that determination. As the Supreme Court has stated: "It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." Bennett v. Spear, 520 U.S. 154, 172 (1997). Because SMCRA section 510(b) mandates that WVDEP adhere to the buffer zone rule, and the buffer zone rule in turn does not give WVDEP discretion to issue permits without making the requisite findings, the complaint alleges a violation of a nondiscretionary duty.

Rather than challenging the manner that WVDEP has applied the buffer zone rule, the complaint alleges that WVDEP has failed to implement the rule altogether. In alleging that WVDEP has issued permits without making the findings required by SMCRA, the complaint does not allege that WVDEP has issued permits based on

inadequate or unsupported findings. Indeed, WVDEP has acknowledged that it has a policy of issuing mining permits without making the required findings. See WVDEP Br. 30; see also, e.g., JA 390, 572, 594, 609, 613. Similarly, the complaint does not challenge WVDEP's assessment of the environmental harms caused by valley fills, as WVDEP has acknowledged that valley fills cause adverse environmental effects in the filled stream segments. See Brief for the Federal Appellants ("U.S. Br.") 49-51. Given the uncontested conclusion that valley fills cause adverse environmental effects to the filled stream segments, "there is a nondiscretionary duty to act in accordance with [that] determination." Kennecott Copper, 572 F.2d at 1355.

WVDEP argues (WVDEP Br. 44) that the buffer zone rule cannot form the basis of a suit for the violation of nondiscretionary duties under SMCRA because WVDEP has discretion to construe the buffer zone rule as not applying to the filled stream segments. As the district court correctly found, however, that interpretation of the buffer zone rule is unreasonable, and, as discussed below, WVDEP is not entitled to deference for this regulatory interpretation. Moreover, the fact that an agency may have discretion in how it construes a legal requirement does not mean that the agency has discretion to ignore the requirement. See NWF v. Hanson, 859 F.2d 313, 315-316 (4th Cir. 1988) (an agency has "a mandatory duty to * * * construe the applicable statutes and regulations").^{1/}

² Moreover, whether the district court had jurisdiction depends

solely on whether the complaint alleges the violation of nondiscretionary duties, not the merits of those allegations. See 30 U.S.C. 1270(a)(2) (establishing jurisdiction "where there is alleged a failure * * * to perform any act or duty under this chapter which is not discretionary") (emphasis added); cf. Gwaltney v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 64 (1987) (jurisdiction under the CWA's citizen suit provision "does not require that a defendant 'be in violation' of the Act at the commencement of suit; rather, the statute requires that a defendant be 'alleged to be in violation'").

B. The Buffer Zone Rule Claims Are Not Barred by the Eleventh Amendment

WVDEP and the industry-intervenors argue that the district court lacked jurisdiction over the buffer zone rule claims because the applicable version of the buffer zone rule is codified as part of state law. As a result, it is argued, the claims are barred by the Eleventh Amendment, which prohibits suits in federal courts against state officials for the violation of state law. See Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 106 (1984). Similarly, it is argued that the claims do not fall within SMCRA's citizen suit provision because allegedly they do not involve nondiscretionary duties established "under this chapter," i.e., under SMCRA. Those arguments should be rejected because federal law requires that WVDEP adhere to its SMCRA regulations, including its version of the buffer zone rule, and the Eleventh Amendment does not bar suits against state officials for the violation of federal law. Ex parte Young, 209 U.S. 123 (1908).

As discussed above, SMCRA mandates that WVDEP must deny mining permits unless it finds "that all the requirements of this chapter and the State * * * program have been complied with." 30 U.S.C. 1260(b) (emphasis added). Federal law thus precludes WVDEP from issuing mining permits that do not comply with the West Virginia regulations approved to implement SMCRA. The fact that the buffer zone rule is codified under state law does not alter the fact that federal law mandates that WVDEP must adhere to it.

