

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

BRIEF FOR THE FEDERAL APPELLANTS

OF COUNSEL:

GARY S. GUZY

General Counsel

STEVEN NEUGEBOREN

Attorney

Environmental Protection
Agency

Washington, D.C. 20044

JOHN D. LESHY

Solicitor

THOMAS BOVARD

Attorney

Department of the Interior

Washington, D.C. 20240

CHARLES A. BLANCHARD

General Counsel

EARL STOCKDALE

Deputy General Counsel

DIEDRE DUNCAN

Attorney

Department of the Army

Washington, D.C. 20310

LOIS J. SCHIFFER

Assistant Attorney General

STEVEN E. RUSAK

DAVID C. SHILTON

JARED A. GOLDSTEIN

Attorneys

Environment & Natural

Resources Division

U.S. Department of Justice

Washington, D.C. 20530

(202) 514-5316

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

BRIEF FOR THE FEDERAL APPELLANTS

INTERESTS OF THE UNITED STATES

This appeal concerns the environmental protections under the Surface Mining Control and Reclamation Act (SMCRA) and the Clean Water Act (CWA) for "valley fills" -- the placement of rock and dirt overburden from mining in mountainous areas in valleys and the streams that flow through those valleys. The appeal significantly implicates the interests of the United States, as it involves the interpretation and application of federal statutes administered by three federal agencies -- the Corps of Engineers (Corps), the Environmental Protection Agency (EPA), and the Office of Surface Mining in the Department of the Interior (DOI). Through SMCRA and the CWA, the United States is committed to protecting the natural environment from the harms caused by surface mining. See 30 U.S.C. 1202(a); 33 U.S.C. 1251(a). The brief makes four points:

First, the court correctly held that plaintiffs' citizen suit claim against the Director of the West Virginia Department of

Environmental Protection (WVDEP) is not barred by the Eleventh Amendment.

Second, the district court correctly found that SMCRA's stream buffer zone rule, 30 C.F.R. 816.57, prohibits the burial of substantial portions of intermittent and perennial streams beneath excess mining spoil.^{1/} The elimination of substantial intermittent or perennial stream segment necessarily causes adverse environmental effects, as it eliminates all aquatic life that inhabits those stream segments. As the district court rightly concluded, the elimination of entire stream segments and all the life they contain plainly causes environmental harm. Accordingly, the district court correctly granted summary judgment on plaintiffs' buffer zone claims.

¹ As discussed below, intermittent streams are defined by SMCRA as streams that obtain their flow from surface runoff and groundwater discharge, while perennial streams are those that flow continuously throughout the year. 30 C.F.R. 701.5.

Third, the district court incorrectly concluded that the Corps lacks authority to regulate the disposal of surface mining spoil under CWA section 404. The question of the Corps' CWA authority was not properly before the district court, as the only disputed claims involved claims against WVDEP under SMCRA. Because the resolution of the SMCRA claims against WVDEP does not depend on the question of the Corps' authority under CWA section 404, the district court's conclusion regarding the Corps' CWA authority should be considered dictum.^{1/} Moreover, the district court had already resolved the question of the Corps' authority in a prior order, which approved a settlement of the CWA claims against the Corps. Under the settlement, the Corps generally will not allow valley fills in watersheds that drain more than 250 acres unless it can be shown that the fill satisfies the rigorous requirements necessary to obtain an individual permit under CWA section 404. The district court's order approving the settlement requiring the Corps to regulate valley fills has not been appealed by any party.

Fourth, the district court selected an overly broad remedy to address the buffer zone claims. The plaintiffs' claims and the evidence presented to the court involved spoil disposal activities

² The district court characterized its conclusion on the Corps' authority as part of its holding. 72 F.Supp.2d at 658. Accordingly, the federal parties believe that they are sufficiently aggrieved by the decision to have standing to appeal. See 15A Wright & Miller, Federal Practice and Procedure § 3902.1. If the federal parties could not be designated appellants, they would nonetheless have the right to file this brief as an amicus curiae. See Fed. R. App. P. 29(a).

that bury substantial stream segments under valley fills. The injunction, however, prohibits even minor spoil disposal activities that do not involve the filling of stream segments. The injunction is therefore not narrowly focused on the specific problems raised by the buffer zone claims.

DECISIONS BELOW

On October 20, 1999, the United States District Court for the Southern District of West Virginia (Haden, C.J.) issued a permanent injunction against the Director of the West Virginia Department of Environmental Protection (WVDEP), enjoining the issuance of permits under SMCRA that would authorize the placement of excess spoil from coal mining operations into intermittent and perennial streams. The court also stated that the Army Corps of Engineers lacks jurisdiction under the CWA to regulate the disposal of mining spoil as waste into streams. That decision is reported at 72 F.Supp.2d 642 and appears at Joint Appendix (JA) 2799. On November 1, 1999, the district court issued a stay of the injunction pending appeal.

That decision is reported at 190 F.R.D. 194 and appears at JA 2891. On December 17, 1999, the federal appellants – Col. Dana Robertson, Lt. Gen. Joe N. Ballard, and Michael D. Gheen, Army Corps of Engineers officials – filed a notice of appeal. JA 60.

JURISDICTION

The district court had subject matter jurisdiction pursuant to SMCRA section 520(a)(2), which provides that federal district courts "shall have jurisdiction" over civil actions against "the appropriate State regulatory authority to the extent permitted by

the eleventh amendment to the Constitution" where there is alleged a failure to perform a non-discretionary duty imposed by SMCRA. 30 U.S.C. 1270(a)(2). As discussed more fully below, Counts 2 and 3 of the complaint are not barred by the Eleventh Amendment. See *infra* pp. 33-38.

This Court has jurisdiction pursuant to 28 U.S.C. 1292(a)(1), which authorizes appellate jurisdiction over orders granting injunctions.

STATEMENT OF THE ISSUES

1. Whether a challenge to the Corps' authority under CWA section 404 to regulate the disposal of excess surface mining spoil into intermittent and perennial streams is properly raised by a challenge to WVDEP administration of SMCRA.

2. Whether the Eleventh Amendment bars a citizen suit, brought under section 520(a)(2) of SMCRA, 30 U.S.C. 1270(a)(2), that alleges that WVDEP failed to administer SMCRA in accordance with the state and federal stream buffer zone rule, 30 C.F.R. 816.57 and 38 C.S.R. 38 § 2-5.2.

3. Whether it is consistent with the stream buffer zone rule for the Director of WVDEP to approve mining permits that allow substantial segments of intermittent and perennial streams to be filled with excess mining spoil.

4. Whether the district court's injunction, which prohibits the placement of any excess mining spoil in any intermittent or perennial stream for the purpose of waste disposal, is an overly broad remedy for WVDEP's noncompliance with the stream buffer zone rule.

STATEMENT OF THE CASE

Plaintiffs bring a broad-based challenge to the regulation of mountaintop removal mining in West Virginia. Specifically, plaintiffs – persons who live near several proposed valley fills and a conservation association (hereinafter "Bragg") – challenge the manner in which valley fills^{1/} associated with mountaintop

³ A valley fill is defined by the SMCRA regulations as "a

removal mining are regulated by WVDEP under SMCRA and by the Corps under the CWA.

1. Factual background. As its name suggests, mountaintop removal mining involves the removal of the top of a mountain in order to recover the coal seams contained in the mountain. Explosives are used to break the mountain's rock, and massive earth-moving equipment, often including equipment called "draglines," remove the spoil, i.e., the dirt and rock that composed the mountaintop over or between the coal seams.^{1/} While SMCRA calls for excess spoil to be placed back in the mined areas - returning the lands to their approximate original contour (AOC), see 30 U.S.C. 1265(b)(3) - that result ordinarily cannot be accomplished with mountaintop removal mining because of stability concerns with the spoil pile and the fact that broken rock takes up more volume than did the in-place rock prior to mining. See JA

fill structure * * * that is placed in a valley where side slopes of the existing valley, measured at the steepest point, are greater than 20 degrees, or where the average slope of the profile of the valley from the toe of the fill to the top of the fill is greater than 10 degrees." 30 C.F.R. 701.5.

⁴ See 30 C.F.R. 701.5 ("Spoil means overburden that has been removed during surface coal mining operations.>").

946. Mountaintop removal creates an immense quantity of excess spoil, which is typically placed in valley fills on the sides of the former mountains, burying streams that flow through the valleys. See JA 118, 119, 127, 143, 1508-1510 (photographs).

All types of surface and underground coal mining in Appalachia generate excess spoil fills due to the increased volume of broken rock, limitations on the steepness and height to which broken rock may be placed to achieve a stable slope, and the steep topography of the region. Large mines may be surrounded by several valley fills. Depending on the local topography and the profile of those valleys, a single fill may be over 1,000 feet wide and over a mile long. See JA 143.

While mountaintop removal mining has been practiced in some form since the late 1960s, it has become a prevalent coal mining technique in West Virginia during the 1990s due to several factors.