Furthermore, this Court has recognized that state SMCRA regulations are issued pursuant to SMCRA and thus implement federal law: "It may reasonably be said that once the Secretary approves a state surface coal mining and reclamation program, the rules, regulations, orders, and permits issued under that program are 'issued,' in the language of § 520(f), 'pursuant to' SMCRA." Molinary v. Powell Mountain Coal Co., 125 F.3d 231, 236 (4th Cir. 1997). See also Hodel v. Virginia Surface Mining & Reclamation Assn., 452 U.S. 264, 289 (1984) (SMCRA "prescribes federal minimum standards governing surface coal mining, which a State may either implement itself or else yield to a federally administered program.") (emphasis added); In re Permanent Surface Mining Regulation Litigation, 653 F.2d 514, 518-519 (D.C. Cir. 1981) ("Under a state program, the state makes decisions applying the national requirements of the Act to the particular local conditions of the state.") (emphasis added).

In support of their argument that state SMCRA programs do not implement federal law, WVDEP and industry-intervenors mistakenly point to SMCRA section 503, which establishes that approved state programs assume "exclusive jurisdiction" over the regulation of surface coal mining in their states. That provision, however, establishes only that approved state agencies have "exclusive jurisdiction" within their states to regulate mining pursuant to SMCRA and subject to federal oversight. See 33 U.S.C. 1253(a). The provision of "exclusive jurisdiction" to implement SMCRA does not alter the fact that approved state programs implement federal

law. See 30 U.S.C. 1291(26) (defining "state regulatory authority" as the "agency in each State which has primary responsibility at the State level for administering this chapter") (emphasis added).

Moreover, the provision of "exclusive jurisdiction" to state agencies is subject to the Secretary's oversight and enforcement authority. See 30 U.S.C. 1253(a), 1271. Because West Virginia's federally approved mining program implements federal law, WVDEP is subject to suit in federal court for failing to follow the mandate of federal law.

II. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT ON THE SMCRA CLAIMS

The parties have adopted conflicting constructions of the SMCRA stream buffer zone rule as the rule applies to valley fills.

The Director of WVDEP construes the rule to allow valley fills that bury intermittent or perennial stream segments as long as there are no significant adverse environmental effects at some indeterminate point downstream of the fill. See WVDEP Br. 14-30. The Secretary of the Interior, in contrast, agrees with appellees and the district court that the buffer zone rule prohibits valley fills that have adverse environmental effects in any part of an intermittent or perennial stream, including the filled segments of a stream (i.e., the "footprint" of the fill). See U.S. Br. 40-49.

Because SMCRA gives the Secretary authority to construe and implement SMCRA, and to oversee the states' construction and implementation of SMCRA, the Secretary's interpretation of the standards established by federal law is entitled to deference.

Even if the Secretary's interpretation of the buffer zone rule were not entitled to deference, that interpretation best effectuates the statutory and regulatory language, as well as the purposes of SMCRA.

A. The Secretary's Interpretation of the Buffer Zone Rule Is Entitled to Deference

As the D.C. Circuit has held, the Secretary of the Interior alone is entitled to deference for his interpretation of the standards established by SMCRA because the Secretary "has the ultimate responsibility for guaranteeing effective state enforcement of uniform minimum standards." In Re Permanent Surface Mining, 653 F.2d at 523. Accordingly, the D.C. Circuit rejected the argument that "deference is due, not to the Secretary, but to the individual state regulatory agencies that bear primary responsibility for enforcement of the Act." Ibid. Under Chevron, deference is due to the "agency's construction of the statute which it administers," 467 U.S. at 842, and SMCRA vests authority in the Secretary to "administer the programs for controlling surface coal mining operations which are required by this chapter." 30 U.S.C. 1211(c)(1). That authority continues in states like West Virginia that have gained approval to implement SMCRA. See 30 U.S.C. 1271; In Re Permanent Surface Mining, 653 F.2d at 519-520; Southern Ohio Coal Co. v. Office of Surface Mining, 20 F.3d 1418, 1424 (6th Cir. 1994).

Several provisions of SMCRA demonstrate that Congress intended that the Secretary's interpretation of the standards established by

SMCRA prevail over contrary state interpretations. When the Secretary finds that a state is not properly interpreting or otherwise implementing the standards established by SMCRA, he may request that the state bring its program into compliance with SMCRA and the implementing federal regulations. 30 U.S.C. 1271(b); 30 C.F.R. 732.17(e). In extreme cases, the Secretary may implement federal enforcement of all or part of a state SMCRA program, 30 U.S.C. 1271(b), or withdraw federal approval for the state program and substitute a federal program, 30 U.S.C. 1254(a)(3). Those provisions demonstrate a clear congressional intent that the Secretary retain oversight authority to interpret the minimum federal standards established under SMCRA and to require states to act consistently with that interpretation.^{1/}

³ The Secretary has informed WVDEP and the other state mining agencies that he plans to develop guidelines for implementing his interpretation of the buffer zone rule and to use the

administrative procedures established by SMCRA to require that state mining agencies comply with those guidelines. See generally 33 C.F.R. Parts 732 and 733. The fact that the Secretary has not yet completed that administrative process in no way undermines the deference that this Court owes to the Secretary's interpretation.

WVDEP erroneously argues that it is entitled to deference because what is at issue is the state version of the buffer zone rule, not the federal buffer zone rule. The state buffer zone rule, however, implements a minimum standard established by federal law, and the Secretary retains ultimate authority to construe and effectuate that standard. See 30 U.S.C. 1254(a)(3), 1271(b). While West Virginia's buffer zone rule differs in some respects from the federal rule, the state rule implements the minimum standard established by the federal rule, in that it prohibits mining activities that "disturb" the area within 100 feet of an intermittent or perennial stream unless the permitting authority finds that the disturbance will not "adversely affect" "water quantity and quality" and other "environmental resources" of the stream.^{1/} SMCRA mandates that the state buffer zone rule must be interpreted consistently with the federal rule.

⁴ On its face, the state rule appears to be stricter than the

federal rule, in that it prohibits mining activities that "adversely affect the normal flow or gradient of the stream" as well as "fish migration." 38 C.S.R. § 2-5.2. That difference between the two rules is immaterial to this appeal because WVDEP has interpreted its rule as being less strict than the federal buffer zone rule, which SMCRA does not allow.

As West Virginia has recognized, SMCRA requires that approved state mining programs must be "consistent with regulations issued by the Secretary." 30 U.S.C. 1253(a)(7). State regulations may be "more stringent" than the federal minimum, 30 U.S.C. 1253(b), but "when there is a conflict between the federal and state provisions, the less restrictive state provision must yield to the more stringent federal provision." Canestraro v. Fareber, 374 S.E.2d 319, 321 (W.Va. 1988). The principle that state SMCRA regulations must be consistent with the federal SMCRA regulations applies not only to the text of state regulations but to their interpretation as well. See Schultz v. Consolidation Coal Co., 475 S.E.2d 467, 476 (W.Va. 1996) ("[A] state regulation enacted pursuant to WVSCMRA must be read in a manner consistent with federal regulations enacted in accordance with SMCRA."); Russell v. Island Creek Coal Co., 389 S.E.2d 194, 199 (W.Va. 1989) ("When a provision of the West Virginia Surface Coal Mining and Reclamation Act * * * is inconsistent with federal requirements in the Surface Mining Control and Reclamation Act, * * * the state act must be read in a way consistent with the federal act."). Accordingly, WVDEP's buffer zone rule cannot be interpreted less stringently than the federal rule; it must either be interpreted consistently with the federal rule or it must yield to the Secretary's interpretation.

As the D.C. Circuit emphasized, SMCRA's establishment of federal minimum standards would be undermined if each state were entitled to interpret those standards differently from each other and differently from the Secretary. In Re Permanent Surface

Mining, 653 F.2d at 523. The goal of uniform federal regulation thus does not countenance deference to state agencies authorized to administer federal law: "Chevron's policy underpinnings emphasize the expertise and familiarity of the federal agency with the subject matter of its mandate and the need for coherent and uniform construction of federal law nationwide. Those considerations are not apt [to a state agency's administration of federal law]." Turner v. Perales, 869 F.2d 140, 141 (2d Cir. 1989); see also U.S. West Communications, Inc. v. Hix, 986 F. Supp. 13, 17 (D. Colo. 1997) ("[G]iving deference to state commission determinations might only undermine, rather than promote, a coherent and uniform construction of federal law nationwide."). Because state agencies administering SMCRA lack the nationwide perspective of the Secretary, they are not entitled to deference in interpreting SMCRA, at least when that interpretation conflicts with the Secretary's interpretation. See Kenaitze Indian Tribe v. Alaska, 860 F.2d 312, 316 (9th Cir. 1988) (no deference to state agency implementing federal law because "it lacks * * * the nationwide perspective characteristic of a federal agency").^{5/}