See generally JA 275-276. First, as the demand for electricity has increased, so has the demand for the relatively clean-burning, low-sulfur coal found in West Virginia. Second, coal supplies near the surface have been significantly depleted. Third, the development of large surface mining equipment, known as draglines, has made it possible to remove mountaintops more efficiently and economically. Draglines, which resemble giant cranes, some of which are 20 stories tall with a 100-yard-long boom, may be capable of moving over 100 cubic yards of earth in a single scoop. See JA 120.

At the time of the passage of SMCRA, excess spoil from coal mining was generally placed in the extreme headwaters of streams, affecting primarily ephemeral stream sections.^{1/} While some larger fills existed, the volume of such fills was generally less than 250,000 cubic yards each. JA 275. Today, the volume of a single stream fill can be as much as 250 million cubic yards, with stream burials up to two miles long. Ibid. From 1986 to 1998, it is estimated that at least 900 stream miles were filled with excess spoil and other coal mining wastes in Kentucky, Pennsylvania, Virginia, and West Virginia. JA 282 (table 3). More than half of the filled stream segments are in West Virginia. Ibid.

2. Statutory background. Valley fills are regulated primarily under two federal statutory programs: the CWA and SMCRA.

a. Regulation of valley fills under the CWA. The CWA prohibits the discharge of any pollutant from any point source into the waters of the United States, except in compliance with a permit issued under one of the permit programs established by the statute.

33 U.S.C. 1311. The two principal permit programs are the National Pollutant Discharge Elimination System (NPDES), administered by EPA under CWA section 402, 33 U.S.C. 1342, and the dredge and fill permit program administered by the Corps under CWA section 404, 33 U.S.C. 1344. The NPDES program establishes technology-based and water-quality-based standards. 33 U.S.C.

⁵ "Ephemeral" stream are streams or portions of streams that flow "only in direct response to precipitation in the immediate watershed." 30 C.F.R. 701.5.

1311. The section 404 permit program, which applies to the discharge of "dredged or fill material," calls for the application of a set of guidelines promulgated by EPA in conjunction with the Corps under CWA section 404(b)(1), 33 U.S.C. 1344(b)(1).

EPA and the Corps have adopted somewhat different definitions of "fill material" covered by the section 404 program. EPA's definition focuses on whether a discharge has the effect of filling waters, defining "fill material" as "any 'pollutant' which replaces portions of the 'waters of the United States' with dry land or which changes the bottom elevation of a water body for any purpose." 40 C.F.R. 232.2 (emphasis added). The Corps' definition focuses on the purpose of the discharge, defining "fill material" as:

any material used for the primary purpose of replacing aquatic area with dry land or of changing the bottom elevation of a waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the Clean Water Act.

33 C.F.R. 323.3(e) (emphasis added).

EPA and the Corps are taking action to eliminate the confusion that has arisen over the two definitions. On April 17, 2000, EPA and the Corps submitted to the Office of the Federal Register a proposed new definition of "fill material." Under the proposed rule, "fill material" would be defined by both agencies as:

material (including but not limited to rock, sand, and earth) that has the effect of:

(i) Replacing any portion of a water of the United States with dry land, or

(b) Changing the bottom elevation of any portion of a water of the United States.

(2) The term "fill material" does not include discharges covered by proposed or final effluent limitations guidelines and standards * * * or discharges covered by an NPDES permit issued under section 402 of the Clean Water Act.

Addendum 36, 38. On April 17, 2000, the proposed rule was submitted for publication in the Federal Register. The public comment period for the proposed rule will run for 60 days from the date of publication in the Federal Register.

b. Regulation of valley fills under SMCRA. In enacting SMCRA, Congress found that it is "essential to the national interest" to ensure the continued supply of coal, 30 U.S.C. 1201(b). At the same time, Congress found that "many surface mining operations result in disturbances of surface areas * * * by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, * * * and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources." 30 U.S.C. 1201(c). Congress thus enacted SMCRA to "strike a balance between 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). In doing so, Congress declared an end to the assumption that "the permanent degrading of the local surroundings and the pollution of streams was the inevitable price which the community paid in return for jobs and tax revenue generated by the coal industry." H.R. Rep. No. 218,

95th Cong., 1st Sess., reprinted in 1977 U.S.C.C.A.N. 593, 666. SMCRA thus "establishes a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. 1202(a). The administration of SMCRA is entrusted to the Secretary of the Interior, acting through the Office of Surface Mining (OSM). 30 U.S.C. 1211(c)(1).

i. State administration of SMCRA. SMCRA provides that, upon consultation and the written concurrence of EPA, the Secretary of the Interior may approve state programs for the administration of SMCRA if the state has demonstrated that it "has the capability of carrying out the provisions of this chapter and meeting its purposes." 30 U.S.C. 1253(a). In order to gain approval to administer SMCRA, the state must enact a law "which provides for the regulation of surface coal mining and reclamation operations in accordances with the requirements of this chapter." 30 U.S.C. 1253(a)(1). The state must further establish a regulatory authority with sufficient personnel and funding "to regulate surface coal mining and reclamation operations in accordance with the requirements of this chapter." 30 U.S.C. 1253(a)(3). Finally, the state must establish "rules and regulations consistent with regulations issued by the Secretary pursuant to this chapter." 30 U.S.C. 1253(7). 30 U.S.C. 1253(b). While state programs must contain the minimum standards established by SMCRA, a state program may provide for "more stringent * * * environmental controls and regulations of surface coal mining and reclamation operation than do

the provisions of [SMCRA] or any regulation issued pursuant thereto." 30 U.S.C. 1255(b).

ii. SMCRA's environmental performance standards and the buffer zone rule. Permits for surface mining may be issued under SMCRA by OSM or by approved state agencies only if it has been shown that the proposed mining activities will satisfy general performance standards applicable to all surface coal mining operations. 30 U.S.C. 1265(b). Among those standards, SMCRA provides that surface mining activities must "minimize the disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations." 30 U.S.C. 1265(b)(10). SMCRA further provides that surface mining activities must, "to the extent possible using the best technology currently available, minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable." 30 U.S.C. 1265(b)(24).

To carry out the performance standards established by SMCRA, OSM adopted a "stream buffer zone" rule, which provides:

(a) No land within 100 feet of a perennial stream or an intermittent stream shall be disturbed by surface mining activities, unless the regulatory authority specifically authorizes surface mining activities closer to, or through, such a stream. The regulatory authority may authorize such activities only upon finding that-

(1) Surface mining activities will not cause or contribute to the violation of applicable State

or Federal water quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream; and

(2) If there will be a temporary or permanent stream-channel diversion, it will comply with § 816.43.

(b) The area not to be disturbed shall be designated as a buffer zone, and the operator shall mark it as specified in § 816.11.

30 C.F.R. 816.57. The buffer zone rule applies only to "intermittent" and "perennial" streams, and not to "ephemeral" streams. As those terms are defined by SMCRA regulation, ephemeral streams are streams, or portions of streams, that flow "only in direct response to precipitation in the immediate watershed." 30 C.F.R. 701.5. An "intermittent" stream is a stream, or stream portion, that "obtains its flow from the surface runoff and groundwater discharge." Ibid. "Perennial" streams are streams, or stream portions, that flow continuously during the calendar year. Ibid.

The buffer zone rule was adopted "to protect streams from sedimentation and gross disturbances of stream channels caused by surface coal mining and reclamation operations." 48 Fed. Reg 30,312 (June 30, 1983). In adopting the rule, OSM recognized that:

It is impossible to conduct surface mining without disturbing a number of minor natural streams, including some which contain biota. For this reason, surface coal mining operations will be permissible as long as environmental

protection will be afforded to those streams with more significant environmental-resource value.

Id. at 30,314. Recognizing that surface mining activities would disturb some streams, OSM chose to protect intermittent and perennial streams and stream segments because those streams and stream segments were recognized to be especially significant in establishing the hydrologic balance.⁶ As OSM stated, "intermittent and perennial streams generally have environmental resource values worthy of protection under Section 515(b)(24) of the Act." Id. at 30,312. In contrast, OSM concluded that buffer zone protection was not required for "springs, seeps, ponding areas, and ephemeral streams." Id. at 30,313.

The State of West Virginia, which administers an approved SMCRA program through WVDEP, adopted a state version of the buffer zone rule:

No land within one hundred feet (100') of an intermittent or perennial stream shall be disturbed by surface mining operations including roads unless specifically authorized by the Director. The Director will authorize such operations only upon finding that surface mining activities will not adversely affect 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

⁶ "Hydrologic balance" is "the relationship between the quality and quantity of water inflow to, water outflow from, and water storage in a hydrologic unit such as a drainage basin, aquifer, soil zone, lake, or reservoir." 30 C.F.R. 701.5.

standards. The area not to be disturbed shall be designated a buffer zone and marked accordingly.