⁵ While this Court has suggested that "some deference" is due a state's implementation of federal standards it has been authorized to implement, Ritter v. Cecil County, 33 F.3d 323, 327 (4th Cir. 1994), that suggestion does not apply here because the state's interpretation is inconsistent with the interpretation adoption by the federal agency vested with oversight authority. See Perry v. Dowling, 95 F.3d 231, 236 (2d Cir. 1996) (state's interpretation of the Medicaid Act is entitled to deference because that interpretation has been expressly approved by the federal agency authorized to administer the Act).

The deference owed to the Secretary's interpretation of the buffer zone rule is not undermined by the fact that the Secretary overruled the interpretation of the rule that had been adopted in the August 1999 MOU. The Supreme Court repeatedly has "rejected the argument that an agency's interpretation is not entitled to deference because it represents a sharp break with prior interpretations of the statute in question." Rust v. Sullivan, 500 U.S. 173, 186-187 (1991); see also Chevron, 467 U.S. at 863-64. As the Court has held, "substantial deference is nonetheless appropriate if there appears to have been good reason for the change." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 355-356 (1989) (emphasis added); see also Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 742 (1996).

The district court's thorough discussion of the buffer zone rule plainly established "good reason" for the Secretary's change of position. As the Secretary explained, the district court's decision "has prompted us to examine whether the August 1999 MOU properly interprets SMCRA and its implementing regulations." Addendum to U.S. Br. at 39. That re-examination convinced the Secretary "that the section 404(b)(1) guidelines do not in fact establish standards that are equivalent to those found in OSM's stream buffer zone rule." Ibid. As a result, "[p]ermit applications must meet the requirements of both rules, and compliance with the 404(b)(1) guidelines will not necessarily satisfy the requirements of the stream buffer zone rule." Ibid.¹⁷

⁶ WVDEP mistakenly suggests (WVDEP Br. 37 n.11) that the

Secretary's change of position violates the August MOU itself. The MOU expressly states that it does not "affect statutory or regulatory authorities of any of the signatory agencies" and "does not impose any legally binding requirements on Federal agencies." JA 2221. As the Secretary explained to WVDEP, the MOU "could not be interpreted to prevent this Department from taking a different view of SMCRA upon further examination (in this case prompted by the federal court decision). That is, as the agency charged by Congress with administering SMCRA, the Department of the Interior, cannot contract away its authority to establish the appropriate interpretation of the law." Addendum 39-40.

While the Secretary provided a reasoned explanation for the federal agency's change of position, WVDEP has repeatedly changed its interpretation of the buffer zone rule without offering any explanation. Until August 1999, WVDEP concluded that the buffer zone rule does not apply to the footprint of valley fills. See WVDEP Br. 31. In the August 1999 MOU, however, WVDEP abruptly changed positions, concluding that the buffer zone rule does apply to the footprint but that valley fills would be approved if they were approved under CWA section 404. JA 2218-2222. In its brief to this Court, WVDEP has reverted to its prior interpretation without any explanation for this change. WVDEP Br. 31. Notwithstanding this changed position, WVDEP asks this Court to defer to both its present and past interpretations of the buffer zone rule. See WVDEP Br. 13-14, 36. Even if WVDEP were entitled to deference for an interpretation of the buffer zone rule that conflicts with the Secretary's interpretation, WVDEP's failure to offer any explanation for its repeated change of positions would undermine such deference.

Accordingly, the Secretary's interpretation of SMCRA's buffer zone rule alone is entitled to deference. That interpretation mandates that the district court's grant of summary judgment be affirmed.⁷

⁷ The Supreme Court's recent decision in Christensen v. Harris County, 120 S. Ct. 1655 (2000), confirms that the Secretary is entitled to deference for his interpretation of the buffer zone rule. In Christensen, the Court concluded that it would not give deference under Chevron to the Secretary of Labor's interpretation of the Fair Labor Standards Act because that interpretation was

contained in an informal opinion letter. The Court distinguished its earlier decision in Auer v. Robinson, 519 U.S. 452 (1997), in which it had deferred under Chevron to an agency's interpretation of its own regulations where that interpretation was expressed solely in the agency's legal briefs. Christensen states that Auer continues to be good law because it involved "an agency's interpretation of its regulation," in contrast to the statutory interpretation at issue in Christensen. 120 S. Ct. at 1663. This case, like Auer and unlike Christensen, involves an agency's construction of its own regulations, and the Secretary's interpretation is therefore entitled to deference notwithstanding the fact that the interpretation is expressed in the April 17 letter to WVDEP and in the federal government's briefs to this Court. In any event, even if deference under Chevron and Auer were not appropriate here, the Secretary's view is "entitled to respect" under Skidmore v. Swift, 323 U.S. 134, 140 (1944), to the extent that the interpretation has "the power to persuade." 120 S. Ct. at 1663.

B. The Secretary's Interpretation of the Buffer Zone Rule Best Effectuates SMCRA

As the Secretary of the Interior has reasonably concluded, the buffer zone rule applies to intermittent and perennial stream segments proposed to be buried by valley fills. By its terms, the buffer zone rule prohibits mining activities that "disturb" land within 100 feet of an intermittent or perennial stream unless the regulatory authority finds that the proposed mining activity will not "adversely affect" the environmental resources of the stream. The rule plainly seeks to protect the area proposed to be "disturbed," as the rule requires that "[t]he area not to be disturbed shall be designated as a buffer zone." 30 C.F.R. 816.57(b); see also 30 C.F.R. 701.5 (defining "disturbed area"). Because valley fills by their nature cause the area where they are placed to be disturbed, the buffer zone rule protects the site of proposed fills. Furthermore, SMCRA regulations define an intermittent or perennial "stream" protected by the buffer zone rule as the stream as a whole as well as a "part of a stream." 30 C.F.R. 701.5. By prohibiting mining activities that adversely affect the environmental resources of an intermittent or perennial "stream," the buffer zone rule by its terms protects any reach or portion of an affected stream.

The conclusion that the buffer zone rule applies to the footprint of a proposed valley fill as well as to downstream areas comports with the text of SMCRA, which mandates that mining operations must "minimize the disturbance to the prevailing

hydrologic balance at the mine site and in associated offsite areas." 30 U.S.C. 1365(b)(10). By specifying that mining disturbances such as valley fills should minimize environmental harm "at the mine site," Congress expressed its intent to protect streams where the disturbances occur, i.e., in the footprint of proposed valley fills. By specifying that mining disturbances should minimize environmental harm "in associated offsite areas," Congress sought to protect affected downstream areas. Furthermore, applying the buffer zone rule to the filled stream segment advances the purpose of the rule, which was enacted to "protect stream channels," 44 Fed. Reg. 15176, and also advances the general purpose of the standards established under SMCRA, which were promulgated "to ensure that all surface mining activities are conducted in a manner which preserves and enhances environmental and other values in accordance with the Act." 30 C.F.R. 816.2.

WVDEP's contrary conclusion, that the buffer zone rule does not apply to the footprint of valley fills, see WVDEP Br. 12-30, finds no support in the plain language or purpose of the buffer zone rule. WVDEP does not challenge the conclusion that valley fills in intermittent or perennial streams "disturb" the stream segments where they are placed, as SMCRA's regulations expressly define an area where excess spoil is placed to be a "disturbed" area. 30 C.F.R. 701.5. Nor does WVDEP challenge the conclusion that the buffer zone rule prohibits such disturbances unless it can be found that they will not adversely affect the environmental resources of the "stream," which is defined to include stream

segments. WVDEP nonetheless seeks to establish an exception to the prohibition on disturbing intermittent or perennial streams for only one type of mining disturbance - valley fills - notwithstanding the absence of any support in the text of the buffer zone rule for such an exception.^{8/}