38 C.S.R. § 2-5.2.

iii. Mountaintop removal and the placement of excess spoil. In enacting SMCRA, Congress recognized the environmental hazards posed by the valley fills associated with mountaintop removal mining: "Serious problems are presented * * * by operations using head-of-the-hollow or valley fill. For such operations, it is uncertain whether spoil can be placed in an environmentally sound manner." H. Rep. No. 95-218, 95th Cong., 1st Sess. 157 (1977) (quoting Sec. of the Interior Cecil Andrus), reprinted in 1977 U.S.C.C.A.N. 593, 688. See also id. at 615 ("[S]ome mountaintop removal operations have caused serious environmental problems in the Appalachian area. The key cause of these problems has been the 'valley' fill or 'head-of-the-hollow' fill techniques utilized to dispose of excess spoil material.").

Rather than prohibiting valley fills, Congress concluded that valley fills "should be limited to the minimum and that strong spoil placement standards are needed to insure that there will be no offsite damages." Id. at 688-689 (quoting Sec. of the Interior Andrus); see also Cong. Rec. 33,314 (Oct. 9, 1973) (statement of Sen. Jackson) (stating that the disposal of spoil from mountaintop removal mining may be authorized only if fills satisfy "very carefully determined conditions precedent").

The text of SMCRA establishes the "strong spoil disposal standards" required for surface coal mining, including mountaintop

removal mining. Three environmental performance standards govern the conditions under which surface mining, including associated spoil disposal, may be authorized. Pursuant to those standards, surface mining operations may be authorized only if the permitting authority finds (1) that the mining operations will "minimize disturbances and adverse impacts * * * on fish, wildlife, and related environmental values"; (2) that "no damage will be done to natural watercourses"; (3) that the excess spoil will be placed in an area that "does not contain springs, natural water courses or wet weather seeps unless lateral drains are constructed from the wet areas to the main underdrains in such a manner that filtration of the water into the spoil will be prevented"; and (4) that the disposal "is compatible with the natural drainage patterns and surroundings." 30 U.S.C. 1265(b)(10),(22),(24).

Implementing these provisions, SMCRA regulations establish numerous provisions relevant to mountaintop removal mining and valley fills. See 30 C.F.R. Part 824 (permanent program standards for mountaintop removal); 30 C.F.R. 816.41 to 816.57 (standards for protecting the hydrologic balance of mining areas); 30 C.F.R. 816.71 to 816.74 (standards for the disposal of excess spoil). Pursuant to these regulations, valley fills may be approved only if "runoff from the areas above the fill and runoff from the surface of the fill [are] diverted into stabilized diversion channels." 30 C.F.R. 816.72(a)(2). Permanent diversion channels of intermittent and perennial streams "must be designed and constructed so as to restore or approximate the premining characteristics of the original stream

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). Finally, the permitting authority must find, pursuant to the buffer zone rule, that spoil disposal in intermittent or perennial streams will not cause or contribute to the violation of state or federal water quality standards and will not "adversely affect" water quantity, water quality, and other environmental values. 30 C.F.R. 816.57.

iv. SMCRA's citizen suit provision. SMCRA section 520(a) establishes that, "to the extent permitted by the eleventh amendment," any "adversely affected" person may sue the Secretary of the Interior or the relevant state regulatory agency for failing to comply with non-discretionary duties established by SMCRA:

[A]ny person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this chapter -

* * *

(2) against the Secretary or the appropriate State regulatory authority to the extent permitted by the eleventh amendment to the Constitution where there is alleged a failure of the Secretary or the appropriate State regulatory authority to perform any act or duty under this chapter which is not discretionary with the Secretary or with the appropriate State regulatory authority.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties.

30 U.S.C. 1270(a).

Congress enacted section 520 to "assure that regulatory agencies and surface operators comply with the requirements of the Act and approved regulatory programs." S. Rep. No. 128, 95th Cong., 1st Sess. 88 (1977). See also H. Rep. No. 118, 95th Cong., 1st Sess. 89 (1977), reprinted in 1977 U.S.C.C.A.N. 593, 625 ("[P]roviding citizens access to administrative appellate procedures and the courts is a practical and legitimate method of assuring the regulatory authority's compliance with the requirements of the act.").

3. Procedural history. Bragg brought a broad-based challenge to the state and federal regulation of valley fills associated with mountaintop removal mining in West Virginia. The only claims directly pertinent to this appeal are Counts 2 and 3, which allege that WVDEP did not comply with the state and federal versions of SMCRA's stream buffer zone rule. The remaining claims were resolved in settlements approved by the district court.

a. Bragg's claims against the Corps. In Counts 12 and 13, Bragg alleged that the Corps lacks authority to regulate valley fills under CWA section 404 and that, regardless of the Corps' jurisdiction, the Corps violated the CWA by approving valley fills in general nationwide permits. JA 107-107, ¶¶ 134-139. In December 1998, the Corps entered into a settlement with the plaintiffs that resolved Counts 12 and 13. JA 285-298. As a long-term measure, the settlement provides that federal regulation of valley fills in West Virginia will be determined through the preparation of an

environmental impact statement (EIS) by EPA, the Corps, OSM, the Fish and Wildlife Service, and WVDEP. JA 287-288, ¶¶ 7-10. The EIS will address the environmental effects of federal regulation of valley fills and will provide coordinated agency guidance on how best to regulate valley fills. The settlement anticipates that a draft EIS will be completed by June 2000 and the final EIS by December 2000. As an interim measure, the settlement provides that the Corps will regulate valley fills in West Virginia under CWA section 404, generally requiring individual permits for valley fills in watersheds that drain greater than 250 acres, while generally authorizing smaller fills pursuant to a nationwide permit.⁷ JA 288-291, ¶¶ 11-15. In April 1999, a memorandum of understanding (MOU) was entered into by the Army, EPA, DOI, and WVDEP, to implement the settlement agreement. JA 1725-1732.

In June 1999, the district court approved the settlement, finding it "fair, adequate, [and] reasonable," as well as "faithful to the environmental statutes under which the litigation was brought." 54 F. Supp. 2d 653, 670 (S.D.W.V. 1999). Although the settlement disposes of all claims against the federal parties, the district court retained jurisdiction over the federal parties in order to interpret and enforce the settlement. Id. at 670-671.

⁷ Under 33 U.S.C. 1344(e), the Corps may issue nationwide section 404 permits - i.e., general permits applicable on a nationwide basis for a category of activity involving the discharge of dredged or fill material - if it is determined that the permitted activity will cause only minimal adverse environmental effects.

b. Bragg's claims against WVDEP regarding SMCRA's buffer zone rule. In Count 2, Bragg alleges that WVDEP has a pattern and practice of issuing permits for valley fills in intermittent and perennial streams without making the required findings under the buffer zone rule. JA 1794-1796, ¶¶ 70-73. In Count 3, Bragg alleges that the buffer zone rule does not authorize WVDEP to permit the burial of substantial portions of perennial or intermittent streams in valley fills. JA 1796-1797, ¶¶ 74-77. As Bragg acknowledges, the buffer zone rule "allows minor incursions" into intermittent streams but prohibits valley fills in intermittent and perennial streams "because such fills bury and destroy substantial portions of intermittent or perennial streams." JA 1796-1797, ¶¶ 75-76.

Until August 1999, it was WVDEP's position that the buffer zone rule does not apply to the intermittent and perennial stream segments proposed to be filled by valley fills. In August 1999, WVDEP changed its position when it signed an MOU with OSM, the Army, and EPA, in which WVDEP agreed with the federal agencies that valley fills in intermittent or perennial streams could be approved only if the buffer zone findings were made for the filled stream segments. JA 2218-2222. The August 1999 MOU also expressed the position that the standards established for obtaining a permit under CWA section 404(b) are "comparable" to the findings required by the buffer zone rule and that, as a result, OSM and WVDEP would deem the buffer zone rule to be satisfied for fills receiving a permit under CWA section 404. JA 2219-2220.

In April 1999, cross motions for summary judgment were filed as to Counts 2 and 3. On October 20, 1999, the district court ruled in Bragg's favor on those claims and enjoined WVDEP from issuing SMCRA permits for the discharge of any excess spoil from surface mining into intermittent and perennial streams. 72 F.Supp.2d 642. In granting summary judgment on Count 2, the court held that the Director of WVDEP has a nondiscretionary duty to make the findings required under the buffer zone rule before authorizing valleys fills within 100 feet of an intermittent or perennial stream. Id. at 661. In granting summary judgment on Count 3, the district court held that WVDEP has a nondiscretionary duty under the buffer zone rule to deny permits for valley fills in intermittent and perennial streams. Id. at 663. The court found that valley fills are inconsistent with the state and federal versions of the buffer zone rule because valley fills cannot be said to have no "adverse effect" on stream flow, fish migration, water quality, and other environmental values.

On the contrary:

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

Id. at 661-662.