C. Application of the Buffer Zone Rule to Valley Fills Does Not Conflict With SMCRA and Its Implementing Regulations

With no support for its interpretation in the text of the buffer zone rule, WVDEP seeks to support its reading of the rule by resort to other regulatory and statutory provisions that purportedly authorize valley fills in intermittent or perennial streams. These arguments fail because the construction of the buffer zone rule must begin with the text of the rule. In any

⁸ The industry-intervenors attempt to support their interpretation of the buffer zone rule by pointing to the fact that the rule anticipates that mining activities may be approved that go "through" a stream. Mining activities that temporarily go through an intermittent or perennial stream may be authorized, however, only when the activities will not adversely affect the environmental resources of the "stream," meaning that the stream segment will continue to exist with its environmental resources intact. Valley fills that permanently eliminate stream segments cannot meet that standard.

event, none of the other provisions on which WVDEP relies supports the conclusion that the buffer zone rule must be read to allow valley fills in intermittent or perennial streams.

1. **38 C.S.R. § 2-5.2.** WVDEP points to a state regulation authorizing valley fills in "natural drainways," 38 C.S.R. § 2-5.2, which are defined as "any natural water course which may carry water to the tributaries and rivers of the watershed." 38 C.S.R. § 2-77. As the district court recognized, the most natural reading of that definition would not include intermittent or perennial streams because a "water course" carries water to such bodies. JA 2817-2818. Even if WVDEP were correct that a state regulation authorizes valley fills in intermittent or perennial streams, a state regulation may not be less stringent than the federal SMCRA regulations and thus may not allow valley fills in intermittent or perennial streams that are prohibited by the federal buffer zone rule. See *supra* 12-13.

2. **30 U.S.C. 1265(b)(22)(D).** WVDEP contends that the text of SMCRA contemplates the placement of valley fills in intermittent or perennial streams by pointing to 30 U.S.C. 1265(b)(22)(D), which prohibits disposing of excess spoil in areas containing "springs, natural water courses or wet weather seeps" unless certain drainage and filtration requirements are satisfied.

The Secretary of the Interior has reasonably concluded that "springs, natural water courses or wet weather seeps" do not include intermittent or perennial streams. See 48 Fed. Reg. 30,316 (buffer zone protection is required for intermittent or perennial

streams but is not required for "springs, seeps, ponding areas, and ephemeral streams").

3. **30 C.F.R. 816.46(c)(1)(ii).** WVDEP points to 30 C.F.R. 816.46(c)(1)(ii), which prohibits the placement of sedimentation ponds in perennial streams, and argues that this rule somehow mandates that valley fills must be allowed in intermittent and perennial streams. It is not clear how restrictions on sedimentation ponds are relevant to valley fills. Sedimentation ponds are not exempt from the buffer zone rule, as OSM specifically concluded in the preamble to the rule. 48 Fed. Reg. 30,313.

4. **30 C.F.R. 816.43.** WVDEP next points to 30 C.F.R. 816.43, which establishes criteria for approving stream diversions in intermittent or perennial streams. In fact, that provision manifests an intent to protect stream segments, as it allows intermittent or perennial streams to be diverted only if the diverted stream segment "approximate[s] the premining characteristics of the original channel including the natural riparian vegetation to promote the recovery and the enhancement of the aquatic habitat." 30 C.F.R. 816.43(a)(3). The regulations thus establish that intermittent or perennial stream segments may be diverted if there are no adverse environmental effects on the diverted stream segment, but the regulations prohibit the elimination of intermittent or perennial stream segments.

5. **30 C.F.R. 816.72(b).** WVDEP looks for support in 30 C.F.R. 816.72(b), which prohibits the placement of valley fills using rock-core chimney drains "in an area containing intermittent

or perennial streams." WVDEP argues that it can be inferred from this prohibition that valley fills that do not incorporate rock-core chimney drains may be placed in intermittent or perennial streams. As the district court correctly recognized, the prohibition on placing rock-core chimney drains "in an area containing" intermittent or perennial streams does not establish that valley fills may otherwise be placed in intermittent or perennial streams. JA 2819-2820.