As relief, the court granted plaintiffs' motion for a permanent injunction, "enjoining [WVDEP] from further violations of the nondiscretionary duties discussed above and from approving any further surface mining permits under current law that would authorize placement of excess spoil in intermittent and perennial streams for the primary purpose of waste disposal" Id. at 663.

In the course of its opinion, the district court discussed the subjects addressed in the April and August MOUs. The court concluded, contrary to the April 1999 MOU, that valley fills for the purpose of waste disposal cannot be regulated by the Corps under CWA section 404. Id. at 655-657. In the court's view, the discharge of excess spoil from mountaintop removal mining does not amount to the discharge of "fill material" under the Corps' regulation because the spoil is discharged for the purpose of waste disposal rather than for the primary purpose of raising the bottom elevation of the water. As a result, the court concluded that valley fills cannot be regulated by the Corps under CWA section 404. Also, contrary to the August 1999 MOU, the court concluded that satisfaction of the section 404(b)(1) guidelines is not equivalent to satisfaction of the SMCRA buffer zone rule. Id. at 657-660. Accordingly, WVDEP could not rely on findings made pursuant to the CWA section 404(b)(1) guidelines in lieu of making the buffer zone findings.^{8/}

⁸ As discussed below, the federal appellants do not challenge the district court's conclusion that the CWA 404(b)(1) guidelines cannot be used as a substitute for the SMCRA buffer zone rule. On April 17, 2000, the Solicitor of the Interior and the Acting Director of OSM sent a letter to Michael Castle, Director of WVDEP, informing him that it is the conclusion of DOI, EPA, the

The Director of WVDEP, along with mining companies, mining associations, and the United Mine Workers, all of which had intervened on behalf of WVDEP, immediately filed notices of appeal to this Court. On October 29, 1999, the district court stayed the injunction pending appeal. On December 17, 1999, the federal appellants filed a notice of appeal.

c. Bragg's other claims against WVDEP. In a consent decree approved by the district court on February 17, 2000, Bragg and WVDEP settled Counts 4 to 10, 14, and 15, which alleged violations of SMCRA's requirements regarding such matters as the protection of riparian vegetation, the submission of a hydrologic reclamation plan, and restoring the approximate original contour of mined areas. JA 2912. On March 20, 2000, intervenor mining associations and coal companies filed a notice of appeal from that order. This Court consolidated the appeals from the district court's February 17, 2000 order with the appeals from the district court's October 20, 1999 order.

STANDARD OF REVIEW

Corps, and the Department of Justice that the August 1999 MOU does not comport with the proper interpretation of the stream buffer zone rule and the 404(b)(1) guidelines. Addendum 39-40.

A district court's entry of summary judgment is reviewed de novo. Henson v. Liggett Group, Inc., 61 F.3d 270, 274 (4th Cir.1995). The scope of an injunction is reviewed for abuse of discretion. Tuttle v. Arlington Co. School Bd., 195 F.3d 698, 704 (4th Cir. 1999); Wilson v. Office of Civilian Health and Med. Programs of the Uniformed Servs., 65 F.3d 361, 363 (4th Cir.1995).

SUMMARY OF ARGUMENT

1. **The Army Corps of Engineers has authority to regulate valley fills under Clean Water Act section 404.** The district court erred in concluding that the Army Corps of Engineers lacks authority under CWA section 404 to regulate valley fills. That portion of the district court decision is dictum, as the only claims before the district court were Bragg's claims against WVDEP under SMCRA. Those claims do not depend on the Corps' authority under the CWA. In June 1999, when the question of the Corps' CWA authority was directly presented, the district court found that it was fair, reasonable, and faithful to the CWA for the Corps to continue to regulate valley fills. That order and the settlement it approved have not been appealed by any party. Because the Corps' authority is not at issue in the claims against WVDEP, this Court need not address the issue except to clarify that that aspect of the district court's opinion does not constrain the Corps' authority under the approved settlement. Furthermore, the Corps' regulatory definition of "fill material," which the district court found to preclude the Corps from regulating valley fills, is currently the subject of a joint EPA-Corps notice-and-comment rulemaking. Rulemaking, rather than this

appeal, represents the appropriate vehicle for resolving the differing regulations identified by the district court.

2. The Eleventh Amendment does not bar the buffer zone rule claims. As the district court correctly found that the Eleventh Amendment does not bar Counts 2 and 3. Ex parte Young, 209 U.S. 123 (1908), establishes that the Eleventh Amendment does not bar federal courts from hearing suits that seek to enjoin violations of federal law by state officials. State SMCRA programs are approved by the Secretary of the Interior, and the approved state standards become enforceable as a matter of federal law. Counts 2 and 3 of Bragg's complaint, which allege that the state failed to comply with the terms of the state and federal buffer zone rule, thus state a violation of federal law.

3. The district court correctly granted summary judgment on the buffer zone rule claims. The district court correctly granted summary judgment on Count 2, holding that valley fills in intermittent or perennial streams may be authorized under the buffer zone rule only if the permitting agency finds that they will not adversely affect the environmental resources of the filled stream segments. WVDEP has acknowledged that it has routinely approved valley fills in intermittent and perennial streams without making the findings called for by the buffer zone rule for the stream segment filled. The district court correctly rejected the arguments that WVDEP was not required to make the buffer zone findings, holding that the findings required by the buffer zone rule must be made for the filled stream segments and not at some point downstream

from the valley fills; and (2) findings made by the Corps under the CWA section 404(b)(1) guidelines are not a substitute for the buffer zone findings.

The district court also correctly granted summary judgment on Count 3, holding that the burial of substantial portions of intermittent or perennial streams in valley fills causes adverse environmental impact in the filled stream segments and therefore cannot be authorized consistent with the buffer zone rule. The uncontested evidence demonstrates that the burial of substantial portions of intermittent or perennial causes adverse environmental effects to the filled stream segments, as such fills eliminate all aquatic life that inhabited those segments.

4. The injunction entered by the district court is overly broad. The injunction entered by the district court as a remedy for the buffer zone rule claims prohibits WVDEP from authorizing the disposal of any excess spoil in any intermittent or perennial stream for the purposes of waste disposal. As such, the injunction prohibits even minor spoil disposal activities that do not involve the filling of stream segments. No evidence was presented to the district court that the disposal of small quantities of mining spoil, even the disposal of de minimis quantities, invariably causes adverse environmental effects. Because the injunction is therefore overly broad, this Court should reverse the injunction and remand for the district court to frame an injunction that is more narrowly tailored to the claims that were before the court.

ARGUMENT

I. THE ARMY CORPS OF ENGINEERS HAS AUTHORITY TO REGULATE VALLEY FILLS UNDER CLEAN WATER ACT SECTION 404

The district court erred in concluding that the Army Corps of Engineers lacks authority under CWA section 404 to regulate valley fills. Because the only claims before the district court were Bragg's claims against WVDEP under SMCRA, the question of the Corps' authority to regulate valley fills under CWA section 404 was not properly before the court. The federal appellants did not brief the issue, as Bragg's SMCRA claims against WVDEP do not depend on the Corps' authority under the CWA. Indeed, the issue of the Corps' CWA authority over valley fills was resolved in the court's June 1999 order, in which the court found that it was fair, reasonable, and faithful to the CWA for the Corps to continue to regulate valley fills. The June 1999 order and the settlement it approved have not been appealed by any party and therefore remain in force. Because the Corps' authority was not at issue in the October 20 order on appeal here, the district court's discussion of the Corps' authority should be considered dictum. Accordingly, this Court need not address the issue except to clarify that that aspect of the district court's decision does not constrain the Corps' authority under the approved settlement.

Furthermore, the differing definitions of "fill material" are currently the subject of a joint EPA-Corps notice-and-comment rulemaking. Rulemaking, rather than this litigation, represents the appropriate vehicle for resolving the meaning of "fill" material under the CWA.

A. The District Court's Discussion of the Corps' Authority Under the Clean Water Act Is Dictum

As this Court has stated, dictum is a "statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding -- that, being peripheral, may not have received the full and careful consideration of the court that uttered it." Pittston Co. v. United States, 199 F.3d 694, 703 (4th Cir. 1999) (quoting United States v. Crawley, 837 F.2d 291, 292 (7th Cir.1988)). The legal issues raised by Counts 2 and 3 are limited to the allegation that WVDEP violates non-discretionary duties imposed by SMCRA's stream buffer zone rule. The scope of the Corps' authority under the CWA has no bearing on the state's SMCRA authority. Thus, although the district court characterized it as part of its holding, see 72 F.Supp.2d at 658, the district court's discussion of the Corps' CWA authority was peripheral to the decision's analytical foundation and should be considered dictum.

As discussed more fully below, see *infra* pp. 42-49, the CWA and SMCRA establish independent obligations with which mining operations must comply. The CWA's 404(b)(1) guidelines authorize the discharge of fill material into United States' waters if, among other requirements, the discharge will not cause "significant degradation" to the aquatic ecosystem. 40 C.F.R. 230.10(c). SMCRA's buffer zone rule authorizes mining activities near streams only if the activities will "not adversely affect" environmental values. Because the two statutes establish different standards and operate independently, the resolution of the SMCRA claims against WVDEP does

not depend on or implicate the scope of the Corps' authority under CWA section 404. Accordingly, this Court does not need to address the scope of the Corps' authority in order to resolve the SMCRA claims against WVDEP.

Recognizing that the SMCRA buffer zone claims do not turn on the Corps' section 404 authority, Bragg stated in district court papers that, in challenging WVDEP's administration of SMCRA, "[p]laintiffs are not challenging the Corps' authority to authorize discharges of mining spoil pursuant to § 404 of the Clean Water Act." Plaintiffs' Reply in Support of Their Motion for Summary Judgment on Counts 2 & 3, at 13 n.8. The district court similarly indicated that its analysis of the Corps' section 404 authority was not necessary to its analysis of the SMCRA claims, stating that "[a]lthough the Court holds § 404 permits may not issue for fills with the primary purpose of waste disposal, that holding, without more, does not preclude" the state's issuance of SMCRA permits under its interpretation of the buffer zone rule. 72 F.Supp.2d at 658. Both the district court and Bragg thus agree that the scope of WVDEP's authority under SMCRA does not depend on the Corps' authority under the CWA.

The question of the Corps' CWA authority was raised in the district court because, relying on the August 1999 MOU, WVDEP argued that findings made by the Corps under section 404 are "comparable" to the findings required by the SMCRA buffer zone rule. As discussed below, the federal agencies have re-examined the position taken in the August 1999 MOU in light of the district court's ruling

and have concluded that the 404(b)(1) guidelines do not establish standards that are equivalent to the buffer zone rule. Regardless of the correctness of the August 1999 MOU, however, the determination of whether the 404(b)(1) guidelines establish standards comparable to the buffer zone rule does not require a determination of the Corps' section 404 authority over valley fills.

That is, the Corps' jurisdiction over valley fills depends on the meaning of the term "fill material," a question entirely distinct from whether the CWA 404(b)(1) guidelines' standard of "significant degradation" is comparable to the SMCRA buffer zone rule's standard.

Accordingly, the portion of the district court's opinion addressing the Corps' authority to regulate valley fills is dictum.

B. The District Court's Unchallenged June 1999 Order Approves a Settlement Requiring the Corps to Regulate Valley Fills

The district court's dictum that the Corps lacks authority to regulate valley fills in no way negates the district court's June 17, 1999 order, which approved the settlement between Bragg and the Corps. Under that settlement, the parties agreed that the Corps would continue to regulate valley fills under CWA section 404.

Under the terms of the settlement, valley fills that cause more than minimal adverse effects on waters of the United States can only be authorized if they are the subject of an individual section 404 permit issued by the Corps in accordance with the 404(b)(1) guidelines. JA 288-289. Those guidelines establish that the discharge of fill material into U.S. waters may be approved only if it is determined that (1) no practicable alternatives to the

discharge exist; (2) the discharge will not cause or contribute to state water quality violations; (3) the discharge will cause or contribute to significant degradation of U.S. waters; and (4) appropriate steps are taken to minimize potential adverse impacts on the aquatic ecosystem. 40 C.F.R. 230.10. In approving the settlement, the district court plainly recognized that it calls on the Corps to regulate valley fills under section 404. See 54 F.Supp.2d at 658. The district court expressly found that the settlement was not only "fair, adequate, [and] reasonable," the court also found that it was "faithful to the environmental statutes under which the litigation was brought." Id. at 670. The court further stated that "the Agreement provides a rational approach to resolving the claims against the Federal Defendants and to addressing the larger issues raised in this case. * * * Finally, the Agreement is in the public interest by resolving, in a fair, adequate and reasonable manner, issues that presented risks to both the environment and economy." Ibid.

The June 1999 order has not been appealed by any party. Indeed, in entering the settlement, Bragg waived the right to raise the issue of the Corps' CWA authority in challenging permits for valley fills. JA 291-292, ¶ 16. The court's approval of the settlement in the June 1999 order thus recognizes the unchallenged authority of the Corps to regulate valley fills under section 404. The district court's contrary dictum in the October 20 order should not be construed to affect the Corps' authority in any way.

C. To the Extent that the Differing Regulatory Definitions of "Fill Material" Pose an Obstacle to the Corps' Authority to Regulate Valley Fills, that Problem Is Being Addressed Through Rulemaking

In concluding that "overburden or excess spoil, being a pollutant and waste material, is not 'fill material' subject to Corps' authority under Section 404 of the CWA when it is discharged into waters of the United States for the primary purpose of waste disposal," 72 F.Supp.2d 657, the district court addressed the scope of the Corps' authority under the Corps' regulatory definition of "fill material," not under the terms of the CWA itself. The CWA does not define "fill material," and, as the district court noted, the Corps and EPA have issued differing definitions. 72 F.Supp.2d at 658. The confusion caused by the differing regulatory definitions of "fill material" is being resolved through rulemaking.

On April 17, 2000, EPA and the Corps submitted a joint proposed rule to the Federal Register to establish a single definition of "fill material" under the CWA. Rulemaking, not litigation over WVDEP's administration of SMCRA, represents the appropriate forum for resolving the differing regulations adopted by EPA and the Corps.^{1/}

⁹ As the preamble to the proposed rule explains, the differing definitions of fill material have resulted in regulatory uncertainty and inconsistencies. Addendum 11-16. Compare Avoyelles Sportsmen League, Inc. v. Marsh, 715 F.2d 897, 924-925 (5th Cir. 1983), with Resources Investments, Inc. v. United States Army Corps of Engineers, 151 F.3d 1162, 1168 (9th Cir. 1998). By establishing a single definition of "fill," the proposed rule would "ensure proper, consistent, and more effective regulation under the Clean Water Act of materials that have the effect of replacing any portion of a water of the United States with dry land." Addendum 2.

As the preamble to the proposed rule explains, EPA and the Corps have concluded that valley fills, like other discharges of pollutants that fill waters of the United States, are more appropriately regulated under CWA section 404 than under section 402. Addendum 18-20. The section 404(b)(1) guidelines address the environmental concerns raised by proposals to fill U.S. waters and establish a framework for analyzing the environmental effects of converting waters to dry land. See 40 C.F.R. Part 230. Because valley fills are a type of filling activity, the Corps and EPA have concluded that the section 404 program provides the appropriate CWA framework for considering the permissibility of valley fills associated with surface mining operations. Furthermore, regulation of valley fills under section 404 is appropriate because valley fills are comprised of rock, sand, and earth, the most common materials regulated under section 404.

Because (1) the district court's discussion of the Corps' authority to regulate valley fills under CWA section 404 is dictum, (2) the district court's June 1999 order approving the settlement requiring the Corps to regulate of valley fills remains in effect; and (3) the confusion created by the differing definitions of "fill material" is being resolved through rulemaking, this Court need not address the question of the Corps' CWA authority except to clarify that the portion of the district court's decision does not constrain the Corps' authority under the approved settlement.

II. THE ELEVENTH AMENDMENT DOES NOT BAR THE BUFFER ZONE RULE CLAIMS

Counts 2 and 3 of Bragg's complaint allege that WVDEP's authorization of valley fills in intermittent and perennial streams violates non-discretionary duties imposed by SMCRA's buffer zone rule. Specifically, Count 2 alleges that WVDEP violates a non-discretionary duty by authorizing valley fills in intermittent and perennial streams without making the findings required by the buffer zone rule. Count 3 alleges that WVDEP violates a non-discretionary duty imposed by the buffer zone rule by authorizing valley fills in intermittent and perennial streams. Both claims are brought under SMCRA section 520(a)(2), which authorizes suits by adversely affected persons against the appropriate state agency "to the extent permitted by the eleventh amendment." 30 U.S.C. 1270(a)(2). As the district court correctly found, pursuant to Ex parte Young, 209 U.S. 123 (1908), the Eleventh Amendment does not bar Counts 2 and 3.

Ex parte Young, 209 U.S. 123 (1908), establishes that the Eleventh Amendment does not preclude federal court jurisdiction over claims seeking to enjoin violations of federal law by state officials. Jurisdiction under Ex parte Young is based on the Supremacy Clause and is limited to claims for prospective relief. Edelman v. Jordan, 415 U.S. 651, 665-670 (1974); see also Green v. Mansour, 474 U.S. 64, 68 (1985) (unlike money damages, "[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law."). Counts 2 and 3 comply with the limitations on Ex parte Young jurisdiction, as they seek prospective relief only.

Ex parte Young is limited to claims that state officials are violating federal law. As the Supreme Court held in Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984), Ex parte Young does not authorize suits based on the violation of state law:

A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, 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. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.

465 U.S. at 106. The Eleventh Amendment issue presented by this case is whether a suit for injunctive relief against state officials for failure to administer the state version of SMCRA's buffer zone rule is a suit based on federal law for purposes of jurisdiction under Ex parte Young.¹⁰ As the district court correctly ruled, Bragg's SMCRA claims are based on federal law and therefore are not barred by the Eleventh Amendment.