6. 30 U.S.C. 1272(e). WVDEP contends that SMCRA cannot be read to prohibit valley fills in intermittent or perennial streams because SMCRA section 522(e), 30 U.S.C. 1272(e), expressly prohibits surface mining activities in certain specified areas. That argument is a non-sequitur. In addition to prohibiting mining activities in certain areas, SMCRA prohibits mining activities that do not meet specified environmental standards. 30 U.S.C. 1265(a). Because the elimination of intermittent or perennial stream segments violates those standards, it is prohibited.

7. CWA section 404. WVDEP argues that SMCRA must be read to authorize valley fills in intermittent or perennial streams because such fills may be authorized under CWA section 404, 33 U.S.C. 1344. But the question of whether valley fills are consistent with the CWA or any other federal statute is a distinct question from whether they are consistent with SMCRA. As the D.C. Circuit has noted, "the provision of multiple regulatory authorities is far from unknown." Environmental Defense Fund v. EPA, 598 F.2d 62, 77-78 (D.C. Cir. 1978). As that court held,

authorization to conduct an activity under one federal environmental statute does not guarantee that the activity must be authorized under SMCRA. Chemical Manufactures Assn. v. EPA, 673 F.2d 507, 512 (D.C. Cir. 1982). Instead, "[w]hen there are two acts upon the same subject, the rule is to give effect to both if possible." Morton v. Mancari, 417 U.S. 535, 551 (1974) (quoting United States v. Borden Co., 308 U.S. 188, 198 (1939)).^{1/}

D. WVDEP's Predictions of the Effects of Applying the Buffer Zone Rule to Valley Fills Are Unsupported and Irrelevant to the Interpretation of the Rule

WVDEP argues that the buffer zone rule cannot be read to apply to the footprint of valley fills because, purportedly, that would effectively eliminate all mining in West Virginia. WVDEP Br. 40-41. WVDEP points to no evidence in support of that claim and presented no such evidence in response to the motion for summary judgment. See JA 2894. Under the buffer zone rule, mining companies may place valley fills in ephemeral streams, springs, and other small water bodies, and WVDEP makes no attempt to show that

⁹ See also U.S. Br. 45-49; Hudson River Fishermen's Association v. New York, 751 F. Supp. 1088, 1099-1100 (S.D.N.Y. 1990) ("Clearly, the Safe Drinking Water Act does not provide adequate justification for ignoring the express and unambiguous directive of the previously adopted Clean Water Act."); Environmental Defense Fund, 598 F.2d at 77-78.

mining requires the burial of entire segments of intermittent and perennial streams.

In support of the argument that the interpretation of the buffer zone rule given by the district court and the Secretary impermissibly prohibits mining, WVDEP points to SMCRA's purpose of "striking a balance between protection of the environment and * * * the Nation's need for coal as an essential source of energy." 30 U.S.C. 1202(f). In adopting the buffer zone rule, however, the Secretary of the Interior struck that balance, protecting intermittent and perennial streams from mining disturbances, while allowing mining activities that disturb ephemeral streams, springs, and other small water bodies. See 48 Fed. Reg. at 30,316. The effect of the buffer zone rule on mining was considered at the time of the rulemaking, as industry opponents of the rule argued that it "could have serious adverse effects on many operations and preclude the mining of significant reserves." *Id.* at 30312. WVDEP and the industry-intervenors may disagree with the balance between environmental and economic values struck by the buffer zone rule, but that disagreement does not excuse WVDEP's failure to apply the rule.

III. THE INJUNCTION IS OVERLY BROAD

Although the district court correctly granted summary judgment on the buffer zone rule claims, it imposed an injunction that is overly broad in that it prohibits not only valley fills that unquestionably cause adverse environmental effects in intermittent and perennial streams but prohibits the disposal of any excess

spoil in intermittent or perennial streams. The injunction goes beyond appellees' complaint, which addressed valley fills that "bury substantial portions" of intermittent and perennial streams, see JA 1796, ¶ 75, and which requested an injunction barring "valley fills that bury or destroy portions of intermitent or perennial streams," id. at 1821. No evidence was presented to support the claim that the disposal of even de minimis quantities of spoil invariably causes adverse environmental effects and therefore is prohibited by the buffer zone rule.