SMCRA establishes a program of cooperative federalism, under which state agencies may administer federal law if the Secretary of the Interior approves the state's program. See 30 U.S.C. 1253. As the D.C. Circuit stated, SMCRA establishes "a continuing partnership between the states and the federal government, with the Secretary

¹⁰ This issue may also be framed as a statutory question: whether a suit for failure to comply with the state buffer zone rule is properly brought within the terms of the citizen suit provision, which authorizes suit for failure to perform a duty imposed "under this chapter." 30 U.S.C. 1270(a)(2).

[of the Interior] providing oversight, advice, and backup authority, and the states bearing the major responsibility for implementation of the Act." In re Permanent Surface Mining Regulation Litigation, 653 F.2d 514, 516 (D.C. Cir. 1980). See also H. Rep. No. 218, 95th Cong., 1st Sess. 57 (1977) (the "fundamental concept" central to SMCRA is that it contains "a set of national environmental performance standards to be applied to all coal mining operations and to be enforced by the State with backup authority in the Department of the Interior").

The text of SMCRA makes clear that approved state programs for administering SMCRA establish standards enforceable as federal law.

In order for a state to gain approval to administer SMCRA, it must demonstrate that it "has the capability of carrying out the provisions of this chapter and meeting its purposes." 30 U.S.C. 1253(a) (emphasis added). Among other things, the state must enact a law "which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this chapter." 30 U.S.C. 1253(a)(1) (emphasis added). The state must further establish a regulatory authority with sufficient personnel and funding "to regulate surface coal mining and reclamation operations in accordance with the requirements of this chapter." 30 U.S.C. 1253(a)(3) (emphasis added). To do so, the state must establish a permit program sufficient for "meeting the requirements of this subchapter for the regulations of surface coal mining and reclamation operations." 30 U.S.C. 1253(a)(4) (emphasis added). Finally, the state must establish "rules and regulations consistent

with regulations issued by the Secretary pursuant to this chapter."

30 U.S.C. 1253(7). These provisions, among others, demonstrate that Congress intended approved state programs to effectuate the terms of federal law.

SMCRA further makes clear that state standards implementing approved programs become a part of federal law. SMCRA regulations provide that upon approval of the state regulatory program, the program is "codified" in a part of the C.F.R. reserved for that purpose. 30 C.F.R. 900.12. Pursuant to that provision, the West Virginia SMCRA program was published in the Federal Register, and portions of that program appear at 30 C.F.R. Part 948. Furthermore, under SMCRA section 504(b), the Secretary of the Interior has authority to enforce the state SMCRA standards as federal law if the state is unable to do so. 30 U.S.C. 1254(b). In addition, SMCRA permits issued by a state establish federal standards, the violation of which may give rise to enforcement actions in federal courts. 30 U.S.C. 1270(a)(1).

This Court has agreed that the violation of state regulations adopted pursuant to SMCRA and state-issued SMCRA permits constitutes the violation of federal law, enforceable through SMCRA's citizen suit provision. In Molinary v. Powell Mountain Coal Co., 125 F.3d 231 (4th Cir. 1997), owners of a surface estate sued a mining company under 30 U.S.C. 1270(f), a subsection of SMCRA's citizen suit provision that authorizes suits for damages against private parties who have caused injury by violating "any rule, regulation, order, or permit issued pursuant to this chapter." 30 U.S.C.

1270(f). This Court ruled that "[i]t 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." 125 F.3d at 236. Molinary thus compels the conclusion that state regulations adopted under SMCRA enforce federal standards and therefore are not barred by Pennhurst.

SMCRA is far from unique in incorporating state standards into federal law. For example, EPA approval of state water quality standards under the CWA bestows on the state standards a federal character, at least insofar as they affect interstate water pollution. As the Supreme Court stated:

This regulation effectively incorporates into federal law those state-law standards the Agency reasonably determines to be "applicable." In such a situation, then, state water quality standards – promulgated by the States with substantial guidance from the EPA and approved by the Agency – are part of the federal law of water pollution control.

Arkansas v. Oklahoma, 503 U.S. 81, 110 (1992).¹¹ See also Burke Co. Bd. of Ed. v. Denton, 875 F.2d 973, 983-984 (4th Cir. 1990) (noting that the Education of the Handicapped Act, 20 U.S.C. 1401(18)(B),

¹¹ While the Court found that EPA approval of such state water quality standards makes those standards part of the federal law of water pollution control, the CWA differs from SMCRA in that state permitting programs under the CWA are expressly administered pursuant to state law. See 33 U.S.C. 1342(b), 1344(g); Mianus River Preservation Comm. v. EPA, 541 F.2d 899, 906 (2d Cir. 1976). In accordance with that basic difference between a state's administration of the CWA and a state's administration of SMCRA, SMCRA – and not the CWA – establishes a federal cause of action against state agencies for their administration of the SMCRA program. 30 U.S.C. 1270(a)(2).

requires federal courts to enforce state law standards); Oklahoma Nursing Ass'n v. Demps, 792 F. Supp. 721, 727-728 (W.D. Okla. 1992) (violation of state Medicaid plan constitutes violation of federal law). As with these other statutes, SMCRA incorporates state standards into federal law, making compliance with the state standard a requirement of federal law. As such, the allegation that the state failed to abide by the terms of a regulation adopted to administer SMCRA establishes a claim under Ex parte Young and is not barred by the Eleventh Amendment.

III. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT ON THE BUFFER ZONE RULE CLAIMS

The district court correctly found that valley fills in intermittent or perennial streams may be authorized under SMCRA's buffer zone rule only if WVDEP makes a finding that valley fills will not adversely affect the environmental resources of the stream segments proposed to be filled. The district court also correctly found that the burial of substantial portions of intermittent or perennial streams in valley fills cannot be authorized under the buffer zone rule. Accordingly, the district court correctly granted summary judgment on Counts 2 and 3.

A. The District Court Correctly Granted Summary Judgment on Count 2: Valley Fills in Intermittent and Perennial Streams Cannot be Authorized Without Making the Findings Required by the Buffer Zone Rule

The buffer zone rule applies to valley fills in intermittent or perennial streams. The buffer zone rule prohibits mining activities that "disturb" land within 100 feet of intermittent or perennial streams unless certain findings are made. 30 C.F.R. 816.57. SMCRA

regulations define a "disturbed area" to include "an area where * * * spoil * * * is placed by surface coal mining operations." 30 C.F.R. 701.5. Because the defining feature of valley fills is the placement of excess mining spoil, valley fills cause the areas where they are permitted to be "disturbed," as that term is defined by the regulations. See also JA 560. Valley fills thus require authorization under the buffer zone rule if they are to be approved within 100 feet of an intermittent or perennial stream.

WVDEP acknowledged that it routinely approves valley fills in intermittent and perennial streams without making the findings called for by the buffer zone rule for the stream segment filled. See, e.g., JA 390, 572, 594, 609, 613. In the district court, two primary arguments were presented to justify WVDEP's failure to make the required buffer zone findings: (1) the findings required by the buffer zone rule need only be made downstream from valley fills, not for the filled stream segments themselves; and (2) the findings required for approval of a fill under CWA section 404 are equivalent to the findings required by the buffer zone rule, obviating the need to make the buffer zone findings. As the district court correctly found, both arguments lack merit.

- 1. The buffer zone rule findings must be made for the particular intermittent or perennial stream segments where mining activities are proposed**

SMCRA unequivocally expresses a congressional intent to protect aquatic resources at the site where mining activities occur. SMCRA section 515(b)(10) provides that mining operations must "minimize the disturbances 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 activities must seek to protect water resources "at the mine site and in associated offsite areas," Congress made clear that water resources must be protected where mining activities occur and not only at downstream portions away from the mining sites.

The buffer zone rule implements the statutory requirement to protect stream segments from the harmful effects of surface mining.

By providing that "land within 100 feet of a perennial stream or an intermittent stream" may not be disturbed by mining activities unless the disturbance will have no adverse effects on the "environmental resources of the stream," 30 C.F.R. 816.57, the buffer zone rule seeks to protect the affected stream segments. Under SMCRA regulations, an intermittent stream is "[a] stream or reach of a stream" that meets certain criteria, and a perennial stream is "a stream or part of a stream," that meets other criteria.