Appellees suggest that the federal appellants waived this argument by not presenting it to the district court. While the general rule is that parties waive arguments not raised below, the rule is subject to exceptions. Karpa v. C.I.R., 909 F.2d 784, 788 (4th Cir. 1990). Furthermore, "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." Singleton v. Wulff, 428 U.S. 106, 121 (1976). The federal appellants did not participate in the district court briefing of the SMCRA claims for the simple reason that the federal appellants were not named as defendants to those claims. The interests of the federal appellants in the SMCRA claims became clear only when the district court issued an opinion that purported to hold that the Corps lacks authority under the CWA to issue permits for valley fills.¹⁰

¹⁰ This court has ruled that the federal appellants have authority to appeal the district court's judgment. WVDEP and the

Accordingly, the federal appellants' failure to raise their objection to the scope of the injunction should be excused.¹¹

industry-intervenors moved to strike the federal appellants' brief and to dismiss the federal appellant's appeal on the ground that the federal parties are not properly designated "appellants," and on July 26, 2000, this Court denied the motion.

¹¹ Moreover, in this appeal the federal parties are entitled to present the views not only of the Corps but of the United States as a whole, including the views of the Secretary of the Interior in his role as the administrator of SMCRA. In litigation, the United States must speak with "one voice * * * that reflects not the parochial interests of a particular agency, but the common interests of the government and therefore of all the people." United States v. Providence Journal Co., 485 U.S. 693, 706 (1987).

IV. THE CORPS HAS AUTHORITY TO REGULATE VALLEY FILLS UNDER CWA SECTION 404

As discussed in our opening brief, the question of the Corps' CWA authority is not presented by this appeal. While the district court characterized as "holding" its conclusion that the Corps lacks authority to regulate valley fills under the CWA, 72 F.Supp.2d at 658, no party has argued that the scope of the Corps' CWA authority is directly presented by this appeal.¹² Instead, the only claims on appeal are brought against WVDEP under SMCRA, and those claims in no way involve the scope of the Corps' authority under the CWA. The Corps' authority over valley fills was resolved in a June 1999 order, which approved a settlement under which the parties agreed that the Corps would regulate valley fills under CWA section 404.¹³ Because no party has appealed or otherwise challenged the June 1999 order, that order and the settlement it approved (not the district court's subsequent dictum) continue to

¹² See U.S. Br. 27-29; Industry Br. 52; Brief of Plaintiffs-Appellees ("Plaintiffs Br.") at 77.

¹³ See U.S. Br. 29-31; Industry Br. 51-53; Plaintiffs Br. 78 (noting that in the settlement "Bragg agreed not to question the Corps' jurisdiction under § 404 to regulate valley fills"); WVDEP Br. 28.

establish the authority for the Corps' regulation of valley fills under CWA section 404.

The CWA was injected into the SMCRA claims when WVDEP argued that SMCRA's buffer zone rule establishes a standard comparable to the standards established under CWA section 404(b)(1). As discussed above and in our opening brief, the district court properly rejected that argument. See U.S. Br. 42-49. Even if it were true, however, that the two statutes establish comparable standards for approving valley fills, that conclusion would in no way call into question the Corps' authority to regulate valley fills under the CWA, which derives from the definition of the term "fill material" under the CWA, and which no party has claimed is related to the proper interpretation of SMCRA's buffer zone rule.¹⁴

CONCLUSION

For the reasons stated above and in our opening brief, this Court should affirm the grant of summary judgment on Counts 2 and 3 but should reverse the injunction entered by the district court and should remand for the entry of a narrower injunction tailored to

¹⁴ As discussed in our opening brief, the definition of "fill material" is the subject of a joint EPA-Corps proposed rulemaking. The comment period on the proposed rule was extended to July 19, 2000, 65 Fed. Reg. 65778 (June 16, 2000), and the agencies currently are considering the comments submitted on the proposal.

the activities presented to the district court. This Court should also clarify that the Corps continues to have authority to regulate valley fills pursuant to the unappealed June 1999 order.

Respectfully submitted,

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