30 C.F.R. 701.5. By its plain terms, the buffer zone rule protects particular stream segments and does not allow mining activities, such as valley fills, in intermittent or perennial streams unless there is a finding that the activity will cause no adverse environmental effect in the affected stream segment.^{1/}

¹² Congress's intent to protect affected stream segments is also effectuated by the stream diversion regulation, which allows perennial and intermittent streams to be diverted only if the diverted 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). Thus, stream diversions may be authorized only if the diversion is designed not to adversely affect the

By expressly and unambiguously applying to the stream segments where mining activities are proposed, the buffer zone cannot be satisfied by a finding that the stream's environmental resources are protected at some downstream point. The district court thus correctly found that nothing in SMCRA or its implementing regulations "suggests that portions of existing streams may be destroyed so long as (some other portion of) the stream is saved." 72 F.Supp.2d at 651. Accordingly, valley fills that disturb intermittent or perennial streams may be approved only if there is a finding that activity will not adversely affect the environmental resources of the filled stream segment. Because it is uncontested that WVDEP has had a practice of not making such findings, the district court correctly granted summary judgment on Count 2.

environmental resources of that stream segment.

2. Findings made pursuant to the CWA 404(b)(1) guidelines are not a substitute for the findings required by the buffer zone rule

Prior to August 1999, it was WVDEP's position that the buffer zone rule does not apply to the intermittent and perennial stream segments proposed to be filled by valley fills and that, as a result, the buffer zone rule was satisfied if it was found that a valley fill causes no adverse environmental effects at some point downstream from the fill. In August 1999, supported by an MOU signed by OSM, EPA, the Corps, and WVDEP, WVDEP changed its position. The August 1999 MOU states that the buffer zone rule must be satisfied in the filled stream segments and that the requirements for obtaining a permit under CWA section 404(b) are "comparable" to buffer zone rule requirements. Based on the August 1999 MOU, it was asserted that the buffer zone rule findings are satisfied for fills receiving a permit under CWA section 404.

The district court's decision, which rejected the August 1999 MOU, prompted the signatory federal agencies to re-examine the relationship between the standards established by the CWA section 404(b)(1) guidelines and the standard established by the buffer zone rule. While the two sets of standards are in many respects similar, the federal agencies recognize that the two statutes establish independent standards with which surface mining operations must comply. Accordingly, the federal agencies have now concluded that the district court correctly held that findings made in applying the

CWA 404(b)(1) guidelines cannot be used as a substitute for the findings required by the stream buffer zone rule.¹³

a. The CWA 404(b)(1) guidelines and SMCRA buffer zone rule establish independent standards

¹³ On April 17, 2000, the Solicitor of the Interior and the Acting Director of OSM sent a letter to the Director of WVDEP, which informed WVDEP that the August 1999 MOU does not represent the federal government's interpretation of the buffer zone rule. The letter points out that the August 1999 MOU itself recognized that it did not (and could not) restrict the authority of the relevant agencies to establish the appropriate interpretation of the law. As the agency charged by Congress with the administration of SMCRA, OSM has a responsibility to interpret SMCRA and its implementing regulations, including the responsibility to alter its interpretations when it is persuaded that such changes are mandated.

The CWA and SMCRA establish independent obligations and standards with which mining operations must comply. Under the 404(b)(1) guidelines, the discharge of fill material into waters of the United States may be authorized only if, in addition to meeting other requirements, the discharge will not "cause or contribute to significant degradation of the waters of the United States." 40 C.F.R. 230.10(c). The 404(b)(1) guidelines specify that a discharge will cause "significant degradation" if it causes "significantly adverse effects" on human health or the environment. 40 C.F.R. 230.10(c). The buffer zone rule, in contrast, authorizes activities affecting intermittent or perennial streams only if those activities will not "adversely affect" environmental resources. 30 C.F.R. 816.57. By the plain language of the buffer zone rule, the unmodified phrase "adverse effects" encompasses a larger set of effects than the 404(b)(1) guidelines' "significantly adverse effects" standard. As a result, the buffer zone language adopts a stricter standard than the 404(b)(1) guidelines.

The plain language of the buffer zone rule precludes reading into the rule a threshold of "significant" adverse environmental impact before providing buffer zone protection. In a variety of statutory contexts, courts have rejected arguments to read into a statute or regulation a threshold requirement of significance when the statute or regulation does not include such a threshold.¹⁴

¹⁴ See, e.g., North Carolina v. Federal Energy Regulatory Commission, 112 F.3d 1175 (D.C. Cir. 1997) (expressing "serious reservations concerning FERC's attempt to redefine the statutory phrase 'any discharge,' 33 U.S.C. § 1341(a)(1), to mean only those

Moreover, in adopting the stream buffer zone rule, OSM made a deliberate choice not to adopt a "significance" threshold, specifically rejecting the suggestion that buffer zone protection is warranted only when mining activities "significantly" disturb a stream. See 48 Fed. Reg. 30,313 (June 30, 1983).

Because the CWA 404(b)(1) guidelines and SMCRA buffer zone rule require similar analyses regarding the environmental effects of fills, it may be appropriate for the SMCRA permitting authorities to consider findings made in approving a fill permit under the 404(b)(1) guidelines to be relevant in determining whether to approve mining activities under the buffer zone. The different standards established under the two regulatory schemes, however,

discharges that are 'material'); Arkansas Poultry Federation v. EPA, 852 F.2d 354 (8th Cir. 1988) (liability for CWA permit violation can be imposed even if user's discharge was not a "significant" contribution to the violation of its permit); NRDC v. EPA, 824 F.2d 1211, 1216 (D.C. Cir. 1987) (interpreting the Safe Drinking Water Act's requirement that EPA set levels for contaminants that cause "any adverse effect on the health of persons," 42 U.S.C. 300g-(b)(1), and concluding that "[t]his language is inconsistent with a requirement that the Administrator make a threshold finding of significant risk; a contaminant may have some adverse effect on the health of persons without posing a significant risk to human health."); Minnehaha Creek Watershed Dist v. Hoffman, 597 F.2d 617, 626-627 (8th Cir. 1979) (rejecting the contention that "a significant alteration in water quality must be demonstrated before the addition of a particular substance to navigable waters can be classified as the discharge of a pollutant"). The conclusion that the buffer zone rule cannot be construed to impose a "significant" adverse effect standard does not mean that the relevant agencies lack discretion to interpret the rule as permitting activities that have only de minimis environmental effects. See Alabama Power Co. v. Costle, 636 F.2d 323, 360 (D.C. Cir. 1979).

preclude a simple substitution of the findings under the 404(b)(1) guidelines for the findings necessary under the buffer zone rule.

b. SMCRA section 702(a) does not mandate that the CWA takes precedence over SMCRA

In the district court, WVDEP asserted that SMCRA section 702(a) precludes interpreting SMCRA and its implementing regulations to prohibit valley fills authorized by the CWA. Section 702(a) provides:

Nothing in this Act shall be construed as superseding, amending, modifying, or repealing * * * any of the following Acts or with any rule or regulation promulgated thereunder, including, but not limited to -

(3) The Federal Water Pollution Control Act, as amended, the State laws enacted thereto, or other Federal laws relating to the preservation of water quality.

30 U.S.C. 1292(a). WVDEP has argued that because SMCRA cannot supersede, amend, modify, or repeal the CWA, SMCRA cannot be construed to prohibit any activity that would be allowed by the CWA. That argument is without merit.

SMCRA section 702 provides merely that SMCRA does not alter the existing regulatory schemes adopted by Congress in the CWA and other environmental statutes. As with dozens of statutes that contain similar clauses,¹⁵ section 702 provides that the adoption of SMCRA does not implicitly repeal or otherwise affect existing statutes.

¹⁵ See, e.g., 7 U.S.C. 2910; 10 U.S.C. 2723; 15 U.S.C. 1155; 16 U.S.C. 545b; 16 U.S.C. 1164; 16 U.S.C. 3344; 16 U.S.C. 3378(c); 40 U.S.C. 136(i); 42 U.S.C. 1962-1(c).

But it would in no way supersede, amend, modify, or repeal the CWA to give both SMCRA and the CWA independent force.

When Congress has intended that one statute should take precedence over another statute in the regulation of a particular activity, it has done so with language very different and much clearer than SMCRA section 702. For example, the Resource Conservation and Recovery Act (RCRA) provides:

Nothing in this chapter shall be construed to apply to (or to authorize any State, interstate, or local authority to regulate) any activity or substance which is subject to the Federal Water Pollution Control Act, the Safe Drinking Water Act, the Marine Protection, Research and Sanctuaries Act of 1972, or the Atomic Energy Act of 1954, except to the extent that such application (or regulation) is not inconsistent with the requirements of such Acts.

42 U.S.C. 6905(a). Even such language has been held to prohibit only a "direct conflict" between RCRA and a "specific provision" of one of the listed statutes. Edison Electric Institute v. EPA, 996 F.2d 326, 337 (D.C. Cir. 1993).

As WVDEP pointed out in the district court, in enacting SMCRA, Congress was concerned that the statute might lead to regulations that duplicate or conflict with regulations enacted by EPA under the CWA and the Clean Air Act. SMCRA addressed this concern, however, through section 702(c), which provides that "[t]o the greatest extent practicable, each Federal agency shall cooperate with the Secretary and the States in carrying out" SMCRA. 30 U.S.C. 1292(c).

SMCRA further seeks to prevent redundant or conflicting regulations by providing that EPA must review state SMCRA programs involving

water quality standards. 30 U.S.C. 1253(b). Congress concluded that these measures would sufficiently prevent conflicts or duplications between the CWA and SMCRA. See H.R. 218, House Interior and Insular Affairs Comm., 95th Cong., 1st Sess., reprinted in 1977 U.S.C.C.A.N. 593, 674.

In support of its construction of SMCRA section 702(a), WVDEP has relied on In re Surface Mining Regulation Litigation, 627 F.2d 1346 (D.C. Cir. 1980), where the court held that the CWA and its regulatory framework "are to control" where EPA has established a CWA regulation addressing "surface coal mining's hydrologic impact."

Ibid. In subsequent cases, the D.C. Circuit has significantly clarified the reach of that decision. The court thus found that RCRA does not limit DOI's SMCRA authority, notwithstanding the fact that RCRA, like the CWA, is listed as one of the statutes that SMCRA cannot "supersede":

At most, the two statutes may result in promulgation of two sets of guidelines on disposal of mining waste. Such regulatory overlap is not the same as a situation where two statutes provide mutually exclusive results when applied to the same facts, especially since SMCRA and RCRA are directed toward quite different objectives: SMCRA directly regulates surface coal mining, while RCRA provides guidelines for state regulation of open dumping.

Chemical Manufacturers Assn. v. EPA, 673 F.2d 507, 512 (D.C. Cir. 1982). See also NRDC v. EPA, 937 F.2d 641 (D.C. Cir. 1991); National Wildlife Federation v. Hodel, 839 F.2d 694, 765 (D.C. Cir. 1988). Other courts have agreed that SMCRA section 702(a) does not prevent DOI from issuing regulations that would prohibit activities

that may be allowed under other environmental statutes. See, e.g., West Virginia Mining and Reclamation Ass'n v. Babbitt, 970 F. Supp. 506 (S.D.W.V. 1997) (notwithstanding the CWA, OSM "has an independent responsibility to assure the protection of the hydrologic balance and ensure full reclamation of the permitted site").

While WVDEP has asserted that it would create an impermissible statutory "conflict" to read the buffer zone rule to establish a stricter standard than that established by the 404(b)(1) guidelines, such a statutory construction does not create any such "conflict" as that term is understood in the law. As the Supreme Court has held, two statutes can be said to conflict only when it is impossible to comply with both. See Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995). No such conflict arises if SMCRA is construed to prohibit some activities that would be authorized by the CWA, since it is possible to comply with both statutes by engaging in only those activities authorized by both statutes.

Where an activity is regulated under the CWA and SMCRA - i.e., a surface mining activity that involves the discharge of pollutants from point sources into U.S. waters - regulation of the activity is governed by the usual principles that courts apply to reconcile overlapping statutes. Under those principles, "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. 'When 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)). See also 2A Sutherland Statutory Construction § 51.05 (4th ed. 1984). An activity governed by both the CWA and SMCRA must therefore satisfy the requirements of both statutes.

B. The District Court Correctly Granted Summary Judgment on Count 3: The Burial of Substantial Portions of Intermittent or Perennial Streams Violates the Buffer Zone Rule

Count 3 alleges that the buffer zone rule does not authorize WVDEP to permit the burial of substantial portions of perennial or intermittent streams. JA 1796, ¶ 75. As Bragg acknowledges, the buffer zone rule "allows minor incursions" into intermittent streams but prohibits valley fills in intermittent and perennial streams "because such fills bury and destroy substantial portions of intermittent or perennial streams." Id., ¶¶ 75-76. While the state and federal agencies that administer SMCRA ordinarily have a range of discretion in making the findings required by the buffer zone rule, the agencies lack discretion to approve mining activities within stream buffer zones that unquestionably cause adverse environmental effects. Because it is uncontested that the burial of substantial portions of intermittent and perennial streams causes adverse environmental effects in the filled segments of the streams, the district court correctly granted summary judgment on Count 3.

The uncontested evidence presented to the district court demonstrates that the burial of substantial portions of intermittent or perennial causes adverse environmental effects to the filled

stream segments. JA 597-598, 1414, 1970-1980, 1986. The evidence involved valley fills consisting of 13.2 million, 80 million, and 151 million cubic yards. JA 625, 1918. See also JA 1903-1904; 1929-1930. Valley fills of such size far exceed the scale of valley fills at the time SMCRA was enacted.¹⁶ The spoil disposal proposals examined by the district court included no plans to construct stream diversions approximating the premining characteristics of the filled stream segments or protecting the aquatic habitats of the stream segments as required 30 C.F.R. 816.72 and 816.43. Such stream diversions would have been impossible given that the fill would have covered the surrounding watershed with over 100 feet of rock. JA 942, 950. The proposed fills thus would have simply eliminated the affected stream segments, segments that a United States Fish and Wildlife field report stated are necessary to "support healthy aquatic communities and provide fresh water, nutrients and food organisms to downstream aquatic ecosystems." JA 1926.

Neither WVDEP nor any party presented evidence suggesting that valley fills cause no adverse environmental impacts in the filled stream segments. Indeed, WVDEP repeatedly acknowledged that valley fills could not be approved if the buffer zone rule were read to apply to the affected stream segments. See, e.g., Defendants'

¹⁶ In 1977, when SMCRA was enacted, valley fills generally were less than 250,000 cubic yards each. JA 275. By 1996, fills ten times that size were not uncommon, filling streams segments up to 2 miles long. Ibid.

Proposed Findings of Fact and Law 30, 31; JA 2201-2204, 2209, 2210-2214.

Rather than deny requests for valley fills within buffer zone variances based on the harm done to the affected stream segments, WVDEP applied a policy of approving valley fills in intermittent and perennial streams based on the erroneous conclusion that the buffer zone rule does not apply to the filled stream segments. See JA 573.

Because it is uncontested that the burial of substantial portions of intermittent or perennial streams causes adverse environmental effects in the filled stream portion, the district court correctly granted summary judgment as to Count 3.

IV. THE INJUNCTION IS OVERLY BROAD

The complaint and the evidence presented to the district court addressed mining activities that "bury substantial portions" of intermittent and perennial streams. JA 1796, ¶ 75. As the complaint acknowledges, the buffer zone rule "allows minor incursions" into intermittent and perennial streams. Ibid. Like the complaint, the district court's opinion addresses the massive valley fills associated with the current practice of mountaintop removal mining. See, e.g., 72 F.Supp.2d at 662 (concluding that valley fills cannot satisfy the buffer zone rule because "valley fills are waste disposal projects so enormous that, rather than the stream assimilating the waste, the waste assimilates the stream"). The district court granted an injunction, however, that enjoins WVDEP from "approving any further surface mining permits under current law that would authorize placement of excess spoil in

intermittent and perennial streams for the primary purpose of waste disposal." Id. at 663. The district court thus prohibited WVDEP from authorizing the placement of any excess mining spoil into any intermittent or perennial stream for the purpose of waste disposal.

By prohibiting the placement of any excess spoil in intermittent or perennial streams, the district court stripped WVDEP of authority to approve much more modest spoil disposal activities than those challenged by Bragg. The district court's injunction prohibits even minor spoil disposal activities that do not involve the filling of stream segments. Indeed, the district court's injunction would prohibit the placement of even de minimis amounts of excess spoil, such as a single rock or handful of dirt, in any intermittent or perennial stream. Neither the law nor the evidence presented to the district court mandates the conclusion that such spoil disposal inevitably causes adverse environmental effects.

Because some placement of excess spoil may not cause adverse environmental effects and therefore may be appropriately approved under the stream buffer zone rule, this Court should reverse the injunction and remand the case to the district court for the entry of an injunction that more narrowly addresses the claims that were before the court.

CONCLUSION

For the reasons stated above, this Court should reverse the permanent injunction entered by the district court and remand for the entry of a narrower injunction tailored to the activities before the court. To the extent that this Court finds the district court's

discussion of the Corps' authority under CWA section 404 was not dictum, the Court should clarify that the Corps continues to have authority to regulate valley fills pursuant to the unchallenged settlement approved by the district court. In all other respects, the district's decision should be affirmed.

Respectfully submitted,

OF COUNSEL:

GARY S. GUZY

General Counsel

STEVEN NEUGEBOREN

Attorney

Environmental Protection

Agency

Washington, D.C. 20044

JOHN D. LESHY

Solicitor

THOMAS BOVARD

Attorney

Department of the Interior

Washington, D.C. 20240

CHARLES A. BLANCHARD

General Counsel

EARL STOCKDALE

Deputy General Counsel

DIEDRE DUNCAN

Attorney

Department of the Army

Washington, D.C. 20310

LOIS J. SCHIFFER

Assistant Attorney General

STEVEN E. RUSAK

DAVID C. SHILTON

JARED A. GOLDSTEIN

Attorneys

Environment & Natural

Resources Division

U.S. Department of Justice

Washington, D.C. 20530

(202) 514-5316